
# INDIAN LAW REPORTS
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# 2013

**(Containing cases determined by the High Court of Delhi)**

# VOLUME-1, PART-II

**(CONTAINS GENERAL INDEX)**



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**NOMINAL-INDEX**
**VOLUME-1, PART-II**
**FEBRUARY, 2013**

Pages

**SUBJECT-INDEX**
**VOLUME-1, PART-II**
**FEBRUARY 2013**

Proceedings of Executive Committee were to be sent to Government—Regulation making power of Committee was subject to approval of Government—Alteration or Extension of purposes of Society required prior concurrence of Government—Prior sanction of Government of India required before bringing into force any rules and regulations of the Trust or any amendment thereto—It was an altar ego of the Government's instrumentality—National Book Trust is "Other authority" and thus, "State" within the meaning of Article 12 of Constitution of India.

*AR Abdul Gaffar* v. *Union of India & Ors.* ..... *494*

— Article 16 (4), 298, 371 and 372—Whether SC/ST's migrating from their state of origin to Union Territory can claim rights of SC/ST's in that Union Territory?—Held, any Scheduled Caste or Scheduled Tribe notified as such by the President can be classified as such caste or tribe, who answers that description would be entitled to the benefit of reservation in all Union Territories. In the case of States, however, having regard to separate administrative arrangements under the Constitution, such a position would not apply and those castes or tribes, notified in relation to those state(s) as Scheduled Castes or Scheduled Tribes, alone would be entitled to the benefits, and those migrating from one state to another, cannot enjoy such benefits.

Ratio Decidendi

"In a union territory all SC/ST's whether local or the ones who have migrated are to be treated at par. As far as states are concerned, the settled law is that SC/ST's of one state migrating to the other state cannot claim the rights bestowed upon them in their state of origin."

*Deepak Kumar and Ors.* v. *District and Sessions Judge, Delhi and Ors.* ..... *519*

— Article 226, 265 and Entry 49 in list II of Schedule VII—Petitioner in this petition has been seeking transfer of land in



issue in records of respondent no.2 and consequent execution of a lease deed in its favour—Plot in issue has been transferred three times over—Respondent No. 2 had, at one stage, conveyed to petitioner that he was required to pay a sum of Rs. 73,02,291 towards unearned increase vis-a-vis all three transfers which had taken place qua plot—Figure was scaled down to Rs. 15,15,693 and thereafter brought down to a further sum of Rs. 6,79,700 in respect of charges towards unearned increase—A sum of Rs. 14,22,250 was sought to be imposed towards interest, calculated upto 28.04.10—As of now, Respondent No. 2 is seeking to charge Rs. 11,80,200 towards unearned increase charges, in addition to interest amounting to Rs. 1,70,556—Order challanged before HC—Plea taken, all that petitioner was required to pay, if at all, was money towards unearned increase which stood quantified at Rs. 6,79,700—Petitioner, if at all was liable to pay interest for period 07.08.96 till 25.06.01 i.e. for second sale—Respondent No. 2 could not have imposed unearned increase charges on each sale, as was sought to be done—This amounted to unjust enrichment—Per contra plea taken, letters scaling down demand for uneared increase were issued without approval of management and a decision was taken to withdraw said letters—Transfer could be effected in favour of petitioner if, he were to pay balance sum of Rs. 6,71,056 to Respondent No. 2—Held—Respondent No. 2 was wanting to collect charges towards unearned increase in terms of a policy letter dated 27.09.2001 whereas all three transactions took place prior to 27.09.2001—There is no averment whatsoever in affidavit as to when such a decision was taken to withdraw letters relied upon by petitioner and as to whether same was communicated to petitioner—Petitioner was entitled to believe that those letters were written under ostensible authority to convey to him what were charges payable by him towards unearned increase—Unearned increase calculated and conveyed to petitioner was not a conjured up figure but based on Respondent No. 2's Policy Circular of 05.10.2010—There is nothing disclosed in affidavit of Respondent No. 2 which

deceased—Father of deceased preferred appeal under MCI Regulations—Ethics Committee found petitioner and another doctor guilty of negligence and adjourned deliberations to next meeting to decide quantum of punishment to be imposed on those found guilty—Order was challenged by way of Writ Petition which was disposed of with directions to MCI to pass a final order both on merits as well as on question of jurisdiction after giving due opportunity to aggrieved parties—Contrary to those directions, petitioner filed application seeking dismissal of appeal on grounds of jurisdiction without entering into merits of case—MCI concluded vide impugned order that it had jurisdiction to deal with Matter—Order challanged before HC—Plea taken, decision of DMC was in nature of opinion sought by Police authorities and no appeal could have been maintained against such a decision—Therefore, entire proceedings before MCI were without jurisdiction—Per contra plea taken, MCI had concurrent jurisdiction to deal with offences and complaints of professional misconduct alongwith State Medical Council—Matter required examination on merits and present writ petition was filed only to interdict conclusion of proceedings before MCI—Held—Instances of offences and/or professional misconduct which constitute infamous act, and which call for disciplinary action, both MCI and/or State Medical Council are empowered to deal with such a matter and in this exercise they are not precluded from considering and dealing with any other form of professional misconduct which is not listed/categorized under Regulation 7—MCI exercises both original as well as appellate jurisdiction—If MCI, is made cognizant of certain facts pertaining to what would constitute ordinarily in "letter and spirit" a professional misconduct by a registered medical practitioner then, it would have necessary authority to deal with matter—MCI can on its own take action on infraction of regulation or infamous act or professional conduct coming to its notice—Appeal provision would have no relevance, since MCI has exercised original jurisdiction—MCI has correctly concluded that it



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*Dr. Alka Gupta* v. *Medical Council of India & Anr.* ..... *669*

— Article 226—Indian Evidence Act. 1872—Section 45—Indian Penal Code, 1860—Section 304A—Indian Medical Council Act, 1956—Section 20A and 33 (m)—Daughter of Respondent No.2 died in Max Hospital—Her husband lodged complaint with police alleging wrong treatment and negligence—Police sought opinion of Delhi Medical Council (DMC) as to whether there was any negligence involved in this case—DMC concluded that no medical negligence could be attributed to doctors in treatment administered to deceased—Father of deceased preferred appeal under MCI Regulations—Ethics Committee found petitioner and another doctor guilty of negligence and adjourned deliberations to next meeting to decide quantum of punishment to be imposed on those found guilty—Order was challenged by way of Writ Petition which was disposed of with directions to MCI to pass a final order both on merits as well as on question of

jurisdiction after giving due opportunity to aggrieved parties—Contrary to those directions, petitioner filed application seeking dismissal of appeal on grounds of jurisdiction without entering into merits of case—MCI concluded vide impugned order that it had jurisdiction to deal with Matter—Order challanged before HC—Plea taken, decision of DMC was in nature of opinion sought by Police authorities and no appeal could have been maintained against such a decision—Therefore, entire proceedings before MCI were without jurisdiction—Per contra plea taken, MCI had concurrent jurisdiction to deal with offences and complaints of professional misconduct alongwith State Medical Council—Matter required examination on merits and present writ petition was filed only to interdict conclusion of proceedings before MCI—Held—Instances of offences and/or professional misconduct which constitute infamous act, and which call for disciplinary action, both MCI and/or State Medical Council are empowered to deal with such a matter and in this exercise they are not precluded from considering and dealing with any other form of professional misconduct which is not listed/categorized under Regulation 7—MCI exercises both original as well as appellate jurisdiction—If MCI, is made cognizant of certain facts pertaining to what would constitute ordinarily in "letter and spirit" a professional misconduct by a registered medical practitioner then, it would have necessary authority to deal with matter—MCI can on its own take action on infraction of regulation or infamous act or professional conduct coming to its notice—Appeal provision would have no relevance, since MCI has exercised original jurisdiction—MCI has correctly concluded that it makes no distinction between a representation and a complaint—It is not form but substance of representation, which would decide that: whether or not it raises issue and, in that sense, a complaint of professional misconduct by a registered medical practitioner—If MCI was made cognizent of act which prima facie had ingredients of professional misconduct then it would have necessary original jurisdiction



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— Article 226—Arbitrator acting under aegis of Permanent Machinery of Arbitrators (PMA) established by Govt. of India in respect of disputes concerning Central Public Sector Undertakings, Banks, Trusts and/or other Government departments issued notice of claim of Respondent No. 2 UCO Bank to petitioner—Writ petition filed to lay challenge to her jurisdiction to proceed further with matter—Plea taken, petitioner is not a party to statement of claim filed by Respondent No.2/UCO Bank, therefore no notice could have been issued to Petitioner/NTC nor could any liability been foisted on it—Sita Ram Mills (SRM) was nationalised under Nationalisation Act and therefore liabilities pertaining to period prior to nationalization were of erstwhile owners and could not be foisted upon Petitioner/NTC—Per contra plea taken, since Commissioner of payment (COP) had made part payment, claim is maintained for balance sum which pertains to dues qua various credit facilities granted in pre/post takeover period—Since petitioner has taken over SRM, it is liable to pay outstanding dues of Respondent No. 2/UCO Bank—Held—PMA was constituted by virtue of office memorandum dated 22.01.2004 issued by GOI, Ministry of Heavy Industries and Public Enterprises, Deptt. of Public Enterprises—It is therefore not a mechanism which stands

effaced by virtue of dissolution of Committee on Disputes (COD)—This made clear, on a perusal of yet another OM dated 01.09.2011, issued by Cabinet Sectt. of GOI which supersedes provision in OM, which required public enterprises to approach COD before approaching Courts or Tribunals—OM of 01.09.2011 does not envisage dissolution of PMA—All that, it does it that Govt. Departments and Public Enterprises qua disputes concerning them would not be required to approach COD, if they wish to approach PMA—Superssession of OM dated 22.01.2004 by OM dated 01.09.2011 is only to that limited extent—Both, petitioner/NTC being a Central Public Sector Enterprises and Respondent No. 2/UCO Bank, a nationalized bank, are covered under OM dated 22.01.2004, no consent is required for initiation of arbitration proceedings under PMA mechanism—Issue qua jurisdiction is a mixed question of fact and law and cannot be determined without looking into various factual and legal aspects which would include interpretation of Nationalization Act and TM Act—Where a party approaches Arbitrator, without intervention of Court, Arbitrator is empowered to ascertain both existence and validity of Arbitration Agreement—This principle is evolved to ensure quick and effective adjudication of disputes by Arbitrator—Issue whether or not petitioner/NTC is owner of SRML cannot be examined by Arbitrator in a summary manner, without appreciating full contours of claim set up by Respondent No. 2/UCO Bank—Defence of Petitioner/NTC is based mainly on one particular fact that it is not liable for debts due—There is no defence on merits—Bifurcation of issues would only delay proceedings before Arbitrator—Therefore, for this Court to interdict proceedings before arbitrator, at this stage, would result in delaying adjudication of disputes—Writ petition dismissed.

*National Textile Corporation Ltd.* v. *Union of India & Ors.* ..... *655*

— Article 14 and 19(1) (a)—Indian Evidence Act, 1872—Section 126 to 129—CIC directed petitioners to supply entire



information to extent not supplied after redacting names and designations of officers who made notings—Captioned Writ Petitions file raising a common question of law whether petitioners are obliged to furnish information to respondent which is retained by them in record, in form of file notings as also opinion of Judge Advocate General (JAG) found in records of respondents under relevant provisions of R.T.I. Act—Plea taken, CIC in several cases, contrary to decision in these cases has taken view that file nothings which include legal opinions, need not be disclosed, as it may effect outcome of legal action instituted by applicant/querist seeking information—This was not permissible as it was a bench of co-equal strength—In case, CIC disagreed with view taken earlier, it ought to have referred matter to a larger Bench—There was a fiduciary relationship between officers in chain of command, and those, who were placed in higher echelons, of what was essentially a pyramidical structure—Since JAG Branch has a duty to act and give advice on matters falling within ambit of its mandate, disclosure of information would result in a breach of fiduciary relationship qua those who give advice and final decision making authority, which is recipient of advice—Held—File notings and opinions of JAG branch are information, to which, a person taking recourse to RTI Act can have access provided it is available with concerned public authority—In institutional set up, it can hardly be argued that notes on file qua a personnel or employee of institution, such as Army, whether vis-a-vis his performance or his conduct, in any manner, can benefit person, who generates note or renders opinion—As a matter of fact, person who generates note or renders opinion is presumed to be a person who is objective and not conflicted by virtue of his interest in matter, on which, he is called upon to deliberate—If that position holds, then it can neither be argued nor can it be conceived that notes on file or opinions rendered in institutional setup by one officer qua working or conduct of another officer brings forth a fiduciary relationship—A denial of access to such information to information seekers, i.e.,

respondents herein, especially in circumstances that said information is used admittedly in coming to conclusion that delinguent officers were guilty, and in determining punishment to be accorded to them, would involve a serious breach of principles of natural justice, as non-communication would entail civil consequences and would render such a decision vulnerable to challenge under Article 14 of Constitution of India provided information is sought and was not given—Right to information is a constitutional right under Article 19(1) (a) of Constitution of India—Institution i.e. Indian Army in present case cannot by any stretch of imagination be categorized as a client—Legal professional privilege extends only to a barrister, pleader, attorney or Vakil—Persons who have generated opinions and/or notings on file in present case do not fall in any of these categories—Information in issue cannot be denied to Parliament and State Legislature—Therefore, necessary consequences of providing information to respondents should follow—CIC is however advised in future to have regard to discipline of referring matters to a larger bench where a bench of coordinate strength takes a view which is not consistent with view of other—Writ petitions dismissed.

*Union of India & Ors.* v. *Col. V.K. Shad*..... *625*

**INDIAN CONTRACT ACT, 1872**—Section 28—Arbitration and Conciliation Act, 1996—Section 16—Constitution of India, 1950—Article 226—Arbitrator acting under aegis of Permanent Machinery of Arbitrators (PMA) established by Govt. of India in respect of disputes concerning Central Public Sector Undertakings, Banks, Trusts and/or other Government departments issued notice of claim of Respondent No. 2 UCO Bank to petitioner—Writ petition filed to lay challenge to her jurisdiction to proceed further with matter—Plea taken, petitioner is not a party to statement of claim filed by Respondent No.2/UCO Bank, therefore no notice could have been issued to Petitioner/NTC nor could any liability been foisted on it—Sita Ram Mills (SRM) was nationalised under



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*Dr. Alka Gupta* v. *Medical Council of India & Anr.* ..... *669*

**INDIAN PENAL CODE, 1860**—Sections 420/406/120-B/34 – Quashing of FIR in non-compoundable offences – Inherent powers of the High Court may be exercised if the possibility of conviction is remote and bleak and the continuation of criminal case would put the accused to great oppression and prejudice. HELD: Inherent power to quash FIR in cases involving non-compoundable offences may be exercised if in view of the High Court, there being a compromise between the offender and the victim, the possibility of conviction is remote and bleak and the continuation of criminal case would put the accused to great oppression and prejudice and that extreme injustice would be caused to the offender despite full and complete settlement and compromise with the victim – High Court is well within its jurisdiction to secure the ends of justice by putting an end to the criminal case if it is of the view that continuation of criminal proceedings would tantamount to abuse of process of law despite settlement and compromise – In present case, High Court was satisfied that compromise and settlement was properly reached between the Petitioners and the Respondent No.2.

*Inderpal Thukral & Anr.* v. *State & Anr.* ..... *705*

— Sections 420/406/120-B/34 – Quashing of FIR in non-compoundable offences – Inherent powers of the High Court may be exercised if the possibility of conviction is remote and bleak and the continuation of criminal case would put the accused to great oppression and prejudice. HELD: Inherent power to quash FIR in cases involving non-compoundable

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**INDIAN MEDICAL COUNCIL (PROFESSIONAL, ETIQUETTE AND ETHICS) REGULATIONS, 2002**—Regulation 7, 8.1, 8.2, 8.7 and 8.8—Constitution of India, 1950—Article 226—Indian Evidence Act. 1872—Section 45—Indian Penal Code, 1860—Section 304A—Indian Medical Council Act, 1956—Section 20A and 33 (m)—Daughter of Respondent No.2 died in Max Hospital—Her husband lodged complaint with police alleging wrong treatment and negligence—Police sought opinion of Delhi Medical Council (DMC) as to whether there was any negligence involved in this case—DMC concluded that no medical negligence could

be attributed to doctors in treatment administered to deceased—Father of deceased preferred appeal under MCI Regulations—Ethics Committee found petitioner and another doctor guilty of negligence and adjourned deliberations to next meeting to decide quantum of punishment to be imposed on those found guilty—Order was challenged by way of Writ Petition which was disposed of with directions to MCI to pass a final order both on merits as well as on question of jurisdiction after giving due opportunity to aggrieved parties—Contrary to those directions, petitioner filed application seeking dismissal of appeal on grounds of jurisdiction without entering into merits of case—MCI concluded vide impugned order that it had jurisdiction to deal with Matter—Order challanged before HC—Plea taken, decision of DMC was in nature of opinion sought by Police authorities and no appeal could have been maintained against such a decision—Therefore, entire proceedings before MCI were without jurisdiction—Per contra plea taken, MCI had concurrent jurisdiction to deal with offences and complaints of professional misconduct alongwith State Medical Council—Matter required examination on merits and present writ petition was filed only to interdict conclusion of proceedings before MCI—Held—Instances of offences and/or professional misconduct which constitute infamous act, and which call for disciplinary action, both MCI and/or State Medical Council are empowered to deal with such a matter and in this exercise they are not precluded from considering and dealing with any other form of professional misconduct which is not listed/categorized under Regulation 7—MCI exercises both original as well as appellate jurisdiction—If MCI, is made cognizant of certain facts pertaining to what would constitute ordinarily in "letter and spirit" a professional misconduct by a registered medical practitioner then, it would have necessary authority to deal with matter—MCI can on its own take action on infraction of regulation or infamous act or professional conduct coming to its notice—Appeal provision would have no relevance, since MCI has exercised



original jurisdiction—MCI has correctly concluded that it makes no distinction between a representation and a complaint—It is not form but substance of representation, which would decide that: whether or not it raises issue and, in that sense, a complaint of professional misconduct by a registered medical practitioner—If MCI was made cognizent of act which prima facie had ingredients of professional misconduct then it would have necessary original jurisdiction to deal with such material placed before it—Nomenclature given to action by father of deceased would have no relevance—MCI can treat action of father of deceased as original complaint and deal with matter in accordance with extent provisions of MCI Regulations—While dealing with cases of professional misconduct, MCI is not fettered with rules of locus and therefore fact father of deceased was not a original complainant in that he was not a Class I Legal Heir of deceased would make no difference—There is no merit in writ petition.

*Dr. Alka Gupta* v. *Medical Council of India & Anr.* ..... *669*

**MOTOR VEHICLE ACT, 1988**—S. 163A—These Cross Appeals arise out of a common judgment in Suit No. 931/2008 decided by the Motor Accident Claims Tribunal, (the Tribunal) by judgment dated 28.03.2009 whereby a compensation of Rs. 5,33,000/- was awarded in favour of Pitamber & Ors., for the death of Smt. Harpyari, who died in a motor accident on 27.11.2006—The deceased's income was claimed to be Rs. 39,000/- per annum. The Claimants' grievance is that the deceased's age was taken as 53 years to select the multiplier '11' whereas according to the postmortem report, the age was 40 yeas. Thus, it is contended that the appropriate multiplier was '15' instead of '11' as taken by the Tribunal—The loss of dependency is liable to be enhanced—Per contra, learned counsel for the Insurer submits that the award of compensation on the basis of the age as given in the Ration

Card was rightly taken, in preference to the age mentioned in the Postmortem Report as the Ration Card produced by the Claimants was a more authentic document than a Postmortem Report not inclined to agree with the contention raised on behalf of the Claimants that the age of the deceased as mentioned in the Postmortem Report should have been into consideration for selection of the multiplier. The Claimants have not come forward with any explanation as to why the age in the Ration Card was wrongly mentioned. The deceased had six children including four major children and, therefore, it was unbelievable that she would be just 40 years old—In any case, in the absence of any other evidence with regard to proving of age or any explanation for the fact the age in the Ration Card was wrongly mentioned, the Tribunal rightly took the deceased's age to be 53 years as mentioned in the Ration Card.

*New India Assurance Co. Ltd.* v. *Pitamber & Ors.* ... *453*

— Section 166—Section 163 A—Claim for compensation—Accident took place on 31.10.2001—Dumper hit tempo at the dead end of night—Dumper driven at a very fast speed—Death of a bachelor, aged about 23 years—Tribunal awarded compensation of Rs. 1,70,296/-—Aggrieved appellant/ respondent preferred appeal—Alleged no finding as to negligence recorded by the Tribunal—In the absence of any proof of earning, increase of 50% towards future prospects is without any basis—Held—Proof of negligence essential; to be established on preponderance of probability—Vehicle suddenly came on carriage way meant for the traffic from opposite direction—Was driven at a fast speed at the dead of night—Criminal case registered against him—No representation made against it—Rash and negligence driving proved—Compensation not exorbitant or excessive—Appeal dismissed.

*M.C.D.* v. *Sureshi Devi* ..... *475*

— Section 163-A—Section 147(1)(b)—Workmen's Compensation Act, 1923—Truck owned by respondent



no.6—Death of helper sleeping under the truck—Driver (respondent no. 5) failed to take care—Tribunal awarded compensation of Rs. 5,63,200/-—Aggrieved, Insurance Company/Appellant preferred the appeal and contended that the accident took place because of the negligence of the deceased himself, liability to pay the compensation restricted under the Workmen's Compensation Act and excess be paid by the owner/respondent no.6—Held, Appellant liability not statutory but contractual, under the W.C. Act—Cannot avoid its liability to pay compensation—Liable to pay compensation to the extent of its liability under the W.C. Act and rest payable by respondent no.6—Appeal disposed of.

*New India Assurance Co. Ltd.* v. *Krishna & Ors.* ..... *487*

— Section 163-A—Section 140—The deceased borrowed scooter, from its owner—Accident on account of rash and negligent driving of the deceased—Mother filed claim for compensation—Tribunal held, since the deceased borrowed a two wheeler from its owner, respondent had no liability to pay the compensation—Dismissed the petition—Aggrieved, claimant preferred appeal—Contended, claimant being a poor widow, entitled to compensation—Held, accident took place on account of neglect and default of the deceased; legal representative not entitled to compensation, from the owner—Appeal dismissed.

*Sushila* v. *Brijesh & Ors.* ..... *511*

— Deceased boarded a DTC Bus—After reaching some distance, someone placed a knife on Driver's neck commanding him to stop the DTC bus—During this commotion, the Driver also heard people at the rear say that a person; i.e. Deceased had been killed—After the persons with knives alighted, the Driver reached Police Station and made a statement to I.O.—Deceased was removed to Hospital where he was declared brought dead—Claim Petition filed against DTC by the Legal Heirs—Claims Tribunal held that accident had arisen out of

**RECOVERY OF DEBTS DUE TO BANKS & FINANCIAL INSTITUTIONS ACT, 1993 (RDB ACT)**—Whether the provisions of Arbitration & Conciliation Act, 1996 are excluded in respect of proceedings under Recovery of Debts Due to Banks & Financial Institutions Act, 1993—Held, claim of money by the bank or financial institution against the borrower is a 'right in personam' with no element of any public interest and hence arbitrable—Debt Recovery Tribunal is simply a replacement of Civil Court—No special rights are created in favour of the banks or financial institutions under RDB Act—Matters which come within the scope and jurisdiction of Debt Recovery Tribunal are arbitrable.

Ratio Decidendi

"If a particular enactment creates special rights and obligations and gives special powers to tribunals which are not with the civil Courts such as Tribunals constitute under the Rent Control Act and the Industrial Disputes Act, the disputes arising under such enactments would not be arbitrable."



**RIGHT TO INFORMATION ACT, 2005**—2(f), 2(h), 2(i), 2(j), 3, 6(2), 7(9), 8(1) (e), (g), (h), (i) and (j), 9, 10(1), 11, 19(8) (b), 20 (1) 22—Regulations For The Army, 1987 (Revised)—Para 37 (c)—Military Security Instructions, 2001—Para 193—Constitution of India, 1950—Article 14 and 19(1) (a)—Indian Evidence Act, 1872—Section 126 to 129—CIC directed petitioners to supply entire information to extent not supplied after redacting names and designations of officers who made notings—Captioned Writ Petitions file raising a common question of law whether petitioners are obliged to furnish information to respondent which is retained by them in record, in form of file notings as also opinion of Judge Advocate General (JAG) found in records of respondents under relevant provisions of R.T.I. Act—Plea taken, CIC in several cases, contrary to decision in these cases has taken view that file nothings which include legal opinions, need not be disclosed,



as it may effect outcome of legal action instituted by applicant/querist seeking information—This was not permissible as it was a bench of co-equal strength—In case, CIC disagreed with view taken earlier, it ought to have referred matter to a larger Bench—There was a fiduciary relationship between officers in chain of command, and those, who were placed in higher echelons, of what was essentially a pyramidical structure—Since JAG Branch has a duty to act and give advice on matters falling within ambit of its mandate, disclosure of information would result in a breach of fiduciary relationship qua those who give advice and final decision making authority, which is recipient of advice—Held—File notings and opinions of JAG branch are information, to which, a person taking recourse to RTI Act can have access provided it is available with concerned public authority—In institutional set up, it can hardly be argued that notes on file qua a personnel or employee of institution, such as Army, whether vis-a-vis his performance or his conduct, in any manner, can benefit person, who generates note or renders opinion—As a matter of fact, person who generates note or renders opinion is presumed to be a person who is objective and not conflicted by virtue of his interest in matter, on which, he is called upon to deliberate—If that position holds, then it can neither be argued nor can it be conceived that notes on file or opinions rendered in institutional setup by one officer qua working or conduct of another officer brings forth a fiduciary relationship—A denial of access to such information to information seekers, i.e., respondents herein, especially in circumstances that said information is used admittedly in coming to conclusion that delinguent officers were guilty, and in determining punishment to be accorded to them, would involve a serious breach of principles of natural justice, as non-communication would entail civil consequences and would render such a decision vulnerable to challenge under Article 14 of Constitution of India provided information is sought and was not given—Right to information is a constitutional right

**ILR (2013) I DELHI 453**
**MAC. APP.**

**NEW INDIA ASSURANCE CO. LTD. ....APPELLANT**

**VERSUS**

**PITAMBER & ORS. ....RESPONDENTS**

**(G.P. MITTAL, J.)**

**MAC. APP. NO. : 304/2009 & 345/2009** **DATE OF DECISION: 23.01.2012**

**Motor Vehicle Act, 1988—S. 163A—These Cross Appeals arise out of a common judgment in Suit No. 931/2008 decided by the Motor Accident Claims Tribunal, (the Tribunal) by judgment dated 28.03.2009 whereby a compensation of Rs. 5,33,000/- was awarded in favour of Pitamber & Ors., for the death of Smt. Harpyari, who died in a motor accident on 27.11.2006—The deceased's income was claimed to be Rs. 39,000/- per annum. The Claimants' grievance is that the deceased's age was taken as 53 years to select the multiplier '11' whereas according to the postmortem report, the age was 40 yeas. Thus, it is contended that the appropriate multiplier was '15' instead of '11' as taken by the Tribunal—The loss of dependency is liable to be enhanced—Per contra, learned counsel for the Insurer submits that the award of compensation on the basis of the age as given in the Ration Card was rightly taken, in preference to the age mentioned in the Postmortem Report as the Ration Card produced by the Claimants was a more authentic document than a Postmortem Report not inclined to agree with the contention raised on behalf of the Claimants that the age of the deceased as mentioned in the Postmortem Report should have been into consideration for selection of the multiplier. The Claimants have not**



**come forward with any explanation as to why the age in the Ration Card was wrongly mentioned. The deceased had six children including four major children and, therefore, it was unbelievable that she would be just 40 years old—In any case, in the absence of any other evidence with regard to proving of age or any explanation for the fact the age in the Ration Card was wrongly mentioned, the Tribunal rightly took the deceased's age to be 53 years as mentioned in the Ration Card.**

There are judgments of the Supreme Court also which have lamented the inaction on the part of the Central Govt. in not carrying out amendment in the Second Schedule to the Act, but have held that under Section 163-A of the Act, the compensation can be granted only as per the structured formula. The first such judgment is **Oriental Insurance Company v. Hansrajbhai v. Kodala,** (2001) 5 SCC 175, where it was held that the benefit of filing a petition on no-fault liability can be claimed on the basis of income with a cap of Rs. 40,000/-. It was the highest slab in the Second Schedule. It was observed that others have to approach the Court under Section 166 of the Act. Para 15 of the report is extracted hereunder:-

> "15. In this context if we refer to the Review Committee's Report, the reason for enacting Section 163-A is to give earliest relief to the victims of the motor vehicle accidents. The Committee observed that determination of cases takes a long time and, therefore, under a system of structural compensation, the compensation that is payable for different classes of cases depending upon the age of the deceased, the monthly income at the time of death, the earning potential in the case of a minor, loss of income on account of loss of limb etc. can be notified and the affected party can then have option of their accepting 'lump sum' compensation under the Scheme of structural compensation or of pursuing his claim

through the normal channels. The Report of the Review Committee was considered by the State Governments and comments were notified. Thereafter, the Transport Development Council made suggestions for providing adequate compensation to victims of road accidents without going into long drawn procedure. As per the objects and reasons, it is a new pre-determined formula for payment of compensation to road accidents victims on the basis of age/income, which is more liberal and rational. On the basis of the said recommendation after considering the Report of the Transport Development Council, the Bill was introduced with 'a new pre-determined formula for payment of compensation to road accident victims on the basis of age/income, which is more liberal and rational', i.e. Section 163-A. It is also apparent that compensation payable under Section 163-A is almost based on relevant criteria for determining the compensation such as annual income, age of the victim and multiplier to be applied. In addition to the figure which is arrived at on the basis of said criteria, the Schedule also provides that amount of compensation shall not be less than Rs.50,000/-. It provides for fixed amount of general damage in case of death such as (1) Rs.2000/- for funeral expenses (2) Rs.5000/- for loss of consortium, if beneficiary is the spouse (3) Rs.2400/- for loss of estate (4) for medical expenses supported by the bills, voucher not exceeding Rs.15000/-. Similarly, for disability in a non-fatal accident Para 5 of the Schedule provides for determination of compensation on the basis of permanent disability. Para 6 provides for notional income for those who had no income prior to an accident at Rs.15000/- per annum. There is also provision for reduction of 1/3rd amount of compensation on the assumption that the victim would have incurred the said amount towards maintaining himself had he been alive. The purpose of this Section



and the Second Schedule is to avoid long drawn litigation and delay in payment of compensation to the victims or his heirs who are in dire need of relief. If such affected claimant opts for accepting the lump-sum compensation based on structured formula, he would get relief at the earliest. It also gives vital advantage of not pleading or establishing any wrongful act or neglect or default of the owner of the offending vehicle or vehicles. This no-fault liability appears to have been introduced on the basis of the suggestion of the Law Commission to the effect that 'the expanding notions of social security and social justice envisage that liability to pay compensation must be "no-fault liability" and as observed by this Court in **Ramanbhai's** case (Supra), "in order to meet to some extent the responsibility of the society to the deaths and injuries caused in road accidents." However, this benefit can be availed of by the claimant only by restricting his claim on the basis of income at a slab of Rs.40,000/- which is the highest slab in the Second Schedule which indicates that the legislature wanted to give benefit of no-fault liability to a certain limit. This would clearly indicate that the Scheme is in alternative to the determination of compensation on fault basis under the Act. The object underlining the said amendment is to pay compensation without there being any long drawn litigation on an predetermined formula, which is known as 'structured formula' basis which itself is based on relevant criteria for determining compensation and the procedure of paying compensation after determining the fault is done away. Compensation amount is paid without pleading or proof of fault, on the principle of social justice as a social security measure because of ever increasing motor vehicles accidents in a 'fast moving' society. Further, the law before insertion of Section 163-A was giving limited benefit to the extent provided under Section 140 for no-fault liability and determination of

compensation amount on fault liability was taking a long time. That mischief is sought to be remedied by introducing Section 163-A and the disease of delay is sought to be cured to a large extent by affording benefit to the victims on 'structured formula' basis. Further, if the question of determining compensation on fault liability is kept alive it would result in additional litigation and complications in case claimants fail to establish liability of the owner of the defaulting vehicles." **(Para 17)**

**Important Issue Involved:** The Claimants approaching the Court under Section 163-A of the Act can be awarded compensation only on the basis of the structured formula given in the Second Schedule.

**[Ch Sh]**

**APPEARANCES:**

**FOR THE APPELLANT** : Mr. D.K. Sharma, Advocate.

**FOR THE RESPONDENTS** : Mr. O.P. Mannie Advocate for R-1 to R-7.

**CASES REFERRED TO:**

1. *Jagdish & Anr.* vs. *Madhav Raj Mishra and Anr.* MAC APP.190/2011 decided on 19.04.2011.
2. *Oriental Insurance Company Limited* vs. *Anita Devi & Ors.,* 20011 (5) AD (Delhi) 138
3. *Oriental Insurance Company Limited* vs. *Om Prakash & Ors.,* 1 (2009) ACC 148.
4. *Oriental Insurance Company Limited* vs. *Meena Variyal* (2007) 5 SCC 428.
5. *Oriental Insurance Company Limited* vs. *Smt. Pataso & Ors.,* MAC APP.962/2005 decided on 01.09.2008.
6. *Deepal Girishbhai Soni* vs. *United India Insurance Company Limited,* (2004) 5 SCC 385.



7. *Minu B. Mehta* vs. *Balkrishna Ramchandra Nayan & Anr.,* (1977) 2 SCC 441.

**RESULT:** Disposed of.

**G.P. MITTAL, J.**

**1.** These Cross Appeals arise out of a common judgment in Suit No.931/2008 decided by the Motor Accident Claims Tribunal, (the Tribunal) by judgment dated 28.03.2009 whereby a compensation of '5,33,000/- was awarded in favour of Pitamber & Ors., for the death of Smt. Harpyari, who died in a motor accident on 27.11.2006.

**2.** MAC APP.304/2009 has been preferred by the New India Assurance Company Limited, which is the contesting Respondent in Cross MAC APP.345/2009. For the sake of convenience, the New India Assurance Company Limited shall be referred to as the Insurer.

**3.** MAC APP.345/2009 has been preferred by the Appellants Pitamber & Ors. who are the Respondents in MAC APP.304/2009. For the sake of convenience, Pitamber & Ors. shall be referred to as the Claimants.

**4.** A Claim Petition was preferred under Section 163-A of the Motor Vehicles Act (the Act) for grant of compensation under the structured formula.

**5.** The deceased's income was claimed to be Rs. 39,000/- per annum. The Claimants' grievance is that the deceased's age was taken as 53 years to select the multiplier '11' whereas according to the postmortem report, the age was 40 years. Thus, it is contended that the appropriate multiplier was '15' instead of '11' as taken by the Tribunal. Thus, the learned counsel for the Claimants argued that the loss of dependency is liable to be enhanced.

**6.** Per contra, learned counsel for the Insurer submits that the award of compensation on the basis of the age as given in the Ration Card was rightly taken, in preference to the age mentioned in the Postmortem Report as the Ration Card produced by the Claimants was a more authentic document than a Postmortem Report.

**7.** In MAC APP.304/2009, it is contended on behalf of the Insurer that amount of Rs. 1,00,000/- awarded towards the non pecuniary damages and Rs. 4,000/- awarded towards the funeral expenses was in contravention

of the Second Schedule. Once the Claimants have approached the Court for grant of compensation without proving any negligence on the part of the tortfeasor, they were entitled to the compensation as per the structured formula only.

**8.** I am not inclined to agree with the contention raised on behalf of the Claimants that the age of the deceased as mentioned in the Postmortem Report should have been taken into consideration for selection of the multiplier. The Claimants have not come forward with any explanation as to why the age in the Ration Card was wrongly mentioned. The deceased had six children including four major children and, therefore, it was unbelievable that she would be just 40 years old.

**9.** In any case, in the absence of any other evidence with regard to proving of age or any explanation for the fact that the age in the Ration Card was wrongly mentioned, the Tribunal rightly took the deceased's age to be 53 years as mentioned in the Ration Card.

**10.** MAC APP.345/2009 preferred by the Claimants is devoid of any merit; the same is accordingly dismissed.

**11.** Pending applications also stand disposed of.

**MAC.APP. 304/2009**

**12.** The question whether a compensation in a Petition under Section 163-A of the Motor Vehicles Act (the Act) can be claimed and awarded strictly in accordance with the structured formula given in the Second Schedule has vexed the Courts in the country. The High Courts and the Supreme Court have been requesting the legislature to come out with an amendment to the Second Schedule which was incorporated way back in the year 1994 so that adequate and 'just compensation' may be awarded to the persons in the lower income bracket.

**13.** If we go by the structured formula, a person getting the minimum wages of an unskilled worker today would not be able to get the compensation under Section 163-A of the Act.

**14.** Learned counsel for the Claimants relies upon the judgment of this Court in **Oriental Insurance Company Limited v. Smt. Pataso & Ors.,** MAC APP.962/2005 decided on 01.09.2008, whereby it was held that considering the inflation and depreciation in the value of the rupee,



there was no justification to restrict the award of general damages to the Second Schedule under Section 163-A of the Act.

**15.** In **Oriental Insurance Company Limited v. Om Prakash & Ors.,** 1 (2009) ACC 148, Rs. 50,000/- was awarded as compensation on account of loss of child and pain and suffering, which was beyond the limits prescribed under Section 163-A of the Act.

**16.** There are later judgments of this Court in **Jagdish & Anr. v. Madhav Raj Mishra and Anr.** MAC APP.190/2011 decided on 19.04.2011; and **Oriental Insurance Company Limited v. Anita Devi & Ors.,** 20011 (5) AD (Delhi) 138, decided on 10.05.2011 which have adopted the line that when the Claimants approach the Court under Section 163-A of the Act, the compensation is to be restricted as per the structured formula.

**17.** There are judgments of the Supreme Court also which have lamented the inaction on the part of the Central Govt. in not carrying out amendment in the Second Schedule to the Act, but have held that under Section 163-A of the Act, the compensation can be granted only as per the structured formula. The first such judgment is **Oriental Insurance Company v. Hansrajbhai v. Kodala,** (2001) 5 SCC 175, where it was held that the benefit of filing a petition on no-fault liability can be claimed on the basis of income with a cap of Rs. 40,000/-. It was the highest slab in the Second Schedule. It was observed that others have to approach the Court under Section 166 of the Act. Para 15 of the report is extracted hereunder:-

> "15. In this context if we refer to the Review Committee's Report, the reason for enacting Section 163-A is to give earliest relief to the victims of the motor vehicle accidents. The Committee observed that determination of cases takes a long time and, therefore, under a system of structural compensation, the compensation that is payable for different classes of cases depending upon the age of the deceased, the monthly income at the time of death, the earning potential in the case of a minor, loss of income on account of loss of limb etc. can be notified and the affected party can then have option of their accepting 'lump sum' compensation under the Scheme of structural compensation or of pursuing his claim through the normal

channels. The Report of the Review Committee was considered by the State Governments and comments were notified. Thereafter, the Transport Development Council made suggestions for providing adequate compensation to victims of road accidents without going into long drawn procedure. As per the objects and reasons, it is a new pre-determined formula for payment of compensation to road accidents victims on the basis of age/ income, which is more liberal and rational. On the basis of the said recommendation after considering the Report of the Transport Development Council, the Bill was introduced with 'a new pre-determined formula for payment of compensation to road accident victims on the basis of age/income, which is more liberal and rational., i.e. Section 163-A. It is also apparent that compensation payable under Section 163-A is almost based on relevant criteria for determining the compensation such as annual income, age of the victim and multiplier to be applied. In addition to the figure which is arrived at on the basis of said criteria, the Schedule also provides that amount of compensation shall not be less than Rs.50,000/-. It provides for fixed amount of general damage in case of death such as (1) Rs.2000/- for funeral expenses (2) Rs.5000/- for loss of consortium, if beneficiary is the spouse (3) Rs.2400/- for loss of estate (4) for medical expenses supported by the bills, voucher not exceeding Rs.15000/-. Similarly, for disability in a non-fatal accident Para 5 of the Schedule provides for determination of compensation on the basis of permanent disability. Para 6 provides for notional income for those who had no income prior to an accident at Rs.15000/- per annum. There is also provision for reduction of 1/3rd amount of compensation on the assumption that the victim would have incurred the said amount towards maintaining himself had he been alive. The purpose of this Section and the Second Schedule is to avoid long drawn litigation and delay in payment of compensation to the victims or his heirs who are in dire need of relief. If such affected claimant opts for accepting the lump-sum compensation based on structured formula, he would get relief at the earliest. It also gives vital advantage of not pleading or establishing any wrongful act or neglect or default of the owner of the offending vehicle or vehicles. This no-fault liability appears to have been



introduced on the basis of the suggestion of the Law Commission to the effect that 'the expanding notions of social security and social justice envisage that liability to pay compensation must be "no-fault liability" and as observed by this Court in **Ramanbhai's** case (Supra), "in order to meet to some extent the responsibility of the society to the deaths and injuries caused in road accidents." However, this benefit can be availed of by the claimant only by restricting his claim on the basis of income at a slab of Rs.40,000/ - which is the highest slab in the Second Schedule which indicates that the legislature wanted to give benefit of no-fault liability to a certain limit. This would clearly indicate that the Scheme is in alternative to the determination of compensation on fault basis under the Act. The object underlining the said amendment is to pay compensation without there being any long drawn litigation on an predetermined formula, which is known as 'structured formula' basis which itself is based on relevant criteria for determining compensation and the procedure of paying compensation after determining the fault is done away. Compensation amount is paid without pleading or proof of fault, on the principle of social justice as a social security measure because of ever increasing motor vehicles accidents in a 'fast moving' society. Further, the law before insertion of Section 163-A was giving limited benefit to the extent provided under Section 140 for no-fault liability and determination of compensation amount on fault liability was taking a long time. That mischief is sought to be remedied by introducing Section 163-A and the disease of delay is sought to be cured to a large extent by affording benefit to the victims on 'structured formula' basis. Further, if the question of determining compensation on fault liability is kept alive it would result in additional litigation and complications in case claimants fail to establish liability of the owner of the defaulting vehicles."

**18.** In **Deepal Girishbhai Soni v. United India Insurance Company Limited,** (2004) 5 SCC 385; the observations of the Supreme Court in Para 67 partly appears to be contrary as initially it was stated that we do not agree with the findings in **Kodala** (supra) that if a person invokes provisions of Section 163-A of the Act, the annual income of Rs. 40,000/- per annum shall be treated as a cap. The Hon'ble Supreme

Court hastens to add that in our opinion, the proceedings under Section 163-A being a social security provision, providing for a distinct scheme, only those whose annual income is upto Rs. 40,000/- can take the benefits thereof. All other Claimants have to be determined under Chapter XII of the Act.

**19.** Para 67 in **Deepal Girishbhai Soni** (supra) is extracted hereunder:-

> "67. We, therefore, are of the opinion that **Kodala** (supra) has correctly been decided. However, we do not agree with the findings in **Kodala** (supra) that if a person invokes provisions of Section 163-A, the annual income of Rs.40,000/- per annual shall be treated as a cap. In our opinion, the proceeding under Section 163-A being a social security provision, providing for a distinct scheme, only those whose annual income is upto Rs. 40,000/- can take the benefit thereof. All other claims are required to be determined in terms of Chapter XII of the Act."

**20.** The observations of the Supreme Court in Para 72 of the report in **Deepal Girishbahi Soni** (supra) further clarifies the position that the Supreme Court expected the Central Govt. to bestow serious consideration to carry out an amendment in the Second Schedule from time to time to obviate the difficulty faced by the victims belonging to the lower income group.

**21. Deepal Girishbahi Soni** (supra) was relied in two decisions of this Court in (i) **Oriental Insurance Company Limited v. Anita Devi & Ors.** (supra) and (ii) **Jagdish & Anr. v. Madhav Raj Mishra and Anr.** where it was held that:-

> "'the Claimants approaching the Court under Section 163-A of the Act can be awarded compensation only on the basis of the structured formula given in the Second Schedule."

**22.** In **Anita Devi & Ors.** (supra) a compensation of Rs.10,000/- towards loss of estate, Rs. 10,000/- towards funeral expenses, Rs.10,000/- towards loss of consortium and Rs.1,00,000/- towards the loss of love and affection was reduced to Rs.2,000/- for funeral expenses, Rs.5,000/- towards loss of consortium (where the beneficiary is the spouse) and Rs. 2,500/- towards the loss of estate only (as per the structured formula).



The overall compensation of Rs. 8,13,639/- was reduced to Rs.4,39,940/- which was in accordance with the Second Schedule.

**23.** In the later judgment of the Supreme Court in **Oriental Insurance Company Limited v. Meena Variyal** (2007) 5 SCC 428 while referring to **Minu B. Mehta v. Balkrishna Ramchandra Nayan & Anr.,** (1977) 2 SCC 441, it was held that a person can apply to the Tribunal to claim compensation in terms of the Schedule without proving the negligence or default on the part of the driver/owner of the offending vehicle and in other cases, the Claimants had to approach the Court under Section 166 of the Act and were necessarily under obligation to prove the negligence. Para 27 of the report is extracted hereunder:-

> "27. We think that the law laid down in **Minu B. Mehta and Anr. v. Balkrishna Ramchandra Nayan and Anr.** (supra) was accepted by the legislature while enacting the Motor Vehicles Act, 1988 by introducing Section 163-A of the Act providing for payment of compensation notwithstanding anything contained in the Act or in any other law for the time being in force that the owner of a 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 the motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be, and in a claim made under Sub-section (1) of Section 163-A of the Act, 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 concerned. Therefore, the victim of an accident or his dependants have an option either to proceed under Section 166 of the Act or under Section 163-A of the Act. Once they approach the Tribunal under Section 166 of the Act, they have necessarily to take upon themselves the burden of establishing the negligence of the driver or owner of the vehicle concerned. But if they proceed under Section 163-A of the Act, the compensation will be awarded in terms of the Schedule without calling upon the victim or his dependants to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle."

**24.** In view of the judgments of the Supreme Court in **Kodala** (supra), **Deepal Girishbhai Soni and Meena Variyal** (supra), the judgments of this Court in **Smt. Pataso & Ors.** (supra) and **Om Prakash & Ors.** (supra) cannot be taken as precedent.

**25.** The judgment of this Court in **Anita Devi & Ors.** (supra) which is in consonance with the law laid down in **Kodala** (supra), **Deepal Girishbhai Soni** (supra) and **Meena Variyal** (supra) shall be taken as a binding precedent.

**26.** In view of the above, a compensation of Rs.5,000/- is granted towards loss of consortium instead of Rs.50,000/-; Rs.2,000/- towards funeral expenses instead of Rs.4,000/- and Rs.2,500/- towards loss of estate and love and affection instead of Rs. 50,000/-.

**27.** The overall compensation awarded is re-assessed as under:-

| | **Head of Compensation** | **Granted by the Tribunal** | **Granted by this Court** |
|---|---|---|---|
| 1. | Loss of Dependency | Rs. 4,29,000/- | Rs. 4,29,000/- |
| 2. | Loss of Consortium | Rs. 50,000/- | Rs. 5,000/- |
| 3. | Funeral Expenses | Rs. 4,000/- | Rs. 2,000/- |
| 4. | Loss of Estate & Love & Affection | Rs. 50,000/- | Rs. 2,500/- |
| | **TOTAL** | **Rs. 5,33,000/-** | **Rs. 4,38,500/-** |

**28.** The compensation of Rs. 5,33,000/- awarded by the Tribunal is reduced to Rs. 4,38,500/-.

**29.** The excess amount of Rs. 94,500/- along with the interest earned if any, during the pendency of the Appeal shall be refunded by the Claimants to the Insurer within 30 days. The statutory amount of Rs. 25,000/- deposited by the Insurer shall be refunded to it.

**30.** MAC APP.304/2009 preferred by the insurer is allowed in above terms. No costs.

**31.** Pending applications also stand disposed of.

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**ILR (2013) I DELHI 466**
**FAO (OS)**

**UNION OF INDIA** **....PETITIONER**

**VERSUS**

**CONBES INDIA PVT. LTD.** **....RESPONDENT**

**(A.K. SIKRI, ACJ., SANJAY KISHAN KAUL & RAJIV SHAKDHER, JJ.)**

**FAO (OS) NO. : 494/2010** **DATE OF DECISION: 24.02.2012**

**Arbitration Act, 1940—S. 14—S. 17—Respondent filed petition u/s 14 and 17 of the Arbitration Act for making the award Rule of the Court—Appellant filed objections—Contended that arbitrator could not have awarded any interest on the awarded amount in view of S. 16 (2) of the General Condition of Contract—Ld. Single Judge held, notwithstanding the aforesaid contractual provision, arbitrator had jurisdiction to award the interest—Division bench on appeal, found some conflict—Referred the matter to larger bench—Full bench held that the principles which clearly emerged is that in case where agreement silent about the award of the interest, the discretion lies with the arbitrator to award or not to award pendente-lite interest—On the other hand, where the arbitration clause specifically prohibits grants of interest, the arbitrator bound by such contractual provisions and has no power to grant the interest—Held—Arbitrator had no power to award pendente-lite interest in view of express prohibition—Order of single judge set aside on this aspect—Appeal disposed off.**

No doubt, this latest judgment is rendered by two Judges Bench. However, it has interpreted the earlier two Constitution Bench judgments and it is well established principle of law

that the interpretation given by the Apex Court to the earlier judgments is also law under Article 141 of the Constitution and binding on High Courts and Subordinate Courts. The principle which clearly emerges from the reading of the aforesaid judgment culled out from the **GC Roy** (supra) is that in case where agreement is silent about the award of interest, the discretion lies with the Arbitrator to award or not to award the interest. The Arbitrator shall have the power to award the pendente lite interest though it would be in his discretion to exercise such a power and decide whether to award or not to award the interest in a given case. On the other hand, if the arbitration clause specifically prohibits grant of interest, then, the arbitrator is bound by such contractual provision and would have no power to grant the interest. It would be of interest to mention at this stage that situations have occurred where the clause in the agreement prohibits the contractor from claiming the interest and on such clause issues have arisen as to whether the Arbitrator can still grant the interest. In **Sayeed Ahmed** (supra) the Supreme Court was categorical in holding that in the face of such a provision even the Arbitrator was powerless.

**(Para 8)**

**Important Issue Involved:** The arbitrator cannot award interest if the arbitration clause specifically prohibits so.

**[Gu Si]**

**APPEARANCES:**

**FOR THE PETITIONER** : Mr. A.S. Chandhiok, ASG with Mr. H.R. Tiwari and Mr. J.K. Singh, Advocates.

**FOR THE RESPONDENT** : Mr. Vivekanand, Advocate.

**CASES REFERRED TO:**

1. *Union of India* vs. *Krafters Engineering and Leasing Private Ltd.* (2011) 7 SCC 279.



2. *Union of India* vs. *Saraswat Trading Agency and Ors.* (2009) 16 SCC 504.
3. *Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa* vs. *N.C. Budharaj* (2001) 2 SCC 721.
4. *M/s Housing and Urban Development Corporation* vs. *M/s Shapoorji Pallonji & Co. Ltd.* FAO (OS) No. 239/2000.
5. *Secretary, Irrigation Department, Govt. of Orissa and Ors.* vs. *G.C. Roy* (1992) 1 SCC 508.

**RESULT:** Appeal disposed off.

**A.K. SIKRI, ACTING CHIEF JUSTICE:** (ORAL)

**1.** This intra court appeal is preferred by the Union of India challenging the orders dated 5.4.2010 passed by the learned Single Judge in CS(OS) 122/2009 preferred by the appellant which was a petition under Section 14 & 17 of the Arbitration Act, 1940 filed by the respondent herein for making the award passed by the Arbitrator as a rule of the Court. On receipt of notice of the said petition, the appellant had filed objections under Section 30 & 33 of the Arbitration Act, (hereinafter referred to as 'the Act, 1940'). Specific objection was laid to the award in respect of Clai ms No. 1,2,5,6, and 8 etc. Objection qua Claims No. 1,2,5 and 6 were rejected and qua claim no.8, objections were sustained thereby reducing the amount awarded under this claim to Rs. 1,75,000/-. Insofar as this part of the order of the learned Single Judge is concerned, there is no dispute. In this behalf, though the order of the learned Single Judge sustaining the claims is challenged, the same was not pressed at the time of arguments and only controversy which is raised before us pertains to the award of pendente lite interest by the learned Arbitrator.

**2.** The submission of the appellants was that the Arbitrators could not have awarded any interest on the awarded amount in view of Section 16 (2) of the General Conditions of Contract (GCC). However, this contention did not find favour with the learned Single Judge who has, by means of impugned order, held that notwithstanding the aforesaid contractual provision, the Arbitrator had the jurisdiction to award the interest. While taking this view various judgments cited by the learned Counsel for the parties on either side have been taken note of and

considered, to which we shall be referring to at an appropriate stage.

**3.** When the matter came up for argument before the Division Bench, the Division Bench took note of the judgments cited on either side and *prima facie* found that there appears to be some conflict and, therefore, the vexed question needed consideration by a Larger Bench. Vide orders dated 5.12.2011, the matter was referred to the Larger Bench. Since this order takes note of the controversy involved, we reproduce that order in verbatim:-

> "The vexed question whether the clause prohibiting the grant of interest contained in the contract between the parties could also preclude the Arbitrator from granting pendent lite interest has arisen in this appeal. There have been various positions on this aspect.
>
> Suffice it to say that a number of judgments of the learned Single Judge of this Court have taken a view that the award of pendent lite interest by the Arbitrator is not barred under the Indian Arbitration Act, 1940. In this behalf we may refer to the judgment in FAO No. 289/2003 **Union of India Vs. R.C. Singhal and Ors.** decided on 21.03.2006. The subsequent judgment by one of us (Sanjay Kishan Kaul, J.) in **Thermospares India Vs. BHEL and Ors.** 130 (2006) DLT 382 followed this view. We are informed that a similar view has been taken in OMP No. 403/2002 **Union of India Vs. TRG Industries Pvt. Ltd.** decided on 28.07.2006 and OMP No. 44/2010 **Union of India Vs. M/s Chenab Construction Joint Venture** decided on 05.03.2010.
>
> The clause in question in the present case is identical to the one in **Union of India Vs. R.C. Singhal and Ors.** case (supra) and **Mandnani Construction Corporation (P) Ltd. Vs. Union of India and Ors.** 2009 (4) Arbitration Law Reporter 457 (SC).
>
> Thus this view is favourable to the respondent as adopted by the learned Single Judge in the impugned order.
>
> The matters does not rests at this since, in **Madnani Construction Corporation (P) Ltd. Vs. Union of India and Ors.** case (supra), the Supreme Court has taken the same view. However, learned counsel for the appellant has referred to a judgment in **Sayeed Ahmed & Co. Vs. State of U.P. and Ors.** 2009 (3) Arbitration Law Reporter 29 (SC), which is an earlier judgment and according to him takes a contrary view. Learned counsel has also referred similarly to the **Union of India Vs. Saraswat Trading Agency and Ors.** (2009) 16 SCC 504.
>
> In FAO (OS) No. 239/2000, **M/s Housing and Urban Development Corporation Vs. M/s Shapoorji Pallonji & Co. Ltd.** decided on 02.11.2011 various judgments were not brought to our notice and in respect of a different clause, we took a view relying on the judgment in **Secretary, Irrigation Department, Govt. of Orissa and Ors. Vs. G.C. Roy** (1992) 1 SCC 508.
>
> We are thus of the view that this issue needs to be examined by a larger bench of this court to bring about a settled legal position. The papers be placed before Hon'ble the Acting Chief Justice for constitution of a Larger Bench."



This is how the matter comes up before this Full Bench.

**4.** We have heard Mr. A.S.Chandhiok, learned ASG for the appellant and Mr.Vivekanand, learned counsel who appeared for the respondent.

**5.** The reference order spells out the conflicting approach of this Court and takes note of relevant judgments of the Supreme Court which have to be kept in mind while straightening the controversy. In the first blush, though it may appear that the view taken by the Supreme Court in **Engineers-De-Space-Age** 9 (1996) 1 SCC 516 and **Madnani** (supra) is contrary to the ratio of **Sayeed Ahmed** (supra), a close scrutiny of these judgments which all interpreted the Constitution Bench judgments in **Secretary, Irrigation Department, Government of Orissa Vs. G.C. Roy** (supra) and **Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa Vs. N.C. Budharaj** 2001 (2) SCC 721, would make it clear that the issue stands squarely decided by a Constitution Bench judgment in **G.C.Roy** (supra). In fact, it is not even necessary for us to indulge in detailed discussion on this aspect as our task is made easier by a recent judgment of the Supreme Court in the case of **Union of India Vs. Krafters Engineering and Leasing Private Ltd.** (2011) 7 SCC 279 wherein the Supreme Court has undertaken the identical exercise which we are supposed to undertake. The Court extensively quoted from

**G.C. Roy** (supra) which was also a case under the Arbitration Act, 1940 and dealt with the question of pendente lite interest. We would like to extract some portion from the said Constitution Bench judgment hereunder:-

> "43. The question still remains whether arbitrator has the power to award interest pendente lite, and if so on what principle. **We must reiterate that we are dealing with the situation where the agreement does not provide for grant of such interest nor does it prohibit such grant. In other words, we are dealing with a case where the agreement is silent** as to award of interest. On a conspectus of aforementioned decisions, the following principles emerge:
>
> (i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, Code of Civil Procedure and there is no reason or principle to hold otherwise in the case of arbitrator.
>
> (ii) An arbitrator is an alternative form (sic forum) for resolution of disputes arising between the parties. If so, he must have the power to decide all the disputes or differences arising between the parties. If the arbitrator has no power to award interest pendente lite, the party claiming it would have to approach the court for that purpose, even though he may have obtained satisfaction in respect of other claims from the arbitrator. This would lead to multiplicity of proceedings.
>
> (iii) **An arbitrator is the creature of an agreement.** It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow, as they think fit, so long as they are not opposed to law. (The proviso to Section 41 and Section 3 of Arbitration Act illustrate this point). All the same, the agreement must be in conformity with law. **The arbitrator must also act and make his award in accordance with the general law of the land and the agreement.**



> (iv) Over the years, the English and Indian courts have acted on the assumption that where the agreement does not prohibit and a party to the reference makes a claim for interest, the arbitrator must have the power to award interest pendente lite. Thawardas has not been followed in the later decisions of this Court. It has been explained and distinguished on the basis that in that case there was no claim for interest but only a claim for unliquidated damages. It has been said repeatedly that observations in the said judgment were not intended to lay down any such absolute or universal rule as they appear to, on first impression. Until Jena case almost all the courts in the country had upheld the power of the arbitrator to award interest pendente lite. Continuity and certainty is a highly desirable feature of law.
>
> (v) Interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference (pre-reference period). For doing complete justice between the parties, such power has always been inferred.
>
> 44. Having regard to the above consideration, we think that the following is the correct principle which should be followed in this behalf:
>
> **Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred to the arbitrator, he shall have the power to award interest pendente lite.** This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and therefore when the parties refer all their disputes - or refer the dispute as to interest as such - to the arbitrator, he shall have the power to award interest. This does not mean that in every case the arbitrator should necessarily award interest pendente lite. It is a **matter within his discretion to** be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view."

(emphasis added)

**6.** Thereafter, the Court reproduced the following discussion from **N.C. Budharaj** (supra):-

> "26. For all the reasons stated above, we answer the reference by holding that the arbitrator appointed with or without the intervention of the court, has jurisdiction to award interest, on the sums found due and payable, for the pre-reference period, in the absence of any specific stipulation or prohibition in the contract to claim or grant any such interest. The decision in Jena case taking a contra view does not lay down the correct position and stands overruled, prospectively, which means that this decision shall not entitle any party nor shall it empower any court to reopen proceedings which have already become final, and apply only to any pending proceedings. No costs."

**7.** Further exercise undertaken by the Court relates to the discussion of the subsequent judgments particularly **Engineering De-Space-Age and Sayeed Ahmed** (supra) and summed up the position in the following manner:-

> "15. Considering the specific prohibition in the agreement as discussed and interpreted by the Constitution Bench, we are in respectful agreement with the view expressed in **Sayeed Ahmed and Company** (supra) and we cannot possibly agree with the observation in **Board of Trustees for the Port of Calcutta** (supra) in a case arising under the Arbitration Act, 1940 that the arbitrator could award interest pendente lite ignoring the express bar in the contract.
>
> 17. At the end of the argument, learned Counsel for the Respondent heavily relied on the recent decision of this Court in **Madnani Construction Corporation Private Limited** (supra) which arose under the Arbitration Act, 1940. There also, Clause 30 of SCC and Clause 52 of GCC prohibits payment of interest. Though the Bench relied on all the earlier decisions and considered the very same clause as to which we are now discussing, upheld the order awarding interest by the arbitrator de hors to specific bar in the agreement.
>
> 21. In the light of the above principle and in view of the specific prohibition of contract contained in Clause 1.15, the arbitrator



> ceases to have the power to grant interest. We also clarify that the Arbitration Act, 1940 does not contain any specific provision relating to the power of arbitrator to award interest. However, in the Arbitration & Conciliation Act, 1996, there is a specific provision with regard to award of interest by the arbitrator. The bar under Clause 1.15 is absolute and interest cannot be awarded without rewriting the contract."

**8.** No doubt, this latest judgment is rendered by two Judges Bench. However, it has interpreted the earlier two Constitution Bench judgments and it is well established principle of law that the interpretation given by the Apex Court to the earlier judgments is also law under Article 141 of the Constitution and binding on High Courts and Subordinate Courts. The principle which clearly emerges from the reading of the aforesaid judgment culled out from the **GC Roy** (supra) is that in case where agreement is silent about the award of interest, the discretion lies with the Arbitrator to award or not to award the interest. The Arbitrator shall have the power to award the pendente lite interest though it would be in his discretion to exercise such a power and decide whether to award or not to award the interest in a given case. On the other hand, if the arbitration clause specifically prohibits grant of interest, then, the arbitrator is bound by such contractual provision and would have no power to grant the interest. It would be of interest to mention at this stage that situations have occurred where the clause in the agreement prohibits the contractor from claiming the interest and on such clause issues have arisen as to whether the Arbitrator can still grant the interest. In **Sayeed Ahmed** (supra) the Supreme Court was categorical in holding that in the face of such a provision even the Arbitrator was powerless.

**9.** It was for this reason that when the contract barred the Arbitrator from granting any interest or bars the contractor from claiming any interest, it would amount to a clear prohibition regarding interest as the Arbitrator could not ignore such express bar in the contract.

**10.** Appling the aforesaid principle to the facts of this case, the clear answer would be that the Arbitrator had no power to award pendente lite interest. As pointed out above, Clause 16(2) of GCC stipulates in no uncertain terms that the interest would not be payable. The said Clause reads as under:-

"16(1) xxx xxx xxx

(2) Interest on amounts – No interest will be payable on the earnest money or the security deposit or amounts payable to the Contractor under the contract, but Government Securities deposited in term of sub-clause (1) of this clause will be repayable with interest accrued thereon."

**11.** We, thus, are of the view that the award of pendente lite interest by the Arbitrator was not legally justified. That order of the learned Single Judge making the award a rule of the Court on this aspect is set aside.

**12.** The appeal is disposed of accordingly.

**13.** There shall be no order as to costs.

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**ILR (2013) I DELHI 475**
**MAC. APP.**

**M.C.D. ....APPELLANT**

**VERSUS**

**SURESHI DEVI ....RESPONDENT**

**(G.P. MITTAL, J.)**

**MAC. APP. NO. : 479/2007 DATE OF DECISION: 24.02.2012**

**Motor Vehicle Act, 1988—Section 166—Section 163 A—Claim for compensation—Accident took place on 31.10.2001—Dumper hit tempo at the dead end of night—Dumper driven at a very fast speed—Death of a bachelor, aged about 23 years—Tribunal awarded compensation of Rs. 1,70,296/—Aggrieved appellant/ respondent preferred appeal—Alleged no finding as to negligence recorded by the Tribunal—In the absence**



**of any proof of earning, increase of 50% towards future prospects is without any basis—Held—Proof of negligence essential; to be established on preponderance of probability—Vehicle suddenly came on carriage way meant for the traffic from opposite direction—Was driven at a fast speed at the dead of night—Criminal case registered against him—No representation made against it—Rash and negligence driving proved—Compensation not exorbitant or excessive—Appeal dismissed.**

There are cases where there is direct evidence on negligence. At the same time, there may be cases where negligence would be inferred against the driver of the vehicle from indirect or circumstantial evidence. The registration of a criminal case always depends upon the assessment and discretion of the Investigating Officer. If two vehicles are involved in an accident, the driver of one of them may be negligent or both of them may be negligent. Similarly, even in case of a pedestrian, he himself may be solely responsible or have contributed to the accident. Of late, some of the Claims Tribunal do not discuss the issue of negligence and hold the driver liable simply on account of registration of a criminal case against him. The registration of a criminal case, subject to certain exceptions, may be taken as sufficient proof of involvement of the vehicle in the accident but not as a proof of the negligence. **(Para 6)**

In **Minu B. Mehta and Anr. v. Balkrishna Ramchandra Nayan and Anr.,** 1977 (2) SCC 441; it was held that proof of negligence is essential before a person or his master can be held liable to pay the compensation. A plea was raised before the Supreme Court that use of a motor vehicle is enough to make the owner liable to pay the compensation. The contention was repelled and it was held as under:-

"23. The Indian Law introduced provisions relating to compulsory insurance in respect of third party insurance by introducing Chapter VIII of the Act.

These provisions almost wholly adopted the provisions of the English law. The relevant sections found in the three English Acts Road Traffic Act, 1930. the Third Parties (Rights against Insurers) Act, 1930 and "the Road Traffic Act, 1934 were incorporated in Chapter VIII. Before a person can be made liable to pay compensation for any injuries and damage which have been caused by his action it is necessary that the person damaged or injured should be able to establish that he has some cause of action against the party responsible. Causes of action may arise out of actions for wrongs under the common law or for breaches of duties laid down by statutes. In order to succeed in an action for negligence the plaintiff must prove (1) that the defendant had in the circumstances a duty to take care and that duty was owed by him to the plaintiff, and that (2) there was a breach of that duty and that as a result of the breach damage was suffered by the plaintiff. The master also becomes liable for the conduct of the servant when the servant is proved to have acted negligently in the course of his employment. Apart from it in common law the master is not liable for as it is often said that owner of a motor car does not become liable because of his owning a motor car.

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27. This plea ignores the basic requirements of the owner's liability and the claimant's right to receive compensation. The owners' liability arises out of his failure to discharge a duty cast on him by law. The right to receive compensation can only be against a person who is bound to compensate due to the failure to perform a legal obligation. If a person is not liable legally he is under no duty to compensate anyone else. The Claims Tribunal is a tribunal constituted by the State Government for expeditious disposal of the motor claims. The general law applicable is only



common law and the law of torts. If under the law a person becomes legally liable then the person suffering the injuries is entitled to be compensated and the Tribunal is authorised to determine the amount of compensation which appears to be just. The plea that the Claims Tribunal is entitled to award compensation which appears to be just when it is satisfied on proof of injury to a third party arising out of the use of a vehicle on a public place without proof of negligence if accepted would lead to strange results.

28. Section 110(1) of the Act empowers the State Government to constitute one or more Motor Accidents Claims Tribunals for such area as may be specified for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death or bodily injury to persons. The power is optional and the State Government may not constitute a Claims Tribunal for certain areas. When a claim includes a claim for compensation the claimant has an option to make his claim before the Civil Court. Regarding claims for compensation therefore in certain cases Civil Courts also have a jurisdiction. If the contention put forward is accepted so far as the Civil Court is concerned it would have to determine the liability of the owner on the basis of common law or torts while the Claims Tribunal can award compensation without reference to common law or torts and without coming to the conclusion that the owner is liable. The concept of owner's liability without any negligence is opposed to the basic principles of law. The mere fact that a party received an injury arising out of the use of a vehicle in a public place cannot justify fastening liability on the owner. It may be that a person bent upon committing suicide may jump before a car in motion and thus get himself killed. We cannot perceive by what reasoning the owner of the car could be made liable. The proof of negligence remains the

linch pin to recover compensation. The various enactments have attempted to mitigate a possible injury to the claimant by providing for payment of the claims by insurance.

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30. A person is not liable unless he contravenes any of the duties imposed on him by common law or by the statute. In the case of a motor accident the owner is only liable for negligence and on proof of vicarious liability for the acts of his servant The necessity to provide effective means for compensating the victims in motor accidents should not blind us in determining the state of law as it exists today." **(Para 8)**

**Important Issue Involved:** The registration of a criminal case, subject to certain exceptions may be taken as sufficient proof of involvement of the vehicle in the accident but not as a proof of the negligence. In certain situation where there is hardship for the plaintiff to prove the manner of the accident, applying the principles of res ipsa the onus to prove how the accident happened, would shift on the defendant.

**[Vi Ku]**

**APPEARANCES:**

**FOR THE APPELLANT** : Ms. Biju Rajesh, Advocate for Mr. Gaurang Kanth Advocate.

**FOR THE RESPONDENT** : Ms. Deepali Gupta, Advocate for respondent no. 1.

**CASES REFERRED TO:**

1. *Parmeshwari Devi* vs. *Amir Chand and Ors.,* (2011) 11 SCC 635.
2. *Bimla Devi and Ors.* vs. *Himachal Road Transport Corporation and Ors.,* (2009) 13 SC 530.



3. *Oriental Insurance Company Limited* vs. *Meena Variyal & Ors.,* (2007) 5 SCC 428.
4. *Rylands* vs. *Fletcher* [1861-73] All E.R. 1.
5. *Pushpabai Purshottam Udeshi & Ors.* vs. *Ranjit Ginning & Pressing Co. (P) Ltd. & Anr.* AIR 1977 SC 1735.
6. *Minu B. Mehta and Anr.* vs. *Balkrishna Ramchandra Nayan and Anr.,* 1977 (2) SCC 441.
7. *M/s. Ruby Insurance Company Limited* vs. *Govindaraj,* AAO Nos. 607/1973 and 296/1974.

**RESULT:** Appeal dismissed.

**G.P. MITTAL, J.**

**1.** The Appellant Municipal Corporation of Delhi impugns the judgment dated 10.01.2007 passed by the Motor Accident Claims Tribunal, (the Claims Tribunal) whereby a compensation of Rs. 1,70,296/- was awarded for the death of Vinod Kumar Joshi who was aged about 23 years and a bachelor at the time of the accident, which occurred on 31.10.2001. No Cross Appeal/Cross Objections have been filed by the First Respondent.

**2.** The following contentions are raised on behalf of the Appellant:-

(i) The Claims Tribunal failed to record any finding on negligence, yet decided the issue of negligence against the Appellant; and

(ii) There was no proof of the deceased's income; his income was taken as per minimum wages of an unskilled worker but were increased by 50% towards the future prospects without any basis.

**3.** On the other hand, it is submitted on behalf of First Respondent that the negligence was duly proved from PW-2's testimony. The compensation awarded was very low.

**4.** On the issue of negligence, the Claims Tribunal held as under:-

"9. The factum of the accident is not disputed. The petitioner has claimed that it had occurred due to the negligence of respondent No.1, driver of the offending vehicle. Though,

respondent No.1 has denied his negligence, it is admitted that a case of rash and negligent driving was instituted against him. It has been further been proved though the deposition of PW2 and the MLC/Medical record, that the deceased succumbed to his injuries on the spot. Issue No.1 is, therefore, decided in favour of the petitioner."

**5.** A perusal of the impugned judgment shows that the Claims Tribunal returned the finding on the issue of negligence simply on the ground that the factum of accident was not disputed as a case for rash and negligent driving was instituted against the Appellant's driver. To say the least, the entire approach of the Claims Tribunal was against the basic principles of liability under the law of Torts.

**6.** There are cases where there is direct evidence on negligence. At the same time, there may be cases where negligence would be inferred against the driver of the vehicle from indirect or circumstantial evidence. The registration of a criminal case always depends upon the assessment and discretion of the Investigating Officer. If two vehicles are involved in an accident, the driver of one of them may be negligent or both of them may be negligent. Similarly, even in case of a pedestrian, he himself may be solely responsible or have contributed to the accident. Of late, some of the Claims Tribunal do not discuss the issue of negligence and hold the driver liable simply on account of registration of a criminal case against him. The registration of a criminal case, subject to certain exceptions, may be taken as sufficient proof of involvement of the vehicle in the accident but not as a proof of the negligence.

**7.** 'Negligence' is failure to take proper care, a reasonable man would have done under the circumstances. There may be cases where an inference of negligence could be derived from the manner in which the accident takes place. For instance, where a motor vehicle goes up the pavement and strike against a pedestrian; or the tyre of a motor vehicle bursts, it loses control and collides against a pedestrian or the said vehicle turning turtle causing injuries to the passengers, or when a motor vehicle moving on a bridge collided against a railing and falls into a Canal. In such cases, the principles of strict liability as laid down in **Rylands v. Fletcher** [1861-73] All E.R. 1 would be applicable. The applicability of the principle of res ipsa loquitur was explained by the Supreme Court in **Pushpabai Purshottam Udeshi & Ors. v. Ranjit Ginning & Pressing**



**Co. (P) Ltd. & Anr.** AIR 1977 SC 1735. It was observed that in certain situation there is hardship for the Plaintiff to prove the manner of the accident. In such cases applying the principles of 'res ipsa' the onus to prove how the accident happened, would shift on the defendant. In **Pushpabai Purshottam Udeshi & Ors.**(supra) the Supreme Court observed:-

"6. The normal rule is that it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle of res ipsa loquitur. The general purport of the words res ipsa loquitur is that the accident "speaks for itself" or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence. Salmond on the Law of Torts (15th Ed.) at p. 306 states : "The maxim res ipsa loquitur applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so caused". In Halsbury's Laws of England, 3rd Ed., Vol. 28, at page 77, the position is stated thus: "An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference arising from them is that the injury complained of was caused by the defendant's negligence, or where the event charged a negligence 'tells its own story' of negligence on the part of the defendant, the story so told being clear and unambiguous". Where the maxim is applied the burden is on the defendant to show either that in fact he was not negligent or that the accident might more probably have happened in a manner which did not connote negligence on his part....."

**8.** In **Minu B. Mehta and Anr. v. Balkrishna Ramchandra**

**Nayan and Anr.,** 1977 (2) SCC 441; it was held that proof of negligence is essential before a person or his master can be held liable to pay the compensation. A plea was raised before the Supreme Court that use of a motor vehicle is enough to make the owner liable to pay the compensation. The contention was repelled and it was held as under:-

> "23. The Indian Law introduced provisions relating to compulsory insurance in respect of third party insurance by introducing Chapter VIII of the Act. These provisions almost wholly adopted the provisions of the English law. The relevant sections found in the three English Acts Road Traffic Act, 1930 the Third Parties (Rights against Insurers) Act, 1930 and "the Road Traffic Act, 1934 were incorporated in Chapter VIII. Before a person can be made liable to pay compensation for any injuries and damage which have been caused by his action it is necessary that the person damaged or injured should be able to establish that he has some cause of action against the party responsible. Causes of action may arise out of actions for wrongs under the common law or for breaches of duties laid down by statutes. In order to succeed in an action for negligence the plaintiff must prove (1) that the defendant had in the circumstances a duty to take care and that duty was owed by him to the plaintiff, and that (2) there was a breach of that duty and that as a result of the breach damage was suffered by the plaintiff. The master also becomes liable for the conduct of the servant when the servant is proved to have acted negligently in the course of his employment. Apart from it in common law the master is not liable for as it is often said that owner of a motor car does not become liable because of his owning a motor car.
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> 27. This plea ignores the basic requirements of the owner's liability and the claimant's right to receive compensation. The owners' liability arises out of his failure to discharge a duty cast on him by law. The right to receive compensation can only be against a person who is bound to compensate due to the failure to perform a legal obligation. If a person is not liable legally he is under no duty to compensate anyone else. The Claims Tribunal is a tribunal constituted by the State Government for expeditious



> disposal of the motor claims. The general law applicable is only common law and the law of torts. If under the law a person becomes legally liable then the person suffering the injuries is entitled to be compensated and the Tribunal is authorised to determine the amount of compensation which appears to be just. The plea that the Claims Tribunal is entitled to award compensation which appears to be just when it is satisfied on proof of injury to a third party arising out of the use of a vehicle on a public place without proof of negligence if accepted would lead to strange results.
>
> 28. Section 110(1) of the Act empowers the State Government to constitute one or more Motor Accidents Claims Tribunals for such area as may be specified for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death or bodily injury to persons. The power is optional and the State Government may not constitute a Claims Tribunal for certain areas. When a claim includes a claim for compensation the claimant has an option to make his claim before the Civil Court. Regarding claims for compensation therefore in certain cases Civil Courts also have a jurisdiction. If the contention put forward is accepted so far as the Civil Court is concerned it would have to determine the liability of the owner on the basis of common law or torts while the Claims Tribunal can award compensation without reference to common law or torts and without coming to the conclusion that the owner is liable. The concept of owner's liability without any negligence is opposed to the basic principles of law. The mere fact that a party received an injury arising out of the use of a vehicle in a public place cannot justify fastening liability on the owner. It may be that a person bent upon committing suicide may jump before a car in motion and thus get himself killed. We cannot perceive by what reasoning the owner of the car could be made liable. The proof of negligence remains the linch pin to recover compensation. The various enactments have attempted to mitigate a possible injury to the claimant by providing for payment of the claims by insurance.
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30. A person is not liable unless he contravenes any of the duties imposed on him by common law or by the statute. In the case of a motor accident the owner is only liable for negligence and on proof of vicarious liability for the acts of his servant The necessity to provide effective means for compensating the victims in motor accidents should not blind us in determining the state of law as it exists today."

**9.** In para 37 of the report, the Supreme Court referred to a Division Bench judgment of Madras High Court in **M/s. Ruby Insurance Company Limited v. Govindaraj,** AAO Nos. 607/1973 and 296/1974 delivered on 13.12.1976, where it was suggested to have social insurance to provide cover for the Claimants irrespective of proof of negligence.

**10.** In **Oriental Insurance Company Limited v. Meena Variyal & Ors.,** (2007) 5 SCC 428, the three Judges Bench decision in **Menu B. Mehta** (supra) was relied. It was held that to claim compensation under Section 166 of the Motor Vehicle Act (the Act), the proof of negligence on the part of the driver of the vehicle was a *sine qua non*. The owner becomes vicariously liable for the act of his servant and the Insurer on account of the contract of insurance to indemnify the owner. It was observed that in a Petition under Section 163-A of the Act, negligence or default on the part of the owner or driver of the vehicle was not required to be proved. At the same time, it has to be kept in mind that proof of negligence as required in a Claim Petition under Section 166 of the Act, is not the same as in a criminal case i.e. "beyond reasonable doubt", but "the preponderance of probability".

**11.** In **Bimla Devi and Ors. v. Himachal Road Transport Corporation and Ors.,** (2009) 13 SC 530, while holding that in a petition for award of compensation, the negligence has to be proved on the touchstone of preponderance of probability, in para 15, it was observed as under:-

"15. In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of



proof beyond reasonable doubt could not have been applied. For the said purpose, the High Court should have taken into consideration the respective stories set forth by both the parties."

**12.** The observations of the Supreme Court in **Bimla Devi** (supra) were referred with approval in later judgment in **Parmeshwari Devi v. Amir Chand and Ors.,** (2011) 11 SCC 635.

**13.** After holding that negligence is required to be established in a Petition under Section 166 of the Act, it is the time to refer to the facts of this case.

**14.** In this case, the accident occurred while the deceased was travelling in a tempo bearing No.DL-1LA-5353. He was sitting in the rear portion of the tempo being employed as a conductor-cum-labourer. PW-2 Krishan Prasad deposed that when the vehicle reached near Minto Bridge, one dumper being driven at a very fast speed came from the side of ITO and hit against his tempo. It is not disputed that the accident took place on a road which was a two carriage way divided by a central verge. Since one of the carriage way was under repair, the same had been closed. The Appellant's vehicle came on the other carriage way because of closure of the road. Obviously, the driver had no option when the road was closed but to come on the other carriage way, meant for the traffic coming from the opposite direction. A perusal of the certified copy of the site plan shows that dumper had suddenly changed the carriage way. It is important to note that the accident took place at 1:30 A.M. (in the dead of night). It was, therefore, expected of the Appellant's driver to have taken extra precaution while coming to the carriage way meant for the traffic coming from the opposite direction.

**15.** PW-2 Krishan Prasad says that he was driving his vehicle at a very slow speed whereas dumper driven by the Appellant's driver came at a very fast speed. This was disputed by the Appellant's driver, who entered the witness box as RW-1. It is a case of oath against oath and since the Appellant's driver suddenly came on the carriage way, meant for the traffic coming from the opposite direction and the fact that a criminal case was registered against him against which the Appellant's driver did not make any representation would impel me to hold that the Respondent had proved that the accident was caused on account of rash and negligent driving on the part of the Appellant's driver.

**16.** As far as quantum of compensation is concerned, as stated earlier, the First Respondent has not filed any Appeal for enhancement of compensation. PW-2's testimony that Vinod Kumar Joshi was getting wages at the rate of Rs. 100/- per day in addition of Rs. 100/- for the night (whenever he worked at night) was not challenged in cross-examination. Thus, it can safely be assumed that the deceased's income must be between Rs. 3,000/- to Rs. 4,000/- per month. Even if, the deceased's monthly income is taken as Rs. 3,000/- and if he spent 50% thereof towards his personal and living expenses, the loss of dependency on applying the multiplier of '11' (as per the age of the deceased's mother 55 years), comes to Rs. 1,98,000/- (3,000/- x 1/2 x 12 x 11) i.e. more than what was arrived at by the Claims Tribunal.

**17.** Thus, it cannot be said that the compensation of Rs. 1,70,296/- awarded by the Claims Tribunal was exorbitant or excessive.

**18.** The Appeal is devoid of any merit; the same is accordingly dismissed.

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**ILR (2013) I DELHI 487**
**MAC. APP.**

**NEW INDIA ASSURANCE CO. LTD. ....APPELLANT**

**VERSUS**

**KRISHNA & ORS. ....RESPONDENTS**

**(G.P. MITTAL, J.)**

**MAC. APP. NO. : 220/2012 DATE OF DECISION: 25.05.2012**

**Motor Vehicles Act, 1988—Section 163-A—Section 147(1)(b)—Workmen's Compensation Act, 1923—Truck owned by respondent no.6—Death of helper sleeping under the truck—Driver (respondent no. 5) failed to take care—Tribunal awarded compensation of Rs. 5,63,200/-—Aggrieved, Insurance Company/Appellant preferred the appeal and contended that the accident took place because of the negligence of the deceased himself, liability to pay the compensation restricted under the Workmen's Compensation Act and excess be paid by the owner/respondent no.6—Held, Appellant liability not statutory but contractual, under the W.C. Act—Cannot avoid its liability to pay compensation—Liable to pay compensation to the extent of its liability under the W.C. Act and rest payable by respondent no.6—Appeal disposed of.**



I have perused the policy of insurance placed on record of the Trial Court. Insured (the Respondent No.6) paid a premium of Rs. 50/- to cover the risk of two employees under the W.C. Act. Thus, the Appellant's liability was not a statutory liability towards third party risk but was a contractual liability to pay the compensation under the W.C. Act.

**(Para 5)**

**Important Issue Involved:** Where premium is paid to cover the risk under the Workmen's Compensation Act, the liability of the insurance company is not a statutory liability towards third party risk but is a contractual liability to pay compensation under the Workmen's Compensation Act.

**[Vi Ku]**

**APPEARANCES:**

**FOR THE APPELLANT** : Mr. K.L. Nandwani, Advocate.

**FOR THE RESPONDENTS** : Mr. S.N. Parashar, Advocate for R-1 to R-4. Mr. Yashpal Rangi, Advocate for R-5 & R-6.

**CASES REFERRED TO:**

1. *National Insurance Company Limited* vs. *Sinitha & Ors.*, 2011 (13) SCALE 84.
2. *Gottumukkala Appala Narasimha Raju* vs. *National*

*Insurance Company Ltd.* (2007) 13 SCC 446.

3. *National Insurance Co. Ltd.* vs. *Prembai Patel & Ors.,* (2005) 6 SCC 172

4. *Deepal Girishbhai Soni* vs. *United India Insurance Company Limited,* (2004) 5 SCC 385).

5. *Oriental Insurance Company* vs. *Hansrajbhai V. Kodala,* (2001) 5 SCC 175.

**RESULT:** Appeal disposed of.

**G.P. MITTAL, J.**

**1.** The Appellant New India Assurance Co. Ltd. impugns a judgment dated 05.12.2011 passed by the Claims Tribunal whereby a compensation of Rs. 5,63,200/- (including an interim compensation of Rs. 50,000/-) was awarded in favour of the Respondents No.1 to 4 on account of the death of Surender who was working as a helper on Truck No.RJ32-GA-2090 owned by the Respondent No.6 (Deepak Soni).

**2.** The contentions raised on behalf of the Appellant are:-

i) The Insurance Company is not liable to pay the compensation at all as the accident took place because of the negligence of the deceased himself. The Appellant Insurance Company could put up a defence in this regard in a Claim Petition under Section 163-A on the basis of judgment of the Supreme Court in **National Insurance Company Limited v. Sinitha & Ors.,** 2011 (13) SCALE 84.

ii) As per the contract of insurance between the Appellant and the owner (the Respondent No.6), the Appellant covered the risk of two employees under the Workmen Compensation Act. The Appellant was liable to pay the compensation restricted under the Workmen's Compensation Act, 1923 (W.C. Act). The excess compensation was payable only by the owner.

**3.** It is true that as per **Sinitha** (supra), the owner/insurer can avoid the liability to pay the compensation where the accident takes place because of the wrongful act, neglect or default of the deceased himself.



In other words, this limited defence is available to the owner/insurer of the vehicle. In this case, the deceased Surender was sleeping under the offending vehicle. In the FIR registered against the Respondent No.5, it has been stated that the accident was caused as the driver had failed to take care that the deceased who was working as a helper on the truck was sleeping under the truck. Moreover, the Appellant Insurance Company did not lead any evidence as to the circumstances under which and the exact place where the deceased was sleeping at the time he was run over by the truck. In the circumstances, the Appellant's case is not covered by **Sinitha (supra)**.

**4.** Otherwise also, the Appellant's liability to pay the compensation is under the W.C. Act because of the contract of insurance. The question of wrongful act, neglect or default of the deceased employee or negligence of the employer are not relevant for award of compensation (**Gottumukkala Appala Narasimha Raju v. National Insurance Company Ltd.** (2007) 13 SCC 446). Thus, the Appellant Insurance Company cannot avoid its liability to pay the compensation.

**5.** I have perused the policy of insurance placed on record of the Trial Court. Insured (the Respondent No.6) paid a premium of Rs. 50/- to cover the risk of two employees under the W.C. Act. Thus, the Appellant's liability was not a statutory liability towards third party risk but was a contractual liability to pay the compensation under the W.C. Act.

**6.** In **National Insurance Co. Ltd. v. Prembai Patel & Ors.,** (2005) 6 SCC 172, a three Judge Bench of the Supreme Court held that under Section 147(1)(b), the owner is under obligation to take a policy to cover the risk of an employee arising only under the W.C. Act. The owner could take any policy for extending the risk by paying an additional premium. Paras 12, 13, 16 and 17 of the report are extracted hereunder:

> "12. The heading of Chapter XI of the Act is Insurance of Motor Vehicles Against Third Party Risks and it contains Sections 145 to 164. Section 145(1) of the Act provides that no person shall use, except as a passenger, or cause or allow any other person to use, a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying

with requirements of Chapter XI. Clause (b) of sub-section (1) of Section 147 provides that a policy of insurance must be a policy which insurers the person or classes of persons specified in the policy to the extent specified in sub-section (2) against any liability which may be incurred by him in respect of death of or bodily injury to any person or passenger or damages to any property of a third party caused by or arising out of the use of the vehicle in public place. Sub-clause (i) and (ii) of clause (b) are comprehensive in the sense that they cover both "any person" or "passenger". An employee of owner of the vehicle like a driver or a conductor may also come within the purview of the words "any person" occurring in sub-clause (i). However, the proviso( i) to clause (b) of sub-section(a) of Section 147 says that a policy shall not be required to cover liability in respect of death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Act in respect of death of or bodily injury to any such employee as is described in sub-clause (a) or (b) or (c). The effect of this proviso is that if an insurance policy covers the liability under the Workmen's Act in respect of death of or bodily injury to any such employee as is described in sub-clause (a) or (b) or (c) of proviso (i) to Section 147(1)(b), it will be a valid policy and would comply with the requirements of Chapter XI of the Act. Section 149 of the Act imposes a duty upon the insurer (insurance company) to satisfy judgments and awards against persons insured in respect of third-party risks. The expression – "such liability as is required to be covered by a policy under clause (b) of sub-section (1) of Section 147 being a liability covered by the terms of the policy" – occurring in sub-section (1) of Section 149 is important. It clearly shows that any such liability, which is mandatorily required to be covered by a policy under clause (b) of Section 147(1), has to be satisfied by the insurance company. The effect of this provision is that an insurance policy, which covers only the liability arising under the Workmen's Act in respect of death of or bodily injury to any such employee as described in sub-clause (a) or (b) or (c) to



proviso (i) to Section 147(1)(b) of the Act is perfectly valid and permissible under the Act. Therefore, where any such policy has been taken by the owner of the vehicle, the liability of the insurance company will be confined to that arising under the Workmen's Act.

13. The insurance policy being in the nature of a contract, it is permissible for an owner to take such a policy whereunder the entire liability in respect of the death of or bodily injury to any such employee as is described in sub-clauses (a) or (b) or (c) of proviso (i) to Section 147(1)(b) may be fastened upon the insurance company and insurance company may become liable to satisfy the entire award. However, for this purpose the owner must take a policy of that particular kind for which he may be required to pay additional premium and the policy must clearly show that the liability of the insurance company in case of death of or bodily injury to the aforesaid kind of employees is not restricted to that provided under the Workmen's Act and is either more or unlimited depending upon the quantum of premium paid and the terms of the policy.

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16. The High Court, in the impugned judgment, has held that if the legal representatives of the deceased employee approach the Motor Accidents Claims Tribunal for payment of compensation to them by moving a petition under Section 166 of the Act, the liability of the insurance company is not limited to the extent provided under the Workmen's Act and on its basis directed the appellant Insurance company to pay the entire amount of compensation to the claimants. As shown above, the insurance policy taken by the owner contained a clause that it was a policy for "Act Liability" only. This being the nature of policy the liability of the appellant would be restricted to that arising under the Workmen's Act. The judgment of the High Court, therefore, needs to be modified accordingly.

17. The judgment of the High Court insofar as it relates to quantum of compensation and interest, which is to be paid to the claimants (Respondents 3 to 6 herein) is affirmed. The liability

of the appellant Insurance Company to satisfy the award would be restricted to that arising under the Workmen's Act. Respondents 1 and 2(owners of the vehicle) would be liable to satisfy the remaining portion of the award."

**7.** From **Prembai Patel** (supra), it is evident that the Appellant's liability was only to pay the compensation to the extent of his liability under the W.C. Act. Since this was a contractual liability, the Insurance Company was liable to pay the compensation under the contract and rest of the compensation would be payable by the owner i.e. the Respondent No.6.

**8.** Under Section 163-A, the compensation has to be awarded as per the structured formula. (**Oriental Insurance Company v. Hansrajbhai V. Kodala,** (2001) 5 SCC 175 and **Deepal Girishbhai Soni v. United India Insurance Company Limited,** (2004) 5 SCC 385). The loss of dependency thus comes to Rs.4,80,000/- (Rs.40,000/- x 2/3 x 18). The Respondents No.1 to 4 would be entitled to a sum of Rs.5,000/- towards loss of consortium, Rs.2,500/- towards loss to estate and Rs.2,000/- towards funeral expenses. The overall compensation comes to Rs.4,89,500/-.

**9.** The compensation under Schedule IV of Section 4 of the W.C. Act on the basis of minimum wages of an unskilled worker (the deceased being a helper and in the absence of any proof of the deceased's income) comes to Rs.3,94,017/- Rs.(3633 ÷ 2 x 1/2 x 216.91).

**10.** In view of the above discussion, the compensation of Rs.3,94,017/- along with interest @ 7.5% per annum from the date of the filing of the Petition till its deposit shall be paid by the Appellant Insurance Company.

**11.** Rest of the compensation of Rs.95,483/- along with interest @ 7.5% per annum from the date of the filing of the Petition till its deposit, shall be paid by the Respondent No.6 (owner).

**12.** The Respondent No.6 is directed to deposit the amount of Rs. 95,483/- along with interest in the name of the First Respondent within six weeks with UCO Bank, Delhi High Court Branch, failing which the Respondents No.1 to 4 shall be entitled to take execution against the Respondent No.6.



**13.** The excess amount of compensation (after adjusting the amount of Rs.3,94,017/- along with interest) shall be refunded to the Appellant Insurance Company.

**14.** The compensation payable to the Respondents No.1 to 4 shall be payable in the proportion as directed by the Claims Tribunal.

**15.** The statutory amount of Rs. 25,000/- shall also be refunded to the Appellant Insurance Company.

**16.** The Appeal is disposed of in above terms.

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**ILR (2013) I DELHI 494**
**LPA**

**AR ABDUL GAFFAR ....APPELLANT**

**VERSUS**

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

**(A.K. SIKRI, ACJ., HIMA KOHLI & RAJIV SAHAI ENDLAW, JJ.)**

**LPA NO. : 600/2010 DATE OF DECISION: 01.06.2012**

**Constitution of India, 1950—Article 12—Whether National Book Trust (NBT) is "State"—Reference made to Full Bench by Division Bench, in view of an earlier decision, where National Book Trust was held to be not "State"—Held Government exercised "deep and pervasive" over functioning of NBT—Evident from the fact Chairman of Trust was appointed by Government of India, who was to hold office at the pleasure of the Government—Two members were to be from respective Ministry of Finance and Ministry of Information and Broadcasting —Annual Report and**

**audited statements of account were required to be submitted to Government of India—Proceedings of Trust were required to be sent to Ministry of Education—All members of Executive Committee were appointed/nominated by Government—Proceedings of Executive Committee were to be sent to Government—Regulation making power of Committee was subject to approval of Government—Alteration or Extension of purposes of Society required prior concurrence of Government—Prior sanction of Government of India required before bringing into force any rules and regulations of the Trust or any amendment thereto—It was an altar ego of the Government's instrumentality—National Book Trust is "Other authority" and thus, "State" within the meaning of Article 12 of Constitution of India.**

In **Chander Mohan Khanna** (supra), however, the Supreme Court added a word of caution observing that Article 12 should not be stressed so as to bring in every autonomous body which has some nexus with the Government within the sweep of the expression 'State'. Reference was made to some other judgments, wherein a discordant note was struck with the observations that a wide enlargement of the meaning must be tempered by a wise limitation. The line of thinking was that it must not be lost sight of that in the modern concept of Welfare State, independent institution, corporation and agency are generally subject to State Control. The State control does not render such bodies as 'State' under Article 12 and the State Control, however, vast and pervasive is not determinative. Even the financial contribution by the State is also not conclusive. The combination of State aid coupled with an unusual degree of control over the management and policies of the body, and rendering of an important public service being the obligatory functions of the State may largely point out that the body is 'State'. On this touchstone, the two-Judge Bench of the Supreme Court discussed various provisions on Memorandum of Association and the rules of the NCERT and came to the



conclusion that its activities are not wholly related to Governmental functions and affairs of NCERT are conducted by executive committee comprising of Government servants and educationists. The funds of the NCERT were coming from various sources. NCERT is free to apply its income for achievement of its objectives and implementation of programmes. Thus, the Government control was confined only to the proper utilization of the grant and it was otherwise autonomous body. On that basis, it was held that the case did not satisfy the requirements of 'State' under Article 12 of the Constitution. **(Para 12)**

**Important Issue Involved:** National Bank Trust of India is an "Authority" and thus, "State" within the meaning of section 12 of Constitution of India.

**[La Ga]**

**APPEARANCES:**

**FOR THE APPELLANT** : Mr. Ashish Mohan (Amicus Curie) along with appellant-in-person.

**FOR THE RESPONDENTS** : Mr. Jatan Singh, CGSC for UOI. Mr. B.K. Satija, Advocate for NBT.

**CASES REFERRED TO:**

1. *Pradeep Kumar Biswas & Ors. Indian Institute of Chemical Biology & Ors.* 2002 (5) SCC 111.
2. *O.P. Gupta* vs. *Delhi Vidyut Board & Anr.,* 2000 (54) DRJ 237.
3. *Chander Mohan Khanna* vs. *NCERT,* AIR 1992 SC 76.
4. *J.S. Shamim* vs. *National Book Trust,* (W.P.(C) 1446/1989).
5. *Ajay Hasia etc.* vs. *Khalid Mujib Sehravardi and Ors. etc.,* (1981) 1 SCC 722.
6. *Ramana Dayaram Shetty* vs. *The International Airport Authority of India and Ors.,* (1979) 3 SCC 489.

**RESULT:** Appeal allowed.

**A.K. SIKRI (Acting Chief Justice)**

**1.** The reasons for referring this appeal to the Full Bench for consideration are contained in the orders dated 03.7.2012 passed by the Division Bench and for clear understating, we reproduce the same hereunder:

> "1. The learned Single Judge has dismissed the writ petition filed by the appellant on the ground of non-maintainability holding that National Book Trust is not a 'State' within the meaning of Article 12 of the Constitution of India. While doing so, the learned Single Judge relied upon the judgment of the Division Bench of this Court in **J.S. Shamim Vs. National Book Trust,** (W.P.(C) 1446/1989).
>
> 2. A perusal of the said judgment in **J.S. Shamim** (supra) case would reveal that the Division Bench has relied upon the judgment of Supreme Court in **Chander Mohan Khanna Vs. NCERT,** AIR 1992 SC 76.
>
> 3. Learned Counsel for the appellant states that judgment of J.S. Shamim is no longer a good law in view of Constitution Bench judgment (rendered by Seven-Judge Bench) of the Supreme Court in **Pradeep Kumar Biswas & Ors. Indian Institute of Chemical Biology & Ors.** 2002 (5) SCC 111. He further submits that in **J.M. Shamim** (supra) the Division Bench did not go into the status and character of National Book Trust and simply relied upon the judgment of Supreme Court in Chander Mohan Khanna (supra) which case related to NCERT.
>
> 4. We are of the opinion that the matter requires to be considered by Larger Bench. Accordingly, Registry is directed to place the matter before the Acting Chief Justice for constitution of the Larger Bench."

**2.** It is apparent from the above that the issue is: Whether National Book Trust (hereinafter referred to as 'NBT') is a 'State' or 'another authority' within the meaning of Article 12 of the Constitution of India? Learned Single Judge dismissed the writ petition holding that NBT does



not come within the purview of Article 12 of the Constitution of India relying upon the judgment of the Division Bench of this Court in **J.S. Shamim Vs. National Book Trust,** [W.P.(C) 1446/1989] which in turn placed sole reliance upon the judgment of the Supreme Court in **Chander Mohan Khanna Vs. NCERT,** AIR 1992 SC 76. However, **Chander Mohan Khanna** (supra) has been held to be no longer good law by the Constitution Bench in **Pradeep Kumar Biswas & Ors. Indian Institute of Chemical Biology & Ors.** 2002 (5) SCC 111. Thus, the effect thereof has to be seen.

**3. J.S. Shamim** (supra) is a short order which does not discuss the issue independently or in detail as to why NBT is not a 'State'. It simply follows **Chander Mohan Khanna** (supra) as is without discussing anything more as can be seen from the following brief order passed in the following words therein:

> "In view of the decision of the Supreme Court reported as **Chander Mohan Khanna Vs. N.C.E.R.T,** AIR 1992 Supreme Court 76, which has held that National Council of Educational Research & Training is not a State, we have to come to the conclusion that the National Book Trust is also not a State as there is no essential difference between the constitution of N.C.E.R.T., with which the Supreme Court was concerned, and the National Book Trust.
>
> Because of that reason, this writ petition is dismissed with liberty to the petitioner to take action in accordance with law."

**4.** In **Chander Mohan Khanna** (supra), the Supreme Court held that NCERT was not a 'State' under Article 12 of the Constitution giving the following reason:

> "The object of the NCERT as seen from the above analysis is to assist and advise the Ministry of Education and Social Welfare in the implementation of the Governmental policies and major programmes in the field of education particularly school education. The NCERT undertakes several kinds of programmes and activities connected with the coordination of research extension services and training, dissemination of improved educational techniques, collaboration in the educational programmes. It also undertakes preparation and publication of books, materials, periodicals and

other literature. These activities are not wholly related to Government functions. The affairs of the NCERT are conducted by the Executive Committee comprising of Government servants and educationists. The Executive Committee would enter into arrangements with Government, public or private organizations or individuals in furtherance of the objectives for implementation of programmes. The funds of the NCERT consist of: (i) grants made by the Government, (ii) contribution from other sources and (iii) income from its own assets. It is free to apply its income and property towards the promotion of its objectives and implementation of the programmes. The Government control is confined only to the proper utilization of the grant. The NCERT is thus largely an autonomous body."

**5.** The ratio of the aforesaid decision was commented upon by the Seven-Judge Bench of the Supreme Court in **Pradeep Kumar Biswas** (supra). This Seven-Judge Bench judgment of the Supreme Court settles the parameters which have to be taken into consideration for determining as to whether an authority can be called 'State' within the meaning of Article 12 of the Constitution. In **Pradeep Kumar Biswas** (supra), the Court held that:

> "From this perspective, the logical sequitur is that it really does not matter what guise the State adopts for this purpose, whether by a Corporation established by statute or incorporated under a law such as the Companies Act or formed under the Societies Registration Act, 1860. Neither the form of the Corporation, nor its ostensible autonomy would take away from its character as 'State' and its constitutional accountability under Part III vis-a-vis the individual if it were in fact acting as an instrumentality or agency of Government."

**6.** Therefore, the mere fact that a body is largely autonomous as held in **Chander Mohan Khanna** (supra) is held to be of no significance. As a matter of fact, the reasoning of the Court in **Chander Mohan Khanna** (supra) has, to that extent, been specifically disapproved as is clear from the following passage:

> "45. These objects which have been incorporated in the Memorandum of Association of CSIR manifestly demonstrate



that CSIR was set up in the national interest to further the economic welfare of the society by fostering planned industrial development in the country. That such a function is fundamental to the governance of the country has already been held by a Constitution Bench of this Court as far back as in 1967 in **Rajasthan Electricity Board v. Mohan Lal** (Supra) where it was said:

> "The State, as defined in Article 12, as thus comprehended to include bodies created for the purpose of promoting the educational and economic interests of the people".

46. We are in respectful agreement with this statement of the law. The observations to the contrary in **Chander Mohan Khanna v. NCERT** (supra) relied on by the Learned Attorney General in this context, do not represent the correct legal position."

**7.** The effect of the aforesaid, insofar as the instant case is concerned, would be as follows:

Since the Division Bench of this Court in **J.S. Shamim** (supra) followed **Chander Mohan Khanna** (supra) and that judgment has been held to be not representing correct legal position, **J.S. Shamim** (supra) also stands overruled. As a fortiori, the impugned order of the learned Single Judge which follows **J.S. Shamim** (supra) has to be necessarily set aside.

**8.** In this backdrop, the issue as to whether the NBT is an authority under Article 12 of the Constitution of India will have to be examined afresh keeping in view the test laid down by the Supreme Court in various judgments and applying those tests in the case of NBT. Article 12 of the Constitution of India gives the definition of 'the State', which is inclusive one, as under:

> "12. Definition. – In this part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

**9.** Formation of NBT was on the basis of decision of the Government of India which decided to establish NBT vide resolution dated 15.6.1957.

Thereafter, the Government of India had taken a decision to reorganize the NBT vide resolution No.F.14-9/62-S.W. 2, dated 28.9.1962 thereby enlarging the objectives which it seeks to achieve. Para 2 of these objectives states that the Trust shall be an autonomous body, created by and supported by funds placed at its disposal by the Government, though at the same time, permitted to receive donations and bequests as well.

**10.** NBT is not 'Government of India' or 'Government of a State'. It is not a 'local authority' as well. We, therefore, have to determine as to whether it falls within the ambit of 'Other Authorities' under control of the Government of India. The ambit and scope of 'other authorities' got a paradigm shift in the case of **Ramana Dayaram Shetty Vs. The International Airport Authority of India and Ors.,** (1979) 3 SCC 489 wherein the Supreme Court held that even a non-statutory body like a society registered under the Societies Registration Act, 1860 would come within the purview of Article 12 once it is found that it is under the control of the Government of India. The tests laid down in **Ramana Dayaram Shetty** (supra) were further expanded in **Ajay Hasia etc. Vs. Khalid Mujib Sehravardi and Ors. etc.,** [(1981) 1 SCC 722]. In this judgment expounding the law on the subject, the Court formulated six tests are as under:

(i) One thing is clear that if the entire share capital of the Corporation is held by the Government, it would go a lone way towards indicating that the Corporation is an instrumentality or agency of the Government.

(ii) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with Government character.

(iii) It may also be a relevant factor, whether the corporation enjoys monopoly status which is the State conferred or State protected.

(iv) Existence of "deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.

(v) If the functions of the Corporation of public importance and closely related to the Government functions, it would



be a relevant factor in classifying the corporation as an instrumentality or agency of Government.

(vi) "Specifically, if a Department of Government is transferred to a corporation, it would be a strong factor supportive of this inference" of the corporation being an instrumentality or agency of Government.

**11.** The aforesaid tests to determine whether a body falls within the definition of 'State' in Article 12 laid down in **Ramana Dayaram Shetty** (supra) with the Constitution Bench imprimatur in **Ajay Hasia** (supra) form the keystone of the subsequent jurisprudential superstructure judicially crafted on the subject.

**12.** In **Chander Mohan Khanna** (supra), however, the Supreme Court added a word of caution observing that Article 12 should not be stressed so as to bring in every autonomous body which has some nexus with the Government within the sweep of the expression 'State'. Reference was made to some other judgments, wherein a discordant note was struck with the observations that a wide enlargement of the meaning must be tempered by a wise limitation. The line of thinking was that it must not be lost sight of that in the modern concept of Welfare State, independent institution, corporation and agency are generally subject to State Control. The State control does not render such bodies as 'State' under Article 12 and the State Control, however, vast and pervasive is not determinative. Even the financial contribution by the State is also not conclusive. The combination of State aid coupled with an unusual degree of control over the management and policies of the body, and rendering of an important public service being the obligatory functions of the State may largely point out that the body is 'State'. On this touchstone, the two-Judge Bench of the Supreme Court discussed various provisions on Memorandum of Association and the rules of the NCERT and came to the conclusion that its activities are not wholly related to Governmental functions and affairs of NCERT are conducted by executive committee comprising of Government servants and educationists. The funds of the NCERT were coming from various sources. NCERT is free to apply its income for achievement of its objectives and implementation of programmes. Thus, the Government control was confined only to the proper utilization of the grant and it was otherwise autonomous body. On that basis, it was held that the case did not satisfy the requirements of

'State' under Article 12 of the Constitution.

**13.** However, as pointed out above, in **Pradeep Kumar Biswas** (supra), Seven-Judge Bench of the Supreme Court has categorically held that the aforesaid observations do not represent correct legal position. At the same time, the Court agreed to the tests laid down in **Ajay Hasia** (supra), and expounded the meaning of those tests in the following words:

> "The picture that ultimately emerges is that the tests formulated in **Ajay Hasia** are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesis, be considered to be a State within the meaning of Article 12. The question in each case would be - whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State."

**14.** Interestingly, counsel for both the parties before us agreed that we have to apply these tests while determining the status of NBT in the present case. It is the application of these tests to the facts of the instant case where the counsel for the parties differ. Mr. Ashish Mohan, learned Amicus Curie appointed by us, made a passionate submission that NBT would constitute a 'State' under Article 12 of the Constitution of India on the application of the principles laid down in the aforesaid judgment. Mr. Jatan Singh, learned counsel appearing for the respondents, on the other hand, submitted that NBT does not fall in any of the categories enumerated by the Supreme Court in **Ajay Hasia** (supra). At the outset, it was submitted that NBT is not constituted under the constitutional or statutory provisions and is not a sovereign authority, but is in fact, a registered society. The financial assistance approved by the Government is not to the extent so as to meet almost entire expenditure of the NBT. It was submitted that the Government control is confined only to the proper utilization of the grant. It is further pertinent to note that though the Government funding does form a part of the resources of the NBT, the share of financial assistance is very limited as NBT's funding is not



entirely from Government resources and other private sources form a major part of its funding. Mr. Jatant Singh submitted that the Government funding forms one out of the five sources of the funding available with the NBT. He further submitted that as far as the activities undertaken by the NBT are concerned, the same are enlisted as objects of the Trust in the Memorandum of Association and Rules of the NBT. A plain reading of the objectives makes it clear that although some of the activities undertaken by the NBT are for public welfare, yet the activities of the NBT as a whole are not closely related to Governmental/sovereign functions. It is also submitted that the functions/objectives as enumerated can otherwise be performed by the NBT. According to him, the ultimate test is that of existence of "deep and pervasive State control" over the functioning of a Corporation. In this regard, he submitted that having regard to foregoing submissions of limited financial assistance provided by the Government and also the functions of the NBT which are not Governmental functions or functions of public importance, etc., it cannot be said that the State exercises a "deep and pervasive" control over the functioning of the NBT.

**15.** Learned counsel for the respondent also relied upon the judgment of the Supreme Court in **M/s. Zee Tele Films Ltd. and Another Vs. Union of India and Others** [AIR 2005 SC 2677] wherein the Court held that the Board of Control for Cricket in India was not a State under Article 12 of the Constitution of India. Following passages from that judgment are specifically submitted:

> "30. However, it is true that the Union of India has been exercising certain control over the activities of the Board in regard to organizing cricket matches and travel of the Indian team abroad as also granting of permission to allow the foreign teams to come to India. But this control over the activities of the Board cannot be construed as an administrative control. At best this is purely regulatory in nature and the same according to this Court in **Pradeep Kumar Biswas's** case (supra) is not a factor indicating a pervasive State control of the Board.
>
> 31. Be that as it may, it cannot be denied that the Board does discharge some duties like the selection of an Indian cricket team, controlling the activities of the players and others involved in the game of cricket. These activities can be said to be akin to

public duties or State functions and if there is any violation of any constitutional or statutory obligation or rights of other citizens, the aggrieved party may not have a relief by way of a petition under Article 32. But that does not mean that the violator of such right would go scot-free merely because it or he is not a State. Under the Indian jurisprudence there is always a just remedy for violation of a right of a citizen. Though the remedy under Article 32 is not available, an aggrieved party can always seek a remedy under the ordinary course of law or by way of a writ petition under Article 226 of the Constitution which is much wider than Article 32.

XXX XXX XXX

36. In the above view of the matter, the second respondent-Board cannot be held to be a State for the purpose of Article 12. Consequently, this writ petition filed under Article 32 of the Constitution is not maintainable and the same is dismissed."

**16.** It was, thus, argued that not every autonomous body like the NBT, with some of Government involvement shall be construed to be State within the meaning of Article 12 of the Constitution, as the same would lead to a chaotic situation where every employee (as in the instant case as well) would seek entitlement to various benefits such as retirement benefits, etc. which are otherwise available only to Government employees. It is also argued that a Corporation is designated as an autonomous body for a specific reason. Such bodies have their own set of Rules and regulations and are not governed by Article 309 of the Constitution. In this regard, reliance is placed on the judgment of this Court in **O.P. Gupta Vs. Delhi Vidyut Board & Anr.,** 2000 (54) DRJ, wherein the Court held that the Delhi Vidyut Board is a body constituted and being an autonomous body, it is governed by its own set of Rules and Regulations. It was further held that the Pension Rules as relied upon in the case are not automatically applicable on Delhi Vidyut Board and the employees of the Delhi Vidyut Board are not governed by Article 309 of the Constitution.

**17.** We have given our thoughtful consideration to the aforesaid submissions made by the counsel for the parties on either side. To find an answer, naturally, first task is to scan through various provisions of



the Memorandum of Association of NBT to determine as to whether **Ajay Hasia** (supra) tests are satisfied. The NBT is a society registered under the Societies Registration Act. Its primary object is to produce and to encourage the production of good literature and to make such literature available at moderate prices to the public. In furtherance of this object, the NBT has undertaken the task to publish books in English, Hindi and other languages recognized in the Constitution of India, particularly, of the following types:

i) The classical literature of India;

ii) Outstanding works of Indian authors in Indian languages and their translation from one Indian language to another;

iii) Translation of outstanding books from foreign languages; and

iv) Outstanding books of modern knowledge for popular diffusion.

**18.** In the aid of these objectives, it is also the function of the NBT to bring out book-lists, arrange exhibitions and seminars and take all necessary steps to make the people book-minded. The income of property of the Trust, however derived, has to be applied towards the promotion of the objects. However, insofar as grants made by the Government are concerned, in respect of the expenditure of those grants, the Government is empowered to impose conditions. The Government of India is also given power to appoint one or more persons to work and progress of the Trust in such manner as the Government of India may stipulate. On receipt of any such report, the Government is also empowered to take such action and issue such directions as it may consider necessary in respect of any of the matters dealt with in the report and the Trust shall be bound to comply with such directions. Rule 3 of Rules of the National Book Trust, India stipulates as to who would be the members of the Trust, which is as follows:

"3. Members of the Trust: The Trust shall consist of the following members:

a) The Chairman to be appointed by the Government of India;

b) One representative of the Ministry of Education;

c) One representative of the Sahitya Akademi;

d) One representative of the Ministry of Finance;

e) One representative of the Ministry of Information and Broadcasting;

f) Such other persons, not exceeding 14, as the Government of India may, from time to time, nominate."

**19.** The term of the Member appointed by the Government of India is three years (Rule 7). All outgoing Members are eligible for – reappointment (Rule 8). The Chairman of the Trust shall hold office at the pleasure of the Government of India (Rule 13). Functions and powers of the Chairman are stipulated in Rules 41 to 52 which read as under:

"48. The Chairman shall be the chief executive officer of the Trust.

49. The Chairman shall preside over all the meetings of the Trust and its Executive Committee.

50. The Chairman shall have all necessary powers for carrying on the day-to-day functions of the Trust.

51. In the event of disagreement between representatives of the Ministry of Finance and the Chairman on financial matters beyond the delegated powers of the National Book Trust, India, the matter may be referred to the Minister of Education and the Finance Minister for a decision."

**20.** The Annual Report of the working of the Trust as well as audited statement of the accounts of the preceding year are to be submitted to the Government together with audit report by the end of December every year (Rule 19).

**21.** Executive Committee is also constituted under the Rules and it can be seen that Members of the Executive Committee representatives of the Government:

"26. Members: The affairs of the Trust shall be administered, directed and controlled, subject to rules and regulations and overall guidance of the Trust, by an Executive Committee, which shall consist of the following:



i) Chairman of the Trust who shall be ex-officio Chairman of the Executive Committee;

ii) A representative of the Ministry of Education;

iii) A representative of the Ministry of Finance who shall also be the financial Advisor of the Trust;

iv) A representative of the Ministry of Information and Broadcasting:

v) Not more than three non-official members of the Trust to be nominated by the Government."

**22.** The function of the Executive Committee is to carry out the objects of the Trust as the said Memorandum of Association also manage the affairs of funds of the Trust and to generally exercise of the powers of the Trust. The Executive Committee also has the power to frame regulations for the administration and management of the affairs of the Trust, with the previous approval of the Government of India. The source of the funds of the NBT are stipulated in Rule 54.

**23.** Rule 57 is also relevant and we reproduce the same:

"57. All matters relating to the affairs of the Trust having financial implication shall be referred to the Financial Adviser for his advice in cases where powers may be delegated to the officers of the Trust under the Regulations.

Subject to the provisions of Rule 51 (a), when the advice of the Financial Adviser is not proposed to be accepted, the matter shall be rendered to the Trust which shall take such decision as may be deemed fit after the Financial Adviser has been given an opportunity to express his point of view."

**24.** The NBT is to maintain proper accounts in such forms as may be prescribed the Government of India in consultation with the Comptroller and Auditor General of India ('CAG' in short) or any person authorized by him in his behalf. It is mandatory that these accounts are audited annually by CAG or any person authorized in this behalf. CAG or other person authorized by him for auditing the accounts is given the same rights, privileges and authority, which it has in connection with the audit of the Government accounts. It is specifically spelt out that these rights include the right to demand the production of books, accounts cash

vouchers and other documents and papers, and inspect any of the offices of the Trust. The accounts of the Trust as certified by the CAG or any person authorized by him in this behalf, together with the audit report thereon, shall be forwarded annually to the Government of India (Rule 58).

**25.** As per Rule 59, the Executive Committee is required to prepare annual report of the proceedings of the Trust for the information of the Government of India and the members of the Trust. Rule 60 which provides for amendment of rules and regulations states that this has to be with the previous concurrence with the Government of India. Such a sanction is not mandatory, but a pre-condition which has to be obtained prior to the enforcement of the amendment, is provided in Rule 62.

**26.** From the aforesaid provisions, without any cavil of doubt, we can conclude that there is a "deep and pervasive" control over the functioning of NBT. The society owes its existence to the resolution passed by the Government. It is primarily run by the funds provided by the Government. The all-pervasive administrative control rests with the Government at every stage in respect of the functioning of the NBT which is evident from the following:

i) The Chairman of the Trust is appointed by the Government of India (Rule 3) and holds office during the Governments please (Rule 13). Two of its members are representatives of the Ministry of Finance and the Ministry of Information and Broadcasting respectively (Rule 3).

ii) The meeting of the Trust is convened by the Chairman, i.e., the representative of the Government (Rule 18).

iii) The Annual Report and the audited statement of accounts is required to be submitted to the Government of India (Rule 19).

iv) The record of proceedings of the Trust are required to be sent to the Ministry of Education, Government of India (Rule 19).

v) The Constitution of the Executive Committee of the Trust also indicates the pervasive administrative control of the Government. All the members of the Executive Committee are appointed/nominated by the Government (Rule 26).



vi) The proceedings of the Executive Committee are also required to be sent to the Government of India (Rule 40).

vii) The regulation making power of the Executive Committee is subject to prior approval of the Government of India (Rule 42). viii) Any alteration or extension of the purposes of the Society requires previous concurrence of the Government (Rule 60). ix) Sanction of the Government of India is required to be obtained before the Rules and Regulations of the Trust or any amendment to them is brought into force (Rule 62).

**27.** Learned counsel for the respondent has tried to play down the role of the Government by submitting that it is confined to the proper utilization of the grant. This argument stands negatived by the provisions of the Memorandum of Association and Rules highlighted above. No doubt, every autonomous body with some kind of Government involvement cannot be construed to be 'State' within the meaning of Article 12 of the Constitution. However, when we find that NBT is within the tight grip of the Government and the control of the Government runs through at every stage right from the creation of the NBT, to the appointment of the members, to the fundings, to the appointment of various functionaries, to the controlling of the functioning through those appointed members and also through means of audit, etc. and further that the parameters within which NBT is to function, and even when the amendments are to be carried out, there cannot be any other conclusion but to say that it is an altar ego of the Government's instrumentality.

**28.** Submission of Mr. Jatan Sigh that if NBT is treated an authority under Article 12 of the Constitution, then its employees would seek entitlement to the various benefits as available to Government employees is an unnecessary fear. Merely because NBT is declared an authority under Article 12, its employees would not be governed by Article 309 of the Constitution, which position is clarified in **O.P. Gupta** (supra) relied upon by the learned counsel himself.

**29.** We also do not find any merit in the contention of the learned counsel for the respondent that the NBT should not be treated as authority under Article 12 of the Constitution merely because Notification under Section 14 of the Administrative Tribunal Act covering NBT under this

Act has not been issued., which has been issued in the case of NCERT. Section 14 of the Act enables the Government to issue Notification covering such authorities within the jurisdiction of Administrative Tribunal. Reverse, however, would not be true. A particular authority is not to be adjudged as authority under Article 12 of the Constitution on the basis as to whether there is such notification or not.

**30.** We, thus, conclude that the National Book Trust is 'other authority' and thus, 'State' within the meaning of Article 12 of the Constitution. Accordingly, we set aside the impugned order of the learned Single Judge and remit the case back to decide the same on merit.

**31.** Before we part with, we would like to put on record our appreciation for the useful assistance rendered by Mr. Ashish Mohan as an Amicus.

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**ILR (2012) I DELHI 511**
**MAC. AAP.**

**SUSHILA** **....APPELLANT**

**VERSUS**

**BRIJESH & ORS.** **....RESPONDENTS**

**(G.P. MITTAL, J.)**

**MAC. APP. NO. : 663/2010** **DATE OF DECISION: 11.07.2012**

**Motor Vehicle Act, 1988—Section 163-A—Section 140—The deceased borrowed scooter, from its owner—Accident on account of rash and negligent driving of the deceased—Mother filed claim for compensation—Tribunal held, since the deceased borrowed a two wheeler from its owner, respondent had no liability to pay the compensation—Dismissed the petition—Aggrieved, claimant preferred appeal—Contended,**



**claimant being a poor widow, entitled to compensation—Held, accident took place on account of neglect and default of the deceased; legal representative not entitled to compensation, from the owner—Appeal dismissed.**

A Claim under Section 163-A of the Act can be claimed by a person without proving any "wrongful act", "neglect" or "default" of the driver of the vehicle who caused the accident. But at the same time, if the person claiming the compensation himself is responsible for that accident or in other words, where the accident occurred because of the wrongful act, neglect or default of the Claimant or the deceased, the owner of the vehicle would be entitled to escape the liability under Section 163-A of the Act.

**(Para 6)**

**Important Issue Involved:** A claim under Section 163-A of the Act can be claimed by a person without proving any 'wrongful act', 'neglect' or 'default' of the driver of the vehicle who caused the accident. But at the same time, if the person claiming the compensation himself is responsible for that accident or in other words, where the accident occurred because of the wrongful act, neglect or default of the claimant or the deceased, the owner of the vehicle would be entitled to escape the liability under section 163-A of the Act.

**[Vi Ku]**

**APPEARANCES:**

**FOR THE APPELLANT** : Mr. Santosh Chaurihaa, Advocate.

**FOR THE RESPONDENT** : Mr. Rajat Brar and Ms. Rameeza Hakeem Advocate for R-2.

**CASES REFERRED TO:**

1. *National Insurance Company Limited* vs. *Sinitha & Ors.*, 2011 (13) SCALE 84.

2. *Ningamma & Anr.* vs. *United India Insurance Company Limited,* (2009) 13 SCC 710.

3. *Oriental Insurance Company Limited* vs. *Smt. Rajni Devi & Ors.* I (2009) ACC 297 (SC).

4. *Oriental Insurance Company Limited* vs. *Hansrajbhai v. Kodala,* (2001) 5 SCC 175.

5. *General Manager, Chandigarh Transport Undertaking-I, Chandigarh & Anr.* vs. *Kanwaljit Kaur & Ors.,* FAO No.1413/2000.

**RESULT:** Appeal dismissed.

**G.P. MITTAL, J. (ORAL)**

**1.** The Appellant Sushila impugns a judgment dated 22.03.2010 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby a Petition under Section 163-A of the Motor Vehicles Act, 1988 (the Act) preferred by the Appellant was dismissed.

**2.** The Claims Tribunal while relying on **Ningamma & Anr. v. United India Insurance Company Limited,** (2009) 13 SCC 710 and **Oriental Insurance Company Limited v. Smt. Rajni Devi & Ors.** I (2009) ACC 297 (SC) held that since the deceased Sunil Kumar Mishra (the Appellant's son) had borrowed a two wheeler from its owner, the Respondents had no liability to pay the compensation.

**3.** It is urged by the learned counsel for the Appellant that the deceased is a poor widow and some compassion may be shown to her.

**4.** The case is squarely covered by the judgments of the Supreme Court in **Ningamma** (supra) and **Rajni Devi** (supra) as relied on by the Claims Tribunal whereby it was held that a borrower of a vehicle steps into the shoes of the owner and the owner cannot claim compensation from himself.

**5.** There is another aspect of the case. As per the FIR Ex.PW-2/A, relied on by the Appellant herself, the accident occurred on account of rash and negligent driving of the two wheeler No. DL-6S-AC-1258 by the deceased himself.

**6.** A Claim under Section 163-A of the Act can be claimed by a



person without proving any "wrongful act", "neglect" or "default" of the driver of the vehicle who caused the accident. But at the same time, if the person claiming the compensation himself is responsible for that accident or in other words, where the accident occurred because of the wrongful act, neglect or default of the Claimant or the deceased, the owner of the vehicle would be entitled to escape the liability under Section 163-A of the Act.

**7.** The distinction between award of compensation on the basis of *'liability without fault'* under Section 140 and payment of compensation without proving fault of the driver or owner of the vehicle 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. 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."

**8.** In this case, as stated earlier, the accident took place on account of neglect and default of the deceased Sunil Kumar Mishra himself. The Appellant being his legal representative is not entitled to the grant of compensation from the owner under Section 163-A of the Act.

**9.** 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.

**10.** In view of the foregoing discussion, the Appeal is devoid of any merit; the same is accordingly dismissed.

**11.** Pending Applications stand disposed of.

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**ILR (2012) I DELHI 519**
**W.P. (C)**

**DEEPAK KUMAR AND ORS. ....PETITIONERS**

**VERSUS**

**DISTRICT AND SESSIONS JUDGE, DELHI AND ORS. ....RESPONDENTS**

**(A.K. SIKRI, ACJ., S. RAVINDRA BHAT & RAJIV SAHAI ENDLAW, JJ.)**

**W.P. (C) NO. : 5390/2010, C.M. NO. : 20815/2010** **DATE OF DECISION: 12.09.2012**

**Constitution of India, 1950—Article 16 (4), 298, 371 and 372—Whether SC/ST's migrating from their state of origin to Union Territory can claim rights of SC/ST's in that Union Territory?—Held, any Scheduled Caste or Scheduled Tribe notified as such by the President can be classified as such caste or tribe, who answers that description would be entitled to the benefit of reservation in all Union Territories. In the case of States, however, having regard to separate administrative arrangements under the Constitution, such a position would not apply and those castes or tribes, notified in relation to those state(s) as Scheduled Castes or Scheduled Tribes, alone would be entitled to the benefits, and those migrating from one state to another, cannot enjoy such benefits.**



**Ratio Decidendi**

**"In a union territory all SC/St's whether local or the ones who have migrated are to be treated at par. As far as states are concerned, the settled law is that SC/ST's of one state migrating to the other state cannot claim the rights bestowed upon them in their state of origin."**

**[As Ma]**

**APPEARANCES:**

**FOR THE PETITIONERS** : Mr. Mahabir Singh, Sr. Advocate with Dr. Vijendra Mahndiyan, Ms. Pallavi Awasthi, Mr. Rakesh Dahiya, Advocates, Ms. Geeta Luthra, Sr. Advocate with Mr. Sanjeev Sahay, Mr. Harish Malik, Advocates, Akshat Goel, Mr. Aditya Singh, Mr. Rajiv Dalal, Mr. Varun Nishchal and Ms. Neha Gupta, Advocates, Mr. Suresh Tripathy, Advocate, Mr. Manoj Kumar Mithilesh Kumar Singh and Mr. Tarun Verma Deepali Gupta, Advocate.

**FOR THE RESPONDENTS** : Ms. Avnish Ahlawat with Ms. Latika Choudhary, Ms. Urvashi Malhotra and Ms. Subham Mahajan, District and Sessions Judge, Delhi. Mr. Sachin Datta, CGSC, Mr. Dinesh Relan and Ms. Sweta, Advocates, Mr. Viraj. R. Datar. Mr. B.V. Niren, Mr. Utkarsh Sharma and Mr.

Prasouk Jain, Mr. Rakesh Khanna, Gunjan Sharma, Ms. Geeta Luthra, Mr. Sanjeev Sahay, Mr. M.K. Bhardwaj, Mr. Harish Malik, Mr. Pradeep Kumar, Ms. Shobhana Takiar for the GNCTD.

**CASES REFERRED TO:**

1. *Anupam Garg* vs. *District and Sessions Judge,* LPA No. 417/2010.
2. *State of Uttaranchal* vs. *Sandeep Kumar Singh and Ors.* (2010) 12 SCC 794.
3. *Subhash Chandra* vs. *Delhi Subordinate Services Selection Board* (2009) 15 SCC 458.
4. *Shree Surat Valsad Jilla KMG Parishad* vs. *Union of India,* (2007) 5 SCC 360.
5. *E.V. Chinnaiah* vs. *State of A.P.* (2005) 1 SCC 394.
6. *S.Pushpa & Ors.* vs. *Sivachanmugavelu & Ors.* 2005 (3) SCC 1.
7. *Central Board of Dawoodi Bohra Community & Anr.* vs. *State of Maharashtra & Anr.* (2005) 2 SCC 673.
8. *MCD* vs. *Veena and Ors.* 2001 (6) SCC 571.
9. *State of Maharashtra* vs. *Milind,* 2001(1) SCC 4.
10. *New Delhi Municipal Council* vs. *State of Punjab* 1997 (7) SCC 339.
11. *State of Sikkim* vs. *Surendra Prasad Sharma* 1994 (5) SCC 282.
12. *Action Committee* vs. *Union of India,* (1994) 5 SCC 244.
13. *Sankersan Dash* vs. *Union of India,* AIR 1991 SC 1612.
14. *Marri Chandrasekhara Rao* vs. *The Dean, Seth GS Medical College,* (1990) 3 SCC 130.
15. *India Cements Ltd.* vs. *Union of India,* 1990(1) SCC 12.
16. *Union of India* vs. *Raghubir Singh* AIR 1989 SC 1933.



17. *M.S. Malathi* vs. *The Commissioner, Nagpur Division and Ors.,* AIR 1989 Bombay 138.
18. *Shyamaraju Hegde* vs. *U. Venkatesha Bhat & Ors.* 1988 SCR (1) 340.
19. *Ghanshyam Kisan Borikar* vs. *L.D. Engineering College,* AIR 1987 Gujarat 83.
20. *Kum. Manju Singh* vs. *The Dean, B.J. Medical College,* AIR 1986 Gujarat 175.
21. *Soosai* vs. *Union of India* 1985 (Supp) SCC 590.
22. *Pradeep Jain* vs. *Union of India* AIR 1984 SC 1420.
23. *State of Maharashtra* vs. *Raj Kumar* AIR 1982 SC 1301.
24. *M. Muni Reddy* vs. *Karnataka Public Service Commission and Ors.,* 1981 Lab I.C.1345.
25. *Ganapati Sitaram Balvalkar & Anr.* vs. *Waman Shripad Mage (Since Dead) Through Lrs.,* [1981] 4 SCC 143.
26. *Ambika Prasad Misra* vs. *State of U.P.* AIR 1980 SC 1762.
27. *Davis* vs. *Johnson,* (1978) 2 WLR 152.
28. *State of U.P* vs. *Ram Chandra Trivedi* AIR 1976 SC 2547.
29. *V.B. Singh* vs. *State of Punjab,* ILR 1976 (1) Punj and Har. 769.
30. *Mattulal* vs. *Radhe Lal,* [1975] 1 SCR 127.
31. *Pradip Tandon* vs. *State of U.P.* 1975 (1) SCC 267.
32. *Acharaya Maharajshri Narandrapra- sadji AnandprasadjiMaharaj etc.* vs. *The State of Gujarat& Ors.,* [1975] 2 SCR 317.
33. *Broom* vs. *Cassell & Co.,* [1972] 1 AER 801.
34. *K. Appa Rao* vs. *Director of Posts and Telegraphs, Orissa and Ors.,* AIR 1969 Orissa 220.
35. *T.M. Kanniyan* vs. *Income Tax Officer* 1968 (2) SCR 103 (AIR 1968 SC 367).

36. *T.M. Kanniyan* vs. *ITO* [AIR 1968 SC 637].

37. *B. Basavingappa* vs. *D. Munichinnappa,* 1965(1) SCR 315.

38. *Bhaiyalal* vs. *Harikishan Singh* AIR 1965 SC 1557.

39. *Sri Venkatamana Devaru and Ors.* vs. *State of Mysore and Ors.,* 1958 SCR 895 at 918.

**RESULT:** Panding allowed.

**S. RAVINDRA BHAT, J.**

**1.** The Constitution makers fervently hoped to usher a society committed to equality, where barriers of race, gender, domicile, descent and the unforgiving marginalization of a large section of the society as a result of the ills of the caste system and the practise of untouchability, would eventually be eliminated. The commitment has remained largely an unrealized promise. The strategy of the State to bridge the social gulf through affirmative action has thrown up constant challenges which Courts are called upon to resolve. This is one such challenge, where the Court has to grapple with the interpretation of Articles 341 and 342 read with Article 16, in the context of differing standards of what is the permissible reservation standard applicable on the one hand to residents of states who take up residence in one state, as opposed to residents of states who take up residence in Union territories. This judgment seeks to answer a reference made to the Full Bench, constituted for the purpose of deciding the appropriate course which this Court should adopt in regard to the interpretation of Articles 341 and 342 of the Constitution of India, in the light of conflicting decisions of the Supreme Court, and whether the field is covered by larger, Constitution Bench judgments of that Court.

**2.** The Court would discuss the facts of each case later, in the course of judgment, after considering the legal position, and seek to apply the principles deducible. At this stage, it would be necessary to state that the precise question involved is whether castes or tribes which do not find mention in the relevant Scheduled Castes or Scheduled Tribes orders issued by the President or the Amendment Acts (by Parliament) in relation to the Union Territory of Delhi, but are so described in relation to other states or Union Territories or such castes who are separately



notified as scheduled castes in relation to other states, can claim the benefit of reservation for the purpose of employment in the service of the Union Territory of Delhi, or for the purpose of admission to its educational institutions. The reference arose in the context of the previous decision of a two judge Bench of this Court, in **Delhi and State Subordinate Selection Board v Mukesh Kumar** (decided on 25th July, 2011, in WP 610/2011). It was held there that: "10. From the aforesaid pronouncement of law, it is vivid that Scheduled Castes or Scheduled Tribes in one State cannot get the benefit in another State. The parents of the respondents may belong to the castes of "Chamar", "Jatva", "Kali" and "Pasi" and those castes may have been notified in terms of Scheduled Caste Order or Scheduled Tribe Order issued in terms of Clause (1) of Article 341 or Article 342 of the Constitution of India in a particular State but the respondents who have obtained the certificates in Delhi on the basis of the certificates of their parents issued by other States and have migrated to Delhi, cannot avail the benefit. Thus, the view expressed by the tribunal that they belong to Scheduled Castes in the National Capital Territory of Delhi because of the said notification and, hence, what is only required is the authentication and verification of the same is not in consonance with the decisions of the **Marri Chandra Shekhar Rao** (supra), **Action Committee** (supra) and **Subhash Chandra & Anr.** (supra)."

**3.** During the hearing before the Division Bench (which initially heard the present cases), it was submitted that the above decision, as it was premised on the judgment in **Subhash Chandra v. Delhi Subordinate Services Selection Board** (2009) 15 SCC 458 is not a binding precedent, because a larger, three judge decision in **S.Pushpa & Ors. v. Sivachanmugavelu & Ors.** 2005 (3) SCC 1 (hereafter "Pushpa") had held that unlike in the case of States, Union Territories are within the administrative control of the Union Government, in view of the express provisions of the Constitution. Consequently, any Scheduled Caste or Scheduled Tribe notified as such by the President, can be classified as such caste or tribe, under Article 16 (4) of the Constitution, and once that is done, each member of such caste or tribe, who answers that description would be entitled to the benefit of reservation in all Union Territories. In the case of States, however, having regard to separate administrative arrangements under the Constitution, such a position would not apply and those castes or tribes, notified in relation to those state(s)

as Scheduled Castes or Scheduled Tribes, alone would be entitled to the benefits, and those migrating from one state to another, cannot enjoy such benefits. The decision in Pushpa being rendered by a larger bench of three judges, could not be characterized as obiter dicta. Counsel for some of the petitioners (who relied on the benefits of the Pushpa decision) further argued that the Supreme Court itself has stated that the decision in Subhash Chandra could not have said that Pushpa was not binding, and the proper course should have been to refer the matter for decision by a larger Bench. In this context, it was submitted that such course has been adopted precisely in **State of Uttaranchal vs . Sandeep Kumar Singh and Ors** (2010) 12 SCC 794. In the latter decision, it was observed that:

> "Clauses (1) and (2) of Article 16 guarantee equality of opportunity to all citizens in the matter of appointment to any office or of any other employment under the State. Clauses (3) to (5), however, lay down several exceptions to the above rule of equal opportunity. Article 16(4) is an enabling provision and confers a discretionary power on the State to make reservation in the matter of appointments in favour of "backward classes of citizens" which in its opinion are not adequately represented either numerically or qualitatively in services of the State. But it confers no constitutional right upon the members of the backward classes to claim reservation. Article 16(4) is not controlled by a Presidential Order issued under Article 341(1) or Article 342(1) of the Constitution in the sense that reservation in the matter of appointment on posts may be made in a State or Union Territory only for such Scheduled Castes and Scheduled Tribes which are mentioned in the Schedule appended to the Presidential Order for that particular State or Union Territory. This article does not say that only such Scheduled Castes and Scheduled Tribes which are mentioned in the Presidential Order issued for a particular State alone would be recognised as backward classes of citizens and none else. If a State or Union Territory makes a provision whereunder the benefit of reservation is extended only to such Scheduled Castes or Scheduled Tribes which are recognised as such in relation to that State or Union Territory then such a provision would be perfectly valid. However, there would be no infraction of clause (4) of Article 16 if a Union Territory by



virtue of its peculiar position being governed by the President as laid down in Article 239 extends the benefit of reservation even to such migrant Scheduled Castes or Scheduled Tribes who are not mentioned in the Schedule to the Presidential Order issued for such Union Territory. The UT of Pondicherry having adopted a policy of the Central Government where under all Scheduled Castes or Scheduled Tribes, irrespective of their State are eligible for posts which are reserved for SC/ST candidates, no legal infirmity can be ascribed to such a policy and the same cannot be held to be contrary to any provision of law.

A two Judge Bench in **Subhash Chandra & Anr. vs. Delhi Subordinate Services Selection Board & Ors.** held that the dicta in S. Pushpa case is an obiter and does not lay down any binding ratio. We may notice that a three Judge Bench in S. Pushpa case relied on Marri Chandra Shekhar Rao; Action Committee, cases and understood the ratio of those judgments in a particular manner. In our considered opinion, it was not open to a two Judge Bench to say that the decision of a three Judge Bench rendered following the Constitution Bench judgments to be per incuriam.

8. In **Central Board of Dawoodi Bohra Community & Anr. vs. State of Maharashtra & Anr.** (2005) 2 SCCC 673 a Constitution Bench of this Court in categorical terms held that the law laid down by the Supreme Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength. A Bench of lesser Coram cannot disagree or dissent from the view of the law taken by a Bench of larger Coram. In case of doubt all that the Bench of lesser Coram can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger Coram than the Bench whose decision has come up for consideration. It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a Coram larger than the one which pronounced the decision laying down the law the correctness of which is doubted.

9. In our view, a two Judge Bench of this Court could not have held the decision rendered by a three Judge Bench in S. Pushpa case to be obiter and per incuriam.

10. A very important question of law as to interpretation of Articles 16 (4), 341 and 342 arises for consideration in this appeal. Whether Presidential Order issued under Article 341(1) or Article 342(1) of the Constitution has any bearing on the State's action in making provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State? The extent and nature of interplay and interaction among Articles 16(4), 341(1) and 342(1) of the Constitution is required to be resolved.

11. For the aforesaid reasons, therefore, in our view, it would be appropriate that this case is placed before the Hon'ble the Chief Justice of India for constituting a Bench of appropriate strength. The registry is, accordingly, directed to place the papers before the Hon'ble the Chief Justice of India for appropriate directions."

As a result of the above submission, the Division Bench was of the opinion that it would be appropriate that these writ petitions are considered by a Full Bench.

**Provisions of the Constitution of India**

**4.** The relevant provisions to be considered in this case are Articles 16, 341, 342 and Article 366 of the Constitution of India. They read as under:

"16. Equality of opportunity in matters of public employment. -

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.



(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent. reservation on total number of vacancies of that year.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination."

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341. Scheduled Castes

(1) The President [may with respect to any State [or Union

Territory], and where it is a State, after consultation with the Governor thereof], by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State [or Union territory, as the case may be].

(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under Clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

342 . Scheduled Tribes

(1) The President [may with respect to any State (or Union territory), and where it is a State, after consultation with the Governor thereof], by public notification, specify the tribes or tribal communities or parts of or groups within tribes of tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State [or Union Territory, as the case may be].

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under Clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

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366. Definitions. - In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say -

XXXXXX XXXXXX XXXXXX

(24) "Scheduled Castes" means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under article 341 to be Scheduled Castes for the purposes of this Constitution;



(25) "Scheduled Tribes" means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under article 342 to be Scheduled Tribes for the purposes of this Constitution..."

Submissions on behalf of Petitioners in WP No. 5390/2010, WP No. 3223/2011 3278/2011, 7717/2010 and WP 1513/2011 in line with the decision in Pushpa.

**5.** The Petitioners, who seek directions of the Court that the judgments in Pushpa is binding and that the judgment in Subhash Chandra ought not to be followed, urged that the two previous decisions in **Marri Chandrasekhara Rao Vs. The Dean, Seth GS Medical College,** (1990) 3 SCC 130 and **Action Committee vs. Union of India,** (1994) 5 SCC 244, while considering the question held that the benefits of reservation to migrant Scheduled Caste candidates of one State against quotas reserved for Scheduled Caste candidates in the other states cannot be given reservation benefit, would not apply in the case of Union Territories. They argued that Pushpa considered the scheme of the Constitution as well as the said two judgments (Marri and Action Committee) and held as follows:

"the Government of Pondicherry has throughout been proceeding on the basis that being a Union Territory, all orders regarding reservation for SC/ST in respect of posts/services under the Central Government are applicable to posts/services under the Pondicherry Administration as well. Since all SC/ST candidates which have been recognised as such under the orders issued by the President from time to time irrespective of the State/Union Territory, in relation to which particular castes or tribes have been recognised as SCs/STs are eligible for reserved posts/services under the Central Government, they are also eligible for reserved posts/services under the Pondicherry Administration. Consequently, all SC/ST candidates from outside the UT of Pondicherry would also be eligible for posts reserved for SC/ST candidates in the Pondicherry Administration. Therefore, right from the inception, this policy is being consistently followed by the Pondicherry Administration whereunder migrant SC/ST candidates are held to be eligible for reserved posts in the

Pondicherry Administration.

17. We do not find anything inherently wrong or any infraction of any constitutional provision in such a policy. The principle enunciated in Marri Chandra Shekhar Rao cannot have application here as UT of Pondicherry is not a State. As shown above, a Union Territory is administered by the President through an Administrator appointed by him. In the context of Article 246, Union Territories are excluded from the ambit of the expression "State" occurring therein. This was clearly explained by a Constitution Bench in **T.M. Kanniyan v. ITO** [AIR 1968 SC 637]. In **New Delhi Municipal Council v. State of Punjab** [(1997) 7 SCC 339] the majority has approved the ratio of T.M. Kanniyan and has held that the Union Territories are not States for the purpose of Part XI of the Constitution (para 145). The Tribunal has, therefore, clearly erred in applying the ratio of Marri Chandra Shekhar Rao in setting aside the selection and appointment of migrant SC candidates.;

20. .... A fortiori, for the purpose of identification, it becomes equally important to know who would be deemed to be Scheduled Caste in relation to that State or Union Territory. This exercise has to be done strictly in accordance with the Presidential Order and a migrant Scheduled Caste of another State cannot be taken into consideration otherwise it may affect the number of seats which have to be reserved in the House of the People or Legislative Assembly. Though, a migrant SC/ST person of another State may not be deemed to be so within the meaning of Articles 341 and 342 after migration to another State but it does not mean that he ceases to be an SC/ST altogether and becomes a member of a forward caste.

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21. Clauses (1) and (2) of Article 16 guarantee equality of opportunity to all citizens in the matter of appointment to any office or of any other employment under the State. Clauses (3) to (5), however, lay down several exceptions to the above rule of equal opportunity. Article 16(4) is an enabling provision and confers a discretionary power on the State to make reservation



in the matter of appointments in favour of backward classes of citizens which in its opinion are not adequately represented either numerically or qualitatively in services of the State. But it confers no constitutional right upon the members of the backward classes to claim reservation. Article 16(4) is not controlled by a Presidential Order issued under Article 341(1) or Article 342(1) of the Constitution in the sense that reservation in the matter of appointment on posts may be made in a State or Union Territory only for such Scheduled Castes and Scheduled Tribes which are mentioned in the Schedule appended to the Presidential Order for that particular State or Union Territory. This article does not say that only such Scheduled Castes and Scheduled Tribes which are mentioned in the Presidential Order issued for a particular State alone would be recognised as backward classes of citizens and none else. If a State or Union Territory makes a provision whereunder the benefit of reservation is extended only to such Scheduled Castes or Scheduled Tribes which are recognised as such in relation to that State or Union Territory then such a provision would be perfectly valid. However, there would be no infraction of clause (4) of Article 16 if a Union Territory by virtue of its peculiar position being governed by the President as laid down in Article 239 extends the benefit of reservation even to such migrant Scheduled Castes or Scheduled Tribes who are not mentioned in the Schedule to the Presidential Order issued for such Union Territory. The UT of Pondicherry having adopted a policy of the Central Government whereunder all Scheduled Castes or Scheduled Tribes, irrespective of their State are eligible for posts which are reserved for SC/ST candidates, no legal infirmity can be ascribed to such a policy and the same cannot be held to be contrary to any provision of law.."

It is argued that the position of law being clear, this Court is bound by Pushpa, and cannot, having regard to the imperative of Article 141, follow Subhash Chandra, which was rendered by a Bench composition of two judges. Moreover, submitted learned counsel, Subhash Chandra has been doubted and referred for decision by a larger Bench in **Sandeep Kumar Singh** (supra).

**6.** Counsel argued that unlike States, the Union Territories are not

federating units, and have a position subordinate to the Union Government. In view of this, it is open to the Union Government, exercising its independent powers under Article 16 (4), to declare which of the castes are to be treated as Scheduled Castes for the purpose of recruitment to Union Territories. Furthermore, the power to classify what castes are Scheduled Castes is that of the President, as provided under Articles 341 and 342 of the Constitution. Having regard to this undeniable position, and the constitutional structure which envisages ultimate administrative control of the Union Territories by the Union Government, the Pushpa rule is sound, and has to be accepted. The view of the Division Bench, preferring Subash Chandra's ratio, is unsustainable in law.

**7.** It was further argued that the Pushpa rule is binding on this Court, which has no discretion in the matter of interpretation. Counsel argued that the previous decisions in Marri and Action Committee were considered in Pushpa; moreover, those previous decisions dealt with migration from states of scheduled castes and scheduled tribes (some of the castes or tribes being mentioned in the Presidential orders in respect of more than one state). However, the Court in those two cases did not have the occasion to consider the question from the perspective of the Union Territories.

**8.** Learned Senior counsel contended that Article 141 and the decisions reported bind this Court into applying the *Pushpa* rule which has not been overruled till date, and continues to be the law on the subject as far as the Union Territories are concerned.

**9.** It was argued that in any event, the *Subhash Chandra* decision had been given only prospective application or effect by virtue of the Supreme Court's order dated 13.11.2009. Therefore, wherever vacancies arose, or selection processes began prior to that decision, Courts were bound to apply the rule in *Pushpa*. Any contrary administrative instructions relied on by the official respondents, i.e. the Government of NCT of Delhi, and the Delhi Jal Board, were invalid.

**Contentions on behalf of parties who support the application of Subhash Chandra judgment, (Petitioners in WP 7878/2010 and Respondents in WP 1513/2011)**

**10.** Ms. Geeta Luthra, Senior counsel for the writ petitioners in cases where Subhash Chandra is relied on, argued that the decision in



Marri and Action Committee were by larger, five judge Bench formations. They spelt out the law clearly that irrespective of the identity of a caste or tribe across a state, a member of such caste or tribe in one state could not claim the benefit of reservation in another part of the territory of India, as far as State or Union Territory service or access to resources was concerned. In other words, under the scheme of the Constitution, the expressions *"for the purposes of this Constitution"* a tribe or caste would *"be deemed to be Scheduled Tribes in relation to that State or Union Territory, as the case may be"* only if that concerned state notified it to be so. Further, the scheme of the Scheduled Caste Orders and Scheduled Tribe Orders, (which were inviolate and could not be touched by anyone except Parliament through law made in that regard), directed that such benefits would accrue to the residents of the concerned state or Union Territory only. Learned counsel emphasized that if it were held that an independent power to classify exists under Article 16 (4), as the decision in Pushpa suggests, the mandate of Articles 341 (2) and 342 (2) would be negated. Therefore, argued counsel, the Supreme Court's decision in Subhash correctly deduced that Pushpa could not be followed, since it was contrary to the decisions in Marri and Action Committee.

**11.** It was argued that by virtue of Articles 341 and 342 of the Constitution of India and the notifications issued under those provisions, only Delhi listed Scheduled caste candidates could be considered for admission in the Scheduled Caste categories for the purposes of reservations under the Constitution. Counsel submitted that by treating SC candidates from other States at par with SC candidates from Delhi, the Union Territory would be giving privileges that violate the legitimate rights of Scheduled caste applicants and candidates under the Constitution. This would be so because such treatment would equate dissimilar persons as being equally entitled under law to receive benefits of affirmative action policies in a specific State, with others who are given similar status, though in different States or Union Territories.

**12.** Placing reliance on the decisions in Marri Chandrasekhara Rao and Action Committee, learned counsel argued that is it not possible for someone belonging to an SC category in one State or Union Territory to avail of reservation in another State if that caste is not categorized as SC in that State or Union Territory. Nor is it possible for her (or him) to avail of benefits, even if the caste of the same nomenclature is mentioned as

a Scheduled Caste in state to which she (or he) has migrated. Reliance was also placed on **State of Maharashtra v. Milind,** (2001) 1 SCC 4 to say that the order of the President under Article 341, enlisting castes as beneficiaries of reservations policies, is specific to geographical regions, i.e. specific States and Union Territories or even regions within the States. It is only Parliament that can amend the Presidential order. The Executive cannot extend such benefits to any class of persons other than those on whom it was intended to be conferred. This is further borne out from the decision of the Supreme Court in **Shree Surat Valsad Jilla KMG Parishad v. Union of India,** (2007) 5 SCC 360, where the Court held that inclusion of a caste as a scheduled one in respect of a particular area within a state is an exercise for the President and the Parliament to conduct and cannot be gone into by the Courts.

**Historical background**

**13.** Before the advent of the Constitution, the concept of disadvantaged castes was recognized. Disadvantaged castes were those who suffered multiple challenges and disabilities in their social acceptance. An attempt was made by virtue of provisions of the Government of India Act, 1935 to enable reservations for the "Depressed classes", as they were then known. The Government of India (Scheduled Castes) Order, 1936, drawn up under the First, Fifth and Sixth Schedule to the Government of India Act, (read with Section 309) was the first notification which conferred and confined scheduled caste status only to *"residents"* in *"the localities specified in relation to them respectively in those parts of that Schedule"*. The Supreme Court traced this background in **Soosai V. Union Of India** (1985) Supp. SCC 590, while commenting on the pernicious effect of caste and the practise of untouchability:

> "This social attitude committed those castes to severe social and economic disabilities and cultural and educational backwardness. And though most of Indian history the oppressive nature of the caste structure has denied to those disadvantaged castes the fundamentals of human dignity, human self-respect and even some of the attributes of the human personality. Both history and latter day practice in Hindu society are heavy with evidence of this oppressive tyranny, and despite the efforts of several noted social reformers, especially during the last two centuries, there has been a crying need for the emancipation of the depressed classes from the degrading condition of their social and economic servitude. Dr. J. H. Hutton, a Census Commissioner of India, framed a list of the depressed classes systematically, and that list was made the basis of an order promulgated by the British Government in India called the Government of India (Scheduled Castes) Order, 1936. The Constitution (Scheduled Castes) Order, 1950 is substantially modelled on the Order of 1936. The Order of 1936 enumerated several castes, races or tribes in an attached Schedule and they were, by paragraph 2 of the Order, deemed to be Scheduled Castes..... During the framing of the Constitution, the Constituent Assembly recognised "that the Scheduled Castes were a backward section of the Hindu community who were handicapped by the practice of untouchability'', and that "this evil practice of untouchability was not recognised by any other religion and the question of any Scheduled Caste belonging to a religion other than Hinduism did not therefore arise''. The Sikhs however, demanded that some of their backward sections, the Mazhabis, Ramdasis, Kabirpanthis and Sikligars, should be included in the list of Scheduled Castes. The demand was accepted on the basis that these sects were originally Scheduled Castes Hindus who had only recently been converted to the Sikh faith and "had the same disabilities as the Hindu Scheduled Castes''. The depressed classes within the fold of Hindu society and the four classes of the Sikh community were therefore made the subject of the original Constitution (Scheduled Castes) Order, 1950. Subsequently in 1956 the Constitution (Scheduled Castes) Order, 1950 was amended and it was broadened to include all Sikh untouchables."



The Court went on to describe the process whereby castes were notified as scheduled castes or tribes, and negated the plea of discrimination of members of castes (who are scheduled castes) who had converted to another religion. It was underlined that to continue within the description of scheduled castes, the concerned individual who converts should be able to show an identical level of social disadvantage:

> "8. It is quite evident that the president had before him all this material indicating that the depressed classes of the Hindu and

the Sikh communities suffered from economic and social disabilities and cultural and educational backwardness so gross in character and degree that the members of those castes in the two communities called for the protection of the constitutional provisions relating to the Scheduled Castes. It was evident that in order to provide for their amelioration and advancement it was necessary to conceive of intervention by the State through its legislative and executive powers. It must be remembered that the declaration incorporated in paragraph 3 deeming them to be members of the Scheduled Castes was a declaration made for the purposes of the Constitution. It was a declaration enjoined by clause (1) of Article 341 of the Constitution... It is necessary to establish further that the disabilities and handicaps suffered from such caste membership in the social order of its origin - Hinduism - continue in their oppressive severity in the new environment of a different religious community."

**14.** Dr. B.R. Ambedkar, while moving Article 300-A of the Draft Constitution (which ultimately became Article 341) said, in the Constituent Assembly, on 17.11.1949, that:

"The object of these two articles, as I stated, was to eliminate the, necessity of burdening the Constitution with long lists of Scheduled Castes and Scheduled Tribes. It is now proposed that the President, in consultation with the Governor or Ruler of a State should have, the power to issue a general notification in the Gazette specifying all the Castes and tribes or groups thereof deemed to be Scheduled Castes and Scheduled Tribes for the purposes of the privileges which have been defined for them in the Constitution. The only limitation that has been imposed is this : that once a notification has been issued by the President, which, undoubtedly, lie will be issuing in consultation with and on the advice of the Government of each State, thereafter, if any elimination was to be made from the List so notified or any addition was to be made, that must be made by Parliament and not by the President. The object is to eliminate any kind of political factors having a play in the matter of the disturbance in the Schedule so published by the President."

(emphasis supplied)



**15.** Later, during the debates on 2-12-1948 (*Constituent Assembley Debates, 2nd December, Debates on Article 13, Volume II* also quoted in *Founding Father's view* by H. S Saksena), Dr. Ambedkar dealt with precisely the question which this court has to consider, i.e the status of scheduled caste or tribe members who migrate to another part of the country, and whether they can be treated as scheduled castes (or tribes) there. In reply to a query by another member, he stated the following:

"He asked me another question and it was this. Supposing a member of a Scheduled Tribe living in a tribal area migrates to another part of the territory of India, which is outside both the scheduled area and the tribal area, will he be able to claim from the local government, within whose jurisdiction he may be residing, the same privileges which he would be entitled to when he is residing within the scheduled area or within the tribal area? It is a difficult question for me to answer. If that matter is agitated in quarters where a decision on a matter like this would lie, we would certainly be able to give some answer to the question in the form of some clause in his Constitution. But, so far as the present Constitution stands, a member of a Scheduled Tribe going outside the Scheduled area or tribal area would certainly not be entitled to carry with him the privileges that he is entitled to when he is residing in a scheduled area of a tribal area. So far as I can see, it will be practicably impossible to enforce the provisions that apply to tribal areas or scheduled areas, in areas other than those which are covered by them .."

**16.** The issue of how those migrating from one state to another are to be treated for reservation benefit purposes was first dealt with in 1975, by a Union Ministry of Home Affairs (MHA) notification (dated 2-5-1975) declaring the terms and conditions which were applicable for reservation of seats in case of migration of Scheduled Castes and Scheduled Tribes from one state to another. Para 2(ii) of the said order stated that:

"Where a person migrates from one state to another, he can claim to belong to SC or ST only in relation to the state to which he originally belongs and not in respect of the state to which he has migrated."

On 22.02.1977, the MHA issued another notification clarifying the earlier

order of 1975, with regard to residence, which stated that:

> "As required under Article 341 and 342 of the Constitution the President has with respect to every State and Union Territory and where it is State after consultation with governor of the concerned state issued orders notifying various castes and tribes as SC and ST in relation to that State or UT from time to time. The inter State area restriction have been deliberately imposed so that the people belonging to the specific community residing in specific area, which has been assessed to quality for SC or ST status, only benefit from the facilities provided for them. Since the people belonging to the same caste but living in different States/UTs may not necessarily suffer from the same disabilities, it is possible that two persons belonging to same caste but residing in different states/UTs may not be treated to belong to SC/ST or vice versa. Thus the residence of a particular person in a particular locality assumes a special significance. This residence has not to be understood in the literal or ordinary sense of the word. On the other had it connotes the permanent residence of a person on the date of notification of the Presidential Order scheduled his caste/ tribe in relation to that locality. Thus a person who is temporarily away from his permanent place of abode at the time of the notification of the presidential Order applicable in his case, say for example, to earn a living or seek education etc., can also be regarded as scheduled caste or scheduled tribe, as the case may be, if his caste/tribe has been specified in that order in relation to his state/UT. But he cannot be treated as such in relation to place of his temporary residence notwithstanding the fact that the name of his caste/tribe has been scheduled in respect of that area in any Presidential Order.
>
> It is to ensure the veracity of this permanent residence of a person and that of the caste/tribe to which he claims to belong that the Government of India has made a special provision in the proforma prescribed for the issue of such certificate. In order that the certificates are issued to be deserving person it is necessary that proper verification based primarily on revenue record and if need be, through reliable inquires, is made before such certificates are issued. As it is only Revenue Authorities who, decide having



> access to relevant revenue records are in a position to make reliable inquiries. Government of India insists upon the production of certificates, from such authorities only. In order to be competent to issue such certificate therefore authority mentioned in Appendix 15 of this Brochure should be the one concerned with the locality in which person applying for the certificate had his place of permanent abode at the time of the notification of the relevant order. Thus the Revenue Authority of one District would not be competent to issue such a certificate in respect to persons belonging to another District. No can such an authority of one state/UT issue such certificate in respect of persons whose place of permanent resident at the time of the notification of a particular Presidential Order, has been in a different state/ Union Territory. In the case of persons born after the date of notification of the relevant Presidential Order, the place of residence for the purpose of acquiring Scheduled Casts or Scheduled Tribes status, is the place of permanent abode of their parents at the time of the notification of Presidential Order under which they claim to belong to such caste/tribe."

The issue was revisited in another circular of 1982, issued by the Union Government, which decided that caste certificates could be issued to those who migrated from one state to another, but clarified that this would not alter their status as scheduled caste or scheduled tribe members, in one State or another.

**17.** A textual reading of Articles 341 and 342 of the Constitution of India shows that Presidential Notifications, whether in respect of Scheduled Castes or in respect of Scheduled Tribes, are *"for the purposes of this Constitution" and "in relation to that State (or Union Territory, as the case may be)"*. Also, if there is a Presidential Notification under Article 341(1) or Article 342(2), Parliament may by law include or exclude caste, race, tribe or group in the list of Scheduled Caste and Schedules Tribes notified under the Presidential Notification. The Constitution (Scheduled Castes) Order, 1950, the Constitution (Scheduled Tribes) Order, 1950 and the Constitution (Scheduled Castes) (Union Territories) Order, 1951, Constitution (Scheduled Castes) (Union Territories) Order, 1951, Constitution (Scheduled Tribes) (Union Territories) Order, 1951 were the first Presidential Notifications issued under Article 341 and

Article 342 of the Constitution of India specifying Scheduled Castes and tribes in relation to various States and Union Territories. The Order of 1950 was amended by the Constitution (Scheduled Castes and Scheduled Tribes Order), Amendment Act, 1956, (Act 63/1956). Another amending Act was enacted by Parliament in 1976. Earlier, orders had been made for the first time in relation to certain territories, such as the Constitution (Andaman and Nicobar Islands) Scheduled Tribes Order, 1959. Further, amendments had taken place as and when Parliament reorganized states, through separate Acts, such as the Bombay Reorganization Act, the Punjab Reorganization Act, Andhra Reorganisation Act, States Reorganization Act (which led to large scale modification of the 1950 and 1951 Presidential Orders). Similarly, when new territories were incorporated into India, such as Pondicherry, or Sikkim, the Scheduled Castes or Scheduled Tribes Orders were made in relation to the new territories (for instance, the Constitution (Dadra and Nagar Haveli) Scheduled Castes Order, 1962, the Constitution (Dadra and Nagar Haveli) Scheduled Tribes Order, 1962; the Constitution (Pondicherry) Scheduled Castes Order, 1964, the Constitution (Goa, Daman and Diu) Scheduled Caste Order, 1968, the Constitution (Goa, Daman and Diu) Scheduled Tribes Order, 1968; the Constitution (Nagaland) Scheduled Tribes Order, 1970 – after the reorganization of Assam; the Constitution (Sikkim) Scheduled Castes Order, 1978; the Constitution (Sikkim) Scheduled Tribes Order, 1978) the recent ones being upon creation of the States of Uttarakhand, Chhatisgarh, and Jharkhand. Likewise, when previous Union Territories (such as Goa and Arunachal Pradesh) were constituted into States, consequential amendments were made to the Scheduled Castes and Tribes Orders. In the case of Goa, the Goa, Daman and Diu Reorganisation Act, 1987 (Act No. 18 of 1987), by Section 19 amended the Scheduled Castes and Scheduled Tribes Orders. Arunachal Pradesh and Mizoram were constituted as States (from previous status as Union Territories) by Re-organization enactments in 1986. All these were Parliamentary enactments. The Presidential Notifications of 1950 and 1951 (as amended) in relation to Scheduled castes and scheduled tribes of various states, very importantly provided that:

> "the castes, races or tribes or parts of, or groups within, castes or tribes specified in [Parts to [XXIV]] of the Schedule to this Order shall, in relation to the States to which those Parts respectively relate, be deemed to be Scheduled Castes so far as regards member thereof resident in the localities specified in relation to them in those Parts of that Schedule."



An identical condition was engrafted in the Scheduled Castes (Union Territories) Order, 1951:

> "Subject to the provisions of this Order, the castes, races or tribes or parts of, or groups within, castes or tribes, specified in 3 [Parts I to III] of the Schedule to this Order shall, in relation to the 2 [Union territories] to which those parts respectively relate, be deemed to be Scheduled Castes so far as regards members thereof resident in the localities specified in relation to them respectively in those Parts of that Schedule."

**18.** Part VIII of the Constitution of India deals with Union Territories. It, inter alia, consists of Articles 239 to 241. Article 239 provides for the administration of every Union Territory by the President acting through an Administrator. It reads as follows:

> "239. Administration of Union Territories
>
> (1) Save as otherwise provided by Parliament by law, every Union Territory shall be administered by the President acting, to such extent as he thinks fit, through an administrator to be appointed by him with such designation as he may specify.
>
> (2) Notwithstanding anything contained in Part VI, the President may appoint the Governor of a State as the administrator of an adjoining Union Territory, and where a Governor is so appointed, he shall exercise his functions as such administrator independently of his Council of Ministers."

**19.** So far as the Union Territory of Delhi is concerned, Article 239AA was introduced in the Constitution of India by the Constitutional (69th Amendment) Act, 1991 with effect from 1.1.1992. It provides for a Legislative Assembly, seats whereof are required to be filled by members chosen by direct election from territorial constituencies in the National Capital Territory. Under Article 239AA(3)(a), the Legislative Assembly has powers to make laws for the Union Territory of Delhi in respect to the matters specified under said clause (3)(a) of Article 239AA of the Constitution of India.

**20.** The expressions *"in relation to that State or Union Territory"* and *"for the purposes of this Constitution"* used in Articles 341 and 342 of the Constitution of India are relevant and determinative of the issues in this case at hand. According to one set of petitioners, since under the constitutional scheme, the Union Territory NCT of Delhi has to be administered by the President acting through an Administrator, the Union of India is within its rights in issuing instructions, either under specific statutes, or generally of executive nature, requiring reservations to be made for admissions to institutions in the Union Territory of Delhi. The other set of petitioners, on the other hand, urged that Article 239 should be read harmoniously with Articles 341 and 342 of the Constitution of India. It is argued that Article 15(4) and Article 16 (4) are merely enabling provisions, and do not confer any substantive power to classify or choose castes or tribes. The specific provision under Article 16 (4) only deals with the State's duty to ensure "adequate representation" in the services, but under no circumstances does it enable the exercise of deciding which communities or castes are to be included or excluded for the purpose of reservation. In other words, the entitlement of communities and the conditions attached to such entitlement, to reservations, are exclusively found in the Presidential notifications, or amendments to it, by Parliament. If therefore, there is no Presidential Notification under Article 342 of the Constitution of India for the purposes of reservation for Scheduled Tribes, or only a few castes are notified as Scheduled Castes for the Union Territory of Delhi, the sine qua non being missing, no reservation can be effected for members belonging to Scheduled Tribes or for those castes which are not notified for the Union Territory. Furthermore, the nature of Scheduled Castes Orders, made under the Constitution and as amended from time to time by the Parliament, indicate a clear intent to limit benefits to only those enlisted in the Constitution Schedule Caste (Union Territories) Order, 1951, in relation to Delhi, and subject to residential qualifications spelt out in it.

**21.** The Union Territories Scheduled Castes Order of 1951, amended by an Act, in 1956 and later in 1976, and still later, in 1987, reads as follows:

> "THE CONSTITUTION (SCHEDULED CASTES) UNION TERRITORIES) ORDER, 1951 C.O. 32, dated the 20th September, 1951.



In exercise of the powers conferred by Clause (1) of Article 341 of the Constitution of India, as amended by the Constitution (First Amendment) Act, 1951, the President is pleased to make the following order namely:

1. This order may be called the constitution (Scheduled Castes) (Union Territories) Order, 1951.

2. Subject to the provisions of this order, the castes races or tribes or parts of, or groups within, castes or tribes, specified in (parts 1 to III of the Scheduled to this Order shall, in relation to the (Union Territories) to which those parts respectively relate, be deemed to be Scheduled Castes so far as regards members thereof resident in the localities specified in relation to them respectively in those parts of that schedule.

3. Notwithstanding anything contained in paragraph 2, no person who professes a religion different from the Hindu (or the Sikh or the Buddhist) Religion shall be deemed to be a member of a Scheduled caste. [4. Any reference in this order to a Union Territory in part 1 of the Scheduled shall be construed as a reference to the territory constituted as a Union territory as from the first day of November, 1956, any reference to a Union territory in part II of the Schedule shall be construed as a reference to the territory constituted as a Union territory as from the first day of November, 1966 and any reference to a Union territory in part III of the Schedule shall be construed as a reference to the territory constituted as a Union territory as from the day appointed under clause (b) of Section 2 of the Goa, Daman and Diu Reorganisation Act, 1987].

[THE SCHEDULE

PART 1

DELHI

1. Throughout the Union Territory:

1. Ad Dharmi 2. Aheria 3. Aheria 4. Balal 5. Banjara 6. Bawaria

7. Bazigar 8. Bhangi 9. Bhil 10. Chamar, Chanwar Chamanr, Jatya or Jatav Chamar, Mochi Ramadasia, Ravidasi, Reghgrh or

Raigharh

11. Chohra (Sweeper) 12. Chuhar (Balmiki)

13. Dhanak or Dhanuk 14. Dhobi 15. Dom 16. Gharrami

17. Julaha (Weaver) 18. Karbirpanthi 19. Kachhandha 20. Kanjar or Giarah

21. Khatik 22. Koli 23. Lalbegi 24. Madri 25. Mallah 26. Mazhabi

27. Meghwal 28. Naribut 29. Nat (Rana), Badi 30. Pasi

31. Perna 32. Sansi or Bhedkut 33. Sapera 34. Sikligar 35. Singiwala or Kalbelia 36. Sirkiband \

Part III

CHANDIGARH

[throughout the Union Territory]

1. Ad Dharmi 2. Bangali 3. Barar, Burar or Berar 4. Batwal, Barwala]

5. Baruia or Bawaria 6. Bazigar 7. Balmiki, Chura or Bhangi 8. Bhanjra

9. Chamar, Jatia, Chamar, 10. Chanal Rehgar, Raigar, Ramadasi Or Ravidas 11. Dagi 12. Darin. 13. Dhanak 14. Dhogri, Dhangri or Siggi 15. Dumna, Mahasha or Doom 16. Ganga 17. Gandhila or Gandil Gondola 18, Kabirpanthi or Julaha 19. Khatik 20. Kori or Koli 21. Marija or Marecha 22. Mazhabi 23. Megh 24. Nat 25. Od 26. Pasi 27. Perna 28. Pherera 29. Sanhai 30. Sanhal 31. Sansoi 32. Sandi, Bhedkut or Manesh 33. Sapela 34. Sarera 35. Sikligar 36. Sirkibandi

PART III DAMAN AND DIU

III. Throughout the Union Territory :

1. Bhangi (Hadi) 2. Chambhar, Mochi 3. Mahar 4. Mahyavanshi (Vankar)

5. Mangi"



Thus, in relation to Delhi, there are only 36 castes listed as scheduled castes in the Order; they have to be *"residents of"* the concerned territory, i.e of Delhi, to avail the benefit. Therefore, as regards entitlement of benefit of reservation "for the purpose of the Constitution", textually, only such members of the Scheduled Castes who fulfil the requisites spelt out in the Presidential Notification for Delhi can legitimately claim it.

**22.** In Marri, the Supreme Court dealt with the question whether an individual belonging to a Scheduled Tribe or scheduled caste, in one state would be entitled to the benefit of reservation in a different state, (whether he "carried" the tag of disability to be entitled to reservation, upon migration). It was held that:

> "7. In this connection, the provisions of Articles 341 and 342 of the Constitution have been noticed. These Articles enjoin that the President after consultation with the Governor where the States are concerned, by public notification, may specify the tribes or tribal communities or parts of or groups of tribes or tribal communities, which shall be deemed to be Scheduled Tribes in relation to that State under Articles 341 or 342 Scheduled Tribes in relation to that State or Union Territory. The main question, therefore, is the specification by the President of the Scheduled Castes or Scheduled Tribes, as the case may be, for the State or Union Territory or part of the State. But this specification is "for the purposes of this Constitution". It is, therefore, necessary, as has been canvassed, to determine what the expression "in relation to that state" in conjunction with "for the purposes of this Constitution" seeks to convey.
>
> XXXXXX XXXXXX XXXXXX
>
> 12. It is, however, necessary to give proper meaning to the expressions *"for the purpose of this Constitution"* and "in relation to that State" appearing in Articles 341 and 342 of the Constitution. The High Court of Gujarat has taken the view in two decisions, namely, **Kum. Manju Singh v. The Dean, B.J. Medical College,** AIR 1986 Gujarat 175 and **Ghanshyam Kisan Borikar v. L.D. Engineering College,** AIR 1987 Gujarat 83 to which our attention was drawn, that the phrase *"for the purposes of this Constitution"*

cannot be and should not be made subservient to the phrase "in relation to that State" and, therefore, it was held in those two decisions that in consequence, the classification made by one State placing a particular caste or tribe in the category of Scheduled Castes or Scheduled Tribes would entitle a member of that caste or tribe to all the benefits, privileges and protections under the Constitution of India. A similar view has been taken by the Karnataka High Court in the case of **M. Muni Reddy v. Karnataka Public Service Commission and Ors.,** 1981 Lab I.C.1345. On the other hand, the Orissa High Court in the case of **K. Appa Rao v. Director of Posts and Telegraphs, Orissa and Ors.,** AIR 1969 Orissa 220 and the full Bench of the Bombay High Court in **M.S. Malathi v. The Commissioner, Nagpur Division and Ors.,** AIR 1989 Bombay 138 have taken the view that in view of the expression "in relation to that State" occurring in Articles 341 and 342, the benefit of the status of Scheduled Castes or Scheduled Tribes would be available only in the State in respect of which the Caste or Tribe is so specified. A similar view has been taken by the Punjab and Haryana High Court in the case of **V.B. Singh v. State of Punjab,** ILR 1976 (1) Punj and Har. 769.

13. It is trite knowledge that the statutory and constitutional provisions should be interpreted broadly and harmoniously. It is trite saying that where there is conflict between two provisions, these should be so interpreted as to give effect to both. Nothing is surplus in a Constitution and no part should be made nugatory. This is well settled. See the observations of this Court in **Sri Venkatamana Devaru and Ors. v. State of Mysore and Ors.,** 1958 SCR 895 at 918, where Venkatarama Aiyar, J. reiterated that the rule of construction is well settled and where there are in an enactment two provisions which cannot be reconciled with each other, these should be so interpreted that, if possible, effect could be given to both. It, however, appears to us that the expression "for the purposes of this Constitution" in Articles 341 as well as in Article 342 do imply that the Scheduled Castes and the Scheduled Tribes so specified would be entitled to enjoy all the constitutional rights that are enjoyable by all the citizens as such. Constitutional right e.g. it has been argued that right to



migration or right to move from one pat to another is a right given to all to scheduled castes or tribes and to non-scheduled castes or tribes. But when a Scheduled Caste or tribe migrates, there is no inhibition in migrating but when he migrates, he does not and cannot carry any special rights or privileges attributed to him or granted to him in the original State specified for that State or area or part thereof. If that right is not given in the migrated state it does not interfere with his constitutional right of equality or of migration or of carrying on his trade, business or profession. Neither Articles 14, 16, 19 nor Article 21 are denuded by migration but he must enjoy those rights in accordance with the law if they are otherwise followed in the place where he migrates. There should be harmonious construction, harmonious in the sense that both parts or all parts of a constitutional provision should be so read that one part does not become nugatory to the other or denuded to the other but all parts must be read in the context in which there are used. It was contended that the only way in which the fundamental rights of the petitioner under Articles 14, 19(1)(d), 19(1)(e) and 19(1)(f) could be given effect to is by construing Article 342 in a manner by which a member of a Scheduled Tribe gets the benefit of that status for the purposes of the Constitution throughout the territory of India. It was submitted that the words "for the purposes of this Constitution" must be given full effect. There is no dispute about that. The words "for the purposes of this Constitution" must mean that a Scheduled Caste so designated must have a right under Articles 14, 19(1)(d), 19(1)(e) and 19(1)(f) inasmuch as these are applicable to him in its area where he migrates or where he goes. The expression "in relation to that State" would become nugatory if in all States the special privileges or the rights granted to Scheduled Castes or Scheduled Tribes are carried forward. It will also be inconsistent with the whole purpose of the scheme of reservation. In Andhra Pradesh, a Scheduled Caste or a Scheduled Tribe may require protection because a boy or a child who grows in that area is inhibited or is at disadvantage. In Maharashtra that caste or that tribe may not be so inhibited but other castes or tribes might be. If a boy or a child goes to that atmosphere of Maharashtra as a young boy or a child and

goes in a comparatively different atmosphere or Maharashtra where this inhibition or this disadvantage is not there, then he cannot be said to have that reservation which will denude the children or the people of Maharashtra belonging to any segment of that State who may still require that protection. After all, it has to be borne in mind that the protection is necessary for the disadvantaged castes or tribes of Maharashtra as well as disadvantaged castes or tribes of Andhra Pradesh. Thus, balancing must be done as between those who need protection and those who need no protection i.e. who belong to advantaged castes or tribes and who do not. Treating the determination under Articles 341 and 342 of the Constitution to be valid for all over the country would be in negation, to the very purpose and scheme and language of Article 341 read with Article 14(4) of the Constitution."

**23.** The rule in Marri was again reiterated by another Constitution Bench of the Supreme Court in the Action Committee decision, stating:

"3. On a plain reading of Clause (1) of Articles 341 and 342 it is manifest that the power of the President is limited to specifying the castes or tribes which shall, for the purposes of the Constitution, be deemed to be Scheduled Castes or Scheduled Tribes in relation to a State or a Union Territory, as the case may be. Once a notification is issued under Clause (1) of Articles 341 and 342 of the Constitution, Parliament can by law include in or exclude from the list of Scheduled Castes or Scheduled Tribes, specified in the notification, any caste or tribe but save for that limited purpose the notification issued under clause (1), shall not be varied by any subsequent notification. What is important to notice is that the castes or tribes have to be specified in relation to a given State or Union Territory. That means a given caste or tribe can be a Scheduled Caste or a Scheduled Tribe in relation to the State or Union Territory for which it is specified. These are the relevant provisions with which we shall be concerned while dealing with the grievance made in this petition."

Having posed the question, the Court, in *Action Committee*, read the ratio in *Marri,* and commented as follows:



"It must also be realised that before specifying the castes or tribes under either of the two articles the President is, in the case of a State, obliged to consult Governor of that State. Therefore, when a class is specified by the President, after consulting the Governor of State A, it is difficult to understand how that specification made "in relation to that State" can be treated as specification in relation to any other State whose Governor the President has not consulted. True it is that this specification is not only in relation to a given State whose Governor has been consulted but is "for the purposes of this Constitution" meaning thereby the various provisions of the Constitution which deal with Scheduled Castes/Scheduled Tribes. The Constitution Bench has, after referring to the debates in the Constituent Assembly relating to these articles, observed that while it is true that a person does not cease to belong to his caste/tribe by migration he has a better and more socially free and liberal atmosphere and if sufficiently long time is spent in socially advanced, areas, the inhibitions and handicaps suffered by belonging to a socially disadvantageous community do not truncate his growth and the natural talents of an individual gets full scope to blossom and flourish. Realising that these are problems of social adjustment it was observed that they must be so balanced in the mosaic of the country's integrity that no section or community should cause detriment or discontentment to the other community. Therefore, said the Constitution Bench, the Scheduled Castes and Scheduled Tribes belonging to a particular area of the country must be given protection so long as and to the extent they are entitled to in order to become equals with others but those who go to other areas should ensure that they make way for the disadvantaged and disabled of that part of the community who suffer from disabilities in those areas....

16. We may add that considerations for specifying a particular caste or tribe or class for inclusion in the list of Scheduled Castes/Schedule Tribes or backward classes in a given State would depend on the nature and extent of disadvantages and social hardships suffered by that caste, tribe or class in that State which may be totally non est in another State to which

persons belonging thereto may migrate. Coincidentally it may be that a caste or tribe bearing the same nomenclature is specified in two States but the considerations on the basis of which they have been specified may be totally different. So also the degree of disadvantages of various elements which constitute the input for specification may also be totally different. Therefore, merely because a given caste is specified in State A as a Scheduled Caste does not necessarily mean that if there be another caste bearing the same nomenclature in another State the person belonging to the former would be entitled to the rights, privileges and benefits admissible to a member of the Scheduled Caste of the latter State "for the purposes of this Constitution".

**24.** A later Constitution Bench of the Supreme Court, in its decision in Milind, held that:

"Plain language and clear terms of these Articles show (1) the President under Clause (1) of the said Articles may with respect to any State or Union Territory and where it is a State, after consultation with the Governor, by public notification specify the castes, races or tribes or parts of or groups within the castes, races or tribes which shall for the purposes of the Constitution be deemed to be Scheduled Castes/Scheduled Tribes in relation to that State or Union Territory as the case may; (2) under Clause (2) of the said Articles, a notification issued under Clause (1) cannot be varied by any subsequent notification except by law made by Parliament. In other words, Parliament alone is competent by law to include in or exclude a caste/tribe from the list of Scheduled Castes and Scheduled Tribes specified in notifications issued under Clause (1) of the said Articles. In including castes and tribes in Presidential Orders, the President is authorised to limit the notification to parts or groups within the caste or tribe depending on the educational and social backwardness. It is permissible that only parts or groups within them be specified and further to specify castes or tribes thereof in relation to parts of the State and not to the entire State on being satisfied that it was necessary to do so having regard to social and educational backwardness. The States had opportunity to present their views through Governors when consulted by the



President in relation to castes or tribes, parts or groups within them either in relation to the entire State or parts of State. It appears that the object of clause (1) of Articles 341 and 342 was to keep away disputes touching whether a caste/tribe is a Scheduled Caste/Scheduled Tribe or not for the purpose of the Constitution. Whether a particular caste or a tribe is Scheduled Caste or Scheduled Tribe as the case may be within the meaning of the entries contained in the Presidential Orders issued under Clause (1) of Articles 341 and 342, is to be determined looking to them as they are. Clause (2) of the said articles does not permit any one to seek modification of the said orders by leading evidence that the caste/Tribe (A) alone is mentioned in the Order but caste/Tribe (B) is also a part of caste/Tribe (A) and as such caste/Tribe (B) should be deemed to be a Scheduled Caste/ Scheduled Tribe as the case may be. It is only Parliament that is competent to amend the Orders issued under Articles 341 and 342."

**25.** It would be material here to notice another decision, which is somewhat relevant. The Supreme Court had to deal with a situation where a State sought to sub-divide Scheduled Castes (which had been included in the Presidential notification) into most backward castes. The Supreme Court, again underlined the conclusiveness of the determination by the President, and the exclusive jurisdiction of Parliament to amend it, in the Constitution Bench judgment, reported as **E.V. Chinnaiah v. State of A.P.** (2005) 1 SCC 394. In that decision, it was held that:

"13. We will first consider the effect of Article 341 of the Constitution and examine whether the State could, in the guise of providing reservation for the weaker of the weakest, tinker with the Presidential List by subdividing the castes mentioned in the Presidential List into different groups. Article 341 which is found in Part XVI of the Constitution refers to special provisions relating to certain classes which includes the Scheduled Castes. This article provides that the President may with respect to any State or Union Territory after consultation with the Governor thereof by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled

Castes in relation to that State or Union Territory. This indicates that there can be only one list of Scheduled Castes in regard to a State and that list should include all specified castes, races or tribes or part or groups notified in that Presidential List. Any inclusion or exclusion from the said list can only be done by Parliament under Article 341(2) of the Constitution. In the entire Constitution wherever reference has been made to 'Scheduled Castes' it refers only to the list prepared by the President under Article 341."

**26.** In a Constitution Bench ruling in **Bhaiyalal V. Harikishan Singh** AIR 1965 SC 1557 the Supreme Court noticed that while framing notifications under Articles 341 and 342, the President has the necessary materials and that the executive Government cannot amend it; only Parliament is empowered to amend the Notification under Articles 341(2) and 342(2) of the Constitution, as is underlined by the expression *"but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification"* occurring in each of the said provisions. It was held by the Court that:

"The object of Art. 341(1) plainly is to provide additional protection to the members of the Scheduled Castes having regard to the economic and educational backwardness from which they suffer. It is obvious that in specifying castes, races or tribes, the President has been expressly authorised to limit the notification to parts of or groups within the castes, races or tribes, and that must mean that after examining the educational and social backwardness of a caste, race or tribe, the President may well come to the conclusion that not the whole caste, race or tribe but parts of or groups within then should be specified. Similarly, the President can specify castes, races or tribes or parts thereof in relation not only to the entire State, but in relation to parts of the State where he is satisfied that the examination of the social and education are backwardness of the race, caste or tribe justifies such specification. In fact, it is well-known that before a notification is issued under Art. 341(1), an elaborate enquiry is made and it is as a result of this enquiry that social justice is sought to be done to the castes, races or tribes as may appear to be necessary, and in doing justice, it would obviously be expedient not only to



specify parts or groups of castes, races or tribes, but to make the said specification by reference to different areas in the State. Educational and social backwardness is regard to these castes, races or tribes may not be uniform or of the same intensity in the whole of the State; it may very in degree or in kind in different areas and that my justify the division of the State into convenient and suitable areas for the purpose of issuing the public notification in question."

It is, therefore, evident that the co-relationship between the area or region, and the community concerned, which suffers from social and economic disabilities caused by untouchability (in that area or region) so as to require inclusion, for special treatment as a Scheduled Caste, is the paramount consideration.

**27.** By virtue of Article 341, the Presidential orders made under Sub- Article (1) acquire an exclusive status. But for Articles 341(1) and (2) [or Article 342(1) and (2)], it would have been possible for both the Union and States, to legislate upon, or frame policies, concerning the subject of reservation, vis-a-vis inclusion of Castes/Tribes and the conditions applicable. The presence of Articles 338, 341 and 342 indicates that :

a) Only the President could, as a one- time measure, notify castes/ tribes as Scheduled Castes/Tribes and also indicate conditions attaching to such declaration.

b) There is only one constitutionally sanctioned authority, viz. National Commission enjoined to submit reports in that regard to the President, after due deliberation;

c) Even the authority that originally notified the SC/ST order (The President) loses the right to vary such notification [Article 341(2)];

d) Future inclusions, modifications, variations deletions and amendments to the SC/ST orders can be made only by Parliament.

It is immediately discernible, therefore, that the rationale for migrant citizens (notified as members of a scheduled caste in one region or state) moving from one place to another and not being entitled to claim benefit of reservation (in spite of their belonging to Scheduled Caste in their own State and a caste of that nomenclature being notified in the State when

they migrate) - is not premised on existence of legislative, administrative/ executive control over Union Territories by the Union, as opposed to States. Apparently, that is not a relevant factor for deciding who can enjoy the benefit of reservation. This is because the authority in the case of both Union Territories and States to make an order, including communities in the lists for concerned states/Union Territories is the same, i.e. the President, initially, and later, the Parliament. Also, the President has no greater power in respect of modification/alteration of the order, in the case of Union Territories. He ceases to have any power to vary, amend or modify the Order. Only Parliament has exclusive power by way of legislation to amend an SC/ST Order, in the case of States as well as Union Territories.

**28.** The Scheme and position of the Constitution (Scheduled Castes) Orders is that-

1) Originally a common Presidential Order was made in respect of States in 1950.

2) Another common Presidential Order was made in respect of Union Territories in 1951. The Union Territories Order continues to be in force. It comprehends 3 Union Territories including Delhi and Chandigarh.

3) Separate orders have been made in respect of the Union Territories of Pondicherry and Dadra and Nager Haveli. There is no order in respect of Andaman Nicobar Islands.

4) Amendments were made to the Scheduled Caste/Tribe Orders of the States and Union Territories Order of 1951, by an Acts of Parliament in 1956 and later, in 1976.

**29.** Whenever States' reorganization took place in the past, Parliament exercised its powers under Article 341(2) and Article 342 (2) and provided for specific Castes/Tribes that had to be Scheduled Castes and Scheduled Tribes in relation to the reorganized States/Union Territories. The Scheme of the Constitution Scheduled Caste Orders, more particularly, the Constitution Scheduled Castes (Union Territories) Order, also clarify that Parliamentary intention was to extend benefits of reservation in relation to the Union Territories in terms of the conditions mentioned in the Orders themselves. Therefore, the expansive construction by which



Scheduled Castes for one State are sought to be given benefits in Union Territories, would be contrary to the express intendment of the Orders in relation to the Union Territories, and indeed the Constitution. If Parliamentary intention was that all Scheduled Castes in all States could be considered as Scheduled Castes in all Union Territories, such intention would have been explicit. By the same analogy, if Presidential or Parliamentary intention was to extend the benefit of reservation in Union Territories even to migrants from States having the same Caste nomenclature (as notified in a Union Territory such as Delhi), that intention too would have been explicit. Existence of few caste groupings only *"in relation"* to Delhi, therefore, rules out the claim of migrants from other States/Union Territories.

**29.** The Constitution makers principally had in mind the practice of untouchability while providing for castes to be known as Scheduled Caste or Scheduled Tribes (in the latter case, the *indicia* being backwardness bordering primitiveness). This is clear from a reading of Articles 17, 46,330, 332, 338, 341 and 342 of the Constitution, as noted by the Supreme Court in the decision reported as **Soosai Vs. Union of India** 1985 (Supp) SCC 590. The underlying principle for including or excluding a Caste from the list of Scheduled Castes in relation to State or a Union Territory has been and will remain the same, namely; whether that caste/group suffers from such disability in that area as to warrant its inclusion in the relevant Scheduled Caste Order for the concerned State/Union Territory. This awareness is evident from the decision of the Constitution Bench in the Marri, Action Committee, Milind and Chinnaiah cases. Logically the rule of denial of reservation benefits to persons migrating from one State to another, appear to equally apply in the case of migrants to Union Territories.

**30.** A compelling aspect which the court cannot ignore lightly is that a limited construction of the Rule in Marri's case so as to make a departure in the case of Union Territories would destroy the integrity of a principle which has to apply through-out the country. Conferment or denial of a benefit to a migrant, based on his being a member of Scheduled Caste in the place of his origin, cannot be made to depend upon the existence or otherwise of an administrative unit as a Union Territory or a State. Parliament has the exclusive power to make new States and Union Territories, alter the boundaries of the States/Union Territories, re-

organise States/Union Territories, create/destroy States/Union Territories. In the exercise of such power, Parliament does not even have to seek recourse to Article 368 of the Constitution by virtue of Articles 3 and 4. The law which creates a State or Union Territory or re-organizes boundaries can be passed with a simple majority. Such a law can amend the First Schedule of the Constitution of India. Exercising such power, the Union of India has been re-organized as many as 16 times. Through its exercise many former Union Territories namely, Goa, Andhra Pradesh, Mizoram and Himachal Pradesh, which had been Union Territories at some point or the other, were conferred State-hood. The existence of State or Union Territory boundaries, therefore does not alter the reality about their impermanence. Though a Union, India comprises of destructible states. The latest re-organization in 2000 saw realignment of boundaries and creation of three new states. Thus, the principle that persons of origin in relation to the State/Union Territory concerned, only, being entitled to the benefit of reservation with respect to that Union Territory/State (emphasized in Marri and Action Committee) has to be applied to States as well as Union Territories.

**31.** The decisions, right from Bhaiyalal, to Chinnaiah, all rendered by Constitution Benches have affirmed that:

(i) The Presidential Notifications and Acts are conclusive and binding. They cannot be investigated by the Courts, [Ref. **B. Basavingappa vs. D. Munichinnappa,** 1965(1) SCR 315, **State of Maharashtra vs. Milind,** 2001(1) SCC 4]

(ii) The SC and ST Orders are to be read as they are, and cannot be varied or modified by interpretation;

(iii) Every such Presidential Order (or modification thereof through Parliamentary Act) has consistently insisted that the notified castes or states "in relation" to that state or Union territory are in respect of residents of that territory.

(iv) The Presidential notifications are to be construed strictly as regards matters mentioned therein (*Milind*);

(v) It is permissible to notify scheduled castes/tribes in parts of a State or parts of any area. Such restrictions are not discriminatory, having regard to be purpose of extending benefits to castes that are



backward in relation to a specified area (*Bhaiyalal,* 1965(2) SCR 877).

(vi) No authority, save Parliament is empowered to modify or amend the Orders under Articles 341 and 342 (Bhaiyalal, Marri, Milind);

**32.** Apart from the above, the construction which would result in notified scheduled castes or tribes, in union territories (such as, for instance Andaman and Nicobar, or Daman) having to compete for the limited number of reserved public employment opportunities along with all scheduled castes and tribes, notified in all states and Union Territories (and not in their territories only) would result in over classification. It would also discriminate between the quality of opportunity or access to reservation benefits between citizen and citizen. Whereas in States, the competition would be restricted to those who are members of the notified lists, in Union Territories, the rule would be different; those members who are considered to be scheduled castes or tribes *"in relation to"* that Union territory would have to compete, per force with a large number of people who are not scheduled castes or tribes in relation to such territory. Such a consequence would completely undermine the benefit of reservation, as the result would be that the castes or tribes so notified in relation to the union territory would have vastly reduced chances of getting recruited.

**33.** This Court also notices that in matters of public employment, the State (within the meaning of Article 12) cannot, by virtue of Article 16 (2) be discriminated against on ground of inter alia "place of birth" – a prohibition similar to what is provided under Article 15 (1). However, it is only Parliament, which can make laws prescribing, in regard to a *"class of employment or appointment to an office under the Government or or any local or other authority, within a State or Union territory any requirement as to residence within the State or Union territory"* by virtue of Article 16 (3). This aspect was considered by the Supreme Court in **State of Sikkim v. Surendra Prasad Sharma** 1994 (5) SCC 282 as follows:

> "However, notwithstanding anything in the Constitution, Parliament was empowered to make laws inter alia with respect to any matter referred to in Article 16(3). Thus, Parliament could prescribe by law the requirement as to residence within a State or Union Territory and if such a law is made nothing in Article

16 will stand in the way of such prescription. Since Article 16(3) is in Part III of the Constitution, the law, if made, would clearly be intra vires the Constitution."

**Pradip Tandon v State of U.P.** 1975 (1) SCC 267 and **State of Maharashtra v. Raj Kumar** AIR 1982 SC 1301 are two cases where the reservations based on residence, made by State's notifications or orders, in the absence of Parliamentary enactment, were held unconstitutional. In **Pradeep Jain v Union of India** AIR 1984 SC 1420, it was held that:

"Parliament alone is given the right to enact an exception to the ban on discrimination based on residence and that too only with respect to positions within the employment of a State Government."

The provision of Article 16 (3) read with Articles 341 (2) and 342 (2) invests Parliament, and Parliament only with exclusive jurisdiction to provide for residential qualifications in relation to public employment, even in States. This is consistent with the intention of the Constitution to exclude all other authorities from enacting or providing for residential qualifications. Thus, State Legislatures and other wings such as the Union Executive, whether in relation to state employment or local authority employment, or Union or Union Territory employment, are not competent to make such residential provisions. Consequently, States or even Union Government cannot add to, or subtract from the conditions spelt out by the SC/ST orders, either in relation to states or union territories.

**34.** Constitutions are interpreted differently from other statutes. Their provisions are meant to endure the test of time; at the same time Courts have to ensure that meaning is given to every term and expression in the concerned provision. In **India Cements Ltd. vs. Union of India,** 1990(1) SCC 12, a seven Judge Constitution Bench of the Supreme Court held that:

"16. Courts of law are enjoined to gather the meaning of the Constitution from the language used and although one should interpret the words of the Constitution on the same principles of interpretation as one applies to an ordinary law but these very principles of interpretation compel one to take into account the nature and scope of the Act which requires interpretation. It has



to be remembered that it is a Constitution that requires interpretation. Constitution is the mechanism under which the laws are to be made and not merely an Act which declares what the law is to be...

17. In Re C.P. and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, C.J. of the Federal Court of India relied on the observations of Lord Wright in James v. Commonwealth of Australia and observed that a Constitution must not be construed in any narrow or pedantic sense, and that construction most beneficial to the widest possible amplitude of its powers, must be adopted. The learned Chief Justice emphasised that a broad and liberal spirit should inspire those whose duty it is to interpret the Constitution, but they are not fee to stretch or pervert the language of the enactment in the interest of any legal or constitutional theory, or even for the purposes of supplying omissions or correcting supposed errors. A Federal Court will not strengthen, but only derogate from its position, if it seeks to do anything but declare the law; but it may rightly reflect that a Constitution of a country is a living and organic thing, which of all instruments has the greatest claim to be construed ut res magis valeat quam pereat- 'it is better that it should live than that it should perish'."

This approach was also underlined in Action Committee's case in the following terms:

"The interpretation that the Court must put on the relevant constitutional provisions in regard to Scheduled Castes/Scheduled Tribes and other backward classes must be aimed at achieving the objective of equality promised to all citizens by the Preamble of our Constitution. At the same time it must also be realised that the language of clause (1) of both the Articles 341 and 342 is quite plain and unambiguous. It clearly states that the President may specify the castes or tribes, as the case may be, in relation each State or Union Territory for the purposes of the Constitution."

**35.** The decision of the Supreme Court in **S. Pushpa** (supra) was concerned with the issue of whether the consistent practice of the Govt of Pondicherry, extending SC/ ST status benefits to all classes of SC/ST

candidates, whether from that Union Territory or not, for the purpose of public employment in the administration of the Union Territory, was legal. The court affirmed that practice, holding:

> "These documents show that Government of Pondicherry has throughout been proceeding on the basis that being a Union territory, all orders regarding reservation for SC/ST in respect of posts/services under the Central Government are applicable to posts/services under the Pondicherry administration as well. Since all SC/ST candidates which have been recognized as such under the orders issued by the President from time to time irrespective of the State/Union territory, in relation to which particular castes or tribes have been recognized as SCs/STs are eligible for reserved posts/services under the Central Government, they are also eligible for reserved posts/services under the Pondicherry administration. Consequently, all SC/ST candidates from outside the U.T. of Pondicherry would also be eligible for posts reserved for SC/ST candidates in Pondicherry administration. Therefore, right from the inception, this policy is being consistently followed by the Pondicherry administration whereunder migrant SC/ST candidates are held to be eligible for reserved posts in Pondicherry administration.
>
> We do not find anything inherently wrong or any infraction of any constitutional provision in such a policy. The principle enunciated in **Marri Chandra Shekhar Rao** (supra) cannot have application here as U.T. of Pondicherry is not a State. As shown above, a Union territory is administered by the President through an administrator appointed by him. In the context of Article 246, Union territories are excluded from the ambit of expression "State" occurring therein. This was clearly explained by a Constitution Bench in **T. M. Kanniyan vs. Income Tax Officer** 1968 (2) SCR 103 (AIR 1968 SC 367). In **New Delhi Municipal Council vs. State of Punjab** 1997 (7) SCC 339 the majority has approved the ratio of T. M. Kanniyan and has held that the Union territories are not States for the purpose of Part XI of the Constitution (para 145). The Tribunal has, therefore, clearly erred in applying the ratio of Marri Chandra Shekhar Rao in setting aside the selection and appointment of migrant SC



> candidates.? The above observations were based on the following opinion of the Court: ?Clauses (1) and (2) of Article 16 guarantee equality of opportunity to all citizens in the matter of appointment to any office or of any other employment under the State. Clauses (3) to (5), however, lay down several exceptions to the above rule of equal opportunity. Article 16(4) is an enabling provision and confers a discretionary power on the State to make reservation in the matter of appointments in favour of "backward classes of citizens'' which in its opinion are not adequately represented either numerically or qualitatively in services of the State. But it confers no constitutional right upon the members of the backward classes to claim reservation. Article 16(4) is not controlled by a Presidential Order issued under Article 341(1) or Article 342(1) of the Constitution in the sense that reservation in the matter of appointment on posts may be made in a State or Union territory only for such Scheduled Castes and Scheduled Tribes which are mentioned in the schedule appended to the Presidential Order for that particular State or Union territory. This Article does not say that only such Scheduled Castes and Scheduled Tribes which are mentioned in the Presidential Order issued for a particular State alone would be recognized as backward classes of citizens and none else. If a State or Union territory makes a provision whereunder the benefit of reservation is extended only to such Scheduled Castes or Scheduled Tribes which are recognized as such, in relation to that State or Union territory then such a provision would be perfectly valid. However, there would be no infraction of clause (4) of Article 16 if a Union territory by virtue of its peculiar position being governed by the President as laid down in Article 239 extends the benefit of reservation even to such migrant Scheduled Castes or Scheduled Tribes who are not mentioned in the schedule to the Presidential Order issued for such Union territory. The U.T. of Pondicherry having adopted a policy of Central Government whereunder all Scheduled Castes or Scheduled Tribes, irrespective of their State are eligible for posts which are reserved for SC/ST candidates, no legal infirmity can be ascribed to such a policy and the same cannot be held to be contrary to any provision of law."

**36.** The above observations make it clear that in *Pushpa*, the Supreme

Court took a specific view about how scheduled castes notified in a State are to be treated in relation to employment in Union territories. The judgment also shows that the structure of the Scheduled Caste and Scheduled Tribes, requiring residential qualifications in relation to the States or Union Territories concerned, was not considered. The larger Bench rulings in *Milind* and *Bhaiyalal* clarify conclusiveness of the Presidential Order, and the ruling in *Bhaiyalal* evidences the nuanced nature of the exercise undertaken to determine the extent of backwardness deserving protection. In *Bhaiyalal*, it was noted that educational and social backwardness in regard to the castes, races or tribes may not be uniform or of the same intensity everywhere and that *"it may vary in degree or in kind in different areas and that may justify the division of the State into convenient and suitable areas"*. These was not brought to the notice of the Court in Pushpa, nor were the nuances of the text of the Union Territories Scheduled Caste Order of 1951 brought to its notice. Nevertheless, the fact remains that Pushpa is definitive and categorical on the issue, and constitutes binding precedent for this Court.

**Binding nature of the holding in Pushpa**

**37.** High Courts, and indeed all Courts, are tethered to precedent and the law declared by the Supreme Court by virtue of Article 141 of the Constitution. The doctrine of precedent is essential to ensure consistency and stability in the administration of law or else, if each court is left free to pursue its views regardless of previous judgments of higher courts, or Benches of greater composition, in a hierarchal system, the consequence would be chaos and uncertainty about the law. Here, one recollects the caution administered in **Broom v. Cassell & Co.,** [1972] 1 AER 801 that:

> "it will never be necessary to say so again, that in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers".

The rule was again explained in **Davis v. Johnson,** (1978) 2 WLR 152 in the following words:

> "Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules."



The Supreme Court, speaking through Krishna Iyer, J, in **Ambika Prasad Misra v. State of U.P.** AIR 1980 SC 1762 explained that even though a decision might be based on faulty reasoning or might be unsatisfactorily argued, if it is of a higher court and consequently binding, has to be necessarily followed. The following observations in Salmond's 'Jurisprudence', page 215 (11th edition) was referred to:

> "A decision does not lose its authority merely because it was badly argued, inadequately considered and fallaciously reasoned."

**38.** In this context, the Supreme Court held in **Shyamaraju Hegde vs U. Venkatesha Bhat & Ors** 1988 SCR (1) 340 that:

> "The Full Bench in the impugned judgment clearly went wrong in holding that the two-Judge Bench of this Court referred to by it had brought about a total change in the position and on the basis of those two judgments. Krishnaji's case would be no more good law. The decision of a Full Bench consisting of three Judges rendered in Krishnaji's case was binding on a bench of equal strength unless that decision had directly been overruled by this Court or by necessary implication became unsustainable. Admittedly there is no overruling of Krishnaji's decision by this Court and on the analysis indicated above it cannot also be said that by necessary implication the ratio therein supported by the direct authority of this Court stood superseded. Judicial propriety warrants that decisions of this Court must be taken as wholly binding on the High Courts. That is the necessary outcome of the tier system.

**39.** In view of the above discussion, this Court holds that whatever reservations may exist and might have even been voiced in **Subhash Chandra** about the holding in **S. Pushpa** being contrary to earlier Constitution Bench rulings in Marri, Action Committee, Milind etc., it was not open to a Division Bench of this court, in **Delhi and State Subordinate Selection Board v Mukesh Kumar** (supra) to say that **Subhash Chandra** prevailed, particularly since **S. Pushpa** was by a larger three member Bench. It is true that the concerns and interpretation placed by **Subhash Chandra** flow logically from a reading of the larger

Supreme Court Constitution Bench rulings. Nevertheless, since this Court is bound by the doctrine of precedent, and by virtue of Article 141 has to follow the decision in **Pushpa**, as it deals squarely with the issue concerning status of citizens notified as scheduled castes from a state to a Union Territory, it was not open, as it is not open to this court even today, to disregard **Pushpa**. The Court further notices that the correctness of Subhash Chandra has been referred for decision in the **State of Uttaranchal** case; the matter is therefore at large, before the Constitution Bench, which will by its judgment show the correct approach. Till then, however, **Pushpa** prevails.

**40.** In view of the above discussion about the applicable law, this Court proposes to take up each Writ Petition referred to this Bench.

**WP.No. 7878/2010: Sarv Rural & Urban Welfare Society**

**41.** The writ petitioner, a society incorporated for the upliftment of Backward, scheduled castes and others in Delhi, in education, social and cultural fields, seeks the implementation of the Supreme Court ruling in **Subhash Chandra** and urges that only those castes which are notified as scheduled castes, under the Constitution (Scheduled Castes) Union Territories Order, 1951 for the Union Territory of Delhi should be allowed the benefit of scheduled caste reservations in respect of facilities in Delhi. It is submitted that allowing the benefit to scheduled castes which are not notified in relation to Delhi, or granting it to Scheduled Tribes, for whom no notification exists in Delhi, is contrary to Articles 14 and 16 of the Constitution of India.

**42.** This court has previously held that whatever doubts may exist in respect of the applicability of **Pushpa**, since that is a larger Bench ruling, judicial discipline demands that till the five-judge Bench clarifies the law, or takes a view contrary to Pushpa, this Court is bound by that decision. However, it would be relevant to notice one aspect, on which clarification and guidance would be essential. As noticed earlier, there are only 36 notified castes in the list in respect of (**in relation to**) the Union Territory of Delhi. If **Subhash Chandra** were to be applied, members of those scheduled castes who are **"residents of"** Delhi can avail the benefit. Therefore, as regards entitlement of benefit of reservation to posts under the Govt of NCT of Delhi for the purpose of the Constitution, only such members of the SCs who fulfil the requisites spelt out in the



Presidential Notification for Delhi can legitimately claim it. As regards Central Government posts and services, however, the situation necessarily has to be different. The analogy here can be with All India service, which, conceptually and definitionally is through-out the territories of India. Thus, a person claiming to be Scheduled Caste has to specify that he belongs to a caste notified as Scheduled Caste in one State or one Union Territory and that he is a resident of that State/Union Territory. Fulfilment of that criterion is sufficient for the purpose of Union Government service, since all Scheduled Castes in all States/Union Territories are part of Union of India (however, the converse is not true of State Service or service under Union Territory, where territoriality has to be given effect to). This parity with All India Service, under the Union, is necessary because the Supreme Court, in Marri, did not invalidate the policy, though made aware of it. Further, facilities owned or funded by the Central Government for which admission is on All India basis, can be located anywhere, either in Union Territories or States. Their mere location cannot confer greater benefits to residents of those States or Union Territories.

**43.** The reliefs which the petitioners seek, is in the nature of a general direction, which the court cannot give, having regard to the present state of the law, particularly the binding judgment in Pushpa.

**44.** The writ petitioners cannot, for the above reasons, be granted any reliefs.

**WP No. 5390/2010; WP No. 3223/2011, 3278/2011 and 7717/2010**

**45.** In this case, the writ petitioners had applied for appointment to the post of Lower Division Clerk, pursuant to a public advertisement issued by the Officer of the District and Sessions Judge Delhi, calling for applications in respect of 412 vacancies to that post. Of these, 94 were reserved for OBC candidates, 52 for Scheduled caste candidates, and 47 for Scheduled Tribe candidates. The selection was to be on the basis of performance in the written test, a typing test and also an interview. The written test was held on 7-3-2010; the petitioners' applications were processed, and they were allowed to sit as scheduled caste or scheduled tribe candidates, on the basis of the certificate furnished by them. Their claims were based on their fathers being members of scheduled castes, notified in places i.e. States or Union territories other than Delhi. The writ

petitioners qualified in the written test, and were called for a typing test, which was held on 17-4-2010. All of them qualified in the typing test, and were all asked to appear in the interview, which they did, on 13-5-2010. They were offered appointments by separate letters in June, 2010. The petitioners claim that at this time, they were medically examined, and even their antecedents verified. It was urged that they were working at the time they were offered appointment, and were consequently asked to submit resignation letters, to take up their new appointment as LDCs, which they did. It was submitted that they were informed that their applications for joining were withheld, on account of the judgment of the Supreme Court, in Subhash Chandra. Their counsel submitted that those scheduled caste candidates, who had applied and whose castes were notified in the Scheduled Castes and Tribes Union Territories Order, were, however, allowed to join. It was emphasized that the petitioners have been treated unequally, and discriminated against, without any reason. Having accepted the scheduled caste or scheduled tribe applications, and selected them it was not open to the respondents to deny them the benefit. In WP 816/2011 it is further averred that though the petitioner had qualified and was called for interview, yet again, by a circular dated 13-9-2010 issued by the District Judge, a typing test was called for, in respect of those who had secured between 20 and 29 marks (out of 30 marks) in the previous typing test. For the first time, in respect of the same selection process, after the written test, a typing test and interview was conducted, and the petitioners were declared successful (in the first round) and had not joined, were directed to be treated as general category candidates. This circular (of 13-9-2010) stated, *inter alia*, that:

> "Candidates of SC and OBC candidates who have migrated from outside Delhi and fulfil all conditions of general category candidate, will be called for typing test, if they have secured 74 marks in the written test.
>
> Those who clear the type test with speed of 30 words per minute will be considered for appointment to the post of LDC. Only those candidates will be called for interview who were not interviewed earlier. Those who already joined the service in pursuance of the LDC examination in 2009, shall also have to pass the type test with speed of 30 words per minutes..."

It was submitted that having treated the petitioners like scheduled caste



candidates eligible to compete as such, after conclusion of the entire recruitment process, and declaration of results, of the written test, it was not open to the District Judge to impose further conditions, disqualifying them and treating them as belonging to another, or general category.

**46.** The respondents in the writ petition and the Govt of NCT of Delhi argued that after the decision in **Subhash Chandra**, it became necessary to restrict the benefit of reservation for scheduled castes in relation to the Union Territory of Delhi to only members of those castes who found mention in the Presidential Notification in relation to Delhi. The withholding of appointment cannot be characterized as *arbitrary*, since no selected candidate has a vested right in appointment. For this proposition, reliance was placed on the decision reported as **Sankersan Dash v. Union of India,** AIR 1991 SC 1612. It was also argued that the candidates had to be called for re-typing test in view of the decision of a Division Bench of this Court in **Anupam Garg v District and Sessions Judge,** LPA No. 417/2010. The candidates who had secured between 22 and 29.5 marks in the typing test were called for such re-typing test. The petitioners were not treated as SC/ST but as General category candidates; they did not get the necessary cut off marks in that category.

**47.** The view which this Court expressed, about the binding nature of the Supreme Court's ruling in **Pushpa** prevailing, would apply in this case. There is no doubt that the advertisement in the present case was issued in December, 2009. At that time, the judgment in **Subhash Chandra** had already been delivered (it was pronounced on 4th August, 2009). Yet, the fact remains that being a larger Bench ruling of three judges, **Pushpa** had to prevail. This is highlighted by the view of the Supreme Court in **State Of U.P vs Ram Chandra Trivedi** AIR 1976 SC 2547:

> "It is also to be borne in mind that even in cases where a High Court finds any conflict between the views expressed by larger and smaller benches of this Court, it cannot disregard or skirt the views expressed by the larger benches."

**48.** There is, however, one more aspect which requires to be borne in mind. In view of instructions having been made pursuant to **Subhash Chandra's** judgment, a clarification was sought from the Supreme Court, by way of an application filed by the Government of National Capital Territory of Delhi and Delhi Technological University. The Court referred

to the background facts and the decision rendered in Subhash Chandra & Anr and stated as follows:

> "The present application filed by the Government of N.C.T. of Delhi is for clarification as to whether the judgment delivered in the Civil Appeal would also cover those Scheduled Tribes students who were successful in the written examination and had been selected for counselling before the judgment was delivered. Therefore, in the said application, the following reliefs have been prayed for:
>
> > "a) Pass an order clarifying that the observations made and decision taken by this Hon'ble court in its judgment dated 04.08.2009 in Civil Appeal No. 5092 of 2009 {**Subhash Chandra v Delhi Subordinate Services Selection Board & Ors.**} would not come in way of hinder the admission process of the Appellant-University & other Delhi Government run colleges and polytechnics in filling up seats reserved in favour of Scheduled Tribe candidates for the academic session 2009-2010 only, and can be filled up by Scheduled Tribe candidates immigrating from places outside Delhi; or, in the alternative;
> >
> > b) Pass an order directing the manner in which the seats reserved for Scheduled Tribe candidates in the Applicant-University be filled up for the academic session 2009-2010 only."
>
> Learned Additional Solicitor General appearing in support of the application filed by the Government of NCT of Delhi, submitted that although a notification had not been issued in terms of Article 341 of the Constitution, by way of past practice, students from the Scheduled Tribes category from other States had also been considered for admission in Delhi University. The learned ASG sought further clarification as to whether the judgment was intended to be prospective or whether it intended to cover those candidates who have already been selected for. Two other applications filed by the students who were successful and have been selected for counselling also pray for the same clarification and for a direction that



> they be admitted into the institutions for which they had applied and were successful.
>
> In this situation, we had requested the learned ASG, Mr.Mohan Parasaran, to take instructions from the Government of NCT of Delhi in its Department of and Technical Education as to whether the Scheduled Tribes students, referred to hereinabove, could be accommodated although the first semester was to be completed soon. The learned ASG has produced a copy of instructions received by him from the OSD, DTU & Deputy Director (TTE) Mr. O.P. Shukla, wherein it has been mentioned that if the Delhi Category of Scheduled Tribes students who were successful and had been selected for counselling were to be admitted, special classes would be arranged for them to complete the mandatory teaching requirements of 13 weeks for one semester and thereafter they could catch up with the other students for the second semester in March, 2010. It has also been indicated that loss of study of these students in January and February, 2010 of second semester will be compensated by holding special/ extra classes on Saturdays and Sundays and other vacations. It was also indicated that while issuing directions, the Court should not extend the benefit to Scheduled Tribes candidates who have already taken admission in any Institute/University in Delhi as that would disturb to the entire admission process.
>
> Apart from the learned ASG, we have also heard Mr. Naresh Kaushik, learned counsel, in support of I.A.Nos.9 and 10 and Ms. Lata Krishnamurthy, learned counsel, in respect of I.A.Nso.11 and 12. In addition, we have also heard Mr.D.N. Goburdhan, learned counsel, who had appeared for the appellant in the Civil Appeal. While learned counsel for the applicants were all ad idem in their approach to the matter, Mr.Goburdhan had reservations and submitted that any order that may be passed in these applications would amount to violation of provisions of the Constitution itself. Having considered the submissions made on behalf of the parties, it should first be clarified

that we are only considering whether the judgment and order passed in the Civil Appeal intended to cover even those Scheduled Tribes candidates who had not only participated in the selection process but had also been selected for counselling prior to the delivery of the said judgment. We are of the view that this does not entail invocation of our power under Article 142 of the Constitution and, accordingly, Mr. Goburdhan's submission, has no merit.

We clarify that the judgment delivered in C.A. No. 5092/2009 was intended to take effect prospectively and it was not the intention of the Court that the students who had already applied and had been selected for counselling should also be covered by the same. The High Court had in its judgment indicated that there were no materials on record to prove that the S.T. applicants were migrants. In our view such a consideration is immaterial for our purpose since despite the fact that the notification had been issued under Article 341 of the Constitution, as per past practice, S.T. candidates were being given admission in Delhi educational institutions. Unfortunately, although the applications were made soon after the judgment was delivered, the same could not be taken up for final disposal before the first semester has almost come to an end. In such circumstances, we accept the recommendations of the Department of Training & Technical Education,

Government of NCT of Delhi, and direct that the successful students who had been called for counselling and have not already taken admission in any institution or University in Delhi, would be entitled to admission in the respective institutions for which they had applied for and also direct that special classes be arranged for the students to enable them to catch up with those who are in the process of completing the final semester. Such admission process should be completed, if possible, within a week from date."

(emphasis supplied)



**49.** This Court is of the opinion that the above clarification (about **Subhash Chandra** being prospective) was meant to cover the candidates who had participated in the admission process in **Subhash Chandra's** case. However, that order of the Supreme Court was meant to tide over the hardship that was likely to flow from the implementation of the **Subhash Chandra** judgment. That clarificatory order of the Supreme Court itself was by a two judge Bench of the Supreme Court, and did not consider which of the two decisions, i.e **Pushpa**, or **Subhash Chandra** was correct. In these circumstances, having regard to the decision of the Supreme Court in **Ram Chandra Trivedi's** case (supra) the law and opinion in Pushpa has to prevail, since it is by a larger Bench (than Subhash Chandra). This course is to be followed additionally, on the authority of the decisions of the Supreme Court in **Ganapati Sitaram Balvalkar & Anr. v. Waman Shripad Mage (Since Dead) Through Lrs.,** [1981] 4 SCC 143; **Mattulal v. Radhe Lal,** [1975] 1 SCR 127; **Acharaya Maharajshri Narandrapra- sadji AnandprasadjiMaharaj etc. v. The State of Gujarat& Ors.,** [1975] 2 SCR 317 and **Union of India v Raghubir Singh** AIR 1989 SC 1933. In the last mentioned decision, by a Constitution Bench, the Supreme Court pertinently held that (the):

> "pronouncement of law by a Division Bench of this Court is binding on a Division Bench of the same or a smaller number of Judges, and in order that such decision be binding, it is not necessary that it should be a decision rendered by the Full Court or a Constitution Bench of the Court."

**50.** Some of the petitioners were asked to appear in the re-typing test on account of directions in **Anupam Garg's** judgment, by a Division Bench. In the case of Monika Meena, (the petitioner in W.P. 7717/2010), the respondent's position is that she secured an overall marks of 123 and had got 30 marks in the first typing test, and that since she had produced an ST certificate which showed that her father was a migrant, she could not be given the benefit of reservation. Though she had secured more marks than the last general category candidate (which was 117), she was denied appointment as she was overaged, according to the general category criteria. In the case of Sandeep Soni (W.P. 3278/2011), the facts are that he was allowed to compete as a SC candidate but was asked to later appear in the re-typing test, as the certificate was in relation to a state outside Delhi. He was consequently treated as a general category candidate;

his overall marks are 114, and the last cut off marks in respect of general category candidates is 117.5.

**51.** In all the cases, the writ petitioners' initial claim as Scheduled caste or scheduled tribe candidates had been accepted and they were allowed to compete. They were successful in the recruitment test. Later, they were told about **Subhash Chandra's** judgement. Subsequently, some of them appeared in the re-typing test, necessitated by the judgment of the Division Bench in **Anupam Garg**. This was used as an occasion to treat them as general category candidates. This court is of the opinion that having regard to the clear judgments of the Supreme Court about the binding nature of the judgment of larger Bench decisions, the law declared by **Pushpa** could not have been disregarded, even if there were a judgment by a two judgment decision to the contrary. Furthermore, there was no change in the ground reality between the time when the petitioners initially appeared, and were asked to appear in the re-typing test again. The only object of the re-typing test was to see the proficiency of those who had secured between 20 and 29.5 marks. However, that could not have meant that the respondents unilaterally changed the status of the petitioners – in the middle of the recruitment process- to general category candidates. In the case of Monika Meena, the injustice which has ensued is writ large; she has more than the cut off scored by the last candidate in the general category, and also had scored 30 marks in the typing test. Yet, she is now denied appointment on the ground that as general category candidate she was "overage". On the other hand, she is not overaged, if the original status recognized by the respondents as a reserved category candidate, is continued.

**52.** As a result of the above discussion, it is held that the writ petitioners' claims to be members of scheduled castes and scheduled tribes, having been accepted on the basis of the prevailing understanding that migrant citizens who fall within the description of one or more scheduled castes, or tribes, somewhere in the country (and might not necessarily fit that description in the list in relation to Delhi), based on **Pushpa**, have to be considered and their cases processed for the purpose of appointment. In view of the authoritative pronouncements of the Supreme Court mentioned above, it cannot be said that **Subhash Chandra** overruled **Pushpa**. Their cases for appointment have to be processed, regardless of the circular dated 13-10-2010 issued by the District Judge,



Delhi; they shall be treated as scheduled caste or tribe candidates, for this purpose. These writ petitioners therefore, are entitled to relief.

**Writ Petitions 816/2011, 1713/2011 and 8368/2010**

**53.** The writ petitioners in these proceedings appeared as Other Backward Class (OBC) candidates, for the post of Lower Division Clerk (LDC) advertised by the District Judge. The subject matter of these is similar to those in the batch writ petitions dealt with above [W.P.(C) 5930/2010, 3223/2011, 3278/2011 and 7717/2010]. However, unlike in the other cases, the petitioners are OBC candidates. Their grievance is that though they appeared and were treated as OBC candidates, later, after the decision in Anupam Garg's case, which occasioned a retyping test, their certificates were not accepted.

**54.** The respondents' submission in these cases is that after the initial selection/recruitment process, their results were withheld on account of the decision in **Subhash Chandra's** case. Even though the writ petitioner in W.P.(C) 8368/2010 appeared in the second retyping test, the fact remained that as on the date of her application, the certificate furnished was issued by some authority in Chandigarh. The petitioner, Veena Yadav was born and educated outside Delhi and, therefore, could not claim benefit of reservation as an OBC candidate. Besides these, it is argued that unlike SCs/STs, OBC's stand on an entirely different footing and there is no change in law. The respondents' counsel relied upon the Supreme Court decision in **MCD v. Veena and Ors.** 2001 (6) SCC 571. Learned counsel also relies upon Article 340 of the Constitution of India, which requires the President to appoint a Commission to investigate conditions of backward classes and make recommendations. It is submitted that unlike in the case of Articles 341 and 342 in respect of SCs/STs, there are no similar presidential notifications which have sanctity and primacy for OBCs.

**55.** It can be seen from the above discussion that the writ petitioners in these cases are not members of the SCs/STs. The certificate issued in their cases clearly brought out the fact that they were OBCs from outside Delhi; those certificates were furnished at the time the application was made. In this context Article 340 reads as follows:

> **"340. Appointment of a Commission to investigate the conditions of backward classes -**

(1) The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State and the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission.

(2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

(3) The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament."

**56.** The Supreme Court had occasion to consider the claim of reservation for OBCs under the Constitution in Veena's case. The Court was alive to the fact that OBCs are notified in respect of each State. The Court had to consider the facts from an almost identical fact situation where candidates from one State claimed to be OBCs in another State or in another Union Territory. **Veena** (supra) pertained to the Union Territory of Delhi. The Court held that the OBC certificate issued by one State authority or in respect of a resident of a State with his origins in that State would be inadmissible in another State or Union Territory, for purposes of employment etc., and that the candidate cannot claim be an OBC in the other State. The Court pertinently held as follows:

"6 . Castes or groups are specified in relation to a given State or Union Territory, which obviously means that such caste would include caste belonging to an OBC group in relation to that State or Union Territory for which it is specified. The matters that are to be taken into consideration for specifying a particular caste in a particular group belonging to OBCs would depend on the nature and extent of disadvantages and social hardships suffered by that



caste or group in that State. However, it may not be so in another State to which a person belonging thereto goes by migration. It may also be that a caste belonging to the same nomenclature is specified in two States but the considerations on the basis of which they had been specified may be totally different. So the degree of disadvantages of various elements which constitute the data for specification may also be entirely different. Thus, merely because a given caste is specified in one State as belonging to OBCs does not necessarily mean that if there be another group belonging to the same nomenclature in another State, a person belonging to that group is entitled to the rights, privileges and benefits admissible to the members of that caste. These aspects have to be borne in mind in interpreting the provisions of the Constitution with reference to application of reservation to OBCs."

**57.** It is also clear that in the case of OBCs, the considerations which weigh with the executive government in issuing notifications are different than in the case of the Scheduled Castes and Tribes. The power to issue Notifications is not rigidly conditioned as in the case of Articles 341 and 342; Parliament also does not have exclusive jurisdiction. The degree of backwardness in the case of OBCs is of an entirely different kind than in the case of Scheduled Castes and Tribes. In view of the above discussion, this Court is of the opinion that the above three writ petitions W.P.(C) 816/2011, 1713/2011 and 8368/2010 have to fail. Writ Petition No. 1205/2011

**58.** In this case too, the petitioners had applied for appointment to the post of LDC pursuant to the advertisement issued by the District Judge. The first two petitioners are members of Other Backward Classes (OBC) but whose castes are notified in relation to other states and whose fathers had shifted residence to Delhi. The third and fourth petitioners (Sandeep Kumar and Alaxender Toppo) belong to Scheduled Tribes, notified as such in other states such as Haryana and Bihar. The fifth petitioner is a member of a Schedule Castes notified in Bihar. Their common case is that all of them claimed that their applications were processed and they were permitted to appear in the written examination, subsequently in the typing test and also in the interview (the latter being held on 13.05.2010). It is also stated that they were issued with letters

of appointment in June, 2010, and they underwent medical examination. One petitioner i.e. Radhey Shyam even resigned from his existing service.

**59.** The petitioners aver that in this background, the respondents subsequently took the position that they were not entitled to be treated as reserved category candidates and were, therefore, treated as belonging to the general category. It is stated that their appointments were consequently withheld.

**60.** The position of the respondents during the arguments was similar as in other cases, namely, that since the petitioners claim the benefit as reserved candidates, which was inadmissible in view of the **Subhash Chandra's** judgment, they cannot be appointed to the reserved vacancies.

**61.** As in the case of WP Nos. 816/2011, 1713/2011 and 8368/2010, the first two petitioners' claim for appointment cannot be considered. They belong to OBC not notified as such in Delhi. The petition, as far as they are concerned, has to consequently fail. So far as the other three petitioners (Nos. 3 to 5) are concerned, for the reasons mentioned in Paragraph 49 of this judgment, the respondents have to, on the basis of the ruling in **Pushpa's** case, continue to treat them as Scheduled Castes or Scheduled Tribes candidates, as the case may be. Their cases are to be processed having regard to the last cut off marks obtained by those who were appointed in such reserved category. This writ petition has to, therefore, succeed as far as the third, fourth and fifth petitioners are concerned. It has to fail as regards the first two petitioners.

**W.P. No.1513/2011**

**62.** In this case, the Delhi Jal Board claims to be aggrieved by an order of the Central Administrative Tribunal (C.A.T.) dated 7.9.2010 in O.A. No.2181/2010. The facts are that the applicants before the CAT (Respondent nos.1-8 in the present appeal and hereafter called the general category officers), had challenged the final seniority list drawn by the Delhi Jal Board (hereafter referred to as "the Board"). In that, the Respondent nos.9-11 (who were originally arrayed before the Tribunal as Respondent nos.5-7 and are referred to hereafter as the "SC/ST officers") had been treated as senior to the said general category officers on the basis of their being members of Scheduled Castes or Scheduled Tribes. These general category employees had contended that the said SC/ST



officers were ineligible for the benefit of reservations since their castes were not notified as Scheduled Castes **"in relation to"** Delhi.

**63.** Before the Tribunal, the respondents, i.e., the reserved category employees had relied upon the clarification issued by the Supreme Court in respect of the prospective application of **Subhash Chandra's** judgment. However, the Tribunal held that the clarification was not to any avail and that reasoning in **Subhash Chandra's** case applied retrospectively. The Tribunal also sought to place reliance upon the ruling in **Marri Chandrashekhar Rao** and the **Action Committee** cases.

**64.** We have considered the submissions of the parties. In this case, the reserved category candidates had been appointed to the reserved posts as far back as in 1989 and 1990. Even though the question of their seniority on account of their being members of the Scheduled Castes and Scheduled Tribes did not arise then, nevertheless, the fact remains the Board did not have any grievance; indeed it treated their claim to belong to the members of the Scheduled Castes as valid. If the Tribunal's logic i.e. that such employees or officials cannot be treated as Scheduled Castes or Scheduled Tribes members, were to be upheld, logically, they were also not entitled to hold the post since their appointments were made in the very first instance on the basis of their being members of such Scheduled Castes. Such an unreasonable and wholly inequitable result cannot follow. The other result of the CAT's decision would be that for the purpose of initial appointment, these SC/ST candidates would be treated as such, but for the purpose of seniority, and accelerated promotion, they would be denied reservation benefits. Furthermore, the status of such SC/ST officers could not have been allowed to be challenged after such a long time, i.e after more than two decades. The Tribunal erred in entertaining the applications of the first eight respondents, and ought to have dismissed it, on this short ground, since the issue of status of such SC/ST officers stood settled more than 20 years ago, and could not have been questioned. The finalization of seniority might have arguably led the applicants to approach the Tribunal; however, as to the status of the SC/ST officers, the issue could not have been gone into, since their initial appointments had been finalized long ago.

**65.** These petitions pose a difficult challenge to the High Courts when they are confronted with differing, and at times conflicting judgments

of the Supreme Court. On the one hand, the decision in **Pushpa** (by three judges) is seemingly in conflict with rulings of at least three Constitution Benches of the Supreme Court. However, there cannot be any doubt as to its binding nature, since it pointedly and specifically deals with the question of migrant scheduled tribes and scheduled caste candidates entitlements to reservation benefits under the Constitution, when they move to Union Territories. At the same time, the reasons outlined in Subhash Chandra about the correctness of Pushpa's views are weighty and powerful; yet the fact remains that the said decision was by a Bench of two judges, and could not be construed as having "overruled" **Pushpa**. In fact, the approach adopted by Subhash Chandra has been frowned upon, and the conflict between **Subhash Chandra** and **Pushpa** has been referred to a Constitution Bench in the State of Uttaranchal case. At the same time, the fact that **Pushpa** remains as a binding precedent, cannot be ignored by virtue of the overbearing nature of Article 141 of the Constitution. In this background, the clarification by a two Bench decision that **Subhash Chandra** should operate prospectively, has to be viewed in the context. The two judge Bench was concerned with the effect of **Subhash Chandra**, in respect of those who had applied for admission the process of which had not been completed. The clarification was meant really to cover their cases, and minimize the adverse impact which would have flowed on a strict application of **Subhash Chandra**. However, if that order itself were to be a normative declaration, further inequities would arise, because the binding nature of **Pushpa** has not been undermined in it. Also, in the context of seniority, as in the case of the officials of the Board, if it is held that for purposes of initial employment, scheduled caste and tribe officers who had migrated from states and places other than Delhi, would continue to be treated as possessing that status, but would be denied further benefits, such as seniority positions, and promotions, which they would have otherwise been legitimately entitled to as members of such scheduled castes or tribes (on account of prospective application of **Subhash Chandra's** case), the result would be utterly unjust and inequitable. It would lead to a highly anomalous situation where reservation benefit would be admitted at the stage of appointment but denied for subsequent benefits. This would itself result in violation of Articles 16 (4A) and 16 (4B) of the Constitution. As a result of the above discussion, the present petition deserves to succeed.



**Conclusions**

**66.** This court summarizes its conclusions, as follows:

(1) The decisions in **Marri, Action Committee, Milind** and **Channaiah** have all ruled that scheduled caste and tribe citizens moving from one State to another cannot claim reservation benefits, whether or not their caste is notified in the state where they migrate to, since the exercise of notifying scheduled castes or tribes is region (state) specific, i.e **"in relation"** to the state of their origin. These judgments also took note of the Presidential Notifications, which had enjoined such citizens to be **"residents"** in relation to the state which provided for such reservations.

(2) The considerations which apply to Scheduled Caste and Tribe citizens who migrate from state to state, apply equally in respect of those who migrate from a state to a union territory, in view of the text of Articles 341 (1) and 342 (1), i.e. only those castes and tribes who are notified in relation to the concerned Union Territory, are entitled to such benefits. This is reinforced by the Presidential Notification in relation to Union Territories, of 1951. Only Parliament can add to such notification, and include other castes, or tribes, in view of Articles 341 (2), Article 342 (2) which is also reinforced by Article 16 (3). States cannot legislate on this aspect; nor can the executive – Union or state, add to or alter the castes, or tribes in any notification in relation to a state or Union Territory, either through state legislation or through policies or circulars. Differentiation between residents of states, who migrate to states, and residents of states who migrate to Union Territories would result in invidious discrimination and over-classification thus denying equal access to reservation benefits, to those who are residents of Union Territories, and whose castes or tribes are included in the Presidential Order in respect of such Union Territories. The Pushpa interpretation has led to peculiar consequences, whereby:

(i) The resident of a state, belonging to a scheduled caste, notified in that state, cannot claim reservation benefit, if he takes up residence in another state, whether or not his caste is included in the latter State's list of scheduled castes;

(ii) However, the resident of a state who moves to a Union Territory would be entitled to carry his reservation benefit, and status as member of scheduled caste, even if his caste is not

included as a scheduled caste, for that Union Territory;

(iii) The resident of a Union Territory would however, be denied the benefit of reservation, if he moves to a State, because he is not a resident scheduled caste of that State.

(iv) The resident of a Union Territory which later becomes a State, however, can insist that after such event, residents of other states, whose castes may or may not be notified, as scheduled castes, cannot be treated as such members in such newly formed states;

(v) Conversely, the scheduled caste resident of a state which is converted into a Union Territory, cannot protest against the treatment of scheduled caste residents of other states as members of scheduled caste of the Union Territory, even though their castes are not included in the list of such castes, for the Union Territory.

(3) The ruling in **Pushpa** is clear that if the resident of a state, whose caste is notified as Scheduled caste or scheduled tribe, moves to a Union Territory, he carries with him the right to claim that benefit, in relation to the Union Territory, even though if he moves to another state, he is denied such benefit (as a result of the rulings in **Marri** and **Action Committee**). The ruling in Pushpa, being specific about this aspect vis-a-vis Union Territories, is binding; it was rendered by a Bench of three judges.

(4) The later ruling in **Subhash Chandra** doubted the judgment in **Pushpa**, holding that it did not appreciate the earlier larger Bench judgments in the correct perspective. Yet, **Subhash Chandra** cannot be said to have overruled **Pushpa**, since it was rendered by a smaller Bench of two judges. This approach of **Subhash Chandra** has been doubted, and the question as to the correct view has been referred to a Constitution Bench in the **State of Uttaranchal** case.

(5) By virtue of the specific ruling applicable in the case of Union Territories, in **Pushpa**, whatever may be the doubts entertained as to the soundness of its reasoning, the High Courts have to apply its ratio, as it is by a formation of three judges; the said decision did notice the earlier judgments in **Marri** and **Action Committee**. Article 141 and the discipline



enjoined by the doctrine of precedent compels this Court to follow the **Pushpa** ruling.

(6) In matters pertaining to incidence of employment, such as seniority, promotion and accelerated seniority or promotional benefits, flowing out of Articles 16 (4A) and (4B) of the Constitution, there may be need for clarity, whichever rule is ultimately preferred – i.e the **Pushpa** view or the **Marri** and **Action Committee** view. In such event, it may be necessary for the guidance of decision makers and High Courts, to spell out whether the correct view should be applied prospectively. Furthermore, it may be also necessary to clarify what would be meant by prospective application of the correct rule, and whether such employment benefits flowing after recruitment, would be altered if the **Marri** view is to be preferred.

**67.** In view of the above discussion WP No. 5390/2010; WP No. 3223/2011 3278/2011, 7717/2010 are allowed. The third, fourth and fifth Petitioners in W.P. 1205/2010 are entitled to succeed; the said petition is allowed to that extent. The said petition is dismissed, as far as the first and second writ petitioners are concerned. For the reasons mentioned earlier, W.P.(C) 816/2011, 1713/2011 7878/2010 and 8368/2010 are dismissed. W.P.(C) No. 1513/2011 is allowed, and the impugned order of the Central Administrative Tribunal is set aside. Consequently, in WP No. 5390/2010; WP No. 3223/2011 3278/2011, 7717/2010 as well as WP 1205/2010 (as far as it concerns the third, fourth and fifth Petitioners) the District Judge, and the Govt. of NCT are hereby directed to ensure that the petitioners' cases for appointment to LDC are processed, and they are treated as scheduled caste or schedule tribe candidates, entitled to be considered as such, and appropriate orders made in that regard. This exercise shall be concluded within six weeks from today.

**68.** Having regard to the public importance of the questions which have arisen and have been dealt with, in relation to the interpretation of Articles 16, 341and 342 of the Constitution of India, the Court hereby grants certificate to appeal to the unsuccessful parties, under Article 134A of the Constitution of India, to appeal to the Supreme Court.

**69.** There shall be no order on costs.

**ILR (2013) I DELHI 583**
**WP(C)**

**HDFC BANK LTD. ....PETITIONER**

**VERSUS**

**SATPAL SINGH BAKSHI ....RESPONDENT**

**(A.K. SIKRI, ACJ., SANJAY KISHAN KAUL & RAJIV SHAKDHER, JJ.)**

**WP (C) NO. : 3238/2011 DATE OF DECISION: 13.09.2012**

**Arbitration & Conciliation Act, 1996—Section 8—Recovery of Debts Due to Banks & Financial Institutions Act, 1993 (RDB Act)—Whether the provisions of Arbitration & Conciliation Act, 1996 are excluded in respect of proceedings under Recovery of Debts Due to Banks & Financial Institutions Act, 1993—Held, claim of money by the bank or financial institution against the borrower is a 'right in personam' with no element of any public interest and hence arbitrable—Debt Recovery Tribunal is simply a replacement of Civil Court—No special rights are created in favour of the banks or financial institutions under RDB Act—Matters which come within the scope and jurisdiction of Debt Recovery Tribunal are arbitrable.**

**Ratio Decidendi**

**"If a particular enactment creates special rights and obligations and gives special powers to tribunals which are not with the civil Courts such as Tribunals constitute under the Rent Control Act and the Industrial Disputes Act, the disputes arising under such enactments would not be arbitrable."**

**[As Ma]**



**APPEARANCES:**

**FOR THE PETITIONER** : Mr. Punit K. Bhalla, Ms. Chetna Bhalla, Advocates.

**FOR THE RESPONDENT** : Mr. Parag P. Tripathi, Amicus Curiae with Mr. Anuj Bhandari, Advocate.

**CASES REFERRED TO:**

1. *Booz Allen and Hamilton Inc.* vs. *SBI Home Finance Limited & Ors.,* (2011) 5 SCC 532.
2. *Snehadeep Structures Pvt. Ltd.* vs. *Maharashtra Small-Scale Industries Development Corporation Ltd.,* (2010) 3 SCC 34.
3. *Nahar Industrial Enterprise Ltd.* vs. *Hong Kong and Shanghai Banking Corporation,* (2009) 8 SCC 646.
4. *Kohinoor Creations and Ors.* vs. *Syndicate Bank,* 2005 (2) Arb. LR 324 (Delhi).
5. *Sahebgouda* vs. *Ogeppa,* (2003) 6 SCC 151.
6. *Union of India* vs. *Delhi High Court Bar Association,* (2002) 4 SCC 275.
7. *Executive Engineer, Dhenkanal Minor Irrigiation Division* vs. *N.C. Budharaj,* (2001) 2 SCC 721].
8. *Allahabad Bank* vs. *Canara Bank,* (2000) 4 SCC 406.
9. *Life Insurance Corporation of India* vs. *D.J. Bahadur,* (1981) 1 SCC 315.
10. *Damji Valji Shah* vs. *LIC of India,* AIR 1966 SC 135.

**RESULT:** Petition Dismissed.

**A.K. SIKRI (ACTING CHIEF JUSTICE):**

This writ petition is filed by the HDFC Bank Limited (hereinafter referred to as the bank) questioning the validity of orders dated 9th March, 2011 passed in Appeal No.116/2011 by the Debt Recovery Appellate Tribunal, Delhi (DRAT for short) which had confirmed the orders dated 8th October, 2010 passed by the Debt Recovery Tribunal – II (DRT-II for short) in OA 178/2009. The bank had filed OA before

the DRT for recovery of the outstanding amount against the loan disbursed to the respondent and in this OA, the respondent herein had filed application under Section 8 of the Arbitration and Conciliation Act, 1996 ("Arbitration Act") on the ground that Clause 14.7 of the loan agreement provided for adjudication of disputes through arbitration by a sole arbitrator and, therefore, the respondent prayed for stay of the proceedings of the OA. This application was allowed by the Presiding Officer vide order dated 8th October, 2010 holding that once there was an arbitration agreement between the parties, provisions of the Arbitration Act as contained in Section 8 of the Arbitration Act would prevail over the Recovery of Debts due to Banks and Financial Institutions Act, 1993 ("RDB Act"). The DRT, thus, dismissed the OA as not maintainable giving liberty to the bank to refer the matter to the arbitration as per law. The bank went in appeal but this order is maintained by the DRAT dismissing the appeal in limine. The present writ petition is filed against the aforesaid orders.

**2.** It is clear from the brief description of the factual matrix noted above that the core issue is which of the two enactments, namely, Arbitration Act and RDB Act is to prevail over the other. The Division Bench has framed this legal question in the following format:

> "Whether the provisions of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Arbitration Act) are excluded in respect of proceedings initiated by banks and financial institutions under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as the RDB Act)."

**3.** When the matter came up for hearing before the Division Bench, another judgment of Division Bench of this Court in **Kohinoor Creations and Ors. v. Syndicate Bank,** 2005 (2) Arb. LR 324 (Delhi) was referred to wherein it has been inter alia held that in view of the provisions of Section 34 of the RDB Act, the provisions of Arbitration Act stand excluded and on that basis, it was argued that the view held by DRT and DRAT in the impugned orders did not reflect the correct legal position which was contrary to the aforesaid judgment of this Court. The Division Bench considered it proper that the matter required to be settled by a larger bench giving the following reasons therefor:

> "Learned counsel for the petitioner has referred to a judgment of Division Bench of this court in **Kohinoor Creations and Ors.**



**Vs. Syndicate Bank** 2005 (2) ARBLR 324 Delhi wherein it has been inter alia held that in view of the provisions of section 34 of the RDB Act, the provisions of the Arbitration Act stand excluded. In coming to this conclusion, specific emphasis is laid on sub-section (2) of Section 34 of the RDB Act. Section 34 of the RDB Act reads as under:-

> "34. Act to have over-riding effect-
>
> (1). Save as otherwise provided in sub-section(2), the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.
>
> (2). The provisions of this Act or the rules made there under shall be in addition to, and not in derogation of the Industrial Finance Corporation Act, 1948, the State Financial Corporation Act, 1951, the Unit Trust of India Act, 1963, the Industrial Reconstruction Bank of India Ltd., 1984, the Sick Industrial Companies (Special Provisions) Act, 1985 and the Small Industries Development Bank of India Act, 1989."

The submission of the learned counsel for the petitioner thus is, relying on the aforesaid judgment, that if a claim is over Rs.10 Lakh then jurisdiction of the Civil Court is excluded qua banks and financial institution, and therefore banks and financial institution have to necessarily approach the DRT for recovery of the amount in terms of the RDB Act. In other words, the applicability of the Arbitration Act stands ousted. In our considered view, sub-section(2) of section 34 of the RDB Act only provides that the provision of that Act are in addition to certain acts specified therein. The question which arises for consideration is whether by implication all other Acts not referred to in sub-section (2) of Section 34 are overridden by the provisions of the RDB Act. While considering this aspect, it will have to be borne in mind that firstly, the Arbitration Act was enacted after the enforcement of the RDB Act and secondly, the exclusivity of jurisdiction conferred on the DRTs. is perhaps applicable to public forums as against private forums such as an arbitral tribunal. To test the

proposition, if one were to ask whether the DRT would refuse to pass an order on a compromise application where parties agree to an intercession of an arbitrator on a portion of a claim during the pendency of the matter before it; the answer may perhaps be in the negative. There are therefore, to our mind, several unanswered aspects of the matter which require closer examination.

We are thus of the view that this matter is of some importance and thus the question of law as aforesaid, needs to be settled by a Larger Bench of this court..."

**4.** This is how the matter was placed before this Bench. Keeping in view the importance of the issue involved and also that the respondent has failed to put in appearance inspite of service, we had requested Mr. Parag P. Tripathi, learned senior counsel to assist the Court. Mr. Tripathi stated that after examining the whole matter, he was of the view that RDB Act was a special statute which would prevail over the Arbitration Act. He thus argued on these lines thereby supporting the cause of the bank. Mr.Tripathi opened his submission by explaining the special status of the RDB Act and the raison d'etre behind this enactment. He impressed upon the fact that this Act was enacted in the background of swelling Non Performing Assets (NPAs) and difficulty of banks and financial institutions to recover loans and enforcement of the same. Mostly, these institutions are public financial institutions and monies are public money. The focus was therefore expeditious adjudication and recovery of debts. The validity of the Act was upheld by the Supreme Court in **Union of India v. Delhi High Court Bar Association,** (2002) 4 SCC 275 which set aside the judgment of the High Court. Referring to preamble of the RDB Act, he pointed out that the same provides for "establishment of tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions". Going by the Objects and Reasons behind the RDB Act, it was crystal clear that the purpose was to unlock the locked potentials of NPAs. In this sense, he submitted, RDB Act was special statute enacted for specific purpose. In this context, explaining the concept of a special law or statute, of Mr.Tripathi endeavored to build step by step edifice of his submissions in the following manner:

(a) Section 9 of CPC makes it clear that every party has a right of recourse to civil remedy before a duly constituted



civil court unless the remedy is barred either expressly or by implication. It is also a settled law that any provision ousting the jurisdiction of civil court must be strictly construed. [**Sahebgouda v. Ogeppa,** (2003) 6 SCC 151].

(b) He then explained the working of RDB Act pointing out that RDB Act is relatable to Entry 45 of List I (Banking). Preamble of this Act provides for "establishment of tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions....". Under Section 19, only a bank or a financial institution [as defined under Section 2(d) and (h) of the RDB Act] can trigger the provisions of the RDB Act when the 'debt' [as defined under Section 2(g)] is more than '10 Lakhs [Section 1(4)]. Therefore, RDB Act operates within a very narrow compass and deals with a very special situation of recovery of debts due to banks and financial institutions, which clearly makes it a special law dealing with a specific situation.

(c) On the other hand, Arbitration Act relates to Entry 11A (Administration of Justice) and Entry 13 (Civil Procedure, including Arbitration) of List III. As per the preamble of this Act, it "consolidates and amends the law relating to domestic arbitration, the international arbitration and enforcement of foreign arbitral awards as to define the law relating to Constitution....". Premised on this, submission of Mr. Tripathi was that the Arbitration Act takes within its sweep all possible arbitrations dealing with an exceptionally wide cross sections and possible areas of disputes. Any dispute, which is arbitrable in nature, would be governed by the provision of the Arbitration Act, which exposes its general nature as regards the subject matter of disputes it deals with. Further, an arbitral tribunal is an alternative to civil courts and its jurisdiction would coincide with a civil court [**Executive Engineer, Dhenkanal Minor Irrigiation Division v. N.C. Budharaj,** (2001) 2 SCC 721].

(d) Advancing his plea predicated on his aforesaid submission pointing out the nature of RDB Act and Arbitration Act,

Mr. Tripathi argued that the Arbitration Act is a general statute vis-a-vis RDB Act which is a special statute with regard to recovery of debts of banks and financial institutions and, therefore, the provisions of special statute, i.e. RDB Act, would prevail over those of general statute, i.e. Arbitration Act.

(e) Mr. Tripathi accepted that Arbitration Act may be special statute when it is placed in juxtaposition with the jurisdiction of civil courts to entertain and adjudicate civil disputes inasmuch as in that sense, the Arbitration Act provided for special forum, chosen by the parties who wanted to remain away from the civil court for the adjudication of their *inter se* disputes. His submission, however, was that there have been instances where the same statute has been treated as a special statute vis-a-vis one legislation and as a general statute vis-a-vis another legislation. The issue arose in **Life Insurance Corporation of India v. D.J. Bahadur,** (1981) 1 SCC 315, viz. whether in the context of a dispute between workmen and management (of LIC), the LIC Act or the Industrial Disputes Act is a special statute. It was observed:

"52. In determining whether a statute is a special or a general one, the focus must be on the principal subject matter plus the particular perspective. For certain purposes, an Act may be general and for certain other purposes it may be special and we cannot blur distinctions when dealing with finer points of law.

The Apex Court further held:

"....vis-a-vis 'industrial disputes' at the termination of the settlement as between the workmen and the Corporation the ID Act is a special legislation and the L.I.C. Act a general legislation. Likewise, when compensation on nationalisation is the question, the L.I.C. Act is the special statute."

Similarly in the case of **Damji Valji Shah v. LIC of India,** AIR 1966 SC 135, the Supreme Court held:

"Further, the provision of the special Act, i.e. the LIC Act, will



override the provisions of the general Act, viz., the Companies Act which is an Act relating to companies in general."

He also drew our attention to the decision of **Snehadeep Structures Pvt. Ltd. v. Maharashtra Small-Scale Industries Development Corporation Ltd.,** (2010) 3 SCC 34, where the Supreme Court while dealing with applicability of provisions of the interest on delayed payment to Small Scale and Ancillary Industrial Undertaking Act, 1993 vis-a-vis Arbitration Act, held:

"38. The preamble of Interest Act shows that the very objective of the Act was "to provide for and regulate the payment of interest on delayed payments to small scale and ancillary industrial undertakings and for matters connected therewith or incidental thereto." Thus, as far as interest on delayed payment to Small Scale Industries as well as connected matters are concerned, the Act is a special legislation with respect to any other legislation, including the Arbitration Act. The contention of the respondent that the matter of interest payment will be governed by Section 31(7) of the Arbitration Act, hence, is erroneous. Section 4 of the Interest Act endorses the same which sets out the liability of the buyer to pay interest to the supplier 'notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force.' Thus, Interest Act is a special legislation as far as the liability to pay interest, or to make a deposit thereof, while challenging an award/decree/order granting interest is concerned."

He, thus, impressed that insofar as comparison of RDB Act with Arbitration Act is concerned, RDB Act is to be treated as special statute vis-a-vis Arbitration Act and on the application of settled principle of **generalia specialibus non derogant** the former would prevail over the latter to the limited extent of proceeding initiated by the Banks/Financial Institutions for the recovery of debts.

**5.** In his attempt to carry home these points, other submissions of Mr.Tripathi were as follows:

(i) Section 17 of the RDB Act makes it clear that the DRT alone is to decide the applications of the Banks and Financial Institutions for recovery of debts due to them. Also, Section

18 of the Act clearly bars the jurisdiction of any other court, except High Court and Supreme Court, from entertaining matters specified in Section 17. Furthermore, Section 31 of the Act transfers all such cases pending before any Court to the DRT. It is therefore evident from the scheme of the RDB that an exclusive jurisdiction has been given to the DRT. He argued that the law on this point has already been conclusively settled by the Supreme Court in the matter of **Allahabad Bank v. Canara Bank,** (2000) 4 SCC 406, where the issue was with regard to jurisdiction of DRT and Recovery Officers under the DRT Act vis-a-vis Company Court (when a winding up petition is pending, or a winding up order has been passed). It was held that the adjudication of liability and execution of the certificate in respect of debt payable to banks and financial institutions is within the exclusive jurisdiction of the DRT and the concerned Recovery Officer, and in such a case the jurisdiction of the Company Court under Section 442, 537 and 446 of the Companies Act, 1956 stands ousted.

(ii) On the other hand, the Arbitration Act is a substitute for a civil Court within the meaning of Section 9 to adjudicate civil disputes, subject to the additional limitation where it is a right in rem, which is to be adjudicated. Taking sustenance from the judgment of Supreme Court in the matter of **Booz Allen and Hamilton Inc. v. SBI Home Finance Limited & Ors.,** (2011) 5 SCC 532, he pointed out that the Supreme Court while dealing with the issue of **'arbitrability'** of dispute held that Arbitral Tribunals are **'private fori'** chosen by the parties in place of Courts or Tribunals which are **'public fori'** constituted under the laws of the country. All disputes relating to 'right in personam' are considered to be amenable to arbitration and all disputes relating to **'right in rem'** are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. He attempted to apply the ratio of the aforesaid judgment to the given case arguing that when the legislature has expressly made a particular



kind of dispute to be decided by a public forum, then the same has been by implication excluded from the purview of arbitrability and therefore cannot be decided by a private forum like arbitration.

(iii) Mr. Tripathi also tried to draw support from Section 34 of the RDB Act which provides a non-obstante clause. Section 34(2) stipulates that RDB Act is 'in addition to and not in derogation' to any law or force. On the contrary, the Arbitration Act does not have any non-obstante clause except a limited extent insofar as judicial intervention is concerned as provided in Section 5 of the Arbitration Act. He thus submitted that where there are two Acts, the one having a non-obstante clause will prevail over the other and for this reason also, RDB Act should prevail over Arbitration Act. He also submitted that a finer reading of the provisions of RDB Act, particularly Section 34 thereof, would reveal that application of Arbitration Act had been expressly as well as impliedly excluded. He also submitted that even if the Arbitration Act is a latter Act, the concept of arbitration was well known to Parliament right from Arbitration Act, 1891 through to the Arbitration Act, 1940. Apart from Section 34, even Section 18 of the RDB Act ousts jurisdiction of all other courts in relation to matters specified in Section 17. Since arbitration is an alternative to the jurisdiction of civil courts and its jurisdiction would be confined and in alternative to cases where civil courts have jurisdiction, therefore, when the jurisdiction of civil courts are ousted, it would impliedly oust the jurisdiction of the arbitral tribunal also. It is Section 18 which is somewhat in pari materia with Section 5 of the Arbitration Act.

(iv) Mr. Tripathi concluded his submissions by referring to the judgment of the Supreme Court in **Nahar Industrial Enterprise Ltd. v. Hong Kong and Shanghai Banking Corporation,** (2009) 8 SCC 646 and submitted that the issue at hand stands settled by the aforesaid judgment. In that case, the issue was whether the High Court or Supreme Court has the power to transfer a suit pending

in a Civil Court to DRT. The Court enunciated the law as under:

"117. The Act, although, was enacted for a specific purpose but having regard to the exclusion of jurisdiction expressly provided for in Sections 17 and 18 of the Act, it is difficult to hold that a civil court's jurisdiction is completely ousted. Indisputably the banks and the financial institutions for the purpose of enforcement of their claim for a sum below Rs. 10 lakhs would have to file civil suits before the civil courts. It is only for the claims of the banks and the financial institutions above the aforementioned sum that they have to approach the Debt Recovery Tribunal. It is also without any cavil that the banks and the financial institutions, keeping in view the provisions of Sections 17 and 18 of the Act, are necessarily required to file their claim petitions before the Tribunal. The converse is not true. Debtors can file their claims of set off or counter-claims only when a claim application is filed and not otherwise. Even in a given situation the banks and/or the financial institutions can ask the Tribunal to pass an appropriate order for getting the claims of set-off or the counter claims, determined by a civil court. The Tribunal is not a high powered tribunal. It is a one man Tribunal. Unlike some Special Acts, as for example Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 it does not contain a deeming provision that the Tribunal would be deemed to be a civil court."

**5.** Mr. Puneet Bhalla, learned counsel appearing for the bank adopted the aforesaid arguments. In addition, he heavily relied upon the reasons given by the Division Bench in **Kohinoor Creations** (supra) and submitted that the approach of the Division Bench in the said case was in tune with the legal position which should be maintained.

**6.** From the detailed submissions made by Mr. Tripathi and Mr. Bhalla as noted above and the reading of judgment of the Division Bench in **Kohinoor Creations** (supra), it is clear that the entire rationale sought to be projected is the exclusiveness of the RDB Act to deal with the matters which fall within the jurisdiction of the Debt Recovery Tribunals constituted under the said Act. On that basis, the attempt is to show that all those matters which are covered by the RDB Act for which special machinery in the form of Debt Recovery Tribunal and Debt Recovery



Appellate Tribunal is constituted, such matters come within the sole and exclusive domain of Debt Recovery Tribunal and no other body or forum has any jurisdiction to deal with such disputes.

**7.** There is no doubt that those matters which are covered by the RDB Act and are to be adjudicated upon by the Debt Recovery Tribunal/ Debt Recovery Appellate Tribunal, jurisdiction of civil courts is barred. Up to this point, we are in agreement with the learned counsels. However, the answer to the question posed before us does not depend upon the aforesaid principle. That principle only ousts the jurisdiction of civil courts. Focus of the issue, however, has to be somewhat different viz. even when a special Tribunal is created to decide the claims of banks and financial institutions of amounts more than '10 Lakhs, can the parties by mutual agreement still agree that instead of the Tribunal constituted under the RDB Act, these disputes shall be decided by the Arbitral Tribunal. If answer to this question is in the negative, then those submissions made by the counsels shall prevail. On the other hand, if we find that it is permissible for the parties, by agreement, to agree for domestic forum of their own choice, namely, Arbitral Tribunal under the Arbitration Act to deal with such claims, then the edifice of the apparent forceful submissions of Mr. Tripathi would collapse like house of cards as all those submissions would be relegated to the pale of insignificance.

**8.** No doubt, for determination of disputes the State provides the mechanism in the form of judicial fora, i.e. administration of justice through the means of judicial system established in this country as per the Constitution and the laws. However, it is also recognized that that is not the only means for determination of lis or resolution of conflicts between the parties. Still the parties are given freedom to choose a forum, alternate to and in place of the regular courts or judicial system for the decision of their *inter se* disputes. There has been a recognition of the concept that notwithstanding the judicial system, parties are free to chose their own forum in the form of arbitration. This was first recognized by enacting Arbitration Act, 1891. Introduction of Section 89 in the Code of Civil Procedure by amendment to the said Code in the year 2002 takes this concept further by introducing various other forums, known as Alternate Dispute Resolution. Thus, even when the matter is pending in the Court, parties to the dispute are given freedom to resort to Lok Adalat, conciliation, mediation and also the arbitration.

**9.** All civil societies demand a proper, effective and independent judicial system to resolve the disputes that may arise. Resolution of disputes by Municipal Courts is, therefore, prevalent in all countries and independence of judiciary is endeavoured in democratic set ups. While courts are State machinery discharging sovereign function of judicial decision making, various alternate methods for resolving the disputes have also been evolved over a period of time. One of the oldest among these is the arbitration. This is a forum for dispute resolution in place of municipal court. Important feature of arbitration is that parties to the dispute voluntarily agree to get the disputes decided by one or more persons, rather than the Court. Though the Indian Arbitration and Conciliation Act, 1996 does not contain a definition of "arbitration", Statement of Objects and Reasons contained therein gives an indication of the general principles on which arbitration is founded. These are:

i. The object of arbitration is to ensure a fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.

ii. The parties should be free to agree how their disputes are resolved subject only to such safeguards as are necessary in the public interest.

iii. Intervention of the courts should be restricted.

**10.** Thus, the Courts have not been the only forum for conflict resolutions. As already pointed about above, arbitration in the form of statute was given recognition in the year 1899 though even earlier to that, arbitration in some or other form prevailed in this country. What is important is that arbitration as an alternate to resolution by municipal courts is recognized and in the process, sanctity is attached to the domestic forum which is chosen by the parties themselves. In that sense, party autonomy is recognized as paramount. It is a recognition of the fact that the parties are given freedom to agree how their disputes are resolved. Even the intervention by the Courts is restricted and is minimal.

**11.** What follows from the above? When arbitration as alternate to the civil courts is recognized, which is the common case of the parties before us, creation of Debt Recovery Tribunal under the RDB Act as a forum for deciding claims of banks and financial institutions would make any difference? We are of the firm view that answer has to be in the



negative. What is so special under the RDB Act? It is nothing but creating a tribunal to decide certain specific types of cases which were earlier decided by the civil courts and is popularly known as 'tribunalization of justice'. It is a matter of record that there are so many such tribunals created. Service matters of the civil servants and employees of public bodies/authorities which were hitherto dealt with by the civil courts and the High Court are now given to the Central Administrative Tribunal and State Administrative Tribunals with the enactment of Administrative Tribunals Act, 1985. Disputes of defence personnel are now dealt with by special tribunals called Armed Forces Tribunal constituted under the Armed Forces Tribunal Act, 2007. With the creation of all these special tribunals, the matters which were up to now dealt with by civil courts or High Courts are to be taken up by these tribunals in the first instance. (We would like to point out that in so far as High Court is concerned, constitutional remedy provided under Article 226 of the Constitution of India remains intact as held in **L. Chandrakumar v. Union of India,** (1994) 5 SCC 539. However, it is not necessary to dilate on this issue as that does not have any bearing on the present issue).

**12.** With the creation of these alternate fora with all trappings of the Court and with the decision of the disputes which were hitherto dealt with by the civil courts, can it be said that parties are now totally precluded and prohibited of exercising their choice of domestic forum in the form of arbitral tribunal. Before we answer this question, we would like to refer to the judgment in the case of **Booz Allen and Hamilton Inc.** (supra). The Supreme Court in that case dealt with the issue of **"arbitrability of disputes"** and held that all disputes relating to 'right in personam' are considered to be amenable to arbitration and disputes relating to 'right in rem' are those disputes which are not arbitrable and require to be adjudicated by courts and public tribunals, being unsuited for private arbitration. Law in this respect is explained by the Supreme Court with utmost clarity, precision and erudition in the following terms:

> "32. The nature and scope of issues arising for consideration in an application under Section 11 of the Act for appointment of arbitrators, are far narrower than those arising in an application under Section 8 of the Act, seeking reference of the parties to a suit to arbitration. While considering an application under Section 11 of the Act, the Chief Justice or his designate would not

embark upon an examination of the issue of 'arbitrability' or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application under Section 34 of the Act, relying upon Sub-Section 2(b)(i) of that section.

33. But where the issue of 'arbitrability' arises in the context of an application under Section 8 of the Act in a pending suit, all aspects of arbitrability have to be decided by the court seized of the suit, and cannot be left to the decision of the Arbitrator. Even if there is an arbitration agreement between the parties, and even if the dispute is covered by the arbitration agreement, the court where the civil suit is pending, will refuse an application under Section 8 of the Act, to refer the parties to arbitration, if the subject matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a special court or Tribunal.

34. The term 'arbitrability' has different meanings in different contexts. The three facets of arbitrability, relating to the jurisdiction of the arbitral tribunal, are as under:

> (i) whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the arbitral tribunal) or whether they would exclusively fall within the domain of public fora (courts).
>
> (ii) Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the 'excepted matters' excluded from the purview of the arbitration agreement.
>
> (iii) Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the



> scope of the submission to the arbitral tribunal, or whether they do not arise out of the statement of claim and the counter claim filed before the arbitral tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be 'arbitrable' if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the arbitral tribunal.

35. Arbitral tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the Legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by a public fora (courts and Tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.

36. The well recognized examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

37. It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide: Black's Law Dictionary).

38. Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to sub-ordinate rights in personam arising from rights in rem have always been considered to be arbitrable."

**13.** What is discernible from the above is that all disputes relating to 'right in personam' are arbitrable and choice is given to the parties to choose this alternate forum. On the other hand, those relating to 'right in rem' having inherent public interest are not arbitrable and the parties, choice to choose forum of arbitration is ousted. Examined in this line, it is obvious that a claim of money by the bank or financial institution against the borrower cannot be treated as 'right in rem'. Each claim involves adjudication whether, on the facts of that case, money is payable by the borrower to the bank/financial institution and if so to what extent. Each case is the decision on the facts of that case with no general ramifications. A judgment/decision of the Debt Recovery Tribunal deciding a particular claim can never be 'right in rem' and is a 'right in personam' as it decides the individual case/claim before it with no elements of any public interest.

**14.** Merely because there were huge NPAs and lot of monies



belonging to the banks and financial institutions was stuck up and the legislature in its wisdom decided to create a special forum to have expeditious disposal of these cases would not mean that decisions rendered by Debt Recovery Tribunal come in the realm of 'right in rem'. At the same time, we find from the judgment in **Booz Allen and Hamilton Inc.** (supra) that certain kinds of disputes for which tribunals are created are held to be non-arbitrable. Examples are Rent Control Tribunal under the Rent Control Act and Labour Court/Industrial Tribunal under the Industrial Disputes Act, 1947. Obviously, question that would immediately strike is as to what would be the yardstick to determine some kind of disputes to be decided by the tribunals are non-arbitrable whereas some other disputes become arbitrable. According to us, cases where a particular enactment creates special rights and obligations and gives special powers to the tribunals which are not with the civil courts, those disputes would be non-arbitrable. It is a matter of common knowledge that Rent Control Act grants statutory protection to the tenants. Wherever provisions of Rent Control Act are applicable, it overrides the contract entered into between the parties. It is the rights created under the Act which prevail and those rights are not enforceable through civil courts but only through the tribunals which is given special jurisdiction not available with the civil courts. Likewise, Industrial Disputes Act, 1947 creates special rights in favour of the workman or employers and gives special powers to the industrial adjudicators/tribunals to even create rights which powers are not available to civil courts. Obviously such disputes cannot be decided by means of arbitral tribunals which are substitute of civil courts. On the other hand, in so far as tribunal like Debt Recovery Tribunal is concerned, it is simply a replacement of civil court. There are no special rights created in favour of the banks or financial institutions. There are no special powers given to the Debt Recovery Tribunal except that the procedure for deciding the disputes is little different from that of CPC applicable to civil courts. Otherwise, the Debt Recovery Tribunal is supposed to apply the same law as applied by the civil courts in deciding the dispute coming before it and is enforcing contractual rights of the Banks. It is, therefore, only a shift of forum from civil court to the tribunal for speedy disposal. Therefore, applying the principle contained in **Booz Allen and Hamilton Inc.** (supra), we are of the view that the matters which come within the scope and jurisdiction of Debt Recovery Tribunal are arbitrable.

**15.** Once that conclusion is arrived at, obviously the parties are given a choice to chose their own private forum in the form of arbitration.

**16.** Another significant fact which has to be highlighted is that the bank entered into agreement with the respondent herein on its own standard form formats. The terms and conditions of the loan were set out and decided by the bank. The respondent signed on dotted lines. In this scenario, when it was the proposal of the bank to have an arbitration clause to which the respondent had agreed, bank cannot now be permitted to say that this arbitration clause is of no consequence. Accepting the contention of bank would mean that the arbitration clause is rendered nugatory. It defeats the very effect of the said arbitration clause which was foisted by the bank itself upon the respondent, though in law, it becomes mutually acceptable between the parties.

**17.** Matter can be looked into form another angle as well. Had the bank invoked the arbitration on the basis of aforesaid clause containing arbitration agreement between the parties and referred the matter to the arbitral tribunal, was it permissible for the respondent to take an objection to the maintainability of those arbitration proceedings? Answer would be an emphatic no. When we find that answer is in the negative, the Court cannot permit a situation where such an arbitration agreement becomes one sided agreement, namely, to be invoked by the bank alone at its discretion without giving any corresponding right to the respondent to have the benefit thereof.

**18.** For all the aforesaid reasons, we find that orders of authorities below are without blemish. Finding no merit in this writ petition, the same is dismissed. However, since nobody had appeared on behalf of the respondent, we are not imposing any costs.

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**ILR (2013) I DELHI 602**
**MAC. APP.**

**DELHI TRANSPORT CORPORATION ....APPELLANT**

**VERSUS**

**SHAKEELA PARVEEN & ORS. ....RESPONDENTS**

**(G.P. MITTAL, J.)**

**MAC. APP. NO. : 658/2007 DATE OF DECISION: 01.11.2012**

**Motor Vehicles Act, 1988—Deceased boarded a DTC Bus—After reaching some distance, someone placed a knife on Driver's neck commanding him to stop the DTC bus—During this commotion, the Driver also heard people at the rear say that a person; i.e. Deceased had been killed—After the persons with knives alighted, the Driver reached Police Station and made a statement to I.O.—Deceased was removed to Hospital where he was declared brought dead—Claim Petition filed against DTC by the Legal Heirs—Claims Tribunal held that accident had arisen out of use of Motor Vehicle—In Appeal, Held that—Admittedly the robbers wanted to rob the passengers—Possibly, there was an act by the Deceased to resist the robbery, which led to his stabbing by Deceased—Thus, act of committing robbery was the felonious act intended and act of stabbing or causing death was not originally intended—Therefore, no escape from conclusion that death of deceased was accidental arising out of use of DTC bus.**

**Important Issue Involved:** Deceased liable to compensation if Accident arose out of use of a Motor Vehicle pursuant to a felonious act, which was not intended.

**[An Ba]**

**APPEARANCES:**

**FOR THE APPELLANT** : Mr. Avnish Ahlawat, Advocate.

**FOR THE RESPONDENTS** : Ms. Shantha Devi Raman, Advocate.

**CASES REFERRED TO:**

1. *AXN & Ors.* vs. *John Worboys (1) Inceptum Insurance Company Limited* (2012) EWHC 1730 (QB).
2. *United India Insurance Company Limited* vs. *Kanshi Ram & Ors.* 2006 ACJ 492.
3. *Rita Devi & Ors.* vs. *New India Assurance Company Limited & Anr.* 2000 (5) SCC 113.
4. *Challis* vs. *London and South Western Railway Company* (1905) 2 KB 154.
5. *Nisbet* vs. *Rayne & Burn,* (1910) 1 KB 689.

**RESULT:** Appeal dismissed.

**G.P. MITTAL, J. (ORAL)**

**1.** The sole question raised for determination in the instant Appeal is whether deceased Zamil suffered death in an accident arising out of use of motor vehicle, that is, DTC bus No.DL-1P-9753

**2.** The facts of the case are not very much in dispute. Joginder Singh, the driver of the DTC bus was driving the bus from ISBT to Anand Vihar. Some passengers boarded the bus from Shastri Park, Seelampur and Bihari Colony. At about 7:00 A.M., the bus reached near Jagat Puri when the driver heard an alarm that money has been removed from the pocket. The driver also noticed that somebody had placed a knife at his neck. Thereafter, the person (who had held the knife on the driver's neck) commanded the driver to stop the bus. He heard people saying in the rear of the bus that a person had been stabbed. At Karkari Mor (turning), four boys who were armed with knife alighted from the bus. The driver took the bus to Patparganj Bus Depot. A call was made to the police. The police reached the bus depot where driver Joginder Singh made a statement to the IO on the basis of which FIR No.24 was recorded in Police Station Krishna Nagar.



**3.** Deceased Zamil was removed to SDN hospital where he was declared brought dead. A Claim Petition was filed by the Respondents No.1 to 4 against the Appellant DTC claiming compensation of Rs. 7,50,000/-. During inquiry before the Claims Tribunal the Respondents (the Claimants) tried to set up a case that since the bus was taken to Patparganj Depot instead of nearest hospital deceased Zamil died on account of profuse bleeding from the injuries inflicted by the robbers. The fact that the deceased was not taken to the hospital even after the alleged robbers alighted from the bus is not disputed. In fact, it is an admitted case of the parties and formed part of the FIR lodged by Joginder Singh, the driver of the DTC bus.

**4.** On appreciation of evidence, the Claims Tribunal while relying on **Rita Devi & Ors. v. New India Assurance Company Limited & Anr.** 2000 (5) SCC 113 held that this accident had arisen out of use of a motor vehicle. Since it was a Petition under Section 163-A of the Motor Vehicles Act, 1988 (the Act), the Claims Tribunal accepted the deceased's income as Rs. 40,000/-, deducted one-third towards personal and living expenses and applied the multiplier of 18 as given in the second Schedule to compute the loss of dependency. The Claims Tribunal awarded overall compensation of Rs. 5,10,000/-.

**5.** It is urged by the learned counsel for the Appellant that in Rita Devi the compensation was awarded as the victim was covered as a workman under the Workmen's Compensation Act, 1923. Thus, it is urged that the reliance on Rita Devi is misplaced.

**6.** Mr. Avnish Ahlawat, learned counsel for the Appellant places reliance on the report of House of Lords in **AXN & Ors. v. John Worboys (1) Inceptum Insurance Company Limited** (2012) EWHC 1730 (QB) decided on 25.06.2012 where a taxi driver used to commit rape and rob unwary female passengers who hired the taxi. A number of Claim Petitions were filed against the insurer of the taxi on the ground that bodily injuries were suffered by the victims arising out of use of vehicle on a road. The House of Lords held that the essential character of the journey in question was the use of the vehicle for a criminal purpose and held that the bodily injuries were not suffered by the Claimants *"arising out of the use of the vehicle on a road or other public place within the meaning of RTA 1988, Section 145 (3)(a).*" The judgment cited does not support the Appellant's case. Moreover, the judgment

would not be relevant in view of the authoritative pronouncement of the Supreme Court in Rita Devi.

**7.** In Rita Devi one Dasarath Singh was the driver of an auto rickshaw owned by Lalit Singh. On 22.03.1995 some unknown passengers hired the auto rickshaw from a rickshaw stand. The said auto rickshaw was stolen and dead body of driver Dasarath Singh was recovered by the Appellants on the next day. The auto rickshaw was never recovered. A Claim Petition was filed by the legal heirs of deceased Dasarath Singh for claim of compensation under the Motor Vehicles Act. The Claims Tribunal allowed the Claim Petition on the ground that there was an agreement between the vehicle owner and the Insurance Company to compensate the employer of the vehicle. The statutory liability was fastened on the Respondent Insurance Company to pay the compensation.

**8.** On an Appeal, the Gauhati High Court (Kohima Bench) in M.A. (F) No. 8 (K) 96 took the view that there was no motor accident as contemplated under the Act. The High Court further held that it was a case of murder and not of an accident. The Appeal was accordingly allowed and the judgment and the award made by the Claims Tribunal was set aside. The legal representatives of the deceased auto rickshaw driver preferred an Appeal before the Supreme Court. The Supreme Court relying on **Challis v. London and South Western Railway Company** (1905) 2 KB 154 and **Nisbet v. Rayne & Burn,** (1910) 1 KB 689 drew distinction between the felonious act which accidentally results in death and a murder simpliciter. It was laid down that if the dominant intention of the felonious act is to kill any particular person then such killing is not accidental murder but a murder simpliciter. While if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act then such murder is an accidental murder. Paras 10 and 14 of the report are extracted hereunder:-

> "10. The question, therefore is, can a murder be an accident in any given case? There is no doubt that "murder", as it is understood, in the common parlance is a felonious act where death is caused with intent and the perpetrators of that act normally have a motive against the victim for such killing. But there are also instances where murder can be by accident on a given set of facts. The difference between a "murder" which is not an accident and a "murder" which is an accident, depends on the proximity of the cause of such murder. In our opinion, if the dominant intention of the Act of felony is to kill any particular person then such killing is not an accidental murder but is a murder simpliciter, while if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act then such murder is an accidental murder.
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> x x x x x x x x x x
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> 14. Applying the principles laid down in the above cases to the facts of the case in hand, we find that the deceased, a driver of the autorickshaw, was duty bound to have accepted the demand of fare-paying passengers to transport them to the place of their destination. During the course of this duty, if the passengers had decided to commit an act of felony of stealing the autorickshaw and in the course of achieving the said object of stealing the autorickshaw, they had to eliminate the driver of the autorickshaw then it cannot but be said that the death so caused to the driver of the autorickshaw was an accidental murder. The stealing of the autorickshaw was the object of the felony and the murder that was caused in the said process of stealing the autorickshaw is only incidental to the act of stealing of the autorickshaw. Therefore, it has to be said that on the facts and circumstances of this case the death of the deceased (Dasarath Singh) was caused accidentally in the process of committing theft of the autorickshaw."



**9.** In **Rita Devi** a contention was sought to be raised which is vehemently urged before me that an Insurance Company may be liable to pay the compensation in respect of death of an employee due to a motor vehicle as this would be an employment injury which was negatived by the Supreme Court in Para 15. Para 15 of Rita Devi reads thus:-

> "15. Learned counsel for the respondents contended before us that since the Motor Vehicles Act has not defined the word "death" and the legal interpretations relied upon by us are with reference to the definition of the word "death" in the Workmen's Compensation Act the same will not be applicable while

interpreting the word "death" in the Motor Vehicles Act because according to her, the objects of the two Acts are entirely different. She also contends that on the facts of this case no proximity could be presumed between the murder of the driver and the stealing of the autorickshaw. We are unable to accept this contention advanced on behalf of the respondents. We do not see how the object of the two Acts, namely, the Motor Vehicles Act and the Workmen's Compensation Act are in any way different. In our opinion, the relevant object of both the Acts is to provide compensation to the victims of accidents. The only difference between the two enactments is that so far as the Workmen's Compensation Act is concerned, it is confined to workmen as defined under that Act while the relief provided under Chapter X to XII of the Motor Vehicles Act is available to all the victims of accidents involving a motor vehicle. In this conclusion of ours we are supported by Section 167 of the Motor Vehicles Act as per which provision, it is open to the claimants either to proceed to claim compensation under the Workmen's Compensation Act or under the Motor Vehicles Act. A perusal of the objects of the two enactments clearly establishes that both the enactments are beneficial enactments operating in the same field, hence the judicially accepted interpretation of the word "death" in the Workmen's Compensation Act is, in our opinion, applicable to the interpretation of the word "death" in the Motor Vehicles Act also."

**10.** A similar question fell for consideration before the learned Single Judge of this Court in **United India Insurance Company Limited v. Kanshi Ram & Ors.** 2006 ACJ 492. In the said case, Sohan Lal who was working as a driver with the transport company (owner of the truck) was murdered by the second driver of the truck and goods loaded in the truck were stolen. The learned Single Judge while relying on Rita Devi held that no evidence was led by the Appellant Insurance Company to suggest that the dominant purport of Jeet Singh (the second driver) was to kill Sohan Lal and not to commit theft. The Appeal preferred by the Appellant United India Insurance Company Limited in that case was thus dismissed.



**11.** The present case is squarely covered by the report of the Supreme Court in **Rita Devi** and a judgment of this Court in **Kanshi Ram**.

**12.** Turning to the facts of this case, admittedly the robbers wanted to rob the passengers. There was an alarm that pocket of a passenger has been picked. Possibly either there was some resistance or an objection to the act of robbery by the deceased which led to his stabbing by the robbers. Thus, the act of committing robbery was the felonious act intended by the robbers and the act of stabbing or causing death was originally not intended and the same was caused only in furtherance of the act of robbery. Thus, there is no escape from the conclusion that the death of Zamil in the instant case was accidental arising out of the use of bus No. DL-1P-9753.

**13.** Thus there is no error or infirmity in the impugned judgment. The Appeal is devoid of any merit; the same is accordingly dismissed.

**14.** Fifty percent of the compensation amount was deposited in pursuance of the order dated 07.11.2007 passed by this Court. Rest of the compensation shall be deposited by the Appellant DTC within six weeks.

**15.** By order dated 21.08.2008 25% of the award amount was disbursed in favour of the Claimants. Rest of the amount of compensation already deposited and to be deposited shall be disbursed/held in fixed deposit in terms of the order passed by the Claims Tribunal.

**16.** The statutory deposit of Rs.25,000/- shall be refunded to the Appellant.

**17.** Pending Applications also stand disposed of.

**ILR (2013) I DELHI 609**
**WP (C)**

**SANJEEV K. BHATIA ....PETITIONER**

**VERSUS**

**GOVT. OF NCT OF DELHI & ANR. ....RESPONDENTS**

**(RAJIV SHAKDHER, J.)**

**W.P. (C) NO. : 3464/2010 DATE OF DECISION: 06.11.2012**

**Constitution of India, 1950—Article 226, 265 and Entry 49 in list II of Schedule VII—Petitioner in this petition has been seeking transfer of land in issue in records of respondent no.2 and consequent execution of a lease deed in its favour—Plot in issue has been transferred three times over—Respondent No. 2 had, at one stage, conveyed to petitioner that he was required to pay a sum of Rs. 73,02,291 towards unearned increase vis-a-vis all three transfers which had taken place qua plot—Figure was scaled down to Rs. 15,15,693 and thereafter brought down to a further sum of Rs. 6,79,700 in respect of charges towards unearned increase—A sum of Rs. 14,22,250 was sought to be imposed towards interest, calculated upto 28.04.10—As of now, Respondent No. 2 is seeking to charge Rs. 11,80,200 towards unearned increase charges, in addition to interest amounting to Rs. 1,70,556—Order challanged before HC—Plea taken, all that petitioner was required to pay, if at all, was money towards unearned increase which stood quantified at Rs. 6,79,700—Petitioner, if at all was liable to pay interest for period 07.08.96 till 25.06.01 i.e. for second sale—Respondent No. 2 could not have imposed unearned increase charges on each sale, as was sought to be done—This amounted to unjust**



**enrichment—Per contra plea taken, letters scaling down demand for uneared increase were issued without approval of management and a decision was taken to withdraw said letters—Transfer could be effected in favour of petitioner if, he were to pay balance sum of Rs. 6,71,056 to Respondent No. 2—Held—Respondent No. 2 was wanting to collect charges towards unearned increase in terms of a policy letter dated 27.09.2001 whereas all three transactions took place prior to 27.09.2001—There is no averment whatsoever in affidavit as to when such a decision was taken to withdraw letters relied upon by petitioner and as to whether same was communicated to petitioner—Petitioner was entitled to believe that those letters were written under ostensible authority to convey to him what were charges payable by him towards unearned increase—Unearned increase calculated and conveyed to petitioner was not a conjured up figure but based on Respondent No. 2's Policy Circular of 05.10.2010—There is nothing disclosed in affidavit of Respondent No. 2 which would show as to why figure of Rs. 6,79,700 towards unearned increase conveyed to Petitioner earlier was incorrect and that correct amount towards unearned increase charges ought to have been Rs. 11,80,200—State and its instrumentalities are not, in pure sense, adversial litigants—They have a far greater onus, to place on record all facts as appearing on records, however, inconvenient and unpalatable they may be—Having regard to fact that petitioner has agreed to pay regularization/interest charges for period 07.08.96 till June, 2001 which Respondent No. 2 has calculated at Rs. 1,70,556 all that petitioner can be called upon to pay is said amount—Demand letter dated 28.04.10 is quashed—Respondent No.2 is directed to effect transfer of plot in issue, in name of petitioner, in its record, on petitioner paying a sum of Rs. 1,70,556 to Respondent No. 2 towards regularization charges/**

**interest within a period of two weeks from today—Respondent No. 2 is also directed to execute a lease deed in favour of petitioner qua plot in issue, on payment of aforementioned amount and fulfilment of other formalities—Respondent No. 2 shall do needful within two weeks of petitioner fulfilling requisite formalities.**

**Important Issue Involved:** State and its instrumentalities are not, in the pure sense, adversial litigants. They have a far greater onus, to place on record all facts as appearing on record, however, inconvenient and unpalatable they may be.

**[Ar Bh]**

**APPEARANCES:**

**FOR THE PETITIONER** : Mr. Tarun Sharma, Advocate.

**FOR THE RESPONDENT** : Mr. Sandeep Aggarwal and Mr. K.A. Singh, Advocates.

**RESULT:** Petition Disposed of.

**RAJIV SHAKDHER, J.**

**1.** The petitioner, in this case has been seeking the transfer of the land in issue, being plot no.A-131, situate at Narela Industrial Complex, Narela, Delhi-110 040 admeasuring 350 sq.mtrs. (in short the plot) in the records of respondent no.2, and consequent execution of a lease deed in its favour, since June, 2001. The petitioner has already approached this court twice, once by way of a writ petition, and the second time, by way of a contempt petition. Respondent no.2, which is the main contesting respondent, has shown in this case, as the facts narrated hereinafter would disclose, a complete inability to convey to the petitioner as to what are the exact charges he is required to pay.

1.1 The plot in issue has been transferred three times over. The petitioner acquired ownership of the plot when it was sold the third time around. Respondent no.2 had, at one stage, conveyed to the petitioner



that he was required to pay a sum of Rs.73,02,291/- towards unearned increase vis-a-vis all three transfers which, had taken place qua the plot. This figure was scaled down to Rs.15,15,693/-, and thereafter, brought down to a further sum of Rs.6,79,700/- in respect of charges towards unearned increase. In addition, a sum of Rs.14,22,250/- was sought to be imposed towards interest, calculated upto 28.04.2010. As of now, though, respondent no.2 is seeking to charge Rs.11,80,200/- towards unearned increase charges, in addition to interest amounting Rs. 1,70,556/-.

1.2. The aforesaid synoptic view of the matter, is given, to bring to fore the inability of respondent no.2 to firm up its position on the issue.

**2.** With the aforesaid preface in place, let me give a brief background as to how the present writ petition came to be filed in this court.

2.1 The plot in issue, was provisionally allotted on 07.09.1990, to one Sh. Man Bhawan Singh Jain, by respondent no.2. This allotment was made under a Development Scheme, which required establishment of an industrial park. Sh. Man Bhawan Singh Jain, was handed over possession of the said plot on 23.02.1992.

2.2 On 18.04.1994, Sh. Man Bhawan Singh Jain sold the said plot, to one, M/s. J.M. Sons, for a sum of Rs.3,25,000/-. M/s. J.M. Sons, in turn, sold the said plot, on 07.08.1996, to one Satinder Pal Bhatia, for a sum of Rs.3,70,000/-.

2.3 Mr. Satinder Pal Bhatia, who is the father of the present petitioner, sold the said plot, to the petitioner, on 12.06.2001, for a consideration of Rs.3,90,000/-.

2.4 The petitioner, immediately thereafter, vide letter dated 25.06.2001, approached respondent no.2, with a request to effect the change in ownership, and convey the charges, if any, he was required to pay, in that behalf. The said letter evidently was followed by several other letters dated 12.08.2002, 19.04.2005, 07.06.2005, 19.04.2006 and 07.08.2007.

2.5 Evidently, respondent no.2 made no attempt to comply the request made by the petitioner. In the meanwhile, the petitioner built a factory shed, on the said plot. Consequent thereto, on 27.05.2005, the

petitioner got sanctioned, an industrial electricity connection from the North Delhi Power Limited (NDPL), vide demand note no.89734. Similarly, the Municipal Corporation of Delhi (MCD), in its records, has, it appears, mutated the super structure built on the said plot, in favour of the petitioner. As a matter of fact, the MCD has also assessed, as on 31.03.2006, the built up area qua the super structure erected on the said plot for the purpose of payment of property tax.

2.6 The petitioner, claims that he paid, what according to him, were the requisite dues payable, in the present case, and also, deposited with respondent no.2, true copies of the original title documents alongwith an undertaking to pay applicable unearned increase charges.

2.7 In view of what, the petitioner claims, was a case of deliberate procrastination by respondent no.2 (in not responding to its request for effecting transfer and conveying the charges to be paid in that regard), the petitioner, having been left with no choice, approached this court by way of writ petition, under Article 226 of the Constitution of India. This writ petition was numbered as WP(C) 6841/2007. A single Judge of this court, vide order dated 21.01.2008, disposed of the writ petition, with a direction to respondent no.2, to consider the request of the petitioner, in accordance with applicable policy, subject to the petitioner depositing all lawful charges. Respondent no.2, was required to do the needful within four weeks, and similarly, the petitioner was required to pay the requisite charges within the same time period. On payment of charges and removal of objection, the said respondent was required to pass orders within four weeks, which was required to be communicated in writing to the petitioner. In case, the petitioner was aggrieved by the order eventually passed, he was given liberty to challenge the said order in accordance with law.

2.8 On 04.02.2010, the petitioner had to write to the respondents to comply with the order of this court dated 21.01.2008. It is claimed by the petitioner that even though the concerned officer of respondent no.1, requisitioned the file pertaining to the plot in issue, on 08.02.2008, no orders were passed for reasons best known to the respondents.

2.9 Respondent no.2, however, claimed that it had issued a letter dated 12.03.2008, to the petitioner, (though, the said letter, has not been placed on record) whereby, it evidently communicated to the petitioner that, based on the policy in vogue, the petitioner will have to pay for a



single transfer a sum of Rs.24,34,097/- (as on 31.03.2009), and since, the petitioner was the third transferee, he was required to pay three times the amount; which was quantified, as Rs.73,02,291/-.

**3.** The petitioner, in these circumstances, approached this court for the second time; albeit by way of a contempt petition, on 02.04.2008. The petition was registered as : Cont. Cas(C) 207/2008.

3.1 Evidently, while the contempt petition was pending, respondent no.2 issued yet another communication dated 13.05.2008, to the petitioner, which was in response to the letter of the petitioner dated 13.04.2008. It is in this letter that, a reference was made by respondent no.2, to its earlier letter dated 12.03.2008. There was also a reference to the fact that, a legal notice had been issued on behalf of the original allottee Sh. Man Bhawan Singh Jain, and that, no reply had been received from the petitioner, despite the same being forwarded to him.

3.2 In the contempt petition, on 19.01.2010, a single Judge of this Court directed the respondents to transfer the plot in issue, in terms of order dated 21.01.2008 within four weeks, failing which respondent shall "lose all revenue" and it shall, be deemed the plot in issue is owned by the petitioner.

3.3 It is pertinent to note that respondent no.2, sought to explain the delay by trotting up the excuse that, the original allottee, had raised a dispute by issuing them a legal notice, in 2008. This court, however, brushed aside the said ground taken by respondent no.2, and went on to observe that, no cognizance of a notice issued in 2008 by a person who had been allotted a plot in issue in 1992, could be taken. The learned Judge observed that, a mere issuance of a notice in 2008, would not result in creation of any right in favour of the original allottee.

3.4 Respondent no.2, evidently, was not sure of the unearned increase charges conveyed by it to the petitioner, and therefore, the issue was re-visited at the meeting of the Industrial Land Management Advisory Committee (in short Committee), held on 15.02.2010. The minutes of the meeting dated 16.02.2010, would show that, apparently, the petitioner was called to the meeting.

3.5 The minutes also show that, respondent no.2 recognized the fact that, the petitioner had, intimated to it, the factum of the plot in

issue, being transferred to his name on 25.06.2001. The minutes, also record the fact that, the demand letter conveying the charges payable by the petitioner, to effect the transfer of the plot to his name, could not be intimated, because of the purported dispute raised by the original allottee. Having regard to the orders of this court passed on 21.01.2008 and 19.01.2010, the respondent no.2 recognized the fact that, qua plot in issue its record had to reflect the name of the petitioner as the transferee.

3.6 Based on the recognition of the fact that, three transfers had taken place after the original allotment in 1992 (i.e., on 18.04.1994, 07.08.1996 and thereafter, in favour of the petitioner on 12.06.1996), a decision qua charges to be levied was taken in the following terms :-

> "..After the sales/transactions as per the respective date/year of execution of the sale, i.e., April, 1994, August, 1996 and June, 2001 as per provision of Land Management Guidelines. Further, regularization charges for late intimation will be applicable as per clause 2(iii) with of Land Management Guidelines with regard to first and second sale, till June, 2001 i.e., when the present applicant intimated the transaction. Subject to the payment of the UEI charges and any other dues as payable in accordance with policy, the branch concerned may process the case for change of constitution in terms of the High Court order today itself..."

3.7 Evidently, pursuant to the aforesaid decision taken at the meeting of the committee, a communication was sent to the petitioner, on the very date when, the aforesaid meeting was held i.e., on 15.02.2010. In the said communication, the petitioner was informed that the recommendations of the committee were being put up before the competent authority for approval and, therefore in the meanwhile, he should deposit Rs.79,594/- towards other charges; the details of which were provided in the said communication.

3.8 A formal communication, with regard to the transfer charges payable by the petitioner, pursuant to the decision taken at the aforementioned meeting of the Committee, was sent, on 02.03.2010. The petitioner, was directed to deposit a sum of Rs.15,15,693/-. The amount, was directed to be paid within a period of 30 days from the date of issuance of the said communication; failing which, interest at the rate of 18% p.a. was to be charged.



3.9 The petitioner, appears to have asked for a break-up of the transfer charges, quantified at Rs.15,15,693/- vide communication dated 25.03.2010. Respondent no.2, evidently, vide letter dated 29.03.2010, sent a communication enclosing therewith a break-up of the charges demanded of the petitioner. It is important to detail out the break-up, as it would assist in appreciating, why and how the final conclusion is arrived at in this case by me :-

ORIGINAL ALLOTTEE : SH. M.B.S. JAIN C/80

DATE OF POSSESSION : 23-03-11992 C/113

N.O.C. ISSUED : 27-04-1993 C/127

| | Date of Sale made | Docu-ment | Date of Intimat-ion to DSIIDC | Delay period of Intima-tion | Rate of unearned increased per sq. mt. | Total amount i.e., UEI x350 squ mt. | Charges as per and Manag-ement Guide-lines | |
|---|---|---|---|---|---|---|---|---|
| Ist Sale | To M/s. J.M. Sons (C/196) | Agree-ment to Sale dt. 18/4/94 | 25-06-2001 | 7 years 1 month 7 days | C/321 | Rs.2,27,500 | C/369 ii(iii) (80%) Rs.182000/- | |
| IInd Sale | To Sh. Satinder Pal Bhatia C/190 | Agree-ment to Sale dt. 7/08/1996 | 25-06-2001 | 4 years 10 months 18 days | Rs.780 /- (Year 96-97) | Rs.2,73,000 | (50%) Rs.136500/- | |
| IIIrd Sale | To Sh. Sanjeev Bhati C/183 to C/187 | Sale Agree-ment to Sale dt. 12-06-01 | 25-06 -2001 C/211 | 13 days | Rs.194 1/- (Year 2001-02) | Rs.679700 | Rs.16993/- 2.5% | |
| | | | | | | 11,80,200/ | Rs.33,5493 | Rs.15,15,693/- |

UNEARNED INCREASED : RS.11,80,200.00

REGULARISATION CHARGES : RS. 3,35,493.00

RS.15,15,693.00"

3.10 Importantly, it would be noted that, both communication dated 02.03.2010 and 29.03.2010 was issued by, one, Mr. V.K. Bhatia, Divisional

Manager (Narela); an officer of respondent no.2. Respondent no.2, followed the aforesaid communication with yet another communication dated 16.04.2010, calling upon the petitioner to pay the said transfer charges as per its earlier communication dated 02.03.2010.

**4.** The petitioner, by a letter dated 23.04.2010, made a grievance to respondent no.2, qua the quantification of the transfer charges. The petitioner, conveyed to respondent no.2 that, the charges were exorbitant and unreasonable, and that, he was willing to pay the transfer charges, in accordance with the applicable rules and guidelines, as indicated in the judgment of this court dated 15.09.2004, passed in WP (C) 3087/2003. A copy of the judgment in that case, was annexed to the said letter. It would be important to note that, evidently, in the said case, respondent no.2 had conceded that, transfer charges were not leviable on each sale, and that, 50% of the unearned increase was payable, based on the difference in the value of the plot on the date on which the premium was first paid, and the date of transfer. It was also observed in said case that since, as per the policy letter of 27.09.2001 rates had been enhanced, the enhanced rates would be charged and paid; albeit on a single transfer basis.

4.1 However, the aforesaid communication of the petitioner yielded no result, and consequently on, 28.04.2010, respondent no.2 communicated the impugned demand to the petitioner vide demand notice of even date. The impugned demand letter was also issued, pertinently, by Mr. V.K. Bhatia, Divisional Manager (Narela).

4.2 In the meanwhile, Contempt Case (C) No.207/2008, came up for hearing before a Single Judge of this court, on 04.05.2010. Having regard to the fact that a formal demand letter was issued to the petitioner on 28.04.2010, the petitioner chose to withdraw the contempt petition, and assail, the demand made, by way of an appropriate remedy. 5. It is in this background that the petitioner has filed the present writ petition.

5.1 On the very first date, i.e., 20.05.2010, when the writ petition was moved in this court, the impugned letter dated 28.04.2010 was stayed subject to the petitioner depositing Rs.6,79,700/- which, he admitted, as the amount which was payable by him towards transfer charges.



5.2 Thereafter, the matter was listed from time to time. The material date being : 06.08.2012. On 06.08.2012, when the matter was heard by me, the stand of the parties was recorded. On that date, I was shown a copy of the letter dated 13.12.2010 issued by Mr. V.K. Bhatia, Divisional Manager (Narela) (to whom I have made a reference above) wherein, it was indicated that having regard to the policy contained in circular dated 05.10.2010, the **"total UEI charges"** in the petitioner's case worked out to a sum of "Rs.21,01,950/-" out of which **"Rs.6,79,000/-"** having already been paid by him, he was required to pay, a balance sum of Rs. 14,22,250/-. With this letter, a calculation sheet, showing a break-up of the revised dues, was also appended. The contents of the calculation sheet are as follows :-

"Revised Dues

Name of Allottee : Mr. M.B.S. Jain (C/80)
Date of Allotment : 27.07.1990 (C/72)
Date of Possession : 24.03.1992 (C/1993)
Date of NOC :
Date of Construction : 25.06.2001 (C/21)

Date of deposit of admitted amount of Rs.6,79,700/- : 28.04.2010

RATE OF INTEREST FOR DELAY PERIOD - 18% P.A.

Date of Sales :

Ist sale to Shri J.M. Sons on 18.04.1994 (C/196)
IInd sale to Sh. Satinder Pal Bhatia on 07.08.1996 (C/190)
IIIrd sale to Sh. Sanjeev Bhatia on 12.06.2001 (C/182)

| Details of Sales | Date | Financ-ialYear | Mkt. Rates | UEI Rate | UEI Charges | Delay Period | Interest amount upto 28/04/10 | Total amount recove-rable |
|---|---|---|---|---|---|---|---|---|
| 1. | 2. | 3. | 4. | 5. | 6. | 7. | 8. | (6+8) |
| Ist sale | 18/ 04/94 | 1994-95 | - | 2,27,500/- @ 650/sq.mt | 2,27,500/- | 192.5 months | 6,56,883/- | 8,84,383/- |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| IInd sale | 07/ 08/96 | 1996-97 | - | 2,73,000/- @ 780/sq.mt. | 45,500/- | 165 months | 1,12,613/- | 1,58,113/- |
| IIIrd sale | 12/ 06/01 | 2001-02 | - | 6,79,700/- @1942/ sq.mt. | 4,06,700/- | 8 years 11 months | 6,52,754/- | 10,59,454/ |
| Total | | | | | **6,79,700/-** | | **14,22,250/-** | **21,01,950/-** |

5.3 In so far as, the petitioner was concerned, his counsel took the stand before me that, having paid the principal amount demanded i.e. Rs.6,79,700/-, which was obviously towards unearned increase charges, the only issue which survived was the payment of interest. The interest, as per communication dated 13.12.2010, was quantified at Rs. 14,22,250/-. The petitioner's counsel submitted that the petitioner would be liable to pay interest, for the period 07.08.1996 to 25.06.2001, since no intimation with regard to second sale had been issued to respondent no.2.

5.4 It is in this background that on 06.08.2012, Respondent no.2, was directed by me, to file an affidavit bearing in mind the dates of intimation given at page 12 of the writ petition, in particular, with regard to intimation of first sale (which was transacted between Sh. Man Bhawan Singh Jain and M/s. J.M. Sons). A reference in this regard was made to letter dated 24.11.1994 (sic 24.10.1994), in my order of 06.08.2012.

5.5 It may also be noted that in the first paragraph of my order, there is an inadvertent reference to the fact that demand, in the impugned letter, towards unearned increase charges was Rs.21,01,950/-. To be noted, as indicated above, in the impugned letter the demand raised, towards unearned increase charges is Rs.15,15,693/- which, by the letter of 13.12.2010 (qua unearned increase charges) was brought down to Rs.6,79,000/- (To be noted, as per the table annexed to the said letter the figure apparently ought to be Rs.6,79,700/-). As noticed above, the figure of Rs.21,01,950/- was in fact : referred to in the letter of 13.12.2010. The said demand of Rs.21,01,950/- was inclusive of unearned increase charges of Rs.6,79,700/- and interest amounting to Rs.14,22,250/-.



5.6. In accordance with the aforementioned directions, contained in my order of 06.08.2012, respondent no.2 filed an additional affidavit on 29.08.2012. After detailing out the history of the case, in paragraphs 3(k), 4 and 5 of its affidavit, it accepted the fact that, the concerned Divisional Manager (who as pointed out earlier was, Sh. V.K. Bhatia) had conveyed through two letters, one dated 03.12.2010, and the other, dated 13.12.2010 (to which I have already made a reference above) that, the total charges demanded of the petitioner was a sum of Rs.21,01,950/- which included unearned increase charges of Rs.6,79,700/- and interest quantified at Rs.14,22,250/- calculated upto 28.04.2010.

5.7. In the very same affidavit, it is averred that letters dated 03.12.2010 and 13.12.2010, were issued by the said Divisional Manager Mr. V.K. Bhatia, without formal approval of the Management; specially since the matter was pending before the court. It is also averred that, it was a clear case of **"negligence"** on his part.

5.8 It is, however, admitted in the affidavit that, the said letters are, on the record of respondent no.2, though there is no noting on the file that the said Divisional Manager, was authorised to issue, the aforementioned letters. It is further averred that, after considering the matter, the management had decided to withdraw the letters dated 03.12.2010 and 13.12.2010.

5.9 It is, however, conveyed by the very same affidavit that since, it has now come to light that, respondent no.2 had intimation of the first sale, the amount charged towards regularization charges/interest is scaled down to Rs.1,70,556/-.

**6.** In effect, against the total amount of Rs.15,15,693/- which included Rs.11,80,200/- towards unearned increase and Rs.3,35,493/- towards interest was now pegged at Rs.13,50,756/-, which included Rs.11,80,200/- towards unearned increase charges and Rs.1,70,556/- towards regularization charges/interest.

6.1 Therefore, according to respondent no.2, since the petitioner had already paid a sum of Rs.6,79,700/-, after adjusting the said sum from the total charges, quantified at Rs.13,50,756/-, he was liable to pay a sum of Rs.6,71,056/-. The latest calculations appended to the affidavit dated 29.08.2012 are as follows :-

| | | Date of Sale | Date of intimation to DSIIDC | Period of intimation on | UEI rate per sq. mtr. | UEI Amount. 350 sq. mtr. x UEI rate | Regularization charges as per LMGL | Amount |
|---|---|---|---|---|---|---|---|---|
| Ist sale | To M/s. J.M. Sons C-196/133 | Agreement to Sale 18.04.1994 | 26.10.94 | 6 months 8 days | (1994-95) Rs.650/ | 227500/- | @7.5% | 17063/- |
| IInd sale | To M/s. Sh. Satinder Pal Bhatia C-190 | Agreement to sale 07.08.1996 | 25.06.2001 | 4 year 10 months 18 days | (1996-97) Rs.780/- | 273000/ | @10% for one year and 5% for each 6 months | 136500/- |
| IIIrd sale | To Sh. Sanjeev Bhatia | 12.06.2001 | 25.06.2001 | 13 days | (2001-02) 1942/- | 679700/- | @2.5% | 16993/- |
| | | | | | | 1180200/- | | 170556/- |

| | |
|---|---|
| Total : | 13,50,756.00 |
| Less: Payment received on 26.05.2010 | 6,79,700.00 |
| Balance UEI | Rs.6,71,056.00 |

SUBMISSIONS OF COUNSELS

**7.** In the background of the aforesaid facts, the learned counsel for the petitioner submitted that, all that the petitioner was required to pay, if at all, was the money towards unearned increase charges which, as per respondent no.2's own communications of 03.12.2010 and 13.02.2010, stood quantified at Rs.6,79,700/-.

7.1 The learned counsel further submitted that the petitioner, if at all was liable to pay interest for the period 07.08.1996 till 25.06.2001 i.e., for the second sale. It is submitted that, in so far as, the first and third sales are concerned, admittedly respondent no.2, as it now transpires was aware of the same. Special emphasis was laid by the learned counsel for the petitioner on the judgment of a single Judge of this court dated



15.09.2004, passed in WP(C) 3087/2003. It was contended by the learned counsel for the petitioner that, respondent no.2 could not have imposed unearned increase charges, on each sale, as was sought to be done. This according to the petitioner amounted to unjust enrichment.

7.2 As a matter of fact, in the writ petition, though grounds have been taken to challenge the imposition of unearned increase, as being violative of Article 265 of the Constitution of India and a reference in this behalf is made to other concomitant articles and entry 49 in list II of Schedule VII; during the course of the arguments, it was limited to calculation of appropriate unearned increase payable by the petitioner and appropriate interest/regularization charges.

**8.** On the other hand, the learned counsel for the respondent no.,2 addressed arguments based on the pleadings filed before the court by the said respondent. In particular, reliance was placed on the averments made in the latest affidavit dated 29.08.2012. In sum and substance, it was argued by learned counsel for respondent no.2 that, transfer could be effected in favour of the petitioner if, he were to pay the balance sum of Rs.6,71,056/- to respondent no.2.

REASONS

**9.** Having heard the learned counsels for parties and perused the record at great length, according to me the following aspects emerge in the present case :-

9.1. Respondent no.2 had, in the first instance, vide letter dated 12.03.2008 communicated to the petitioner that he would be liable to pay Rs.24,34,097/-, (as on 31.03.2009), for each transfer. Since there were three sale transactions involved, he would have to pay three (3) times the amount i.e., Rs.73,02,291/- besides other amounts. This stand was reiterated in respondent no.2's letter of 13.05.2008.

9.2. After the meeting of the Committee of 15.02.2010, respondent no.2 drastically scaled down its demand from Rs.73,02,291/- to Rs.15,15,693/-. A break-up of the transfer charges of Rs.15,15,693/- was supplied to the petitioner vide letter dated 29.03.2010. The details furnished by the petitioner showed that, respondent no.2 intended to collect a sum of Rs.11,80,200/- towards unearned increase charges, in addition to, Rs.3,35,493/- towards interest/regularization charges.

9.3. Respondent no.2, evidently was, wanting to collect charges towards unearned increase in terms of a policy letter dated 27.09.2001. What is required to be noticed is that, all three sale transactions took place prior to 27.09.2001. The last sale transaction, in favour of the petitioner, took place on 12.06.2001. This stand of respondent no.2 is demonstrable from the impugned demand letter of 28.04.2010.

9.4. The demand letter of 28.04.2010, was issued by Sh. V.K. Bhatia, Divisional Manager (Narela), an officer of respondent no.2.

9.5. The very same Divisional Manager i.e., Sh. V.K. Bhatia, admittedly issued the two letters dated 03.12.2010 and 13.12.2010 whereby, while scaling down the demand for unearned increase from Rs.11,80,200/- to Rs.6,79,700/-, he increased the interest/regularization charges to Rs.14,22,250/-.

9.6. It is admitted in the affidavit filed on 29.08.2012, on behalf of respondent no.2 that, these letters are on record of respondent no.2. Respondent no.2, however, has taken the stand that the said letters were issued without the approval of the Management, specially in the circumstances that the matter was sub-judice. It was further contended that a decision was taken to withdraw the said letters. There is no averment whatsoever in the said affidavit as to when such a decision was taken to withdraw the said letters, and as to whether, the same was communicated to the petitioner. There is an eloquent silence, in the affidavit of respondent no.2, on this aspect of the matter. By the very same affidavit, the respondent no.2 has reverted to the position of 29.03.2010; albeit with a further modification. While the unearned increase charges have been maintained at Rs.11,80,200/-, the interest/regularization charges have been scaled down in favour of the petitioner, from Rs.3,35,493/- to Rs.1,70,556/-.

9.7. Finally, the record also shows that, the petitioner's reliance on the judgment of this court dated 15.09.2004 passed in WP(C) 3087/2003 may not help his cause as respondent no.2 had filed an appeal being : LPA No.1047/2006 wherein, the Division Bench disposed of the appeal without examining the issue as to whether respondent no.2 had made a concession before the learned Single Judge, in view of the fact that, the judgment of the learned Single Judge had already been implemented. The Division Bench, confined the judgment of the learned Single Judge to the facts and circumstances of that case, without it being held as a binding



precedent, in other matters.

**10.** In view of the above, I have no doubt in mind that, respondent no.2, will have to be held to the figure of unearned increase charges as communicated by Sh. V.K. Bhatia, Divisional Manager (Narela). The said officer has all along communicated with the petitioner; he was, as a matter of fact, instrumental in issuing letters dated 02.03.2010, 29.03.2010 and 16.04.2010, as also the impugned demand dated 28.04.2010.

10.1 The petitioner, therefore, was entitled to believe that, Sh. V.K. Bhatia had the ostensible authority to convey to him what were the charges payable by him towards unearned increase. Apart from this what is pertinent to note, is that, Mr. V.K. Bhatia has not apparently conjured up the figure but has placed reliance on respondent no.2's policy circular of 05.10.2010. There is nothing disclosed in the affidavit of 29.08.2012 which would show as to why the figure of Rs.6,79,700/-, calculated by Sh. V.K. Bhatia, towards unearned increase charges was incorrect, and that, the correct amount towards the unearned increase charges ought to have been Rs.11,80,200/-. Where, admittedly, Sh. V.K. Bhatia went wrong though, was in, in calculating regularization/interest charges. Mr. V.K. Bhatia, overlooked the fact respondent no.2 had knowledge qua the first sale and the third sale. Therefore, as acknowledged by respondent no.2, the figure of regularization charges/interest was wrongly calculated in its record. What is, however, disconcerting is that respondent no.2 kept back these facts, till such time it was directed to file an affidavit by me. State and its instrumentalities are not, in the pure sense, adversial litigants. They have a far greater onus, to place on record all facts as appearing on record, however, inconvenient and unpalatable they may be. This was not how respondent no.2, approached the matter in the present case.

10.2. Apart from the above, even otherwise, I find there is merit in the contention of the petitioner that if, the impugned demand of 28.04.2010, was based on the policy letter of 27.09.2001, how could it be given effect qua transactions in which the petitioner was not involved, being the third purchaser in the entire chain of sale and purchase effected vis-a-vis the plot in issue. However, this aspect need not detain me, in view of the fact that, the petitioner has already agreed to pay unearned increase charges to the extent of Rs.6,79,700/-.

10.3 Thus, having regard to the fact that, the petitioner has also agreed to pay regularization/interest charges for the period 07.08.1996 till

June, 2001 which, respondent no.2 has calculated at Rs.1,70,556/-, all that the petitioner can be called upon to pay is the said amount. Accordingly, the demand letter dated 28.04.2010 is quashed. Respondent no.2, is directed to effect transfer of the plot in issue, in the name of the petitioner, in its record, on the petitioner paying a sum of Rs.1,70,556/- to respondent no.2 towards regularization charges/interest within a period of two weeks from today.

10.4 Respondent no.2 is also directed to execute a lease deed, in favour of the petitioner qua the plot in issue, on payment of the aforementioned amount and fulfillment of other formalities. Respondent no.2 shall do the needful, within two weeks, of the petitioner fulfilling the requisite formalities.

**11.** In addition, respondent no.2 is directed to pay a sum of Rs.20,000/- towards costs to the petitioner. The cost shall be paid within one week from today.

**12.** The writ petition is disposed of, in the aforesaid terms.

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**ILR (2013) I DELHI 625**
**WP (C)**

**UNION OF INDIA & ORS. ....PETITIONERS**

**VERSUS**

**COL. V.K. SHAD ....RESPONDENT**

**(RAJIV SHAKDHER, J.)**

**W.P. NOS. : 499/12, 1138/12 & 1144/12** **DATE OF DECISION: 09.11.2012**

**Right to Information Act, 2005—2(f), 2(h), 2(i), 2(j), 3, 6(2), 7(9), 8(1) (e), (g), (h), (i) and (j), 9, 10(1), 11, 19(8) (b), 20 (1) 22—Regulations For The Army, 1987 (Revised)—Para 37 (c)—Military Security Instructions,**



**2001—Para 193—Constitution of India, 1950—Article 14 and 19(1) (a)—Indian Evidence Act, 1872—Section 126 to 129—CIC directed petitioners to supply entire information to extent not supplied after redacting names and designations of officers who made notings—Captioned Writ Petitions file raising a common question of law whether petitioners are obliged to furnish information to respondent which is retained by them in record, in form of file notings as also opinion of Judge Advocate General (JAG) found in records of respondents under relevant provisions of R.T.I. Act—Plea taken, CIC in several cases, contrary to decision in these cases has taken view that file nothings which include legal opinions, need not be disclosed, as it may effect outcome of legal action instituted by applicant/querist seeking information—This was not permissible as it was a bench of co-equal strength—In case, CIC disagreed with view taken earlier, it ought to have referred matter to a larger Bench—There was a fiduciary relationship between officers in chain of command, and those, who were placed in higher echelons, of what was essentially a pyramidical structure—Since JAG Branch has a duty to act and give advice on matters falling within ambit of its mandate, disclosure of information would result in a breach of fiduciary relationship qua those who give advice and final decision making authority, which is recipient of advice—Held—File notings and opinions of JAG branch are information, to which, a person taking recourse to RTI Act can have access provided it is available with concerned public authority—In institutional set up, it can hardly be argued that notes on file qua a personnel or employee of institution, such as Army, whether vis-a-vis his performance or his conduct, in any manner, can benefit person, who generates note or renders opinion—As a matter of fact, person who generates note or renders opinion is presumed to be a person who is objective and not**

**conflicted by virtue of his interest in matter, on which, he is called upon to deliberate—If that position holds, then it can neither be argued nor can it be conceived that notes on file or opinions rendered in institutional setup by one officer qua working or conduct of another officer brings forth a fiduciary relationship—A denial of access to such information to information seekers, i.e., respondents herein, especially in circumstances that said information is used admittedly in coming to conclusion that delinguent officers were guilty, and in determining punishment to be accorded to them, would involve a serious breach of principles of natural justice, as non-communication would entail civil consequences and would render such a decision vulnerable to challenge under Article 14 of Constitution of India provided information is sought and was not given—Right to information is a constitutional right under Article 19(1) (a) of Constitution of India—Institution i.e. Indian Army in present case cannot by any stretch of imagination be categorized as a client—Legal professional privilege extends only to a barrister, pleader, attorney or Vakil—Persons who have generated opinions and/or notings on file in present case do not fall in any of these categories—Information in issue cannot be denied to Parliament and State Legislature—Therefore, necessary consequences of providing information to respondents should follow—CIC is however advised in future to have regard to discipline of referring matters to a larger bench where a bench of coordinate strength takes a view which is not consistent with view of other—Writ petitions dismissed.**

**Important Issue Involved:** (A) There can be no doubt that file notings and opinions of the JAG branch are information, to which, a person taking recourse to the RTI Act can have access provided it is available with the concerned public authority.



(B) It can neither be argued nor can it be conceived that notes on file or opinions rendered in an institutional setup by one officer qua the working or conduct of another officer brings forth a fiduciary relationship.

(C) Right to Information is a constitutional right under Article 19(1) (a) of the Constitution of India.

(D) The Institution i.e. The Indian Army in the present case cannot by any stretch of imagination be categorized as a client. The legal professional privilege extends only to a barrister, pleader, attorney or Vakil. The persons who have generated opinions and/or the notings on the file in the present case do not fall in any of these categories.

(E) The CIC is advised in future to have regard to the discipline of referring the matters to a larger bench where a bench of co-ordinate strength takes a view which is not consistent with the view of the other.

**[Ar Bh]**

**APPEARANCES:**

**FOR THE PETITIONERS** : Mr. Rajeeve Mehra, Additional Solicitor General with Mr. Ankur Chibber, Ms. Aakriti Jain & Mr. Ashish Virmani, Advocates.

**FOR THE RESPONDENTS** : Col. V.K. Shad, Respondent in person in WP(C) No. 499/2012.

**CASES REFERRED TO:**

1. *Central Board of Secondary Education & Ors.* vs. *Aditya Bandopadhayay & Ors.* (2011) 8 SCC 497.
2. *ICAI* vs. *Suaunak H. Satya and Ors.* (2011) 8 SCC 781.
3. *UOI* vs. *R.S. Khan* 173 (2010) DLT 680].

4. *India* vs. *Subhash Chandra Agarwal,* 166 (2010) DLT 305.

5. *CPIO, Supreme Court of India* vs. *Subhash Chandra Agarwal and Anr.,* WP (C) 288/2009, pronounced on 02.09.2009.

6. *Dale & Carrington Invt. (P) Ltd.* vs. *P.K. Prathaphan:* (2005) 1 SCC 212.

7. *Maj. General Surender Kumar Sahni* vs. *UOI & Ors* in CW No. 415/2003 dated 09.04.2003.

8. *P.V. Sankara Kurup* vs. *Leelavathy Nambier:* (1994) 6 SCC 68.

9. *Lyell* vs. *Kennedy* (1889) 14 AC 437.

10. *Needle Industries (India) Ltd.* vs. *Needle Industries Newey (India) Holding Ltd.* (1981) 3 SCC 333.

11. *Mrs. Nellie Wapshare* vs. *Pierce Lasha & Co. Ltd.* AIR 1960 Mad 410.

**RESULT:** Dismissed.

**RAJIV SHAKDHER, J.**

**1.** The captioned writ petitions raises a common question of law, which is, whether the petitioners are obliged to furnish information to respondent which is retained with them in the record, in the form of file notings as also the opinion of the Judge Advocate General (in short JAG) found in records of the respondents, under the relevant provisions of the Right to Information Act, 2005 (in short the RTI Act).

1.1 In each of the matters, the Union of India (UOI) has been represented by Mr Rajeeve Mehra, ASG, while the respondents have appeared in person. Amongst the respondents, Col. V.K. Shad has appeared in person and made submission at each date, while the same cannot be said of the other two respondents, Col P.P. Singh and Brig. S. Sabharwal who have put in appearances occasionally. In particular, they were absent on the last two dates of hearing when matters were heard at length and the judgment was reserved in the matters. Nevertheless, it appears that, the said officers have adopted and are in sync, with the submissions made by Col. V.K. Shad.



1.2 The orders impugned in each of the captured writ petitions were those passed by the Central Information Commission (in short CIC). In WP(C) 499/2012, two orders are impugned. The principal order being order dated 15.06.2011, followed by a consequential order, dated 13.12.2011.

1.3 In WP(C) 1138/2012, there are, once again, two orders, which are impugned. The first order impugned is, the principal order, which is, dated 04.11.2011. This order follows the decision taken by the CIC in Col. **V.K. Shad's case.** The second order is dated 05.01.2012, which actually, only records, the fact that the matter had been concluded by the order dated 4.11.2011, and that the registry of the CIC had mistakenly relisted the matter. The order however, also goes on to record the fact that, a written representation was submitted on behalf of the petitioners herein that, they be given, thirty (30) days time to comply with the order of the CIC.

1.4 In the third and last writ petition being: WP(C) 1144/2012, the order impugned is dated 9.6.2011.

1.5 In each of these matters, the impugned orders have been passed by the same Chief Information Commissioner.

2. Though the question of law is common, for the sake of completeness, I propose to briefly touch upon the relevant facts involved in each of the matters, which led to institution of the instant writ petitions.

2.1 For the sake of convenience, however, each of the respondents in their respective writ petitions will be referred to by their name.

WP(C) NO. 499/2012

**3.** Col. V.K. Shad was posted to the Army Core Supply Battalion 5628 in September, 2008. Evidently, he fell out with his deputy, one, Lt. Col. B.S. Goraya. Col. V.K. Shad had issues with regard to Lt. Col. B.S. Goraya, which in his perception impacted the functioning in the unit. Lt. Col. B.S. Goraya, on his part made counter allegations against Col. V.K. Shad qua issues which he regarded as infractions of standard operating procedures governing the functioning of the personnel inducted into the army.

3.1 Consequently, in May, 2009, a Court of Inquiry was ordered

by the Head Quarter, Western Command, to investigate, charges of alleged acts of indiscipline leveled by Col. V.K. Shad against Lt. Col. B.S. Goraya as also counter charges made by Lt. Col. B.S. Goraya against Col. V.K. Shad. 3.2 The inquiry against Col. V.K. Shad pertained to the following:

> "(i) Failure to follow laid down procedure with respect to sale of BPL watches, as a non CSD item between October, 2008 and March, 2009.
>
> (ii) Accepting money in Regt Fund Acct amounting to Rs 27,133/- (Rupees twenty seven thousand one hundred and thirty three only) as sponsorship from CSD Liquor Vendors between January and February 2009.
>
> (iii) Improperly passed instructions to JC-664710W Nb Sub AR Ghose of 5682 ASC Bn, JCO in-Charge AWWA Venture Shop, to not to charge the profit of 5% on the sale of fruits and vegetables to MG-IC-Adm. MG ASC and DDST of HQ Western Command."

3.3 As regards, Lt. Col. B.S. Goraya (later on promoted as colonel), what one was able to glean from the record is that, he was charged with making unwarranted allegations against his commanding officer Col. V.K. Shad, relating to counseling letters to officers; non-payment of mess bills; and purchase of pickle from officer's mess fund for personal use.

3.4 The Court Of Inquiry concluded its proceedings in August, 2009. The opinion of the Court Of Inquiry was as follows:

> "....(a) No case of financial misappropriation or malafide intention on part of IC-48682N Co. VK Shad, CO 5682 ASC Bn has been ascertained by the court.
>
> (b) Actions taken by Col VK Shad, CO 5682 ASC Bn in all the cases examined by the court, though at places not strictly as per laid down procedures, are on issues pertaining to routine day to day functioning of the unit and did not have any serious ramifications or resulted in any gross violation/ deviation from the accepted norms.
>
> (c) IC-46873K Lt. Col BS Goraya, 2IC, 5682 ASC Bn has



> apparently got into a personality clash with the CO, Vol. V.K. Shad. In the bargain, the former has attempted to polarize the Unit and in effect adversely affected the day to day functioning of the unit in gen and the CO in particular.
>
> (d) All issues which the court examined were of routine/mundane nature and could have been resolved in the departmental channel itself.
>
> 2. The court recommends that:-
>
> (a) IC 48682N Col V K Shad, CO 5682 Bn (MT) should be suitably counselled for lapses in laid down procedures with reference to the issues of "sale of BPL Watches", "acceptance of sponsorship money from CSD Liquor Vendors" and "Functioning of AWWA Venture Shop, Chandimandir".
>
> (b) IC-46873K Lt. Col B S Goraya, 2IC 5682 ASC Bn (MT) is recommended to be posted out of the Unit forthwith as the presence of the offr in the Bn as 2IC, is detrimental to the administrative and operational efficiency of the Bn.
>
> (c) Suitable Disciplinary/administrative action be initiated against IC-46873K Lt Col BS Goraya for leveling baseless allegations against Col VK Shad, CO on routine/ mundane issues and acting in a manner not befitting the Second in Command of the Bn by adversely affecting the functioning of the Bn....."

3.5 It appears that the reviewing authority, which in this case was the Commander P.H. & H.P(1) Sub Area, differed with the opinion of the Court Of Inquiry, and thus, recommended, initiation of administrative and disciplinary action against Col. V.K. Shad. In so far as Lt. Col. B.S. Goraya was concerned, in addition to initiating administrative action; a recommendation was also made that, he should be posted out of the unit forthwith as the presence of the said officer in the battalion as the second-in-command was detrimental to the administrative and operational efficiency of the Battalion.

3.6 The matter reached the next level of command which was the General Officer Commanding (GOC) Head Quarters 2 Corps (GOC-in-Chief).

3.7 The GOC-in-Chief, while partially agreeing with the findings and opinion of the Court Of Inquiry, noted that, it agreed with the recommendations of the Commander P.H. & H.P. (1) Sub Area. In conclusion the GOC-in-Chief, while recommending administrative action against both Col. V.K. Shad and Lt. Col. B.S. Goraya; and concurring with the view that Lt. Col. B.S. Goraya needed to be posted outside the battalion 5682 - proceeded to convey his severe displeasure (non-recordable) to Col. V.K. Shad.

3.8 This direction was issued on 10.7.2010, though after a show cause notice was issued to Col. V.K. Shad on 8.4.2010, to which he was given an opportunity to file his defence/reply.

**4.** It is in this background that Col. V.K. Shad vide an application dated 23.8.2010, took recourse to the RTI Act seeking information with regard to the following:

> "(a) Opinion and findings of the C of I convened by the convening order ref in para 1 above.
>
> (b) Recommendations on file of staff at various HQs.
>
> (c) Recommendations of Cdrs in chain of comd.
>
> (d) Directions of the GOC-in-C on the subject inquiry.
>
> (e) Copies of all letters written by Lt. Col. B.S. Goraya where he has leveled allegations against me to HQ Western Command including those written to HQ Corps and HQ PH & HP(1) Sub Area till date. I may also be info of action taken, if any, against Lt Col BS Goraya for his numerous acts of indiscipline."

**5.** The PIO, vide communication dated 29.9.2010, declined to give any information. The said communication, however, did indicate that under Army Rule 184 (Amended), the statement of exhibits of the Court Of Inquiry proceedings are made available to those persons whose character and military reputation is in issue in the proceedings before the Court Of Inquiry. The officer was advised by the said communication to apply accordingly.

**6.** Being aggrieved, Col. V.K. Shad, approached the first appellate authority. The first appellate authority agreed with the view taken by the PIO except, with regard to, the denial of access to letters written by Lt.



Col. B.S. Goraya to the Head Quarters, Western Command including those written to Head Quarter 2 Corps and Head Quarters PH & HP (1) Sub Area. The rationale employed by the first appellate authority was that once investigation were over, copies of letters written by Lt. Goraya uptil March, 2010 could be provided to Col. V.K. Shad. In addition to the above, a further direction was issued, which was, to inform Col. V.K. Shad as regards the action, if any, initiated, against Lt. Col. B.S. Goraya.

**7.** Not being satisfied, Col. V.K. Shad, approached the CIC. The CIC, vide order dated 15.06.2011, directed the petitioners to supply to Col. V.K. Shad, the entire information, to the extent not supplied, within a period of four weeks from the date of the order.

**8.** Since, there was a failure, on the part of the petitioners to comply with the directions of the CIC, within the time stipulated, a complaint was lodged by the Col. V.K. Shad, with the CIC, on 2.8.2011. Accordingly, a show cause notice was issued by the CIC, on 6.9.2011, to the PIO, Head Quarter Western Command. The notice was made returnable on 27.9.2011.

8.1 Vide communication dated 19.9.2011, the hearing before the CIC was rescheduled for 5.10.2011. By yet another notice dated 26.9.2011, the hearing was, once again, rescheduled for 12.10.2011.

8.2 At the hearing held on, 12.10.2011, the CIC extended the time for implementation of its order by a period of (40) days, at the request of the CPIO. The proceedings were posted for 1.12.2011.

8.3 By a notice dated 29.11.2011, the said proceedings, were rescheduled for 30.12.2011. On 30.12.2011, the CIC passed the second impugned order, in view of non-compliance of its earlier order dated 15.6.2011. By order dated 30.2.2011, the CIC issued a show cause notice to the then PIO, as to why, penalty of Rs 25000 should not be imposed on him under Section 20(1) of the RTI Act, for failure to implement its order. A show cause notice was also issued to the Secretary, Government of India, Ministry of Defence, as to why compensation to the tune of Rs 50,000/- should not be awarded to Col. V.K.Shad, under the provisions of Section 19(8)(b) of the RTI Act, for failure to supply information, in compliance, with its orders. The personal appearance of the two named officers alongwith their written representation, was also directed. The matter was posted for further proceedings, on 7.2.2012.

8.4 It is in this background that writ petition 499/2012, was moved in this court, on 24.01.2012 when, the impugned orders in so far as it directed provision of the opinion of the JAG branch, was stayed.

WP(C) No. 1138/2012

**9.** In this case a Court Of Inquiry was ordered by the Head Quarter Central Command, to investigate circumstances in which, one (1) rifle 5.56 mm INSAS alongwith one (1) magazine and 40 (forty) cartridges, SAS 5.56 mm Ball INSAS, from 40 Company ASC (Sup) Type 'D', was lost on the night of 14/15 January, 2006 and thereafter, recovered on 18.01.2006.

9.1 On the conclusion of the Court Of Inquiry, the proceedings, the findings as also the recommendations as in the first case, were finally placed before the GOC-in-Chief, Central Command, who came to the conclusion that administrative action was imperative against Col. P.P. Singh, for his failure to supervise the duties which were required to be performed by his subordinates and, in ensuring, the safe custody of weapons, taken on charge, by his unit, contrary to the provisions of para 37(c) of the Regulations For The Army 1987 (Revised) and para 193 of the Military Security Instructions, 2001.

9.2 Based on the directions of the GOC-in-Chief, a show cause notice was issued to Col. P.P. Singh, on 28.10.2006. After perusing the reply of Col. P.P. Singh, and based on the record the GOC-in-Chief, Central Command directed that his severe displeasure (Recordable) be conveyed to Col. P.P. Singh.

9.3 It is in this background that Col. P.P. Singh also took recourse to the RTI Act, and sought, the following information vide his application dated 29.1.2011:

> "(a) Findings and opinion of the Court alongwith recommendations of the Cdrs in chain and dirn of the competent authority (GOC UB Area, GOC-in-C Central Command) on the Court Of Inquiry convened under Stn. SQs Cell, Meerut convening order no. 124901/4/G dt 21 Jan 2006.
>
> (b) Noting sheets relating to processing this case at HQ UB Area and HQ Central Command based on which GOC-in-C awarded me Severe Displeasure (Recordable). In this connection refer dirn issued HQ Central Command letter no. 190105/653/U/DV dt. 10 feb 2007.
>
> (c) Please provide copy of the authority under which this Court Of Inquiry was forwarded to HQ UB Area and further on to HQ Central Command whereas the convening authority of the Court Of Inquiry was St. HQ Cell Meerut."



9.4 By communication dated 21.2.2011, the PIO rejected the application of Col. P.P. Singh by taking recourse to the provisions of Section 8(1)(e) of the RTI Act.

9.5 Being aggrieved, Col. P.P. Singh preferred an appeal with the first appellate authority. Interestingly, the first appellate authority while agreeing with the conclusions of the PIO observed that the PIO had "correctly disposed" of Col. P.P. Singh application as it fell squarely under the exceptions provided in Section 8(1) (g) & (h) of the RTI Act. It may be pertinent to point out that the PIO had in fact taken recourse to provisions of Section 8(1)(e) of the RTI Act.

9.6 Col. P.P. Singh preferred an appeal with the CIC. The CIC, while taking note of the fact that no proceedings were pending against Col. P.P. Singh, directed the release of information sought by him based on the reasoning provided in its order passed in **Col. V.K. Shad's case**, though after redacting the names and designations of the officers, who had made notings in the files, in accordance with the provisions of Section 10(1) of the RTI Act. The petitioners were directed to furnish the information, as directed, within four (4) weeks of the order.

9.7 As noticed above, though Col. P.P. Singh's appeal before the CIC was disposed on 4.5.2011, it got listed again on 5.1.2012, on which date thirty (30) days were sought on behalf of the petitioners, to comply with the order of the CIC.

WP(C) No. 1144/2012

**10.** On 5.12.2009, a Court Of Inquiry was ordered by the Head Quarters Western Command to investigate the alleged irregularities, in the procurement of shoes, as part of personal kit stores item for Indian troops, proceedings on a United Nation's assignment, during the period January, 2006 till the date of issuance of the convening order.

10.1 The Court Of Inquiry, evidently, found Brig. S. Sabharwal guilty of certain lapses alongwith four officers of the Ordinance Services Directorate, Integrated Head Quarters, Ministry of Defence. Brig. S. Sabharwal's conduct was found blameworthy, in so far as, he had omitted to obtain formal written sanction of the Major General of the Ordinance prior to issuing orders to carry out a major amendment vis-a-vis the scope and composition of the board of officers, who were involved in the short-listing of eligible firms; and for omitting to comply with instructions, which required him to nominate an officer of the rank of brigadier who belonged to a Branch other than the Ordinance Branch, for inclusion in the price negotiation committee. It appears that Brig. S. Sabharwal had, contrary to the stipulated norms, nominated instead an officer of the rank of Major General attached to the Ordinance Services Directorate.

10.2 Based on the findings of the Court Of Inquiry, a show cause notice was issued to Brig. S. Sabharwal, on 10.04.2010, by the Head Quarters Western Command. Brig. S. Sabharwal, replied to the show cause notice vide communication dated 20.05.2010. However, by a communication dated 14.6.2010, Brig. S. Sabharwal called upon the concerned authority to defer its decision on the show cause notice, till such time it had sought clarifications from officers named in the said communication with regard to his assertion that he had been issued verbal instructions with regard to the matter under consideration.

10.3 On 18.6.2010, Brig. S. Sabharwal wrote to the authority concerned that since, he was one of the last witnesses summoned for cross-examination by the Court Of Inquiry, he was not able to present his case effectively. In these circumstances, he requested the convening authority to accord permission to cross-examine the witnesses in his defence, so that he could bring out the facts of the case in their correct perspective.

10.4 Evidently, a day prior to the aforesaid request, i.e., on 17.6.2010, the GOC-in-Chief, after considering the recommendations of the Court Of Inquiry, the contents of the show cause notice and the reply of Brig. S. Sabharwal, directed that his severe displeasure (recordable), be conveyed to Brig. S. Sabharwal.

10.5 This resulted in Brig. S. Sabharwal approaching the PIO with



an application under the RTI Act. The application was preferred with the PIO, on 3.12.2010. Brig. S. Sabharwal sought the following information:

> "(a) All notings and correspondence of case file No. 0337/UN/PERS KIT STORES/DV2 of HQ Western Command.
>
> (b) Action taken Notings initiated by HQ Western Comd (DV) on HQ 335 Msl Bde Sig No. A-0183 dt 14 Jun 10 (Copy encl)."

10.6 The PIO, however, vide communication dated 10.12.2010, denied the information by relying upon the provisions of Section 8(4)(e) and (h) [sic 8(1)(e) and (h)] of the RTI Act. It was the opinion of the PIO that, notings and correspondence on the subject including legal opinions generated in the case could not be given to Brig. S. Sabharwal in view of a ***"fiduciary relationship existing in the chain of command and staff processing the case"***. It was also observed by the PIO that the notings and contents of the classified files were exempt from disclosure under the provisions of the Department of Personnel and Training (in short DoPT) letter no. 1/20/2009-IR dated 23.6.2009, and that, no public interest would be served in disclosing the information sought for other than the applicant's own interest.

10.7 Being aggrieved, Brig. S. Sabharwal filed an appeal with the first appellate authority, on 12.1.2011. The first appellate authority rejected the appeal, which was conveyed under the cover of the letter dated 11.2.2011. To be noted, that even though, the letter dated 11.2.2011 is on record, the order of the first appellate authority has not been placed on record by the petitioners herein.

**11.** Brig. S. Sabharwal, being dissatisfied with result, filed a second appeal with the CIC. The CIC, passed a similar order, as was passed in the other two cases, whereby it directed that copy of file notings be supplied to Brig. S. Sabharwal after redacting the names and designations of the officers, who made the notings, in accordance with, the provisions of Section 10(1) of the RTI Act.

SUBMISSIONS OF COUNSELS

**12.** In the background of the aforesaid facts, it has been argued by Mr Mehra, learned ASG, that the CIC in several cases, contrary to the decision in **V.K. Shad's case,** has taken the view that the file notings, which include legal opinions, need not be disclosed, as it may affect the

outcome of the legal action instituted by the applicant/querist seeking the information. Before me, however, reference was made to the case of **Col. A.B. Nargolkar vs Ministry of Defence passed in appeal no. CIC/LS/A/2009/000951 dated 22.9.2009.**

12.1 It was thus the submission of the learned ASG that, in the impugned orders, a contrary view has been taken to that which was taken in **Col. A.B. Nargolkar's** case. This, he submitted was not permissible as it was a bench of co-equal strength. It was submitted that in case the CIC disagreed with the view taken earlier, it ought to have referred the matter to a larger Bench.

12.2 Apart from the above, Mr. Mehra has submitted that, the petitioner's action of denying information, which pertains to file notings and opinion of the JAG branch is sustainable under Section 8(1)(e) of the RTI Act. It was contended that there was a fiduciary relationship between the officers in the chain of command, and those, who were placed in the higher echelons, of what was essentially a pyramidical structure. In arriving at a final decision, the GOC-in-Chief takes into account several inputs, which includes, the notings on file as well as the opinion of the JAG branch. It was submitted that since, the JAG branch has a duty to act and give advice on matters falling within the ambit of its mandate, the disclosure of information would result in a breach of a fiduciary relationship qua those who give the advice and the final decision making authority, which is the recipient of the advice.

12.3 Mr Mehra submitted that, in all three cases, the advice rendered by the JAG branch was taken into account both while initiating proceedings and also at the stage of imposition of punishment against the delinquent officers.

12.4 Though it was not argued, in the grounds, in one of the writ petitions, reliance is also placed on Army Rule, 184, to contend that only the copy of the statements and documents relied upon during the conduct of Court Of Inquiry are to be provided to the delinquent officers. It is contended that the directions contained in the impugned orders of the CIC, are contrary to the said Rule.

12.5 In order to buttress his submissions reliance was placed by Mr Mehra, on the observations of the Supreme Court, in the case of



**Central Board of Secondary Education & Ors. vs. Aditya Bandopadhayay & Ors.** (2011) 8 SCC 497. A particular stress, was laid on the observations made in paragraphs 38, 39, 44, 45 and 63 of the said judgment.

**13.** On the other hand, the respondents in the captioned writ petitions, who were led by **Col. V.K. Shad,** contended to the contrary and relied upon the impugned orders of the CIC. Specific reliance was placed on the judgments of this court, in the case of, **Maj. General Surender Kumar Sahni vs. UOI & Ors** in CW No. 415/2003 dated 09.04.2003 and **The CPIO, Supreme Court of India vs. Subhash Chandra Agarwal & Anr.** WP(C) 288/2009 pronounced on 02.09.2009; and the judgment of the Supreme Court in the case of **CBSE vs Aditya Bandopadhayay**.

REASONS

**14.** I have heard the learned ASG and the respondents in the writ petitions. As indicated at the very outset, the issue has been narrowed down to whether or not the file notings and the opinion of the JAG branch fall within the provisions of Section 8(1)(e) of the RTI Act. I may only note, even though the authorities below have fleetingly adverted to the provisions of Section 8(1)(h) of the RTI Act, the said aspect was neither pressed nor argued before me, by the learned ASG. The emphasis was only qua the provisions of Section 8(1)(e) of the RTI Act. The defence qua non-disclosure of information set up by the petitioners is thus, based on, what is perceived by them as subsistence of a fiduciary relationship between officers who generate the notes and the opinions which, presumably were taken in account by the final decision making authority, in coming to the conclusion which it did, with regard to the guilt of the delinquent officers and the extent of punishment, which was accorded in each case.

**15.** In order to answer the issue in the present case, fortunately I am not required to, in a sense, re-invent the wheel. The Supreme Court in two recent judgments has dealt with the contours of what would constitute a fiduciary relationship.

15.1 Out of the two cases, the first case, was cited before me, which is **CBSE vs Aditya Bandopadhayay** and the other being **ICAI vs Suaunak H. Satya and Ors.** (2011) 8 SCC 781.

15.2 Before I proceed further, as has been often repeated in judgment after judgments the preamble of the RTI Act, sets forth the guideline for appreciating the scope and ambit of the provisions contained in the said Act. The preamble, thus envisages, a practical regime of right to information for citizens, so that they have access to information which is in control of public authorities with the object of promoting transparency and accountability in the working of every such public authority. This right of the citizenry is required to be balanced with other public interest including efficient operations of the government, optimum use of limited physical resources and the preservation of confidentiality of sensitive information. The idea being to weed out corruption, and to hold, the government and their instrumentalities accountable to the governed.

15.3 The RTI Act is, thus, divided into six chapters and two schedules. For our purpose, what is important, is to advert to, certain provisions in chapter I, II and VI of the RTI Act.

15.4 Keeping the above in mind, what is thus, required to be ascertained is:

(i) whether the material with respect to which access is sought, is firstly, information within the meaning of the RTI Act? (ii) whether the information sought is from a public authority, which is amenable to the provisions of the RTI Act? (iii) whether the material to which access is sought (provided it is information within the meaning of the RTI Act and is in possession of an authority which comes within the meaning of the term public authority) falls within the exclusionary provisions contained in Section 8(1)(e) of the RTI Act?

15.5 In order to appreciate the width and scope of the aforementioned provision, one would also have to bear in mind the provisions of Sections 9, 10, 11 & 22 of the RTI Act.

**16.** In the present case, therefore, let me first examine whether file notings and opinion of the JAG branch would fall within the ambit of the provisions of the RTI Act.

16.1 Section 2(f), inter alia defines information to mean "any" "material" contained in any form including records, documents, memo, emails, opinions, advises, press releases, circulars, orders, log books, contracts, reports, papers, samples, models, data material held in any



electronic form and information relating to any private body, which can be, accessed by a public authority under any other law for the time being in force. Section 2(i) defines record as one which includes - any document, manuscript and file; (ii) any microfilm and facsimile copy of a document; (iii) reproduction of image or images embodied in such microfilm; and (iv) any other material produced by a computer or any other device.

16.2 A conjoint reading of Section 2(f) and 2(i) leaves no doubt in my mind that it is an expansive definition even while it is inclusive which, brings within its ambit any material available in any form. There is an express reference to "opinions" and "advices", in the definition of information under Section 2(f). While, the definition of record in Section 2(i) includes a "file".

16.3 Having regard to the above, there can be no doubt that file notings and opinions of the JAG branch are information, to which, a person taking recourse to the RTI Act can have access provided it is available with the concerned public authority.

16.4 Section 2(h) of the RTI Act defines a public authority to mean any authority or body or institution of Central Government established or constituted, inter alia, by or under, the Constitution or by or under a law made by Parliament. There can be no doubt nor, can it be argued that the Indian Army is not a public authority within the meaning of the RTI Act; which has the Ministry of Defence of the Government of India as its administrative ministry

16.5 The scope and ambit of the right to the information to which access may be had from a public authority is defined in Section 2(j). Section 2(j), inter alia, gives the right to information, which is accessible under this Act and, is held by or, is in control of the public authority by seeking inspection of work, documents, records by taking notes, extracts of certified copy of documents on record, by taking certified copy of material and also obtaining information in the form of discs, floppy, tapes, video cassetes, which is, available in any other electronic mode, whether stored in the computer or any other device.

16.6 Therefore, information which is available in the records of the Indian Army and, records as indicated hereinabove includes files, is information to which the respondents are entitled to gain access. The

question is: which is really the heart of the matter, as to whether the information sought, in the present case, falls in the exclusionary (1)(e) of Section 8 of the RTI Act.

16.7 It may be important to note that Section 3 of the RTI Act, is an omnibus provision, in a sense, it mandates that all citizens shall have right to information subject to the other provisions of the RTI Act. Therefore, unless the information is specifically excluded, it is required to be provided in the form in which it is available, unless: (i) it would disproportionately divert the resources of public authority or, (ii) would be detrimental to the safety and preservation of the record in question [See Section 7(9)] or, the provision of information sought would involve an infringement of copy right subsisting in a person other than the State (see Section 9).

16.8 One may also be faced with a situation where information sought is dovetailed with information which though falls within the exclusionary provisions referred to above, is severable. In such a situation, recourse can be taken to Section 10 of the RTI Act, which provides for severing that part of the information which is exempt from disclosure under the RTI Act, provided it can be "reasonably" severed from that which is not exempt. In other words, information which is not exempted but is otherwise reasonably severable, can be given access to a person making a request for grant of access to the same.

16.9 Section 11 deals with a situation where information available with a public authority which relates to or has been supplied by a third party, and is treated as confidential by that third party. In such an eventuality the PIO of the public authority is required to give notice to such third party of the request received for disclosure of information, and thereby, invite the said third party to make a submission in writing or orally, whether the information should be disclosed or not. In coming to a conclusion either way, the submissions made by the third party, will have to be kept in mind while taking a decision with regard to disclosure of information.

**17.** The last Section, which is relevant for our purpose, is Section 22. The said Section conveys in no uncertain terms the width of the RTI Act. It is a non-obstante clause which proclaims that the RTI Act shall prevail notwithstanding anything inconsistent contained in the Official



Secrets Act, 1923 or any other law for the time being in force or, in any instrument having effect by virtue of any law other than the RTI Act. In other words, it overrides every other act or instrument having the effect of law including the Official Secrets Act, 1923.

17.1 Thus, an over-view of the Act would show that it mandates a public authority, which holds or has control over any information to disclose the same to a citizen, when approached, without the citizen having to give any reasons for seeking a disclosure. And in pursuit of this goal, the seeker of information, apart from giving his contact details for the purposes of dispatch of information, is exempted from disclosing his personal details [see Section 6(2)].

17.2 Therefore, the rule is that, if the public authority has access to any material, which is information, within the meaning of the RTI Act and the said information is in its possession and/or its control, the said information would have to be disseminated to the information seeker, i.e., the citizen of this country, without him having to give reasons or his personal details except to the extent relevant for transmitting the information.

17.3 As indicated above, notes on files and opinions, to my mind, fall within the ambit of the provisions of the RTI Act. The possessor of information being a public authority, i.e., the Indian Army it could only deny the information, to the seeker of information who are respondents in the present case, only if the information sought falls within the exceptions provided in Section 8 of the RTI Act; in the instant case protection is claimed under clause (1)(e) of Section 8. Therefore, the argument of the petitioners that the information can be denied under Army Rule, 184 or the DoPT instructions dated 23.06.2009 are completely untenable in view of the over-riding effect of the provisions of the RTI Act. Both the Rule and the DoPT instructions have to give way to the provisions of Section 22 of the RTI Act. The reason being that, they were in existence when the RTI Act was enacted by the Parliament and the legislature is presumed to have knowledge of existing legislation including subordinate legislation. The Rule and the instruction can, in this case, at best have the flavour of a subordinate legislation. The said subordinate legislation cannot be taken recourse to, in my opinion to nullify the provisions of the RTI Act.

17.4 Therefore, one would have to examine the provisions of Section 8(1)(e) of the RTI Act. The relevant parts of the said Section read as under:

> "8. Exemption from disclosure of information – (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen -
>
> xxxx
>
> xxxx
>
> xxxx
>
> (e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information.
>
> xxxx
>
> xxxx
>
> Provided that the information, which cannot be denied to the Parliament or State Legislature shall not be denied to any person.
>
> (2) Notwithstanding anything in the Official Secrets Act, 1923 (19 of 1923) nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.
>
> (3) x x x x x
>
> Provided that where any question arises as to the date from which the said period of twenty years has to be computed, the decision of the Central Government shall be final, subject to the usual appeals provided for in this Act."

17.5 In **CBSE vs Aditya Bandopadhyay** case, the Supreme Court was called upon to decide the issue as to whether, an examinee was entitled to an inspection of his answer books, in view of the appellant before the Supreme Court, i.e., the CBSE, claiming exemption under Section 8(1)(e) of the RTI Act.



17.6 In this context, the court considered the issue: whether the examining body holds the evaluated answer books in a fiduciary relationship with the examiners.

17.7 The Supreme Court after noting various meanings ascribed to the term

> "fiduciary" in various dictionaries and texts, summed up what the term fiduciary would mean, in the following paragraph of its judgment:
>
> ".....39. The term 'fiduciary' refers to a person having a duty to act for the benefit of another, showing good faith and condour, where such other person reposes trust and special confidence in the person owing or discharging the duty. The term *'fiduciary relationship'* is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction/s. The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted thing, the fiduciary has to act in confidence and expected not to disclose the thing or information to any third party...."

17.8 Examples of certain relationships, where both parties act in a fiduciary capacity, while treating the other as beneficiary, are set out in paragraph 40 and 41 of the judgment. In paragraph 41 onwards the Court examined what would be the true scope of the expression "information available to a person in his capacity as fiduciary relationship", as used in Section 8(1)(e) of the RTI Act. In that context several fiduciary relationships were referred to like the one between a trustee and a beneficiary of a trust; a guardian with reference to a minor or, a physically infirm or mentally incapacitated person; a parent with reference to a child; a lawyer or a chartered accountant with reference to a client etc. After considering the matter at length, the Supreme Court came to the conclusion that there was no fiduciary relationship between the examining

body and the examiner with reference to evaluated answer books. The court also examined the issue that if one were to assume that there was a fiduciary relationship between the examiner and the examining body, whether the exemption would operate vis-a-vis third parties. In paragraph 44 of the judgment, the court concluded that if there was a fiduciary relationship, the exemption would operate vis-a-vis a third party, however, there would be no question of withholding information relating to the beneficiary from the beneficiary himself.

17.9 In paragraphs 49 and 50, the court concluded that since the examiner is acting as an agent of the examining body, in principle, the examining body is not in the position of a fiduciary, with reference to the examiner. On the other hand, once the examiner hands over the custody of the evaluated answer books, whose contents he is barred from disclosing as he acts as a fiduciary, uptill that point of time, ceases to be in that relationship once the work of evaluation of answer books is concluded, and the evaluated answer sheets are handed over to the examining body. In other words, since the examiner does not have any copyright or proprietary right or a right of confidentiality, in the evaluated answer books, the examining body cannot be said to be holding the evaluated answer books in a fiduciary relationship qua the examiner.

**18.** A similar view was held by the same Bench of the Supreme Court in the case of **ICAI vs Shaunak H. Satya**. The Supreme Court, while dealing with the issue whether the instructions and solutions to questions are information available to examiner and moderators in their fiduciary capacity, and therefore, exempt under Section 8(1)(e) of the RTI Act, made the following observations in paragraph 22 of the judgment:

> "....22. It should be noted that Section 8(1)(e) uses the words "information available to a person in his fiduciary relationship. Significantly Section 8(1)(e) does not use the words "information available to a public authority in its fiduciary relationship". The use of the words "person" shows that the holder of the information in a fiduciary relationship need not only be a 'public authority' as the word 'person' is of much wider import than the word 'public authority'. Therefore the exemption under Section 8(1)(e) is available not only in regard to information that is held by a public authority (in this case the examining body) in a fiduciary capacity, but also to any information that is given or made available by a public authority to anyone else for being held in a fiduciary relationship. In other words, anything given and taken in confidence expecting confidentiality to be maintained will be information available to a person in fiduciary relationship. As a consequence, it has to be held that the instructions and solutions to questions communicated by the examining body to the examiners, head-examiners and moderators, are information available to such persons in their fiduciary relationship and therefore exempted from disclosure under Section 8(1)(d) of RTI Act...."



**19.** The court also made clear in paragraph 26 of the judgment that there were ten categories of information which were exempt from Section 8 of the RTI Act. Out of the ten categories, six categories enjoyed absolute exemption. These being: those information, which fell in clauses (a), (b), (c), (f), (g) & (h) of Section 8(1) of the RTI Act, while information enumerated in clauses (d), (e) & (j) of the very same Section enjoyed "conditional" exemption to the extent that the information was subject to over-riding power of the competent authority under the RTI Act in larger public interest, which could in a given case, direct disclosure of such information. Clause (i), the Supreme Court noted, was period specific in as much as under Sub-Section (3) such information could be provided if the event or matter in issue had occurred 20 years prior to the date of the request being made under Section 6 of the RTI Act. It inter alia concluded, that, information relating to fiduciary relationship under clause 8(1)(e) did not enjoy absolute exemption.

**20.** Before I proceed further, I may also note that the first proviso in Section 8 says that, information which cannot be denied to the Parliament or the State Legislature, shall not be denied to any person. Subsection (2) of Section 8, states that notwithstanding anything contained in the Official Secret Acts, 1923, or any of the exemptions provided in Subsection (1), would not come in the way of a public authority in allowing access to information if, public interest in its disclosure outweighs the harm to the protected interest.

20.1 A Full Bench of this court in the case of Secretary General, Supreme Court of **India Vs. Subhash Chandra Agarwal,** 166 (2010) DLT 305, in the context of provisions of Section 8(1)(j) also examined what would constitute a fiduciary relationship. The observations contained

in paragraph 97 to 101, being apposite are extracted hereinbelow:

"....97. As Waker defines it: "A "fiduciary" is a person in a position of trust, or occupying a position of power and confidence with respect to another such that he is obliged by various rules of law to act solely in the interest of the other, whose rights he has to protect. He may not make any profit or advantage from the relationship without full disclosure. The category includes trustees, Company promoters and directors, guardians, solicitors and clients and other similarly placed." [Oxford Companion to Law, 1980 p.469]

98. "A fiduciary relationship", as observed by Anantnarayanan, J., "may arise in the context of a jural relationship. Where confidence is reposed by one in another and that leads to a transaction in which there is a conflict of interest and duty in the person in whom such confidence is reposed, fiduciary relationship immediately springs into existence." [see **Mrs. Nellie Wapshare v. Pierce Lasha & Co. Ltd.** AIR 1960 Mad 410]

99. In **Lyell v. Kennedy** (1889) 14 AC 437, the Court explained that whenever two persons stand in such a situation that confidence is necessarily reposed by one in the other, there arises a presumption as to fiduciary relationship which grows naturally out of that confidence. Such a confidential situation may arise from a contract or by some gratuitous undertaking, or it may be upon previous request or undertaken without any authority.

100. In **Dale & Carrington Invt. (P) Ltd. v. P.K. Prathaphan:** (2005) 1 SCC 212 and **Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd.** (1981) 3 SCC 333, the Court held that the directors of the company owe fiduciary duty to its shareholders. In **P.V. Sankara Kurup v. Leelavathy Nambier:** (1994) 6 SCC 68, the Court held that an agent and power of attorney can be said to owe a fiduciary relationship to the principal.

101. Section 88 of the Indian Trusts Act requires a fiduciary not to gain an advantage of his position. Section 88 applies to a trustee, executor, partner, agent, director of a company, legal



advisor or other persons bound in fiduciary capacity. Kinds of persons bound by fiduciary character are enumerated in Mr. M. Gandhi's book on "Equity, Trusts and Specific Relief" (2nd ed., Eastern Book Company)

(1) Trustee,

(2) Director of a company,

(3) Partner,

(4) Agent,

(5) Executor,

(6) Legal Adviser,

(7) Manager of a joint family,

(8) Parent and child,

(9) Religious, medical and other advisers,

(10) Guardian and Ward,

(11) Licensees appointed on remuneration to purchase stocks on behalf of government,

(12) Confidential Transactions wherein confidence is reposed, and which are indicated by (a) Undue influence,

(b) Control over property,

(c) Cases of unjust enrichment,

(d) Confidential information,

(e) Commitment of job,

(13) Tenant for life,

(14) Co-owner,

(15) Mortgagee,

(16) Other qualified owners of property,

(17) De facto guardian,

(18) Receiver,

(19) Insurance Company,

(20) Trustee de son tort,

(21) Co-heir,

(22) Benamidar.

20.2 The above would show that there are two kinds of relationships. One, where a fiducial relationship exists, which is applicable to legal relationships between parties, such as guardian and ward, administrator and heirs, executors and beneficiaries of a testamentary succession; while the other springs from a confidential relationship which is pivoted on confidence. In other words confidence is reposed and exercised. Thus, the term fiduciary applies, it appears, to a person who enjoys peculiar confidence qua other persons. The relationship mandates fair dealing and good faith, not necessarily borne out of a legal obligation. It also permeates to transactions, which are informal in nature. [See words and phrases Permanent Edn. (Vol. 16-A, p. 41) and para 38.3 of the **CBSE vs Aditya Bandopadhyay**]. As indicated above, the Supreme Court in the very same judgment in paragraph 39 has summed up as to what the term fiduciary would mean.

20.3 In the instant case, what is sought to be argued in sum and substance that, it is a fiducial relation of the latter kind, where the persons generating the note or opinion expects the fiduciary, i.e., the institution, which is the Army, to hold their trust and confidence and not disclose the information to the respondents herein, i.e., Messers V.K. Shad and Ors. If this argument were to be accepted, then the persons, who generate the notes in the file or the opinions, would have to be, in one sense, the beneficiaries of the said information. In an institutional set up, it can hardly be argued that notes on file qua a personnel or an employee of an institution, such as the Army, whether vis-a-vis his performance or his conduct, in any manner, can benefit the person, who generates the note or renders an opinion. As a matter of fact, the person who generates the note or renders an opinion is presumed to be a person who is objective and not conflicted by virtue of his interest in the matter, on which, he is called upon to deliberate. If that position holds, then it can neither be argued nor can it be conceived that notes on file or



opinions rendered in an institutional setup by one officer qua the working or conduct of another officer brings forth a fiduciary relationship. It is also not a relationship of the kind where both parties required the other to act in a fiduciary capacity by treating the other as a beneficiary. The examples of such situations are found say in a partnership firm where, each partner acts in fiduciary capacity qua the other partner(s).

20.4 If at all, a fiduciary relationship springs up in such like situation, it would be when a third party seeks information qua the performance or conduct of an employee. The institution, in such a case, which holds the information, would then have to determine as to whether such information ought to be revealed keeping in mind the competing public interest. If public interest so demands, information, even in such a situation, would have to be disclosed, though after taking into account the rights of the individual concerned to whom the information pertains. A denial of access to such information to the information seekers, i.e., the respondents herein, (**Messers V.K. Shad & Co.**) especially in the circumstances that the said information is used admittedly in coming to the conclusion that the delinquent officers were guilty, and in determining the punishment to be accorded to them, would involve a serious breach of principles of natural justice, as non-communication would entail civil consequences and would render such a decision vulnerable to challenge under Article 14 of the Constitution of India provided information is sought and was not given. [See **UOI vs R.S. Khan** 173 (2010) DLT 680].

**21.** It is trite law that the right to information is a constitutional right under Article 19(1)(a) of the Constitution of India which, with the enactment of the RTI Act has been given in addition a statutory flavour with the exceptions provided therein. But for the exceptions given in the RTI Act; the said statute recognizes the right of a citizen to seek access to any material which is held or is in possession of public authority.

**22.** This brings me to the first proviso of Section 8(1), which categorically states that no information will be denied to any person, which cannot be denied to the Parliament or the State Legislature. Similarly, sub-section (2) of Section 8, empowers the public authority to over-ride the Official Secrets Act, 1923 and, the exemptions contained in sub-section (1) of Section 8, of the RTI Act, if public interest in the disclosure of information outweighs the harm to the protected interest. As indicated

hereinabove, the Supreme Court in CBSE vs Aditya Bandopadhayay case has clearly observed that exemption under Section 8(1)(e) is conditional and not an absolute exemption.

**23.** I may only add a note of caution here: which is, that protection afforded to a client vis-a-vis his legal advises under the provisions of Section 126 to 129 of the Evidence Act, 1872 is not to be confused with the present situation. The protection under the said provisions is accorded to a client with respect to his communication with his legal advisor made in confidence in the course of and for the purpose of his employment unless the client consents to its disclosure or, it is a communication made in furtherance of any illegal purpose. The institution i.e The Indian Army in the present case cannot by any stretch of imagination be categorized as a client. The legal professional privilege extends only to a barrister, pleader, attorney or Vakil. The persons who have generated opinions and/or the notings on the file in the present case do not fall in any of these categories.

23.1 Having regard to the above, I am of the view that the contentions of the petitioners that the information sought by the respondents (Messers V.K. Shad & Co.) under Section 8(1)(e) of the Act is exempt from disclosure, is a contention, which is misconceived and untenable. For instance, can the information in issue in the present case, denied to the Parliament and State Legislature. In my view it cannot be denied, therefore, the necessary consequences of providing information to Messers V.K. Shad should follow.

**24.** The argument of the learned ASG that, the CIC had taken a diametrically opposite view in the other cases and hence the CIC ought to have referred the matter to a larger bench, does have weight. This objection ordinarily may have weighed with me but for the following reasons :-

24.1 First, the judgment of the CIC cited for this purpose i.e., **Col. A.B. Nargolkar case,** dealt with the situation where an order of remand was passed directing the PIO to apply the ratio of the judgment of a Single Judge of this court in the case of the **CPIO, Supreme Court of India Vs. Subhash Chandra Agarwal and Anr.,** WP (C) 288/2009, pronounced on 02.09.2009. The CIC by itself did render a definite view.



24.2 Second, keeping in mind the fact that the information commissioners administering the RTI Act are neither persons who are necessarily instructed in law, i.e., are not trained lawyers, and nor did they have the benefit of such guidance at the stage of argument, I do not think it would be appropriate to set aside the impugned judgment on this ground and remand the matter for a fresh consideration by a larger bench of the CIC. This view, I am inclined to hold also, on account of the fact that, since then there have been several rulings of various High Courts including that of the Supreme Court, to which I have made a reference above, and that, remanding the matter to the CIC would only delay the cause of the parties before me.

24.3 These are cases which affect the interest of both parties, especially the petitioners in a large number of cases, and therefore, the need for a ruling of a superior court one way or the other, on the issue. It is in this context that I had proceeded to decide the matter on merits, and not take the route of remand in this particular case. The CIC is, however, advised in future to have regard to the discipline of referring the matters to a larger bench where a bench of co-ordinate strength takes a view which is not consistent with the view of the other.

**25.** For the foregoing reasons, the writ petitions are dismissed. The impugned orders passed by the CIC are sustained. The information sought by Messers V.K. Shad and Ors will be supplied within two weeks from today, in terms of the orders passed by the CIC. However, having regard to the peculiar facts and circumstances of the case, parties are directed to bear their own costs save and except to the extent that the sum of Rs 5000/- each, deposited pursuant to the two orders of my predecessor of even date, passed on 27.02.2012, in WP(C) Nos. 1144/2012 and 1138/2012, shall be released, on a pro rata basis, to the three respondents, towards incidental expenses.

ILR (2012) I DELHI 655
WP(C)

NATIONAL TEXTILE CORPORATION LTD. ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(RAJIV SHAKDHER, J.)

W.P. (C) NO. : 5527/2012 DATE OF DECISION: 22.11.2012

Indian Contract Act, 1872—Section 28—Arbitration and Conciliation Act, 1996—Section 16—Constitution of India, 1950—Article 226—Arbitrator acting under aegis of Permanent Machinery of Arbitrators (PMA) established by Govt. of India in respect of disputes concerning Central Public Sector Undertakings, Banks, Trusts and/or other Government departments issued notice of claim of Respondent No. 2 UCO Bank to petitioner—Writ petition filed to lay challenge to her jurisdiction to proceed further with matter—Plea taken, petitioner is not a party to statement of claim filed by Respondent No.2/UCO Bank, therefore no notice could have been issued to Petitioner/NTC nor could any liability been foisted on it—Sita Ram Mills (SRM) was nationalised under Nationalisation Act and therefore liabilities pertaining to period prior to nationalization were of erstwhile owners and could not be foisted upon Petitioner/NTC—Per contra plea taken, since Commissioner of payment (COP) had made part payment, claim is maintained for balance sum which pertains to dues qua various credit facilities granted in pre/post takeover period—Since petitioner has taken over SRM, it is liable to pay outstanding dues of Respondent No. 2/UCO Bank—Held—PMA was constituted by virtue of office memorandum dated



22.01.2004 issued by GOI, Ministry of Heavy Industries and Public Enterprises, Deptt. of Public Enterprises—It is therefore not a mechanism which stands effaced by virtue of dissolution of Committee on Disputes (COD)—This made clear, on a perusal of yet another OM dated 01.09.2011, issued by Cabinet Sectt. of GOI which supersedes provision in OM, which required public enterprises to approach COD before approaching Courts or Tribunals—OM of 01.09.2011 does not envisage dissolution of PMA—All that, it does it that Govt. Departments and Public Enterprises qua disputes concerning them would not be required to approach COD, if they wish to approach PMA—Superssession of OM dated 22.01.2004 by OM dated 01.09.2011 is only to that limited extent—Both, petitioner/NTC being a Central Public Sector Enterprises and Respondent No. 2/UCO Bank, a nationalized bank, are covered under OM dated 22.01.2004, no consent is required for initiation of arbitration proceedings under PMA mechanism—Issue qua jurisdiction is a mixed question of fact and law and cannot be determined without looking into various factual and legal aspects which would include interpretation of Nationalization Act and TM Act—Where a party approaches Arbitrator, without intervention of Court, Arbitrator is empowered to ascertain both existence and validity of Arbitration Agreement—This principle is evolved to ensure quick and effective adjudication of disputes by Arbitrator—Issue whether or not petitioner/NTC is owner of SRML cannot be examined by Arbitrator in a summary manner, without appreciating full contours of claim set up by Respondent No. 2/UCO Bank—Defence of Petitioner/NTC is based mainly on one particular fact that it is not liable for debts due—There is no defence on merits—Bifurcation of issues would only delay proceedings before Arbitrator—Therefore, for this Court to interdict proceedings before arbitrator, at this stage, would

**result in delaying adjudication of disputes—Writ petition dismissed.**

**Important Issue Involved:** (A) Permanent Machinery of Arbitrators (PMA) established by the Govt. of India vide Office Memorandum dated 22.01.2004 in respect of disputes, concerning Central Public Sector Undertakings, Banks, Trusts and/or other Government departments is not a mechanism which stands effaced by virtue of dissolution of the Committee on Disputes (COD).

(B) When a Nationalized Bank is the claimant and respondent is a Central Public Sector Enterprise, no consent of respondent is required for initiation of arbitration proceedings under the Permanent Machinery of Arbitrators (PMA) mechanism.

(C) Where a party approaches an Arbitrator, without the intervention of the Court, the arbitrator is empowered to ascertain both the existence and validity of the Arbitration Agreement.

**[Ar Bh]**

**APPEARANCES:**

**FOR THE PETITIONER** : Mr. Sanjay Ghose and Mohd. Farrukh, Advocates.

**FOR THE RESPONDENTS** : Mr. Ruchir Mishra, Advocate for R-1. Mr. Kamal Khurana, Advocate for R-2.

**CASES REFERRED TO:**

1. *Electronics Corporation of India Ltd.* vs. *Union of India and Ors.* (2011) 3 SCC 404.
2. *National Insurance Company Ltd.* vs. *Bhogra Polyfab Private Limited* (2009) 1 SCC 267.



3. *Oil and Natural Gas Commission* vs. *City & Industrial Development Corporation Maharashtra Ltd.* (2007) 7 SCC 39.
4. *SBP & Co.* vs. *Patel Engineering Ltd.* (2005) 8 SCC 618.
5. *Oil and Natural Gas Commission* vs. *CCE (ONGC-III)* (2004) 6 SCC 437.
6. *Oil and natural Gas Commission* vs. *CCE (ONGC-II)* 1995 Supp (4) SCC 541.

**RESULT:** Writ Petition dismissed.

**RAJIV SHAKDHER, J.**

**1.** The present writ petition has been filed to assail the notice dated 17.10.2011, issued by the Arbitrator, who is acting under the aegis of the Permanent Machinery of Arbitrators (in short PMA), established by the Govt. of India vide Office Memorandum dated 22.01.2004, in respect of disputes, concerning Central Public Sector Undertakings, Banks, Trusts and/or other Government departments.

**2.** The Petitioner/National Textile Corporation Ltd. (in short NTC) has, at stage of issuance of notice by the learned Arbitrator, approached this court to lay challenge to her jurisdiction to proceed further with the matter.

2.1 As per the impugned notice, the first date of hearing was fixed on 17.02.2012.

2.2 In accordance with the notice dated 17.10.2011, Respondent no.2, which is the UCO Bank, filed its statement of claim on 17.11.2011. It appears that on 23.12.2011, the Petitioner/NTC filed its reply to the statement of claim in which several defences have been taken including the defence that the Petitioner/NTC is not a party to the arbitration proceedings. Pivoted on this basic plank, and the submission that PMA no longer exists, the Petitioner/NTC has deemed it fit to approach this Court. Briefly, this submission is made in the background of the following brief facts:-

**3.** The claimant before the Arbitrator is Respondent no.2/UCO Bank. The statement of claim which has been filed and placed on record before

this court, indicates that there are two respondents in the action filed before the Arbitrator. The first respondent, is the Union of India which is, sued through the Ministry of Textiles, Govt. of India, while the second respondent is an entity by the name of Sita Ram Mills Limited (in short SRML).

3.1 In order to appreciate the objection taken on the learned Arbitrator's jurisdiction, it would be important to examine the broad framework of the Statement Of Claim filed by Respondent no.2/UCO Bank. The essential ingredient of the Statement of Claim are as follows:-

3.2 SRML was nationalized w.e.f. 01.04.1994 under the Textile Undertakings (Nationalization), Act, 1995 (in short Nationalization Act); that prior to the take over of the management of SRML, a sum of Rs.11,70,39,000/- became due and payable by SRML to Respondent no.2/UCO Bank; post the take over of management of SRML by the Petitioner i.e., the National Textile Company Ltd. (in short NTC) under the Textile Management Act, 1984 (in short TM Act), Respondent no.1/ Union of India (in short UOI) issued a guarantee for a sum of Rs.1,73,00,000/- in favour of Respondent no.2/UCO Bank: since the Petitioner/NTC did not pay the sum to Respondent no.2/UCO Bank, a suit was filed by Respondent no.2/UCO Bank being : Suit No.4489/1996 in the Bombay High Court, on 21.11.1996, for recovery of a sum of Rs.3,19,09,000/-; as the Petitioner was declared a sick industrial company under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 (in short SICA), the proceedings in the suit filed against the Petitioner/NTC were stayed; in terms of the provisions of the Nationalization Act the properties of SRML vested with the Government and therefore, in terms of the said Act, claims pertaining to pre and post takeover in terms of the said Act were required to be lodged with the Commissioner of Payment (in short COP) in terms of the date specified, as per the notification issued in that behalf; Respondent no.2/UCO Bank submitted its claim with COP on 17.01.2002, which was registered, after an initial hesitation, on 04.07.2005; in pursuance of the said claim an affidavit of proof of claim dated 13.07.2005 was filed, **wherein a sum of Rs.1,05,35,86,783.47 was claimed towards pre and post take over liability under the Nationalization Act;** the COP vide award dated 13.03.2006 allowed a part of the claim under Category 1 of the Nationalization Act to the tune of Rs.70,23,025/- towards principal; the



claim of Rs.1,18,80,098/- was relegated to Category II(b) being an outstanding liability against unserviced interest; the balance claim in the sum of Rs.103,46,83,660.47 towards interest beyond appointed date, was rejected; the claimant received a sum of Rs.70,23,025/- by way of a cheque dated 20.03.2006; by a subsequent award dated 28.03.2007 a further sum equivalent to Rs.89,59,609/- was awarded by the COP towards pending liability of interest till the appointed date; the said sum was received by the claimant vide cheque dated 30.03.2007; therefore, in all Respondent no.2/UCO Bank has received a total sum of Rs.1,59,82,634/- against the total claim of Rs.1,05,35,86,783.47; Respondent no.2/UCO Bank lodged its request for initiation of arbitration with Respondent no.1/UOI vide communication dated 30.08.2004. 3.3 It is in the background of the aforementioned assertions made in the statement of claim by Respondent no.2/UCO Bank that it sought the recovery of a balance sum of Rs.103,76,04,149.47 from Respondent no.1/UOI and SRML jointly and severely with further interest @ 16.5% p.a. with quarterly rests from 01.01.2002 till the date of payment and/or realization.

**4.** The Petitioner/NTC in its reply sought to take the following broad defences :-

(i). it is not a party to the Statement of Claim filed by Respondent no.2/UCO Bank, therefore, no notice could have been issued to the Petitioner/NTC nor could have any liability been foisted on it;

(ii). the details of guarantee furnished by Respondent no.1/UOI have not been set out in the Statement of Claim;

(iii) there is non-disclosure of the fact that, the suit filed in the Bombay High Court was transferred to the Debt Recovery Tribunal (in short DRT), which adjourned the same sine die vide order dated 16.04.2002, on account of proceedings qua Petitioner/NTC pending under the provisions of SICA. To be noted, this application was admittedly filed by the petitioner before the DRT, on the ground, as per their own averment, its application for revival was pending before the Board of Industrial and Financial Reconstruction (in short BIFR);

(iv) Petitioner/NTC was not a party before the COP;

(v) the claim preferred (before the Arbitrator) was subject matter of adjudication before the COP;

(vi) it is denied that SRML was nationalized. It is stated that only a textile undertaking: "Sita Ram Mill", belonging to SRML was nationalized;

(vii) SRML, is an independent entity under the Companies Act, 1956, which continues to exist. The Petitioner/NTC is in no way concerned with the debts of SRML under the provisions of the Nationalization Act;

(viii) that w.e.f. 18.10.1983, under an ordinance titled:

"Textile Undertaking (Taking Over of Management) Ordinance, 1983 (in short the 1983 Ordinance), the Central Government took over the management of Sita Ram Mills as against SRML. Under the 1983 Ordinance, the Central Government appointed the Petitioner/NTC as the custodian of the said Mill. The ordinance was replaced by the TM Act of 1983;

**(ix). Sita Ram Mills was nationalized under the Nationalization Act w.e.f. 01.04.1994 and therefore, liabilities pertaining to the period prior to 01.04.1994 were those of the erstwhile owners and could not be foisted on the Petitioner/NTC;**

**5.** In the rejoinder filed by SRML, the contentions raised, (apart from the usual rebuttal) specifically dealt with and brought forth the following aspects:-

(i). the **National Textile Corporation (South), Maharashtra** was appointed as an **"additional custodian"** to assist the Petitioner/NTC vide order dated 19.10.1983. The Board of the Directors of the Petitioner/NTC (which was appointed as a custodian), at their meeting of 25.10.1983, passed a resolution which inter alia resolved as follows :-

> "...To borrow or raise or secure the payment of any money from any Bank or financial institution or any other source except various Bank limits required for running of mills and suppliers, credit for supplies to be made to the textile undertakings in due course".
>
> **In pursuance of the said board meeting, the additional custodian has with the prior approval of the custodian requested the Claimant to grant working capital facility for the said textile undertaking by way of Cash Credit and Discount/Purchase of bills/cheques to the extent of Rs.142**



**Lakhs on the** hypothecation of the whole of the stocks of raw materials, stocks in process, finished goods, stores, spares and present and future debts and other assets presently with the said Unit (but excluding stocks of raw materials, finished goods, dyes and chemicals and spares and book-debts which were already hypothecated and pledged to the Bank on the date of take-over of the management of the textile undertaking of the said Company) and the Bank agreed to accede to the said request on condition that the said loans facilities shall be guaranteed by the President of India..." (emphasis supplied)

(ii). Based on the above, it claimed that the additional custodian i.e., National Textile Corporation (South) Maharashtra which was operating in consonance with the resolution passed by the Petitioner/NTC, borrowed monies from Respondent no.2/the claimant.

(iii). The arbitration proceedings were initiated at a time when COP had refused to entertain the entire claim of Respondent no.2/UCO Bank. However, since the COP, made payment to the extent of Rs.1,59,82,634/-, the claim is maintained for the balance sum of Rs.105,35,86,783.47, which pertains to dues qua various credit facilities granted in the pre/post takeover period.

(iv). The Arbitrator by its notice of 17.10.2011 has made Petitioner/NTC a party in addition to Respondent no.2/UCO Bank.

**(v). Since, the petitioner has taken over Sita Ram Mill, it is liable to pay the outstanding dues of Respondent no.2/UCO Bank. The contention that the petitioner is not concerned with the debts owned by SRML under the provisions of the Nationalization Act, is erroneous. Post the Nationalization Act i.e., w.e.f. 01.04.1994, the Petitioner/NTC having taken over Sita Ram Mill, it is liable for payment of outstanding dues of Respondent no.2/UCO Bank.**

(vi). Since, proceedings before the DRT are adjourned sine die, without prejudice to the rights of Respondent no.2/UCO Bank, it is entitled to pursue the arbitration route.

**6.** It appears that the Petitioner/NTC thereafter moved an application

on 17.02.2012, calling upon the Arbitrator to decide the issue of maintainability of the arbitral proceedings as a preliminary issue and thereupon, recall the impugned arbitration notice dated 17.10.2011.

6.1 It is important to note that this application was premised on the fact that the Supreme Court vide judgment rendered on 17.02.2011 in the case of **Electronics Corporation of India Ltd. Vs. Union of India and Ors.** (2011) 3 SCC 404 having done away with the mechanism of the Committee on Disputes (in short COD), the present arbitral process should not continue any further as the earlier judgments of the Supreme Court, which are compenditiously referred to as the ONGC cases, stand overruled. The said judgments being :

(i). **Oil and natural Gas Commission vs CCE (ONGC-II)** 1995 Supp (4) SCC 541;

(ii). **Oil and Natural Gas Commission vs CCE (ONGC-III)** (2004) 6 SCC 437; and

(iii). **Oil and Natural Gas Commission vs City & Industrial Development Corporation Maharashtra Ltd.** (2007) 7 SCC 39.

6.2 In the application of 17.2.2012, it is further averred that since, the process is not based on any "statute" or "consent" but on the basis of the mandate of the court which stood withdrawn on 17.02.2011, the present proceedings which were initiated by notice dated 17.10.2011 are without jurisdiction and therefore, should be terminated. It was further submitted that proceedings before the Arbitrator are governed by the Arbitration and Conciliation Act, 1996 which requires the existence of a written arbitral agreement, as the basic pre-requisite for commencement of an arbitral process. A reference was also made to section 28 of the Indian Contract Act, 1872 and the right to seek access by way of judicial review.

6.3 A reply was filed to the same by Respondent no.2/UCO BANK, which was followed by a rejoinder by the Petitioner/NTC.

**7.** The learned Arbitrator on her part vide notice dated 28.06.2012, indicated that she was inclined to decide all issues simultaneously and publish one single award in that behalf. The learned Arbitrator indicated that this procedure was being followed to save time and to avoid avoidable



delay in adjudication. The learned Arbitrator has thus fixed three continuous days, out of Delhi, in Mumbai for hearing the matter. The dates given by the learned Arbitrator are 18th to 20th December, 2012.

**8.** On the very first date, in the present proceedings, it was indicated that the question revolved around the Constitution of the PMA. Thus, Union of India was directed to assist in the matter. The perusal of material placed before me seems to suggest that, PMA was constituted by the decision of the Cabinet Secretariat of the Govt. of India as reflected in its Office Memorandum (OM) dated 22.01.2004. It will be noticed that, though undoubtedly, the COD was formed based on the ONGC judgments, which have been reversed by the Supreme Court by its own judgment in the case of **Electronics Corporation of India Ltd.** (supra); it did not comment or deal with Constitution of PMA.

8.1 The judgment in the **Electronics Corporation of India Ltd.** (supra) undoubtedly, even according to the petitioner, does not deal with the mechanism of PMA. The PMA, as indicated above by me, was constituted by virtue of an office memorandum dated 22.01.2004 issued by the Govt. of India, Ministry of Heavy Industries and Public Enterprises, Department of Public Enterprises. It is, therefore, in my view not a mechanism which stands effaced by virtue of dissolution of the COD. This is made clear, on a perusal of yet another OM dated 01.09.2011, issued by the Cabinet Secretariat of the Govt. of India which supersedes the provision in the OM, which required the public enterprises to approach the COD before approaching courts or Tribunals. The OM of 01.09.2011 does not envisage the dissolution of PMA. All that, it does is that, Government Departments and Public Enterprises qua disputes concerning them would not be required to approach the COD, if they wish to approach the PMA. The supersession of OM dated 22.01.2004 by OM dated 01.09.2011, is only to that limited extent and no more.

8.2 It cannot be disputed that both the Petitioner/ NTC and Respondent no.2/UCO Bank are covered under the OM dated 22.01.2004; the Petitioner being a Central Public Sector Enterprise, while Respondent No.2/UCO Bank is a Nationalised Bank. If that is so, then no consent is required for initiation of arbitration proceedings under the PMA mechanism.

**9.** The other issue qua jurisdiction which is raised: that the petitioner/ NTC is not responsible for the debts owed by SRML, as it is not a party

to the claim lodged with the learned Arbitrator or on the ground that the debts, if any, owed to respondent no.2/UCO bank are owed by SRML and not the Petitioner/NTC is, according to me, a mixed question of fact and law, and thus, cannot be determined without looking into various factual and legal aspects which would include interpretation of the Nationalization Act and the TM Act. This is precisely, the reason that I have set out the framework of the claim made by Respondent no.2/UCO Bank, in the foregoing paragraphs, as also, the reply and rejoinder filed thereafter; to bring to fore the fact that various issues emerge which require consideration by the learned Arbitrator even to come to the conclusion: as to whether she has the jurisdiction to deal with the matter, as contended by the Petitioner/NTC.

9.1 To cite one example, SRML contends the National Textile Corporation (South) Maharashtra was appointed an additional custodian to assist the Petitioner/NTC vide order dated 19.10.1983; whereupon the Board of Directors of the Petitioner/NTC passed a resolution dated 25.10.1983 – based on which, it sought additional working capital facility "vis-a-vis [the] textile undertaking" from Respondent no.2/UCO Bank with approval of the Custodian i.e., petitioner/NTC. Among, several issues which would arise are:-

(i). Do all dues claimed, pertain to pre or post take over or, a bit of both?

(ii). Did the petitioner/NTC avail of any credit facility in respect of textile undertaking taken over by it?

(iii). If the Petitioner/NTC was not responsible for the debts owned by SRML, why did it move the DRT to seek stay of proceedings in the DRT based on the fact that proceeding qua itself were pending before SICA. The contents of the application and order passed by DRT, will require scrutiny. To be noted, the DRT did not stay the proceedings only qua the Petitioner /NTC but adjourned it *sine die*.

**10.** Though, M. Ghose in his submissions before me contended that provisions of the Arbitration and Conciliation Act, 1996 (1996 Act) were not applicable as they are sought to be excluded under the PMA mechanism, there is a liberal reference to the provision contained in the 1996 Act in the Petitioner/NTC's application dated 17.02.2012, which seeks decision on the preliminary issue of jurisdiction.



10.1 I would therefore, take it that the 1996 Act has no application. Since the PMA mechanism itself excludes its applicability; even so, principles analogous to those evolved by courts under the 1996 Act, would have me hold that, where a party approaches an Arbitrator, without the intervention of the Court, the Arbitrator is empowered to ascertain both the existence and validity of the Arbitration agreement. The principle is evolved to ensure quick and effective adjudication of disputes by the Arbitrator. The observations of the Supreme Court, in the case of, **National Insurance Company Ltd. Vs. Bhogra Polyfab Private Limited** (2009) 1 SCC 267, which in turn are based on the Constitution Bench judgment in the case of **SBP & Co. vs. Patel Engineering Ltd.** (2005) 8 SCC 618 deal with this aspect quite clearly, in the context of section 16 of the 1996 Act, which relates to the power of the Arbitrator to rule on his own jurisdiction. The observation being apposite are extracted hereinbelow for the sake of convenience:-

> "...20. This Court in *SBP & Co.* also examined the 'competence' of the arbitral tribunal to rule upon its own jurisdiction and about the existence of the arbitration clause, when the Chief Justice or his designate had appointed the Arbitral Tribunal under Section 11 of the Act, after deciding upon such jurisdictional issue. This Court held: (SCC pp. 644 & 649, paras 12 & 20)
>
> "12. ....We are inclined to the view that the decision of the Chief Justice on the issue of jurisdiction and the existence of a valid arbitration agreement would be binding on the parties when the matter goes to the Arbitral Tribunal.....
>
> 20. Section 16 is said to be the recognition of the principle of *Kompetenz - Kompetenz.* The fact that the Arbitral Tribunal has the competence to rule on its own jurisdiction and to define the contours of its jurisdiction, only means that when such issues arise before it, the Tribunal can and possibly, ought to decide them. This can happen when the parties have gone to the Arbitral Tribunal without recourse to Section 8 or 11 of the Act. But where the jurisdictional issues are decided under these Sections, before a reference is made, Section 16 cannot be held to empower the Arbitral Tribunal to ignore the decision given by the judicial authority or the Chief Justice before the reference to it was made. The competence to decide does not enable the arbitral

tribunal to get over the finality conferred on an order passed prior to its entering upon the reference by the very statute that creates it. That is the position arising out of Section 11(7) of the Act read with Section 16 thereof. The finality given to the order of the Chief Justice on the matters within his competence under Section 11 of the Act, are incapable of being reopened before the Arbitral Tribunal."

21. It is thus clear that when a contract contains an arbitration clause and any dispute in respect of the said contract is referred to arbitration without the intervention of the court, the Arbitral Tribunal can decide the following questions affecting its jurisdiction: (a) whether there is an arbitration agreement; (b) whether the arbitration agreement is valid; (c) whether the contract in which the arbitration clause is found is null and void and if so whether the invalidity extends to the Arbitration clause also. It follows therefore that if the respondent before the Arbitral Tribunal contends that the contract has been discharged by reason of the claimant accepting payment made by the respondent in full and final settlement, and if the claimant counters it by contending that the discharge voucher was extracted from him by practicing fraud, undue influence, or coercion, the Arbitral Tribunal will have to decide whether the discharge of contract was vitiated by any circumstance which rendered the discharge voidable at the instance of the claimant. If the Arbitral Tribunal comes to the conclusion that there was a valid discharge by voluntary execution of a discharge voucher, it will refuse to examine the claim on merits, and reject the claim as not maintainable. On the other hand, if the Arbitral Tribunal comes to the conclusion that such discharge of contract was vitiated by any circumstance which rendered it void, it will ignore the same and proceed to decide the claim on merits..."

(emphasis supplied)

10.3 The only distinction between the case cited above and the instinct case is that the PMA mechanism is not based on a contract but on an executive order which adverts to attributes of entities, for it get triggered. Apart, from that distinction, the principle, in my view, should squarely apply. There is no challenge to the PMA mechanism before me,



except to say it has dissolved. The Union of India i.e., respondent No.1 has taken no such stand before me.

**11.** The argument that Petitioner/NTC is not party to the proceedings is dependent on whether or not the Petitioner/ NTC is the owner of SRML. The Arbitrator has thought it fit to issue notice to the petitioner/ NTC. In the given facts, this issue cannot be examined by learned Arbitrator, in a summary manner, as is sought to be contended by Mr. Ghose, without appreciating the full contours of the claim set up by Respondent no.2/UCO Bank. 11.1 The interesting aspect is that the defence of the Petitioner/ NTC qua the claim set up by Respondent no.2/UCO Bank, is based mainly on one particular fact, which is that, it is not liable for the debts due. There is no defence on merits, therefore, bifurcation of issues would only delay the proceedings before the Arbitrator.

**12.** In my view, therefore, for this court to interdict the proceedings before the learned Arbitrator, at this stage, under Article 226 of the Constitution of India would result in delaying the adjudication of the disputes. In my opinion, the learned Arbitrator is right in holding that, to avoid delay, in a matter, all issues need to be decided together. As discussed above, the issue of jurisdiction, which is being raised by the petitioner/NTC, is dependent on facts and, the evidence which the parties may lead. Therefore, the sensible course would be the one adopted by the learned Arbitrator, which is, to decide the all issues at one-go.

**13.** For the reasons stated hereinabove, the writ petition is dismissed.

**ILR (2013) I DELHI 669**
**WP (C)**

**DR. ALKA GUPTA ....PETITIONER**

**VERSUS**

**MEDICAL COUNCIL OF INDIA & ANR. ....RESPONDENTS**

**(RAJIV SHAKDHER, J.)**

**W.P. (C) NO. : 5677/2012 DATE OF DECISION: 30.11.2012**

**Indian Medical Council (Professional, Etiquette and Ethics) Regulations, 2002—Regulation 7, 8.1, 8.2, 8.7 and 8.8—Constitution of India, 1950—Article 226—Indian Evidence Act. 1872—Section 45—Indian Penal Code, 1860—Section 304A—Indian Medical Council Act, 1956—Section 20A and 33 (m)—Daughter of Respondent No.2 died in Max Hospital—Her husband lodged complaint with police alleging wrong treatment and negligence—Police sought opinion of Delhi Medical Council (DMC) as to whether there was any negligence involved in this case—DMC concluded that no medical negligence could be attributed to doctors in treatment administered to deceased—Father of deceased preferred appeal under MCI Regulations—Ethics Committee found petitioner and another doctor guilty of negligence and adjourned deliberations to next meeting to decide quantum of punishment to be imposed on those found guilty—Order was challenged by way of Writ Petition which was disposed of with directions to MCI to pass a final order both on merits as well as on question of jurisdiction after giving due opportunity to aggrieved parties—Contrary to those directions, petitioner filed application seeking dismissal of appeal on grounds of jurisdiction without entering into merits of case—MCI concluded vide impugned**



**order that it had jurisdiction to deal with Matter—Order challanged before HC—Plea taken, decision of DMC was in nature of opinion sought by Police authorities and no appeal could have been maintained against such a decision—Therefore, entire proceedings before MCI were without jurisdiction—Per contra plea taken, MCI had concurrent jurisdiction to deal with offences and complaints of professional misconduct alongwith State Medical Council—Matter required examination on merits and present writ petition was filed only to interdict conclusion of proceedings before MCI—Held—Instances of offences and/or professional misconduct which constitute infamous act, and which call for disciplinary action, both MCI and/or State Medical Council are empowered to deal with such a matter and in this exercise they are not precluded from considering and dealing with any other form of professional misconduct which is not listed/categorized under Regulation 7—MCI exercises both original as well as appellate jurisdiction—If MCI, is made cognizant of certain facts pertaining to what would constitute ordinarily in "letter and spirit" a professional misconduct by a registered medical practitioner then, it would have necessary authority to deal with matter—MCI can on its own take action on infraction of regulation or infamous act or professional conduct coming to its notice—Appeal provision would have no relevance, since MCI has exercised original jurisdiction—MCI has correctly concluded that it makes no distinction between a representation and a complaint—It is not form but substance of representation, which would decide that: whether or not it raises issue and, in that sense, a complaint of professional misconduct by a registered medical practitioner—If MCI was made cognizent of act which prima facie had ingredients of professional misconduct then it would have necessary original jurisdiction to deal with such material placed before**

**it—Nomenclature given to action by father of deceased would have no relevance—MCI can treat action of father of deceased as original complaint and deal with matter in accordance with extent provisions of MCI Regulations—While dealing with cases of professional misconduct, MCI is not fettered with rules of locus and therefore fact father of deceased was not a original complainant in that he was not a Class I Legal Heir of deceased would make no difference—There is no merit in writ petition.**

In this context, I have no difficulty in observing that the nomenclature given to the action filed by father of the deceased Nikita Manchanda, before the MCI, would have no relevance. Even though the action is titled as an appeal under the provisions of regulation 8.2 read with regulation 8.8 of the MCI Regulations, that by itself, would not take away the jurisdiction of the MCI to deal with the matter. Therefore, the argument of the petitioner that appeal would not lie from an opinion rendered by the Delhi Medical Council, is also misconceived, for the reason that MCI can treat the action of the father of the deceased, as an original complaint, and thereafter, deal with the matter in accordance with the extant provisions of the MCI Regulations.

**(Para 12.9)**

**Important Issue Involved:** (A) The instances of offences and/or professional misconduct which constitute an infamous act, and which call for disciplinary action, both MCI and/or the State Medical Council are empowered to deal with such a matter, and in this exercise they are not precluded from considering and dealing with any other form of professional misconduct which is not listed/categorized under regulation 7.



(B) MCI exercise both original as well as appellate jurisdiction. If MCI is made cognizant of certain facts pertaining to what would constitute ordinarily in "letter or spirit" a professional misconduct by a registered medical practitioner then, it would have the necessary authority to deal with the matter.

(C) While dealing with cases of professional misconduct, MCI is not fettered with rules of locus.

(D) It is not the form but the substance of the representation, which would decide that: whether or not it raises an issue and, in that sense, a complaint of professional misconduct by a registered medical practitioner.

**[Ar Bh]**

**APPEARANCES:**

**FOR THE PETITIONER** : Mr. Anil Goel & Mr. Rajeev Kumar, Advocates.

**FOR THE RESPONDENT** : Mr. Amit Kumar & Mr. Ashish Kumar, Advocates.

**CASES REFERRED TO:**

1. *Jacob Mathew* vs. *State of Punjab and Ors.* (2005) 6 SCC 1.
2. *Malay Ganguly* vs. *Medical Council of India and Others in* (2002) 10 SCC 93.

**RESULT:** Dismissed.

**RAJIV SHAKDHER, J.**

**1.** This is a writ petition which is directed against the order dated 15.05.2012 passed in Appeal no.597/2010 by respondent no.1 i.e., the Medical Council of India (hereinafter referred to in short as MCI). The impugned order passed by MCI is an interlocutory order whereby, on an

application filed by the petitioner challenging its jurisdiction, it took the view that it had the jurisdiction to hear the matter on merits.

**2.** The judgment in this matter was reserved at the notice stage itself. MCI which had advance notice of the writ petition being filed in this court; was hence represented by counsel. It was for this reason, there was no representation on behalf of respondent no.2.

**Background**

**3.** The writ petition has thus been filed in the background of the following brief facts :-

3.1 Late Nikita Manchanda was admitted in Max Hospital situate at Pitam Pura for delivery of a child, on 03.05.2009, at about 5.00 a.m. The child was in a breech condition which required performance of a lower segment caesarean section procedure, under general anesthesia. At about 5.41 a.m. on 03.05.2009 Nikita Manchanda delivered a male child. At around 8.30 p.m. on 04.05.2009, Nikita complained of severe pain in her lower abdomen and back, whereupon the patient was administered an injection. The pain, however, reoccurred alongwith cold chills. The patient was again injected with medicine and also given tablets. Evidently, the patient had two episodes of vomiting at around 2.00 a.m. on 05.05.2009. By 7.00 a.m., the patient complained of severe pain, which is when, the patient was shifted to SICU. In the interregnum, it appears, that blood investigation and ultrasound were also prescribed to be conducted qua the patient. Apparently, as the patient's condition deteriorated, she was intubated for ventilatory support. The family members were apparently asked to arrange for blood, for which purpose, the family members approached a blood bank, at Shalimar Bagh, Delhi. However, unfortunately, Nikita's condition worsened and she was declared dead at 12.30 p.m., on 05.05.2009.

3.2 Nikita's husband Mr. Aman Sarna, lodged a complaint with the Police station located at Saraswati Vihar, Delhi wherein, after giving a brief summary of the events, as they had transpired between the time of his wife's admission in Max Hospital and her death, he alleged that she died on account of "wrong treatment and negligence". He also demanded a post mortem to be carried out on his wife's body.

3.3 Evidently, on 06.05.2009 a post mortem was carried out. A



report on which, was deferred till the receipt of, the chemical analysis report. It would be pertinent to note that, neither the post mortem report nor the chemical analysis report, is on record.

3.4 On 28.05.2009, the Dy. Commissioner of Police, Head Quarters, Delhi wrote to the Dy. Secretary (Home), Govt. of NCT of Delhi, to request the Delhi Medical Council to give its opinion : as to whether there was any negligence involved in this case, since the family members of the deceased had lodged a complaint and alleged therein, that she died in suspicious circumstances, on account of medical negligence of the doctors at the Max Hospital.

3.5 Based on the above, the Delhi Medical Council examined the case and disposed of the same vide order dated 07.06.2010. It may be important to note, that the petitioner has raised an argument before me that, the Delhi Medical Council had erroneously referred to its decision of 07.06.2010, as an order, whereas it is really an opinion, which was sought by the police authorities, in line with the judgment of the Supreme Court, in the case of **Jacob Mathew Vs. State of Punjab and Ors.** (2005) 6 SCC 1. I would deal with this aspect of the matter in the latter part of my judgment.

3.6 The Delhi Medical Council, after hearing the aggrieved parties, which included, the father and the husband, as also, the uncle of the deceased and, the doctors involved in the episode, came to the conclusion that, in their opinion no medical negligence could be attributed to the doctors in the treatment administered to late Nikita Manchanda. The operative part of the decision reads as follows :-

> "...The Delhi Medical Council observed that the patient had an elective caesarean section on 3.5.2009 Max Hospital, Pitampura, New Delhi. Her operative and immediate postoperative period was uneventful. However, on 4.5.2009 (11 PM), she had pain abdomen which is generally associated with a LSCS procedure. She was attended to by Dr. Pooja Bhatia, a resident in third year of her DM training (Obst. & Gynae) who was qualified to attend to the patient. As per the clinical condition the patient recorded at 11 PM (4.5.2009) and 2 AM (5.5.2009), there was no medical reasons to order for any diagnostic investigation under those circumstances. Administration of inj. Voveran and prescribing

Tab. Mobizox, hot water bottle massage for lower backache and then administration of inj. Emset 4 mg. for vomiting, by the resident doctor was as per the standard protocol. Unfortunately, in spite of adequate care, patient collapsed in the morning and could not be resuscitated and even autopsy could not ascertain the cause of death, though idiosyncrasy drugs and pulmonary oedema have been mentioned in autopsy finding as a possibility. In view of the above and autopsy report, the Delhi Medical Council is of the opinion that no medical negligence can be attributed on the part of the doctors of Max Hospital, Pitampura, New Delhi, in the treatment administered by them to late Nikita Manchanda....."

3.7. The father of the deceased being dissatisfied with the decision arrived at by Delhi Medical Council, preferred an appeal under Regulation 8.7 and 8.8 of the Indian Medical Council (Professional, Etiquette and Ethics) Regulations, 2002 (in short the MCI Regulations).

3.8. The appeal was considered by the Ethics Committee of the MCI. By an order dated 08.03.2011, the Ethics Committee found the petitioner guilty of negligence in addition to Doctor Rajeev Kapoor, who was found negligent in providing incorrect information. Two other doctors i.e., Dr. Mohammed Nabi and Dr. Preeti Bobal, being junior doctors, were apparently let off as, "they did not have any major contribution towards the negligent management", of the deceased. The Ethics Committee had thereafter adjourned their deliberations to the next meeting to decide on the quantum of punishment to be imposed on those found guilty.

3.9. This order was challenged by the petitioner alongwith two others who were aggrieved by the decision of the Ethics Committee dated 08.03.2011, by way of a writ petition being: WP(C) 3015/2011. The writ petition was disposed of by a Single Judge of this court vide order dated 06.05.2011, with the following observations :-

"..5. In as much as that the hearing of the appeal is to take place on 10th May 2011 and the Petitioners are yet to be heard, this Court is not inclined to pass any order at this stage. It is obvious that no final order will be passed by the MCI without giving each of the Petitioners a full opportunity of being heard and considering



all their submissions, including those raised in this petition and on the question of jurisdiction. The MCI will pass the final order without being influenced by any prima facie opinion which may have been formed by those at its meeting held on 8th March, 2011. If aggrieved by the Final order passed by the MCI, it will be open to the petitioners to seek such appropriate remedies as may be available to them in accordance with law.

**6.** The writ petition and the pending application are disposed of..."

3.10. The petitioner was apparently satisfied with the manner in which the writ petition was disposed of, by this court, as there was no further challenge to the order dated 06.05.2011, passed by this court. The petitioner, however, contrary to the directions issued by this court that MCI would pass a final order both on the merits as well as on the question of jurisdiction after giving due opportunity to the aggrieved parties without being influenced by the prima facie opinion formed at its meeting of 08.03.2011, evidently moved a short application, on 10.05.2011 seeking dismissal of the appeal, at the very threshold, on the grounds of jurisdiction without entering into the merits of the case. The grounds raised in the application were briefly as follows :-

(i) the DCP (HQ) had made a representation to the Delhi Medical Council through Department of Home, Govt. of NCT of Delhi to seek its opinion as to whether there was negligence on the part of the doctors and the hospital in the treatment of the deceased. There is no provision for appeal against an opinion rendered by the Delhi Medical Council;

(ii) the original complaint with the police is filed by the husband of the deceased i.e., Mr. Aman Sarna, who had neither any objection to the opinion rendered by the Delhi Medical Council nor, had he preferred an appeal to MCI; and

(iii) lastly, the appeal had been preferred by Sh. S.P. Manchanda, the father of the deceased. The appeal was not maintainable, as he was neither a class-I heir as per the Hindu Succession Act nor the original complainant.

3.11 The MCI by the impugned order dated 15.05.2005 framed three issues :-

"..1. Whether the Ethics Committee has the jurisdiction to deliberate on this issue.

2. Whether there is any distinction between a representation and a complaint.

3. Whether the representation/complaint of the father is tenable."

3.12 The said issues were decided by a brief order, which is the impugned order, whereby it concluded that by virtue of powers vested in the Ethics Committee by regulation 8 of the MCI Regulations, it had the jurisdiction to deal with the matter; it also concluded that there was no distinction between representation and a complaint; and lastly, in so far as the Ethics Committee was concerned, any representation/a complaint filed by any member of the public was sufficient for it to take up the matter for consideration.

3.13 Accordingly, the Ethics Committee of MCI unanimously decided to issue notices to the concerned parties for consideration of the matter at their next meeting.

3.14 It is against the aforesaid order of the MCI that a writ petition has been filed under Article 226 of the Constitution of India.

Submissions of Counsels

4. Before me the petitioner was represented by Mr. Anil Goel and Mr. Rajeev Kumar, Advocates, while MCI was represented by Mr. Amit Kumar and Mr. Ashish Kumar, Advocates.

**5.** On behalf of the petitioners, the following submissions were made :-

5.1. The decision of the Delhi Medical Council was in the nature of an opinion sought by the police authorities through the aegis of Department of Home, Govt. of NCT of Delhi, in line with the judgment of the Supreme Court in Jacob Mathew's case;

5.2. Even though the decision of Delhi Medical Council was given the nomenclature of an order, it was really in substance an opinion and hence, no appeal could have been maintained against such a decision;

5.3. As a consequence of submissions made above, it was contended, that MCI had thus no jurisdiction to deliberate and decide on the matter;

5.4. The opinion rendered by the Delhi Medical Council was, in sum and substance, an opinion of an expert body which would be tested



in a proceeding in court: whether of civil or criminal nature; as it could only be treated as corroborative evidence and not conclusive evidence. Reliance in this regard was placed on section 45 of the Evidence Act, 1872. Much stress, was also laid on the composition of the body of the Delhi Medical Council which had examined the case. It was contended that it comprised of seven members, of which, five were doctors and the other two, an advocate and an eminent person involved in social work.

5.5. The MCI and the State Medical Council, in this case, the Delhi Medical Councils are bodies which can deal with professional misconduct of a doctor. The power to grant and suspend a licence of a doctor is vested with the State Medical Council. The State Medical Council can entertain a complaint against professional misconduct of any doctor as defined in Chapter 5 of the MCI Regulations under regulation 8.2 of the said regulations. It is when, the State Medical Council takes a decision under regulation 8.2, that an appeal would lie to the MCI under regulation 8.8 of the MCI Regulations.

5.6. In this case, a criminal case was sought to be triggered based on the alleged acts of negligence, which if, sustained would perhaps attract the provisions of Section 304-A of the Indian Penal Code, 1860 (in short IPC). It was in the process of investigation of those allegations by the police that an opinion was sought and rendered by the Delhi Medical Council. There was no complaint which was made to the Delhi Medical Council. The decision rendered by the Delhi Medical Council therefore, on 07.06.2010 could not have given respondent no.2, in law, a right to prefer an appeal to MCI. Consequently, MCI in seeking to exercise jurisdiction qua the matter before it is without jurisdiction.

5.7 In support of the aforesaid submission, a reference was made to the provisions of section 20A and section 33(m) of the Indian Medical Council Act, 1956. Section 20A briefly, empowers the MCI to prescribe standards of professional conduct and etiquette and also code of ethics for medical practitioners. Sub section (2) of section 20A empowers the MCI to make regulations which would specify as to the violations which shall constitute "infamous" conduct, in other words professional misconduct, which regulations shall have effect notwithstanding anything contained in any law for the time being in force. Section 33 is the provision which empowers the MCI to generally make regulations to carry out the purpose of the Act. In particular, clause (m) empowers

MCI to frame standards of professional misconduct and etiquette as also the code of ethics to be observed by the medical practitioners. A reference was thus made to the said provisions to buttress the contention made on behalf of the petitioner that the regulation 7 deals with various kinds of misconduct, while regulation 8.2, as indicated above, provides for the remedy to file a complaint before the "appropriate Medical Council" for disciplinary action with regard to professional misconduct. Regulation 8.8, as indicated above provides for a provision of appeal to the MCI within the stipulated period of sixty days with a provision for extension by another sixty days on sufficient cause being shown against the decision of the State Medical Council.

**6.** The sum and substance of the aforesaid was that the entire proceedings before the MCI were without jurisdiction and hence, the writ petition.

**7.** On the other hand, the learned counsel for respondent no.1 relied upon the impugned order, and the record of the case, to contend that the matter required examination on merits and that the present writ petition was filed only to interdict the conclusion of the proceedings, before the MCI.

7.1 On the question of jurisdiction, learned counsel for respondent no.1 laid emphasis on regulation 8.1 of the MCI Regulations, to contend that, MCI had concurrent jurisdiction to deal with offences and complaints of professional misconduct alongwith the State Medical Council. It was emphasised by the learned counsel for MCI that, regulation 8.1 of the MCI regulations, quite clearly, in no uncertain terms, indicated that the instances of offences as also of professional misconduct set out in the regulations, in particular, regulation 7 neither constituted nor were intended to constitute a complete list of "infamous" acts which called for disciplinary action.

**8.** It was thus contended that the writ petition ought to be dismissed in limine, as the only purpose with which it had been filed was, to somehow, delay the conclusion of the proceedings before MCI. Reasons 9. I have heard the learned counsels for parties and perused the record. Upon consideration of the matter, in my view, the following emerges in the case :-



9.1. The deceased Nikita Manchanda was admitted to the hospital at around 5.00 a.m. on 03.05.2009.

9.2. She delivered a male child at 5.41 a.m. on 03.05.2009.

9.3. Nikita Manchanda died at 12.30 p.m. on 5.05.2009.

9.4. She had complained of severe lower abdomen pain in the night of 4.05.2009, which was followed by atleast two episodes of vomiting.

9.5. Nikita Manchanda was administered various pain killers and other medicines despite which she died, nearly 39 hours post delivery of a child through caesarean section.

9.6. The aggrieved husband Aman Sarna instituted a complaint on the very same date i.e., 05.05.2009 with the police. Evidently, the police after nearly 23 days of the complaint being lodged sought the opinion of the Delhi Medical Council i.e., 28.05.2009.

9.7. The Delhi Medical Council gave its decision on 07.06.2010.

9.8. Aggrieved by the same, an appeal was preferred by the father of the deceased Sh. S.P. Manchanda.

9.9. At the meeting of 8.3.2011, held by MCI, a prima facie view was formed with regard to the guilt of the petitioner and two other persons.

9.10 A writ petition was preferred being WP(C) No. 3015/2011, whereby this court directed MCI not to pass any final order, without giving the petitioners, in that case (which included the petitioner herein), a full opportunity of being heard and considering all their submissions, including those raised in the petition and on the question of jurisdiction. MCI, was thus, directed to pass a **"final order"** without being influenced by any prima facie opinion formed at the meeting held on 8.3.2011. The petitioners, in that case, were given an opportunity to assail the **"final order"** of the MCI, if so aggrieved, in accordance with law.

**10.** Having regard to the aforesaid facts, it is quite evident that this court while passing order made it clear that there would be no piecemeal adjudication. Issues raised with regard to the merits as well as the jurisdiction, were required to be disposed of by the MCI, by a "final order".

10.1 The petitioner, however, has triggered a situation by moving an application before MCI, seeking decision on the issue of jurisdiction without allowing MCI to deliberate upon the merit of the case. Since, MCI has passed the impugned order, at the behest of the petitioner, it may be relevant to deal with the objections raised therein. The upshot of the objection to the jurisdiction raised is as follows:

10.2 Both MCI and the Delhi Medical Council can only deal with aspects of professional misconduct of medical practitioners under the MCI Act and the MCI Regulations framed thereunder. The decision of the Delhi Medical Council of 7.6.2010 is in the nature of an opinion sought by the police authorities prior to their taking a decision as to whether the criminal proceedings ought to be lodged against the petitioner. There being no complaint before the Delhi Medical Council with regard to professional misconduct, the decision of the Delhi Medical Council dated 7.6.2010 could not give rise to an appealable order. Therefore, the appeal preferred by the father of the deceased Nikita Manchanda was not maintainable. As noticed above, in the application filed before the MCI there was also an issue raised that the father of Nikita Manchanda could not have preferred an appeal as he was not a class-I heir. This aspect though was not argued before me.

**11.** In order to appreciate the contentions made on behalf of the petitioner, one would have to advert to regulations 7 and 8 of the MCI Regulations 2002 under which MCI claims to have exercised the jurisdiction. The relevant clauses are referred to hereinafter:

> "7. **MISCONDUCT:**
>
> The following acts of commission or omission on the part of a physician shall constitute professional misconduct rendering him/her liable for disciplinary action...
>
> 7.1 xxx
>
> to
>
> 7.24 xxx
>
> (Regulation 7.1 to 7.24 detail out what, under the said regulations are regarded as acts of professional misconduct).



**8. PUNISHMENT AND DISCIPLINARY ACTION**

8.1. It must be clearly understood that the instances of offences and of Professional misconduct which are given above do not constitute and are not intended to constitute a complete list of the infamous acts which calls for disciplinary action, and that by issuing this notice the Medical Council of India and or State Medical Councils are in no way precluded from considering and dealing with any other form of professional misconduct on the part of a registered practitioner. Circumstances may and do arise from time to time in relation to which there may occur questions of professional misconduct which do not come within any of these categories. Every care should be taken that the code is not violated in letter or spirit. In such instances as in all others, the Medical Council of India and/or State Medical Councils have to consider and decide upon the facts brought before the Medical Council of India and/or State Medical Councils.

8.2. It is made clear that any complaint with regard to professional misconduct can be brought before the appropriate Medical Council for Disciplinary action. Upon receipt of any complaint of professional misconduct, the appropriate Medical Council would hold an enquiry and give opportunity to the registered medical practitioner to be heard in person or by pleader. If the medical practitioner is found to be guilty of committing professional misconduct, the appropriate Medical Council may award such punishment as deemed necessary or may direct the removal altogether or for a specified period, from the register of the name of the delinquent registered practitioner. Deletion from the Register shall be widely publicized in local press as well as in the publications of different Medical Associations/ Societies/Bodies.

8.3. In case the punishment of removal from the register is for a limited period, the appropriate Council may also direct that the name so removed shall be restored in the register after the expiry of the period for which the name was ordered to be removed.

8.4. Decision on complaint against delinquent physician shall be taken within a time limit of 6 months.

8.5. During the pendency of the complaint the appropriate Council

may restrain the physician from performing the procedure or practice which is under scrutiny. 8.6. Professional incompetence shall be judged by peer group as per guidelines prescribed by Medical Council of India. 8.7 Where either on a request or otherwise the Medical Council of India is informed that any complaint against a delinquent physician has not been decided by a State Medical Council within a period of six months from the date of receipt of complaint by it and further the MCI has reason to believe that there is no justified reason for not deciding the complaint within the said prescribed period, the Medical Council of India may –

(i) Impress upon the concerned State Medical Council to conclude and decide the complaint within a time bound schedule;

(ii) May decide to withdraw the said complaint pending with the concerned State Medical Council straightaway or after the expiry of the period which had been stipulated by the MCI in accordance with para (i) above, to itself and refer the same to the Ethical Committee of the Council for its expeditious disposal in a period of not more than six months from the receipt of the complaint in the office of the Medical Council of India. 8.8 Any person aggrieved by the decision of the State Medical Council on any complaint against a delinquent physician, shall have the right to file an appeal to the MCI within a period of 60 days from the date of receipt of the order passed by the said Medical Council: Provided that the MCI may, if it is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, allow it to be presented within a further period of 60 days..."

**12.** A perusal of clause 8.1 would show that the instances of offences and/or professional misconduct which constitute an infamous act, and which call for disciplinary action, both MCI and/or the State Medical Council are empowered to deal with such a matter, and in this exercise they are not precluded from considering and dealing with any other form of professional misconduct which is not listed/ categorized under regulation 7.



12.1 Regulation 8.1, when read alongwith regulation 8.2 and 8.8, would show that under regulation 8.1, the MCI, exercises both original as well as appellate jurisdiction. If MCI, is made cognizant of certain facts pertaining to what would constitute ordinarily in "letter or spirit" a professional misconduct by a registered medical practitioner then, it would have the necessary authority to deal with the matter. This power emanates, in favour of MCI from regulation 8.1.

12.2 Where a complaint is filed with regard to professional misconduct, it would have to be brought before the appropriate medical council, which could, in a given case be the State Medical Council or MCI, for disciplinary action. In the eventuality of, the medical practitioner being found guilty of professional misconduct and awarded punishment, the medical practitioner would have the right to file an appeal with the MCI, if the original complaint is filed and thereafter decided by the State Medical Council. But this is not to say that, MCI cannot on its own take action on an infraction of the regulation or an infamous act or professional conduct coming to its notice.

12.3 These aspects become clear on a careful scrutiny of regulation 8.1 and 8.2. Regulation 8.1 provides the power to issue notice for committing a professional misconduct to both the MCI and/or the State Medical Council. In regulation 8.2, the expression used is: not the State Medical Council but an 'appropriate' Medical Council which in a given case could be the MCI. In regulation 8.8, consciously, the expression used is, once again, the 'State Medical Council'; as it provides for an appellate remedy. An appeal would lie, if the decision under regulation 8.2 is taken by the State Medical Council, which in such a case would be the appropriate Medical Council and not where MCI, has taken a decision.

12.4 The argument, therefore, of the petitioner that there was no complaint under regulation 8.2 with Delhi State Medical Council and therefore no decision had been rendered by it which could in turn be carried in appeal to MCI, is misconceived, if regard is had to construction put forth hereinabove. Regulation 8.2 enables the MCI to entertain a complaint, call it by whatever name. Accordingly, the appeal provision would have no relevance, since MCI has exercised original jurisdiction. The MCI, in the impugned order, has quite correctly concluded that, it makes no distinction between a representation and a complaint.

12.5 It is not the form but the substance of the representation, which would decide that: whether or not it raises an issue and, in that sense, a complaint of professional misconduct by a registered medical practitioner.

12.6 If such aspects come to the notice of MCI in whichever form then, in my view, the MCI would have, apart from anything else, concurrent original jurisdiction to deal with the alleged acts of professional misconduct.

12.7 While the learned counsel for the petitioner is right in his submission that the decision of the Delhi State Medical Council is, an opinion, which was sought, by the police authorities pursuant to the directions of the Supreme Court in Jacob Mathew's case; it cannot deride from the fact that if, MCI was made cognizant of an act which prima facie had ingredients of professional misconduct then, MCI would have the necessary original jurisdiction to deal with such material placed before it. In that respect, rules of locus will not fetter the power conferred on MCI under regulation 8.1, therefore, while the learned counsel for the petitioner may be right in saying that there can be no appeal if the decision rendered by the Delhi State Medical Council is not an order in terms of regulation 8.2 that by itself, as indicated above, would not exclude the jurisdiction of MCI to take cognizance of the material placed before it, irrespective of the nomenclature given to it.

12.8 That MCI has original jurisdiction, is an argument, which finds resonance even in regulation 8.7. Regulation 8.7 clearly indicates that, where the State Medical Council fails to decide a complaint against a delinquent physician within a period of six (6) months from the date of receipt of complaint by it, and the MCI has reason to believe that there is no justifiable reason for the State Medical Council not to decide the complaint within the prescribed period of six (6) months, the MCI has two options available with it. The first one being: to direct the concerned State Medical Council to conclude and decide the complaint within a time bound schedule. The second option, with which we are concerned, is the power of MCI, to either straightaway withdraw the complaint to itself or, after expiry of the extended period stipulated by MCI, under the first option, to withdraw the complaint to itself and refer the same to the Ethics Committee. It may only be noted that regulation 8.7 was introduced



by the MCI pursuant to the observations made by the Supreme court in the case of **Malay Ganguly vs. Medical Council of India and Others** in (2002) 10 SCC 93. Therefore, there is no doubt in my mind that, the MCI has concurrent original jurisdiction, vested in it.

12.9 In this context, I have no difficulty in observing that the nomenclature given to the action filed by father of the deceased Nikita Manchanda, before the MCI, would have no relevance. Even though the action is titled as an appeal under the provisions of regulation 8.2 read with regulation 8.8 of the MCI Regulations, that by itself, would not take away the jurisdiction of the MCI to deal with the matter. Therefore, the argument of the petitioner that appeal would not lie from an opinion rendered by the Delhi Medical Council, is also misconceived, for the reason that MCI can treat the action of the father of the deceased, as an original complaint, and thereafter, deal with the matter in accordance with the extant provisions of the MCI Regulations.

12.10 While dealing with cases of professional misconduct, MCI is not fettered with rules of locus and, therefore, the fact that the father of the deceased was not the original complainant, or that he was not a class-I legal heir of the deceased, would make no difference.

12.11 The police authorities on their part having not proceeded in the matter so far, continue with the investigation and perhaps await the decision of the MCI with regard to the matter in issue.

**13.** For the foregoing reasons, I find no merit in the writ petition. The same is, accordingly, dismissed.

**ILR (2013) I DELHI 687**
**W.P. (C)**

**RAVINDER SINGH ....PETITIONER**

**VERSUS**

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

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

**W.P. (C) NO. : 8763/2011 DATE OF DECISION: 19.02.2013**

**Pension Regulations for the Army, 1961—Regulation 173 and 173-A—Whether the Petitioner was discharged on account of medical disability (lower medical category) and thereby whether he is entitled to award of disability pension, benefits under Regulation 173-A of the Pensions Regulation for Army ?—Held, The Regulation 173-A applies only to individuals on their having being placed in lower medical category (medical disability), but here the Petitioner was discharges not on the account of disability and on the account of repeated disciplinary proceedings against him, where he was found guilty.**

**Ratio Decidendi:**

**"Regulation 173 and 173-A applies to a person invalidated out of service on the account of a disability attributable to military service. Further it shall apply to individuals discharged on the account being placed in low medical category".**

**[As Ma]**

**APPEARANCES:**

**FOR THE PETITIONER** : Col. R.S. Kalkal, Advocate.



**FOR THE RESPONDENTS** : Mr. Sachin Datta, CGSC with Mr. Dinesh Sharma, Advocate.

**CASES REFERRED TO:**

1. *Ex. Sepoy Raghbir Singh* vs. *Union of India & Ors.* WP (C) No.16247/2004.
2. *Ram Pal Singh* vs. *Union of India & Ors.* AIR 1984 SC 504.

**RESULT:** Writ petition Dismissed.

**GITA MITTAL, J (Oral)**

**1.** By way of the instant petition, the petitioner assails an order dated 1st September, 2011 whereby his OA No.522/2010 seeking grant of disability pension under the provisions of Regulation 173A of the Pension Regulations for the Army, 1961 was rejected by the Armed Forces Tribunal.

**2.** The undisputed fact giving rise to the present petition to the extent necessary and briefly noticed hereafter. The petitioner has contended that he was enrolled into the Indian Army on 1st October, 1990 and was thereafter discharged on the 31st January, 2001 on the ground that he was awarded four red ink entries in his service record on account of misdemeanours for which punishment was also imposed thereon.

**3.** The case of the petitioner is that he was found medically unfit by the Medical Board in the year 1997 and was placed in the low medical category but was retained in service. The petitioner was medically examined by a Medical Board held on 16th March, 2000 which had opined that the petitioner was suffering from partial seizure (RT) with generalisation & acute lumbago and was found to be having 30% disability. A second medical examination of the petitioner conducted on 16th September, 2011 confirmed the said diseases and opined the percentage of the petitioner's disability of 20%.

**4.** Learned counsel for the respondents has contended that given the above narration, despite the fact that the petitioner was placed in a low medical category in the year 1997, he was retained in service and was assigned duties even thereafter. It is urged that the petitioner cannot validly contend that his disability was attributable to military service.

**5.** Mr.R.S. Kalkal, learned counsel for the petitioner has drawn our attention to the opinion of the Medical Board dated 23rd January, 1998 wherein, though the board has held that the disability of the petitioner was not directly attributable to the conditions of service, but in para 5 had opined that even if it was not directly attributable to service, it was aggravated "due to stress and strain of service conditions".

The petitioner places reliance on this finding of the Medical Board in support of his claim and entitlement to award of disability pension.

Reliance has also been placed on the provisions of Regulation 173 & 173A of the Pension Regulations for the Army, 1961 in support of the claim.

**6.** This claim of the petitioner was raised for the first time in the year 2004. The petitioner also filed a petition before the Armed Forces Tribunal being OA No. 522/2010 which came to be rejected by the Armed Forces Tribunal by its order of 1st September, 2011. Aggrieved thereby, the present challenge has been laid.

**7.** Before us, Mr.Sachin Datta, learned counsel for the respondents has staunchly contested the claim of the petitioner contending that the petitioner was not discharged on account of medical disability but had been boarded out for the reason that he was awarded four red ink entries in his service record and that he was disentitled to the benefit under Regulation 173-A. It is contended that the case of the petitioner is not even covered under the provisions of Regulation 173 of the Pension Regulations for the Army.

**8.** In order to adjudicate on the rival contention, we may usefully set out the provisions of Regulations 173 & 173-A of the Pension Regulations for the Army, 1961 which read as follows:-

> *"Primary conditions for the grant of disability pension* 173. Unless otherwise specifically provided a disability pension consisting of service element and disability element may be granted to an individual who is invalided out of service on account of a disability which is attributable to or aggravated by military service in non-battle casualty and is assessed 20 per cent or over.
>
> *Individuals discharged on account of their being permanently in low medical category*



> 173-A Individuals who are placed in a lower medical category (other than 'E') permanently and who are discharged because no alternative employment in their own trade/category suitable to their low medical category could be provided or who are unwilling to accept the alternative employment or who having retained in alternative appointment are discharged before completion of their engagement, shall be deemed to have been invalided from service for the purpose of the entitlement rules laid down in Appendix II to these Regulations."

**9.** It is evident that these two regulations apply if a person is invalidated out of service on account of a disability attributable to military service or because no alternative employment in their own trade category suitable to their low medical category could be provided. Given the absolute mandate of Regulation 173, the petitioner certainly cannot place any claim thereunder. So far as Regulation 173-A is concerned, the case of the petitioner also does not fall under any of the three categories to which the regulation applies. The petitioner was continued in service despite his being in a low medical category. His discharge was not on account of the disability but on account of his having been found undesirable after repeated disciplinary proceedings against him in which he was found guilty and was duly punished.

**10.** The Armed Forces Tribunal has concluded that the case of the petitioner is a simple case of discharge and not a discharge on account of the lower medical category. The Regulation 173-A as captioned clearly applies only to individuals discharged on their having been placed in permanent low medical category. In the view we have taken, we are supported by the pronouncement of this court which is in decision dated 16th November, 2006 in WP (C) No.16247/2004 case **Ex. Sepoy Raghbir Singh vs. Union of India & Ors.** wherein, on similar facts, the court held that such a person would not be entitled to disability pension.

**11.** Learned counsel for the petitioner has, however, placed reliance on the pronouncement of the Supreme Court reported at AIR 1984 SC 504 **Ram Pal Singh vs. Union of India & Ors.** in support of the petitioner's claim. We find that in this case, the petitioner was boarded out on account of injury which was suffered by him during the Indo-Pakistan conflict. The case did not involve Regulation 173 or 173A of the Pension Regulation for the Army. There is nothing on record to show

that Ram Pal Singh was kept in service despite his having suffered the injury during the Army conflict. The case is clearly distinguishable on facts. Even otherwise the judgment rendered in that case does not lay down any absolute proposition thereof.

We do not see any reason to differ with the view taken by the Armed Forces Tribunal.

The writ petition is dismissed.

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**ILR (2013) I DELHI 691**
**W.P. (C)**

**V.K. JOSHI ...PETITIONER**

**VERSUS**

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

**(BADAR DURREZ AHMED & SIDDHARTH MRIDUL, JJ.)**

**W.P. (C) NO. : 8618/2010 DATE OF DECISION : 04.01.2013**

**Service Law—Constitution of India 1950—Article 14, Constitution of India Article 16—Whether the Central Administrative Tribunal was right in rejecting the claim of the petitioner for being entitled to promotion from the year 2003, that in when according to him, he had requisite period of service for being considered for promotion to the next higher grade?—Held, in view of clause 3.4.2 of Official Memorandum (dated 29/05/1986), a person who is initially taken on deputation and absorbed later cannot be granted promotion before his absorption and it should be considered from the date he was absorbed in the department. Thus, the said Tribunal was right in rejecting the claim of the Petitioner.**



**Ratio Decidendi:**

**"Promotion to any official getting absorbed after deputation according to the Recruitment Rules of the Department of Personnel and Training should affect filling up vacancies, and not affect previous promotions made before the said absorption."**

**[As Ma]**

**APPEARANCES:**

**FOR THE PETITIONER** : Ms. Jyoti Singh, Sr. Advocate with Mr. Amandeep Joshi.

**FOR THE RESPONDENTS** : Mr. Anuj Aggarwal with Mr. Ashish Virmani.

**CASES REFERRED TO:**

1. *S.I.Rooplal & Ors.* vs. *Lt. Governor of Delhi,* 2000 (1) SCC 644.
2. *Shri S.I. Rooplal & Others* vs. *Lt. Governor through Chief Secretary,* Delhi JT 1999 (9) SC 597.

**RESULT:** Writ Petition Dismissed.

**SIDDHARTH MRIDUL, J.**

**1.** This writ petition assails the order dated 20.08.2010 passed by the Central Administrative Tribunal, Principal Bench, New Delhi in OA No.334/2010. By virtue of the impugned order, the Tribunal rejected the claim of the petitioner for being entitled to promotion from the year 2003, that is, when according to the petitioner, he had the requisite period of service for being considered for promotion to the next higher grade.

**2.** The facts, in brief, are as under:

(i) On 11.01.1998, the petitioner was promoted to the post of Deputy Commandant in the Central Reserve Police Force (CRPF).

(ii) Thereafter, on 01.12.1999, the petitioner was sent on deputation to the respondent no.3 as Assistant Director (Exe).

(iii) Subsequently, with effect from 20.11.2006, the petitioner was absorbed by the respondent no.3 on the post of Assistant Director (Exe) which was equivalent and analogous to the post held by the petitioner in the CRPF at the time when the petitioner was sent on deputation.

(iv) Before the absorption of the petitioner took place, the Department of Personnel and Training (hereinafter referred to as DOP&T) issued an OM dated 27.03.2001 for the purpose of assigning seniority to persons absorbed after being on deputation. The OM dated 27.03.2001, in effect, brought about an amendment to another OM dated 29.05.1986, so as to implement the judgment of the Supreme Court in **S.I.Rooplal & Ors. vs. Lt.Governor of Delhi,** 2000 (1) SCC 644. The relevant portion of the OM dated 27.03.2001 is reproduced hereinafter:

"OFFICE MEMORANDUM

Subject: Seniority of persons absorbed after being on deputation.

The undersigned is directed to say that according to our O.M.No.20020/7/80-Estt(D) dated May 29, 1986 (copy enclosed) in the case of a person who is initially taken on deputation and absorbed later (i.e. where the relevant recruitment rules provide for "transfer on deputation/transfer"), his seniority in the grade in which he is absorbed will normally be counted from the date of absorption. If he has, however, been holding already (on the date of absorption) the same or equivalent grade on regular basis in his parent department, such regular service in the grade shall also be taken into account in fixing his seniority, subject to the condition that he will be given seniority from the date he has been holding the post of deputation,

Or

The date from which he has been appointed on a regular basis to same or equivalent grade in his parent department,

*whichever is later.*

2. The Supreme Court has in its judgement dated December 14,



1999 in the case of **Shri S.I. Rooplal & Others Vs. Lt. Governor through Chief Secretary,** Delhi JT 1999 (9) SC 597 has held that the words "whichever is later" occurring in the Office Memorandum dated May 29, 1986 and mentioned above are violative of Articles 14 and 16 of the Constitution and, hence, those words have been quashed from that Memorandum. The implications of the above ruling of the Supreme Court have been examined and it has been decided to substitute the term "whichever is later" occurring in the Office Memorandum dated May 29, 1986 by the term "whichever is earlier.

3. It is also clarified that for the purpose of determining the equivalent grade in the parent department mentioned in the Office Memorandum date May 29, 1986, the criteria contained in this Department Office Memorandum No. 14017/27/75-Estt.(D)(pt) dated March 7, 1984 (copy enclosed), which lays down the criteria for determining analogous post may be followed.

4. .....

5. .....

6. ....."

(v) Thereafter, the respondent No.3, on 05.01.2007, issued a seniority list of Assistant Director (Exe.) by virtue of which the petitioner was placed at Serial No.58 (A-3) while respondent No.4 (Major Sohan Singh) was placed at Serial No.66. The said seniority list was issued in compliance of the DOP&T's OM dated 27.03.2001. In other words, the petitioner was given the benefit of the judgment in **S.I.Rooplal** (supra).

(vi) Afterwards the petitioner was promoted to the rank of Joint Deputy Director (Exe.) with effect from 25.02.2008.

(vii) However, on 10.03.2008, the respondent No.3 issued the seniority list of Joint Deputy Director (Exe.). In the said seniority list, the respondent No.4 was placed above the petitioner as he was granted promotion to the rank of Joint Deputy Director (Exe) w.e.f. 22.01.2003 whereas the petitioner was promoted as Joint Deputy Director only

in the year 2008.

(viii) The petitioner vide representation dated 17.03.2008 and 09.04.2008 objected to the seniority list dated 10.03.2008, inasmuch as, the petitioner claimed that his seniority should be reckoned from the date from which he had been holding an analogous post in an equivalent grade in his parent cadre (11.01.1998) and not from the date of his absorption with the respondent No.3, i.e., 20.11.2006.

(ix) The representations of the petitioner were rejected by the respondent No.3 by virtue of orders dated 01.04.2008 and 18.08.2008. (x) Thereafter, on 18.09.2008, the petitioner made another representation claiming that the respondent No.3 should give effect to his notional seniority from the date of his absorption, i.e., 11.01.1998. The petitioner further claimed that he was entitled to promotion to the post of Joint Deputy Director (Exe) from 2003 when the Departmental Promotion Committee met and granted promotion to respondent No.4. The said representation also came to be rejected by the respondent No.3 on 26.05.2009.

**3.** Aggrieved by rejection of his representations, the petitioner preferred an Original Application being OA No.1900/09 before the Tribunal challenging the seniority list circulated on 10.03.2008 of Joint Deputy Director (Executive) by the respondent No.3. The said OA was withdrawn by the petitioner with liberty to file a fresh OA after impleading respondent No.4.

**4.** Pursuant thereto, the petitioner filed OA No.334/2010 which was dismissed by the Tribunal by virtue of the order dated 20.08.2010 impugned before us in this writ petition.

**5.** The Tribunal while dismissing the OA held that promotion of the petitioner to the next higher grade would have to be governed by the Recruitment Rules and no promotion could be made de hors the Recruitment Rules. The Tribunal further held that promotion could have only been granted to the petitioner had he satisfied the eligibility conditions prescribed for such promotion. The finding of the Tribunal is extracted herein below:



"7. ..... It is, therefore, clear that the promotion to the next higher grade would be governed by the Recruitment Rules and any employee fulfilling the eligibility conditions would be considered for promotion. In the instant case, the fourth Respondent had become eligible for promotion as JDD in the year 2003 and thereafter as ADD in the year 2008. Once found fit by the DPC, he had to be promoted to these grades. The Applicant got absorbed in the IB, the third Respondent, only in the year 2006. Although he got seniority above the fourth Respondent in the grade of AD, yet he had to complete the period of eligibility for promotion to the grade of JDD. Merely because the fourth Respondent, junior to him in the grade of AD, had been promoted earlier, it would not be permitted for the Applicant to catch up with him and also be promoted to the grade of JDD, notionally or otherwise, de hors the rules

8. ..... We further fail to see how the Applicant could claim promotion on notional basis when there are no Recruitment Rules supporting his claim. The Applicant has chosen to get absorbed in the IB and he has been given the benefit of seniority in the feeder grade of Assistant Director. Thereafter, the future promotions have to be on the basis of the Recruitment Rules which prescribe a period of residency in the grade of Assistant Director in the IB before the Applicant could be promoted to the grade of Joint Deputy Director. We are of the considered opinion that no relaxation can be given in the rules to advance the Applicant further in the ladder of promotion."

(underlining added)

**6.** Before us, the learned senior counsel appearing for the petitioner has strenuously contended that the impugned judgment is erroneous, inasmuch as, once the petitioner has been given the benefit of the DOP&T's OM dated 27.03.2001 for the purpose of assigning his seniority in the grade of Assistant Director (Exe), it would be incorrect and capricious to deny him the benefit of such seniority to the next higher grades of Joint Deputy Director (Exe.) and Additional Deputy Director (Exe.). Counsel further contends that the very purpose of assigning seniority to the petitioner on the basis of his earlier service in same or equivalent grade would be lost if the benefit of seniority for further

promotion was not given. The learned senior counsel for the petitioner next urged that if the benefit of the seniority that inured in favour of the petitioner was not given in future promotion, then mere assigning of seniority from a retrospective date would be of no consequence and benefit of past services given to the petitioner by virtue of the Supreme Court decision in **S.I. Rooplal** (supra) would be rendered illusory.

**7.** Per Contra, the learned counsel for the respondent No.3 contended that the petitioner was absorbed by respondent No.3 on 20.11.2006 and so promotion, if any, could be granted to him only w.e.f. 20.11.2006, the date on which the petitioner was born in the cadre of the respondent No.3 and not prior to that. To buttress his contention, the learned counsel for the respondent No.3 drew our attention to Clause 3.4.2 of DOP&T's OM dated 29.05.1986 which has been reproduced in the next paragraph.

**8.** Before embarking upon a discussion on the rival contentions, it would be apposite to take note of Clauses 3.4.1 and 3.4.2 of DOP&T's OM dated 29.05.1986 before an amendment to the same was effected by the OM dated 27.03.2001. The said clauses read as under:

> "3.4.1 In the case of a person who is initially taken on deputation and absorbed later (i.e. where the relevant recruitment rules provide for "Transfer on deputation/Transfer"), his seniority in the grade in which he is absorbed will normally be counted from the date of absorption. If he has, however, been holding already (on the date of absorption) the same or equivalent grade on regular basis in his parent department. Such regular service in the grade shall also be taken into account in fixing his seniority, subject to the condition that he will be given seniority from
>
> -the date he has been holding the post on deputation,
>
> (or)
>
> -the date from which he has been appointed on a regular basis to the same or equivalent grade in his parent department.
>
> whichever is later.
>
> 3.4.2. The fixation of seniority of a transferee in accordance with the above principle will not, however, affect any regular promotions to the next higher grade made prior to the date of such absorption. In other words, it will be operative only in



> filling up of vacancies in higher grade taking place after such absorption.
>
> .....
>
> ....."
>
> (underlining added)

**9.** It is apparent that simply the words "whichever is later" occurring in Clause 3.4.1 of the OM dated 29.05.1986 are substituted to "whichever is earlier" by a later OM dated 27.03.2001. The said change was necessitated by the decision of the Supreme Court in **S.I.Rooplal** (supra) which, *inter alia,* held that an employee on deputation cannot be denied the benefit of the service rendered by him in an equivalent cadre in the parent department for computing his seniority in the deputed post. No other change was brought about in the OM dated 29.05.2006. Clause 3.4.2 of OM dated 29.05.2006 clearly states that fixation of seniority on the basis of Clause 3.4.1 would not affect any regular promotion made to the next higher grade prior to the date of such absorption. It is further clarified in the said clause that fixation of seniority in accordance with Clause 3.4.1 would be operative only for filling up of vacancies in the next higher grade after the absorption of the employee and not before that.

**10.** In the instant case, the petitioner was absorbed by the respondent No.3 only on 20.11.2006 and in terms of Clause 3.4.2, the petitioner would become eligible for promotion only after his absorption. Therefore, in our considered opinion, there is no merit in the contention advanced by the counsel for the petitioner claiming that the petitioner is entitled to promotion from the year 2003, which is when he had requisite experience for promotion to the next higher grade. In view of Clause 3.4.2, promotion cannot be granted to the petitioner before his absorption by the respondent No.3. It is pertinent to note that petitioner has been promoted to the rank of Joint Deputy Director (Exe) with effect from 25.02.2008 which is after the date of his absorption and the same is in conformity with the OM dated 29.05.1986 as well as the OM dated 27.03.2001.

**11.** In view of the foregoing discussion, the impugned decision warrants no interference. The writ petition has no merit and same is dismissed.

**ILR (2013) I DELHI 699**
**CRL. REV. P.**

**BHIM SAIN TANEJA .... PETITIONER**

**VERSUS**

**STATE (NCT OF DELHI) & ANR. .....RESPONDENTS**

**(G.P. MITTAL, J.)**

**CRL. REV. P. NO. : 33/2012 & CRL. M.A. NO. : 4/2013** **DATE OF DECISION: 07.01.2013**

**Negotiable Instruments Act, 1881 – Section 138 – Compounding of offence – Compromise application jointly moved by the complainant and the accused – Prayer for acquittal – Reliance placed on the Guidelines for compounding the offence under Section 138 by way of imposition of costs, as laid down by SC. HELD: Clause (c) of the said Guidelines applies to compromise application made before Sessions Court or a High Court in revision or appeal and allows compounding of the offence under Section 138 on the condition that the accused pays 15% of the cheque amount by way of costs – Petitioner acquitted subject to payment of 15% of the cheque amount as costs with Delhi High Court Legal Services.**

**[Lo Ba]**

**APPEARANCES:**

**FOR THE PETITIONER** : Mr. Prem Kumar, Advocate with Mr. Rakesh Kumar and Mr. Ashish Sharma, Advocates

**FOR THE RESPONDENTS** : Ms. Rajdipa Behura, APP for the State Mr. Neeraj Gupta with Ms. Meenu Chauhan, Advocates for the complainant along with complainant in person.



**CASE REFERRED TO:**

1. *Damodar S. Prabhu* vs. *Sayed Babalal H.,* (2010) 5 SCC 663.

**RESULT:** Petition allowed.

**G.P. MITTAL, J. (ORAL)**

**CRL. REV. P. 33/2012 and Crl.MA 4/2013**

**1.** This Revision Petition is directed against a judgment dated 09.01.2012 passed by the learned Additional Sessions Judge (ASJ) whereby the Appeal against the conviction and sentence of simple imprisonment for a period of two years and to pay compensation of Rs. 54 lacs and in default of payment of compensation, to undergo further simple imprisonment for a period of 180 days imposed by the learned Metropolitan Magistrate (MM) in Complaint Case under Section 138 of the Negotiable Instruments Act, 1881 (the N.I. Act) was dismissed.

**2.** During pendency of this Revision Petition, a Criminal Application No. 4/2013 was jointly moved by the Petitioner and Respondent No.2 stating that the matter has been compromised and since the offence under Section 138 of the N.I.Act is compoundable, the Petitioner is entitled to be acquitted.

**3.** While dealing with the compounding of offence under Section 138 of the N.I. Act, a three Judge Bench decision of the Supreme Court in **Damodar S. Prabhu v. Sayed Babalal H. (2010) 5 SCC 663** laid down certain guidelines for imposition of costs payable to the Legal Services Authority. It was stated that if the application for compounding of the offence is made at the first or the second hearing of the case, the compounding may be allowed without imposing any costs on the accused. Thereafter, the costs to be imposed was to vary between 10% to 20% depending upon the stage at which the application for compounding was moved by the accused. Para 21 of the report is extracted hereunder:-

> "21. With regard to the progression of litigation in cheque bouncing cases, the learned Attorney General has urged this Court to frame guidelines for a graded scheme of imposing costs on

parties who unduly delay compounding of the offence. It was submitted that the requirement of deposit of the costs will act as a deterrent for delayed composition, since at present, free and easy compounding of offences at any stage, however belated, gives an incentive to the drawer of the cheque to delay settling the cases for years. An application for compounding made after several years not only results in the system being burdened but the complainant is also deprived of effective justice. In view of this submission, we direct that the following guidelines be followed:

**THE GUIDELINES**

(i) In the circumstances, it is proposed as follows:

(a) That directions can be given that the writ of summons be suitably modified making it clear to the accused that he could make an application for compounding of the offences at the first or second hearing of the case and that if such an application is made, compounding may be allowed by the court without imposing any costs on the accused.

(b) If the accused does not make an application for compounding as aforesaid, then if an application for compounding is made before the Magistrate at a subsequent stage, compounding can be allowed subject to the condition that the accused will be required to pay 10% of the cheque amount to be deposited as a condition for compounding with the Legal Services Authority, or such authority as the court deems fit. (c) Similarly, if the application for compounding is made before the Sessions Court or a High Court in revision or appeal, such compounding may be allowed on the condition that the accused pays 15% of the cheque amount by way of costs. (d) Finally, if the application for compounding is made before the Supreme Court, the figure would increase to 20% of the cheque amount."

**4.** The instant case falls within Clause (c) of the aforementioned guidelines. The amount of the cheque in this case is Rs. 27 lacs. The Petitioner would be liable to pay the costs to the extent of 15% of the cheque amount, that is, Rs. 4,05,000/-.



**5.** Thus, in terms of the compromise and compounding of the offence, the Petitioner is acquitted of the charges, subject to deposit of Rs. 4,05,000/- as costs with the Delhi High Court Legal Services Committee within eight weeks and filing a receipt with the Registrar General of this Court within two weeks thereafter.

**6.** The Petition is disposed of in above terms.

**7.** Pending Applications also stand disposed of.

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**ILR (2013) I DELHI 702**
**CRL.M.C.**

**AMUL URHWARESHE .....PETITIONER**

**VERSUS**

**STATE (NCT OF DELHI) & ANR. ....RESPONDENTS**

**(G.P. MITTAL, J.)**

**CRL.M.C. NOS. 1050/2012 DATE OF DECISION: 08.01.2013**
**3071/2012, 3072/2012 & 3073/2012**

**Negotiable Instruments Act, 1881 – Section 138 – Complaints filed against the company as well as the ex-Director of the company– Whether maintainable even after the Director of the Company had resigned – Held – No. HELD: Since, the Petitioner was not a Director of the company on the date when the offence was allegedly committed, therefore, he cannot be prosecuted under Section 141 of the NI Act, 1881 - Petitioner had resigned from directorship of the company and such resignation was duly communicated to the ROC in the year 2000 whereas the offence under Section 138 of NI Act, 1881 was alleged to have been committed in the year 2005.**

**[Lo Ba]**

**APPEARANCES:**

**FOR THE PETITIONER** : Mr. Vishal Gosain with Mr. Harsh Bora, Advocates

**FOR THE RESPONDENTS** : Ms. Rajdipa Behura, APP for the State Mr. Ashok Anand, Advocate with Ms. Priya Pathania Advocate for R-2

**CASES REFERRED TO:**

1. *Atul Kohli & Anr.* vs. *State of Punjab & Anr.,* (2005) 127 Comp. Case. 237 (P&H).
2. *M.L. Gupta* vs. *DCM Financial Services Limited,* 167 (2010) DLT 428.

**RESULT:** Petition allowed and complaints quashed.

**G.P. MITTAL, J. (ORAL)**

**1.** By virtue of these four Petitions, the Petitioner seeks quashing of the four Complaints titled **'M/s. Indian Renewable Energy Development Agency Ltd. (IREDA) v. M/s. Enbee Infrastructure Ltd. Etc.'** qua him on the ground that the dishonoured cheques were dated 31.03.2005; and the Petitioner resigned from the Directorship of M/s. Enbee Infrastructure Ltd. on 31.08.2000 and information in this regard was sent to the Registrar of Companies (ROC) on 10.09.2000, thus the Petitioner cannot be said to be guilty of offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (the N.I.Act).

**2.** The learned counsel for the Petitioner also relies on the order dated 24.01.2011 passed by A.K.Pathak, J. in Criminal M.C. No.1366/2010 and dated 11.04.2012 passed by Pratibha Rani, J. in Criminal M.C. No.1926.2011 where in similar circumstances the complaint against the Petitioner was quashed.

**3.** The learned counsel for Respondent No.2 opposes the Petition on the ground that a perusal of Form No.32, certified copy of which has been placed on record shows that its effective date was only 06.04.2004. He urges that the Petitioner's liability arose much before 06.04.2004 and



mere recording in Column No.6 of Form No.32 that the Petitioner resigned as Director w.e.f. 31.08.2000 would not be sufficient to absolve him of his liability under the N.I.Act. In support of this contention, the learned counsel for Respondent No.2 places reliance on **Atul Kohli & Anr. v. State of Punjab & Anr.** (2005) 127 Comp. Cas. 237 (P&H).

**4.** Learned counsel for the Petitioner has taken me through the certified copy of Form No.32 and also the receipt through which the information regarding resignation was communicated to the ROC. The demand draft for Rs. 1,000/- for lodging an information regarding date of change in appointment was prepared on 03.09.2000 and the information was lodged on 10.09.2000. Therefore, the information regarding Petitioner's resignation would be effective from 10.09.2000. It cannot be said that this information was manipulated or was pre-dated as the same was documented. **Atul Kohli** relied upon by the learned counsel for Respondent No.2, therefore, does not apply to the facts of the present case.

**5.** Since the Petitioner was not the Director of the Company on the date when the offence was allegedly committed, he cannot be prosecuted by taking aid of Section 141 of the N.I.Act. A reference in this connection may be made to a judgment of this Court in **M.L. Gupta v. DCM Financial Services Limited** 167 (2010) DLT 428. In similar circumstances, the complaints were quashed by the Delhi High Court in Criminal MC Nos.1317/2009, 1318/2009, 1319/2009, 1320/2009, 1321/2009 & 1322/2009.

**6.** I find no reason to take a different view. Thus, the Petitions preferred by the Petitioner are allowed and Criminal Complaint Case Nos.2106/1 of 2003, 895/12 of 2005, 901/12 of 2004 and 897/12 of 2004 and the proceedings arising there from as against the Petitioner are quashed.

**7.** Pending Applications also stand disposed of.

**ILR (2013) I DELHI 705**
**CRL.M.C.**

**INDERPAL THUKRAL & ANR. .....PETITIONERS**

**VERSUS**

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

**(G.P. MITTAL, J.)**

**CRL.M.C. 4370/2012 DATE OF DECISION: 09/01/2013**

**Code of Criminal Procedure, 1973 – Section 482 – Indian Penal Code, 1860 – Sections 420/406/120-B/34 – Quashing of FIR in non-compoundable offences – Inherent powers of the High Court may be exercised if the possibility of conviction is remote and bleak and the continuation of criminal case would put the accused to great oppression and prejudice. HELD: Inherent power to quash FIR in cases involving non-compoundable offences may be exercised if in view of the High Court, there being a compromise between the offender and the victim, the possibility of conviction is remote and bleak and the continuation of criminal case would put the accused to great oppression and prejudice and that extreme injustice would be caused to the offender despite full and complete settlement and compromise with the victim – High Court is well within its jurisdiction to secure the ends of justice by putting an end to the criminal case if it is of the view that continuation of criminal proceedings would tantamount to abuse of process of law despite settlement and compromise – In present case, High Court was satisfied that compromise and settlement was properly reached between the Petitioners and the Respondent No.2.**

**[Lo Ba]**



**APPEARANCES:**

**FOR THE PETITIONERS** : Mr. Rajat Aneja with Mr. Vaibhav Jairaj, Advocates

**FOR THE RESPONDENTS** : Ms. Jasbir Kaur, APP for the State/Respondent No.1, Mr. Bipin Kumar Sharma, Advocate for the Respondent No. 2 along with Mr. Pradeep K. Srivastava, Sr. Manager, Kotak Mahindra Bank.

**CASE REFERRED TO:**

1. *Gian Singh* vs. *State of Punjab & Anr.* 2012 (9) SCALE 257.

**RESULT:** FIR quashed and Petition allowed.

**G.P. MITTAL, J. (ORAL)**

**1.** This is a Petition under Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C.) preferred by the Petitioners for quashing of FIR No.362/2005, under Section 420/406/120-B/34 IPC, Police Station Ambedkar Nagar and consequential proceedings arising out of the same.

**2.** FIR No.362/2005 was recorded in Police Station Ambedkar Nagar with the allegations that the Petitioners along with one Smt. Nirmala Thukral (since expired) approached Citifinancial Consumer Finance (India) Ltd. for grant of loan of Rs. 33 lakhs. The said loan having been granted to the Petitioners was repayable in certain instalments as mentioned in the FIR. Subsequently, it came to the notice of Citifinancial Consumer Finance (India) Ltd. that the property which was mortgaged by the Petitioner as collateral security was already mortgaged with the Indian Bank, Chandni Chowk branch, Delhi. The Petitioners defaulted in payment of the instalments. At this stage, the Respondent No.2 came to know that the Petitioners in collusion with Smt. Seema Thukral had cheated Citifinancial Consumer Finance (India) Ltd. Thus, apart from getting a criminal case registered, Citifinancial Consumer Finance (India) Ltd. also initiated arbitration proceedings. In the execution petition Ex.P. No.210/2005 vide a deed of settlement dated 31.05.2006, the Citifinancial Consumer Finance (India) Ltd. assigned the loan amount and all the rights and obligations with regard to the loan in favour of the Respondent No.2 (Kotak Mahindra

Bank Ltd.) including the pending litigation. In Ex.P.210/2005, the dispute between the Petitioners and Citifinancial Consumer Finance (India) Ltd. was settled. By virtue of the settlement, a sum of Rs. 8 lakhs was payable by the Petitioners in full and final settlement of the claim of Citifinancial Consumer Finance (India) Ltd. A sum of Rs. 2.5 lakhs was paid at the time of the settlement. Rest of the amount was payable in 12 equal monthly instalments beginning from 01.01.2011. It is admitted by the learned counsel for the Respondent No.2 that all 12 instalments stand paid. An affidavit to this effect is also placed on record by the Respondent No.2.

**3.** The learned APP has pointed out that there was an earlier loan transaction between the Petitioner No.1 and Indian Bank and that the Indian Bank is yet to recover a sum of Rs. 40 lakhs from the Petitioner No.1. A letter from Indian Bank has also been presented to show that no settlement has been reached by Petitioner No.1/ M/s. Thukral Enterprises with Indian Bank.

**4.** It is stated by the learned counsel for the Petitioners that the mortgaged property, subject matter of the loan transaction between the Petitioner No.1 and Indian Bank, has already been sold by Indian Bank for a sum of Rs.55 lakhs and Indian Bank can have its remedy against its debtor. I am in agreement with the learned counsel in this regard.

**5.** It goes without saying that the offence punishable under Section 406 IPC is a non compoundable. In the case of **Gian Singh v State of Punjab & Anr.** 2012 (9) SCALE 257, the three Judges Bench of the Supreme Court dealt with the issue of quashing of FIR in non compoundable offences. Para 57 of the report is extracted hereunder:-

> "57. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R



> may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."

**6.** In view of the settlement between the Petitioners and the

Respondent No.2, the successor of Citifinancial Consumer Finance (India) Ltd., it would be an exercise in futility to proceed further with the prosecution on the basis of FIR No.362/2005 recorded in Police Station Ambedkar Nagar.

**7.** The FIR No.362/2005, under Section 420/406/120-B/34 IPC of IPC, Police Station Ambedkar Nagar and the proceedings emanating from the FIR against the Petitioners are quashed, subject to payment of Rs.50,000/- as costs to the Blind Relief Society, Lodhi Road (Near Oberoi Hotel), New Delhi within four weeks. Receipt of the deposit be submitted with the Registrar of this Court within six weeks.

**8.** The original documents seized by the police pursuant to the registration of the criminal case shall be returned to the Petitioner.

**9.** The Petition is accordingly allowed.

**10.** Dasti.

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**ILR (2013) I DELHI 709**
**W.P. (C)**

**SHRIKANT SHARMA ....PETITIONER**

**VERSUS**

**UNION OF INDIA AND ORS. ....RESPONDENTS**

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

**W.P. (C) NO. : 7208/2011 DATE OF DECISION: 11.01.2013**

**Constitution of India, 1950—Article 226, Article 14 and Article 356, Armed Forces Tribunal Act, 2007—Section 14, Code of Criminal Procedure (CrPC), 1973—Section 24—What are the parameters of this Court's jurisdiction in judicial review of the exercise of administrative discretion by the respondents and scope of judicial review? Held—The parameters are:- while exercising the power of judicial review, the court is more concerned with the decision making process rather than the merit of the decision itself and while scrutinizing the decision making process it becomes inevitable to also appreciate the facts of the given case, as otherwise the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety. Further, in judicial review, the Court is mainly concerned with the legality of the action under challenge. Therefore, it is well established that this Court in exercise of its power under Article 226 of the Constitution of India can examine the factual matrix to adjudicate upon the several grounds urged by the Petitioner. What are the applicable rules and policies? Held—The 1986 policy are concerned policy relates to consideration of review cases while 1991 policy relates to consideration of fresh cases for promotion. Since, the Respondent nos. 1 to 4 categorically states that these policies are valid, binding and applicable to the instant case. Whether the Petition is eligible for promotion as fresh consideration? Held—That the Petitioner was entitled to be granted his fresh consideration by the Selection Board. Further, it has been held that the Selection Board had assessed officers for promotion to the rank of Let. General Based on promotion policy which had not been approved by competent authority and therefore, the decision of the selection board was illegal. Therefore, further Court rejected the Respondents contention holding that there can be no ratification of an illegal act. Further, a direction was issued by the Board to hold a special selection Board to assessing officers including the Petitioner based on correct policy.**

**Ratio Decidendi:**

**"Appointments are to be made following the applicable and correct procedures and policy which had not been approved by competent authority are illegal".**

**[As Ma]**

**APPEARANCES:**

**FOR THE PETITIONER** : Ms. Jyoti Singh, Sr. Advocate with Ms. T.B. Saahila Lamba and Mr. Amandeep Joshi, Advocates.

**FOR THE RESPONDENTS** : Mr. Ankur Chibber, Advocate for R-1 to 4. Mr. S.S. Pandey, Advocate for R-5.

**CASES REFERRED TO:**

1. *Darshan Lal Choudhary* vs. *Union of India and Ors.* W.P.(C)No.5182/2012.
2. *V.S.S. Goudar* vs. *Union of India and Ors.,* W.P.(C)No.5303/2012.
3. *Col. Tej Ram & Anr.* vs. *Union of India* O.A.No.115/2011.
4. *Centre for Public Interest Litigation & Anr.* vs. *Union of India & Ors.,* (2008) 8 SCC 606.
5. *Rameshwar Prasad and Ors. (VI)* vs. *Union of India and Anr.* : AIR2006SC980.
6. *Jayrajbhai Jayantibhai Patel* vs. *Anilbhai Nathubhai Patel & Ors.* (2006) 8 SCC 200.
7. *State of Uttar Pradesh* vs. *Johri Mal,* (2004) 4 SCC 714.
8. *Union of India* vs. *Lieutenant General Rajendra Singh Kadyan & Anr.* (2000) 6 SCC 698.
9. *Ashok Kumar* vs. *Union of India & Ors.* W.P.(C)No.21900/2005.
10. *Ashok Kumar Uppal & Ors.* vs. *State of J&K & Ors.,* 1998 (4) SCC 179.
11. *SBI & Ors.* vs. *Kashinath Kher & Ors.* 1996 (8) SCC 762.



12. *Tata Cellular* vs. *Union of India* [(1994) 6 SCC 651].
13. *Syed Khalid Rizvi & Ors.* vs. *UOI & Ors.,* 1993 Supp. (3) SCC 575.
14. *Council of Civil Service Unions* vs. *Minister for the civil Service* (1984) 3 All ER 935.
15. *Commissioner of Income-tax* vs. *Mahindra and Mahindra Ltd.* [1983] 144I TR 225 (SC).
16. *North Wales Police* vs. *Evans* (1982) 3 All ER 141.
17. *R.P. Royappa* vs. *State of Tamil Nadu and Anr.* (1974) ILLJ 172 SC.
18. *S. Pratap Singh* vs. *The State of Punjab* (1966) ILLJ 458 SC.
19. *Associated Provincial Picture Houses Ltd.* vs. *Wednesbury Corporation* (1948) 1 KB 233 : (1947) 2 All ER 680.

**RESULT:** Writ petition allowed.

**GITA MITTAL, J.**

**1.** Thomas Jefferson said that "Experience has shown, that even under the best forms of government those entrusted with power have, in time, and by slow operations, perverted it into tyranny". Tyranny points towards arbitrariness. The instant case raises this issue with full force.

**2.** The writ petitioner assails the order dated 22nd of September 2011 passed by the Armed Forces Tribunal rejecting O.A.No.161/2011. By this petition, the petitioner had challenged the legality of the action of the respondents in considering respondent no.5 of the 1974 batch (who was a review case) in 2009 in the Selection Board No.1 held on 12th August, 2009 as a solitary case for promotion to the rank of Major General; and the order dated 22nd October, 2010 passed by the Central Government – respondent no.1 rejecting the statutory complaint of the petitioner against his non-consideration in the aforesaid Selection Board. The petitioner had also laid a challenge to the action of the respondents in not considering him in the Special Selection Board scheduled on 28th April, 2011 (subsequently held on 18th August, 2011) for promotion to the rank of Lieutenant General in which the respondent no.5 has been

considered for promotion.

**3.** The facts giving rise to the instant petition are largely undisputed and are within a narrow compass. To the extent necessary for the purposes of the present consideration and for the purpose of convenience, the issues raised before this Court are being considered in the following heads:



**Factual background**

**4.** The petitioner was commissioned in the Remount Veterinary



Corps (RVC) of the Indian Army on the 22nd of November 1976 with the same date of seniority. The respondent no.5 was commissioned in the RVC in the year, 1974.

**5.** On 1st November, 2006, the respondent no.5 was promoted to the rank of brigadier. The petitioner was promoted as brigadier on the 21st of April, 2008 along with the 1976 batch.

**6.** The Selection Board No.1 was held for the RVC on the 12th of August 2008 for promotion from the rank of Brigadier to Major General. It appears that the respondent no.5 was considered by this selection board along with Brigadier M.L. Sharma, also of the same batch as a fresh batch. Brigadier M.L. Sharma was empanelled by the Board but the respondent no.5 was not empanelled on merits.

**7.** The writ petitioner contends that consideration of the 1974 batch for the promotion to the rank of Major General was thus over. For the next vacancy, as per the applicable policies, the next available batch had to be granted its first consideration as fresh cases. The respondent no.5 could have been considered only as a first review case along with such next available batch in the next selection.

**8.** It is not disputed that in March, 2009 one additional vacancy in the RVC was added for the rank of Major General. Promotion to this vacancy is being strongly contested in the present proceedings.

**9.** It is undisputed that there was no officer eligible for consideration in the next batch which was the 1975 batch as the only officer of the 1975 had retired in the rank of Colonel on the 29th of February 2008.

For the reason that there was no officer for the 1975 batch, the Selection Board No.1 for the additional vacancy, should have granted fresh consideration to the officers of the next available fresh batch. Respondent no.5 could have been considered only with such next Batch as a first review case.

**10.** The petitioner submits that consequently in the year 2009, the petitioner's 1976 batch became eligible for fresh consideration for appointment to the next vacancy of Major General in the RVC as the next available batch.

**11.** The petitioner has submitted that by June, 2009, he had earned

the two requisite confidential reports. In October, 2009, he had also completed the 18 months Adequately Exercised (AE) period.

**12.** In and around July, 2009, the petitioner learnt that the Selection Board No.1 was being held exclusively for the respondent no.5 for his appointment as a Major General against the additional vacancy. Immediately thereon, the petitioner lodged his protests by way of written communications dated 18th and 20th July, 2009. The petitioner pointed out his eligibility as well as the fact that he had completed more than 15 months in the present rank/appointment and referred to a precedent when a Brigadier of the RVC with only one year of service had been considered for the rank of Major General during August, 2007 and had been approved. The petitioner sought inclusion of his name in the forthcoming Staff Selection Board no.1. The petitioner also sought an interview with the Military Secretary which was granted on the 25th of July, 2009. The interview was followed by another representation dated 30th July, 2009 to the Military Secretary.

**13.** The respondent nos.1 to 4 held a Selection Board on 12th August, 2009 treating the respondent no.5 as a fresh case from which the petitioner was excluded from consideration. The respondent no.5 was considered as a stand alone candidate.

**14.** Aggrieved thereby, the petitioner addressed a statutory complaint dated 25th August, 2009 complaining against his non-consideration despite eligibility and fitness for consideration as a fresh case of the 1976 batch which was due for consideration by the Selection Board No.1 for the then existing vacancy of Major General.

**15.** The respondents passed an order on 16th October, 2009 empanelling the respondent no.5 and promoting him as a major general without deciding the petitioner's representation for appointment of a fresh Selection Board which would consider the petitioner as a fresh case and the respondent no.5 as a first review case.

**16.** More than one year after the making of the statutory complaint of the petitioner, a cryptic order dated 22nd October, 2010 of rejection was passed thereon without dealing with the primary issue urged by the petitioner.

**17.** So far as the petitioner's non-consideration was concerned,



again the order dated 22nd October, 2010 failed to consider the submission of the petitioner with regard to the AE tenure and took up the stand that the petitioner had completed only 15+ months of the tenure in August, 2009. In contradiction to para 9 of this order, in para 11, the order of respondent no.1 referred to the consideration of the respondent no.5 by the Selection Board No.1 as a review case.

It is noteworthy that the respondents unequivocally for the first time admitted that respondent no.5 was considered as a stand alone first review case, without being considered with any fresh batch. The respondents rendered no explanation as to why the petitioner of the 1976 batch, though available was not granted first consideration.

**18.** In the meantime, the petitioner makes a grievance that while he was contemplating laying a challenge to the above action as well as the order dated 22nd October, 2010, he learnt that a further Special Selection Board was being scheduled on the 28th of April 2011 for appointments to the rank of Lieutenant General (appointment of DG RVS), for the purpose of again appointing respondent no.5 to this position. The petitioner submits that in the above background, the promotion of respondent no.5 as major general was illegal. Furthermore his one ICR as Major General was invalid for promotion to the rank of Lt. General.

**19.** It is claimed by the petitioner in the writ petition that the Army had put up a proposal, which was approved by the Ministry of Defence, that it would be appropriate to have an accretion of one Major General, i.e. authorized a total of two Major Generals to broaden the selection base for a Lieutenant General in RVC and to prevent any void, should both Major General and Lieutenant General retire in equal succession. The petitioner has contended that the rationale for this was to increase the competition and get the best merit and talent which is the sine qua non of the higher ranks like those of Lieutenant General. It is also categorically averred that during 2010, for selection of higher ranks, the Army had proposed that no single officer would be considered and if only a solitary officer is available, his batch would be clubbed with the next available batch. The petitioner has submitted that this fact has been admitted by the official respondents on affidavits.

A grievance is made that this policy has been completely violated so far as the appointments of respondent no.5 are concerned. The petitioner

submits that the same was on account of vested interests which wanted to favour the respondent no.5, even though the action was completely illegal.

**20.** On the 26th of April 2011, the petitioner filed O.A.No.161/2011 before the Armed Forces Tribunal challenging the aforenoticed illegalities. The matter came up for admission before the tribunal on 27th April, 2011 when notice was issued to the respondents which was accepted on their behalf by a counsel appearing on advance notice. The respondent no.5 was not represented and dasti notice was served upon him. The matter was directed to be listed on 11th May, 2011.

**21.** It is noteworthy that the petitioner had laid a substantive challenge to the order dated 22nd October, 2010 and sought its quashing and setting aside. It has been pointed out by Ms. Jyoti Singh, learned Senior Counsel for the petitioner that by a bonafide mistake, the substantial reliefs claimed by the petitioner were mentioned in column no.9 which was captioned as 'Interim Relief, if any, Prayed For' while the interim relief was erroneously mentioned in column no.8, captioned as 'Relief(s) Sought'. It is urged that this mistake was pointed out to the tribunal which, in its order, has correctly treated para 9 of the petitioner as the main relief which had been prayed for as is evident from para 1 of the order dated 22nd September, 2011 (impugned herein). Perusal of the petition before the tribunal and the impugned order substantiates this position. The main prayer made by the petitioner, though set out in para 9 before the Armed Forces Tribunal, may be usefully set down and reads as follows:

> "(i) To quash and set aside the order dated 22.10.2010 passed by the Central Govt. on the statutory complaint of the applicant dated 29.08.2009.
>
> (ii) To quash and set aside the proceedings and result of No.1 Selection Board held in August 2009 excluding the applicant and quash and set aside the consequent promotion of respondent No.5 to the rank of Major-General.
>
> (iii) To quash and set aside the proposal to hold the scheduled Board of 28.04.2011 for RVC to the rank of Lt. General if the same does not include the applicant.



> (iv) To direct the respondent No.1 to 4 to hold a fresh Board by including the applicant for consideration to the rank of Lt. General and not include the respondent No. 5 in case his promotion to the rank of Major-General itself is found to be bad in law by this Hon'ble Court."

**22.** The petitioner has stated on affidavit that when the matter was listed on 27th April, 2011, the petitioner had pressed for interim relief to the effect that till the matter is decided, the official respondents should be restrained from holding the Selection Board for the rank of Lieutenant General for RVC. An apprehension was expressed by the petitioner that certain vested interests in the Ministry of Defence were conniving with respondent no.5 who would ensure that the Board was held despite the respondent no.5 being ineligible and he was hurriedly promoted to defeat the petitioner's rights. According to the petitioner, the learned counsel for respondent nos.1 to 4 as well as an officer from the MS Branch (Legal) had assured the tribunal that the scheduled Board would not be held till the next date of hearing. The petitioner complains that the respondents delayed the adjudication and did not file the reply despite the case being listed on 11th May, 2011 on which date the counsel for the official respondents as well as Lieutenant Colonel Maneesh Kumar, Assistant, Military Secretary (Legal), MS Branch had informed the Armed Forces Tribunal that they had decided to defer the Board and an assurance was given that the same would not be held till the matter was pending. The petitioner also relies on oral directions as given by the tribunal. It is urged that therefore, the matter was then adjourned to the 25th of May 2011 and again to the 15th of July 2011. The petitioner has submitted that in view of the assurance given by them to the tribunal, the respondents deferred the Selection Board for the RVC and for this reason the petitioner did not oppose the grant of time.

**23.** The Military Secretary's Branch addressed a letter dated 18th April, 2011 to all headquarters and concerned authorities informing that the Special Selection Board and Selection Board No.1 were scheduled to be held on 28th April, 2011. The list of officers to be considered for promotion to the acting rank of Lieutenant General and Major General by these Boards was given as an appendix to the letter. The list of officers also clearly shows that the first review and final review of the earlier batches were being considered only with the fresh cases.

**24.** In para 3 of this letter, so far as the RVC is concerned, the respondents gave the details of the batches of officers in the rank of Maj. General in several Arms and Services of Army who were being considered and the vacancy position.

**25.** It has been contended that in the ordinary course, Selection Boards are normally scheduled in October, 2011 to coincide with the Army Commanders. Conference.

**26.** To the shock of the petitioner, he learnt in the morning of 19th August, 2011 that a Special Selection Board had been held exclusively for the Remount Veterinary Corps (RVC) on 18th August, 2011 for considering a single officer, that is, the respondent no.5 as the only Major General of the RVC for appointment to the rank of Lieutenant General. The petitioner points out that for other Arms and Services, as per the practice followed in the Army, the Selection Board was held during October, 2011. These facts are undisputed.

**27.** Ms. Jyoti Singh, learned Senior Counsel for the petitioner has contended that this was not a scheduled Selection Board in normal course and had been held in undue haste to frustrate the petitioner's pending petition before the Armed Forces Tribunal. It is further urged that the same was contrary to the assurance given before the tribunal. Learned senior counsel contends that in order to further delay adjudication, even on the next date of hearing on the 14th September 2011, the respondents dishonestly failed to file a reply.

**28.** In these circumstances, the petitioner filed a miscellaneous application being No.306/2011 praying for initiating action against the respondents for violating a solemn assurance given before the tribunal and for restraining the official respondents from taking further steps towards approval of the Appointments Committee of the Cabinet (ACC) for declassification of the results. When the application came up before the Tribunal on the 15th September, 2011, the respondents disputed the fact that they had ever given an assurance to the tribunal.

Interestingly, we do not find any denial on record to the petitioner's submission regarding the deferment of the Selection Board for the RVC on record because of such assurance. No reason for the same has alsO been advanced.



**29.** The petitioner immediately approached this court by way of W.P.(C)No.6479/2011 praying for status quo to be maintained in the matter of appointment of the respondent no.5 as a Lieutenant General and that the government should not process the recommendation of the Special Selection Board held on 18th August, 2011 during the pendency of the petitioner's petition. The writ petition was listed before the court on 5th September, 2011. This court passed an order preponing the date of hearing to 9th September, 2011 before the Armed Forces Tribunal. The matter was however, not listed on the 9th of September 2011. During the course of hearing before the Armed Forces Tribunal on the 14th September, 2011, the objections noticed hereinabove were raised before the tribunal specially to the effect that it was unprecedented in the Indian Army that a review case was considered in isolation and that the first time aberration was made to favour the respondent no.5 for extraneous considerations. The tribunal passed an order dated 15th September, 2011 directing the respondents to file an affidavit in the following terms:

> "Learned counsel for the respondent Nos 1 to 4 is directed to file an affidavit that whether there is any convention in the Army that against a single post, one person can be considered when other eligible persons are not available for consideration/review. Secondly, he should also informed whether for such contingency, there is any rule or guidelines and if any clarification has been made by the Ministry of Defence, then the same may be placed on record."

**30.** At the next hearing before the Tribunal on 22nd September, 2011, the respondents handed over an affidavit dated 22nd September, 2011 wherein the petitioner's stand that in 2009, the respondent no.5 was a review case of the 1974 batch was confirmed in paras 6 and 7 of the affidavit in the following terms:

> "6. That in order to form part of a Batch, "Date of Seniority" is therefore, relevant. Date of Seniority for promotions of every officer is fixed at the time of grant of Permanent Commission. For instance, the Applicant was commissioned on 22 Nov 1976. Accordingly, his Date of Seniority is 22 Nov 1976 and he belongs to "1976 Batch". Respondent No 5 was commissioned on 02 Sep 1974 and his Date of Seniority is 02 Sep 1974 and he belongs to 1974 Batch. In respect of the "Seniority", provisions

contained in Army Rule 2(d-iii) and para 69 of the Regulations of the Army (Revised Edition), 1987 are reproduced below:

> **Army Rule 2(d-iii)** "reckonable commissioned service" means service from the date of permanent commission, or the date-of-seniority for promotion fixed on grant of that commission including any ante date for seniority granted under the rules in force on grant of commission".
>
> **69. Reckonable Service for substantive promotion:-** "(a) For substantive promotion, service will reckon from the date of an officer's permanent commission, or date of seniority for promotion fixed on grant of that commission, including any ante-date for seniority and promotion granted under the rules in force from time to time. Periods of service forfeited by sentence of court-martial or by summary award under the Army Act will not, however, reckon as service for promotion".

7. It is submitted that unless the Date of Seniority fixed at the time of grant of Permanent Commission is revised under statutory provisions or instructions, the "Batch" to which an officer belongs, does not change. An officer, who does not get empanelled, does not lose or forfeit seniority, on account of his non-empanelment. He is considered as Review Case along with next fresh batch and if approved, he remains senior to officers of the Fresh Batch. Composition of Branch and Sequence of promotion has accordingly been given in Appendices to the Policy letter dated 11 Dec 1991 (annexure R-3)."

**31.** With regard to the specific direction given by the Armed Forces Tribunal, the respondents in para 8 of the affidavit stated as follows:

> "8. That with respect to the query of the Hon'ble Tribunal, "whether there is any convention in the Army that against a single post, one person can be considered when other eligible persons are not available for consideration/review", it is submitted that in Minor Corps and in higher select ranks in other Arms/ services, there have been a number of cases when there is **only one officer as a fresh case in a "Batch"**. As already stated in para 5 above, Para 4 of the policy letter dated 11-121991 (Annexure R-3) provides, "Officers are considered for promotion to the select rank batch wise by the appropriate Selection Boards". Accordingly, in case a batch consists of only one officer, he alone is considered for promotion."



It is clearly evident from the above that it is only in the case of fresh consideration of a batch that a single officer could be considered. It was admitted by the respondents that there was no policy permitting a review case to be considered as a stand alone candidate for review consideration.

**32.** The petitioner had pointed out other instances where no eligible candidate was available in the immediately next batch. In such eventuality, the next available batch was construed as a batch in which an eligible candidate was available, even though it may be several years apart. Such available batch was then considered as the fresh cases for selection. This was not repudiated by the respondents.

**33.** The Armed Forces Tribunal considered the matter and dismissed the petition by an order dated 22nd September, 2011 holding that the case was a isolated instance where there was a single post available and the respondent no.5 (of the 1974 batch) alone was eligible. It was held that there was no prohibition for the Selection Board to consider the incumbent and, if found suitable, to promote him. The tribunal was of the view that the petitioner was not eligible for consideration for appointment to the next position. It was of the erroneous view that the contention that the review case has to be considered along with the next available batch so that competitive merit could be seen as otherwise it would facilitate selection of one person against one person was devoid of merit. In this regard, the Armed Forces Tribunal observed as follows:

> "5. ...It is true that sometimes when there is single vacancy and no competitor is available then Selection Board can certainly consider and if he is suitable then there is no prohibition to promote that incumbent if it is not done, then it will be a serious violation of Article 14 of the Constitution that unequals have been made equal so as to have a competitive merit consideration. There is no prohibition for the Selection Board, if they find that incumbent is not suitable then they may not select him. To promote person who is eligible to be considered with other persons

who are yet to become eligible means denying him his due consideration. This will vitiate the consideration of the incumbent who has already become eligible. We do not find any merit to quash the order of promotion of Respondent No. 5 to the post of Maj. Gen. on the argument of learned counsel for the Petitioner that he should have waited for another batch to be eligible for consideration. In our view the selection of Respondent No.5 on the post of Maj. Gen. was just and proper and does not suffer from any illegality. It will be open for the Respondents to proceed for consideration of Respondent No.5 for promotion to the post of Lt. Gen. in accordance with law. ..."

**34.** Aggrieved by this order dated 22nd September, 2011, the petitioner has filed the present petition challenging the order and action of the respondents inter alia on the grounds that it is illegal, arbitrary, overlooks the bias in favour of the respondent no.5 and the malafide intent of the official respondents in showing undue favour to the respondent no.5 as well as grave injustice to the petitioner; and effects demoralization and discourages meritorious officers in the force. The challenge also rests on the contention that the orders of the respondents are in violation of the admittedly applicable regulations and policies and the order of the Tribunal has completely overlooked this important aspect of the matter.

**35.** On the 26th of September 2011, the Military Secretary's Branch further informed all authorities that the Govt have approved the empanelment of V-00341 Maj Gen SS Thakral, RVC as a Fresh Case of the 1975 Batch for promotion to the acting rank of Lt Gen in the RVC.

**Scope of Judicial Review**

**36.** Before addressing the challenge raised by the petitioner, it is necessary to understand the parameters of this court's jurisdiction in judicial review of the exercise of administrative discretion by the respondents. It is also necessary to bear in mind that this court is considering a challenge to an order passed by the Armed Forces Tribunal in exercise of its jurisdiction under the Armed Forces Tribunal Act, therefore, exercise of statutory discretion. In this regard, reference requires to be made to binding judicial pronouncements of the Supreme Court of India which would guide the consideration by the court.



**37.** On this aspect, reference may usefully be made also to pronouncement of the Supreme Court reported at (2006) 8 SCC 200, **Jayrajbhai Jayantibhai Patel v. Anilbhai Nathubhai Patel & Ors.** In this case, the court was concerned with the legality of a judgment by the High Court by which the election of the appellant as president of the Anand Municipality had been set aside and the respondent no.1 had been declared as its elected president. The court considered the broad principles of judicial review which have evolved in the field of administrative law referring to following judicial precedents in the following terms:

"14. In **Council of Civil Service Unions v. Minister for the civil Service** (1984) 3 All ER 935 Lord Diplock enunciated three grounds upon which an administrative action is subject to control by judicial review, viz. (i) **illegality** (ii) **irrationality** and (iii) **procedural impropriety**. While opining that "further development on a case by case basis may not in course of time add further grounds" he added that principle of "proportionality" may be a possible ground for judicial review for adoption in future. Explaining the said three grounds, Lord Diplock said:

> By **"illegality"** he means that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it, and whether he has or has not, is a justiciable question; by **"irrationality"** he means **"Wednesbury unreasonableness"**. It applies to a **decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided,** could have arrived at it; and by **"procedural impropriety"** he means not only failure to observe **the basic rules of natural justice or failure to act with procedural fairness, but also failure to observe procedural rules** that are expressly laid down in the legislative instrument by which the tribunal's jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

15. The principle of **"Wednesbury unreasonableness"** or irrationality, classified by Lord Diplock as one of the grounds' for intervention in judicial review, was lucidly summarised by

Lord Greene M.R. in **Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation** (1948) 1 KB 233 : (1947) 2 All ER 680 as follows:

> The court is entitled to investigate the action of the local authority with a view of seeing whether it has taken into account matters which it ought not to take into account, or conversely, has refused to take into account or neglected to take into account matters which it ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that the local authority, nevertheless, have come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere.
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17. Recently in **Rameshwar Prasad and Ors. (VI) v. Union of India and Anr.** : AIR 2006 SC 980, wherein a proclamation issued under Article 356 was under challenge, Arijit Pasayat, J. observed thus:

> "240. A person entrusted with discretion must, so to speak, direct himself properly in law. He must call his attention to matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules he may truly be said to be acting unreasonably. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.
>
> 241. It is an unwritten rule of law, constitutional and administrative, that **whenever a decision-making function is entrusted to be subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote."**

**38.** While pointing out the restraints on the exercise of the power of judicial review in Jayrajbhai Jayantibhai Patel (supra), the Supreme



Court emphasized on the responsibility of the court which should not be undermined by the claim of expertise by the respondents. In this regard, the court relied on authoritative texts which shed light on the present consideration and deserve to be extracted. The same read as follows:

> "19. The following passage from Professor Bernard Schwartz's book **Administrative Law (Third Edition)** aptly echo's our thoughts on the scope of judicial review:
>
> > **Reviewing courts, the cases are now insisting, may not simply renounce their responsibility** by mumbling an indiscriminate **litany of deference to expertise.** Due deference to the agency does not mean abdication of the duty of judicial review and rubber-stamping of agency action: **We must accord the agency considerable, but not too much deference; it is entitled to exercise its discretion, but only so far and no further.**
>
> Quoting Judge Leventhal from Greater Boston Television Corporation v. FCC 444 F.2d 841, 851 (D.C.Cir.1970), he further says:
>
> > "...the reviewing court must intervene if it "becomes aware... that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making...."

Deducing from the aforenoticed precedents and authoritative texts, in **Jayrajbhai Jayantibhai Patel** (supra), the Supreme Court then observed thus:

> "18. Having regard to it all, it is manifest that the power of judicial review may not be exercised unless the administrative decision is illogical or suffers from procedural impropriety or it shocks the conscience of the court in the sense that it is in defiance of logic or moral standards but no standardised formula, universally applicable to all cases, can be evolved. Each case has to be considered on its own facts, depending upon the authority that exercises the power, the source, the nature or scope of power and the indelible effects it generates in the operation of law or affects the individual or society. Though judicial restraint,

albeit self-recognised, is the order of the day, yet an administrative decision or action which is based on wholly irrelevant considerations or material; or excludes from consideration the relevant material; or it is so absurd that no reasonable person could have arrived at it on the given material, may be struck down. In other words, when a Court is satisfied that there is an abuse or misuse of power, and its jurisdiction is invoked, it is incumbent on the Court to intervene. It is nevertheless, trite that the scope of judicial review is limited to the deficiency in the decision-making process and not the decision."

**39.** The following observations of the Supreme Court in **Jayrajbhai Jayantibhai Patel** (supra) on the power of the High Court under Article 226 also require to be extracted and it was observed as follows:

"12. Article 226 of the Constitution is designed to ensure that each and every authority in the State, including the State, acts bonafide and within the limits of its power. xxx But no uniform rule has been or can be evolved to test the validity of an administrative action or decision because the extent and scope of judicial scrutiny depends upon host of factors, like the nature of the subject matter, the nature of the right affected, the character of the legal and constitutional provisions applicable etc. While appreciating the inherent limitations in exercise of power of judicial review, the judicial quest has been to find and maintain a right and delicate balance between the administrative discretion and the need to remedy alleged unfairness in the exercise of such discretion."

**40.** In this judgment (**Jayrajbhai Jayantibhai Patel** (supra), the court also ruled on the legality of the decision of the High Court which having set aside the election of the appellant to declare the respondent no.1 as the president of the council. Reliance was placed on the celebrated decision of the Supreme Court reported at (1994) 6 SCC 651, **Tata Cellular v. Union of India,** wherein it was observed that judicial restraint has two contemporary manifestations namely, one the ambit of judicial intervention and the other, the scope of the court's ability to quash an administrative decision on its merits. In para 27 of **Jayrajbhai Jayantibhai Patel** (supra), the Supreme Court reiterated the well settled principle that judicial review is not concerned with reviewing the merits of the decision



in support of which the application for judicial review is made, but the decision-making process itself. Unless that restriction on the power of the Court is observed, the Court will, as opined in Chief Constable of the **North Wales Police v. Evans** (1982) 3 All ER 141 "under the guise of preventing the abuse of power, be itself guilty of usurping power", which was held to be the case in the precedent.

**41.** We may note that the Supreme Court had held that the presiding officer conducting the election had ignored a relevant factor and failure to do so offended against procedural propriety which made his decision in going ahead with the election meeting perverse and irrational, a facet of unreasonableness, warranting interference under Article 226 of the Constitution of India, therefore, setting aside the election of the appellant was justified. However, declaration of the respondent no.1 as an elected candidate was beyond the permissible scope of judicial review.

**42.** The Supreme Court had occasion to consider the scope of judicial review by the Supreme Court in (2003) 4 SCC 579, **Indian Railway Construction Company Ltd. v. Ajay Kumar** also. As in the present case, the Supreme Court was concerned with service jurisprudence. The court was concerned with a challenge to the action of the disciplinary authority dispensing with a disciplinary inquiry under the **Indian Railway Construction Company Limited (Conduct, Discipline and Appeal) Rules, 1981** and imposition of punishment of dismissal. The court was called upon to consider an objection as to whether there was any scope for judicial review of the disciplinary authority's order dispensing with the inquiry. On the issue of scope of judicial interference in matters of administrative decision, the court referred to the principles laid down in its prior decisions and laid down binding principles which shed valuable light on the consideration by this court in the following terms:

"13. One of the points that falls for determination is the scope for judicial interference in matters of administrative decisions. Administrative action is stated to be referable to broad area of Governmental activities in which the repositories of power may exercise every class of statutory function of executive, quasi-legislative and quasi-judicial nature. it is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or the

exercise of the power is manifestly arbitrary (See **State of U.P. and Ors. v. Renusagar Power Co. and Ors.** AIR 1988 SC 173. At one time, the traditional view in England was that the executive was not answerable where its action was attributable to the exercise of prerogative power Professor De Smith in his classical work "Judicial Review of Administrative Action" 4th Edition at pages 285-287 states the legal position in his own terse language that the relevant principles formulated by the Courts may be broadly summarised as follows. The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it; it must not act under the dictates of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion, it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily on capriciously. These several principles can conveniently be grouped in two main categories: (i) failure to exercise a discretion, and (ii) excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account, and where an authority hands over its discretion to another body it acts ultra vires.

14. The present trend of judicial opinion is to restrict the doctrine of immunity from judicial review to those class of cases which relate to deployment of troupes, entering into international treaties etc. The distinctive features of some of these recent cases signify the willingness of the Courts to assert their power to scrutinize the factual basis upon which discretionary powers have been exercised one can conveniently classify under three heads the grounds on which administrative action is subject to control by



judicial review. The first ground is 'illegality' the second 'Irrationality', and the third 'procedure impropriety'. These principles were highlighted by Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service 1984 (3) All. ER. 935, (commonly known as CCSU Case). If the power has been exercised on a non-consideration or non-application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated. (See **Commissioner of Income-tax v. : Mahindra and Mahindra Ltd.** [1983]144 ITR 225 (SC).

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15. The Court will be slow to interfere in such matters relating to administrative functions unless decision is tainted by any vulnerability enumerated above. like illegality, irrationality and procedural impropriety. Whether action falls within any of the categories has to be established. Mere assertion in that regard would not be sufficient.

16. The famous case commonly known as "**The Wednesbury's case**" is treated as the landmark so far as laying down various basic principles relating to judicial review of administrative or statutory direction.

17. Before summarizing the substance of the principles laid down therein we shall refer to the passage from the judgment of Lord Greene in **Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation** It reads as follows:

".....It is true that discretion must be exercised reasonably. Now what does what mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters

which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could even dream that it lay within the powers the authority.....In another, it is taking into consideration extraneous matters. It is unreasonable that it might almost be described as being done in bad faith; and in fact, all these things run into one another."

Lord Greene also observed (KB p. 260)

".....it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body can come to. *It is not what the court considers unreasonable.....* The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another." (emphasis supplied)

**43.** In (2004) 4 SCC 714, **State of Uttar Pradesh v. Johri Mal,** the Supreme Court also made the following observations and summation on the scope and extent of power of judicial review of the High Court contained in Article 226 of the Constitution of India in the following terms:

"28. The scope and extent of power of the judicial review of the High Court contained in Article 226 of the Constitution of India would vary from case to case, the nature of the order, the relevant statute as also the other relevant factors including the nature of power exercised by the public authorities, namely, whether the power is statutory, quasi-judicial or administrative. The power of judicial review is not intended to assume a supervisory role or don the robes of omnipresent. The power is not intended either to review governance under the rule of law nor do the Courts step into the areas exclusively reserved by the suprema lex to the other organs of the State. Decisions and actions which do not have adjudicative disposition may not strictly fall for consideration before a judicial review court. The limited scope of judicial review succinctly put, is :

(i) Courts, while exercising the power of judicial review, do not



sit in appeal over the decisions of administrative bodies.

(ii) A petition for a judicial review would lie only on certain well-defined grounds.

(iii) An order passed by an administrative authority exercising discretion vested in it, cannot be interfered in judicial review unless it is shown that exercise of discretion itself is perverse or illegal.

(iv) A mere wrong decision without anything more is not enough to attract the power of judicial review ; the supervisory jurisdiction conferred on a Court is limited to seeing that Tribunal functions within the limits of its authority and that its decisions do not occasion miscarriage of justice.

(v) The Courts cannot be called upon to undertake the Government duties and functions. The Court shall not ordinarily interfere with a policy decision of the State. Social and economic belief of a Judge should not be invoked as a substitute for the judgment of the legislative bodies. (See **Ira Mann v. State of Ellinois,** 1876 (94) US (Supreme Reports) 113)."

**44.** In (2008) 8 SCC 606, **Centre for Public Interest Litigation & Anr. v. Union of India & Ors.,** while referring to the inherent limitations in the exercise of power of judicial review into administrative action, the court was concerned with a challenge to the award of a contract on the ground that the same was done arbitrarily for collateral considerations and was actuated by malafide. The court referred to the following observations of the Supreme Court in the prior judgment in (1994) 6 SCC 651, **Tata Cellular v. Union of India**:

"21. While considering the allegations levelled against the acceptance of the impugned contract, we may usefully refer to the observations of this Court in the case of **Tata Cellular v. Union of India** [(1994) 6 SCC 651] which are as follows:

"Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself. It is thus different from an appeal. When hearing an appeal, the court is concerned with the merits of the

> decision under appeal. Since the power of judicial review is not an appeal from the decision, the court cannot substitute its own decision. Apart from the fact that the court is hardly equipped to do so, it would not be desirable either. Where the selection or rejection is arbitrary, certainly the court would interfere. It is not the function of a Judge to act as a superboard, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator.

The duty of the court is thus to confine itself to the question of legality. Its concern should be:

(1) Whether a decision-making authority exceeded its powers?

(2) committed an error of law;

(3) committed a breach of the rules of natural justice,

(4) reached a decision which no reasonable tribunal would have reached or,

(5) abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) *Illegality:* This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) *Irrationality,* namely, Wednesbury unreasonableness. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at. The decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it.



*(iii) Procedural impropriety."*

**45.** The scope of the high court's power under Article 226 of the Constitution to undertake judicial review of exercise of statutory and administrative discretion and action thus have been succinctly laid down by the Supreme Court. This court must confine its consideration within these parameters and norms.

**46.** At this stage, given the challenge in the present reference also requires to be made to the extent to which the high court can examine the factual matrix to base its evaluation and conclusions in compliance with the aforenoticed principles on judicial review. On the nature of the inquiry by the reviewing court, in (2003) 4 SCC 579, **Indian Railway Construction Co. Ltd. v. Ajay Kumar,** the Supreme Court observed as follows:-

> 18. Therefore, to arrive at a decision on "reasonableness" the Court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. The decision of the administrator must have been within the four corners of the law, and not one which no sensible person could have reasonably arrived at, having regard to the above principles, and must have been a bona fide one. The decision could be one of many choices open to the authority but it was for that authority to decide upon the choice and not for the Court to substitute its view.
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> 21. These principles have been noted in aforesaid terms in **Union of India and Anr. v. S. Ganayutham** : (2000) IILLJ 648 SC. In essence, the test is to see whether there is any infirmity in the decision making process and not in the decision itself.
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> 23. Doubtless, he who seeks to invalidates or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by the authority of its powers while he indirect motive or purpose, or bad faith or personal ill-will is not to be held established except on **clear proof** thereof, it is obviously difficult to establish the state of a man's mind, for that is what the

employee has to establish in this case, though this may sometimes be done. The difficulty is not lessened when one has to establish that a person apparently acting on the legitimate exercise of power has, in fact, been acting mala fide in the sense of pursuing an illegitimate aim. It is not the law that mala fide (SIC) the sense of improper motive should be established only by direct evidence. But it must be discernible from the order impugned or **must be shown from the established surrounding factors which preceded the order**. If bad faith would vitiate the order, the same can, in our opinion, **be deduced as a reasonable and inescapable inference from proved facts**. (See **S. Pratap Singh v. The State of Punjab** (1966) ILLJ 458 SC. It cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility. As noted by this Court in **R.P. Royappa v. State of Tamil Nadu and Anr.** (1974) ILLJ 172 SC, Courts would be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration."

**47.** In (2004) 4 SCC 714, **State of Uttar Pradesh v. Johri Mal,** the court was concerned with the challenge to the refusal of authorities to renew the tenure or appointment of a public prosecutor under Section 24 of the code of Criminal Procedure and provisions of the Legal Remembrancer's Manual. Placing reliance on Wade's Administrative Law 8th Edition (p.p. 33 to 35), the court emphasized the distinction between the right of appeal and exercise of the power of judicial review. It was observed that judicial review or the exercise of the court's inherent power was essential to determine whether the challenged action is lawful or not and to award suitable relief. For this, no statutory authority was necessary; the court was simply performing its ordinary functions in order to enforce the law. So far as the power of the court undertaking judicial review to appreciate the finding of facts is concerned, the following observations of the court in paras 30, 32 and 33 are relevant and read as follows:-



"30. It is well-settled that while exercising the power of judicial review the Court is more concerned with the decision making process than the merit of the decision itself. In doing so, it is often argued by the defender of an impugned decision that the court is not competent to exercise its power when there are serious disputed questions of facts when the decision of the Tribunal or the decision of the fact finding body or the arbitrator is given finality by the statute which governs a given situation or which, by nature of the activity the decision maker's opinion on facts is final. But **while examining and scrutinizing the decision making process it becomes inevitable to also appreciate the facts of a given case as otherwise the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety. How far the court of judicial review can reappreciate the findings of facts depends on the ground of judicial review.** For example, if a decision is challenged as irrational, it would be well-nigh impossible to record a finding whether a decision is rational or irrational without **first evaluating the facts of the case and coming to a plausible conclusion and then testing the decision of the authority on the touch-stone of the tests laid down by the Court with special reference to a given case.** This position is **well settled in Indian administrative law.** therefore, to a limited extent of scrutinizing the decision making process, **it is always open to the Court to review the evaluation of facts by the decision maker.**"

In a Division Bench pronounce of this court reported at (2004) 77 DRJ 638, **Alan Dick and Company Limited v. Union of India,** the court was considering a challenge to the award of contract by accepting a bid referring to the aforenoticed principles on which administrative action could be challenged. It was observed that courts have been slow to interfere in the matters relating to administrative functions unless they are convinced that the impugned decision is illegal, irrational or lacks fairness in procedure. It was further observed that while exercising the power of judicial review, the court is more concerned with the decision making process rather than the merit of the decision itself. The court observed that while scrutinizing the decision making process, **"it becomes**

**inevitable to also appreciate the facts of the given case, as otherwise the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety"**. It was also emphasized that in judicial review, the court is mainly concerned with the legality of the action under challenge.

These are the parameters within which this court would examine the present challenge laid down by the petitioner. It is therefore well settled that this court in exercise of its power under Article 226 of the Constitution of India would examine the factual matrix to adjudicate upon the several grounds urged by the petitioner.

**Applicable Rules and Policy**

**48.** Before examining the challenge, given the rank and positions involved and the serious allegations of the petitioner, it is essential to notice the applicable rules and relevant policies of the official respondents. In this regard, reliance on the following has been placed before this court:nd

(i) Policy dated 22August, 1986.

(ii) Policy dated 6th of May 1987 with regard to assessment for appointment.

(iii) Policy dated 11th December, 1991.

(iv) Para 70 of the Defence Service Regulations read with policy dated 7th October, 2002.

(v) MS Branch letter dated 20th March, 2001.

**49.** To facilitate adjudication, the relevant extract of the above documents deserves to be considered in extenso which are extracted hereafter:

(i) **The policy dated 22nd August, 1986:-**

"9. Officers who are not approved are given First and Final Reviews as required and if approved, their seniority is re-adjusted with one/two batches junior to their own batch, but they remain senior to officers of the fresh batch. Officers are considered with a cut off report as applicable to their batch and Review cases are considered with an additional report over and above these with which they had already been considered and not



placed in an acceptable grade."

Para 9 of the policy of 1986 thus shows that the officers who are not approved are given first and final review and if approved, their seniorities are readjusted with 1st or 2nd batches junior to their own batch.

(ii) **The policy dated 11th December, 1991:-**

**"SEQUENCE OF SELECTION TO SELECT RANKS**

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2. Consequent to introduction of the 'Two Stream' concept, certain doubts have been expressed from time to time on the following aspects:

(a) The concept of 'Batch'.

(b) Sequence of promotion within a 'Batch'.

(c) Sequence of promotion within a 'Batch' with application of the 'Two Stream' concept.

3. This letter seeks to clarify the above doubts in the succeeding paragraphs.

4. Officers are considered for promotion to select ranks batchwise by the appropriate Selection Boards. A 'Batch' for consideration for promotion to select ranks is defined as "all officers who reckon seniority in a particular calendar year".

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5. Every officer is given three chances for consideration for promotion. If an officer is not approved for promotion during the first consideration, he loses one year of seniority and slides into the batch of the next year. In the eventuality of his not being approved for promotion even in the second consideration, he loses one more year of seniority and slides further into the next batch. Thereafter, the officer is considered for promotion for the last time and if he is not approved even in the third chance, he is not given any further consideration and is regarded as a finally superseded officer. An illustration of a typical composition of a

batch for consideration for promotion to the select ranks is at Appx 'A'."

Para 5 of the 1991 policy unequivocally states that every officer is given three considerations and each consideration is with the next batch seniority. The appendix to this communication clearly illustrates the manner in which the first review has to be given only with the consideration of the fresh case.

(iii) **Para 70 of the Defence Service Regulations:-**

"70. Claims for promotion.-Officers will normally be considered for promotion in the order of seniority in their Corps but an officer whose early advancement is in the interest of service may be specially selected for promotion to fill a vacancy whatever his seniority in the rank at the time. The cases of officers who are superseded for promotion will be kept under review in accordance with the existing instructions."

These regulations clearly stipulate that cases of officers who are superseded for promotions, will be kept under review in accordance with existing instructions.

(iv) **MS Branch policy dated 7th October, 2002:-**

"5. First/Final Review Cases. Offrs. under consideration as First/Final review cases will be on the basis of policy in vogue for a batch they are being considered 'With'."

It is thus the clear binding policy that consideration of any officer as first/final review cases will be on the basis of the policy in vogue for a batch that he is being considered 'with'. This would also suggest that review cases cannot be considered unless there is a fresh batch with which they have to be considered.

(v) **MS Branch letter dated 20th March, 2001:-**

So far as the description of a batch is concerned, the same is explained in the MS Branch letter dated 20th March, 2001, the relevant extract whereof reads as follows:

**"Batch**

2. **In the Rk. Of Maj**. A batch comprises all offrs reckoning seniority as substantive Maj within a particular calendar yr. For



example, 1982 Batch includes all offrs of 1982 and earlier or later Army seniority who become substantive Majs during the calendar yr 1993.

3. **In the Rank of Lt. Col.** – In the acting rank of Lt. Col, the batch would comprise of final review and first review selectees of previous batch along with the main batch. Army HQ Letter No.38360/MS : 5B dt 29 May 84 refers.

4. For the offrs of JAG Deptt. a batch will be defined as laid down in AI 173/66 or AI 49/73 as the case may be."

The respondents have, therefore, defined a batch in the context of Lieutenant Colonels as comprising of final review and first review selectees of the previous batches along with main batch. The same would apply to all ranks including Brigadiers, Major Generals and Lt. Generals as well. No distinction has been drawn by the respondents.

**50.** It is noteworthy that pursuant to the orders dated 15th September, 2011 of the Armed Forces Tribunal, the respondent nos.1 to 4 filed an affidavit dated 22nd September, 2011 wherein they again reiterated the above policies in the following terms:-

"4. That following policy letters have already been placed on record by way of annexures to the Reply Statement filed earlier:-

(a) Policy letter dated 06 May 1987 on "Selection System (Annexure R-1).

(b) Policy letter dated 22 Aug 1986 on "Sequence of Selection of Review Cases" (Annexure R-2).

(c) Policy letter dated 11 Dec 1991 "Sequence of Selection of Ranks" (Annexure R-3).

5. That Para 4 of the Policy letter dated 11th Dec. 1991 (Annexure R-3) provides, "Officers are considered for promotion to select ranks batchwise by the appropriate Selection Boards. In Para 8 of the Policy letter dated 22 Aug 1986 (Annexure R-3), a "Batch" has been defined as, "all officers who reckon seniority in a particular calendar year".

Aim of the Selection Board classified in Para 5 of the Policy

letter dated 06 May 1987 (Annexure R-1) includes, inter-alia, "To assess all eligible officers of a batch who reckon seniority during one calendar year.....".

Para 10(I) of the policy letter dated 6-5-1987 (Annexure R-1) further proves "Assessment of the officer is based on comparative merit of the overall profile of the officers within his own batch".

The respondents were therefore bound by the above policy declarations in undertaking the selection process.

**51.** It has been argued by Mr.S.S. Pandey, learned counsel appearing for the respondent no.5 that the policies relied upon by the petitioner dated 11th December, 1991 and 22nd August, 2006, do not apply as they relate to only select ranks. However, this submission is to be noted only for the sake of rejection. The 1986 policy and the 1991 policy are concerned with different areas. The 1986 policy relates to consideration of review cases while the 1991 policy relates to consideration of fresh cases for promotion. The respondent nos.1 to 4 have taken a categorical stand that these policies are valid, binding and applicable to the instant case.

**The respondents understanding and implementation of the Regulations/Policies**

**52.** The petitioner has contended that the policy also laid down by the Ministry of Defence in para 74 of the Defence Service Regulations clearly stipulates that officers who are superseded for promotion would be kept under review in accordance with the existing instructions. Such instructions are laid down in the policy letter dated 7th October, 2002 which stipulates that consideration of the officer as the first/final review cases will be on the basis of the policy invoked for the batch that is being considered 'with'. Ms. Jyoti Singh, learned senior counsel appearing for the petitioner submits that this clearly means and applies that review cases cannot be considered unless there is a fresh batch with which they have to be considered. It is contended that this is supported by the MS Branch letter dated 20th March, 2001 where a batch has been defined in the context of Lieutenant Colonels as comprising of final review and first review selectees of the previous batch along with main batch which is being accorded fresh consideration.



**53.** A reading of the above Regulations; the communications as well as the policy letters issued by the respondents would show that the Army records three considerations to an officer for promotion. Every officer is first considered as a fresh case. In case, he fails to be selected, he is granted a second consideration as a first review case and if he still does not succeed, then he is granted third and last consideration as a final review case. In the first review, the officer is considered with the next batch and in the final review, he is considered with the next to next batch respectively.

This is clear from the reading of MS Branch policy dated 22nd August, 1986 and 11th December, 1991. As per para 9 of the 1986 policy, the officers who are not approved, are given first and final review and if approved, their seniority is readjusted with one/two batches junior to their own batch. The 1991 policy in para 9 clearly mentions that every officer is given a total of three considerations and each consideration is with the next batch seniority.

**54.** The question which arises in the instant case is as to how would the review considerations of an officer who is considered and not selected be effectuated in case, in the next batch or even the next to next batch, there is no officer available for consideration as a fresh case. The petitioner has contended that as per the declared policy of the respondents, which has always been applied, in such eventuality the officers of the next available batch would form the fresh batch to be considered. As a result, the unsuccessful officers of the previous batch are considered as, either the first review case or final review case, depending upon the number of the considerations already afforded only with such next available batch. It is pointed out that for this reason the respondents have also already declared the manner in which the seniority of the officers being given review considerations will be maintained and preserved. We find that this has been illustrated by the respondents in the Appendices/ Annexures in the aforenoticed policy declarations of the respondents.

**55.** It has been urged that this reading of the above regulations and the policy is also manifested by the past practice followed by the Army including by the Remount Veterinary Corps.

**56.** Ms. Jyoti Singh, learned Senior Counsel appearing for the petitioner has submitted that this reading of the applicable regulations and

policy as well as implementation thereof as well as practice and procedures has been further admitted in several affidavits filed by the respondent no.1.

**57.** To buttress the above, our attention has been drawn to the counter affidavit of September, 2011 filed by the respondent nos.1 to 4 in O.A.No.161/2011 filed by the petitioner. In reply to para 5(B) of the grounds, in this counter affidavit, the respondents admitted as follows:-

> "5(B) That in reply to contents of Ground 5B, it is submitted that under the existing policy, consideration for promotion is batch wise and a batch for consideration for promotion and sequence to select ranks, is as under:
>
> (a) Final Review Case (e.g. 1973 batch)
>
> (b) First Review Cases (e.g. 1974 batch)
>
> (c) First Case (e.g. 1975 batch)
>
> In this regard, copies of Policy letter dated 22 Aug 1986 "Sequence of Selection Review Cases" and policy letter dated 11 Dec 91 on "Sequence of Selection to Select Ranks" are annexed as **Annexure R-2** and **R-3** respectively. Para 9 of Annexure R-2 stipulates that "officers who are not approved are given First and Final Review as required and if approved, their seniority is readjusted with one/two batches junior to their own batch, but they remain senior to officers of the fresh batch". It is submitted that an officer does not loose seniority per se on being non-empanelled. His seniority is "re-adjusted" only if he is empanelled as a Review case of his original batch on being considered with next batch.
>
> Policy letter dated 07 Oct 2002 on "Consideration of CRs for Selection Boards" also provides that officers under consideration as First/Final Review cases will be on the basis of the policy in vogue for a batch they are being considered with Copy of the policy letter dated 07 Oct 2002 is annexed as **Annexure R-4.**"

**58.** To substantiate his contention before the Armed Forces Tribunal in para 4.4 and ground 'B' of O.A.No.161/2011 as well as in ground 'C' of the present writ petition, the petitioner has stated on affidavit that there



were non-empanelled officers of the 1979 batch for the rank of Colonel. The 1980-81 batch had no officers available for consideration for the rank of Colonel. However, in view of the aforenoticed policies, the non-empanelled officers of the 1979 batch of the RVC were not considered as review cases without the officers who were to be given a fresh consideration. Consequently, the non-empanelled officers of the 1979 batch were clubbed with the 1982 batch being considered as fresh batch for promotion to the rank of Colonel.

Similarly, there was no available eligible officer in the 1983 batch for promotion. Consequently, non-empanelled officers belonging to the 1982 batch were not considered in isolation as first review cases, but were clubbed with the next available fresh consideration batch, that is the 1984 batch for their first review.

**59.** The petitioner has cited another specific instance to the effect that in the Selection Board for the Judge Advocate General Department (another minor corps) held in April, 2009, a 1982 batch officer has not been considered alone as a first review of 1983 batch but has been considered with the fresh case of 1984 batch as the 1983 batch is non-existent.

The respondents have not disputed this factual narration.

**60.** This understanding of the policy and its such implementation has withstood legal challenge and scrutiny by the Armed Forces Tribunal which in another case (O.A.No.115/2011, **Col. Tej Ram & Anr. v. Union of India)** decided on the same day as O.A.No.161/2011 of the petitioner authoritatively rejected the prayer by Col. Tej Ram and Col. T.S. Sachdeva to be granted the same treatment as was accorded to the present respondent no.5. O.A.No.115/2011, **Colonel Tej Ram & Anr. v. Union of India & Ors.**

**61.** Col. Tej Ram and Col. T.S. Sachdeva were recruited on 3rd September, 1979 into the RVC and were thus part of the 1979 Batch. They were promoted to the rank of Lieutenant Colonel but could not be empanelled by the No.2 Selection Board for the acting rank of Brigadier with the 1979 batch in October, 2009. These two officers had a grievance with regard to their ACRs and had filed non-statutory complaints with regard thereto. Redressal was given to them by the authorities who directed expunging a portion of the ACRs. In view of the expunging of

the adverse remarks from their ACRs, a Special Selection Board was held in September, 2010 when these officers were again considered but could not be selected. The stage of fresh consideration of these officers was over. They were subsequently required to be considered as review cases now.

**62.** The respondents pointed out that during 1980-81, there was no batch available for consideration. When the vacancy arose on 23rd February, 2011, the batch of 1982 was eligible for its first consideration as the next available batch with the petitioners being the first review cases. These two officers were considered as first review cases by the Selection Board No.2 held in April, 2011 along with fresh cases by the 1982 batch in accordance with the aforenoticed policy.

**63.** For the said vacancy in the post of Brigadier (which had arisen on 23rd February, 2011), Colonel Tej Ram and Col. Sachdeva contended that since they belonged to the 1979 batch, their cases were required to be considered for promotion without being clubbed with persons belonging to the 1982 batch. As this was not being done, Colonel Tej Ram and the other officer approached the Armed Forces Tribunal by way of O.A.No.115/2011 seeking a direction to the respondents to accord them such consideration. They also prayed for striking down of para 6 of the policy letter for calculation of pro-rata vacancies.

**64.** Our attention has been drawn to the counter affidavit filed by the respondent no.1 in **O.A.No.115/2011, Tej Ram & Anr. v. Union of India** filed by Col. Tej Ram and Col. T.S. Sachdeva challenging their separate non-consideration. In this counter affidavit, the respondent no.1 stated as follows:

> "In terms of **MS Branch policy** letters No 37417/QSIR/MS-5 dated **22 Aug 1986,** "Sequence of Selection Review Cases", Para 9(a) of letter No 04579/MS **(Policy) dated 11 Dec 1991,** 'Sequence of Selection to Select Ranks' and letter No 04477/MS **Policy dated 07 Oct 2002 'Consideration of CRs for SBs**' in Army, officers are considered batch-wise to draw a panel to fill likely vacancies, **alongwith a fresh batch, officers belonging to the previous two batches are given review consideration.** These policy letters are attached as Annexure "R-1" to R-3 respectively.



There was no commissioning and there are no officers in 1980 and 1981 batches of RVC. Col Tej Ram and Col T S Sachdeva, who were **not approved as Special Review (Fresh) cases of their own batch 1979 were thus logically required to the considered as normal review cases alongwith Fresh Cases of the next available batch, which is the 1982 batch,** which has three Cols, by No 2 Selection Board for one vacancy. **The plea of being considered as part of the 1980 batch is not tenable since there was no commissioning in RVC in that year. Normal review cases cannot be considered in isolation but have to be considered alongwith Fresh Cases of the next available batch who would otherwise be deprived of being considered equitably for the available vacancy.** The Special Review (Fresh) cases are considered afresh based on redressal granted consequent to a **complaint or for any other reason.** The officers are considered as per the policy in vogue at the time of consideration of his original batch and with comparative merit of his batch mates. The policy letter No 04502/MS Policy dated 27 Jul 1995 is attached as Annexure "R-4".

4.8 That the contents of Para 4.8 are denied being false, misleading and perceptions of the Applicants. It is submitted that the **review cases cannot be considered alone as the available vacancy will be of the fresh batch and if that batch is not considered, it will be deprived of legitimate and fair consideration.** The review cases were already considered as fresh cases for vacancies available to the said (original) batch but they were not empanelled based on quantified merit and value judgment marks. **In case logic of the Applicants is accepted that would mean that officer who is not approved as Fresh batch with his batch mates will be considered without a Fresh batch for a vacancy which should logically go to Fresh batch and those review cases officers should be empanelled, even though, below the comparative merit of their batch and that cycle should continue until Fresh batch comes up for consideration, does not stand to logic, otherwise, there may not be any supersession in the Minor Corps.**"

(Emphasis Supplied)

**65.** It is pointed out that the two petitions, one by the petitioner (O.A.No.161/2011) and the other by Col. Tej Ram and Col. T.S. Sachdeva (O.A.No.115/2011) raised diametrically opposite challenges based on the same regulations and policies. Both these petitions were listed on the 22nd of September 2011. It has been contended by the petitioner that they were listed and heard by the one Bench on the same day.

**66.** It is noteworthy that Col. Tej Ram and Col. Sachdeva were effectively seeking the same favourable treatment which has been given to the present respondent no.5 by the respondents. The Tribunal in no uncertain terms negated Col. Tej Ram and Col. Sachdeva's contention that they were entitled to a stand alone consideration as review cases dehors the next available batch. O.A.No.115/2011 was dismissed by the tribunal by the order dated 22nd September, 2011. This very contention did not find favour with the Armed Forces Tribunal which held as follows:

> "6. We have bestowed our best of the consideration and we regret that this argument of learned counsel for the petitioner cannot be acceded to. It is true that the consideration is batch wise and if one person is not found suitable and not empanelled then he is entitled to first review along with the next batch and if he still is not found suitable and empanelled then he is entitled to be considered for second review along with the next batch. This is the system followed by the respondents. So far as system is considered there is nothing wrong about it. Only question is that whether **contention of learned counsel for the petitioner that he should be considered against the vacancy of 2011 de hors the 1982 batch. But this cannot be done.** The batch which has become eligible by this time is of 1982 batch. **In 1980 and 1981 there was no recruitments in the Corps of RVC therefore no persons of batch of 1980 and 1981 were available for consideration.** Recruitment only took place in 1982 in this Corps and persons who were recruited in 1982 by this time have become eligible for consideration. **To deny these persons who have become eligible for consideration to the exclusion of 1982 batch would be unfair as these persons have become eligible for consideration for a vacancy which is now available in February – March 2011. This will amount to a reverse discrimination that persons who have become eligible are being sought to be ignored on account of the fact that the persons of 1979 batch who were not found suitable for first consideration and they should alone be considered to the exclusion of 1982 batch. This will be discriminatory denying the persons equal opportunity for consideration for the post. Therefore this contention of learned counsel for the petitioner cannot be countenanced.**"



(underlining by us)

**67.** Col. Tej Ram and Col. T.S. Sachdeva's contention in O.A.No.115/2011 that, as review cases, they were entitled to be considered by the Selection Board dehors the next available batch was thus negated by the order dated 22nd September, 2011. The tribunal thereby accepted the present petitioner's contention that a review case has to be considered with the next available batch and that the review case cannot be considered in isolation.

**68.** The respondents have also reiterated this position in their counter affidavit dated September, 2011 submitted before the Armed Forces Tribunal in O.A.No.161/2011 (which had been filed by the present petitioner) in the following terms:-

> "The Applicant's contention about consideration of Review Case of 1979 batch RVC Officers with Fresh Cases of 1982 batch, it is submitted that Col Tej Ram and Col TS Sachdeva are 1979 batch officers of the RVC. They were first considered for promotion to acting rank of Brig, as Fresh Cases of the 1979 batch of RVC, by No 2 Selection Board held in Oct 2009 and not approved. The officers were granted certain redressals on their respective Non Statutory Compalaints and were considered as Special Review (Fresh) cases of the 1979 batch, by the No 2 Selection Board held in Sep 2010 but not approved. It is submitted that Remount and Veterinary Corps (RVC) is a minor Corps and no officer was commissioned in RVC during 1980-81. Therefore, 1980 and 1981 batches did not exist for RVC. Accordingly, No 2 Selection Board held in Apr 2011 considered the Fresh cases on 1982 batch (03 officers) along with First Review cases of the 1979 batch (04 officers including Col Tej

Ram and Col TS Sachdeva) for promotion to acting rank of Brig against the chain vacancy existing with effect from 24 Feb 2011 on account of retirement of Lt Gen JK Srivastava. **In accordance with extant policy, the First Review cases of 1979 batch were considered with Fresh Cases of 1982 batch for the one vacancy available to the 1982 batch.**"

(underlining by us)

**69.** The Armed Forces Tribunal read the applicable regulations and policies and while deciding O.A.No.115/2011 and held that there could be no stand alone consideration as a review case which had to be considered with a fresh batch. The inevitable and only result was that this finding had to be applied in the O.A.No.161/2011 as well.

**70.** On these findings, the petition filed by the petitioners ought to have been granted, so far as the challenge to the consideration of the respondent no.5 was concerned. However, by an order of the same date, a contradictory finding was returned.

**71.** The present petitioner's contention in his O.A.No.161/2011 that a review case cannot be considered by a Selection Board dehors the next available batch for fresh consideration was rejected.

**72.** It is noteworthy that while passing the judgment dated 22nd September, 2011 in the O.A.No.161/2011 filed by the present petitioner, the Tribunal has evidently overlooked the stand of the respondents in the counter affidavit as well as the aforenoticed policies. The order dated 22nd September, 2011 of the tribunal in O.A.No.161/2011 (filed by the petitioner) has thus overlooked relevant material. It is contrary to its findings in the decision of the same date in O.A.No.115/2011 on identical issues and is legally not sustainable.

**The petitioner's eligibility for promotion to Major General**

**73.** The petitioner has laid a claim that he was eligible for consideration for promotion to the rank of Major General on 12th August, 2009. It is contended that he has been unfairly denied his fresh consideration with the review consideration of the respondent no.5. It is, therefore, necessary to consider the prescribed requirements for appointment as Major General and also to examine the petitioner's claim in this regard.



**74.** As per the prescribed requirements, for appointment as Major General, a person is required to have two annual confidential reports in this rank. It is further pointed out that the respondents have additionally placed a requirement of tenures Adequately Exercised (AE) as Brigadier for Major General and prescripted a minimum tenure in the rank of Major General to enable an officer to be considered by the Special Selection Board for appointment as Lieutenant General. In this regard, our attention is drawn to the policy declaration by the Military Secretary's Branch in its letter dated 26th September, 2003.

**75.** The AE stipulations to enable a Brigadier to be considered for appointment as Major General are provided in this Secretary's Branch wherein it is stated thus:

"5. AE stipulations for Brigs will be as follows:

xxx

(b) Arms/Services Other than Gen Cadre. Tenure in a criteria appt will normally be 18 months subject to min two CRs."

(underlining by us)

**76.** It is an admitted position that the petitioner had earned two annual confidential reports as a Brigadier by June, 2009 and, therefore, met the ACR criterion for consideration for appointment on 12th August, 2009 for the post of Major General. 77. Ms. Jyoti Singh, learned senior counsel for the petitioner has urged before us that the prescription of the adequately exercised (AE) period is not mandatory. Para 5(b) of the policy dated 26th September, 2003 uses the expression "normally" which indicates that this is not an absolute.

**78.** In support of the submission that the respondents have not considered the AE prescription as mandatory, the petitioner has referred to the appointment of Brigadier J.K. Srivastava who was so appointed on the 1st of September 2006. Barely 12 months thereafter Brigadier J.K. Srivastava was considered and empanelled by the Selection Board held on 28th August, 2007 for promotion to the acting rank of Major General. Brigadier J.K. Srivastava was given a waiver of six months AE by the respondent for appointment as Major General. Shortly thereafter, this very officer was again given three and a half months for being appointed as a Lieutenant General.

There is no dispute by the respondents to these factual submissions.

**79.** The petitioner has also referred to the Special Selection Board held in October, 2012 of Maj. General N.S. Kanwar (also of the RVC) who was granted seven months AE waiver.

**80.** An issue with regard to the waiver of a prescription of having served in a duty battalion to be eligible for promotion in the para-military force arose for consideration before the Division Bench of this court in W.P.(C)No.21900/2005, **Ashok Kumar v. Union of India & Ors.** and connected writ petitions. The judgment of the court was delivered on 27th October, 2009 wherein the court discussed the judicial precedents on the spirit, intendment and purpose of residuary rules empowering the employer to exempt the applicability of the rule in the following terms:

> "32. Needless to state, as held in the decision reported as 1993 Supp. (3) SCC 575 **Syed Khalid Rizvi & Ors. Vs. UOI & Ors.,** the intentment of a residuary rule empowering the employer or the Central Government to exempt the applicability of a rule is intended to remove hardships i.e. whenever a situation is shown to exist which is causing undue hardship to an officer or a group of officers, the power of relaxation must be exercised to relieve undue hardship caused due to unforeseen or unmerited circumstances. (See para 33 of the decision)
>
> 33. In a reverse situation, where the employer had exercised the power of relaxation and some officer had challenged the same, in the decision reported as 1996 (8) SCC 762 **SBI & Ors. Vs. Kashinath Kher & Ors.** the Supreme Court upheld the grant of relaxation taking note of the fact that the strict implementation of the Rule was operating harshly and in a manner unfair to some officers with reference to rendition of service in rural/ semi-urban areas. It was held that the object of the relaxation being to see that nobody stole a march over the other; exercise of said power of relaxation was valid. In the decision reported as 1998 (4) SCC 179 **Ashok Kumar Uppal & Ors. Vs. State ofJ &K &Ors.,** it was observed that where injustice might have been caused or is likely to be caused to any individual employee or class of employees or where the working of the rule might become impossible, the power of relaxation under the rules must be exercised."



After so discussing, the court laid down the binding principle thus:

> "34. It is settled law that where a power is vested in an authority and the situation exists warranting exercising of said power, non-exercise thereof would warrant the issuance of a mandamus requiring the power to be exercised. It is equally settled that while exercising a power where wrong questions are posed or relevant facts are excluded or irrelevant facts are included, the decision would be arbitrary and liable to be set aside and a mandamus would be issued, requiring the power to be exercised strictly within the confines of the facts within which the power has to be exercised."

**(Emphasis supplied)**

**81.** The principles laid down by the court in this case squarely apply to the present petitioner's claim of entitlement for waiver of the AE tenure. The failure of the respondents to even consider the petitioner's request for waiver was clearly arbitrary and illegal.

**82.** It has been pointed out that in any case the petitioner was completing 18 months AE in October, 2009 when Selection Board's are normally held. Given the binding requirement that a review case can be considered only with the next batch being accorded its fresh consideration, in case waiver was not to be granted to the petitioner, the respondents were bound to await availability of an eligible officer from the next batch. No reason for holding the Board in August, 2009 is available on the record of the tribunal. No emergency or service exigency is even suggested. Bald averments cannot replace facts when the court or tribunal is considering a challenge on grounds of favouritism. The petitioner's contention that there was no hard and fast rule and that the respondents could have held the Selection Board in any month in 2009 is manifested from the fact that the Selection Board for the appointment of the petitioner as a Major General was held in December, 2009.

**83.** In fact, the respondents have deliberately ignored the petitioner's specific request for waiver and his representations prior to the convening of the Board in August wherein he had requested MS Branch not to hold the Selection Board in August or to give him two and a half month

waiver in the AE period as per the past practice. The petitioner had cited the precedent of Brigadier J.K. Srivastava who had been given the waiver twice as noted above. The respondents render not a wit of a reason for why the petitioner's request for the waiver was not even considered.

**84.** The averments of the petitioner with regard to the waiver given to the other officers as well as to the petitioner's categorical statement that Boards are normally held in April and October and was hastened in August for the sole consideration of the respondent no.5 remain unchallenged even before us.

**85.** The policy, instances and the pleadings of the respondent establish that the AE tenure is not considered mandatory by the respondents. It is also manifest that the respondent grant waiver of this stipulation.

**86.** The respondents do not dispute that they have the power of waiving the requirement of the tenure in a particular rank and that they have relaxed the same in certain cases. There is thus substance in the petitioner's contention that just as other officers who have been granted AE waiver as noticed above, in the given circumstances, the petitioner was entitled for two month waiver in August, 2009 and could have been considered eligible thereupon for appointment as a Major General by the Selection Board held on 12th August, 2009.

**87.** It is trite that exercise of power of relaxation or waiver of a condition cannot be exercised in an arbitrary manner. The failure to consider the petitioner's requests and to exercise the discretion to waive the period of barely two months was arbitrary, unjustified, illegal. The petitioner was to be treated just like the other officers who had been granted waiver in similar positions.

**88.** These circumstances taken cumulatively also point to only one conclusion which is that the respondent nos.1 to 4 were bent on appointing respondent no.5 irrespective of the rule and policy position without a proper selection in which the relative merit of all eligible candidates was assessed. As such the Armed Forces Tribunal has erred in holding that the petitioner was not eligible for consideration in August, 2009 or that comparing the respondent no.5 with the petitioner, was comparing unequals. There is no basis at all for these conclusions given the clear stand of the respondents.



**Selection Board Misled that the respondent no.5 (of the 1974 Batch) was being given a consideration as if he was a fresh case of the 1975 Batch.**

**89.** The petitioner has complained that the respondents were aware that the Selection Board was bound by the policies and that the respondent no.5 could be considered for promotion as a review case only with fresh cases of the next available batch.

**90.** We have noticed above the identity of the issue as in the present case which arose with regard to a review case of Col. Tej Ram and Col. Sachdeva of the 1979 batch. No eligible officer was available in the batches of 1980 and 1981. The first batch in which an eligible officer was available for consideration was the 1982 batch. The respondent's clear understanding of the clear rule and policy stipulation is manifested by the MS Branch letter dated 1st March, 2011 on this case when they wrote as under:

"A/47002/2SB/Mar11/MS(X) 01 Mar 2011

**INTEGRATED HQ OF MOD (ARMY)**
**MS(X)**
**NO.2 SB : RVC OFFRS**

1. Reference your note No.80134/Q/RV-1 dated 03 Jan 2011.

2. The case has been examined in detail by the competent authority. As per extant policy, Review Cases alone cannot be considered in isolation as a batch for consideration by a Selection Board. Therefore, Review Cases of 1979 batch cannot be considered without the fresh batch, otherwise they will get the vacancy of the batch not yet considered.

3. Hence, the Review Cases of 1979 batch of RVC will be considered along with the next available batch of RVC, that is, 1982 batch of RVC.

s/d
(RB Asthana)
Dir/MS(X)

**Dir RVS (RM)"**

The respondents have herein reiterated the applicability of the policy

dated 22nd August, 1986 and 11th December, 1991 coupled with para 70 of the DSR as well as the policy dated 7th October, 2002 as well as their bindingness.

**91.** It is contended that for this reason, the respondents misled the Selection Board and created an impression that respondent no.5 was an officer from the 1975 batch.

**92.** In the present case the respondents knew that the only officer, a Colonel, from the 1975 batch had retired on 29th February, 2008 and there was no Brigadier eligible from the 1975 batch for consideration for promotion to the rank of Major General. It is pointed out that the MS Branch deliberately created the documents which suggest that the respondent no.5 was a 1975 batch Brigadier to facilitate his stand alone consideration for promotion.

**93.** The Military Secretary Branch addressed a letter bearing No.A/47053/1SB/RV/MS(X) dated 7th August, 2009 to the Dy MS, HQ Eastern Command referring to their letter forwarding the petitioner's representation of 18 July, 2009. In this letter dated 7 August, 2009, the respondents stated thus:

> "2. The offr's application has been examined at the appropriate level. It is stated that as per the existing policy on construction of a batch for consideration for promotion, a Brig from the 1975 batch of RVC is due for consideration on forthcoming No. 1SB on 12 Aug 2009. As such, Brig. Shri Kant Sharma who belongs to the 1976 batch of RVC cannot be considered with a 1975 batch offr."

Clearly the authorities were conscious that respondent no.5 if considered as a review case, had to be considered with the next batch. For this reason, an impression was being created (as in the above) that the respondent no.5 was a fresh case of the 1975 Batch.

**94.** The MS Branch letter dated 7th August, 2009 was delivered to the petitioner on 25th August, 2009 (long after Selection Board No.1 had been held on 12th August, 2009).

**95.** The petitioner further complains that the order dated 22nd October, 2010 rejecting his statutory complaint, again reiterated the same illegal position adopted by the respondents that the respondent no.5 was



an officer of the 1975 batch when in para 9 it stated thus:

> "... After consideration of all aspects of the complaint and viewing it against the redress sought, it emerges that the No 1 Selection Board held in respect of RVC officers of 1975 batch in August 2009 is in order and in accordance with policy guidelines on the subject."

**96.** Our attention is drawn to the counter affidavit filed by the respondent no.5 before the Armed Forces Tribunal to O.A.No.161/2011 wherein he also has pleaded that he was considered as a fresh case for Major General.

**97.** The respondents have suggested the same unfortunate stand in the counter affidavit filed in O.A.No.161/2011 in September, 2011 before the Armed Forces Tribunal as is evident from the following deposition:

> "It is submitted that although eight officers were commissioned in the 1975 batch of RVC, none of them had reached the rank of Brig. Also, there was no Brig of 1973 RVC Batch. The Applicant, who belongs to 1976 Batch, could not have been considered as 1975 Batch officer. In the circumstances, the then **Brig SS Thakral,** the First Review Case of 1974 batch, had constituted the 1975 Batch for consideration for promotion to the rank of Maj Gen in accordance with policy on the subject. Respondent No 5was considered by No 1 Selection Board held on 12 Aug 2009 and was approved. Respondent No 5 was promoted to the rank of Maj Gen on 16 Oct 2009.
>
> xxx
>
> It is further submitted that the phenomenon of certain batches not having any officer is not uncommon in the minor corps of Army (RVC, JAG, Mil Farms, Army Aviation etc.) and the extant policy is followed in all relevant cases. It is submitted that No 1 Selection Board held for RVC held in Aug 2009 was justifiable particularly in view of the facts that no other officer was available for consideration to fill the existing vacancy of Maj Gen and the then **Brig SS Thakral** considered as the First Review case of 1974 batch **had constituted the** 1975 **batch in terms of the policy** on the subject. It may be reiterated that though the officers

were initially Commissioned in 1975 batch, no one reached to the rank of Brig, while on the other hand, no such constraints were there in the case of No 2 Selection Board for the 1979 batch of RVC which was also considered as per the policy along with the next available fresh batch for promotion to rank of acting Brig. Contentions of the Applicant about extending favour to Respondent No 5 are, therefore, denied."

(Emphasis supplied)

The above statements to the effect that Brig. S.S. Thakral constituted the 1975 Batch or that this was so in terms of any policy are factually incorrect. The statements appear to have been made to overcome the deliberately committed illegality in considering the respondent no.5 (who was a review case of the 1974 Batch) as a stand alone candidate without considering the fresh cases of any officer from the next available batch.

**Whether the respondent no.5 was eligible for consideration for appointment as Lieutenant General?**

**98.** The petitioner had also challenged the eligibility of the respondent no.5 before the Armed Forces Tribunal for consideration for appointment as Lt. General inter alia on the ground that he did not have the prescribed confidential reports input.

**99.** The respondent no.5's interim confidential report for the period 1st of July 2010 to 23rd of February 2011 was required to be initiated by Lieutenant General J.K. Srivastava. The initiating officer -Lieutenant General J.K. Srivastava retired from the service of the Army with effect from 23rd February, 2011 which was admitted by Lieutenant General J.K. Srivastava in an O.A.No.111/2011 which was filed by him before the Armed Forces Tribunal.

**100.** Ms. Jyoti Singh, learned Senior Counsel for the petitioner has drawn our attention to the procedure and policy of the respondents with regard to writing of the Annual Confidential Reports of the officers.

**101.** The Army authorities have anticipated the contingency of the initiating officer not being available or not being in the position to initiate the confidential reports. To supply this contingency, the authorities have issued **Army order No.45/2001/MS-Confidential Reports on Officers.**



Paras 24 and 30 of this order which are material for the present consideration reads as follows:"

24. **Initiation of CRs by RO.** RO may initiate a CR as due and applicable, provided a ratee cannot earn a CR/ICR from his IO under the following circumstances:

(a) **IO Posted But Not Entitled.** RO may initiate a CR (Annual)/ Early/Interim), excluding Delayed CR whenever it becomes due; in all cases where IO is posted W.P.(C)No.7208/2011 Page 63 of 100

but not entitled to initiate due to limitations of various provisions of this AO. Sanction of SRO will be obtained before initiation of CRs. However, no Early CR/ICR can be initiated by the RO on posting out of the IO, except in cases, as covered under Paragraph 73 of this AO.

(b) **IO Not Posted.** RO may initiate all CRs as become due in cases, where IO is not posted on due date for the CRs, with prior sanction of the SRO, subject to the following conditions:

(i) No CR has been initiated on rate during the period by an IO/ RO.

(ii) CR cannot be initiated by officiating IO in terms of Paragraph 22 above."

"30. A retired IO (or RO required to initiate a CR under provisions of this AO), is not entitled to initiate CRs. Technical/Special to Corps Reporting Officers at first level of reporting are also not entitled to endorse CRs, after retirement. An officer who is due for retirement must initiate CRs as due and applicable and hand over the same to the RO before the date of retirement or on the date he proceeds on leave pending retirement, whichever is earlier. For this purpose, he can initiate reports up to a maximum of 15 days prior to the date he retires from service or proceeds on leave pending retirement. However, RO/SRO/HTO/HSCRO/HOA may endorse CRs even after retirement at their discretion."

**102.** This Army order clearly stated that an officer who is due for retirement must initiate confidential reports as due and applicable and

hand over the same to the Reviewing Officer (RO) before the date of retirement or on the date he proceeds on leave pending retirement, whichever is earlier.

The confidential report of respondent no.5 could have been initiated and handed over by the said initiating officer before the 23rd of February 2011 when he retired. This was not done. The petitioner contended that the Interim Confidential Report, though it has been endorsed as if it was written on 23rd February, 2011, has been initiated after the retirement of Lt. Gen. J.K. Srivastava. As such it was contrary to the prescribed procedure in para 30 of Army Order 45/01/MS and was invalid.

**103.** It is urged that such confidential report cannot be looked at for any purpose. The submission is that on 18th August, 2011 when the SSB was held, the respondent no.5 therefore, did not have the prescribed confidential reports necessary to entitle him to consideration for appointment as Lieut. General.

**104.** The policy letter dated 26th September, 2003 issued by the authorities provides the AE and confidential report stipulations for appointment to the rank of Lieut. General. In this regard, the following two stipulations are relevant for the purposes of the present case:-

> **"Maj Gens**
>
> 3. The min tenure in the rk of Maj Gen, to enable offrs of all Arms/Services (incl Gen Cadre) to be considered by Special Selection Board (SSB) will be 18 months subject to earning two CRs.
>
> 4. While executing the above, the following will be ensured in respect of Maj Gens of Gen Cadre:-
>
> xxx
>
> (b) Min two CRs in criteria appt would be necessary for being AE. However, in org interest, an offr may be posted out after a period of 12 months in a criteria appt provided, the offr has earned at least one CR.
>
> xxx"

**105.** On the issue as to by when the confidential reports should be



in place, a communication dated 31st December, 2010 addressed by the Military Secretary's Branch informing the cut-off dates for the Special CR's for the Selection Board No.2 planned to be held in 2011, which was the concerned Selection Board. The extract thereof which pertained to the RVC reads as follows:

**"SPECIAL CUT OFF CRS : NO 2 SELECTION BOARD 2011**

1. The cut off dates for Special CRs for No 2 SB planned to be held in 2011 are as under:-

| Ser | Arm/ Service | Fresh Batch | Review & Deferred/ Withdrawn Cases | Month | Date of Cut Off/ Special CR |
|---|---|---|---|---|---|
| | | | xxx | | |
| (h) | RVC | 1982 | 1979 & earlier batches | -do | -do |

xxx

4. Comd MS Only. Kindly monitor the progress on initiation and subsequent processing of CRs of all affected officers posted in Comd jurisdiction. Monthly progress report as on 15 of every month till Feb 2011 will be fwd to this branch in accordance with Para 71 of AO 45/2001/MS."

**106.** In O.A.No.161/2011 a specific objection was raised and pressed by the petitioner before the tribunal that one of the two confidential reports considered by the Selection Board for respondent no.5's appointment to the rank of Lieutenant General was invalid as it had been initiated by the initiating officer – Lieutenant General J.K. Srivastava after his retirement.

**107.** The respondent nos.1 to 4 had responded to this objection submitting that the CRs in respondent of respondent no.5 became due on the 23rd February, 2011 on the retirement of the IO Lieutenant General J.K. Srivastava and *"as per the records, he initiated the concerned CRs of respondent no.5 on the same day prior to his retirement when he was in service"*. The respondents contended that CRs were technically valid

in the light of the records available with the Military Secretary of the Branch.

**108.** This objection of the petitioner was simply brushed aside by the Armed Forces Tribunal holding that the ACR was filed by the IO on the same day when he demitted office and there was no illegality in it. No reference at all was made to the applicable Army Order 45/01/MS specifically pleaded and relied upon by the petitioner.

**109.** We may first consider the objection with regard to the validity of the interim confidential report of the respondent no.5. it is undisputed that the initiating officer Lieutenant General J.K. Srivastava had retired on the 23rd of February 2011. The period for which he endorsed the interim confidential report was between 1st July, 2010 and 23rd February, 2011. This interim confidential report was an input forming part of the service profile of the respondent no.5 which was considered by the Selection Board on the 18th August, 2011 when the respondent no.5 was considered for appointment as a Lieutenant General. The petitioner has made a categorical submission that this confidential report was written after Lieutenant General J.K. Srivastava had retired. To support this contention, several important factors have been pointed out.

**110.** It appears that Lieutenant General J.K. Srivastava was aggrieved by the respondent's proposal for his demitting office on the 23rd of February 2011. Therefore, on the 23rd of February 2011, he had filed a petition being O.A.No.81/2011 before the Armed Forces Tribunal under Section 14 of the Armed Forces Tribunal Act, 2007 for quashing the order directing him to demit office in the afternoon of 23rd February, 2011 as he has attained the age of superannuation. Lieutenant General J.K. Srivastava had contended before the Armed Forces Tribunal that the order of his superannuation was not served upon him and he was orally communicated on 22nd February, 2011 by the Dy MS(X) IHQ of the MoD (Army) about the retirement order.

**111.** Before the Armed Forces Tribunal, on the 23rd of February 2011, the respondents had taken a stand that the petition was filed only on apprehensions which did not give Lt. General Srivastava any cause of action. It was also submitted that no order requiring Lt. General J.K. Srivastava to demit office had yet been passed and that retirement was based on policy decision. The respondents stated that the MS Branch had



not received any communication from the Ministry of Defence with regard to the retirement of Lt. General J.K. Srivastava. It was submitted by the respondents that as no order had been passed, the petition was premature. The case was therefore, adjourned by the Armed Forces Tribunal directing the respondents to file a reply with regard to the averments in the petition.

**112.** It appears that Lt. General J.K. Srivastava was thereafter (on the 23rd of February, 2011 itself) called upon to go to the office of the QMG, IHQ of the Ministry of Defence (Army) where the retirement order was served upon him at three minutes past 5:00 pm informing him that he had retired from service w.e.f. 23rd February, 2011 (A/N).

**113.** This order was also challenged by Lieutenant General J.K. Srivastava by way of a second petition being O.A.No.111/2011 before the Armed Forces Tribunal. A copy of the petition was handed over in the present proceeding by learned Senior Counsel for the petitioner, the correctness whereof was not disputed before us by the respondents. With regard to the events which transpired on the 22nd and 23rd February, 2011 in O.A.No.111/2011, it is necessary to notice the narration of facts by Lieutenant General J.K. Srivastava which was to the following effect:-

> "4.8. That on 22 Feb 2011 at about 18:00 hours, the Applicant was informed that he will be retiring on 23 Feb 2011 (AN) on completion of 2 years tenure as DG RVS while the Applicant was out of station at Gondal etc. in Gujarat on Temporary Duty authorized by QMG, IHQ of MoD (Army). The Applicant has been asked to meet the QMG at 10:30 hours on 23 Feb 2011 after returning from T/D in the morning on 23 Feb 2011 for handing over the Retirement Order.
>
> xxx
>
> 4.10. That mischievously the Respondents have called the Applicant to the Office of QMG, IHQ of MoD (Army) and served the retirement order at 3 minutes past 5 PM on 23 Feb 2011, telling the Applicant that you have retired from the service wef 23 Feb 2011 (AN). Thereby, ensuring that the Applicant even does not go back to his office which closes at 5:30 PM."

**114.** The above narration would show that even at 1800hrs (6:00

pm) of the 22nd of February 2011, Lt. General J.K. Srivastava was on temporary duty at Gondal in Gujarat when he was informed about his retirement on 23rd February, 2011 (A/N) which would mean at about 12:00 noon. It is an admitted position before this court that Lieutenant General J.K. Srivastava had filed O.A.No.81/2011 on the 23rd of February 2011 which was mentioned for listing and the aforenoticed order was passed thereon.

**115.** It is argued by Ms. Singh, learned senior counsel for the petitioner that as per the order of the respondents, Lt. General J.K. Srivastava had retired at 12:00 noon on 23rd February, 2011 and, therefore, he would have barely had about three or four hours of service in the morning of the 23rd February, 2011, which period would have been consumed in getting his own petition drafted, filed and listed before the Armed Forces Tribunal on the same day.

**116.** Given the challenges laid by Lieutenant General J.K. Srivastava, first to the retirement proposal and then to the retirement, it is evident that Lieutenant General J.K. Srivastava was considerably agitated about the action of the respondents in retiring him so much so that he filed two petitions before the Armed Forces Tribunal.

**117.** It is also on record that Lieutenant General J.K. Srivastava retired in the afternoon of the 23rd of February 2011 and, as per the retirement order, the same was effective from 1201 hrs. Certainly, when his own fate was in such doldrums and his official position in such jeopardy, it is impossible that this officer would be concerned with the interim confidential report of the respondent no.5.

**118.** The submission made by the petitioner is fortified by other facts placed before us. Along with the reply filed before the Armed Forces Tribunal in O.A.No.161/2011, the respondent no.5 has enclosed as annexure RA-4, a copy of the forwarding letter of this ICR along with details of its physical service. This letter purports to have been signed by Lieutenant General J.K. Srivastava and bears the date of 23rd February, 2011. It is addressed to the Reviewing Officer Lieutenant General Chetinder Singh. Interestingly, this letter is not on any official letterhead. The same inexplicably contains the residential address of Lieutenant General J.K. Srivastava i.e. 3, B.R. Mehta Lane, New Delhi-110011. Another material factor to which our attention is drawn is the fact that the letter is not



numbered in the manner in which every official communication, if it was sent in regular course of official business would have been numbered. The acknowledgment card accompanying this communication which ought to contain the address of the Initiating Officer as well as file number of the Initiating Officer does not do so. The columns of both the file number as well as the address have been left blank.

**119.** Ms. Jyoti Singh, learned Senior Counsel for the petitioner contends that the very fact that the letter dated 23rd February, 2011 contains the residential address of Lt. General J.K. Srivastava would show that the same was written at his residence. Even if, it was assumed that Lieutenant General J.K. Srivastava was in office for the full day on 23rd February, 2011, he would have gone home only after 5 O'clock. In any case, as per the official order, Lt. General J.K. Srivastava had retired in the afternoon.

**120.** In view of the above objection of the petitioner, on the 8th of November 2012, we had issued the following directions:

> "1. During the course of hearing, it has been urged by learned senior counsel for the petitioner that the Annual Confidential Report of the respondent no.5 for the period from 1st July, 2010 to 23rd February, 2011 was invalid as the same was initiated by Lieutenant General J.K. Srivastava after he retired. In this regard, our attention was drawn to the pleadings before the Armed Forces Tribunal in the OA filed by the petitioner. Reference is also being made to OA No.18/2011 filed by the Lieutenant General J.K. Srivastava on the 23rd February, 2011, the date on which he retired. Reliance is also being placed on OA No.45/2001 with regard to the manner in which an officer due to retire, is required to initiate and hand over the confidential report of the officer to whom he is recording the same.
>
> 2. The official respondents were orally directed by us to produce all records relating to said Annual Confidential Report including the receipt and the dispatch register of MS Branch and the movement record.
>
> 3. We are informed by Mr. Ankur Chhiber, learned counsel for the respondent nos.1 to 4 that the said record could not be produced today. He prays for an adjournment to do so. Let the

same be positively produced before us on the next date of hearing."

**121.** Some part of the official record was thereafter made available by the respondents pursuant to our earlier order. Accordingly in the hearing on 19th November, 2012, we had recorded the following order:

"1. Pursuant to the directions made by us on the last date, the respondent nos.1 to 4 have produced the following records before us:

(i) The incoming dak register for ACRs for the period 1.12.2009 to 7.9.2011 from the M.S. Branch.

(ii) The dak receipt register from the QMG branch from 23.8.2009 to 16.11.2011.

(iii) The South Block Dak Register for the period 1.1.2009 to 10.5.2011.

(iv) Outgoing Dispatch register of DG (RVC) from 29.10.2010 to 14.7.2011.

2. On instructions from Col. Devender Singh the following submissions are made by Mr. Ankur Chhibber, learned counsel for the respondents based on the aforestated record:

(i) There is no record of either receipt or dispatch of the letter dated 23rd February, 2011 purportedly sent by Lt. General J.K. Srivastava forwarding the ICR in respect of respondent No. 5 in the DG (RVC) outgoing dispatch register (which has been placed at page 183 of the present record).

(ii) As per the dak register of the QMG Branch, Lt. General Chitinder Singh, the Reviewing Officer has received the ICR in respect of respondent No. 5 on 11th March, 2011.

(iii) As per the dak register of the M.S. Branch, the ICR of respondent No. 5 was received from the Reviewing Officer on 16th March, 2011.

(iv) There is no other record of the letter dated 23rd February, 2011.

3. Mr. Ankur Chhibber seeks leave to place the relevant extracts



of the aforesaid notice registers which is permitted. The same are taken on record."

(underlining by us)

**122.** It is evident from the above records and submissions of Mr. Ankur Chhibber, Advocate that the letter dated 23rd February, 2011 and the enclosed ICR surfaced in official records for the first time only on 11th March, 2011 when the same was received in the office of the Reviewing Officer Chetinder Singh. This was long after Lt. General J.K. Srivastava had retired. The manner in which this document was placed in official records of such senior personnel is not disclosed to us. The impropriety of this exercise and the reason therefore stare in the face as this ICR was one of the essential inputs in the service profile of respondent no.5 placed before the Special Selection Board specially convened on 18th August, 2011 for his consideration in isolation.

**123.** The Tribunal has erred on this issue, in the order dated 22nd September, 2011, when it has simply recorded thus"

> Learned counsel for the petitioner has also pointed out that the ACR for the period 1st July, 2010 to 23rd February, 2011 was written by the Investigating Officer after he has left the office and as such that could not have been written by the Investigating Officer. But this ACR was filled by the Investigating Officer on the same day when he demitted the office. There is no illegality in it."

As discussed above, there is no material at all to support this finding.

**124.** It is evident from a reading of the Army Order No.45/2001 that in case an Initiating Officer cannot initiate the annual or interim confidential report, then the same is required to be initiated by the Reviewing Officer with the prior sanction of the Senior Reviewing Officer.

Thus if Lt. General J.K. Srivastava, the Initiating Officer had retired, the ICR of the respondent no.5 could have been initiated by the Reviewing Officer in the capacity of an initiating officer. Lt. General J.K. Srivastava was not competent to initiate the confidential report of the respondent no.5 thereafter.

**125.** In terms of Army Order 45/01/MS, a confidential report cannot

be initiated by the Initiating Officer after he has retired. We have therefore, no hesitation in holding that the Interim Confidential Report of the respondent no.5 was written by Lieut. General J.K. Srivastava when he was not competent to do so as he had retired. This report could not have been officially placed in the service record of the respondent no.5. Such invalid confidential report could not have formed an input on the service of the respondent no.5 and could not have been considered by the Special Selection Board.

**126.** It is contended by Mr.S.S. Pandey, learned counsel for the respondent no.5 that retirement of Lieutenant General Srivastava was in unusual circumstances and that Army personnel are normally informed nine months in advance of their retirement. It is urged that Army Order 45 should be given a liberal view and the Interim Confidential Report of the respondent no.5 should be considered as a valid report. This submission is completely unacceptable, to say the least.

**127.** The above submission would show that the respondent no.5 was conscious about the illegality and invalidity of the Interim Confidential Report which was placed on his service profile. The respondent no.5 was also fully aware that it is not open to this court to ignore the requirements notified by the respondents. The manner in which the Interim Confidential Report has been placed in the service profile of the respondent no.5 as one of the essential inputs by the Special Selection Board manifests manipulation in official records which has to be deprecated.

**128.** In the absence of this essential input, respondent no.5 could not have been considered for appointment as Lt. General by the Selection Board held on 18th of August, 2011.

**129.** The matter becomes more serious as the SSB was making selections for one of the highest ranks in the army, when neither procedure nor substantial merit can be even remotely compromised. This manner of functioning is unfortunate, to say the least.

**Comparative/relative merit of the two officers**

**130.** It has been staunchly urged on behalf of the petitioner that the respondents were bent upon considering the respondent no.5 as a stand alone case keeping in view the fact that the petitioner had a much more meritorious profile than the respondent no.5 and that if the two officers



were to compete together, it would have been difficult to overlook the merit of present petitioner and to promote the respondent no.5 over and above him.

**131.** In this regard, we may refer to the categorical stand of the petitioner in O.A.No.161/2011 wherein the petitioner had stated that he had served the Organization with utmost dedication and loyalty. He was awarded Chief of Army Staff Commendation Card in January 2001 and Sena Medal (D) on 26.01.2004 and conferred Fellowship of National Academy of Veterinary Sciences during the year 2001. The petitioner specifically contended that he was excluded from the Selection Board No.1 held on 12th August, 2009 as a fresh case for promotion to the rank of Major General for the malafide reason of favouring the respondent no.5. It was pleaded that had the petitioner been considered with his profile vis-a-vis that of respondent No. 5, he would have been empanelled over and above the respondent no.5 and this was well-known to the respondents. The following comparative profile chart was placed by the petitioner:

| **Particular** | **Maj Gen Shri Kant Sharma, SM** | **Maj Gen SS Thakral** | **Remarks** |
|---|---|---|---|
| **Army No** | V-346K | V-341L | |
| **Qualification** | MVSc | BVSc & AH* | *MVSc done during Service |
| **Honours & Awards** | Sena Medal & COAS Commendation Card | COAS Commendation Card | |
| **Command of Major Units** | Central Military Veterinary Lab | Central Military Veterinary Lab | |
| | Equine Breeding Stud, Hisar | x | |
| | RVC Centre & College | x | |
| **Instructor appointment** | Instructor Faculty of NBC | x | |

| | | | |
|---|---|---|---|
| | Protection, college of Military Engineering, Pune | | |
| | Senior Instructor Dog Training at RVC Centre & College | x | |
| | Chief Instructor at RVC Centre & College | x | |
| **Staff appointment** | Brig RVS HQ Eastern Command | Brig RVS HQ Northern Command | |
| | Assistant Military Secretary, Military Secretary Branch, IHQ of MoD (Army) | RV Dte, IHQ of MoD (Army) | |
| **Courses** | Army Equitation Officer (AEO-05) – CZ Grading | Army Equitation Officer (AEO-05) – E Grading | |

**132.** In their counter affidavit, the respondent nos.1 to 4 did not dispute that these averments and stated that they are "matter of record" which in law is an admission of the facts pleaded.

**133.** It has been contended that in the year, 2012 the petitioner has even been awarded a Vashisht Sewa Medal for his meritorious service and his contribution.

**134.** The petitioner has challenged the respondent's appointment also for the reason that the petitioner and respondent no.5 underwent the Arms Equestrian Course in 1981. The respondent no.5 could achieve only an Eco (E) grading. It has been contended that no officer from any Army or service has been promoted to the higher ranks as Colonel/ Brigadier/Major General on an 'E' grading.

**135.** Mr. Ankur Chhibber, learned counsel appearing for respondent nos.1 to 4 and Mr. S.S. Pandey, learned counsel appearing for respondent



no.5 have orally submitted that the respondent no.5 had suffered a fall during this course for which reason he secured the 'E' grading. It is further been contended that the petitioner had scored a 'C' grading in this course. There is however, no challenge to the petitioner's submission that no officer at 'E' grading was promoted to the higher ranks especially to that of a major general.

**136.** The respondents in fact admit the achievements, appointments and assignments of the petitioner vis-a-vis those of the respondent no.5. The petitioner rests his case on his record manifested by the commendation and awards received by him, the prestigious appointments held by him including Command of important RVC establishments as well as Senior and, even, Chief Instructor positions at the RVC Centre and College.

**137.** It is trite that it is not for the court to decide the relative merit. The petitioner has urged that these facts explain as to why it was important for the respondents to exclude the petitioner from consideration when respondent no.5 was accorded the special consideration. We clarify that we express no opinion on the relative merit of the petitioner and respondent no.5.

**138.** The petitioner has sought to emphasize the career profiles to support his submission that the consideration and appointment of respondent no.5 were malafide and guided only by the spirit of favouritism and special dispensation towards him, irrespective of whether such action resulted in compromising high standards and was fatal to merit, which alone should guide all promotions and appointments in the army, especially at the highest ranks of Major General and Lieutenant General in a minor corps as the Remount Veterinary Corps.

**139.** Reference requires to be made to a pronouncement of the Supreme Court reported at (2000) 6 SCC 698, **Union of India v. Lieutenant General Rajendra Singh Kadyan & Anr.** In this case, the appointment of the respondent no.2 as Army Commander was challenged by the respondent no.1 on the ground that he was the senior most eligible officer for appointment to the said post; that he had won various meritorious awards; had performed difficult functions and had been awarded Vishisht Sewa Medal; had outstanding achievements and commendations from the highest in the force. It was urged that appointments and promotions to the said post are contained in the

government of India letter dated 20th 1st October, 1986 (effective from January, 1989); that the respondent no.1 had been recorded as fit in all respects in his ACRs and being the senior most Lieutenant General in the Indian Army, he ought to have been appointed as Army Commander.

**140.** So far as the method of selection and promotion to various posts in the army was concerned, in para 11, the Supreme Court noted the criteria for promotion and selection in the following terms:

> "11. The hierarchy in the Army and the method of selection and promotion to various posts starting from the post of Lieutenant and going up to the post of the Chief of the Army Staff will clearly indicate that the posts of Lieutenant, Captain and Major are automatic promotion posts on passing the promotion examination irrespective of inter se merit, whereas the posts from Major to Lt. Colonel, Lt. Colonel to Colonel, Colonel to Brigadier, **Brigadier to Major General and Major General to Lt. General are all selection posts filled up by promotion on the basis of relative merit assessed by the designated selection boards.** From Lt. General [Corps Commander] to Army Commander is a non-selection post to which promotion is made subject to fitness. It is promotion subject to fitness in all respects, although the rank remains the same. From the post of Army Commander to that of the Chief of the Army Staff, it is by promotion for which no specific criteria have been laid down. There have been precedents where the senior-most Army Commanders have not been appointed as the Chief of the Army Staff. Selection implies the right of rejection depending upon the criteria prescribed. Selection for promotion is based on different criteria depending upon the nature of the post and requirements of the service. Such criteria fall into three categories, namely,
>
> 1. Seniority cum fitness,
>
> 2. Seniority cum merit,
>
> 3. Merit cum suitability with due regard to seniority.
>
> 12. Wherever fitness is stipulated as the basis of selection, it is regarded as a non-selection post to be filled on the basis of



> seniority subject to rejection of the unfit. Fitness means fitness in all respects. "Seniority cum merit" postulates the requirement of certain minimum merit or satisfying a benchmark previously fixed. Subject to fulfilling this requirement the promotion is based on seniority. There is no requirement of assessment of comparative merit both in the case of seniority cum fitness and seniority cum merit. Merit cum suitability with due regard to seniority as prescribed in the case of promotion to All India Services necessarily involves assessment of comparative merit of all eligible candidates, and selecting the best out of them."

**141.** While examining such a challenge, the judicial review by the court is permissible only to the extent of finding whether process in decision making has been observed correctly or not but it cannot interfere with the decision taken by the authorities. It was found by the Supreme Court that in this case, the entire service profile had been taken care of by the authorities concerned; that one aspect (in the profile) may have been emphasized rather than the other, but in the appraisal of the total profile, the court could not substitute its view to that of the authorities. The court applied the well settled principle of administrative law that *"when relevant considerations have been taken note of and irrelevant aspects have been eschewed from consideration and that no relevant aspect has been ignored and the administrative decisions has nexus to the facts on record, the same cannot be attacked on merits. Judicial review is permissible only to the extent of finding whether process in reaching decision has been observed correctly and not the decision as such".*

It was in this background that the court was of the view that the challenge by the respondent no.1 to the appointment of respondent no.2 was misplaced and accepted the challenge to the High Court judgment granting relief to the respondent no.1 in his writ petition.

**142.** The instant case however, raises a challenge to the promotion to the posts of Major General and Lieutenant General. As held by the Supreme Court, appointments in the Army from the rank of Major onwards are Selection posts filled by promotion on the basis of relative merit assessed by the designated Selection Board. Such assessment requires an examination of the comparative merit of all eligible candidates, and selecting

the best out of them. The promotion to the post under consideration is required to be effected on the basis of relative merit which is to be assessed by the designated Selection Boards. The present case is clearly distinguished from **UOI vs. R.S. Kadyan** (Supra).

**143.** Our attention has also been drawn to a communication dated 6th May, 1987 filed by respondent nos.1 to 4 forwarding a paper on the Selection System being followed in the MS Branch of the Army Headquarters for selection of officers to the rank of A/Lt. Col and above. The instant case is concerned with appointments to the rank of Major General and Lt. General. The guidelines of assessment have been provided in para 10 of this paper which states that they have been approved by the Chief of Army Staff. The salient features of the guidelines include the following:-

> "( l) Assessment of the officer is based on the comparative merit of the overall profile of the officers within his own batches. Needless to say, the grading of the board is be assessed from the material placed before the board, and not from personal knowledge, if any."

**144.** The petitioner is aggrieved not because he has been rejected but is aggrieved by the action of the respondents in failing to consider him for promotion though he was entitled to be considered in terms of the policy. A challenge is also laid to the action of the respondents in considering respondent no.5 in isolation for both the appointments, in other words without assessment of his comparative merit vis-a-vis others in violation of declared and binding policy. There is no legal prohibition to the consideration of the issues raised herein.

**Issuance of promotion order dated 28th September, 2011 of the respondent no.5 (to the rank of Lt. General) and pipping ceremony of the respondent no.5 in undue haste**

**145.** It is noteworthy that after passing of the order dated 22nd September, 2011, on 23rd September, 2011 the respondent no.5 had filed a caveat petition being Caveat No.890/2011 in this court contending that he apprehended that the present petitioner may file a writ petition assailing the order dated 22nd September, 2011. This caveat petition is available on the record.



**146.** The petitioner filed the writ petition dated 26th September, 2011, assailing the order dated 22nd September, 2011, after service of the advance copy upon the respondents. The Registry raised certain technical objections which were removed and the writ petition was re-filed.

**147.** Along the writ petition, the petitioner had filed CM No.16399/2011 praying for an order of restraint against the official respondents from getting approval by the Appointments Committee of the Cabinet (ACC) of the recommendations of the Special Selection Board held on 18th August, 2011 whereby the respondent no.5 was selected and further declassification of the results of the said Board by the Army. The petitioner also prayed for staying the operation of the order dated 22nd September, 2011 passed by the Armed Forces Tribunal. This application was listed along with the writ petition and the caveat petition before the court on 28th September, 2011 when all parties were duly represented. On 28th September, 2011, the court recorded the request of the parties for final hearing of the writ petition and directed its listing for final hearing after exactly seven days on 5th October, 2011. Since the writ petition itself was to be heard for final disposal at such a short date, the interim relief was declined.

**148.** Learned senior counsel for the petitioner has contended that the spirit and intent of the order dated 28th September, 2011 and the court posting the matter for final hearing speak for itself. It is contended that the respondents were bent upon favouring the respondent no.5 by any manner and, therefore, the respondents proceeded in undue haste so as to defeat the rights of the petitioner. Therefore, soon after the hearing on the 28th of September 2011, the respondents issued a promotion-cum-posting order dated 28th September, 2011 promoting the respondent no.5 to the rank of Lieutenant General and appointing him as the Director General, Remount and Veterinary Services during the evening hours. It is submitted that this court was not informed about this in the hearing earlier in the day. The petitioner has contended that thereafter, in a totally unprecedented manner, the pipping ceremony of respondent no.5 was effected in undue haste late in the evening of 28th September, 2011 at the residence of Lieutenant General Chetinder Singh.

**149.** Ms. Jyoti Singh, learned senior counsel for the petitioner submits that the pipping ceremony was done in such unholy haste that the senior officers who effected the pipping ceremony were not even in uniform and were in casual attire.

**150.** The above position is also undisputed before us. The respondents however, have filed an affidavit contending that the pipping ceremony is not an official matter but only a ceremonial affair. Reference is made to the pipping done by parents, spouse and children who may be in uniform or otherwise. The respondents state that pipping ceremony has been carried out in the evening time during MS functions. However, they have not cited a single instance where pipping ceremony of an officer of the rank of Lieut. General has been carried out at the residence of a senior officer in the dark by his superiors in civilian or casual attire. Pipping ceremony of cadets passing out of the National Defence Academy or Gentlemen Cadets at the IMA by relatives and friends cannot be compared to the pipping as a Lieutenant General. The respondents do not even venture even a semblance of a reason why the ceremony had to be done in such manner on the very eve of the court hearing.

**151.** While reference is made by the respondents to the fact that an interim order was not granted, the respondents fail to point out that the interim order was not granted because the writ petition had been posted for final hearing. The respondents have not been able to dispute the petitioner's contention that the pipping ceremony being carried out at the residence was unprecedented and was also in unwarranted haste on the very day when the petitioner's writ petition came to be listed.

**152.** The Selection Board for all Arms and Services except the RVC was held on 28th of April 2011. It is contended again the respondents render no explanation either for the postponement of the SSB for RVC on 28th April, 2011 or why it was suddenly held on the 18th of August 2011 suggest credibility to the petitioner's contention that this was because of the assurance given to the Armed Forces Tribunal.

**153.** We note that strictly the respondents may not have violated any court order or legal provision in issuing the promotion order or the pipping ceremony, but given the stature of the persons involved and the ranks under consideration, it is impossible to rationalize the haste with



which the respondents or the manner in which they proceeded. We have come across instances where steps to render infructuous court proceedings are taken, but such actions have hardly ever been in relation to such high positions, especially when there is no emergency or service exigency. We note with pain that there is substance in the petitioner's grievance that the entire exercise was undertaken so as to put the respondent no.5 in position in an effort to defeat the petitioner's challenge and claim. This, of course, was short sighted to say the least.

**Bias in favour of respondent no.5.**

**154.** The petitioner has contended that the respondents were bent upon appointing the respondent no.5 without complying with the binding policy and contrary to the regulations on the subject. It is urged that the respondents exhibited favouritism and partiality towards him and denied quality of treatment to the petitioner. The petitioner has complained that the respondents breached all norms and procedures to favour respondent no.5 for extraneous considerations other than merit. It is urged that the actions and orders of the respondents suffered from bias and have worked injustice to the petitioner.

**155.** It is trite that the unequal treatment does not automatically mean favouritism or partiality. These expressions fell for considerations before a learned single judge of this court in a decision rendered on 11th January, 2011 in W.P.(C)Nos.770745/ 2005 **AEPC VRS Employees Union & Ors. v. Apparel Export Promotion Council**. In this case, the court was considering a challenge by the petitioners who were denied ex-gratia payment on the ground that they had taken voluntary retirement prior to the office order of the respondents granting the same. The court had occasion to interpret the expressions favouritism and partiality which appear in item 5 of Schedule IV to the Payment of Gratuity Act, 1972.

**156.** Keeping in view the contention of the petitioners, the court elaborated on the meaning of the expression favouritism and partiality or preference in the following terms:-

> "11. ...Favouritism means showing favour in the matter of selection on circumstances other than merit. (Per Advanced Law Lexicon by P. Ramanatha Aiyar, 3rd Edn., 2005.) The expression

"favouritism" means partiality, bias. Partiality means inclination to favour a particular person or thing. Similarly, it has been sometimes equated with capricious, not guided by steady judgment, intent or purpose. Favouritism as per Webster's. Encyclopaedic Unabridged Dictionary of the English language means the favouring of one person or group over Ors. having equal claims.

Partiality is the state or character of being partial, favourable, biased or prejudiced.

12. According to Oxford English Dictionary, "favouritism" means- a deposition to show, or the practice of showing favour or partiality to an individual or class, to the neglect of others having equal or superior claims; under preference. Similarly, "partiality" means the quality or character of being partial, unequal state of judgment and favour of one above the other, without just reason. Prejudicial or undue favouring of one person or party: or one side of a question; prejudice, unfairness, bias.

13. Bias may be generally defined as partiality or preference. It is true that any person or authority required to act in a judicial or quasi-judicial matter must act impartially:

> "If however, 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions and the processes of education, formal and informal, create attitudes which precede reasoning in particular instances and which, therefore, by definition, are prejudices." (Per Frank, J. in Linahan, Rel, F 2d at p. 652.)

14. It is not every kind of differential treatment which in law is taken to vitiate an act. It must be a prejudice which is not founded on reason, and actuated by self-interest-whether pecuniary or personal."

On facts, the court found that the use of the expression "favouritism



or partiality" to one set of workers in item 5 of Schedule IV to the Act had been used consciously and that there was no reference to differential treatment. It was further held that the element of bias was necessary to be established by cogent evidence. As there was no basis to accept that there was any favouritism or partiality laid before the court and hence relief was denied in that case.

**157.** In the present case the official respondents were required to explain their actions in not following the binding regulations and policies in holding the unprecedented Selection Board and Special Selection Board exclusively for the respondent no.5. The respondents were called upon to provide the circumstances as to why a special Selection Board was held for the RVC alone on 18th August, 2011 while the Selection Board for other Arms and Services was held during October, 2011.

**158.** So far as the consideration of respondent no.5 as the sole candidate is concerned, the respondents have given the following explanation in their counter affidavit filed before the Armed Forces Tribunal:-

> "It is submitted that Respondent No 5 was considered by No Selection Board in Aug 2009 due to specific reasons and in the larger interest of functional requirements of Army. For the sake of brevity, the answering respondents re-iterate reply to Paras 4.2 and 4.3 above, which may be read as a part of reply to this Para as well."

**159.** Importantly the respondents do not elaborate on the *'specific reasons'* or what was the *'functional requirements of the army'* for appointment of respondent no.5. Given the fact that an unprecedented exception was being made despite and dehors the clear regulation and policy stipulation, these bald statements are grossly insufficient explanation. It is noteworthy that the respondents have also unequivocally admitted that such consideration in isolation was unprecedented and a unique instance in the army. The above discussion substantiates the petitioner's contention that the actions and orders of the respondents stemmed out of obvious bias in favour of respondent no.5 and his selections were not based on comparative (or relative) merit which would have been the sole consideration for the same.

**Conclusion**

**160.** The declared spirit, intendment and purpose of the appointment policy and method is to secure the most meritorious person for the highest appointment in the Army. For this reason, an officer who was not found meritorious in his comparison with his own batch at the time of first consideration, became entitled to a review consideration only in comparison against officers from the next available batch who have been granted their fresh consideration a laudatory policy which gives three opportunities to be promoted to a higher rank to all officer. The undisputable object of this policy is to have the most meritorious person available in the next year, meaning thereby that even an officer who could not make it on comparison in his own batch, would be entitled to promotion if he is found more meritorious on comparison with the next available batch. On the other hand, if the eligible officers in the next batch are more meritorious, the officer from the previous batch would not be entitled to promotion. This rule is in the best interest of the Armed Forces and needs strict adherence.

**161.** It is, therefore, evident that assessment of the officer has to be based on the comparative merit of the overall profile of the officers within his own batches and merit is to be assessed from the material placed before the Board and not from personal knowledge.

**162.** The respondent no.5 could not compete with his own 1974 batchmates and was not empanelled when he was first considered for appointment as a Major General. When being considered as a review case, he had to be considered along with the next available batch which was being accorded its fresh consideration. Consideration and selection could be effected based on the comparative merit of the overall profile of the officers. Instead the respondents have conducted fatades of selection processes wherein respondent no.5 was the sole candidate for consideration. The illegal purpose was to ensure that only respondent no.5 was considered, selected and promoted to senior ranks irrespective of his comparative/relative merit.

**163.** The established and undisputed facts which preceded the orders appointing respondent no.5, first as major general, and then as Lieutenant General, manifest the bad faith in the exercise of the power to effect the



said appointments of respondent no.5. The intent of the respondents is evident from the impression created that the respondent no.5 was of the 1975 batch; the official respondents ignoring the established policy of giving review consideration only with fresh cases; the deliberate failure of the respondents to address the petitioner's requests for AE waiver and his objection in his several representations; not deciding the petitioner's statutory petition for over one year; placing in official records the invalid ICR in the service profile of the respondent no.5 other than in due and regular process; treating the invalid ICR as an essential input for appointment of respondent no.5; the undue haste in conducting the Special Selection Board, appointment of respondent no.5 as Lieutenant General and pipping. It is noted that the petitioner was wrongly denied waiver of the AE stipulations and consideration for appointment as Major General by the Special Selection Board on 12th August 2009 and for appointment as Lieutenant General. The petitioner was empanelled as a Major General only on 8th December 2009.

**164.** The respondent nos.1 to 4 have ignored several relevant factors, which failure offended against procedural propriety, making their decision in proceeding with the selections perverse and irrational, a facet of unreasonableness warranting interference by this court.

**165.** The respondents failed to exercise discretion of waiver of the AE stipulations in favour of the petitioner eschewing all relevant considerations. The respondents have therefore failed to comply with prescribed procedure, acted arbitrarily and abused discretionary powers.

**166.** Comparative or relative merit postulates a comparison which is completely absent when only a single candidate is considered as was done in the case of respondent no.5 by Selection Board No.1 on 12th August, 2009 and Special Selection Board on 18th August, 2004. Consideration of the candidature of the respondent no.5 by the Selection Board no.1 and the Special Selection Board was therefore no consideration in the eyes of law.

**167.** The Armed Forces Tribunal accepted the binding position that a review case cannot be considered in isolation and has to be considered with the fresh cases of the next available batch when it passed the order on 22nd September, 2011 dismissing O.A.No.115/2011 filed by Col. Teja

Ram and Col. T.S. Sachdeva. Despite the above finding, a diametrically opposite view was taken on the same date in the impugned order without dealing with the issues raised or considering the relevant material on record.

**168.** Ignoring merit in effecting appointments has far reaching and disastrous consequences on organizations. It immediately leads to lack of respect for not only the person so appointed, but for superiors who effect such appoints and then permeates towards all superiors generally. The negative impact thereby on the morale of meritorious personnel and consequentially, on the organization as well as the level of efficiency would be inevitable. Such appointments would breed indiscipline and insubordination and create a sense that it is currying favour with superiors or persons in authority, and not merit, which is essential for obtaining promotions and appointments. This would be a disastrous impression in any organization which would have the propensity to breed corruption, nepotism and favoritism.

Such consequences could also result even if merit is not ignored but the prescribed methodology is not met with or standards are lowered, so as to appoint a particular person. This cannot be tolerated in a disciplined force as the army, and that too at the highest levels.

We may point out that such impact would be proportionally much more in a minor corps as the RVC in the Army, which would have lesser officers at all levels and a minimal number who actually reach senior positions.

**169.** Appointments made de hors the applicable procedures and without selection from meritorious candidates in the Army are opposed to national interest and cannot be permitted to stand. With regard to such an appointment, in Union of India & Ors. Vs. Lt. Gen. Rajendra Singh Kadian &Anr. (Supra), the Supreme Court had observed thus:-

> "30. Before parting with the case we need to observe that considering the nature of the sensitivity of the posts involved and that each of the officers feeling that he did not get the best of the deal at the hands of the Government or that the members of the force being aware who is the best is not heading them will certainly weaken the esteem and morale of the force. Therefore, the standards to be adopted and applied should be of the highest order so as to avoid such an impression in the force."
>
> (Underlining by us)



**170.** In view of the above discussion, the order dated 22nd September, 2011 passed by the Armed Forces Tribunal in O.A.No.161/2011, the order dated 22nd October, 2010 passed by the respondents rejecting the statutory complaint of the petitioner; the proceedings and result of the Selection Board No.1 dated 12th August, 2009 with regard to the RVC and the Special Selection Board held on 18th August, 2011 with regard to RVC cannot stand. It has to be held that the petitioner was entitled to be granted his fresh consideration by the Selection Board No.1 on 12th August, 2009 as well as by the Special Selection Board on 18th August, 2009.

**171.** We may note that the instant case is not the first occasion that the appointments to the rank of Lieutenant Generals have been assailed before this court. In W.P.(C)No.5182/2012, **Darshan Lal Choudhary v. Union of India and Ors.** and W.P.(C)No.5303/2012, **V.S.S. Goudar v. Union of India and Ors.,** this court had found that the Special Selection Board had assessed officers for promotion to the rank of Liet. Generals based on a promotion policy which had not even been approved by the competent authority and, therefore, the decision of the Selection Board was illegal. The court had rejected the respondent's contention holding that there can be no ratification of an illegal act. In this background, the court set aside the decision of the Armed Forces Tribunal dated 23rd April, 2012 and the proceedings of the Special Selection Board and quashed the proceedings of the Special Selection Board held on 7th January, 2011. A direction was issued by the Board to hold a Special Selection Board for assessing the officers who were assessed by it on 7th January, 2011 including the petitioners based on the correct policy.

**Result**

**172.** In view of the above discussion, it is held as follows:

(i) the impugned judgment dated 22nd September, 2011 passed by the Armed Forces Tribunal in O.A.No.161/2011 is set aside.

(ii) the proceedings and the result of the Selection Board no.1 held on 12th August, 2009 for the RVC for the promotion of respondent no.5

to the post of Major General are declared illegal and hereby set aside and quashed.

(iii) the proceedings and result of the Special Selection Board held on 18th August, 2011 for the RVC promoting respondent no.5 to the post of Lieutenant General are declared illegal and hereby set aside and quashed.

(iv) it is held that the respondents have not treated the AE tenure for promotions in the RVC to the post of Major General and Lieutenant General as mandatory and have waived the requirement thereof to officers. The petitioner is entitled to the same treatment.

(v) a direction is issued to the respondents no.1 to 4 to consider the case of the petitioner for waiver of the AE tenure as on 12th August, 2009 for consideration for promotion to the post of Major General and as on 18th August, 2011 for the post of Lieutenant General in the light of the observations made in the present judgment and pass orders thereon accordingly.

(vi) as a corollary to the above, the respondents are directed to hold a Selection Board (as per the grounds on which the second vacancy of the Major General was sanctioned in the RVC) following the procedure laid down in the binding policies and taking into consideration the petitioner (for his first consideration) and respondent no.5 (as a review case) as eligible officers for consideration for promotion as Major General as on 12th April, 2009.

(vii) the respondents no.1 to 4 are directed to pass appropriate orders for appointment to the vacancy of Major General in the RVC as on 12th April, 2009 based on the consideration by the Selection Board.

(viii) a further direction is issued to respondents no.1 to 4 to hold a Special Selection Board for effecting promotion to the rank of Lieutenant General (DG RVS) for eligible officers including the petitioner for consideration which would relate back to eligibility as on 18th August, 2011.

(ix) in case the officer is not in service today on account of retirement or such like cause, upon the above considerations and finding of his merit by the board, notional promotion, may be given w.e.f.



12August, 2009 as Major General and 18August, 2011 as Lieutenant General. In such eventuality, the officer concerned would be entitled to all consequential benefits upon notional promotion as Major General and restoration into service if selected as Lieutenant General. All consequential benefits would relate back and be advanced.

(x) given the ranks involved and the brief tenures available to the incumbents, the respondents shall ensure appropriate steps are taken within six weeks.

(xi) the petitioner would be entitled to costs which are quantified at Rs. 25,000/-to be paid by respondents no.1 to 4 within a period of six weeks.

This writ petition is allowed in the above terms.

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**ILR (2013) I DELHI 784**
**CRL.M.C.**

**MANINDER SINGH NARULA .....PETITIONER**

**VERSUS**

**PAWAN KUMAR RALLI .....RESPONDENT**

**(G.P. MITTAL, J.)**

**CRL.M.C. NO. : 2961/2012 DATE OF DECISION: 15.01.2013**

**Negotiable Instruments Act, 1881—Section 138 – Holder of the cheque must make a demand for payment of the cheque amount by giving notice in writing to the drawer with regard to dishonor of cheque – is one of the conditions precedent.**

**Negotiable Instruments Act, 1881—Section 138(b) – drawing of notice – no form of notice has been**

**prescribed – whether demand of interest in the notice would render the notice invalid? – Held: No. Demand for payment of interest in the notice could not lose its character as a notice under Section 138.**

**Negotiable Instruments Act, 1881 – Section 138 – Respondent issued hand written notice dated 27.4.2012 – received by petitioner on 29.4.2012 – on failure of petitioner to pay, cause of action to file complaint arose on 14.5.2012.**

**Negotiable Instruments Act, 1881 – Section 142(2) – Respondent under obligation to file complaint within one month from the date the cause of action arose – cause of action subsisted till 14.6.2012 – complaint filed on 5.7.2012 – barred under Section 142(6) – complaint and summoning order quashed.**

**[Lo Ba]**

**APPEARANCES:**

**FOR THE PETITIONER** : Mr. Vikas Pahwa, Senior Advocate with Mr. Manish Miglani, Advocate.

**FOR THE RESPONDENT** : Amit Bajpai, Advocate along with Respondent in person.

**CASES REFERRED TO:**

1. *MSR Leathers* vs. *S. Palaniappan & Anr.* Criminal Appeal No.261-264 of 2002, decided on 26.09.2012.
2. *Suryalakshmi Cotton Mills Limited* vs. *Rajvir Industries Limited & Ors.* (2008) 13 SCC 678.
3. *Central Bank of India & Anr.* vs. *Saxons Farms & Ors.* (1999) 8 SCC 221.
4. *Sadanandan Bhadran* vs. *Madhavan Sunil Kumar* (1998) 6 SCC 514.

**RESULT:** Petition allowed.



**G.P. MITTAL, J.**

**1.** By virtue of this Petition under Section 482 of the Code of Criminal Procedure (Cr.P.C.) the Petitioner seeks quashing of the criminal complaint case No.819/2012 and the summoning order dated 12.07.2012 passed by the Learned Metropolitan Magistrate (MM), Karkardooma Court, Delhi.

**2.** Before adverting to the grounds raised in the Petition, I would in brief narrate the facts leading to the filing of the complaint under Section 138 of the Negotiable Instruments Act, 1881 (the N.I. Act). According to the Respondent (the Complainant before the MM), three cheques for Rs. 30 lacs, 20 lacs and 10 lacs drawn on Allahabad Bank and ICICI Bank respectively were issued by the Petitioner in favour of the Respondent towards discharge of his liability for a loan of Rs. 60 lacs. After issuing the three cheques in favour of the Respondent, the Petitioner fraudulently instructed his Banker to "stop payment" in respect of the said cheques, since the Petitioner did not have sufficient funds in his account. When the earlier said cheques were presented, the same were dishonoured. The Respondent, therefore, issued a demand notice dated 24.05.2012 calling upon the Petitioner to make the payment of the cheque amount failing which the Respondent shall be compelled to initiate proceedings under Section 138 of the Negotiable Instruments Act, 1881 (the N.I.Act) and under Section 420 IPC. The payment having not been made within a period of 15 days of the receipt of the notice, the Respondent filed a complaint in the Court of MM on 05.07.2012.

**3.** It is urged by the learned counsel for the Petitioner that although the judgment of the Supreme Court in **Sadanandan Bhadran v. Madhavan Sunil Kumar** (1998) 6 SCC 514 has been overruled by a three Judge Bench decision of the Supreme Court in **MSR Leathers v. S. Palaniappan & Anr.** Criminal Appeal No.261-264 of 2002, decided on 26.09.2012 and it has been held that the holder of the cheque can defer prosecution when he expects the drawer to make arrangement for the funds, yet, the cheque has to be presented again in the Bank for a subsequent cause of action.

**4.** The learned counsel for the Petitioner argues that Respondent had issued a handwritten notice dated 27.04.2012 which would have

been received by the Petitioner on 29.04.2012 and on failure to make the payment within 15 days i.e. by 14.05.2012 the cause of action would have arisen in favour of the Respondent to file a Complaint. Under Section 142 (2) of the N.I.Act, the Respondent was under obligation to file a complaint within a period of one month from the date on which the cause of action arose to file a complaint. Thus, the complaint could have been filed the Complaint at the most by 14th June, 2012. The Complaint in the instant case was filed only on 05.07.2012 which was clearly barred under Section 142 (b) of the Act. The learned counsel urges that the subsequent notice dated 24.05.2012 does not give a fresh period of limitation to the Respondent to file a complaint on 05.07.2012.

**5.** On the other hand, learned counsel for the Respondent relies on **MSR Leathers** (supra) and urged that the holder of a cheque can issue successive notices and on failure of the drawer to make the payment, a fresh cause of action would ensue to the holder of the cheque entitling him to file a complaint within a period of one month from the date when the cause of action arose to file a complaint.

**6.** The learned counsel for the Respondent vehemently canvasses that the notice dated 27.04.2012 was not a notice as envisaged under Section 138 of the N.I.Act as it did not make any mention of payment of the cheque amount and neither gave 15 days time period to make the payment. On the other hand, it simply stated for payment of loan amount along with interest immediately. There was not even a whisper that a complaint under Section 138 of the N.I.Act shall be instituted on failure to make the payment of the cheque amount.

**7.** The law laid down in Sadanandan Bhadran that the failure of the holder of the cheque/payee to file a complaint within one month resulted in forfeiture of the Complainant's right to prosecute the drawer which forfeiture cannot be circumvented by him by presenting the cheque afresh and inviting the dishonour to be followed by a fresh notice was disagreed by a three Judge Bench decision in MSR Leathers. The Supreme Court analyzed the provisions of Section 138 and 142 of the N.I.Act. It held that there was nothing in Section 138 or Section 142 of N.I. the Act to curtail the right of the payee on failure of the holder of the cheque to institute prosecution against the drawer when the cause of action to do



so had first arisen. The Supreme Court held the payee or the holder of the cheque can defer prosecution till the cheque which is presented again gets dishonoured for the second or successive time. Paras 21 and 31 of the report are extracted hereunder:-

> "21. There is, in our view, nothing either in Section 138 or Section 142 to curtail the said right of the payee, leave alone a forfeiture of the said right for no better reason than the failure of the holder of the cheque to institute prosecution against the drawer when the cause of action to do so had first arisen. Simply because the prosecution for an offence under Section 138 must on the language of Section 142 be instituted within one month from the date of the failure of the drawer to make the payment does not in our view militate against the accrual of multiple causes of action to the holder of the cheque upon failure of the drawer to make the payment of the cheque amount. In the absence of any juristic principle on which such failure to prosecute on the basis of the first default in payment should result in forfeiture, we find it difficult to hold that the payee would lose his right to institute such proceedings on a subsequent default that satisfies all the three requirements of Section 138.
>
> x x x x x x x x x x
>
> 31. Applying the above rule of interpretation and the provisions of Section 138, we have no hesitation in holding that a prosecution based on a second or successive default in payment of the cheque amount should not be impermissible simply because no prosecution based on the first default which was followed by a statutory notice and a failure to pay had not been launched. If the entire purpose underlying Section 138 of the Negotiable Instruments Act is to compel the drawers to honour their commitments made in the course of their business or other affairs, there is no reason why a person who has issued a cheque which is dishonoured and who fails to make payment despite statutory notice served upon him should be immune to prosecution simply because the holder of the cheque has not rushed to the court with a complaint based on such default or

simply because the drawer has made the holder defer prosecution promising to make arrangements for funds or for any other similar reason. There is in our opinion no real or qualitative difference between a case where default is committed and prosecution immediately launched and another where the prosecution is deferred till the cheque presented again gets dishonoured for the second or successive time."

**8.** Thus, the Supreme Court clearly laid down that there would be second or successive cause/causes of action so long as the cheque is re-presented and is dishonoured within a period of its validity, that is, subject to the outer limit of six months of when it is drawn.

**9.** It is admitted case of the parties that the three cheques dated 25.04.2012 were dishonoured on presentation. It is also not in dispute that the first notice dated 27.04.2012 was issued by the Respondent calling upon the Petitioner to make the payment of the loan amount of Rs. 60 lacs along with interest. Admittedly before issuance of the subsequent notice dated 24.05.2012 the cheques were neither presented again nor the same were dishonoured. The contention raised on behalf of the Respondent is that the handwritten notice dated 27.04.2012 sent earlier to the notice dated 24.05.2012 is not a notice as envisaged under Section 138 of the N.I.Act. Therefore, the same has to be ignored and since notice dated 24.05.2012 is within the stipulated period as laid down under Section 138 of the N.I.Act the complaint filed on 05.07.2012 is within the period of one month from the date when the cause of action arose.

**10.** There cannot be any gain saying that if the notice dated 27.04.2012 is held to be not a notice under Section 138 of the N.I.Act and is thus ignored, the complaint would be within the period of limitation as laid down under Section 142 of the N.I.Act. Therefore, it has to be examined whether the notice dated 27.04.2012 is a demand notice under Section 138 of the N.I. Act or not.

**11.** One of the conditions precedent for holding a drawer of a cheque to have committed the offence under Section 138 of the N.I.Act is that the holder of the cheque must make a demand for payment of the



amount of cheque by giving a notice in writing to the drawer of the cheque with regard to the receipt of information by him (the drawer) from the Bank regarding dishonour of the cheque. No form of notice has been prescribed under Section 138 (b) of the N.I. Act.

**12.** The question of form of notice came up for determination before the Supreme Court in **Central Bank of India & Anr. v. Saxons Farms & Ors.** (1999) 8 SCC 221. In the said case a complaint for dishonour of two cheques were filed in the Court of Judicial Magistrate, First Class. The Magistrate took cognizance in respect of both the complaints. But the High Court quashed the criminal proceedings on the ground that there was no proper notice as required under Section 138 of the N.I.Act. In Para 5 of the judgment, the Supreme Court quoted the contents of the notice which are extracted hereunder:-

"5. We extract below the relevant portion of the notices which is the same in both the notices:-

"The bouncing of the two cheques is a most serious matter. The said act of issuance of cheques knowing fully well that the same shall not be paid constitutes an offence under Section 138 of the Negotiable Instruments Act. As per the provisions of this Act my client through this notice informs you that my client shall represent the two cheques again and if the same are returned unpaid, my client shall report the matter to the police for initiating appropriate criminal action against you all. My client further reserves the right to file criminal case against all of you for the non-payment of the cheques in question and details given above. Kindly arrange to make the payment of the cheques if you intend to avoid the unpleasant action of my client."

**13.** The Hon'ble Supreme Court held that no form of notice is prescribed under Section 138 (b) of the Act. The requirement of Clause (b) of Section 138 of the N.I. Act is that notice shall be given in writing within fifteen days of receipt of information from the bank regarding return of the cheque as unpaid and in the notice a demand for payment of the amount of the cheque has to be made. Paras 7 to 9 of the report in Saxons Farms are extracted hereunder:-

"7. Though no form of notice is prescribed in the above clause (b) the requirement is that notice shall be given in writing within fifteen days of receipt of information from the bank regarding return of the cheque as unpaid and in the notice a demand for payment of the amount of the cheque has to be made.

8. The object of notice is to give a chance to the drawer of the cheque to rectify his omission and also to protect an honest drawer. Service of notice of demand in clause (b) of the proviso to Section 138 is a condition precedent for filing a complaint under Section 138 of the Act. In the present appeals there is no dispute that notices were in writing and these were sent within fifteen days of receipt of information by the appellant Bank regarding return of cheques as unpaid. Therefore, the only question to be examined is whether in the notice there was a demand for payment.

9. The last line in the portion of notice extracted above reads as under:

> "Kindly arrange to make the payment to avoid the unpleasant action of my client."

In our opinion it is a clear demand as required under clause (b) of Section 138."

**14.** The notice dated 27.04.2012 served by the Respondent on the Petitioner is extracted hereunder:-

"Date: 27/04/2012

Sh. Mahinder Singh Narula,

SUB: Loan amount given to you for Rs. 60,00,000/- (Sixty Lacs Only).

This is to inform you that the loan which you have taken from me for Rs.60,00,000/- (Sixty Lacs Only) against which you have issued Cheque Dated 25.04.2012 Number 889953 for Rs.30,00,000/- Thirty Lacs only drawn on Allahabad Bank, Sadar Bazar, Delhi-06, another cheque dated 25.04.2012 Number 545420



for Rs. 20,00,000/- Twenty Lacs only and cheque dated 25.04.2012 Number 545409 for Rs. 10,00,000/- Ten Lacs Only drawn on ICICI Bank, Sadar Bazar Branch Delhi-11006 has been returned due to stop payment for the above said cheques by you (Mahinder Singh).

This shows that your intention is malafide to return the loan amount and interest pending.

This friendly loan I gave you on your personal request many times on Telephone & scare personally to my house in Rohini many times and told your problem to me, after requesting many time by you to help you I (Pawan Kumar Rolli) gave you the cash loan for Rs.60,00,000/- (Sixty Lacs Only) after getting signed many promissory notes, Cash Receipts, 3 cheques, and many other Papers/Documents signed/Promised by you for returning the taken loan amount with interest on time.

Now, on the date and time committed by you to return the loan amount Rs.60,00,000/- (Sixty Lacs Only) along with interest pending you have done the "STOP PAYMENT" for the cheques issued by you.

Kindly make the arrangement of payment of loan along with the interest pending immediately.

Kindly make the payment and interest pending clear otherwise I have to take the necessary legal action against you (Mahinder Singh) by the method of law by filing case (Criminal/Civil) against you. etc.

Thanking you
Pawan Kumar Rolli.
Sd/-
9810178163"

**15.** A perusal of the notice reveals that there is mention of issuance of three cheques for the amount of Rs. 30 lacs, 20 lacs and 10 lacs respectively drawn on the Banks mentioned in the notice. It is further mentioned in the notice that the cheques have been returned due to

'stopping of its payment' by the drawer, that is, the Petitioner. The Respondent called upon the Petitioner to pay the loan amount of Rs. 60 lacs (which was the cheque amount) along with interest. The Respondent further informed the Petitioner that on failure of making the payment plus interest, the Respondent would be obliged to take criminal and civil action against the Petitioner.

**16.** It is true that there is no specific mention of the provision of Section 138 of the N.I.Act in the notice. In my view, the same was not required. It has been laid down in Para 8 of the **Saxons Farms** (supra) that the object of notice is to give an opportunity to the drawer of the cheque to rectify his omission and also to protect an honest drawer.

**17.** The Petitioner was put to sufficient notice regarding dishonour of the three cheques and he was also called upon to make the payment of the three cheques. Of course, Section 138 of the N.I.Act does not envisage the payment of interest and even if interest is not paid, complaint under Section 138 of the N.I.Act cannot be filed. Yet, simply because the demand of payment of interest was also made in the notice, it would not lose its character of a demand notice under Section 138 of the N.I.Act. Thus, I am convinced that the notice dated 27.04.2012 was a valid demand notice issued by the Respondent.

**18.** It is urged by the learned counsel for the Respondent that defence of an accused cannot be taken into consideration to invoke extraordinary jurisdiction under Section 482 Cr.P.C. to quash the criminal complaint. There is no dispute about the propzosition that the powers under Section 482 Cr.P.C. have to be used sparingly and with circumspection, even a plausible defence of an accused cannot ordinarily be taken into consideration to exercise jurisdiction under Section 482 Cr.P.C.

**19.** In **Suryalakshmi Cotton Mills Limited v. Rajvir Industries Limited & Ors.** (2008) 13 SCC 678, the Supreme Court held that High Court can take into consideration the documents of unimpeachable character for the purpose to find out as to whether continuance of criminal proceedings would amount to abuse of process of Court.

**20.** In the instant case, the notice dated 27.04.2012, which is admitted by the Respondent and which has been held by me to be a legal



notice under Section 138 of the N.I.Act would clearly show that the complaint was barred under Section 142(b) of the N.I.Act, as the same was not filed within a period of one month after the expiry of 15 days of receipt of the notice dated 27.04.2012.

**21.** In the circumstances, the continuance of proceedings in the complaint case against the Petitioner would be an abuse of process of Court. The complaint dated 05.07.2012 and the summoning order dated 12.07.2012 passed therein are quashed.

**22.** The Petition is allowed in above terms.

**23.** Pending Applications stands disposed of.


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# DELHI SERIES
# 2013

**(Containing cases determined by the High Court of Delhi)**

# VOLUME-1, PART-II

**(CONTAINS GENERAL INDEX)**



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**INDIAN LAW REPORTS**
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## LIST OF HON'BLE JUDGES OF DELHI HIGH COURT
### During January and February, 2013

1. Hon'ble Mr. Justice D. Murugesan, Chief Justice
2. Hon'ble Mr. Justice Sanjay Kishan Kaul
3. Hon'ble Mr. Justice Badar Durrez Ahmed
4. Hon'ble Mr. Justice Pradeep Nandrajog
5. Hon'ble Ms. Justice Gita Mittal
6. Hon'ble Mr. Justice S. Ravindra Bhat
7. Hon'ble Mr. Justice Sanjiv Khanna
8. Hon'ble Ms. Justice Reva Khetrapal
9. Hon'ble Mr. Justice P.K. Bhasin
10. Hon'ble Mr. Justice Kailash Gambhir
11. Hon'ble Mr. Justice G.S. Sistani
12. Hon'ble Dr. Justice S. Muralidhar
13. Hon'ble Ms. Justice Hima Kohli
14. Hon'ble Mr. Justice Vipin Sanghi
15. Hon'ble Mr. Justice Sudershan Kumar Misra
16. Hon'ble Ms. Justice Veena Birbal
17. Hon'ble Mr. Justice Siddharth Mridul
18. Hon'ble Mr. Justice Manmohan
19. Hon'ble Mr. Justice V.K. Shali
20. Hon'ble Mr. Justice Manmohan Singh
21. Hon'ble Mr. Justice Rajiv Sahai Endlaw
22. Hon'ble Mr. Justice J.R. Midha
23. Hon'ble Mr. Justice Rajiv Shakdher
24. Hon'ble Mr. Justice Sunil Gaur
25. Hon'ble Mr. Justice Suresh Kait
26. Hon'ble Mr. Justice Valmiki J. Mehta
27. Hon'ble Mr. Justice V.K. Jain
28. Hon'ble Ms. Justice Indermeet Kaur
29. Hon'ble Mr. Justice A.K. Pathak
30. Hon'ble Ms. Justice Mukta Gupta
31. Hon'ble Mr. Justice G.P. Mittal
32. Hon'ble Mr. Justice M.L. Mehta
33. Hon'ble Mr. Justice R.V. Easwar
34. Hon'ble Ms. Justice Pratibha Rani
35. Hon'ble Ms. Justice S.P. Garg

**LAW REPORTING COUNCIL**
**DELHI HIGH COURT**

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| 6. | Mr. Mukesh Anand, Senior Counsel of Union Govt. Attached to the High Court | *Member* |
| 7. | Mr. V.P. Vaish, Registrar General | *Secretary* |

# CONTENTS
## VOLUME-1, PART-II
## JANUARY AND FEBRUARY, 2013

Pages

## COMPARATIVE TABLE
## ILR (DS) 2013 (1) = OTHER JOURNAL
## JANUARY AND FEBRUARY

| Page No. | Journal Name | Page No. | Journal Name | Page No. |
|---|---|---|---|---|
| 315 | No Equivalent | 127 | 2012 (8) AD (D) 144 | |
| 72 | 2012 (193) DLT 107 | 82 | No Equivalent | |
| 112 | 2012 (8) AD (Delhi) 133 | 264 | No Equivalent | |
| 398 | 2012 (194) DLT 57 | 105 | No Equivalent | |
| 398 | 2012 (132) DRJ 657 | 371 | 2012 (132) DRJ 600 | |
| 202 | No Equivalent | 190 | 2012 (193) DLT 486 | |
| 409 | 2012 (6) AD (Delhi) 200 | 190 | 2012 (10) AD (Delhi) 1 | |
| 337 | No Equivalent | 190 | 2012 (132) DRJ 753 | |
| 357 | 2012 (8) AD (D) 243 | 248 | 2013 (2) RAJ 532 | |
| 357 | 2013 (196) DLT 39 | 426 | No Equivalent | |
| 1 | 2012 (4) JCC 2586 | 56 | 2007 (96) DRJ 697 | |
| 1 | 2013 Cr LJ 811 | 29 | No Equivalent | |
| 285 | 2013 (2) RAJ 452 | 148 | 2012 (7) AD (D) 580 | |
| 234 | No Equivalent | 148 | 2012 (4) JCC 2441 | |
| 272 | No Equivalent | 157 | No Equivalent | |
| 436 | 2013 (196) DLT 1 | 384 | 2013 (1) RAJ 385 | |
| 436 | 2013 (133) DRJ 1 | 384 | 2012 (7) AD (D) 631 | |
| 436 | 2013 (4) AD (D) 727 | 384 | 2012 (194) DLT 481 | |
| 419 | 2013 (133) DRJ 90 | 20 | No Equivalent | |
| 210 | 2012 (192) DLT 714 | 294 | 2012 (193) DLT 685 | |
| 210 | 2012 (8) AD (D) 519 | 294 | 2012 (9) AD (Delhi) 4 | |
| 139 | No Equivalent | 691 | 2013 (1) AD (D) 792 | |
| 327 | No Equivalent | 691 | 2013 (1) JCC 644 | |
| 88 | No Equivalent | 691 | 2013 Cr LJ 2030 | |
| 99 | 2013 (2) RAJ 583 | 494 | No Equivalent | |
| 132 | No Equivalent | 669 | 2013 (133) DRJ 373 | |





| | | | | |
|---|---|---|---|---|
| 715 | 2013 (2) Crimes 80 (CN (1) | 655 | 2013 (3) RAJ 434 | |
| 715 | 2013 (2) JCC 113 (NI) | 453 | No Equivalent | |
| 712 | 2013 (1) AD (D) 673 | 487 | No Equivalent | |
| 712 | 2013 (1) JCC 55 (NI) | 687 | No Equivalent | |
| 519 | 2012 (192) DLJ 602 | 609 | 2012 (194) DLT 444 | |
| 519 | 2012 (131) DRJ 169 | 609 | 2012 (10) AD (Delhi) 149 | |
| 602 | No Equivalent | 755 | 2013 (198) DLT 237 | |
| 839 | No Equivalent | 722 | No Equivalent | |
| 583 | 2013 (1) RAJ 401 | 511 | No Equivalent | |
| 583 | 2012 (193) DLT 203 | 466 | 2012 (5) RAJ 161 | |
| 583 | 2013 (134) DRJ 566 | 466 | 2012 (3) AD (Delhi) 301 | |
| 718 | 2013 (2) AD (D) 84 | 466 | 2012 (129) DRJ 121 | |
| 731 | 2013 (198) DLT 339 | 466 | 2013 (2) Ab LR 191 | |
| 731 | 2013 (134) DRJ 1 | 466 | 2013 (197) DLT 203 | |
| 731 | 2013 (2) AD (D) 657 | 466 | 2013 (135) DRJ 560 | |
| 829 | 2013 (2) AD (D) 164 | 625 | 2013 (194) DLT 586 | |
| 475 | No Equivalent | 625 | 2013 (133) DRJ 157 | |
| | | 704 | No Equivalent | |

## COMPARATIVE TABLE

## OTHER JOURNAL = ILR (DS) 2013 (1)

## JANUARY AND FEBRUARYS

| Journal Name | Page No. | = | ILR (DS) 2013 (1) | Page No. |
|---|---|---|---|---|
| 2013 (2) Ab LR | 191 | = | IL (DS) 2013 (1) | 466 |
| 2012 (8) AD (Delhi) | 133 | = | IL (DS) 2013 (1) | 112 |
| 2012 (6) AD (Delhi) | 200 | = | IL (DS) 2013 (1) | 409 |
| 2012 (8) AD (D) | 243 | = | IL (DS) 2013 (1) | 357 |
| 2013 (4) AD (D) | 727 | = | IL (DS) 2013 (1) | 436 |
| 2012 (8) AD (D) | 519 | = | IL (DS) 2013 (1) | 210 |
| 2012 (8) AD (D) | 144 | = | IL (DS) 2013 (1) | 127 |
| 2012 (10) AD (Delhi) | 1 | = | IL (DS) 2013 (1) | 190 |
| 2012 (7) AD (D) | 580 | = | IL (DS) 2013 (1) | 148 |
| 2012 (7) AD (D) | 631 | = | IL (DS) 2013 (1) | 384 |
| 2012 (9) AD (Delhi) | 4 | = | IL (DS) 2013 (1) | 294 |
| 2013 (1) AD (D) | 792 | = | IL (DS) 2013 (1) | 691 |
| 2013 (1) AD (D) | 673 | = | IL (DS) 2013 (1) | 712 |
| 2013 (2) AD (D) | 84 | = | IL (DS) 2013 (1) | 718 |
| 2013 (2) AD (D) | 657 | = | IL (DS) 2013 (1) | 731 |
| 2013 (2) AD (D) | 164 | = | IL (DS) 2013 (1) | 829 |
| 2012 (10) AD (Delhi) | 149 | = | IL (DS) 2013 (1) | 609 |
| 2012 (3) AD (Delhi) | 301 | = | IL (DS) 2013 (1) | 466 |
| 2013 Cr LJ | 811 | = | IL (DS) 2013 (1) | 1 |
| 2013 Cr LJ | 2030 | = | IL (DS) 2013 (1) | 691 |
| 2013 (2) Crimes | 80 (CN (1) | = | IL (DS) 2013 (1) | 715 |
| 2012 (193) DLT | 107 | = | IL (DS) 2013 (1) | 72 |
| 2012 (194) DLT | 57 | = | IL (DS) 2013 (1) | 398 |
| 2013 (196) DLT | 39 | = | IL (DS) 2013 (1) | 357 |
| 2013 (196) DLT | 1 | = | IL (DS) 2013 (1) | 436 |
| 2012 (192) DLT | 714 | = | IL (DS) 2013 (1) | 210 |
| 2012 (193) DLT | 486 | = | IL (DS) 2013 (1) | 190 |
| 2012 (194) DLT | 481 | = | IL (DS) 2013 (1) | 384 |
| 2012 (193) DLT | 685 | = | IL (DS) 2013 (1) | 294 |
| 2012 (193) DLT | 203 | = | IL (DS) 2013 (1) | 583 |
| 2013 (198) DLT | 339 | = | IL (DS) 2013 (1) | 731 |





| | | | | |
|---|---|---|---|---|
| 2012 (194) DLT | 444 | = | IL (DS) 2013 (1) | 609 |
| 2013 (198) DLT | 237 | = | IL (DS) 2013 (1) | 755 |
| 2013 (197) DLT | 203 | = | IL (DS) 2013 (1) | 466 |
| 2013 (194) DLT | 586 | = | IL (DS) 2013 (1) | 625 |
| 2012 (192) DLJ | 602 | = | IL (DS) 2013 (1) | 519 |
| 2012 (132) DRJ | 657 | = | IL (DS) 2013 (1) | 398 |
| 2013 (133) DRJ | 1 | = | IL (DS) 2013 (1) | 436 |
| 2013 (133) DRJ | 90 | = | IL (DS) 2013 (1) | 419 |
| 2012 (132) DRJ | 600 | = | IL (DS) 2013 (1) | 371 |
| 2012 (132) DRJ | 753 | = | IL (DS) 2013 (1) | 190 |
| 2007 (96) DRJ | 697 | = | IL (DS) 2013 (1) | 56 |
| 2013 (133) DRJ | 373 | = | IL (DS) 2013 (1) | 669 |
| 2012 (131) DRJ | 169 | = | IL (DS) 2013 (1) | 519 |
| 2013 (134) DRJ | 566 | = | IL (DS) 2013 (1) | 583 |
| 2013 (134) DRJ | 1 | = | IL (DS) 2013 (1) | 731 |
| 2012 (129) DRJ | 121 | = | IL (DS) 2013 (1) | 466 |
| 2013 (135) DRJ | 560 | = | IL (DS) 2013 (1) | 466 |
| 2013 (133) DRJ | 157 | = | IL (DS) 2013 (1) | 625 |
| 2012 (4) JCC | 2586 | = | IL (DS) 2013 (1) | 1 |
| 2012 (4) JCC | 2441 | = | IL (DS) 2013 (1) | 148 |
| 2013 (1) JCC | 644 | = | IL (DS) 2013 (1) | 691 |
| 2013 (2) JCC | 113 (NI) | = | IL (DS) 2013 (1) | 715 |
| 2013 (1) JCC | 55 (NI) | = | IL (DS) 2013 (1) | 712 |
| 2013 (2) RAJ | 452 | = | IL (DS) 2013 (1) | 285 |
| 2013 (2) RAJ | 583 | = | IL (DS) 2013 (1) | 99 |
| 2013 (2) RAJ | 532 | = | IL (DS) 2013 (1) | 248 |
| 2013 (1) RAJ | 385 | = | IL (DS) 2013 (1) | 384 |
| 2013 (1) RAJ | 401 | = | IL (DS) 2013 (1) | 583 |
| 2013 (3) RAJ | 434 | = | IL (DS) 2013 (1) | 655 |
| 2012 (5) RAJ | 161 | = | IL (DS) 2013 (1) | 466 |

**NOMINAL-INDEX**
**VOLUME-1, PART-II**
**JANUARY AND FEBRUARY, 2013**

*Pages*

**"A"**



**"B"**



**"C"**



**"D"**



**"E"**







**"F"**



**"G"**



**"H"**



**"I"**



**"J"**



**"M"**



**"N"**

## SUBJECT-INDEX
## VOLUME-1, PART-II
## JANUARY AND FEBRUARY, 2013

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.



— 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.

*Unitech Limited* v. *Housing and Urban Development Corporation* ..... *384*

— Section 8—Recovery of Debts Due to Banks & Financial Institutions Act, 1993 (RDB Act)—Whether the provisions of Arbitration & Conciliation Act, 1996 are excluded in respect of proceedings under Recovery of Debts Due to Banks & Financial Institutions Act, 1993—Held, claim of money by the bank or financial institution against the borrower is a 'right in personam' with no element of any public interest and hence arbitrable—Debt Recovery Tribunal is simply a replacement of Civil Court—No special rights are created in favour of the banks or financial institutions under RDB Act—Matters which come within the scope and jurisdiction of Debt Recovery Tribunal are arbitrable.

Ratio Decidendi

"If a particular enactment creates special rights and obligations and gives special powers to tribunals which are not with the civil Courts such as Tribunals constitute under the Rent Control Act and the Industrial Disputes Act, the disputes arising under such enactments would not be arbitrable."

*HDFC Bank Ltd.* v. *Satpal Singh Bakshi* ..... *583*

— Section 16—Constitution of India, 1950—Article 226—Arbitrator acting under aegis of Permanent Machinery of Arbitrators (PMA) established by Govt. of India in respect of disputes concerning Central Public Sector Undertakings, Banks, Trusts and/or other Government departments issued notice of claim of Respondent No. 2 UCO Bank to petitioner—Writ petition filed to lay challenge to her jurisdiction to proceed further with matter—Plea taken, petitioner is not a party to

statement of claim filed by Respondent No.2/UCO Bank, therefore no notice could have been issued to Petitioner/NTC nor could any liability been foisted on it—Sita Ram Mills (SRM) was nationalised under Nationalisation Act and therefore liabilities pertaining to period prior to nationalization were of erstwhile owners and could not be foisted upon Petitioner/NTC—Per contra plea taken, since Commissioner of payment (COP) had made part payment, claim is maintained for balance sum which pertains to dues qua various credit facilities granted in pre/post takeover period—Since petitioner has taken over SRM, it is liable to pay outstanding dues of Respondent No. 2/UCO Bank—Held—PMA was constituted by virtue of office memorandum dated 22.01.2004 issued by GOI, Ministry of Heavy Industries and Public Enterprises, Deptt. of Public Enterprises—It is therefore not a mechanism which stands effaced by virtue of dissolution of Committee on Disputes (COD)—This made clear, on a perusal of yet another OM dated 01.09.2011, issued by Cabinet Sectt. of GOI which supersedes provision in OM, which required public enterprises to approach COD before approaching Courts or Tribunals—OM of 01.09.2011 does not envisage dissolution of PMA—All that, it does it that Govt. Departments and Public Enterprises qua disputes concerning them would not be required to approach COD, if they wish to approach PMA—Superssession of OM dated 22.01.2004 by OM dated 01.09.2011 is only to that limited extent—Both, petitioner/NTC being a Central Public Sector Enterprises and Respondent No. 2/UCO Bank, a nationalized bank, are covered under OM dated 22.01.2004, no consent is required for initiation of arbitration proceedings under PMA mechanism—Issue qua jurisdiction is a mixed question of fact and law and cannot be determined without looking into various factual and legal aspects which would include interpretation of Nationalization Act and TM Act—Where a party approaches Arbitrator, without



intervention of Court, Arbitrator is empowered to ascertain both existence and validity of Arbitration Agreement—This principle is evolved to ensure quick and effective adjudication of disputes by Arbitrator—Issue whether or not petitioner/NTC is owner of SRML cannot be examined by Arbitrator in a summary manner, without appreciating full contours of claim set up by Respondent No. 2/UCO Bank—Defence of Petitioner/NTC is based mainly on one particular fact that it is not liable for debts due—There is no defence on merits—Bifurcation of issues would only delay proceedings before Arbitrator—Therefore, for this Court to interdict proceedings before arbitrator, at this stage, would result in delaying adjudication of disputes—Writ petition dismissed.

*National Textile Corporation Ltd.* v. *Union of India & Ors.* ..... *655*

**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*

**ARMED FORCES TRIBUNAL ACT, 2007**—Section 14, Code of Criminal Procedure (CrPC), 1973—Section 24—What are the parameters of this Court's jurisdiction in judicial review of the exercise of administrative discretion by the respondents and scope of judicial review? Held—The parameters are:- while exercising the power of judicial review, the court is more concerned with the decision making process rather than the merit of the decision itself and while scrutinizing the decision making process it becomes inevitable to also appreciate the facts of the given case, as otherwise the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety. Further, in judicial review, the Court is mainly concerned with the legality of the action under challenge. Therefore, it is well established that this Court in exercise of its power under Article 226 of the Constitution of India can examine the factual matrix to adjudicate upon the several grounds urged by the Petitioner. What are the applicable rules and policies? Held—The 1986 policy are concerned policy relates to consideration of review cases while 1991 policy relates to consideration of fresh cases for promotion. Since, the Respondent nos. 1 to 4 categorically states that these policies are valid, binding and applicable to the instant case. Whether the Petition is eligible for promotion as fresh

consideration? Held—That the Petitioner was entitled to be granted his fresh consideration by the Selection Board. Further, it has been held that the Selection Board had assessed officers for promotion to the rank of Let. General Based on promotion policy which had not been approved by competent authority and therefore, the decision of the selection board was illegal. Therefore, further Court rejected the Respondents contention holding that there can be no ratification of an illegal act. Further, a direction was issued by the Board to hold a special selection Board to assessing officers including the Petitioner based on correct policy.

Ratio Decidendi:

"Appointments are to be made following the applicable and correct procedures and policy which had not been approved by competent authority are illegal".

*Shrikant Sharma* v. *Union of India and Ors.* ..... *709*

**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*

**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.

*Shumita Didi Sandhu* v. *Sanjay Singh Sandhu & Ors.* ..... *56*

— 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.

*Walchandnagar Industries Limited* v. *Cement Corporation of India Limited*..... *294*

— Section 9, 11 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.

*DCM Limited* v. *Delhi Development Authority* ..... *337*

**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.

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

— Section 482 – Indian Penal Code, 1860 – Sections 420/406/120-B/34 – Quashing of FIR in non-compoundable offences

– Inherent powers of the High Court may be exercised if the possibility of conviction is remote and bleak and the continuation of criminal case would put the accused to great oppression and prejudice. HELD: Inherent power to quash FIR in cases involving non-compoundable offences may be exercised if in view of the High Court, there being a compromise between the offender and the victim, the possibility of conviction is remote and bleak and the continuation of criminal case would put the accused to great oppression and prejudice and that extreme injustice would be caused to the offender despite full and complete settlement and compromise with the victim – High Court is well within its jurisdiction to secure the ends of justice by putting an end to the criminal case if it is of the view that continuation of criminal proceedings would tantamount to abuse of process of law despite settlement and compromise – In present case, High Court was satisfied that compromise and settlement was properly reached between the Petitioners and the Respondent No.2.

*Inderpal Thukral & Anr.* v. *State & Anr.* ..... *705*

— Section 24—What are the parameters of this Court's jurisdiction in judicial review of the exercise of administrative discretion by the respondents and scope of judicial review? Held—The parameters are:- while exercising the power of judicial review, the court is more concerned with the decision making process rather than the merit of the decision itself and while scrutinizing the decision making process it becomes inevitable to also appreciate the facts of the given case, as otherwise the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety. Further, in judicial review, the Court is mainly concerned with the legality of the action under challenge. Therefore, it is well established that this Court in exercise of its power under Article 226 of



the Constitution of India can examine the factual matrix to adjudicate upon the several grounds urged by the Petitioner. What are the applicable rules and policies? Held—The 1986 policy are concerned policy relates to consideration of review cases while 1991 policy relates to consideration of fresh cases for promotion. Since, the Respondent nos. 1 to 4 categorically states that these policies are valid, binding and applicable to the instant case. Whether the Petition is eligible for promotion as fresh consideration? Held—That the Petitioner was entitled to be granted his fresh consideration by the Selection Board. Further, it has been held that the Selection Board had assessed officers for promotion to the rank of Let. General Based on promotion policy which had not been approved by competent authority and therefore, the decision of the selection board was illegal. Therefore, further Court rejected the Respondents contention holding that there can be no ratification of an illegal act. Further, a direction was issued by the Board to hold a special selection Board to assessing officers including the Petitioner based on correct policy.

Ratio Decidendi:

Appointments are to be made following the applicable and correct procedures and policy which had not been approved by competent authority are illegal".

*Shrikant Sharma* v. *Union of India and Ors.* ..... *709*

**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*

— Article 12—Whether National Book Trust (NBT) is "State"—Reference made to Full Bench by Division Bench, in view of an earlier decision, where National Book Trust was held to be not "State"—Held Government exercised "deep and pervasive" over functioning of NBT—Evident from the fact Chairman of Trust was appointed by Government of India, who was to hold office at the pleasure of the Government—Two members were to be from respective Ministry of Finance and Ministry of Information and Broadcasting —Annual Report and audited statements of account were required to be submitted to Government of India—Proceedings of Trust were required to be sent to Ministry of Education—All members of Executive Committee were appointed/nominated by Government—Proceedings of Executive Committee were to be sent to Government—Regulation making power of Committee was subject to approval of Government—Alteration or Extension of purposes of Society required prior concurrence of Government—Prior sanction of Government of India required before bringing into force any rules and regulations of the Trust or any amendment thereto—It was an altar ego of the Government's instrumentality—National

Book Trust is "Other authority" and thus, "State" within the meaning of Article 12 of Constitution of India.

*AR Abdul Gaffar* v. *Union of India & Ors.* ..... *494*

— Article 16 (4), 298, 371 and 372—Whether SC/ST's migrating from their state of origin to Union Territory can claim rights of SC/ST's in that Union Territory?—Held, any Scheduled Caste or Scheduled Tribe notified as such by the President can be classified as such caste or tribe, who answers that description would be entitled to the benefit of reservation in all Union Territories. In the case of States, however, having regard to separate administrative arrangements under the Constitution, such a position would not apply and those castes or tribes, notified in relation to those state(s) as Scheduled Castes or Scheduled Tribes, alone would be entitled to the benefits, and those migrating from one state to another, cannot enjoy such benefits.

Ratio Decidendi

"In a union territory all SC/ST's whether local or the ones who have migrated are to be treated at par. As far as states are concerned, the settled law is that SC/ST's of one state migrating to the other state cannot claim the rights bestowed upon them in their state of origin."

*Deepak Kumar and Ors.* v. *District and Sessions Judge, Delhi and Ors.* ..... *519*

— Article 226, 265 and Entry 49 in list II of Schedule VII—Petitioner in this petition has been seeking transfer of land in issue in records of respondent no.2 and consequent execution of a lease deed in its favour—Plot in issue has been transferred three times over—Respondent No. 2 had, at one stage, conveyed to petitioner that he was required to pay a sum of Rs. 73,02,291 towards unearned increase vis-a-vis all three transfers which had taken place qua plot—Figure was scaled



down to Rs. 15,15,693 and thereafter brought down to a further sum of Rs. 6,79,700 in respect of charges towards unearned increase—A sum of Rs. 14,22,250 was sought to be imposed towards interest, calculated upto 28.04.10—As of now, Respondent No. 2 is seeking to charge Rs. 11,80,200 towards unearned increase charges, in addition to interest amounting to Rs. 1,70,556—Order challanged before HC—Plea taken, all that petitioner was required to pay, if at all, was money towards unearned increase which stood quantified at Rs. 6,79,700—Petitioner, if at all was liable to pay interest for period 07.08.96 till 25.06.01 i.e. for second sale—Respondent No. 2 could not have imposed unearned increase charges on each sale, as was sought to be done—This amounted to unjust enrichment—Per contra plea taken, letters scaling down demand for uneared increase were issued without approval of management and a decision was taken to withdraw said letters—Transfer could be effected in favour of petitioner if, he were to pay balance sum of Rs. 6,71,056 to Respondent No. 2—Held—Respondent No. 2 was wanting to collect charges towards unearned increase in terms of a policy letter dated 27.09.2001 whereas all three transactions took place prior to 27.09.2001—There is no averment whatsoever in affidavit as to when such a decision was taken to withdraw letters relied upon by petitioner and as to whether same was communicated to petitioner—Petitioner was entitled to believe that those letters were written under ostensible authority to convey to him what were charges payable by him towards unearned increase—Unearned increase calculated and conveyed to petitioner was not a conjured up figure but based on Respondent No. 2's Policy Circular of 05.10.2010—There is nothing disclosed in affidavit of Respondent No. 2 which would show as to why figure of Rs. 6,79,700 towards unearned increase conveyed to Petitioner earlier was incorrect and that correct amount towards unearned increase charges ought to have been Rs. 11,80,200—State and its

instrumentalities are not, in pure sense, adversial litigants—They have a far greater onus, to place on record all facts as appearing on records, however, inconvenient and unpalatable they may be—Having regard to fact that petitioner has agreed to pay regularization/interest charges for period 07.08.96 till June, 2001 which Respondent No. 2 has calculated at Rs. 1,70,556 all that petitioner can be called upon to pay is said amount—Demand letter dated 28.04.10 is quashed—Respondent No.2 is directed to effect transfer of plot in issue, in name of petitioner, in its record, on petitioner paying a sum of Rs. 1,70,556 to Respondent No. 2 towards regularization charges/interest within a period of two weeks from today—Respondent No. 2 is also directed to execute a lease deed in favour of petitioner qua plot in issue, on payment of aforementioned amount and fulfilment of other formalities—Respondent No. 2 shall do needful within two weeks of petitioner fulfilling requisite formalities.

*Sanjeev K. Bhatia* v. *Govt. of NCT of Delhi & Anr.* ..... *609*

— Article 226, Article 14 and Article 356, Armed Forces Tribunal Act, 2007—Section 14, Code of Criminal Procedure (CrPC), 1973—Section 24—What are the parameters of this Court's jurisdiction in judicial review of the exercise of administrative discretion by the respondents and scope of judicial review? Held—The parameters are:- while exercising the power of judicial review, the court is more concerned with the decision making process rather than the merit of the decision itself and while scrutinizing the decision making process it becomes inevitable to also appreciate the facts of the given case, as otherwise the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety. Further, in judicial review, the Court is mainly concerned with the legality of the action under challenge. Therefore, it is well established that this Court in exercise of its power under Article 226 of



the Constitution of India can examine the factual matrix to adjudicate upon the several grounds urged by the Petitioner. What are the applicable rules and policies? Held—The 1986 policy are concerned policy relates to consideration of review cases while 1991 policy relates to consideration of fresh cases for promotion. Since, the Respondent nos. 1 to 4 categorically states that these policies are valid, binding and applicable to the instant case. Whether the Petition is eligible for promotion as fresh consideration? Held—That the Petitioner was entitled to be granted his fresh consideration by the Selection Board. Further, it has been held that the Selection Board had assessed officers for promotion to the rank of Let. General Based on promotion policy which had not been approved by competent authority and therefore, the decision of the selection board was illegal. Therefore, further Court rejected the Respondents contention holding that there can be no ratification of an illegal act. Further, a direction was issued by the Board to hold a special selection Board to assessing officers including the Petitioner based on correct policy.

Ratio Decidendi:

"Appointments are to be made following the applicable and correct procedures and policy which had not been approved by competent authority are illegal".

*Shrikant Sharma* v. *Union of India and Ors.* ..... *709*

— Article 226—Indian Evidence Act. 1872—Section 45—Indian Penal Code, 1860—Section 304A—Indian Medical Council Act, 1956—Section 20A and 33 (m)—Daughter of Respondent No.2 died in Max Hospital—Her husband lodged complaint with police alleging wrong treatment and negligence—Police sought opinion of Delhi Medical Council (DMC) as to whether there was any negligence involved in this case—DMC concluded that no medical negligence could be attributed to doctors in treatment administered to

deceased—Father of deceased preferred appeal under MCI Regulations—Ethics Committee found petitioner and another doctor guilty of negligence and adjourned deliberations to next meeting to decide quantum of punishment to be imposed on those found guilty—Order was challenged by way of Writ Petition which was disposed of with directions to MCI to pass a final order both on merits as well as on question of jurisdiction after giving due opportunity to aggrieved parties—Contrary to those directions, petitioner filed application seeking dismissal of appeal on grounds of jurisdiction without entering into merits of case—MCI concluded vide impugned order that it had jurisdiction to deal with Matter—Order challanged before HC—Plea taken, decision of DMC was in nature of opinion sought by Police authorities and no appeal could have been maintained against such a decision—Therefore, entire proceedings before MCI were without jurisdiction—Per contra plea taken, MCI had concurrent jurisdiction to deal with offences and complaints of professional misconduct alongwith State Medical Council—Matter required examination on merits and present writ petition was filed only to interdict conclusion of proceedings before MCI—Held—Instances of offences and/or professional misconduct which constitute infamous act, and which call for disciplinary action, both MCI and/or State Medical Council are empowered to deal with such a matter and in this exercise they are not precluded from considering and dealing with any other form of professional misconduct which is not listed/categorized under Regulation 7—MCI exercises both original as well as appellate jurisdiction—If MCI, is made cognizant of certain facts pertaining to what would constitute ordinarily in "letter and spirit" a professional misconduct by a registered medical practitioner then, it would have necessary authority to deal with matter—MCI can on its own take action on infraction of regulation or infamous act or professional conduct coming to its notice—Appeal provision would have no relevance, since MCI has exercised



original jurisdiction—MCI has correctly concluded that it makes no distinction between a representation and a complaint—It is not form but substance of representation, which would decide that: whether or not it raises issue and, in that sense, a complaint of professional misconduct by a registered medical practitioner—If MCI was made cognizent of act which prima facie had ingredients of professional misconduct then it would have necessary original jurisdiction to deal with such material placed before it—Nomenclature given to action by father of deceased would have no relevance—MCI can treat action of father of deceased as original complaint and deal with matter in accordance with extent provisions of MCI Regulations—While dealing with cases of professional misconduct, MCI is not fettered with rules of locus and therefore fact father of deceased was not a original complainant in that he was not a Class I Legal Heir of deceased would make no difference—There is no merit in writ petition.

*Dr. Alka Gupta* v. *Medical Council of India & Anr.* ..... *669*

— Article 226—Indian Evidence Act. 1872—Section 45—Indian Penal Code, 1860—Section 304A—Indian Medical Council Act, 1956—Section 20A and 33 (m)—Daughter of Respondent No.2 died in Max Hospital—Her husband lodged complaint with police alleging wrong treatment and negligence—Police sought opinion of Delhi Medical Council (DMC) as to whether there was any negligence involved in this case—DMC concluded that no medical negligence could be attributed to doctors in treatment administered to deceased—Father of deceased preferred appeal under MCI Regulations—Ethics Committee found petitioner and another doctor guilty of negligence and adjourned deliberations to next meeting to decide quantum of punishment to be imposed on those found guilty—Order was challenged by way of Writ

Petition which was disposed of with directions to MCI to pass a final order both on merits as well as on question of jurisdiction after giving due opportunity to aggrieved parties—Contrary to those directions, petitioner filed application seeking dismissal of appeal on grounds of jurisdiction without entering into merits of case—MCI concluded vide impugned order that it had jurisdiction to deal with Matter—Order challanged before HC—Plea taken, decision of DMC was in nature of opinion sought by Police authorities and no appeal could have been maintained against such a decision—Therefore, entire proceedings before MCI were without jurisdiction—Per contra plea taken, MCI had concurrent jurisdiction to deal with offences and complaints of professional misconduct alongwith State Medical Council—Matter required examination on merits and present writ petition was filed only to interdict conclusion of proceedings before MCI—Held—Instances of offences and/or professional misconduct which constitute infamous act, and which call for disciplinary action, both MCI and/or State Medical Council are empowered to deal with such a matter and in this exercise they are not precluded from considering and dealing with any other form of professional misconduct which is not listed/categorized under Regulation 7—MCI exercises both original as well as appellate jurisdiction—If MCI, is made cognizant of certain facts pertaining to what would constitute ordinarily in "letter and spirit" a professional misconduct by a registered medical practitioner then, it would have necessary authority to deal with matter—MCI can on its own take action on infraction of regulation or infamous act or professional conduct coming to its notice—Appeal provision would have no relevance, since MCI has exercised original jurisdiction—MCI has correctly concluded that it makes no distinction between a representation and a complaint—It is not form but substance of representation, which would decide that: whether or not it raises issue and, in that sense, a complaint of professional misconduct by a



registered medical practitioner—If MCI was made cognizent of act which prima facie had ingredients of professional misconduct then it would have necessary original jurisdiction to deal with such material placed before it—Nomenclature given to action by father of deceased would have no relevance—MCI can treat action of father of deceased as original complaint and deal with matter in accordance with extent provisions of MCI Regulations—While dealing with cases of professional misconduct, MCI is not fettered with rules of locus and therefore fact father of deceased was not a original complainant in that he was not a Class I Legal Heir of deceased would make no difference—There is no merit in writ petition.



— Article 226—Arbitrator acting under aegis of Permanent Machinery of Arbitrators (PMA) established by Govt. of India in respect of disputes concerning Central Public Sector Undertakings, Banks, Trusts and/or other Government departments issued notice of claim of Respondent No. 2 UCO Bank to petitioner—Writ petition filed to lay challenge to her jurisdiction to proceed further with matter—Plea taken, petitioner is not a party to statement of claim filed by Respondent No.2/UCO Bank, therefore no notice could have been issued to Petitioner/NTC nor could any liability been foisted on it—Sita Ram Mills (SRM) was nationalised under Nationalisation Act and therefore liabilities pertaining to period prior to nationalization were of erstwhile owners and could not be foisted upon Petitioner/NTC—Per contra plea taken, since Commissioner of payment (COP) had made part payment, claim is maintained for balance sum which pertains to dues qua various credit facilities granted in pre/post takeover period—Since petitioner has taken over SRM, it is liable to pay outstanding dues of Respondent No. 2/UCO

Bank—Held—PMA was constituted by virtue of office memorandum dated 22.01.2004 issued by GOI, Ministry of Heavy Industries and Public Enterprises, Deptt. of Public Enterprises—It is therefore not a mechanism which stands effaced by virtue of dissolution of Committee on Disputes (COD)—This made clear, on a perusal of yet another OM dated 01.09.2011, issued by Cabinet Sectt. of GOI which supersedes provision in OM, which required public enterprises to approach COD before approaching Courts or Tribunals—OM of 01.09.2011 does not envisage dissolution of PMA—All that, it does it that Govt. Departments and Public Enterprises qua disputes concerning them would not be required to approach COD, if they wish to approach PMA—Superssession of OM dated 22.01.2004 by OM dated 01.09.2011 is only to that limited extent—Both, petitioner/NTC being a Central Public Sector Enterprises and Respondent No. 2/UCO Bank, a nationalized bank, are covered under OM dated 22.01.2004, no consent is required for initiation of arbitration proceedings under PMA mechanism—Issue qua jurisdiction is a mixed question of fact and law and cannot be determined without looking into various factual and legal aspects which would include interpretation of Nationalization Act and TM Act—Where a party approaches Arbitrator, without intervention of Court, Arbitrator is empowered to ascertain both existence and validity of Arbitration Agreement—This principle is evolved to ensure quick and effective adjudication of disputes by Arbitrator—Issue whether or not petitioner/NTC is owner of SRML cannot be examined by Arbitrator in a summary manner, without appreciating full contours of claim set up by Respondent No. 2/UCO Bank—Defence of Petitioner/NTC is based mainly on one particular fact that it is not liable for debts due—There is no defence on merits—Bifurcation of issues would only delay proceedings before Arbitrator—Therefore, for this Court to interdict proceedings before



arbitrator, at this stage, would result in delaying adjudication of disputes—Writ petition dismissed.



— Article 14 and 19(1) (a)—Indian Evidence Act, 1872—Section 126 to 129—CIC directed petitioners to supply entire information to extent not supplied after redacting names and designations of officers who made notings—Captioned Writ Petitions file raising a common question of law whether petitioners are obliged to furnish information to respondent which is retained by them in record, in form of file notings as also opinion of Judge Advocate General (JAG) found in records of respondents under relevant provisions of R.T.I. Act—Plea taken, CIC in several cases, contrary to decision in these cases has taken view that file nothings which include legal opinions, need not be disclosed, as it may effect outcome of legal action instituted by applicant/querist seeking information—This was not permissible as it was a bench of co-equal strength—In case, CIC disagreed with view taken earlier, it ought to have referred matter to a larger Bench—There was a fiduciary relationship between officers in chain of command, and those, who were placed in higher echelons, of what was essentially a pyramidical structure—Since JAG Branch has a duty to act and give advice on matters falling within ambit of its mandate, disclosure of information would result in a breach of fiduciary relationship qua those who give advice and final decision making authority, which is recipient of advice—Held—File notings and opinions of JAG branch are information, to which, a person taking recourse to RTI Act can have access provided it is available with concerned public authority—In institutional set up, it can hardly be argued that notes on file qua a personnel or employee of institution, such as Army, whether vis-a-vis his performance or his

conduct, in any manner, can benefit person, who generates note or renders opinion—As a matter of fact, person who generates note or renders opinion is presumed to be a person who is objective and not conflicted by virtue of his interest in matter, on which, he is called upon to deliberate—If that position holds, then it can neither be argued nor can it be conceived that notes on file or opinions rendered in institutional setup by one officer qua working or conduct of another officer brings forth a fiduciary relationship—A denial of access to such information to information seekers, i.e., respondents herein, especially in circumstances that said information is used admittedly in coming to conclusion that delinguent officers were guilty, and in determining punishment to be accorded to them, would involve a serious breach of principles of natural justice, as non-communication would entail civil consequences and would render such a decision vulnerable to challenge under Article 14 of Constitution of India provided information is sought and was not given—Right to information is a constitutional right under Article 19(1) (a) of Constitution of India—Institution i.e. Indian Army in present case cannot by any stretch of imagination be categorized as a client—Legal professional privilege extends only to a barrister, pleader, attorney or Vakil—Persons who have generated opinions and/or notings on file in present case do not fall in any of these categories—Information in issue cannot be denied to Parliament and State Legislature—Therefore, necessary consequences of providing information to respondents should follow—CIC is however advised in future to have regard to discipline of referring matters to a larger bench where a bench of coordinate strength takes a view which is not consistent with view of other—Writ petitions dismissed.

*Union of India & Ors.* v. *Col. V.K. Shad*..... *625*

**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*

— 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 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*

**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 CONTRACT ACT, 1872**—Section 28—Arbitration and Conciliation Act, 1996—Section 16—Constitution of India, 1950—Article 226—Arbitrator acting under aegis of Permanent Machinery of Arbitrators (PMA) established by Govt. of India in respect of disputes concerning Central Public Sector Undertakings, Banks, Trusts and/or other Government departments issued notice of claim of Respondent No. 2 UCO Bank to petitioner—Writ petition filed to lay challenge to her jurisdiction to proceed further with matter—Plea taken, petitioner is not a party to statement of claim filed by Respondent No.2/UCO Bank, therefore no notice could have been issued to Petitioner/NTC nor could any liability been foisted on it—Sita Ram Mills (SRM) was nationalised under Nationalisation Act and therefore liabilities pertaining to period prior to nationalization were of erstwhile owners and could not be foisted upon Petitioner/NTC—Per contra plea taken,

since Commissioner of payment (COP) had made part payment, claim is maintained for balance sum which pertains to dues qua various credit facilities granted in pre/post takeover period—Since petitioner has taken over SRM, it is liable to pay outstanding dues of Respondent No. 2/UCO Bank—Held—PMA was constituted by virtue of office memorandum dated 22.01.2004 issued by GOI, Ministry of Heavy Industries and Public Enterprises, Deptt. of Public Enterprises—It is therefore not a mechanism which stands effaced by virtue of dissolution of Committee on Disputes (COD)—This made clear, on a perusal of yet another OM dated 01.09.2011, issued by Cabinet Sectt. of GOI which supersedes provision in OM, which required public enterprises to approach COD before approaching Courts or Tribunals—OM of 01.09.2011 does not envisage dissolution of PMA—All that, it does it that Govt. Departments and Public Enterprises qua disputes concerning them would not be required to approach COD, if they wish to approach PMA—Superssession of OM dated 22.01.2004 by OM dated 01.09.2011 is only to that limited extent—Both, petitioner/NTC being a Central Public Sector Enterprises and Respondent No. 2/UCO Bank, a nationalized bank, are covered under OM dated 22.01.2004, no consent is required for initiation of arbitration proceedings under PMA mechanism—Issue qua jurisdiction is a mixed question of fact and law and cannot be determined without looking into various factual and legal aspects which would include interpretation of Nationalization Act and TM Act—Where a party approaches Arbitrator, without intervention of Court, Arbitrator is empowered to ascertain both existence and validity of Arbitration Agreement—This principle is evolved to ensure quick and effective adjudication of disputes by Arbitrator—Issue whether or not petitioner/NTC is owner of SRML cannot be examined by Arbitrator in a summary manner, without appreciating full contours of claim set up by Respondent No. 2/UCO Bank—Defence of Petitioner/



NTC is based mainly on one particular fact that it is not liable for debts due—There is no defence on merits—Bifurcation of issues would only delay proceedings before Arbitrator—Therefore, for this Court to interdict proceedings before arbitrator, at this stage, would result in delaying adjudication of disputes—Writ petition dismissed.

*National Textile Corporation Ltd.* v. *Union of India & Ors.* ..... *655*

— Section 126 to 129—CIC directed petitioners to supply entire information to extent not supplied after redacting names and designations of officers who made notings—Captioned Writ Petitions file raising a common question of law whether petitioners are obliged to furnish information to respondent which is retained by them in record, in form of file notings as also opinion of Judge Advocate General (JAG) found in records of respondents under relevant provisions of R.T.I. Act—Plea taken, CIC in several cases, contrary to decision in these cases has taken view that file nothings which include legal opinions, need not be disclosed, as it may effect outcome of legal action instituted by applicant/querist seeking information—This was not permissible as it was a bench of co-equal strength—In case, CIC disagreed with view taken earlier, it ought to have referred matter to a larger Bench—There was a fiduciary relationship between officers in chain of command, and those, who were placed in higher echelons, of what was essentially a pyramidical structure—Since JAG Branch has a duty to act and give advice on matters falling within ambit of its mandate, disclosure of information would result in a breach of fiduciary relationship qua those who give advice and final decision making authority, which is recipient of advice—Held—File notings and opinions of JAG branch are information, to which, a person taking recourse to RTI Act can have access provided it is available with concerned public authority—In institutional set up, it can hardly be argued

that notes on file qua a personnel or employee of institution, such as Army, whether vis-a-vis his performance or his conduct, in any manner, can benefit person, who generates note or renders opinion—As a matter of fact, person who generates note or renders opinion is presumed to be a person who is objective and not conflicted by virtue of his interest in matter, on which, he is called upon to deliberate—If that position holds, then it can neither be argued nor can it be conceived that notes on file or opinions rendered in institutional setup by one officer qua working or conduct of another officer brings forth a fiduciary relationship—A denial of access to such information to information seekers, i.e., respondents herein, especially in circumstances that said information is used admittedly in coming to conclusion that delinguent officers were guilty, and in determining punishment to be accorded to them, would involve a serious breach of principles of natural justice, as non-communication would entail civil consequences and would render such a decision vulnerable to challenge under Article 14 of Constitution of India provided information is sought and was not given—Right to information is a constitutional right under Article 19(1) (a) of Constitution of India—Institution i.e. Indian Army in present case cannot by any stretch of imagination be categorized as a client—Legal professional privilege extends only to a barrister, pleader, attorney or Vakil—Persons who have generated opinions and/or notings on file in present case do not fall in any of these categories—Information in issue cannot be denied to Parliament and State Legislature—Therefore, necessary consequences of providing information to respondents should follow—CIC is however advised in future to have regard to discipline of referring matters to a larger bench where a bench of coordinate strength takes a view which is not consistent with view of other—Writ petitions dismissed.

*Union of India & Ors.* v. *Col. V.K. Shad*..... *625*



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*Union of India & Ors.* v. *Col. V.K. Shad*..... *625*

— Section 45—Indian Penal Code, 1860—Section 304A—Indian Medical Council Act, 1956—Section 20A and 33 (m)—Daughter of Respondent No.2 died in Max Hospital—Her husband lodged complaint with police alleging wrong treatment and negligence—Police sought opinion of Delhi Medical Council (DMC) as to whether there was any negligence involved in this case—DMC concluded that no medical negligence could be attributed to doctors in treatment



administered to deceased—Father of deceased preferred appeal under MCI Regulations—Ethics Committee found petitioner and another doctor guilty of negligence and adjourned deliberations to next meeting to decide quantum of punishment to be imposed on those found guilty—Order was challenged by way of Writ Petition which was disposed of with directions to MCI to pass a final order both on merits as well as on question of jurisdiction after giving due opportunity to aggrieved parties—Contrary to those directions, petitioner filed application seeking dismissal of appeal on grounds of jurisdiction without entering into merits of case—MCI concluded vide impugned order that it had jurisdiction to deal with Matter—Order challanged before HC—Plea taken, decision of DMC was in nature of opinion sought by Police authorities and no appeal could have been maintained against such a decision—Therefore, entire proceedings before MCI were without jurisdiction—Per contra plea taken, MCI had concurrent jurisdiction to deal with offences and complaints of professional misconduct alongwith State Medical Council—Matter required examination on merits and present writ petition was filed only to interdict conclusion of proceedings before MCI—Held—Instances of offences and/or professional misconduct which constitute infamous act, and which call for disciplinary action, both MCI and/or State Medical Council are empowered to deal with such a matter and in this exercise they are not precluded from considering and dealing with any other form of professional misconduct which is not listed/categorized under Regulation 7—MCI exercises both original as well as appellate jurisdiction—If MCI, is made cognizant of certain facts pertaining to what would constitute ordinarily in "letter and spirit" a professional misconduct by a registered medical practitioner then, it would have necessary authority to deal with matter—MCI can on its own take action on infraction of regulation or infamous act or professional conduct coming to its notice—Appeal provision would have no

relevance, since MCI has exercised original jurisdiction—MCI has correctly concluded that it makes no distinction between a representation and a complaint—It is not form but substance of representation, which would decide that: whether or not it raises issue and, in that sense, a complaint of professional misconduct by a registered medical practitioner—If MCI was made cognizent of act which prima facie had ingredients of professional misconduct then it would have necessary original jurisdiction to deal with such material placed before it—Nomenclature given to action by father of deceased would have no relevance—MCI can treat action of father of deceased as original complaint and deal with matter in accordance with extent provisions of MCI Regulations—While dealing with cases of professional misconduct, MCI is not fettered with rules of locus and therefore fact father of deceased was not a original complainant in that he was not a Class I Legal Heir of deceased would make no difference—There is no merit in writ petition.

*Dr. Alka Gupta* v. *Medical Council of India & Anr.* ..... *669*

— Section 45—Indian Penal Code, 1860—Section 304A—Indian Medical Council Act, 1956—Section 20A and 33 (m)—Daughter of Respondent No.2 died in Max Hospital—Her husband lodged complaint with police alleging wrong treatment and negligence—Police sought opinion of Delhi Medical Council (DMC) as to whether there was any negligence involved in this case—DMC concluded that no medical negligence could be attributed to doctors in treatment administered to deceased—Father of deceased preferred appeal under MCI Regulations—Ethics Committee found petitioner and another doctor guilty of negligence and adjourned deliberations to next meeting to decide quantum of punishment to be imposed on those found guilty—Order was challenged by way of Writ Petition which was disposed of with directions



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**INDIAN PENAL CODE, 1860**—Sections 420/406/120-B/34 – Quashing of FIR in non-compoundable offences – Inherent powers of the High Court may be exercised if the possibility of conviction is remote and bleak and the continuation of criminal case would put the accused to great oppression and prejudice. HELD: Inherent power to quash FIR in cases involving non-compoundable offences may be exercised if in view of the High Court, there being a compromise between the offender and the victim, the possibility of conviction is remote and bleak and the continuation of criminal case would put the accused to great oppression and prejudice and that extreme injustice would be caused to the offender despite full and complete settlement and compromise with the victim – High Court is well within its jurisdiction to secure the ends of justice by putting an end to the criminal case if it is of the view that continuation of criminal proceedings would tantamount to abuse of process of law despite settlement and compromise – In present case, High Court was satisfied that compromise and settlement was properly reached between the Petitioners and the Respondent No.2.

*Inderpal Thukral & Anr.* v. *State & Anr.* ..... *705*



— Sections 420/406/120-B/34 – Quashing of FIR in non-compoundable offences – Inherent powers of the High Court may be exercised if the possibility of conviction is remote and bleak and the continuation of criminal case would put the accused to great oppression and prejudice. HELD: Inherent power to quash FIR in cases involving non-compoundable offences may be exercised if in view of the High Court, there being a compromise between the offender and the victim, the possibility of conviction is remote and bleak and the continuation of criminal case would put the accused to great oppression and prejudice and that extreme injustice would be caused to the offender despite full and complete settlement and compromise with the victim – High Court is well within its jurisdiction to secure the ends of justice by putting an end to the criminal case if it is of the view that continuation of criminal proceedings would tantamount to abuse of process of law despite settlement and compromise – In present case, High Court was satisfied that compromise and settlement was properly reached between the Petitioners and the Respondent No.2.

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— Section 304A—Indian Medical Council Act, 1956—Section 20A and 33 (m)—Daughter of Respondent No.2 died in Max Hospital—Her husband lodged complaint with police alleging wrong treatment and negligence—Police sought opinion of Delhi Medical Council (DMC) as to whether there was any negligence involved in this case—DMC concluded that no medical negligence could be attributed to doctors in treatment administered to deceased—Father of deceased preferred appeal under MCI Regulations—Ethics Committee found petitioner and another doctor guilty of negligence and adjourned deliberations to next meeting to decide quantum of punishment to be imposed on those found guilty—Order was challenged by way of Writ Petition which was disposed of with directions

to MCI to pass a final order both on merits as well as on question of jurisdiction after giving due opportunity to aggrieved parties—Contrary to those directions, petitioner filed application seeking dismissal of appeal on grounds of jurisdiction without entering into merits of case—MCI concluded vide impugned order that it had jurisdiction to deal with Matter—Order challanged before HC—Plea taken, decision of DMC was in nature of opinion sought by Police authorities and no appeal could have been maintained against such a decision—Therefore, entire proceedings before MCI were without jurisdiction—Per contra plea taken, MCI had concurrent jurisdiction to deal with offences and complaints of professional misconduct alongwith State Medical Council—Matter required examination on merits and present writ petition was filed only to interdict conclusion of proceedings before MCI—Held—Instances of offences and/or professional misconduct which constitute infamous act, and which call for disciplinary action, both MCI and/or State Medical Council are empowered to deal with such a matter and in this exercise they are not precluded from considering and dealing with any other form of professional misconduct which is not listed/categorized under Regulation 7—MCI exercises both original as well as appellate jurisdiction—If MCI, is made cognizant of certain facts pertaining to what would constitute ordinarily in "letter and spirit" a professional misconduct by a registered medical practitioner then, it would have necessary authority to deal with matter—MCI can on its own take action on infraction of regulation or infamous act or professional conduct coming to its notice—Appeal provision would have no relevance, since MCI has exercised original jurisdiction—MCI has correctly concluded that it makes no distinction between a representation and a complaint—It is not form but substance of representation, which would decide that: whether or not it raises issue and, in that sense, a complaint of professional misconduct by a registered medical practitioner—If MCI was



made cognizent of act which prima facie had ingredients of professional misconduct then it would have necessary original jurisdiction to deal with such material placed before it—Nomenclature given to action by father of deceased would have no relevance—MCI can treat action of father of deceased as original complaint and deal with matter in accordance with extent provisions of MCI Regulations—While dealing with cases of professional misconduct, MCI is not fettered with rules of locus and therefore fact father of deceased was not a original complainant in that he was not a Class I Legal Heir of deceased would make no difference—There is no merit in writ petition.



— Section 304A—Indian Medical Council Act, 1956—Section 20A and 33 (m)—Daughter of Respondent No.2 died in Max Hospital—Her husband lodged complaint with police alleging wrong treatment and negligence—Police sought opinion of Delhi Medical Council (DMC) as to whether there was any negligence involved in this case—DMC concluded that no medical negligence could be attributed to doctors in treatment administered to deceased—Father of deceased preferred appeal under MCI Regulations—Ethics Committee found petitioner and another doctor guilty of negligence and adjourned deliberations to next meeting to decide quantum of punishment to be imposed on those found guilty—Order was challenged by way of Writ Petition which was disposed of with directions to MCI to pass a final order both on merits as well as on question of jurisdiction after giving due opportunity to aggrieved parties—Contrary to those directions, petitioner filed application seeking dismissal of appeal on grounds of jurisdiction without entering into merits of case—MCI concluded vide impugned order that it had jurisdiction to deal with Matter—Order challanged before HC—Plea taken,

decision of DMC was in nature of opinion sought by Police authorities and no appeal could have been maintained against such a decision—Therefore, entire proceedings before MCI were without jurisdiction—Per contra plea taken, MCI had concurrent jurisdiction to deal with offences and complaints of professional misconduct alongwith State Medical Council—Matter required examination on merits and present writ petition was filed only to interdict conclusion of proceedings before MCI—Held—Instances of offences and/or professional misconduct which constitute infamous act, and which call for disciplinary action, both MCI and/or State Medical Council are empowered to deal with such a matter and in this exercise they are not precluded from considering and dealing with any other form of professional misconduct which is not listed/categorized under Regulation 7—MCI exercises both original as well as appellate jurisdiction—If MCI, is made cognizant of certain facts pertaining to what would constitute ordinarily in "letter and spirit" a professional misconduct by a registered medical practitioner then, it would have necessary authority to deal with matter—MCI can on its own take action on infraction of regulation or infamous act or professional conduct coming to its notice—Appeal provision would have no relevance, since MCI has exercised original jurisdiction—MCI has correctly concluded that it makes no distinction between a representation and a complaint—It is not form but substance of representation, which would decide that: whether or not it raises issue and, in that sense, a complaint of professional misconduct by a registered medical practitioner—If MCI was made cognizent of act which prima facie had ingredients of professional misconduct then it would have necessary original jurisdiction to deal with such material placed before it—Nomenclature given to action by father of deceased would have no relevance—MCI can treat action of father of deceased as original complaint and deal with matter in accordance with extent provisions of MCI Regulations—While dealing with



cases of professional misconduct, MCI is not fettered with rules of locus and therefore fact father of deceased was not a original complainant in that he was not a Class I Legal Heir of deceased would make no difference—There is no merit in writ petition.

*Dr. Alka Gupta* v. *Medical Council of India & Anr.* ..... *669*

— 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 MEDICAL COUNCIL ACT, 1956**—Section 20A and 33 (m)—Daughter of Respondent No.2 died in Max Hospital—Her husband lodged complaint with police alleging wrong treatment and negligence—Police sought opinion of Delhi Medical Council (DMC) as to whether there was any negligence involved in this case—DMC concluded that no medical negligence could be attributed to doctors in treatment administered to deceased—Father of deceased preferred appeal under MCI Regulations—Ethics Committee found petitioner and another doctor guilty of negligence and adjourned deliberations to next meeting to decide quantum of punishment to be imposed on those found guilty—Order was challenged by way of Writ Petition which was disposed of with directions to MCI to pass a final order both on merits as well as on question of jurisdiction after giving due opportunity to aggrieved parties—Contrary to those directions, petitioner filed application seeking dismissal of appeal on grounds of



jurisdiction without entering into merits of case—MCI concluded vide impugned order that it had jurisdiction to deal with Matter—Order challanged before HC—Plea taken, decision of DMC was in nature of opinion sought by Police authorities and no appeal could have been maintained against such a decision—Therefore, entire proceedings before MCI were without jurisdiction—Per contra plea taken, MCI had concurrent jurisdiction to deal with offences and complaints of professional misconduct alongwith State Medical Council—Matter required examination on merits and present writ petition was filed only to interdict conclusion of proceedings before MCI—Held—Instances of offences and/or professional misconduct which constitute infamous act, and which call for disciplinary action, both MCI and/or State Medical Council are empowered to deal with such a matter and in this exercise they are not precluded from considering and dealing with any other form of professional misconduct which is not listed/categorized under Regulation 7—MCI exercises both original as well as appellate jurisdiction—If MCI, is made cognizant of certain facts pertaining to what would constitute ordinarily in "letter and spirit" a professional misconduct by a registered medical practitioner then, it would have necessary authority to deal with matter—MCI can on its own take action on infraction of regulation or infamous act or professional conduct coming to its notice—Appeal provision would have no relevance, since MCI has exercised original jurisdiction—MCI has correctly concluded that it makes no distinction between a representation and a complaint—It is not form but substance of representation, which would decide that: whether or not it raises issue and, in that sense, a complaint of professional misconduct by a registered medical practitioner—If MCI was made cognizent of act which prima facie had ingredients of professional misconduct then it would have necessary original jurisdiction to deal with such material placed before it—Nomenclature given to action by father of deceased would

have no relevance—MCI can treat action of father of deceased as original complaint and deal with matter in accordance with extent provisions of MCI Regulations—While dealing with cases of professional misconduct, MCI is not fettered with rules of locus and therefore fact father of deceased was not a original complainant in that he was not a Class I Legal Heir of deceased would make no difference—There is no merit in writ petition.

*Dr. Alka Gupta* v. *Medical Council of India & Anr.* ..... *669*

**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*

**INDIAN MEDICAL COUNCIL (PROFESSIONAL, ETIQUETTE AND ETHICS) REGULATIONS, 2002**—Regulation 7, 8.1, 8.2, 8.7 and 8.8—Constitution of India, 1950—Article 226—Indian Evidence Act. 1872—Section 45—Indian Penal Code, 1860—Section 304A—Indian Medical Council Act, 1956—Section 20A and 33 (m)—Daughter of

Respondent No.2 died in Max Hospital—Her husband lodged complaint with police alleging wrong treatment and negligence—Police sought opinion of Delhi Medical Council (DMC) as to whether there was any negligence involved in this case—DMC concluded that no medical negligence could be attributed to doctors in treatment administered to deceased—Father of deceased preferred appeal under MCI Regulations—Ethics Committee found petitioner and another doctor guilty of negligence and adjourned deliberations to next meeting to decide quantum of punishment to be imposed on those found guilty—Order was challenged by way of Writ Petition which was disposed of with directions to MCI to pass a final order both on merits as well as on question of jurisdiction after giving due opportunity to aggrieved parties—Contrary to those directions, petitioner filed application seeking dismissal of appeal on grounds of jurisdiction without entering into merits of case—MCI concluded vide impugned order that it had jurisdiction to deal with Matter—Order challanged before HC—Plea taken, decision of DMC was in nature of opinion sought by Police authorities and no appeal could have been maintained against such a decision—Therefore, entire proceedings before MCI were without jurisdiction—Per contra plea taken, MCI had concurrent jurisdiction to deal with offences and complaints of professional misconduct alongwith State Medical Council—Matter required examination on merits and present writ petition was filed only to interdict conclusion of proceedings before MCI—Held—Instances of offences and/or professional misconduct which constitute infamous act, and which call for disciplinary action, both MCI and/or State Medical Council are empowered to deal with such a matter and in this exercise they are not precluded from considering and dealing with any other form of professional misconduct which is not listed/categorized under Regulation 7—MCI exercises both original as well as appellate jurisdiction—If



MCI, is made cognizant of certain facts pertaining to what would constitute ordinarily in "letter and spirit" a professional misconduct by a registered medical practitioner then, it would have necessary authority to deal with matter—MCI can on its own take action on infraction of regulation or infamous act or professional conduct coming to its notice—Appeal provision would have no relevance, since MCI has exercised original jurisdiction—MCI has correctly concluded that it makes no distinction between a representation and a complaint—It is not form but substance of representation, which would decide that: whether or not it raises issue and, in that sense, a complaint of professional misconduct by a registered medical practitioner—If MCI was made cognizent of act which prima facie had ingredients of professional misconduct then it would have necessary original jurisdiction to deal with such material placed before it—Nomenclature given to action by father of deceased would have no relevance—MCI can treat action of father of deceased as original complaint and deal with matter in accordance with extent provisions of MCI Regulations—While dealing with cases of professional misconduct, MCI is not fettered with rules of locus and therefore fact father of deceased was not a original complainant in that he was not a Class I Legal Heir of deceased would make no difference—There is no merit in writ petition.

*Dr. Alka Gupta* v. *Medical Council of India & Anr.* ..... *669*

**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.



**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*

**MILITARY SECURITY INSTRUCTIONS, 2001**—Para 193—Constitution of India, 1950—Article 14 and 19(1) (a)—Indian Evidence Act, 1872—Section 126 to 129—CIC directed petitioners to supply entire information to extent not supplied after redacting names and designations of officers who made notings—Captioned Writ Petitions file raising a common question of law whether petitioners are obliged to furnish information to respondent which is retained by them in record, in form of file notings as also opinion of Judge Advocate General (JAG) found in records of respondents under relevant provisions of R.T.I. Act—Plea taken, CIC in several cases, contrary to decision in these cases has taken view that file nothings which include legal opinions, need not be disclosed, as it may effect outcome of legal action instituted by applicant/querist seeking information—This was not permissible as it was a bench of co-equal strength—In case, CIC disagreed with view taken earlier, it ought to have referred matter to a larger Bench—There was a fiduciary relationship between officers in chain of command, and those, who were placed in higher echelons, of what was essentially a pyramidical

structure—Since JAG Branch has a duty to act and give advice on matters falling within ambit of its mandate, disclosure of information would result in a breach of fiduciary relationship qua those who give advice and final decision making authority, which is recipient of advice—Held—File notings and opinions of JAG branch are information, to which, a person taking recourse to RTI Act can have access provided it is available with concerned public authority—In institutional set up, it can hardly be argued that notes on file qua a personnel or employee of institution, such as Army, whether vis-a-vis his performance or his conduct, in any manner, can benefit person, who generates note or renders opinion—As a matter of fact, person who generates note or renders opinion is presumed to be a person who is objective and not conflicted by virtue of his interest in matter, on which, he is called upon to deliberate—If that position holds, then it can neither be argued nor can it be conceived that notes on file or opinions rendered in institutional setup by one officer qua working or conduct of another officer brings forth a fiduciary relationship—A denial of access to such information to information seekers, i.e., respondents herein, especially in circumstances that said information is used admittedly in coming to conclusion that delinguent officers were guilty, and in determining punishment to be accorded to them, would involve a serious breach of principles of natural justice, as non-communication would entail civil consequences and would render such a decision vulnerable to challenge under Article 14 of Constitution of India provided information is sought and was not given—Right to information is a constitutional right under Article 19(1) (a) of Constitution of India—Institution i.e. Indian Army in present case cannot by any stretch of imagination be categorized as a client—Legal professional privilege extends only to a barrister, pleader, attorney or Vakil—Persons who have generated opinions and/or notings on file in present case do not fall in any of these categories—



Information in issue cannot be denied to Parliament and State Legislature—Therefore, necessary consequences of providing information to respondents should follow—CIC is however advised in future to have regard to discipline of referring matters to a larger bench where a bench of coordinate strength takes a view which is not consistent with view of other—Writ petitions dismissed.

*Union of India & Ors.* v. *Col. V.K. Shad*..... *625*

**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.

*National Insurance Company Ltd.* v. *Than Singh & Ors.* ..... *327*

— 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.

*Reliance General Insurance Co. Ltd.* v. *Nisha Devi & Ors.* ..... *371*

— 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.

*Madhu & Ors.* v. *Kuldeep & Ors.* ..... *419*

— S. 163A—These Cross Appeals arise out of a common judgment in Suit No. 931/2008 decided by the Motor Accident Claims Tribunal, (the Tribunal) by judgment dated 28.03.2009 whereby a compensation of Rs. 5,33,000/- was awarded in favour of Pitamber & Ors., for the death of Smt. Harpyari, who died in a motor accident on 27.11.2006—The deceased's income was claimed to be Rs. 39,000/- per annum. The Claimants' grievance is that the deceased's age was taken as 53 years to select the multiplier '11' whereas according to the postmortem report, the age was 40 yeas. Thus, it is contended that the appropriate multiplier was '15' instead of '11' as taken by the Tribunal—The loss of dependency is liable to be enhanced—Per contra, learned counsel for the Insurer submits that the award of compensation on the basis of the age as given in the Ration Card was rightly taken, in preference to the age mentioned in the Postmortem Report as the Ration Card produced by the Claimants was a more authentic document than a Postmortem Report not inclined to agree with the contention raised on behalf of the Claimants that the age of the deceased as mentioned in the Postmortem Report should have been into consideration for selection of the multiplier. The Claimants have not come forward with any explanation as to why the age in the Ration Card was wrongly mentioned. The deceased had six children including four major children and, therefore, it was unbelievable that she would be just 40 years old—In any case, in the absence of any other evidence with regard to proving of age or any explanation for the fact

the age in the Ration Card was wrongly mentioned, the Tribunal rightly took the deceased's age to be 53 years as mentioned in the Ration Card.

*New India Assurance Co. Ltd.* v. *Pitamber & Ors.* ... *453*

— Section 166—Section 163 A—Claim for compensation—Accident took place on 31.10.2001—Dumper hit tempo at the dead end of night—Dumper driven at a very fast speed—Death of a bachelor, aged about 23 years—Tribunal awarded compensation of Rs. 1,70,296/-—Aggrieved appellant/ respondent preferred appeal—Alleged no finding as to negligence recorded by the Tribunal—In the absence of any proof of earning, increase of 50% towards future prospects is without any basis—Held—Proof of negligence essential; to be established on preponderance of probability—Vehicle suddenly came on carriage way meant for the traffic from opposite direction—Was driven at a fast speed at the dead of night—Criminal case registered against him—No representation made against it—Rash and negligence driving proved—Compensation not exorbitant or excessive—Appeal dismissed.

*M.C.D.* v. *Sureshi Devi* ..... *475*

— Section 163-A—Section 147(1)(b)—Workmen's Compensation Act, 1923—Truck owned by respondent no.6—Death of helper sleeping under the truck—Driver (respondent no. 5) failed to take care—Tribunal awarded compensation of Rs. 5,63,200/-—Aggrieved, Insurance Company/Appellant preferred the appeal and contended that the accident took place because of the negligence of the deceased himself, liability to pay the compensation restricted under the Workmen's Compensation Act and excess be paid by the owner/respondent no.6—Held, Appellant liability not statutory but contractual, under the W.C. Act—Cannot avoid its liability to pay compensation—Liable to pay compensation



to the extent of its liability under the W.C. Act and rest payable by respondent no.6—Appeal disposed of.

*New India Assurance Co. Ltd.* v. *Krishna & Ors.* ..... *487*

— Section 163-A—Section 140—The deceased borrowed scooter, from its owner—Accident on account of rash and negligent driving of the deceased—Mother filed claim for compensation—Tribunal held, since the deceased borrowed a two wheeler from its owner, respondent had no liability to pay the compensation—Dismissed the petition—Aggrieved, claimant preferred appeal—Contended, claimant being a poor widow, entitled to compensation—Held, accident took place on account of neglect and default of the deceased; legal representative not entitled to compensation, from the owner—Appeal dismissed.

*Sushila* v. *Brijesh & Ors.* ..... *511*

— Deceased boarded a DTC Bus—After reaching some distance, someone placed a knife on Driver's neck commanding him to stop the DTC bus—During this commotion, the Driver also heard people at the rear say that a person; i.e. Deceased had been killed—After the persons with knives alighted, the Driver reached Police Station and made a statement to I.O.—Deceased was removed to Hospital where he was declared brought dead—Claim Petition filed against DTC by the Legal Heirs—Claims Tribunal held that accident had arisen out of use of Motor Vehicle—In Appeal, Held that—Admittedly the robbers wanted to rob the passengers—Possibly, there was an act by the Deceased to resist the robbery, which led to his stabbing by Deceased—Thus, act of committing robbery was the felonious act intended and act of stabbing or causing death was not originally intended—Therefore, no escape from conclusion that death of deceased was accidental arising out of use of DTC bus.

*Delhi Transport Corporation* v. *Shakeela Parveen & Ors.* ..... *602*

**NEGOTIABLE INSTRUMENTS ACT, 1881**—Section 138 – Compounding of offence – Compromise application jointly moved by the complainant and the accused – Prayer for acquittal – Reliance placed on the Guidelines for compounding the offence under Section 138 by way of imposition of costs, as laid down by SC. HELD: Clause (c) of the said Guidelines applies to compromise application made before Sessions Court or a High Court in revision or appeal and allows compounding of the offence under Section 138 on the condition that the accused pays 15% of the cheque amount by way of costs – Petitioner acquitted subject to payment of 15% of the cheque amount as costs with Delhi High Court Legal Services.

*Bhim Sain Taneja* v. *State (NCT of Delhi) & Anr.... 699*

— Section 138 – Complaints filed against the company as well as the ex-Director of the company– Whether maintainable even after the Director of the Company had resigned – Held – No. HELD: Since, the Petitioner was not a Director of the company on the date when the offence was allegedly committed, therefore, he cannot be prosecuted under Section 141 of the NI Act, 1881 - Petitioner had resigned from directorship of the company and such resignation was duly communicated to the ROC in the year 2000 whereas the offence under Section 138 of NI Act, 1881 was alleged to have been committed in the year 2005.

*Amul Urhwareshe* v. *State (NCT of Delhi) & Anr. ... 702*

— Section 138 – Holder of the cheque must make a demand for payment of the cheque amount by giving notice in writing to the drawer with regard to dishonor of cheque – is one of the conditions precedent.

— Section 138(b) – drawing of notice – no form of notice has been prescribed – whether demand of interest in the notice would render the notice invalid? – Held: No. Demand for



payment of interest in the notice could not lose its character as a notice under Section 138.

— Section 138 – Respondent issued hand written notice dated 27.4.2012 – received by petitioner on 29.4.2012 – on failure of petitioner to pay, cause of action to file complaint arose on 14.5.2012.

— Section 142(2) – Respondent under obligation to file complaint within one month from the date the cause of action arose – cause of action subsisted till 14.6.2012 – complaint filed on 5.7.2012 – barred under Section 142(6) – complaint and summoning order quashed.

*Maninder Singh Narula* v. *Pawan Kumar Ralli..... 784*

**PENSION REGULATIONS FOR THE ARMY, 1961**—Regulation 173 and 173-A—Whether the Petitioner was discharged on account of medical disability (lower medical category) and thereby whether he is entitled to award of disability pension, benefits under Regulation 173-A of the Pensions Regulation for Army ?—Held, The Regulation 173-A applies only to individuals on their having being placed in lower medical category (medical disability), but here the Petitioner was discharges not on the account of disability and on the account of repeated disciplinary proceedings against him, where he was found guilty.

Ratio Decidendi:

"Regulation 173 and 173-A applies to a person invalidated out of service on the account of a disability attributable to military service. Further it shall apply to individuals discharged on the account being placed in low medical category".

*Ravinder Singh* v. *Union of India & Ors.... 687*

**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.

*Skipper Bhawan Flat Buyers Assn. & Ors.* v. *Skipper Towers Pvt. Ltd.* ..... *29*



**RECOVERY OF DEBTS DUE TO BANKS & FINANCIAL INSTITUTIONS ACT, 1993 (RDB ACT)**—Whether the provisions of Arbitration & Conciliation Act, 1996 are excluded in respect of proceedings under Recovery of Debts Due to Banks & Financial Institutions Act, 1993—Held, claim of money by the bank or financial institution against the borrower is a 'right in personam' with no element of any public interest and hence arbitrable—Debt Recovery Tribunal is simply a replacement of Civil Court—No special rights are created in favour of the banks or financial institutions under RDB Act—Matters which come within the scope and jurisdiction of Debt Recovery Tribunal are arbitrable.

Ratio Decidendi

"If a particular enactment creates special rights and obligations and gives special powers to tribunals which are not with the civil Courts such as Tribunals constitute under the Rent Control Act and the Industrial Disputes Act, the disputes arising under such enactments would not be arbitrable."

*HDFC Bank Ltd.* v. *Satpal Singh Bakshi* ..... *583*

**RIGHT TO INFORMATION ACT, 2005**—2(f), 2(h), 2(i), 2(j), 3, 6(2), 7(9), 8(1) (e), (g), (h), (i) and (j), 9, 10(1), 11, 19(8) (b), 20 (1) 22—Regulations For The Army, 1987 (Revised)—Para 37 (c)—Military Security Instructions, 2001—Para 193—Constitution of India, 1950—Article 14 and 19(1) (a)—Indian Evidence Act, 1872—Section 126 to 129—CIC directed petitioners to supply entire information to extent not supplied after redacting names and designations of officers who made notings—Captioned Writ Petitions file raising a common question of law whether petitioners are obliged to furnish information to respondent which is retained by them in record, in form of file notings as also opinion of Judge Advocate General (JAG) found in records of respondents under relevant provisions of R.T.I. Act—Plea taken, CIC in several cases,

contrary to decision in these cases has taken view that file nothings which include legal opinions, need not be disclosed, as it may effect outcome of legal action instituted by applicant/ querist seeking information—This was not permissible as it was a bench of co-equal strength—In case, CIC disagreed with view taken earlier, it ought to have referred matter to a larger Bench—There was a fiduciary relationship between officers in chain of command, and those, who were placed in higher echelons, of what was essentially a pyramidical structure—Since JAG Branch has a duty to act and give advice on matters falling within ambit of its mandate, disclosure of information would result in a breach of fiduciary relationship qua those who give advice and final decision making authority, which is recipient of advice—Held—File notings and opinions of JAG branch are information, to which, a person taking recourse to RTI Act can have access provided it is available with concerned public authority—In institutional set up, it can hardly be argued that notes on file qua a personnel or employee of institution, such as Army, whether vis-a-vis his performance or his conduct, in any manner, can benefit person, who generates note or renders opinion—As a matter of fact, person who generates note or renders opinion is presumed to be a person who is objective and not conflicted by virtue of his interest in matter, on which, he is called upon to deliberate—If that position holds, then it can neither be argued nor can it be conceived that notes on file or opinions rendered in institutional setup by one officer qua working or conduct of another officer brings forth a fiduciary relationship—A denial of access to such information to information seekers, i.e., respondents herein, especially in circumstances that said information is used admittedly in coming to conclusion that delinguent officers were guilty, and in determining punishment to be accorded to them, would involve a serious breach of principles of natural justice, as non-communication would entail civil consequences and would



render such a decision vulnerable to challenge under Article 14 of Constitution of India provided information is sought and was not given—Right to information is a constitutional right under Article 19(1) (a) of Constitution of India—Institution i.e. Indian Army in present case cannot by any stretch of imagination be categorized as a client—Legal professional privilege extends only to a barrister, pleader, attorney or Vakil—Persons who have generated opinions and/or notings on file in present case do not fall in any of these categories—Information in issue cannot be denied to Parliament and State Legislature—Therefore, necessary consequences of providing information to respondents should follow—CIC is however advised in future to have regard to discipline of referring matters to a larger bench where a bench of coordinate strength takes a view which is not consistent with view of other—Writ petitions dismissed.

*Union of India & Ors.* v. *Col. V.K. Shad*..... *625*

— Constitution of India 1950—Article 14, Constitution of India Article 16—Whether the Central Administrative Tribunal was right in rejecting the claim of the petitioner for being entitled to promotion from the year 2003, that in when according to him, he had requisite period of service for being considered for promotion to the next higher grade?—Held, in view of clause 3.4.2 of Official Memorandum (dated 29/05/1986), a person who is initially taken on deputation and absorbed later cannot be granted promotion before his absorption and it should be considered from the date he was absorbed in the department. Thus, the said Tribunal was right in rejecting the claim of the Petitioner.

Ratio Decidendi:

"Promotion to any official getting absorbed after deputation according to the Recruitment Rules of the Department of Personnel and Training should affect filling up vacancies, and

not affect previous promotions made before the said absorption."

*V.K. Joshi* v. *Union of India & Ors.* ..... *691*

**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.

*Amina Bi Kaskar Decd. Thr Lrs.* v. *Union of India & Ors.* ..... *398*

**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.

*Air Marshal Shiv Dev Singh* v. *Swadesh Bhardwaj* ..... *72*

**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.

*Raman Kumar* v. *Neelam Nagpal & Others*..... *264*

— 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.

*A.K. Narula* v. *Iqbal Ahmed and Ors.* ..... *315*

— 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.

*Davender Kumar Sharma* v. *Mohinder Singh & Ors.* ..... *409*

**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*



**WORKMEN'S COMPENSATION ACT, 1923**—Truck owned by respondent no.6—Death of helper sleeping under the truck—Driver (respondent no. 5) failed to take care—Tribunal awarded compensation of Rs. 5,63,200/-—Aggrieved, Insurance Company/Appellant preferred the appeal and contended that the accident took place because of the negligence of the deceased himself, liability to pay the compensation restricted under the Workmen's Compensation Act and excess be paid by the owner/respondent no.6—Held, Appellant liability not statutory but contractual, under the W.C. Act—Cannot avoid its liability to pay compensation—Liable to pay compensation to the extent of its liability under the W.C. Act and rest payable by respondent no.6—Appeal disposed of.

*New India Assurance Co. Ltd.* v. *Krishna & Ors.* ..... *487*