NOMINAL-INDEX
VOLUME-I, PART-I
JANUARY, 2011

Pages

National Insurance Co. Ltd. *v.* Raj Kumari & Ors. 1

Director of Income Tax (Exemption) *v.* M/s. Bagri Foundation 6

Sh. Tilak and Others *v.* Smt. Veena 15

Commissioner of Income Tax *v.* Dhanpat Rai 20

The Commissioner of Income Tax *v.* M/s Harparshad & Company Ltd. 22

Morgan Tectronics Ltd. *v.* CBI 29

Vijay Verma *v.* State (NCT) of Delhi & Anr. 36

Ex. L/NK Mahabir Prasad *v.* UOI and Ors. 43

Sanjay Bhardwaj & Ors. *v.* The State & Anr. 58

UOI *v.* Anil Puri 63

J.K. Sawhney *v.* Punjab National Bank 79

Vikas Saksena *v.* Union of India and Others 84

Alpine Agencies Pvt. Ltd. *v.* Commissioner of Value Added Tax & Others 108

Govt. of NCT of Delhi & Ors. *v.* Naresh Kumar 132

Vinod Kumar Kanojia *v.* UOI and Ors. 151

Dharmendra Kr. Lila *v.* Registrar of Companies 158

Dr. Rajiva Kumar Tiwari *v.* Union of India & Ors. 161

Mahabir Prasad & Another *v.* State 166

Sardar Gurdial *v.* Dr. Sandeep Sharma 193

EX-Const. Vijender Singh *v.* Union of India and Ors. 200

ABW Infrastructures Ltd. & Anr. *v.* Rail Land Development Authority 216

Chanchal Bhatti & Ors. *v.* State (NCT of Delhi) 243

M/s Kundan Infrastructures *v.* NDMC & Anr. 253

Machine Tools (India) Ltd. *v.* The Employees State Insurance Corporation 268

M/s. Genesis Printers *v.* Shri Rati Ram Jatav Presiding Officers & Ors. 279

Shahid Parvez *v.* Union of India & Ors. 297

M/s. South Delhi Maternity & Nursing Home (P) Ltd. *v.* MCD & Others 309

The Vaish Coop. Adarsha Bank Ltd. *v.* Sudhir Kumar Jain & Ors. 321

Neena Shad *v.* MCD & Ors. 342

Ram Chander Singh Prem Dutt Sharma *v.* CBI 372

Samiuddin @ Chotu *v.* The State of NCT Delhi 399

Const. Seth Pal Singh *v.* UOI & Ors. 404

Praveen Kumar Wadhwa *v.* M/s Endure Capital (P) Ltd. 421

Parveen Singh @ Kalia *v.* State of NCT of Delhi 426

Raju Sharma & Ors. *v.* Union of India & Anr. 431

Mrs. Indira Rai *v.* Shri Bir Singh 442

SUBJECT-INDEX
VOLUME-I, PART-I
JANUARY, 2011

ADMINISTRATIVE TRIBUNAL ACT, 1985—Section 19,20 & 21—Aggrieved petitioners by orders of Administrative Tribunal filed writ petitions—As Per, Petitioners who are husband and wife, they were appointed as Medical Officers on contractual basis by MCD from time to time MCD extended their term of appointment and their remuneration also enhanced—Petitioner no. 1 filed three complaints, levelling sexual harassment allegations against colleague and seniors—Sexual Harassment Committee dismissed those complaints and also recommended strict disciplinary action against both the petitioners—Accordingly, Commissioner MCD vide office letter, took decision not to continue with engagement of petitioners with MCD—Aggrieved by said office order petitioner no. 1 filed writ petition which was dismissed and appeal preferred by her also dismissed—Thereafter petitioner no. 1 filed another writ petition which was also dismissed—On the other hand, petitioner no. 2 after dismissal of application of petitioner no. 1 filed application before Administrative Tribunal which was dismissed and review filed by him also dismissed—Petitioners urged in writ petitions MCD discriminated against petitioners by not extending their term of appointment as term of other Medical Officers who were similarly placed and also who were juniors to petitioners were granted extension of term—Also MCD, did not hold inquiry in terms of Article 311 (2) before issuing office order. Held : In the case of an appointment to a permanent post in a government service on probation or on an officiating basis, the servant so appointed does not acquire any substantive right to the post and consequently cannot complain, any more than a private servant employed on probation or on an officiating basis can do, if his service is terminated at any time—Likewise, an appointment to a temporary post in a government service

may be substantive or on probation or on an officiating basis—The servant so appointed acquires no right to the post and his service can be terminated at any time except in one case when the appointment to a temporary post is for a definite period—A person appointed on contractual basis does not enjoy the protection of Article 311 (2) as he is not a member of a Civil Service of the Union or a All India Services or a Civil Services of a State or holds a civil post under the Union or a State.

Neena Shad v. *MCD & Ors.* *342*

BORDER SECURITY FORCE ACT, 1968—Section 117(2)—Border Security Force Rules, 1969—Rule 142—Petitioner charged with attempt to commit suicide—Respondents contend petitioner entered plea of guilty before Summary Security Force Court (SSFC) and dismissed him from service—Order challenged in High Court—Plea taken, petitioner had never pleaded guilty to charge—Per contra, plea taken petitioner had prayed for mitigation of punishment—Held—Proceedings of court do not contain signatures of petitioner at any place at all in SSFC which militate against petitioner having so pleaded—Court is required to test legality and validity of findings returned by SSFC based on material before court and conviction of petitioner cannot be premised on any thing which may have come before them subsequently—Record made by hospital authority and police does not support charge for which petitioner was arraigned—Petitioner reinstated with all consequential benefits.

EX-Const. Vijender Singh v. *Union of India and Ors.* *200*

BORDER SECURITY FORCE RULES, 1969—Rule 142—Petitioner charged with attempt to commit suicide—Respondents contend petitioner entered plea of guilty before Summary Security Force Court (SSFC) and dismissed him

from service—Order challenged in High Court—Plea taken, petitioner had never pleaded guilty to charge—Per contra, plea taken petitioner had prayed for mitigation of punishment—Held—Proceedings of court do not contain signatures of petitioner at any place at all in SSFC which militate against petitioner having so pleaded—Court is required to test legality and validity of findings returned by SSFC based on material before court and conviction of petitioner cannot be premised on any thing which may have come before them subsequently—Record made by hospital authority and police does not support charge for which petitioner was arraigned—Petitioner reinstated with all consequential benefits.

EX-Const. Vijender Singh v. *Union of India and Ors.* *200*

CCS PENSION RULES, 1972—Rule 9—CCS (CCA) Rules, 1965—Rule 14—Charge Sheet issued to respondent set aside by Administrative Tribunal on grounds of delay, being mere formality as decision was already taken to punish the respondent and as respondent had already retired, penalty under Rule 9 could not be inflicted—Order challenged in High Court—Held—Starting point while considering delay is not date or period when misdemeanour took place but when department gains knowledge of relevant facts constituting misdemeanour—40% time consumed by respondent and noting steps taken by department in pursuing matter, no delay in issuing charge sheet—Advice of UPSC that considering nature and seriousness of charge it was case of major penalty is prima facie view and not final view which must await evidence being brought on record and findings returned by IO—Under Rule 9, order which can be passed is to recover pecuniary loss caused to government or impose a cut in pension payable of gratuity or both in full or part upon proof of guilt but pertaining to grave misconduct or negligence—With rampant abuse and disabuse of financial power, it cannot be said if

proved, such kind of misadventures are not grave misconduct—Order of Tribunal quashed.

UOI v. *Anil Puri* *63*

CCS (TEMPORARY SERVICE) RULES, 1965—Rule 5—Indian Penal Code, 1860—Section 363/366/376—Respondents appointed on probation against temporary post of Warder Prison in Tihar—Pursuant to registration FIR, respondents sent to judicial custody—Competent Authority terminated services by non stigmatic orders of discharge simpliciter—Representations made to appointing authority to re-induct respondents in service after their acquittal in criminal trial rejected—Representations styled as appeals also rejected—Impugned orders challenged before Administrative Tribunal to set aside order of termination—Plea taken, order terminating services being penal in nature, department was obliged to hold enquiry—Administrative Tribunal allowed application—Order of Tribunal challenged in High Court—Plea taken, applications before Tribunal were time barred—Respondents being accused of serious offences and arrest was motive and not foundation of order terminating their services—Held, Non statutory representation can never extend limitation—Merely by labelling representation as appeal and said work being reflected in order communicating rejection of representation would not make representation appeal—It is substance which matters not label—Representations questioning order terminating services were highly belated and barred by limitation before Tribunal—Employer has legal right to dispense with services of employee without anything more during or at end of prescribed period—Where no findings are arrived at any inquiry or no inquiry is held but employees chooses to discontinue services of employee against whom complaints are received it would be a case of complaints motivating action and would not be bad—Order of Tribunal quashed.

Govt. of NCT of Delhi & Ors. v. *Naresh Kumar* *132*

CENTRAL CIVIL SERVICE (PENSION) RULES—Rule 41—Application of petitioner for grant of compassionate allowance rejected on ground of his dismissal after disciplinary enquiry as petitioner was delinquent of disobedient nature and habitual of being absent—Compassionate allowance admissible only in those cases where delinquent had been honest and dedicated during whole service period—Order challenged in High Court—Held—Conduct of petitioner for purposes of award of compassionate allowance has to be evaluated by authority considering such application taking totality of record into consideration and cannot be premised on isolated instances or specific instances of misconduct for which employee may have been penalized—Commendations, rewards and positive comments in ACR have not been taken into consideration—Respondents erred in passing impugned order and failed to exercise discretion conferred upon them in accordance with law and applicable rules—Petitioner entitled to award of compassionate allowance in terms of applicable rules and guidelines.

Ex. L/NK Mahabir Prasad v. *UOI and Ors.* *43*

CENTRAL CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES, 1957—Rule 15 (1)—Inquiry officer absolved petitioner of charges—Disciplinary authority held that enquiry was not properly conducted and directed de novo inquiry by new IO—Petitioner absolved of first charge and found guilty of second charge—Disciplinary authority held petitioner guilty of both charges—Notice with copy of report of IO served on petitioner—After considering representation, Disciplinary authority imposed penalty of removal from service—On revision, penalty modified from removal from service to compulsory retirement—Order Challenged in High Court—Plea taken, action of respondents in directing second inquiry is without legal competence and jurisdiction—Disciplinary authority had arrived at a conclusion

that petitioner was guilty of both charges—Notice to petitioner after arriving at such conclusion calling upon petitioner to submit representation was meaningless—Held No rule or regulation prescribe second inquiry on identical charges by concerned authority—Disciplinary authority failed to follow a procedure prescribed by law - It was open to disciplinary to record further evidence or call material which had been ignored by IO to be produced after giving full opportunity to petitioner or IO could have been asked to record further evidence—Direction to conduct second enquiry was unwarranted and illegal—Disciplinary authority is required to record its tentative reasons for such disagreement and give opportunity to charged officer to represent before it records its findings—Communication communicating conclusions already drawn by disciplinary authority gives no real opportunity to petitioner to make a representation in respect of either points of disagreement or proposed punishment—Opportunity to represent against points of disagreement has to be meaningful—Impugned order not sustainable—Petitioner directed to be reinstated in service with national seniority but without back wages.

Const. Seth Pal Singh v. *UOI & Ors.* *404*

CENTRAL SALES TAX ACT, 1956—Section 8—Appellant/assessee a Private limited company, traded in electric, electronic and refrigeration items which were notified to be first point items U/s 5 of the Act—As per, assessee/appellant, it purchased these goods from registered dealers and was not first seller of the goods, therefore had no liability to pay sales tax—Assessee/appellant had put up said claim before Assessing Officer for assessment for year 1996-97—Assessment done both under Delhi Sales Tax Act as well as Central Sales Tax Act and demand of Rs. 3679144 and Rs. 90172 respectively raised under the Acts—Assessee/appellant preferred two rounds of appeal but failed to get full relief—Ultimately, last

order of Income Tax Appellant Tribunal resulted in writ petition in which appellant/assessee agitated the plea, registered dealers from whom it purchased goods had paid sales tax—Therefore, not necessary for assessee to charge sales tax on those very items of goods when assessee sold same to consumers—Assessee/appellant failed to produce original books of accounts or invoices before Assessing Officer as same were lost for which FIR was lodged—Percontra, respondent pleaded appellant/assessee not entitled to relief in absence of original invoices. Held : provisions of Delhi Sales Tax Act and rules framed thereunder were mandatory in nature and it was necessary to construe them strictly in order to avoid misuse—Rule 9 requires the dealer to produce a declaration in or ST-3 duly filled in and signed by the dealer selling the goods which has to be produced in original—No doubt when these original forms ST-3 are lost or destroyed because of circumstances beyond the control of the assessee he should not be punished and denied the benefit - To avail the benefit the dealer has to necessarily seek exemption in the manner as provided in the rules - As the appellant failed to file satisfactory proof in the manner provided under the Act and rules, not entitled to the benefit as claimed.

Alpine Agencies Pvt. Ltd. v. *Commissioner of Value Added Tax & Others* *108*

CODE OF CIVIL PROCEDURE, 1908—Order 12 Rule 6—Execution Proceedings Applicability—Respondent filed suit for recovery of possession and arrears of rent—Decree in petition against appellant, judgment debtor—Respondent filed objections—Appellant contended that decree under Order 12 Rule 6 could not have been passed—Issue of ownership pending—Held—Respondent has filed objections to ward off warrants of attachment of property—Objections in the execution proceedings would not in any manner affect the relationship of landlord and tenant—Section 116 of Indian

Evidence Act creates an estoppel—Findings concurrent and called for no interference.

Praveen Kumar Wadhwa v. *M/s Endure Capital (P) Ltd.* *421*

— Order IX Rule 13—Industrial Disputes Act, 1947—Section 11—Labour Court by ex parte award directed reinstatement of workman with back wages and dismissed application of petitioner for setting aside exparte award—Orders challenged in HC—Plea taken, counsel without any reason stopped appearing in the case—Held—Ex parte award can be set aside on account of giving valid reasons for non appearance—A client can not be made to suffer for fault of his advocate—This can not be a general rule and facts of each case have to be seen—There is no grave prejudice in setting aside ex parte proceedings as at best on setting aside exparte proceedings case will be decided considering respective merits—Impugned order set aside.

M/s. Genesis Printers v. *Shri Rati Ram Jatav Presiding Officers & Ors.* *279*

CODE OF CRIMINAL PROCEDURE, 1973—Framing of charge—Indian Penal Code, 1860—Sections 420, 468, 471, 120-B—Accused company falsified accounts to show lesser liability and induced complainant Bank to sanction credit facility—Company did not pay back and cheated bank of more than Rs 6 crores—Trial Court framed charges against petitioner company u/sections 420, 468, 471 read with 120-B IPC—Whether company being a juristic person can have mens rea for the purpose of Section 120 B—Held, Company acts through its Board of Directors—If company can enter into contracts and perform other legal obligations it can also be party to criminal acts—If the company can have a right to do things through its Board of Directors it can have necessary mens rea also through its Board of Directors—Mens

rea can be fastened on the company if it is an essential element of crime on the ground that mens rea was present in the officers of the company who were acting as mind of the company—Just because offence u/s 420, 468 and 471 IPC included the punishment of imprisonment does not mean company cannot be prosecuted as court can always resort to punishment of imposition of fine—Petition dismissed.

Morgan Tectronics Ltd. v. *CBI* *29*

— Section 482—Indian Companies Act, 1956—Quashing of criminal complaint filed by the Registrar of Companies u/s 62 r/w section 68 of Companies Act in court of ACMM—Allegation that petitioners were signatories to prospectus containing misstatement of facts—Company had collected Rs 210 lakhs from public issue but had failed to accomplish the promises made in the prospectus—Held, compensation in respect of violation of Section 62 can be claimed by filing appropriate civil suit and no criminal complaint under Section 62 would be maintainable—U/s 68 prior sanction of the competent authority is required before launching prosecution which was not done in the case—Petition allowed and proceedings pending before ACMM quashed.

Dharmendra Kr. Lila v. *Registrar of Companies* *158*

— Section 200, 397, 401—Indian Penal Code, 1860—Section 500—Quashing of order of ASJ upholding order of MM dismissing the complaint filed by the petitioner u/s 200 Cr.PC against the respondent for defaming him—Mother of petitioner had filed criminal complaint against respondent and others u/s 133 Cr. PC before SDM—Responsdent vide a notice was called upon to reply—In response to notice respondent submitted reply which was considered as defamatory by the petitioner—Complaint u/s 200 filed before MM—Complaint dismissed—Contention of petitioner that the court below could not have gone into the merits of the case, as at the stage of

presummoning, statement made by the petitioner have to be accepted as true and correct—Held, eight exception to Section 499 IPC applicable—Reply filed by respondent in proceedings initiated by the mother of the Petitioner u/s 133 Cr.PC were filed in the Court of Law which had authority over subject matter in dispute—Reply was filed in good faith to get complaint dismissed—Not case of petitioner that apart from filing on record the reply was circulated to any person—No infirmity in order—Petition dismissed.

Sardar Gurdial v. *Dr. Sandeep Sharma* *193*

— Section 2(h), 468, 469, 470, 472, 473 & 482—Limitation for taking cognizance—Quashing of FIR—Setting aside of order issuing NBW and order initiating proceedings u/s 82 and 83—FIR 107/2003 u/s 379 regd on receiving complaint of one car being stolen—Petitioners arrested in another case along with stolen car—Intimation of arrest given to police station with reference to FIR 107/2003—Possession of stolen car taken by IO and warrants issued by MM—Petitioners could not be arrested—No further steps taken to arrest or conduct investigation in case till subsequent IO wrote note dated 5.06.2006 to ACP informing that earlier IO had not carried out any proceedings and seeking permission to reinvestigate—Application made before MM for issue of NBWs—NBWs issued returned unexecuted—Process u/s 82/83 commenced—Contention of petitioners that Section 397 IPC punishable with imprisonment of three years, so in view of Section 468 Cr PC MM not competent to take cognizance after expiry of three years since barred u/s 468 Cr PC so no NBWs could be issued or process u/s 82/83 initiated—Held, Section 468 deals with cognizance of offences and does not prescribe any limitation period for investigation of offences—It does not bar investigation of offences by the police even if the period of limitation prescribed u/s 468 for taking cognizance has expired—Till chargesheet is filed the stage of taking

cognizance does not arise and it is at the stage of taking cognizance that court decides whether or not to condone delay u/s 473—Investigation cannot be stopped and FIR quashed on ground of delay—Petition dismissed.

Chanchal Bhatti & Ors. v. *State (NCT of Delhi)* *243*

CONSTITUTION OF INDIA, 1950—Article 21 and 226—Appellant requested for reimbursement of medical expenses incurred after his retirement, on heart problem—Request declined as there was no such Scheme for retired employees—Writ challenging order of rejection dismissed by Ld. Single Judge—Order assailed in appeal—Held—Though it is constitutional obligation of state to safeguard right to life of every person and such right is right to lead healthy life and not a life of animal existence, but no law mandates that every citizen is entitled to free medical treatment without any limitation on the amount that can be claimed as reimbursement—Formation of a policy is within exclusive domain of executive and Courts should shy away from issuing directions for formation of policy which has financial, economic and other implications, which at best should be left to wisdom of executive.

J.K. Sawhney v. *Punjab National Bank* *79*

— Article 226—Scope of interference—Appellant filed writ petition alleging manipulation in marks awarded in answer sheets—Learned Single Judge dismissed petition—Held that mere overwriting need not mean manipulation or fudging—Hence Present appeal—Held—Revaluation of answer sheet not permissible unless rules of conducting organization allow for the same—Concerned Rules do not permit revaluation. Indian Evidence Act—Section 73: Held not applicable to writ proceedings—Nonetheless answer sheets scrutinized—Change of marks with regard to a particular question is normal and not indicative of malice or manipulation—Appellant failed to

name even one officer of Respondent No. 3 who was inimical towards Appellant—Appeal dismissed.

Dr. Rajiva Kumar Tiwari v. *Union of India & Ors.* *161*

— Order passed by Ld. Single Judge in Writ Petition (C) Challenged by appellants as their prayer for issuance of mandamus to respondent to agree to suggestions and amendments proposed by them to draft agreement, dismissed—Respondent urged, petitioner awarded project for development of plot being highest bidder with stipulation that bid amount was to be paid in installments—Appellants did not pay the first installment and only gave a performance guarantee and made payments towards interest and success fee—This resulted in series of breach on part of appellants, hence, termination of contract took place—Appellants filed writ petition in which respondent directed to abide by the contract - Even thereafter appellants did not pay first installment but approached respondent for amendment of tender terms and also sought renegotiation of terms of tender—Thereupon Respondent vide letter informed appellants, rejecting suggestions for amendment and modifications and it also invoked bank guarantee furnished by the appellants—Aggrieved appellants, then again filed writ petition which was dismissed by the Ld. Single Judge—According to appellants, Writ Court has jurisdiction to address itself even with regard to unfair practice adopted before entering into agreement and also after entering into the agreement—Held : it may, however, be true that where serious disputed questions of fact are raised requiring appreciation of evidence, and, for determination thereof, examination of witnesses would be necessary; it may not be convenient to decide the dispute in a proceeding under Article 226 of the Constitution of India—From the entire gamut of facts which have been brought on record and projected, it is well nigh impossible to say whether the termination of contract and the forfeiture of the earnest money by the respondent is unreasonable or arbitrary and thereby

invites the frown of Article 14 of the Constitution of India—It is extremely difficult to state that there are no disputed questions of fact—The petitioner should approach the appropriate legal forum as advised in law.

ABW Infrastructures Ltd. & Anr. v. *Rail Land Development Authority* *216*

— Petitioner preferred writ petition impugning condition imposed by respondent NDMC on petitioner to deposit dues of electricity connection earlier installed in property which was purchased by petitioner—As per petitioner, after taking possession of the flat purchased by him, electricity connection was not found existing and electricity meter detached—Petitioner applied to NDMC for electricity connection but NDMC claimed previous dues but petitioner not liable to pay electricity arrears of earlier owner/occupant of flat—Respondent NDMC urged duty of petitioner to ascertain about electricity dues before acquiring property, demand of electricity arrears reasonable and in public interest and necessary to prevent dishonest consumers transferring property without clearing dues. Held : If any statutory rules govern the condition relating to sanction of a connection or supply of electricity, the distributor can insist upon fulfillment of requirement of such rules and regulations—If the rules are silent, can stipulate such terms and conditions as it deems fit and proper to regulate its transactions and dealings—So long as such rules and regulations or the terms and conditions are not arbitrary and unreasonable, Courts will not interfere with them—The conditions of Supply whereunder such arrears are demanded are statutory—The petitioner is liable to pay the dues of the earlier owner/occupant.

M/s Kundan Infrastructures v. *NDMC & Anr.*..... *253*

— Article 226 and 227—Code of Civil Procedure, 1908—Order IX Rule 13—Industrial Disputes Act, 1947—Section 11—

Labour Court by ex parte award directed reinstatement of workman with back wages and dismissed application of petitioner for setting aside exparte award—Orders challenged in HC—Plea taken, counsel without any reason stopped appearing in the case—Held—Ex parte award can be set aside on account of giving valid reasons for non appearance—A client can not be made to suffer for fault of his advocate—This can not be a general rule and facts of each case have to be seen—There is no grave prejudice in setting aside ex parte proceedings as at best on setting aside exparte proceedings case will be decided considering respective merits—Impugned order set aside.

M/s. Genesis Printers v. *Shri Rati Ram Jatav Presiding Officers & Ors.* *279*

— Article 12, 226, 227 & 331—Administrative Tribunal Act, 1985 section 19,20 & 21—Aggrieved petitioners by orders of Administrative Tribunal filed writ petitions—As Per, Petitioners who are husband and wife, they were appointed as Medical Officers on contractual basis by MCD from time to time MCD extended their term of appointment and their remuneration also enhanced—Petitioner no. 1 filed three complaints, levelling sexual harassment allegations against colleague and seniors—Sexual Harassment Committee dismissed those complaints and also recommended strict disciplinary action against both the petitioners—Accordingly, Commissioner MCD vide office letter, took decision not to continue with engagement of petitioners with MCD—Aggrieved by said office order petitioner no. 1 filed writ petition which was dismissed and appeal preferred by her also dismissed—Thereafter petitioner no. 1 filed another writ petition which was also dismissed—On the other hand, petitioner no. 2 after dismissal of application of petitioner no. 1 filed application before Administrative Tribunal which was dismissed and review filed by him also dismissed—Petitioners urged in writ petitions MCD discriminated against petitioners by not extending their

term of appointment as term of other Medical Officers who were similarly placed and also who were juniors to petitioners were granted extension of term—Also MCD, did not hold inquiry in terms of Article 311 (2) before issuing office order. Held : In the case of an appointment to a permanent post in a government service on probation or on an officiating basis, the servant so appointed does not acquire any substantive right to the post and consequently cannot complain, any more than a private servant employed on probation or on an officiating basis can do, if his service is terminated at any time—Likewise, an appointment to a temporary post in a government service may be substantive or on probation or on an officiating basis—The servant so appointed acquires no right to the post and his service can be terminated at any time except in one case when the appointment to a temporary post is for a definite period—A person appointed on contractual basis does not enjoy the protection of Article 311 (2) as he is not a member of a Civil Service of the Union or a All India Services or a Civil Services of a State or holds a civil post under the Union or a State.

Neena Shad v. *MCD & Ors.* *342*

— Article 309—Indian Foreign Services Branch 'B' (Recruitment, cadre, Seniority and Promotion) Rules, 1964 - Rule 3 and 12—Indian Foreign Service, Branch 'B' (Stenographers Cadre, Principal Private Secretary Posts) Recruitment Rules, 1992—Rule 7—Composition of Foreign Service divided into 'General cadre' and Stenographers cadre—Officers of both cadres were eligible to be promoted to Grade I of General Cadre—Officers in Stenographers cadre in post of Private Secretary had option to choose whether they desired promotion to post of Grade I in General Cadre or to post of Principal Private Secretary Grade of Stenographers Cadra—Petitioners had exercised option for promotion to post in Grade I of General cadre—Option exercised was final and

change of option was not permitted—Rules amended by virtue of which officers of Stenographer cadre were not eligible for promotion to Grade—I of General Cadre and could earn promotion only to higher post in stenographer cadre—Petitioners in stenographers cadre working as Private Secretary sought promotion to Grade-I of General Cadre—Representation of petitioners not successful at departmental level—Administrative Tribunal also dismissed their application—Order challenged in High Court—Plea taken, principle of promissory estoppel applied since options were pursuant to statutory provision, exercise of option by petitioners resulted in a contract—Held—A civil servant does not have any vested or statutory right to be promoted—Only right is to be considered for promotion as per recruitment rules—To apply promissory estoppel it has to be shown that person concerned has altered his position on a representation made by opposite party—No person junior to petitioners has been promoted as Principal Private Secretary in Stenographer Cadre—Promotional avenues not denied to Petitioners—Two avenues of promotion stands restricted to only one - Rule continuing to permit option to petitioners for being considered for promotion to Grade - I of General Cadre in absence of promotional avenue to them in General Cadre rendered meaningless.

Raju Sharma & Ors. v. *Union of India & Anr.* *431*

— Article 16—Public employment—Selection process—Change in process—Respondent issued advertisement dated 12.11.2009 inviting applications for, inter alia post of Deputy Commandment (Law) in the Indian Coast Guard Service—Said advertisement also contained selection procedure—Petitioners applied for said post—Issued call letter for appearance before preliminary and final selection board—Peitioners cleared preliminary and Final selection board (FSB)—Last step required Petitioners to appear before Base

Hospital, Delhi Cantt. For medical examination—After leaving premises of selection board—Petitioners telephonically informed to have word with Chief Law Officer, Coast Guard Head Quarters ("CLO")—Prescribed procedure does not mention role of CLO—Petitioners then told to appear before new selection board chaired by CLO—Also told to undertake written test as well as interview on same day—Petitioners did not clear the same—Petitioners made representations in protest—No action taken on said representation—Hence present petitions—Interim application also filed for directions to Respondent to keep one post vacant for each Petitioner—Admitted position that advertisement did not mention any further testing/interview after clearing FSB—Records produced by Respondent do not support averment that Proficiency Competency Board for those candidates recommended by FSB had due approval—Nothing made on 18.12.2009 proposes for first time a further interview after FSB—No specific decision taken—Proposal for short test and interview made on 21.12.2009—Said proposal not placed before any higher authority and entire decision taken by Deputy Director General himself—Held—Appointing authority has no jurisdiction to change or vary selection, process after its commencement—Supreme Court in NT Devin Katti's case held that selection only to be made in terms of rules applicable at time of commencement of selection process—Respondents had not only notified Petitioners of selection procedure through advertisement dated 12.11.2009—Respondent had also completed the said procedure—Procedure to only consist of two phases and nothing further—Even if Deputy Director General competent to approve "Professional competency and suitability" assessment—Such approval only made on 21.12.2009—Same clearly lacks jurisdiction or authority of law—Petitioners not informed of prescribed syllabi for new test—Not given opportunity to prepare—Professional competency assessed on subjects mentioned in "desirable qualifications" that too without notice—Pleas set up

Respondents falsified by records and documents issued to Petitioner as well as records produced before the Court—Nothing on record to even suggest reference to manner in which testing and evaluation of professional competency would be effected—No disclosure on method of testing—Decision to adopt new procedure not made by authority competent to do so—Strong view taken with respect to false and misleading pleas taken by Respondent and attempt to conceal correct record—However since vacant seats remain—Possible to ensure justice without taking this matter further—Selection process taken by Professional Competency Board set aside—If Petitioners found medically fit, Respondent to complete appointment of Petitioners to post of Deputy Commandant (Law) with consequential benefits from date of recommendation of FSB—Costs of rupees 25,000/- awarded to each petitioner.

Vikas Saksena v. *Union of India and Others*..... *84*

— Article 226—Public Interest Litigation—Petition filed on behalf of Hindustan Kanojia Organisation—Said organization a community of "Dhobis", a scheduled caste—Community's feelings affected by use of "Dhobi Ghat" as name of film—Alleging that the said name is violative of Section 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 ("1989 Act") Held—Failed to see how naming of movie/film can be offensive to caste in question—Cinema is public medium to communicate to the society—Governed by Cinematograph Act and Rules framed thereunder—Said Act prohibits use and presentation of visual or words contemptuous of racial or religious groups—Use of "Dhobi Ghat" cannot be construed to violate provisions of 1989 Act—Public interest litigation—Reliance on ratio of Ashok Kumar Pandey case—Present litigation initiated marely to satisfy one's own egoism or megalomania—A public cause is required to be espoused in public interest litigation—Present

litigation is abuse of the process of the Court—Defeats basic concept of public interest litigation for public good—Petition dismissed with costs of Rs. 25,000/-.

Vinod Kumar Kanojia v. *UOI and Ors.* *151*

DELHI MUNICIPAL CORPORATION ACT, 1957—Section 126,129 and 346- Aggrieved petitioner filed Writ Petition against order of Joint Assessor & Collector of MCD fixing ratable value of his property—Petitioner urged upon completion of construction of his building he gave notice to Respondent MCD and applied for grant of occupancy certificate which was rejected—Subsequently MCD issued notice to petitioner under Section 126 of the Act for enhancing ratable value—Objections filed by petitioner were dismissed—Petitioner contended without issuance of Occupancy Certificate and till when property was occupied, no property tax as of completed building could be levied—As per Respondent, under Section 129, liability for property tax accrues from date when notice of completion or occupation whichever is earlier, is given irrespective of grant of occupancy certificate—Also petitioner itself gave notice of completion, cannot be heard to contend that property is not assessable from date of notice—Question which arose for determination is whether notice of completion under building bye-law 7.5.2 can be treated as notice of completion under Section 129. Held:- The two notices cannot be equated and the notice under building Bye-Law 7.5.2 Cannot be a notice under Section 129—While the provision under the Building Bye-Law 7.5.2 is of "completion of works" under the Building Permit, the notice under Section 129 is of "completion of building"—Issuance of a notice of completion coupled with an application for Occupancy Certificate made under Bye Law 7.5.2 is not a notice of completion under Section 129 so as to make the property liable for property tax—The guiding factor has to be a building which is fit for being occupied

both factually and in law before it can attract the incidence of tax.

M/s South Delhi Maternity & Nursing Home (P) Ltd. v. *MCD & Others* *309*

DELHI RENT CONTROL ACT, 1958—Section 14(1)(e) and 25B—Shop let out for non residential purposes—Bona fide required back by landlady for running kirana shop by son—Tenant's contention that additional commercial/business accommodation available with landlady not tenable—Held—Landlady is the master of her choice and it is for her to decide as to what business she wants to run in her shop—Tenant has no right to dictate to the landlord about the suitability of the premises.

Sh. Tilak and Others v. *Smt. Veena* *15*

— Section 14(1)(b), 16 & 39—Subletting—ARCT allowed appeal and set aside eviction order of additional Rent controller of u/s 14(1)(b)—Question of law: Whether the bequest of tenancy rights by way of Will (by tenant) to only one heir out of many heirs, whereby the other heirs are ousted and only one heir is granted the tenancy rights, amounts to subletting?—Held, tenancy rights in a property can be inherited by legal heirs which is let out for a commercial purpose, in accordance with the provisions of Hindu Succession Act after the death of tenant—In case of commercial tenancy, bequeathing the tenancy rights in such tenancy by a tenant, contractual or statutory, only in favour of one of the legal heirs who was otherwise going to succeed such rights in tenanted premises after the death of deceased tenant would not constitute subletting to attract Section 14(b)—A cause of action u/s 14(1)(b) arises only if a stranger (who would not inherit according to law of succession) is put in possession of suit property to the exclusion of the tenant who divests himself of the possession of the suit either in full or in part—

Since in present case tenant had willed property to one of the heirs, it did not amount of subletting—Appeal dismissed.

The Vaish Coop. Adarsha Bank Ltd. v. *Sudhir Kumar Jain & Ors.* *321*

DELHI SALES TAX ACT, 1975—Section 5,43 (6), 45—Central Sales Tax Act, 1956, Section 8—Appellant/assessee a Private limited company, traded in electric, electronic and refrigeration items which were notified to be first point items U/s 5 of the Act—As per, assessee/appellant, it purchased these goods from registered dealers and was not first seller of the goods, therefore had no liability to pay sales tax—Assessee/appellant had put up said claim before Assessing Officer for assessment for year 1996-97—Assessment done both under Delhi Sales Tax Act as well as Central Sales Tax Act and demand of Rs. 3679144 and Rs. 90172 respectively raised under the Acts—Assessee/appellant preferred two rounds of appeal but failed to get full relief—Ultimately, last order of Income Tax Appellant Tribunal resulted in writ petition in which appellant/assessee agitated the plea, registered dealers from whom it purchased goods had paid sales tax—Therefore, not necessary for assessee to charge sales tax on those very items of goods when assessee sold same to consumers—Assessee/appellant failed to produce original books of accounts or invoices before Assessing Officer as same were lost for which FIR was lodged—Percontra, respondent pleaded appellant/assessee not entitled to relief in absence of original invoices. Held : provisions of Delhi Sales Tax Act and rules framed thereunder were mandatory in nature and it was necessary to construe them strictly in order to avoid misuse—Rule 9 requires the dealer to produce a declaration in or ST-3 duly filled in and signed by the dealer selling the goods which has to be produced in original—No doubt when these original forms ST-3 are lost or destroyed because of circumstances beyond the control of the assessee he should not be punished and denied the benefit

- To avail the benefit the dealer has to necessarily seek exemption in the manner as provided in the rules - As the appellant failed to file satisfactory proof in the manner provided under the Act and rules, not entitled to the benefit as claimed.

Alpine Agencies Pvt. Ltd. v. *Commissioner of Value Added Tax & Others* *108*

EMPLOYEES STATE INSURANCE ACT, 1948—Section 45A, 82—Aggrieved appellant, challenged judgment passed by ESI court, urging appellant though registered as Establishment under Delhi Shops & Establishment Act, but is not a shop as not covered by notification dt.30.09.1988—Therefore—appellant cannot be assessed under Section 45A of the Act—Also, less than 20 employees working in Establishment which was not involved in any manufacturing activity—As per Respondent, appellant covered within purview of Act w.e.f. 02.10.1988 and appellant failed to furnish complete and correct particulars in Form—01, thus liable to be assessed under Section 48-Held: It is not that a place where goods are sold is only a shop—A place where services are sold on retail basis is also a shop—When services are being sold, it becomes a commercial activity—Since the Act is intended for social benefit of the workers, it has to be given an extended meaning—Petitioners are not providing anything for free—Petitioner also admitted the strength of their employees on a particular day as 65, thus they are covered under the Act.

Machine Tools (India) Ltd. v. *The Employees State Insurance Corporation* *268*

INCOME TAX ACT, 1961—Section 260(A), 263—Held—Twin conditions for invoking Section 263 of IT Act-One order is erroneous; two order is prejudicial to the interest of the revenue—Conditions not met out-No case made out for invoking jurisdiction u/s 263.

Commissioner of Income Tax v. *Dhanpat Rai* *20*

— Section 11(1)(a), 11(2) 260(A)—Whether a trust can donate its entire income to another trust—Whether "Explanation" appended under Section 11(2) and inserted by the Finance Act applies to accumulations mentioned in Section 11(1) (a) of the IT Act—Held—Explanation applies only to Section 11(2) and not to Section 11(1) of the IT act.

Director of Income Tax (Exemption) v. *M/s. Bagri Foundation* *6*

— Section 256, 271—Assessee/Respondent filed assessment for year 1979-80 and also raised claim for payment of commission to Mrs. Ritu Nanda, Director of Respondent Company amounting to Rs. 2,74,617/- —Assessing Officer found services not rendered by Mrs. Ritu Nanda for which she was purportedly given commission @3% of Contract Value—Also, at relevant time for which payment of commission claimed, Mrs. Ritu Nanda not found to be Director of Company—Thus, AO held claim for Ritu Nanda bogus and imposed penalty of Rs. 1,05,730/- on Respondent—Assessee/Respondent challenged order of penalty in appeal before CIT (Appeal) but dismissed—In further appeal to Income Tax Appellate Tribunal, assessee succeeded as order of penalty set aside—Appellant/Revenue Authority moved petition under Section 256 (2) of the Act seeking reference, "Whether the Tribunal was correct in law in deleting the penalty imposed under the Income-Tax Act, 1961?"—Held: The penalty on the ground of concealment of particulars of non-disclosure of full particulars can be levied only when in the accounts/return an item has been suppressed dishonestly or the item has been claimed fraudulently or a bogus claim has been made—When facts are clearly disclosed in the return of income, penalty cannot be levied and merely because an amount is not allowed or taxed to income it cannot be said that the assessee had filed inaccurate particulars or concealed any income chargeable to tax—Further, conscious concealment is necessary—Even if

some deduction or benefit is claimed by the assessee wrongly but bona fide and no malafide can be attributed, the penalty would not be levied—Even if there is no concealment of Income or furnishing of in accurate particulars, but on the basis there of the claim which is made ex facie bogus, it may still attract penalty provision—Order of Assessing Officer imposing penalty was without any blemish.

The Commissioner of Income Tax v. *M/s Harparshad & Company Ltd.* *22*

INDIAN COMPANIES ACT, 1956—Quashing of criminal complaint filed by the Registrar of Companies u/s 62 r/w section 68 of Companies Act in court of ACMM—Allegation that petitioners were signatories to prospectus containing misstatement of facts—Company had collected Rs 210 lakhs from public issue but had failed to accomplish the promises made in the prospectus—Held, compensation in respect of violation of Section 62 can be claimed by filing appropriate civil suit and no criminal complaint under Section 62 would be maintainable—U/s 68 prior sanction of the competent authority is required before launching prosecution which was not done in the case—Petition allowed and proceedings pending before ACMM quashed.

Dharmendra Kr. Lila v. *Registrar of Companies* *158*

INDIAN EVIDENCE ACT, 1972—Section 45—Reliance on expert witness—Suit filed by plaintiff to recover entire sale consideration paid for purchase of land—Alleged as per Agreement to Sell entered into defendant failed to handover possession—Defendant inter-alia submitted Agreement to Sell to be forged—Plaintiff examined handwriting expert, who deposed in favour of plaintiff—Court found as there was no close friendship between the parties factum of making entire payment even before possession unnatural—Held, expert witness agreed to support case of a party which engaged

them—Hence not much reliance can be placed on them—Taking into consideration inherent improbabilities of case set up by the plaintiff, no reliance placed on opinion of expert.

Mrs. Indira Rai v. *Shri Bir Singh* *442*

INDIAN PENAL CODE, 1860—Sections 397/392/457—Appellant convicted by trial court u/s 397/392/457 and sentenced to RI for 7 years and fine of Rs 500/—For offence u/s 397 r/w 392 IPC and RI for 3 years and fine of Rs 500/—for offence u/s 457 IPC—Allegation that appellant along with three others committed robbery in house of complainant—Contention of appellant that Section 397 not applicable since in the absence of recovery of knife purportedly used by appellant, it cannot be presumed that it was a deadly weapon and so charge u/s 397 could not be established and conviction could only be u/s 392—Held, since knife not recovered or produced during trial appellant could not be sentenced u/s 397 but only u/s 392—Order on sentence modified to one u/s 392 awarding RI for four years—Appeal partly allowed.

Samiuddin @ Chotu v. *The State of NCT Delhi* *399*

— Section 363/366/376—Respondents appointed on probation against temporary post of Warder Prison in Tihar—Pursuant to registration FIR, respondents sent to judicial custody—Competent Authority terminated services by non stigmatic orders of discharge simpliciter—Representations made to appointing authority to re-induct respondents in service after their acquittal in criminal trial rejected—Representations styled as appeals also rejected—Impugned orders challenged before Administrative Tribunal to set aside order of termination—Plea taken, order terminating services being penal in nature, department was obliged to hold enquiry—Administrative Tribunal allowed application—Order of Tribunal challenged in High Court—Plea taken, applications before Tribunal were

time barred—Respondents being accused of serious offences and arrest was motive and not foundation of order terminating their services—Held, Non statutory representation can never extend limitation—Merely by labelling representation as appeal and said work being reflected in order communicating rejection of representation would not make representation appeal—It is substance which matters not label—Representations questioning order terminating services were highly belated and barred by limitation before Tribunal—Employer has legal right to dispense with services of employee without anything more during or at end of prescribed period—Where no findings are arrived at any inquiry or no inquiry is held but employees chooses to discontinue services of employee against whom complaints are received it would be a case of complaints motivating action and would not be bad—Order of Tribunal quashed.

Govt. of NCT of Delhi & Ors. v. *Naresh Kumar* *132*

— Sections 420, 468, 471, 120-B—Accused company falsified accounts to show lesser liability and induced complainant Bank to sanction credit facility—Company did not pay back and cheated bank of more than Rs 6 crores—Trial Court framed charges against petitioner company u/sections 420, 468, 471 read with 120-B IPC—Whether company being a juristic person can have mens rea for the purpose of Section 120 B—Held, Company acts through its Board of Directors—If company can enter into contracts and perform other legal obligations it can also be party to criminal acts—If the company can have a right to do things through its Board of Directors it can have necessary mens rea also through its Board of Directors—Mens rea can be fastened on the company if it is an essential element of crime on the ground that mens rea was present in the officers of the company who were acting as mind of the company—Just because offence u/s 420, 468 and 471 IPC included the punishment of

imprisonment does not mean company cannot be prosecuted as court can always resort to punishment of imposition of fine—Petition dismissed.

Morgan Tectronics Ltd. v. *CBI* *29*

— Section 500—Quashing of order of ASJ upholding order of MM dismissing the complaint filed by the petitioner u/s 200 Cr.PC against the respondent for defaming him—Mother of petitioner had filed criminal complaint against respondent and others u/s 133 Cr. PC before SDM—Responsdent vide a notice was called upon to reply—In response to notice respondent submitted reply which was considered as defamatory by the petitioner—Complaint u/s 200 filed before MM—Complaint dismissed—Contention of petitioner that the court below could not have gone into the merits of the case, as at the stage of presummoning, statement made by the petitioner have to be accepted as true and correct—Held, eight exception to Section 499 IPC applicable—Reply filed by respondent in proceedings initiated by the mother of the Petitioner u/s 133 Cr.PC were filed in the Court of Law which had authority over subject matter in dispute—Reply was filed in good faith to get complaint dismissed—Not case of petitioner that apart from filing on record the reply was circulated to any person—No infirmity in order—Petition dismissed.

Sardar Gurdial v. *Dr. Sandeep Sharma* *193*

— Section 120-B—Trial Court convicted appellants u/s 120-B IPC r/w Section 7,13(2), and 13(1)(d) of PC Act and also for substantive offences u/s 7 and 13(2) r/w Section 13(1)(d) of the PC Act and passed sentence—Allegation that appellants who were in police had picked up the complainant and two others and on being released the appellants demanded bribe of Rs 5,000/- from complainant—The complainant lodged complaint—Appellant Ram Chander was caught pursuant to the trap—Contention of appellants that trial court wrongly relied

upon statement of the complainant which was contradictory, also he was an accomplice, the two independent witnesses had also not supported the prosecution—Held, when appreciating evidence minor discrepancies on trivial matters which do not affect the core of the prosecution case should not weigh with the court to reject evidence—Discrepancies in testimony of complainant few and so testimony cannot be discarded as the same is supported by other evidence on record—No doubt two independent witnesses declared hostile but have still partially corroborated the complainant—Enough evidence on record to hold that appellant Ram Chander caught red handed at the spot with bribe money after he demanded money from complainant—Conviction and sentence of Ram Chander upheld—Allegation of conspiracy of demanding bribe against appellant Prem Dutt Sharma doubtful since he not specifically named in testimony of complainant, he did not come to the place fixed for payment of bribe and not at the spot at the time of the trap—Also although evidence similar third person named by complainant i.e. one ASI Ram Babu and appellant Prem Dutt Sharma, the former was not prosecuted—No evidence to show that the scooter used by Ram Chander belonged to appellant Prem Dutt Sharma—Prem Dutt Sharma given benefit of doubt and acquitted.

Ram Chander Singh Prem Dutt Sharma v. *CBI*..... *372*

INDIAN SUCCESSION ACT, 1925—Intention of testator in propounding the Will—Which interferes or disturbs the natural line of succession—Mere fact some heirs excluded is not a ground to conclude that Will was executed in suspicious circumstances—When all facts point to a valid Will—Delay in overall circumstances—Not fatal.

Mahabir Prasad & Another v. *State* *166*

INDUSTRIAL DISPUTES ACT, 1947—Section 2(oo) and 25 F—Services of workman were terminated vide termination

letter service of which is not disputed—Plea of workman that action of requiring workman to come and collect dues instead of sending amount due alongwith letter is illegal—Per contra. plea of petitioner is that this technical defect is not such that any huge benefit would have accrued as to employer if provision of payment of dues was to have been complied with—Held—It is discretion of courts as to whether facts of case justify reinstatement or compensation would be adequate relief—Reinstatement is not automatic and facts of each case have to be seen to whether reinstatement should be granted or compensation is adequate remedy—Various factors such as industry in question, financial capacity of employer, peculiar circumstances of each case, nature and period of employment have to be seen—Employment of workman was towards working on printing machine which was sold—Plea of workman that there is no inherent right to retrenchment and valid reasons must be given for retrenchment rejected—Only requirement for retrenchment is it must be of type falling under Section 2 (oo) and letter must be accompanied by amount which would be 15 days pay for each year of service and a 30 days notice pay—There is indeed retrenchment but there is a technical violation in that instead of sending amount alongwith termination letter, workman was asked to collect amount—Employment is not of a very large number of years—Award set aside in that it directs reinstatement—Instead of reinstatement, workman should receive a sum of Rs. 1 lac as compensation for illegal retrenchment.

M/s. Genesis Printers v. *Shri Rati Ram Jatav Presiding Officers & Ors.* *279*

— Section 17B—Payment under Section 17B can not be treated as subsistence allowance, if workman is having other sources of income—Workman directed to file affidavit alongwith copies of his bank accounts that he had no other source(s) of income during period he received payment pursuant to order

under section 17B so that there is no need of any recovery from him.

M/s. Genesis Printers v. *Shri Rati Ram Jatav Presiding Officers & Ors.* *279*

LIMITATION ACT, 1963—Applicability to Probate Petitions—Testator bequeathed his property entirely to petitioner—Contention of other heirs—Will not genuine and fabricated-Testator was an old and infirm man-did not possess testamentary capacity—Delay of seven years in propounding the Will—Held—The Limitation Act mention applicability to applications, suits and appeals but it does not mention Petition in form of probate claims or any proceedings under the Indian Succession Act.

Mahabir Prasad & Another v. *State* *166*

MOTOR VEHICLE ACT, 1988—Section 166—Appeal against award of compensation by MACT—Fatal Accident—Gratuitous passenger—Fake driving licence—Deceased aged about 35 yrs.—Motor Mechanic—Left behind widow, three daughters and son-5 dependents-salary Rs. 4500—No documentary proof of income—Tribunal took income as per minimum wage Rs. 3000—Applied multiplier of 16—Deducted one third towards personal expenses—Respondent examined its Director—Proved driving licence issued in the name of Sonpal in December, 1998 for motorcycle plus light motor vehicle—Endorsed for heavy transport vehicle in April, 2010—DL valid upto April, 2007 and proved verification report—Appellant examined DTO Gurgaon-deposed—DL not issued from their office in the name of Rajvir Singh—Tribunal held appellant not led evidence in respect to DL issued from Mathura, therefore, DL valid—No evidence led to prove deceased gratuitous passenger—Held—Findings of Tribunal upheld—Valid driving licence—Deceased not gratuitous

passenger—Award upheld.

National Insurance Co. Ltd. v. *Raj Kumari & Ors.* *1*

NARCOTIC DRUGS AND PHYCHOTROPIC SUBSTANCES ACT, 1985—Section 68-I (3) & 68-A (2) (d) & 68-B(g)—Writ petition by petitioner against order passed by Appellant Tribunal for forfeiture of property, dismissing petitioner's appeal against order passed by Competent Authority U/s 68-I (3) of Act—Petitioner urged his brother detained for indulging in illicit trafficking of drugs and subsequently order of detention passed against him for period of two years—Property belonging to petitioner frozen by police on ground that petitioner being brother of detenu also covered under section 68-A (2) (d) of Act—Police suspected source of said property as well as another shop belonging to petitioner illegal acquired properties of detenu, brother of petitioner—Detenu filed writ petition challenging order of detention—Only initial period of detention of three months sustained and subsequent period of detention held to be vitiated—As per petitioner, for operation of section 68-A (2) (d) of Act subsisting valid order of detention required and as order of detention of his brother, declared void ab initio and only initial period of detention of 3 months sustained, therefore property of petitioner not liable to be forfeited —Also, respondent failed to discharge initial burden of showing nexus between properties acquired by petitioner with alleged illicit earnings of his brother—Respondent argued entire detention order not held to be illegal thus burden shifted on petitioner to show property was acquired by him from his own source of income. Held, If there is a violation of Article 22 (5) in not informing the detenu that he had an opportunity to represent to the declaring authority, upon the Court quashing the Section 9 declaration, the order is impliedly declared void from its inception and on that basis, the benefit of extension of the period of 5 weeks to 4 months and 2 weeks, and the benefit of extention of 11 weeks to 5

month and 3 weeks in Section 9 (2), cease to apply—As the period of 3 months of detention was held valid, the detention order was itself held to be void ab initio and the show cause notice was issued to the petitioner thereafter when there was no valid detention order against his brother—Consequently the essential condition for invoking section 68-A of the Act had been rendered non-existent.

Shahid Parvez v. *Union of India & Ors.* *297*

NARCOTICS DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985—Section 21, 20—Trial Court convicted appellant u/s 21—Appellant along with others apprehended on tip off about supply of drugs—Appellant given notice u/s 50—On checking drugs found on the person of accused—Contention that notice u/s 50 not as per law as appellant not informed of his right to be searched in the presence of a Magistrate or Gazetted Officer—Perusal of notice u/s 50 and testimony of IO showed that appellant was only informed about the option and not about his right of being searched before a Magistrate or a Gazetted Officer—Appellant thus entitled to be acquitted—Appeal allowed.

Parveen Singh @ Kalia v. *State of NCT of Delhi* *426*

PREVENTION OF CORRUPTION ACT, 1988—Section 7, 13 (2) & 13(1)(d) 20- Indian Penal Code, 1860—Section 120-B—Trial Court convicted appellants u/s 120-B IPC r/w Section 7,13(2), and 13(1)(d) of PC Act and also for substantive offences u/s 7 and 13(2) r/w Section 13(1)(d) of the PC Act and passed sentence—Allegation that appellants who were in police had picked up the complainant and two others and on being released the appellants demanded bribe of Rs 5,000/- from complainant—The complainant lodged complaint—Appellant Ram Chander was caught pursuant to the trap—Contention of appellants that trial court wrongly relied upon

statement of the complainant which was contradictory, also he was an accomplice, the two independent witnesses had also not supported the prosecution—Held, when appreciating evidence minor discrepancies on trivial matters which do not affect the core of the prosecution case should not weigh with the court to reject evidence—Discrepancies in testimony of complainant few and so testimony cannot be discarded as the same is supported by other evidence on record—No doubt two independent witnesses declared hostile but have still partially corroborated the complainant—Enough evidence on record to hold that appellant Ram Chander caught red handed at the spot with bribe money after he demanded money from complainant—Conviction and sentence of Ram Chander upheld—Allegation of conspiracy of demanding bribe against appellant Prem Dutt Sharma doubtful since he not specifically named in testimony of complainant, he did not come to the place fixed for payment of bribe and not at the spot at the time of the trap—Also although evidence similar third person named by complainant i.e. one ASI Ram Babu and appellant Prem Dutt Sharma, the former was not prosecuted—No evidence to show that the scooter used by Ram Chander belonged to appellant Prem Dutt Sharma—Prem Dutt Sharma given benefit of doubt and acquitted.

Ram Chander Singh Prem Dutt Sharma v. *CBI*..... *372*

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 (DV ACT)—Section 12—Petitioner NRI was working in Luanda, Angola Africa as Manager—Wife had done MA and MBA and was working with a Multinational company—Metropolitan Magistrate allowed maintenance of Rs 5000/- per month to the wife against petitioner—Appeal against order dismissed—Held, maintenance awarded without considering that petitioner had lost his job in Angola and was unemployed in India—Maintenance can be fixed under the DV act as per the prevalent law regarding providing of maintenance

by the husband to the wife as per which husband is to supposed to maintain his un-earning spouse out of the income which he earns—No law provides that a husband has to maintain a wife living separately from him irrespective of the fact whether he earns or not—Court cannot tell husband that he should beg borrow or steal but give maintenance to the wife; more so when the husband and wife are almost equally qualified and almost equally capable of earning and both claim to be gainfully employed before marriage—Order fixing maintenance with out even prima facie proof of the husband being employed in India and with clear proof of fact that his passport was seized and he was not permitted to leave the country is contrary to law—Petition allowed.

Sanjay Bhardwaj & Ors. v. *The State & Anr.*..... *58*

— Section 2 (f) & 12—Domestic relationship—Application u/s 12 filed by petitioner against her brother and his wife for allowing her to stay in her parents house whenever she visited India from the USA—Metropolitan Magistrate held there was no ground to pass interim order of residence—Appeal dismissed by ASJ—Held, Act cannot be misused to settle property disputes—Where a family member leaves the shared household, to establish his own household and actually establishes his own household he cannot claim to have a right to move an application u/s 12 on the basis of domestic relationship—Domestic relationship comes to an end once the son along with his family moved out of joint family and establishes his own household or when a daughter gets married and establishes her own household with her husband—Such son, daughter, daughter-in-law or son-in-law if they have any right in the property because of coparcenary or because of inheritance such right can be claimed by an independent civil suit and an application under the DV act cannot be filed by a person who has established his separate household and ceased to have domestic relationship—Petitioner had settled in USA,

doing a job there, she was living separately and ceased to be in a domestic relationship with her brother—No relief can be under the DV Act—Petition dismissed.

Vijay Verma v. *State (NCT) of Delhi & Anr.* *36*

RAILWAY PROTECTION FORCE ACT, 1957— Section 1 (i)- Railway Protection Rules, 1987- Rule 153—Central Civil Services (Classification, Control and Appeal) Rules, 1957—Rule 15 (1)—Inquiry officer absolved petitioner of charges—Disciplinary authority held that enquiry was not properly conducted and directed de novo inquiry by new IO—Petitioner absolved of first charge and found guilty of second charge—Disciplinary authority held petitioner guilty of both charges—Notice with copy of report of IO served on petitioner—After considering representation, Disciplinary authority imposed penalty of removal from service—On revision, penalty modified from removal from service to compulsory retirement—Order Challenged in High Court—Plea taken, action of respondents in directing second inquiry is without legal competence and jurisdiction—Disciplinary authority had arrived at a conclusion that petitioner was guilty of both charges—Notice to petitioner after arriving at such conclusion calling upon petitioner to submit representation was meaningless—Held No rule or regulation prescribe second inquiry on identical charges by concerned authority—Disciplinary authority failed to follow a procedure prescribed by law - It was open to disciplinary to record further evidence or call material which had been ignored by IO to be produced after giving full opportunity to petitioner or IO could have been asked to record further evidence—Direction to conduct second enquiry was unwarranted and illegal—Disciplinary authority is required to record its tentative reasons for such disagreement and give opportunity to charged officer to represent before it records its findings—Communication communicating conclusions already drawn by disciplinary

authority gives no real opportunity to petitioner to make a representation in respect of either points of disagreement or proposed punishment—Opportunity to represent against points of disagreement has to be meaningful—Impugned order not sustainable—Petitioner directed to be reinstated in service with national seniority but without back wages.

Const. Seth Pal Singh v. *UOI & Ors.* *404*

ILR (2011) I DELHI 1
MAC

NATIONAL INSURANCE CO. LTD. ....APPELLANT

VERSUS

RAJ KUMARI & ORS. ....RESPONDENTS

(J.R. MIDHA, J.)

MAC APP. NO. : 350/2007 DATE OF DECISION: 4.6.2010

Motor Vehicle Act, 1988—Section 166—Appeal against award of compensation by MACT—Fatal Accident—Gratuitous passenger—Fake driving licence—Deceased aged about 35 yrs.—Motor Mechanic—Left behind widow, three daughters and son-5 dependents-salary Rs. 4500—No documentary proof of income—Tribunal took income as per minimum wage Rs. 3000—Applied multiplier of 16—Deducted one third towards personal expenses—Respondent examined its Director—Proved driving licence issued in the name of Sonpal in December, 1998 for motorcycle plus light motor vehicle—Endorsed for heavy transport vehicle in April, 2010—DL valid upto April, 2007 and proved verification report—Appellant examined DTO Gurgaon-deposed—DL not issued from their office in the name of Rajvir Singh—Tribunal held appellant not led evidence in respect to DL issued from Mathura, therefore, DL valid—No evidence led to prove deceased gratuitous passenger—Held—Findings of Tribunal upheld—Valid driving licence—Deceased not gratuitous passenger—Award upheld.

Important Issue Involved: (A) In the absence of evidence the passenger cannot be held to be gratuitous.

(B) To prove the licence to be fake the insurance company is required to lead evidence.

[Gu Si]

APPEARANCES:

FOR THE APPELLANT : Ms. Manjusha Wadhwa, Advocate.

FOR THE RESPONDENTS : Ms. Hemangi Saikia, Advocate for Respondent No. 1. Mr. Deepak Aggarwal, Proxy Counsel for R-1.

RESULT: Appeal dismissed.

J.R. MIDHA, J.

1. The appellants have challenged the award of the learned Tribunal whereby compensation of Rs.4,30,000/- has been awarded to the claimants/respondents No.1 to 5.

2. The accident dated 25th/26th September, 2003 resulted in the death of Daksh Kumar. The deceased was travelling in Truck bearing No.HR-55A-9393 which met with an accident with another truck bearing No.HR-38D-6701. The deceased was survived by his widow, three daughters and one son, who filed the claim petition before the learned Tribunal.

3. The deceased was aged 35 years at the time of the accident and was working as a motor mechanic earning Rs.4,500/- per month. In the absence of proof of income, the learned Tribunal took the minimum wages of Rs.3,000/- per month, deducted 1/3 towards personal expenses of the deceased and applied the multiplier of 16 to compute the loss of dependency at Rs.3,85,000/-. Rs.5,000/- have been awarded towards medical expenses, Rs.10,000/- towards pain and suffering, Rs.20,000/- towards loss of love and affection, Rs.5,000/- towards funeral expenses and Rs.5,000/- towards loss of estate. The total compensation awarded is Rs.4,30,000/-.

4. The learned counsel for the appellants has urged the following grounds at the time of hearing of this appeal:-

(i) The driver of the offending vehicle was holding a fake

driving licence at the time of the accident.

(ii) The deceased was a gratuitous passenger in the offending vehicle and, therefore, the appellant is not liable.

5. With respect to the driving licence, respondent No.2 examined the its Director as R2W1 who deposed that the driving licence No.1/410/MTR/98 was initially issued on 22nd December, 1998 for motorcycle plus light motor vehicles and was thereafter endorsed for heavy transport vehicle on 6th April, 2010 in the name of Son Pal. The driving licence was valid upto 5th April, 2007. The verification report was exhibited as Ex.R2W2/1.

6. The appellant examined Licencing Clerk, DTO, Gurgaon as RW-3 who deposed that driving licence No.1023/G/02 in the name of Rajbir Singh was not issued by their office. The photocopy of the driving licence was marked as R3W1/1. The appellant also examined its Assistant as RW-3 who proved the investigation report as Ex.R3W2/2.

7. The Claims Tribunal considered the evidence of the appellant as well as the respondent No.7 and held that the driver of the offending vehicle was holding a valid driving licence to drive the HTV issued by Mathura Authority and there is no ground for avoiding the liability by the appellant. The appellant did not led any evidence with respect to driving licence No.1/410/MTR/98 proved by R2W1 and, therefore, the finding of the Claims Tribunal holding that the driver was holding a valid driving licence is correct and is upheld.

8. The second ground raised by the appellant is that the deceased was a gratuitous passenger in the offending vehicle. The appellant has also not led any evidence to prove the same and, therefore, the plea of the appellant is rejected.

9. The deceased was a labourer and is survived by the claimants who are widow, three daughters and one son. The claimants were examined by this Court on 26th February, 2010. Respondent No.1 is a daily wager and respondents No.2 to 5 are minor children. The respondents are staying in a rented accommodation on a monthly rent of Rs.1,000/- and their condition has been found to be very pathetic. This case relates to the accident dated 25th/26th September, 2003 in respect of which the claim petition was filed on 12th February, 2004 and the

claimants are without compensation despite lapse of more than six years after the accident.

10. For all the aforesaid reasons, the appeal is dismissed.

11. The appellant has deposited the entire award amount with UCO Bank in terms of order dated 28th January, 2010 and the said amount is lying in fixed deposit.

12. UCO Bank is directed to release 10% of the amount to respondent No.1 by transferring the same to her savings bank account. The remaining amount be kept in the fixed deposit in the following manner:-

(i) Fixed deposit in respect of 10% of the amount in the name of respondent No.1 for a period of one year.

(ii) Fixed deposit in respect of 10% of the amount in the name of respondent No.1 for a period of two years.

(iii) Fixed deposit in respect of 10% of the amount in the name of respondent No.1 for a period of three years.

(iv) Fixed deposit in respect of 10% of the amount in the name of respondent No.1 for a period of four years.

(v) Fixed deposit in respect of 10% of the amount in the name of respondent No.1 for a period of five years.

(vi) Fixed deposit in respect of 10% of the amount in the name of respondent No.2 for a period of six years.

(vii) Fixed deposit in respect of 10% of the amount in the name of respondent No.3 for a period of seven years.

(viii) Fixed deposit in respect of 10% of the amount in the name of respondent No.4 for a period of eight years.

(ix) Fixed deposit in respect of 10% of the amount in the name of respondent No.5 for a period of nine years.

13. The interest on the aforesaid fixed deposits of appellants shall be paid monthly by automatic credit of interest in the Savings Account of appellant No.1.

14. Withdrawal from the aforesaid account of appellant No.1 shall be permitted after due verification and the Bank shall issue photo Identity Card to appellants No.1 to facilitate identity.

15. No cheque book be issued to appellant No.1 without the permission of this Court.

16. The Bank shall issue Fixed Deposit Pass Book instead of the FDRs to the appellants and the maturity amount of the FDRs be automatically credited to the Saving Bank Account of the beneficiary at the end of the FDR.

17. No loan, advance or withdrawal shall be allowed on the said fixed deposit receipts without the permission of this Court.

18. Half yearly statement of account be filed by the Bank in this Court.

19. On the request of appellants, the Bank shall transfer the Savings Account to any other branch according to the convenience of appellants.

20. The appellants shall furnish all the relevant documents for opening of the Saving Bank Account and Fixed Deposit Account to Mr. M.M. Tandon, Member-Retail Team, UCO Bank Zonal, Parliament Street, New Delhi.

21. The appellant is directed to disclose on affidavit within four weeks whether the statutory amount of Rs.25,000/- has been adjusted while depositing the award amount. If the statutory amount has been so adjusted, the same be transferred to UCO Bank and the UCO Bank is directed to release the said amount to respondent No.1. On the other hand, if the statutory amount has not been adjusted, it may be refunded to the appellant through counsel. If the appellant fails to file the affidavit within four weeks, the Registry shall put up the matter before Court on 5th July, 2010 for directions along with the calculation by the Accounts Department.

22. Copy of the order be given dasti to counsel for both the parties under the signatures of the Court Master.

23. Copy of this order be also sent to Mr. M.M. Tandon, Member-Retail Team, UCO Bank Zonal, Parliament Street, New Delhi (Mobile No. 09310356400) through the UCO Bank, High Court Branch under the signature of Court Master.

ILR (2011) I DELHI 6
I.T.A.

DIRECTOR OF INCOME TAX (EXEMPTION) ....APPELLANT

VERSUS

M/S. BAGRI FOUNDATION ....RESPONDENT

(BADAR DURREZ AHMED AND RAJIV SAHAI ENDLAW, JJ.)

I.T.A. NO. : 19/2010 DATE OF DECISION: 02.07.2010

Income Tax Act, 1961—Section 11(1)(a), 11(2) 260(A)—Whether a trust can donate its entire income to another trust—Whether "Explanation" appended under Section 11(2) and inserted by the Finance Act applies to accumulations mentioned in Section 11(1) (a) of the IT Act—Held—Explanation applies only to Section 11(2) and not to Section 11(1) of the IT act.

The Revenue in the appeal before us inter alia raised a question as to whether the "Explanation" appended under Section 11(2) and inserted by the Finance Act, 2002 w.e.f. 1st April, 2003, applies to accumulations mentioned in Section 11(1)(a) of the Act. The following question was framed for adjudication:-

> "Whether the explanation after Section 11(2) is applicable in respect of the accumulation upto fifteen percent referred to in Section 11(1)(a) also, as distinct from the accumulation out of eighty-five percent as referred to in Section 11(2) of the Income Tax Act, 1961?" **(Para 6)**

Ordinarily, the "explanation" having been appended to Section 11(2), is intended to explain 11(2) only and not Section 11(1). There is nothing to indicate that the explanation though placed after sub-Section (2) is intended to explain

Section 11(1)(a) also. The Finance Act, 2002 vide which the said explanation was added and/or the objects and reasons thereto do not throw any light as to the reason or purpose of the said explanation or that the same is/was intended to apply even to accumulation to the extent of 15% under Section 11(1)(a). **(Para 10)**

The question of law framed is answered accordingly. **(Para 16)**

Important Issue Involved: "Explanation" appended under Section 11(2) and inserted by the Finance Act applies to accumulations mentioned in Section 11(2) and not to Section 11(1)(a) of the IT Act.

[An Ba]

APPEARANCES:

FOR THE APPELLANT : Ms. P.L. Bansal with Mr. Paras Chaudhary and Mr. Anshul Sharma, Advocates.

FOR THE RESPONDENT : Mr. Salil Aggarwal with Mr. Prakash Kumar, Advocates.

CASES REFERRED TO:

1. *Commissioner of Income Tax* vs. *Shri Ram Memorial Foundation* (2004) 269 ITR 35.
2. *The Commissioner of Agricultural Income Tax* vs. *The Plantation Corporation of Kerala Ltd.* AIR 2000 SC 3714.
3. *S.RM.M.CT.M. Tiruppani Trust* vs. *The Commissioner of Income-Tax* (1998) 230 ITR 636 (SC).
4. *Addl. Commissioner of Income Tax* vs. *A.L.N. Rao Charitable Trust* [1995] 216 ITR 697 (SC).
5. *M/s. Patel Roadways Ltd.* vs. *M/s. Prasad Trading Co.* AIR 1992 SC 1514.

6. *M.K. Salpekar* vs. *Sunil Kumar Shamsunder Chaudhari* AIR 1988 SC 1814.
7. *Mohanlal Hargovinddas* vs. *State of M.P.* AIR 1967 SC 1022.
8. *M.P.V. Sundararamier & Co.* vs. *State of Andhra Pradesh* AIR 1958 SC 468.

RESULT: Appeal dismissed.

RAJIV SAHAI ENDLAW, J.

1. This appeal has been preferred against the order dated 27th February, 2009 of the Income Tax Appellate Tribunal (ITAT) dismissing the appeal of the Revenue against the order dated 18th June, 2007 of the Commissioner of Income Tax (Appeals) [CIT(A)] allowing the appeal of the Assessee against the order dated 23rd March, 2006 of the Income Tax Officer (ITO) assessing the income of the Assessee, a Trust duly registered under Section 12AA and duly recognized under Section 80G(5)(vi) of the Income Tax Act, 1961 for the Assessment Year 2003-04 at Rs.31,38,840/- and initiating penalty proceedings against the Assessee for furnishing inaccurate particulars of its income.

2. The Assessee for the relevant year filed return declaring „Nil. income. The case though processed under Section 143(1) was selected for scrutiny. The Assessee had shown the gross total income for the relevant year as Rs.6,92,453/- and deducted therefrom the amount applied for charitable purposes to the extent of Rs.27,28,001/-. The Assessee had made application of income by donation of Rs.26,66,000/- comprising of donation of Rs.25 lacs to BLB Trust as corpus donation and Rs.1,66,000/- to others. The source of the balance amount over and above the income of Rs.6,92,453/- was from FDR encashment, MIP units and MIP-97 encashment which was the accumulation of income of the past and encashment made out of these accumulations/funds.

3. The ITO found that that donation of Rs.25 lacs as corpus donation to BLB Trust was not from current year's income but out of accumulations from the income of earlier years. The ITO, being of the opinion that owing to the explanation appended to Section 11(2) w.e.f. the Assessment Year 2003-04, any donation made out of income accumulation or set apart during the period of accumulation or thereafter

to any trust or institution registered under Section 12AA, as BLB Trust was, was liable to be added in the income of the donor trust, accordingly computed the income as aforesaid of the Assessee.

4. It was *inter alia* the contention of the Assessee before the CIT (A) that the ITO should in any case have given credit of Rs.6,92,453/- being the income of the current year. The CIT (A) found merit in the said contention. It was also the contention of the Assessee before the CIT (A) that the explanation appended to Section 11(2) was not applicable in the facts of the case because the donation to BLB Trust was not out of the accumulations within the meaning of Section 11(1)(a) but out of the free reserves. The CIT (A) accepted the said contention of the Assessee and held the donation by the Assessee of Rs.26,66,000/- aforesaid including the donation of Rs.25 lacs to BLB Trust to have been made out of excess of income over expenditure and not out of amount accumulated under Section 11(1)(a) of the Act. The appeal was accordingly allowed and the Assessee was held to have not violated the provisions of Section 11(1)(a) or 11(2)(a) of the Act.

5. The ITAT affirmed the order of the CIT (A) and held that the Revenue has not been able to make out any case to controvert or rebut the finding of the CIT(A) of the donation in question having been made by the Assessee out of free reserves and income for the year under consideration and not out of accumulations.

6. The Revenue in the appeal before us inter alia raised a question as to whether the "Explanation" appended under Section 11(2) and inserted by the Finance Act, 2002 w.e.f. 1st April, 2003, applies to accumulations mentioned in Section 11(1)(a) of the Act. The following question was framed for adjudication:-

> "Whether the explanation after Section 11(2) is applicable in respect of the accumulation upto fifteen percent referred to in Section 11(1)(a) also, as distinct from the accumulation out of eighty-five percent as referred to in Section 11(2) of the Income Tax Act, 1961?"

7. Section 11(1)(a) is as under:-

> **"11. Income from property held for charitable or religious purposes** - (1) Subject to the provisions of sections, 60 to 63,

> the following income shall not be included in the total income of the previous year of the person in receipt of the income -
>
> (a) income derived from property held under trust wholly for charitable or religious purposes, to the extent to which such income is applied to such purposes in India; and, where any such income is accumulated or set apart for application to such purposes in India, to the extent to which the income so accumulated or set apart is not in excess of fifteen per cent of the income from such property."

Thus the income applied for charitable purposes is not to be included in the total income for the relevant year. A Division Bench of this Court, of which one of us was a member, in **Commissioner of Income-Tax v. Shri Ram Memorial Foundation** (2004) 269 ITR 35 has held that when a donor trust which is itself a charitable and religious trust donates its income to another trust, the provisions of Section 11(1)(a) can be said to have been met by such donor trust and the donor trust can be said to have applied its income for religious and charitable purposes, notwithstanding the fact that the donation is subjected to a condition that the done trust will treat the donation as towards its corpus and can only utilize the accruing income from the donated corpus for religious and charitable purposes. From the same, it follows that if the Assessee trust either itself uses any part of its income for charitable purposes or donates the same to any other charitable trust, such income is exempt from inclusion in the total income of the Assessee trust for the relevant year. The emphasis is on utilizing the income in the relevant year and accumulation is permitted only to a maximum extent of 15%. As long as such accumulation is not more than 15%, such accumulation is also exempt from inclusion in the total income. However, if more than 15% of the income is accumulated, under Section 11(1)(a) the same would not be exempt from inclusion in the total income for the relevant year.

8. No conditions are prescribed for the accumulation of up to 15% permitted under Section 11(1)(a). Section 11(2) permits accumulation in excess of 15% also but subject to certain conditions and with which we are not concerned at present. However, the explanation appended w.e.f. 1st April, 2003 to Section 11(2) is as under:-

"Explanation. – Any amount credited or paid, out of income referred to in clause (a) or clause (b) of sub-section (1), read with the Explanation to that sub-section, which is not applied, but is accumulated or set apart, to any trust or institution registered under Section 12AA or to any fund or institution or trust or any university or other educational institution or any hospital or other medical institution referred to in sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) of clause (23C) of Section 10, shall not be treated as application of income for charitable or religious purposes, either during the period of accumulation or thereafter."

9. What follows is that the amount accumulated cannot be donated to another trust. However, the said explanation does not place a total embargo on donations by one trust to another. It does not prohibit the trust from donating its entire income in a relevant year to another trust, as is the law as noticed in the Division Bench judgment in **Shri Ram Memorial Foundation** (supra). The embargo is only on the income of the trust not applied in the relevant year but accumulated or set apart being donated to another trust. The question which arises is whether such prohibition/embargo is only on the accumulations in excess of 15% with which Section 11(2) deals or extends even to accumulation to the extent of 15% under Section 11(1)(a).

10. Ordinarily, the "explanation" having been appended to Section 11(2), is intended to explain 11(2) only and not Section 11(1). There is nothing to indicate that the explanation though placed after sub-Section (2) is intended to explain Section 11(1)(a) also. The Finance Act, 2002 vide which the said explanation was added and/or the objects and reasons thereto do not throw any light as to the reason or purpose of the said explanation or that the same is/was intended to apply even to accumulation to the extent of 15% under Section 11(1)(a).

11. The Supreme Court in **M.P.V. Sundararamier & Co. Vs. State of Andhra Pradesh** AIR 1958 SC 468 and in **Mohanlal Hargovinddas Vs. State of M.P.** AIR 1967 SC 1022 held that the context and setting of the enactment governs the scope of the "explanation". In **M.K. Salpekar Vs. Sunil Kumar Shamsunder Chaudhari** AIR 1988 SC 1814, the scope of the "explanation" was

construed again in the light of the scheme of the enactment. In **M/s. Patel Roadways Ltd. Vs. M/s. Prasad Trading Co.** AIR 1992 SC 1514, the question was whether the explanation to Section 20 of the CPC was to clause (a) only. The Supreme Court decided, taking into consideration the circumstances and the history of the legislation. The Supreme Court in **The Commissioner of Agricultural Income Tax Vs. The Plantation Corporation of Kerala Ltd.** AIR 2000 SC 3714 was concerned with whether the "explanation" at the bottom of Section 5 of the Agricultural Income Tax Act applied to the entire section or to only one of the clauses thereof. It was held that an explanation below a particular clause/sub section is intended to be an explanation to that specific or particular clause/sub section but when at the bottom of the section, is generally meant to explain the entire section.

12. The question whether the conditions prescribed in Section 11(2) with respect to accumulation in excess of 15%, apply also to accumulation to the extent of 15% under Section 11(1)(a) arose for consideration in **Addl. Commissioner of Income Tax v. A.L.N. Rao Charitable Trust** [1995] 216 ITR 697 (SC). The Supreme Court explained the scheme of Section 11 (1)(a) and Section 11(2) as under:-

" A mere look at Section 11(1)(a) as it stood at the relevant time clearly shows that out of total income accruing to a trust in the previous year from property held by it wholly for charitable or religious purpose, to the extent the income is applied for such religious or charitable purpose, the same will get out of the tax net but so far as the income which is not so applied during the previous year is concerned at least 25% of such income or Rs. 10,000/- whichever is higher, will be permitted to be accumulated for charitable or religious purpose and it will also get exempted from the tax net. Then follows Sub-section (2) which seeks to lift the restriction or the ceiling imposed on such exempted accumulated income during the previous year and also brings such further accumulated income out of the tax net if the conditions laid down by Sub-section (2) of Section 11 are, fulfilled meaning thereby the money so accumulated is set apart to be invested in the Government securities etc. as laid down by Clause (b) of Sub-section (2) of Section 11 apart from the procedure

laid down by Clause (a) of Section 11(2) being followed by the assesee-trust."

13. It was held that the exemption under Section 11(1)(a) (then to the extent of 25% and which was reduced to 15%, also by the Finance Act, 2002) is unfettered and not subject to any conditions and is an absolute exemption. It was further held that if the conditions contained in Section 11(2) are read as applicable to the exemption of up to 15% under Section 11(1)(a) also, then what is an absolute and unfettered exemption of accumulated income guaranteed by Section 11(1)(a) would become a restricted exemption as laid down in Section 11(2). Section 11(2) was held to not operate to whittle down or to cut across the exemption provision contained in Section 11(1)(a). In this regard, it was further noticed that Section 11(2) does not contain any non obstante clause like "notwithstanding the provisions of the sub-Section (1)". Consequently, it was held that after Section 11(1)(a) has had full play and still if any accumulated income of the previous year is left to be dealt with and to be considered for the purpose of income exemption, sub-Section (2) of Section 11 can be pressed in service and if it is complied with then such additional accumulated income beyond 15% (then 25%) can also earn exemption from income tax on compliance of the conditions laid down by Section 11(2). Section 11(2) while enlarging the scope of exemption by removing the restriction imposed by Section 11(1)(a) was held not to take away the exemption allowed by Section 11(1)(a).

14. The same view was followed in **S.RM.M.CT.M. Tiruppani Trust v. The Commissioner of Income-Tax** (1998) 230 ITR 636 (SC).

15. The "explanation" appended after Section 11(2) is nothing but an additional condition attached to accumulation in excess of 15% permitted under Section 11(2). We are unable to hold it as a condition on accumulation up to 15% as provided for in Section 11(1)(a) also. We are unable to find any rational classification for imposing the restriction as contained in the "explanation" to the accumulation of up to 15% also when there is no such restriction to donating the entire income of a year to another charitable trust. If the legislature intended to completely ban/ discourage inter se donation between trusts, it would have changed the position as existing in law as noticed in the Division Bench judgment of this Court in **Shri Ram Memorial Foundation** aforesaid. The legislature

did not do so. Even after the insertion of the "explanation", if a trust donates its entire income for a year to another charitable trust, it would still be entitled to exemption under Section 11(1)(a). It defies logic as to why such donations cannot be permitted out of 15% accumulation permitted under Section 11(1)(a) itself. There is however rationale for imposing the restriction as contained in the "explanation" (supra) to accumulations in excess of 15%. Such accumulations, but for the conditions imposed in Section 11(2) and in the explanation aforesaid, would have been eligible to be taxed. One of the conditions in Section 11(2)(a) is that the purpose for which accumulation in excess of 15% is being made is to be notified; another condition is of the accumulation being permitted for a period not exceeding 10 years; yet another condition is as to the modes in which the accumulation can be invested. There are no such restrictions on accumulation under Section 11(1)(a). The scheme of the section indicates that the additional condition by way of the aforesaid "explanation" is also intended to apply only to accumulations in excess of 15% under Section 11(2) and not to accumulations upto 15% under Section 11(1)(a). The explanation is not found to be intended to take away something from the accumulation upto 15% permitted without any conditions whatsoever under Section 11(1)(a).

16. The question of law framed is answered accordingly.

17. It also follows that even if the donations by the Assessee herein were to be out of accumulations from previous years. and not out of surplus reserves, the same would still not be liable to be included in the total income as assessed by the Income Tax Officer and the order of CIT and ITAT would still be upheld. It is nobody's case that the said accumulations were beyond the accumulation of 15% permitted in Section 11(1)(a).

The appeal is accordingly dismissed.

No order as to costs.

ILR (2011) I DELHI 15
RCR

SH. TILAK AND OTHERS ....PETITIONERS

VERSUS

SMT. VEENA ....RESPONDENT

(V.B. GUPTA, J.)

RCR NO. : 142/2010 AND C.M. NO. : 11531/2010 **DATE OF DECISION: 08.07.2010**

Delhi Rent Control Act, 1958—Section 14(1)(e) and 25B—Shop let out for non residential purposes—Bona fide required back by landlady for running kirana shop by son—Tenant's contention that additional commercial/ business accommodation available with landlady not tenable—Held—Landlady is the master of her choice and it is for her to decide as to what business she wants to run in her shop—Tenant has no right to dictate to the landlord about the suitability of the premises.

It is contended by learned counsel for the petitioners that respondent, her son, her husband and her father-in-law are members of one joint family and all are living together, doing business together and earning together. Trial court failed to deal with this ground, which the petitioners have been taken in their leave application. **(Para 8)**

Lastly, it is contended that further additional commercial/ business accommodation is available with the respondent and trial court did not deal with this aspect of the defence in the impugned order. **(Para 11)**

In this respect it may be pointed out, that it is well settled law that landlady is the master of her choice and it is for her to

decide as to what business she wants to run in her shop. Tenant has no right to dictate to the landlord about the suitability of the premises. **(Para 16)**

In **Satyawati Sharma (Dead) by LRS. Vs. Union of India and Another,** (2008) 5 Supreme Court Cases 287 it was observed that;

> "Even a premises let out for commercial purposes can be got vacated for bona fide requirement and making distinction between residential and commercial purposes as envisaged under Section 14 (1) (e) of the Act, has been held ultra virus of the Constitution". **(Para 17)**

[An Ba]

APPEARANCES:

FOR THE APPELLANTS : Mr. Chetan Sharma, Sr, Advocate with Mr. Manoj Kr. Garg and Mr. Nitin Gupta, Advocates.

FOR THE RESPONDENT : Nemo.

CASE REFERRED TO:

1. *Satyawati Sharma (Dead) by LRS.* vs. *Union of India and Another*, (2008) 5 Supreme Court Cases 287.

RESULT: Petition dismissed.

V.B.GUPTA, J.

1. Present revision petition has been filed against judgment and order dated 15th March, 2010, passed by Additional Rent Controller, Delhi, vide which respondent's eviction petition under Section 14 (1) (e) read with section 25B of Delhi Rent Control Act, 1958, (for short as 'Act') was allowed.

2. Brief facts of this case are that one shop situated on ground floor bearing no. 1786-A, Lal Quan, Delhi was let out by respondent to the petitioners for non residential purposes and the same is required bonafide by the respondent. Respondent is the owner of the shop in question and

she needs the same for running a shop by her son as neither she nor her son has any other reasonably suitable accommodation in Delhi for the said purpose. The premises in dispute was let out long back to the predecessor in interest of the petitioners for non residential purposes. In the shop in dispute, son of respondent will run a Kirana shop.

3. Respondent is also the owner of one half share in property no. 9/26, Kailash Nagar, Gandhi Nagar, Delhi. There are three rooms on the ground floor of the said property and one hall each on the first floor and second floor portions of the said property. One room on the ground floor of the said premises has been let out by respondent to a tenant and in the other room Smt. Anita-the sister of the husband of respondent is residing and in the third room situated on the ground floor Smt. Anita is running a shop. The first floor and second floor portions of the said property are also in occupation of tenants.

4. The area of Kailash Nagar, Gandhi Nagar, Delhi is not suitable for running the said business as there is no market for that business in that area and also because no space is available in the aforesaid house of the respondent for the said purpose.

5. The shop in dispute is more suitable for running the business of sale of spices and dry fruits etc. as the shop in dispute is situated in a commercial market and is also near to the wholesale market of Khari Baoli, Delhi where business of wholesale and retails with respect to Kirana goods, spices and dry fruits etc. is being carried on by large number of shopkeepers.

6. As far as the accommodation available on the back side of the shop in dispute is concerned, the same is being used by the father-in-law and the husband of the respondent for grinding of spices since a long time and a grinding machine is installed in the said space and the spices which are being grinded at that place are sold by the father-in-law of the respondent and her husband in the shop which is being run by the father-in-law of the respondent in Khari Baoli, Delhi. For running the aforesaid business by the son of the respondent about Rs.2,00,000/- would be needed, respondent and her husband have got necessary funds for the said purpose.

7. Petitioner filed an application for leave to contest, which was dismissed by the Additional Rent Controller.

8. It is contended by learned counsel for the petitioners that respondent, her son, her husband and her father-in-law are members of one joint family and all are living together, doing business together and earning together. Trial court failed to deal with this ground, which the petitioners have been taken in their leave application.

9. Other contention is that respondent including her son, have their one more shop at Khari Baoli, Delhi, where admittedly family business is being operated by the respondent. The Court below failed to deal with this ground also.

10. Other contention is that the scope of business of Kiryana and investment and employment in this business at any shop including the shop of respondent at Khari Baoli, Delhi is unlimited and area in which the suit premises is situated has no scope for Kiryana business. The trial court also did not deal with this aspect of the matter.

11. Lastly, it is contended that further additional commercial/business accommodation is available with the respondent and trial court did not deal with this aspect of the defence in the impugned order.

12. Coming to the contentions of learned counsel for the petitioners that respondent, her son and her husband and father-in-law are doing business together and are earning together is just a vague statement. There is no material on record to show that all of them are doing joint business.

13. Regarding other contention, that respondent is having one more shop in Khari Baoli, Delhi, where family business is operated by the respondent. There is nothing on record to show that any family business is being operated at Khari Baoli Shop.

14. In fact, the case of the respondent is that, her father-in-law has been running a shop in Khari Baoli, Delhi, which is in his tenancy, which has not been rebutted by the petitioner.

15. Other ground taken by petitioners is that there is no scope for Kirana business in the area where suit property is situated.

16. In this respect it may be pointed out, that it is well settled law that landlady is the master of her choice and it is for her to decide as to what business she wants to run in her shop. Tenant has no right to dictate to the landlord about the suitability of the premises.

17. In **Satyawati Sharma (Dead) by LRS. Vs. Union of India and Another,** (2008) 5 Supreme Court Cases 287 it was observed that;

> "Even a premises let out for commercial purposes can be got vacated for bona fide requirement and making distinction between residential and commercial purposes as envisaged under Section 14 (1) (e) of the Act, has been held ultra virus of the Constitution".

18. Thus, after going through the record, I find that no triable issues have been raised by the petitioners in their leave application.

19. There is no infirmity. illegality or ambiguity in the impugned judgment passed by the Additional Rent Controller.

20. Hence, present petition being not maintainable is hereby dismissed.

21. No order as to costs.

22. Copy of this judgment sent to trial Court.

CM NO. 11531/2010.

23. Dismissed.

ILR (2011) I DELHI 20
I.T.A.

COMMISSIONER OF INCOME TAX ....APPELLANT

VERSUS

DHANPAT RAI ....RESPONDENT

(DIPAK MISRA CJ. AND MANMOHAN, JJ.)

I.T.A. NO. : 837/2010 DATE OF DECISION: 13.07.2010

Income Tax Act, 1961—Section 260(A), 263—Held—Twin conditions for invoking Section 263 of IT Act-One order is erroneous; two order is prejudicial to the interest of the revenue—Conditions not met out-No case made out for invoking jurisdiction u/s 263.

Important Issue Involved: Twin conditions for invoking Section 263 of IT Act-1 order is erroneous 2 order is prejudicial to the interest of the revenue.

[An Ba]

APPEARANCES:

FOR THE APPELLANT : Ms. Prem Lata Bansal, Advocate.

FOR THE RESPONDENT : Mr. Sanat Kapoor, Advocate.

CASES REFERRED TO:

1. *Malabar Industrial Co. Ltd.* vs. *Commissioner of Income Tax,* (2000) 243 ITR 83 (SC).
2. *CIT* vs. *Gabriel India Ltd.*, (1993)203 ITR 108 Bom.
3. *Gee Vee Enterprises* vs. *Additional Commissioner of Income Tax,* Delhi-I 99 ITR 375.

RESULT: Appeal dismissed.

MANMOHAN, J. (Oral)

1. The present appeal has been filed under Section 260A of Income Tax Act, 1961 (for brevity "Act 1961") challenging the order dated 24th April, 2009 passed by the Income Tax Appellate Tribunal (in short "ITAT"), for the assessment year 2006-2007.

2. Ms. Prem Lata Bansal, learned counsel for revenue stated that ITAT erred in law in setting aside the order passed by the Commissioner of Income Tax (Appeal) under Section 263 of Act, 1961 and restoring the assessment order passed by the Assessing Officer. In this connection, Ms. Prem Lata Bansal, learned counsel for revenue relied upon certain observations made by this Court in **Gee Vee Enterprises vs. Additional Commissioner of Income Tax,** Delhi-I 99 ITR 375.

3. The ITAT in the impugned order has held as under:-

> "12. In the present case, since the Ld. CIT has not pointed out any error in the order of the AO but merely directed to re-examine the issue, we hold that the Ld. CIT was incorrect in terming the assessment order as erroneous insofar as it is prejudicial to the interest of Revenue. The AO having examined the matters and having adopted the course which is legally permissible has not committed any error. We, consequently, set aside the impugned order passed by the Ld. CIT and restore that of the AO."

4. In our opinion, Section 263 of the Act, 1961, does not visualize a case of substitution of judgment by the Commissioner for that of the Assessing Officer who passed the order. The Commissioner on perusal of records may be of the opinion that the estimate made by the Assessing Officer is on the lower side, but that would not vest the Commissioner with the power to re-assess the accounts and determine the income at a higher figure. This is because the Assessing Officer exercises quasi judicial power vested in him in accordance with law and arrives at a conclusion.

5. It is settled law that two conditions have to be fulfilled before the Commissioner can invoke his power under Section 263 of the Act, 1961 namely, the order should be erroneous and further the assessing officer's order should be prejudicial to the interest of Revenue. (Refer to

Malabar Industrial Co. Ltd. vs. Commissioner of Income Tax, (2000) 243 ITR 83 (SC), **CIT vs. Gabriel India Ltd.,** (1993)203 ITR 108 Bom.). Even in the case of **Gee Vee Enterprises** (supra), this Court did not say that the aforesaid conditions precedent need not be fulfilled.

6. In the present case, we have perused the order passed by the Commissioner of Income Tax (Appeal) under Section 263 of the Act, 1961 and we find that in the said order the CIT(A) has neither found the order passed by the assessing officer to be erroneous or prejudicial to the interest of the revenue.

7. Consequently, as the two conditions for invoking jurisdiction under Section 263 of the Act, 1961, are not made out, the CIT(A), in our opinion, could not have exercised the said power. Accordingly, the present petition being devoid of merits is dismissed in liminie but with order as to costs.

ILR (2011) I DELHI 22
ITR

THE COMMISSIONER OF INCOME TAX ....APPELLANT

VERSUS

M/S HARPARSHAD & COMPANY LTD. .....RESPONDENT

(A.K. SIKRI AND REVA KHETRAPAL, JJ.)

ITR NO. : 243/1991 DATE OF DECISION: 04.08.2010

Income Tax Act, 1961—Section 256, 271—Assessee/ Respondent filed assessment for year 1979-80 and also raised claim for payment of commission to Mrs. Ritu Nanda, Director of Respondent Company amounting to Rs. 2,74,617/- —Assessing Officer found services not rendered by Mrs. Ritu Nanda for which she was purportedly given commission @3% of Contract

Value—Also, at relevant time for which payment of commission claimed, Mrs. Ritu Nanda not found to be Director of Company—Thus, AO held claim for Ritu Nanda bogus and imposed penalty of Rs. 1,05,730/- on Respondent—Assessee/Respondent challenged order of penalty in appeal before CIT (Appeal) but dismissed—In further appeal to Income Tax Appellate Tribunal, assessee succeeded as order of penalty set aside—Appellant/Revenue Authority moved petition under Section 256 (2) of the Act seeking reference, "Whether the Tribunal was correct in law in deleting the penalty imposed under the Income-Tax Act, 1961?"—Held: The penalty on the ground of concealment of particulars of non-disclosure of full particulars can be levied only when in the accounts/ return an item has been suppressed dishonestly or the item has been claimed fraudulently or a bogus claim has been made—When facts are clearly disclosed in the return of income, penalty cannot be levied and merely because an amount is not allowed or taxed to income it cannot be said that the assessee had filed inaccurate particulars or concealed any income chargeable to tax—Further, conscious concealment is necessary—Even if some deduction or benefit is claimed by the assessee wrongly but bona fide and no malafide can be attributed, the penalty would not be levied—Even if there is no concealment of Income or furnishing of in accurate particulars, but on the basis there of the claim which is made ex facie bogus, it may still attract penalty provision—Order of Assessing Officer imposing penalty was without any blemish.

The explanations appended to Section 272 (1) (c) of the IT Act entirely indicates the element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing return. The judgment in **Dilip N. Shroof's** case (supra) has not considered the effect and relevance of Section 276C of the I.T.Act. Object behind enactment of Section 271 (1) (c) read with Explanations indicate that the

said section has been enacted to provide for a remedy for loss of revenue. The penalty under that provisions is a civil liability. Willful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution under Section 276C of the I.T. Act. **(Para 12)**

Important Issue Involved: The penalty on the ground of concealment of particulars of non-disclosure of full particulars can be levied only when in the accounts/return an item has been suppressed dishonestly or thse item has been claimed fraudulently or a bogus claim has been made. When the facts are clearly disclosed in the return of income, penalty cannot be levied and merely because an amount is not allowed or taxed to income it cannot be said that the assessee had filed inaccurate particulars or concealed any income chergeable to tax.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Ms. Prem Lata Bansal, Advocate.

FOR THE RESPONDENT : None.

CASES REFERRED TO:

1. *Union of India and Ors.* vs. *Dharmendra Textile Processors and Ors.* (2008) 13 SCC 369, 306 ITR 277 (SC).
2. *Commissioner of Income Tax* vs. *Vidyagauri Natverlal and Ors.* 238 ITR 91.
3. *Krishna* vs. *CIT,* 217 ITR 645.
4. *Rajaram* vs. *CIT,* 193 ITR 614.
5. *CIT* vs. *M. Habibulla* 136 ITR 760 (AU).
6. *CIT* vs. *Escorts Finance Ltd.* 226 CTR (Del) 105.

RESULT: Reference answered against assessee and in favour of Revenue.

A.K. SIKRI, J. (Oral)

1. Nobody appeared on behalf of the assessee inspite of service. Even today, there is no appearance. In these circumstances, we have no

option but to proceed with the matter in the absence of the assessee. We have heard Mrs. Prem Lata Bansal, Advocate for the revenue at length.

2. The Assessing Officer, in the proceedings initiated by him under Section 271 (1) (c) of the Income Tax Act has imposed penalty upon the assessee herein for the concealment of income ˇin respect of assessment year 1979-1980. The CIT (Appeal) had affirmed this penalty. However, Income Tax Appellate Tribunal has set-aside the penalty order. The Revenue has approached this Court by moving petition under Section 256 (2) of the Act seeking reference, which petition was allowed vide order dated 07.01.1991 and direction was given to the Tribunal to draw a statement of case and refer the following question of law for the opinion of this Court:-

> "Whether the Tribunal was correct in law in deleting the penalty imposed by the Income-tax Officer under section 271 (1) (c) of the Income-tax Act, 1961?"

3. This question arises in the following factual backdrop. While passing the assessment order, the Assessing Officer was of the view that the aforesaid claim of payment of commission of Mrs. Ritu Nanda was bogus and could not be substantiated by the assessee even when the opportunity in this behalf was given to it. Therefore, the Assessing Officer chose to serve show cause notice upon the assessee under Section 271(1) (c) of the Act for imposition of penalty. After eliciting the reply of the assessee to the said show cause notice and given hearing, order dated 15.07.1985 was passed by the Assessing Officer thereby imposing penalty in the sum of Rs.1,05,730/-. The assessee has approached the CIT (Appeal) challenging the order of penalty, but unsuccessfully, as the appeal was dismissed on 05.03.1986. In further appeal to the ITAT, however, the assessee succeeded as order of penalty was set-aside by the Tribunal vide order dated 11.02.1988. Before we take note of the considerations which weighed with the Assessing Officer and the CIT (A) on the one hand in imposing the penalty and the ITAT on the other hand in deleting the said penalty, it would be in fitness of things to deal with the claim for commission preferred by the assessee in the return of income filed by it and the reasons because of which the said claim was disallowed.

4. We have already taken note of the reasons given by the Assessing

Officer in disallowing the claim. To recapitulate in brief, the Assessing Officer found that no services were rendered by Mrs. Ritu Nanda as alleged for which she was purportedly given commission @ 3% of the contract value. Further more, though the payment of commission was claimed as given to Mrs. Ritu Nanda as Director of the Company, at the relevant time when this contract from Iran was signed by the assessee, she was not even the Director. In the appeal filed by the assessee, CIT had disallowed part of the commission. Total commission which was claimed to have been paid to Mrs. Ritu Nanda was in the sum of Rs.2,74,617/- and the entire amount was disallowed by the AO. However, CIT (Appeal) disallowed the payment of commission to the extent of Rs.1,83,978/-. Order of CIT (Appeal) in these quantum proceedings has been perused by us. Reading thereof would bring out certain additional facts which are as under:-

5. Amount of Rs.2,74,617/- which was paid to Mrs. Ritu Nanda as commission represented 3% of the contract value. Mrs. Ritu Nanda in turn had made payment to the extent of 1% to M/s Jupiter Trading Corporation. It was found that, in fact, it was M/s Jupiter Trading Corporation which had rendered the requisite services. Instead of paying the commission to M/s Jupiter Trading Corporation directly, the assessee had paid 3% of the contract value as commission to Mrs. Ritu Nanda, who out of this commission paid 1% thereof to M/s Jupiter Trading Corporation. It is for this reason that for the 1% commission which was paid to M/s Jupiter Trading Corporation against the services actually rendered, the CIT (Appeal) had allowed the deduction. Otherwise, in so far as payment made to Mrs. Ritu Nanda is concerned specific and categorical finding of the CIT (Appeal) was that she had not rendered any services for which commission was paid to her. It would be of interest to note that the Income Tax Appellate Tribunal also put its stamp of approval to the aforesaid findings. The relevant portion of the ITAT order reads as under:-

> "In fact no services has been rendered by Smt. Ritu Nanda and that expenditure by the way of commission leaving apart that portion which had been paid to M/s Jupiter Trading Corpn., was not incurred for the purposes of business.".

6. It was also observed that the payment was made to Smt. Ritu Nanda who was daughter-in-law of the Managing Director of the Company

and, thus, it was a bogus payment without any consideration.

7. We have examined the penalty proceedings keeping in view the aforesaid aspects in mind and we are of the opinion that the order of the Assessing Officer imposing penalty was without any blemish and there was no cause for interference in it by the Tribunal. The reasons given by the Tribunal in quashing these penalty proceedings are totally irrelevant, not germane to the issue and rather the Tribunal has lost sight of the aforesaid aspects, which had been conclusively established in the quantum proceedings. In the first instance, the Tribunal has observed that when part claim was allowed by the CIT (Appeal) and only part claim was disallowed, claim for commission was not bogus but was only excessive. This is an observation which is contrary to record. The Tribunal has failed to take note of the fact that part claim as commission was allowed to the assessee not because of the reason that Mrs. Ritu Nanda had rendered any services. It was because of the fact that M/s Jupiter Trading Corporation had rendered services for which it was paid 1% of the commission by Mrs. Ritu Nanda out of 3% received by her. However, the penalty was imposed for putting a bogus claim of payment of commission purportedly paid to Mrs. Ritu Nanda. As far as commission to her is concerned, it was accepted by the ITAT in quantum proceedings that she did not render any services at all.

8. The second reason given by the Tribunal, which flows from the first, is that it was not for the Assessing Officer to substitute its own wisdom or business same with that of the assessee and in case assessee chose to give excessive commission to Mrs. Ritu Nanda, that would call for penalty. Again, while making these observations, the Tribunal was swayed by the wrong fact that Mrs. Ritu Nanda had rendered services and the claim was not bogus but excessive. The findings given in assessment proceedings are relevant and have probative value. Where the assessee produces no fresh evidence or presents any additional or fresh circumstance in penalty proceedings, he would be deemed to have failed to discharge the onus placed on him and the levy of penalty could be justified (**CIT Vs. M. Habibulla** 136 ITR 760 (AU). Explanation (1) below section 271 (1) (c) suggests that the assessee would be deemed to have failed to furnish full and accurate particulars of income, if it failed to offer an explanation, or offers the explanation, which is found by the ITO to be false or it has not been able to substantiate it, in respect

of any facts material to the computation to the total income of that person under Income-tax Act. The assessee had failed to offer any explanation in respect of the addition of Rs.1,83,078/-, and it could be deemed to have concealed the particulars of income or furnished inaccurate particulars thereof, by virtue of this explanation.

9. In **CIT Vs. Escorts Finance Ltd.** 226 CTR (Del) 105, principle of law was resettled in the following words:-

> "It is repeatedly held by the Courts that the penalty on the ground of concealment of particulars of non-disclosure of full particulars can be levied only when in the accounts/ return an item has been suppressed dishonestly or the item has been claimed fraudulently or a bogus claim has been made. When the facts are clearly disclosed in the return of income, penalty cannot be levied and merely because an amount is not allowed or taxed to income as it cannot be said that the assessee had filed inaccurate particulars or concealed any income chargeable to tax. Further, conscious concealment is necessary. Even if some deduction or benefit is claimed by the assessee wrongly but bona fide and no malafide can be attributed, the penalty would not be levied. A fortiorari, if there is a deliberate concealment and false/inaccurate return was filed, which was revised after the assessee was exposed of the falsehood, it would be treated as concealment of income in the original return and would attract penalty even if revised return was filed before the assessment is completed. Likewise, where claim made in the return appears to be ex facie bogus, it would be treated as case of concealment or inaccurate particulars and penalty proceedings would be justified"

10. The law has developed to the extent that even if there is no concealment of income or furnishing of inaccurate particulars, but on the basis thereof the claim which is made is ex facie bogus, it may still attract penalty provision. Cases of bogus hundi loans or bogus sales or purchases have been treated as that of concealment or inaccuracy in particulars of income by the judicial pronouncements.(See **Krishna Vs. CIT,** 217 ITR 645, **Rajaram Vs. CIT,** 193 ITR 614 and Beena Metals 240 ITR 222).

11. Immediately thereafter, in **Commissioner of Income Tax Vs.**

Vidyagauri Natverlal and Ors. 238 ITR 91, Gujarat High Court made a distinction between wrong claim as opposed to false claim and held that if the claim is found to be false, the same would attract penalty. We may also take note of the following observations of the Supreme Court in the case of **Union of India and Ors. Vs. Dharmendra Textile Processors and Ors.** (2008) 13 SCC 369, 306 ITR 277 (SC).

12. The explanations appended to Section 272 (1) (c) of the IT Act entirely indicates the element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing return. The judgment in **Dilip N. Shroof's** case (supra) has not considered the effect and relevance of Section 276C of the I.T.Act. Object behind enactment of Section 271 (1) (c) read with Explanations indicate that the said section has been enacted to provide for a remedy for loss of revenue. The penalty under that provisions is a civil liability. Willful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution under Section 276C of the I.T. Act.

13. Thus, we answer the question as formulated in the negative that is against the assessee and in favour of the Revenue.

ILR (2011) I DELHI 29
WP

MORGAN TECTRONICS LTD. ....PETITIONER

VERSUS

CBI ....RESPONDENT

(SHIV NARAYAN DHINGRA, J.)

WP (CRL) NO. : 65/2010 DATE OF DECISION: 11.08.2010
CRL.A. NO. : 581/2010

Criminal Procedure Code, 1973—Framing of charge—Indian Penal Code, 1860—Sections 420, 468, 471, 120-B—Accused company falsified accounts to show lesser liability and induced complainant Bank to sanction credit facility—Company did not pay back and cheated bank of more than Rs 6 crores—Trial Court framed charges against petitioner company u/sections 420, 468, 471 read with 120-B IPC—Whether company being a juristic person can have mens rea for the purpose of Section 120 B—Held, Company acts through its Board of Directors—If company can enter into contracts and perform other legal obligations it can also be party to criminal acts—If the company can have a right to do things through its Board of Directors it can have necessary mens rea also through its Board of Directors—Mens rea can be fastened on the company if it is an essential element of crime on the ground that mens rea was present in the officers of the company who were acting as mind of the company—Just because offence u/s 420, 468 and 471 IPC included the punishment of imprisonment does not mean company cannot be prosecuted as court can always resort to punishment of imposition of fine—Petition dismissed.

Where a company produced falsified accounts to the bank and obtained benefit from the bank on the basis of falsified accounts and induced the bank to part with huge amount of funds, I consider that a company can be prosecuted for the offence committed by it and mens rea can be fastened on the company, if it is an essential element of the crime, on the ground that mens rea was present in the officers of the company who were acting as mind of the company.

(Para 5)

The other argument raised by the petitioner was that since the sentence prescribed for the offence under Section 420, 468 and 471 IPC included offence of imprisonment and company could not be incorporated, therefore, company cannot be prosecuted. The Supreme Court in **Velliappa Textiles** (Supra) had observed that since company cannot

be sentenced to imprisonment, the court has to resort to punishment of imposition of compensation/fine which is also a prescribed punishment. The observations of Supreme Court are as under:

> "If the custodial sentence is the only punishment prescribed for the offence, this plea is acceptable, but when the custodial sentence and fine are the prescribed mode of punishment, the court can impose the sentence of fine on a company which is found guilty as the sentence of imprisonment is impossible to be carried out. It is an acceptable legal maxim that law does not compel a man to do that which cannot possibly be performed impotentia excusat legem." (para 61)
>
> "As the company cannot be sentenced to imprisonment, the court has to resort to punishment of imposition of fine which is also a prescribed punishment. As per the scheme of various enactments and also the Indian Penal Code, mandatory custodial sentence is prescribed for graver offences. If the appellants' plea is accepted, no company or corporate bodies could be prosecuted for the graver offences whereas they could be prosecuted for minor offences as the sentence prescribed therein is custodial sentence or fine. We do not think that the intention of the Legislature is to give complete immunity from prosecution to the corporate bodies for these grave offences."(Para 62)
>
> "… but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the company. Such discretion is to be read into the Section so far as the juristic person is concerned. Of course, the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing the sentence in accordance with law. As regards

> company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way. We do not think that there is a blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The corporate bodies, such as a firm or company undertake series of activities that affect the life, liberty and property of the citizens. Large scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy." **(Para 6)**

Important Issue Involved: Company can be charged for the offence of cheating, forgery and criminal conspiracy as mens rea can be fastened on the company on the ground that mens rea was present in the officers of the company who were acting as the mind of the company.

[Ad Ch]

APPEARANCES:

FOR THE PETITIONER : Mr. Vijay Aggarwal, Advocate.

FOR THE RESPONDENT : Ms. Suchiti Chandra for Mr. Vikas Pahwa, Standing Counsel for CBI.

CASES REFERRED TO:

1. *Standard Chartered Banks* vs. *Directorate of Enforcement,* (2005) 4 SCC 530.
2. *Assistant Commissioner* vs. *Velliappa Textiles Ltd.,* 2003 (11) SCC 405.

3. *Kalpnath Rai* vs. *State,* AIR 1998 SC 201.

RESULT: Petition dismissed.

SHIV NARAYAN DHINGRA, J.

1. By the present petition, the petitioner has assailed an order dated 12th August, 2008 passed by learned Special Judge, CBI, whereby the learned Special Judge framed charges against the petitioner company charging the company under section 420, 468, 471 IPC read with Section 120-B IPC. The only contention raised by the petitioner before this Court is that a company being a juristic person cannot have mens rea necessary for committing offence of criminal conspiracy as required under section 120-B IPC. It was contended that criminal conspiracy was a personal act and company being a non living person and only a juristic person cannot have the requisite mens rea. Reliance was placed by the petitioner on **Kalpnath Rai Vs. State,** AIR 1998 SC 201 and **Standard Chartered Banks Vs. Directorate of Enforcement,** (2005) 4 SCC 530 and other similar cases.

2. This issue was raised before the Trial Court as well and the Trial Court has dealt with this issue at length. In the present case it would be relevant to note that initially the banker of this company was Indian Bank and this company was enjoying various facilities and limits there. The Indian Bank refused to extend further credits to this company on the ground of RBI restrictions. Thereafter the company switched over to Punjab & Sind Bank and it falsified its accounts and presented the same before Punjab & Sind Bank in order to obtain various credit limits & other facilities from this bank. The company showed lesser liabilities and concealed the facts regarding true liabilities. Due to this concealment of the facts, the company and its officials induced the Punjab & Sind Bank to sanction credit facilities to the tune of Rs. 618.51 lacs. Ultimately the company did not pay the amount and cheated the bank of more than Rs. 6.00 crores resulting into registration of this case.

3. No doubt, the company is a juristic person but the company has its own personality and it acts through its Board of Directors. Action of Board of Directors is considered the action of the company. If Board of Directors, in order to benefit the company, does something then such an act is to be considered as the act of the company. If the argument that

a company can have no guilty mind is accepted, then the next logical thing is that a company can have no mind at all. If the argument of the counsel is accepted, the very existence of the companies will have to be negated. Board of Directors of a company is considered its mind and acting arms. Where for the benefit of company Board of Directors decides to create false documents, falsify the balance sheet; it is an act of the company as well, as a legal person, apart from the act of individuals involved in the act. For every act, whether civil or criminal thought and action, both are necessary. If company can enter into contracts & perform other legal obligations; it can also be party to criminal acts. Several Laws hold companies responsible for offences committed by it through its Board of Directors. If the company can have a right to do things through its Board of Directors, it can have necessary mens rea also through its Board of Directors.

4. In **Assistant Commissioner Vs. Velliappa Textiles Ltd.,** 2003 (11) SCC 405, the Supreme Court held that it was permissible to prosecute a company for offences that require mens rea or knowledge as an essential element for the reason that the acts and state of mind of the officer or agent of a company, who functions as the directing mind and will of the body corporate and controls its functions, shall, in law, be considered to be the acts and state of mind of the company.

5. Where a company produced falsified accounts to the bank and obtained benefit from the bank on the basis of falsified accounts and induced the bank to part with huge amount of funds, I consider that a company can be prosecuted for the offence committed by it and mens rea can be fastened on the company, if it is an essential element of the crime, on the ground that mens rea was present in the officers of the company who were acting as mind of the company.

6. The other argument raised by the petitioner was that since the sentence prescribed for the offence under Section 420, 468 and 471 IPC included offence of imprisonment and company could not be incorporated, therefore, company cannot be prosecuted. The Supreme Court in **Velliappa Textiles** (Supra) had observed that since company cannot be sentenced to imprisonment, the court has to resort to punishment of imposition of compensation/fine which is also a prescribed punishment. The observations of Supreme Court are as under:

"If the custodial sentence is the only punishment prescribed for the offence, this plea is acceptable, but when the custodial sentence and fine are the prescribed mode of punishment, the court can impose the sentence of fine on a company which is found guilty as the sentence of imprisonment is impossible to be carried out. It is an acceptable legal maxim that law does not compel a man to do that which cannot possibly be performed impotentia excusat legem." (para 61)

"As the company cannot be sentenced to imprisonment, the court has to resort to punishment of imposition of fine which is also a prescribed punishment. As per the scheme of various enactments and also the Indian Penal Code, mandatory custodial sentence is prescribed for graver offences. If the appellants' plea is accepted, no company or corporate bodies could be prosecuted for the graver offences whereas they could be prosecuted for minor offences as the sentence prescribed therein is custodial sentence or fine. We do not think that the intention of the Legislature is to give complete immunity from prosecution to the corporate bodies for these grave offences."(Para 62)

"… but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the company. Such discretion is to be read into the Section so far as the juristic person is concerned. Of course, the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing the sentence in accordance with law. As regards company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way. We do not think that there is a blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The corporate bodies, such as a firm or company undertake series of activities that affect the life, liberty and property of the citizens. Large scale financial irregularities are done by various corporations. The corporate vehicle now occupies

such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy."

7. In view of my above discussion, I find that this petition is not maintainable and is hereby dismissed.

ILR (2011) I DELHI 36
CRL.MC.

VIJAY VERMA ....PETITIONER

VERSUS

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

(SHIV NARAYAN DHINGRA, J.)

CRL. MC. NO. : 3878/2009 DATE OF DECISION: 13.08.2010

Protection of Women from Domestic Violence Act, 2005 (DV Act)—Section 2 (f) & 12—Domestic relationship—Application u/s 12 filed by petitioner against her brother and his wife for allowing her to stay in her parents house whenever she visited India from the USA—Metropolitan Magistrate held there was no ground to pass interim order of residence—Appeal dismissed by ASJ—Held, Act cannot be misused to settle property disputes—Where a family member leaves the shared household, to establish his own household and actually establishes his own household he cannot claim to have a right to move an application u/s 12 on the basis of domestic relationship—Domestic relationship comes to an end once the son along with his family moved out of joint family and establishes his own household or when a daughter gets married and

establishes her own household with her husband—Such son, daughter, daughter-in-law or son-in-law if they have any right in the property because of coparcenary or because of inheritance such right can be claimed by an independent civil suit and an application under the DV act cannot be filed by a person who has established his separate household and ceased to have domestic relationship—Petitioner had settled in USA, doing a job there, she was living separately and ceased to be in a domestic relationship with her brother—No relief can be under the DV Act—Petition dismissed.

A perusal of this provision makes it clear that domestic relationship arises in respect of an aggrieved person if the aggrieved person had lived together with the respondent in a shared household. This living together can be either soon before filing of petition or 'at any point of time'. The problem arises with the meaning of phrase "at any point of time". Does that mean that living together at any stage in the past would give right to a person to become aggrieved person to claim domestic relationship? I consider that "at any point of time" under the Act only means where an aggrieved person has been continuously living in the shared household as a matter of right but for some reason the aggrieved person has to leave the house temporarily and when she returns, she is not allowed to enjoy her right to live in the property. However, "at any point of time" cannot be defined as "at any point of time in the past" whether the right to live survives or not. For example if there is a joint family where father has several sons with daughters-in-law living in a house and ultimately sons, one by one or together, decide that they should live separate with their own families and they establish separate household and start living with their respective families separately at different places; can it be said that wife of each of the sons can claim a right to live in the house of father-in-law because at one point of time she along with her husband had lived in the shared household. If this

meaning is given to the shared household then the whole purpose of Domestic Violence Act shall stand defeated. Where a family member leaves the shared household to establish his own household, and actually establishes his own household, he cannot claim to have a right to move an application under Section 12 of Protection of Women from Domestic Violence Act on the basis of domestic relationship. Domestic relationship comes to an end once the son along with his family moved out of the joint family and established his own household or when a daughter gets married and establishes her own household with her husband. Such son, daughter, daughter-in-law, son-in-law, if they have any right in the property say because of coparcenary or because of inheritance, such right can be claimed by an independent civil suit and an application under Protection of Women from Domestic Violence Act cannot be filed by a person who has established his separate household and ceased to have a domestic relationship. Domestic relationship continues so long as the parties live under the same roof and enjoy living together in a shared household. Only a compelled or temporarily going out by aggrieved person shall fall in phrase 'at any point of time', say, wife has gone to her parents house or to a relative or some other female member has gone to live with her some relative, and, all her articles and belongings remain within the same household and she has not left the household permanently, the domestic relationship continues. However, where the living together has been given up and a separate household is established and belongings are removed, domestic relationship comes to an end and a relationship of being relatives of each other survives. This is very normal in families that a person whether, a male or a female attains self sufficiency after education or otherwise and takes a job lives in some other city or country, enjoys life there, settles home there. He cannot be said to have domestic relationship with the persons whom he left behind. His relationship that of a brother and sister, father and son, father and daughter, father and daughter-in-law etc. survives but the domestic

relationship of living in a joint household would not survive & comes to an end. **(Para 6)**

Important Issue Involved: Where a family member leaves the shared household, to establish his own household and actually establishes his own household he cannot claim to have a right to move an application u/s 12 on the basis of domestic relationship.

[Ad Ch]

APPEARANCES:

FOR THE PETITIONER : Mr. K.K. Manan, Mr. Tarun Goomber, Mr. Nipun Bhardwaj , Mr. Pankaj Mandiratta and Mr. Ashish George, Advocate.

FOR THE RESPONDENTS : Mr. Sunil Sharma, APP for the State, Mr. Sunil Sethi, Mr. Sumit Sethi & Mr. B.C. Mishra, Advocates for R-2.

CASES REFERRED TO:

1. *"Indra Warman* vs. *Kishan Kumar Verma",* CS(OS) No. 2137 of 2006.
2. *Vijay Verma* vs. *Kishan Kumar Verma & Ors."* CS(OS) No. 2028 of 2009.

RESULT: Petition dismissed.

SHIV NARAYAN DHINGRA, J.

1. This petition has been filed under Section 482 Cr. P.C. assailing order of learned A.S.J. dated 7th September, 2009, upholding the order of learned M.M. dated 11th July, 2009.

2. Brief facts relevant for the purpose of deciding this petition are that the petitioner herein had filed an application under Section 12 of Protection of Women from Domestic Violence Act making her brother and his wife as respondents. She sought an interim order from the Court

of M.M. for immediate residence rights and police protection so that she could stay at premises No. A-181, Defence Colony, Delhi, whenever she visited India. The petitioner is a permanent resident of USA and is living in USA since year 2000. She came to India on a visit on 15th July, 2008 and alleged that when she went to her parental house on 16th July, 2008, she was not allowed to enter her parental house and hence the application.

3. Learned MM in her order observed that in this case the petition was more in a nature of claiming right in the property. The whole dispute seemed to be property dispute between the parties and there was no ground to pass an interim order of residence. The learned ASJ upheld this contention in appeal.

4. It is not disputed that father of the petitioner is not alive. Property No. A-181, Defence Colony, New Delhi, was owned by the father of the petitioner and respondent No. 2. Petitioner claimed right in the property alleging that she had a right in her father's property whereas respondent No. 2 relied upon a Will executed by father bequeathing his rights and share in the property in favour of his grandson. The respondent also relied upon an affidavit earlier executed by the petitioner showing that she had received her share in the property. It is also not disputed that a suit for partition titled as **"Indra Warman Vs. Kishan Kumar Verma",** being CS(OS) No. 2137 of 2006, filed by the sister of petitioner was pending in the High Court wherein the petitioner was one of the defendants and the petitioner herself also filed a suit for partition in the High Court being CS(OS) No. 2028 of 2009, titled as **" Vijay Verma Vs. Kishan Kumar Verma & Ors."**

5. Filing of a petition under Protection of Women from Domestic Violence Act by the petitioner taking shelter of domestic relationship and domestic violence needs to be considered so that this Act is not misused to settle property disputes. Domestic relationship is defined under the Act in Section 2(f) as under:

> "(f) 'domestic relationship' means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family."

6. A perusal of this provision makes it clear that domestic relationship arises in respect of an aggrieved person if the aggrieved person had lived together with the respondent in a shared household. This living together can be either soon before filing of petition or 'at any point of time'. The problem arises with the meaning of phrase "at any point of time". Does that mean that living together at any stage in the past would give right to a person to become aggrieved person to claim domestic relationship? I consider that "at any point of time" under the Act only means where an aggrieved person has been continuously living in the shared household as a matter of right but for some reason the aggrieved person has to leave the house temporarily and when she returns, she is not allowed to enjoy her right to live in the property. However, "at any point of time" cannot be defined as "at any point of time in the past" whether the right to live survives or not. For example if there is a joint family where father has several sons with daughters-in-law living in a house and ultimately sons, one by one or together, decide that they should live separate with their own families and they establish separate household and start living with their respective families separately at different places; can it be said that wife of each of the sons can claim a right to live in the house of father-in-law because at one point of time she along with her husband had lived in the shared household. If this meaning is given to the shared household then the whole purpose of Domestic Violence Act shall stand defeated. Where a family member leaves the shared household to establish his own household, and actually establishes his own household, he cannot claim to have a right to move an application under Section 12 of Protection of Women from Domestic Violence Act on the basis of domestic relationship. Domestic relationship comes to an end once the son along with his family moved out of the joint family and established his own household or when a daughter gets married and establishes her own household with her husband. Such son, daughter, daughter-in-law, son-in-law, if they have any right in the property say because of coparcenary or because of inheritance, such right can be claimed by an independent civil suit and an application under Protection of Women from Domestic Violence Act cannot be filed by a person who has established his separate household and ceased to have a domestic relationship. Domestic relationship continues so long as the parties live under the same roof and enjoy living together in a shared household. Only a compelled or temporarily going out by aggrieved person shall fall in phrase 'at any point of time', say,

wife has gone to her parents house or to a relative or some other female member has gone to live with her some relative, and, all her articles and belongings remain within the same household and she has not left the household permanently, the domestic relationship continues. However, where the living together has been given up and a separate household is established and belongings are removed, domestic relationship comes to an end and a relationship of being relatives of each other survives. This is very normal in families that a person whether, a male or a female attains self sufficiency after education or otherwise and takes a job lives in some other city or country, enjoys life there, settles home there. He cannot be said to have domestic relationship with the persons whom he left behind. His relationship that of a brother and sister, father and son, father and daughter, father and daughter-in-law etc survives but the domestic relationship of living in a joint household would not survive & comes to an end.

7. This meaning of domestic relationship has sense when we come to definition of domestic violence and the purpose of the Act. The purpose of the Act is to give remedy to the aggrieved persons against domestic violence. The domestic violence can take place only when one is living in shared household with the respondents. The acts of abuses, emotional or economic, physical or sexual, verbal or nonverbal if committed when one is living in the same shared household constitute domestic violence. However, such acts of violence can be committed even otherwise also when one is living separate. When such acts of violence take place when one is living separate, these may be punishable under different provisions of IPC or other penal laws, but, they cannot be covered under Domestic Violence Act. One has to make distinction between violence committed on a person living separate in a separate household and the violence committed on a person living in the shared household. Only violence committed by a person while living in the shared household can constitute domestic violence. A person may be threatening another person 100 miles away on telephone or by messages etc. This may amount to an offence under IPC, but, this cannot amount to domestic violence. Similarly, emotional blackmail, economic abuse and physical abuse can take place even when persons are living miles away. Such abuses are not covered under Domestic Violence Act but they are liable to be punished under Penal laws. Domestic Violence is a violence

which is committed when parties are in domestic relationship, sharing same household and sharing all the household goods with an opportunity to commit violence.

8. I therefore consider that the application filed by the petitioner under Section 12 of Domestic Violence Act was not at all maintainable. The petitioner had settled her separate house in America, her Passport was issued in America, she is doing job in America, she was adult and able to take care of herself, take her own decisions. She decided to live in America after leaving her parents here. If she has any right in her father's property, she has already filed a suit for partition. An application under Section 12 of Domestic Violence Act was nothing but a gross misuse of the Act and I consider that she was rightly denied the interim relief of residence in the property left by her father.

The petition is hereby dismissed.

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EX. L/NK MAHABIR PRASAD ....PETITIONER

VERSUS

UOI AND ORS. ....RESPONDENTS

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

WP (C) NO. : 2556/2010 DATE OF DECISION: 26.08.2010

Central Civil Service (Pension) Rules—Rule 41—Application of petitioner for grant of compassionate allowance rejected on ground of his dismissal after disciplinary enquiry as petitioner was delinquent of disobedient nature and habitual of being absent—Compassionate allowance admissible only in those cases where delinquent had been honest and dedicated during whole service period—Order challenged in High Court—Held—Conduct of petitioner for purposes of award of compassionate allowance has to be evaluated by authority considering such application taking totality of record into consideration and cannot be premised on isolated instances or specific instances of misconduct for which employee may have been penalized—Commendations, rewards and positive comments in ACR have not been taken into consideration—Respondents erred in passing impugned order and failed to exercise discretion conferred upon them in accordance with law and applicable rules—Petitioner entitled to award of compassionate allowance in terms of applicable rules and guidelines.

As against this, the same service record of the petitioner shows that he was awarded a commendation in 1977 for his hard work. In 1981 and 1982, the petitioner was awarded cash rewards. Again in 1994 he was the recipient of a commendation for the work done and the performance of duties during a bye election. The petitioner was also awarded the 25th Independence Anniversary medal. The record also discloses that the petitioner was awarded the Sangram medal. The annual confidential reports of the petitioner show that his work has been continuously assessed as good. In fact, there are several remarks endorsing his honesty and hard work in the character and service roll of the petitioner which has been placed before us. The conduct of the petitioner for the purposes of award of compassionate allowance has to be evaluated by the authority considering such application taking a totality of the record into consideration and cannot be premised on isolated instances or specific instances of misconduct for which the employee concerned may have been penalized. **(Para 9)**

On an application of the principle laid down in the aforenoticed judgments, it has to be held that the respondents have erred in passing the order dated 11th March, 2010

and have failed to exercise discretion conferred upon them in accordance with law and the applicable rules. The respondents have failed to take into consideration the relevant factors relating to the service of the petitioner. The petitioner was dismissed from service as back as on 28th October, 1995 after 23 years of service and a long period of almost 15 years has passed since his dismissal. There is no material denial to the submissions relating to the petitioner's penury and financial hardship on the part of the respondents. The commendations, rewards and the positive comments about his service in the petitioner's ACRs have not been taken into account. Nothing has been pointed out which would disentitle the petitioner in the light of the guidelines dated 22nd April, 1940. **(Para 22)**

Important Issue Involved: The conduct of the petitioner for the purposes of award of compassionate allowance has to be evaluated by the authority considering such application taking a totality of the record into considering and cannot be premised on isolated instances or specific instances of misconduct for which the employee concerned may have been penalized.

[Ar Bh]

APPEARANCES:

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

FOR THE RESPONDENTS : Ms. Kailash Golani, Advocate.

CASES REFERRED TO:

1. *Shadi Ram (Ex.ASI)* vs. *Government of NCT of Delhi & Ors.* 2008 V AD(Delhi) 3.
2. *Idan Puri* vs. *Union of India and Ors.* RLW (2007) 1 Raj 471.
3. *Md. Abdul Samad* vs. *General Manager, South Central Railways and Ors.*: 2007(3)ALD722.
4. *R.S. Sharma* vs. *Union of India and Anr. :* (2004)IIILLJ191.
5. *Mithlesh Sharan Sharma* vs. *The State of Rajasthan & Ors.* 2004 (3) SLR 485.
6. *Thankappan Nair* vs. *State of Kerala* 2001 (3) Ker 464 (W.A. No. 2966/2000) decided on 03.10.2001.
7. *Anna Deoram Londhe (deceased by L.Rs)* vs. *State of Maharashtra :* 1998 5 SLR 480.

RESULT: Allowed.

GITA MITTAL, J. (Oral)

1. Rule DB.

2. With the consent of both parties and having regard to the short controversy involved in the present writ petition, the same is taken up for consideration.

The petitioner assails an order dated 11th March, 2010 passed by the respondents rejecting his application praying for grant of compassionate allowance to him.

3. The facts giving rise to the petition are not only in a narrow campus but are admitted.

4. The petitioner was recruited into the Central Reserve Police Force on 19th January, 1971 in the post of Constable. The petitioner is stated to have absented without leave on 4th August, 1994 which he resumed on 23rd September, 1994 and again deserted the camp laws of the CRPF on 26th September, 1994 without permission. The respondents framed articles of charges against the petitioner and conducted a disciplinary inquiry against him. These proceedings culminated in imposing of the punishment of dismissal from service with effect from 28th October, 1995 upon the petitioner.

5. It is noteworthy that this order of dismissal was passed after the petitioner had rendered 23 years of service.

6. The petitioner appears to have waited 15 years to pass before he made a representation to the Directorate General of the CRPF on 27th November, 2009 requesting for grant of compassionate allowance from the date of his dismissal from service. The reason for the request and

the explanation for the delay in making the representation are both explained on grounds of poor economic conditions. This representation was considered and rejected by the Director General vide the order dated 11th March, 2010 on the ground that the petitioner had been dismissed after holding a disciplinary enquiry against him in accordance with the applicable rules and that the conduct of the petitioner disclosed that he was a "delinquent of disobedient nature and habitual of being absent". The Director General had construed rule 41 of the Central Civil Service (Pension) Rules and arrived at a conclusion that compassionate allowance was admissible only in those cases where the delinquent had been honest and dedicated during the whole service period which was not so, so far as the petitioner was concerned.

Aggrieved by this rejection of his prayer for compassionate allowance, the petitioner has filed the present writ petition.

7. The writ petition has been opposed by Ms. Kailash Golani, learned counsel for the respondents again on the very ground on which the impugned order is premised. It is contended that compassionate allowance is not to be awarded as a matter of right and can be granted only after a careful consideration of the entire service record of the petitioner. In this regard, learned counsel has drawn our attention to the provisions of Rule 41 of the Central Civil Service (Pension) Rules as well as the Government decisions and guidelines which govern exercise of discretion for award or grant of compassionate allowance.

8. We have considered the rival contentions. The respondents have also made available to us the entire service record of the petitioner. The record would disclose that the petitioner had served with the respondents for the period from 19th January, 1971 till termination of his services on 28th October, 1995 by the intervention of the order of dismissal. So far as his conduct during this period of 23 years is concerned, on account of satisfactory rendition of service on 1st July, 1985, the petitioner was promoted as a Lance Naik. He was awarded a censure on some count in 1986. There is also an entry of his having been suspended on 14th November, 1989 for absent without permission for 16 days. The record also discloses reversion of the petitioner to the post of Constable for a period from 16th April, 1990 to 15th April, 1991. However, the petitioner was restored to the rank of Lance Naik with effect from 16th April,

1991. There is no allegation against the petitioner till his absence without leave in the year 1994 which has been noted hereinabove which culminated in his being dismissed from service with effect from 28th October, 1995.

9. As against this, the same service record of the petitioner shows that he was awarded a commendation in 1977 for his hard work. In 1981 and 1982, the petitioner was awarded cash rewards. Again in 1994 he was the recipient of a commendation for the work done and the performance of duties during a bye election. The petitioner was also awarded the 25th Independence Anniversary medal. The record also discloses that the petitioner was awarded the Sangram medal. The annual confidential reports of the petitioner show that his work has been continuously assessed as good. In fact, there are several remarks endorsing his honesty and hard work in the character and service roll of the petitioner which has been placed before us. The conduct of the petitioner for the purposes of award of compassionate allowance has to be evaluated by the authority considering such application taking a totality of the record into consideration and cannot be premised on isolated instances or specific instances of misconduct for which the employee concerned may have been penalized.

10. For the purposes of the present adjudication, we may usefully extract the applicable rule 41 of the Central Civil Service (Pension) Rules which has been relied upon by both counsels before us :-

"41. Compassionate Allowance

(1) A Government servant who is dismissed or removed from service shall forfeit his pension and gratuity:

Provided that the authority competent to dismiss or remove him from service may, if the case is deserving of special consideration, sanction a Compassionate Allowance not exceeding two-thirds of pension or gratuity or both which would have been admissible to him if he had retired on compensation pension.

(2) A Compassionate Allowance sanctioned under the proviso to sub-rule (1) shall not be less than the amount of (Rupees three hundred and seventy-five) (Rupees three thousand five hundred from 1-1-2006.)"

11. Mr. Trivedi, learned counsel for the petitioner has also placed reliance on the government of India decision which has been captioned as Government Instruction Office Memo No. 3(2)-R-II/40 dated 22nd April, 1940 below Rule 41 in Swamy's Compilation of the CCS(Pension) Rules and reads as follows :-

> **"(1) Guiding principles for the grant of Compassionate Allowance** –It is practically impossible in view of the wide variations that naturally exist in the circumstances attending each case, to lay down categorically precise principles that can uniformly be applied to individual cases. Each case has, therefore, to be considered on its merits and a conclusion has to be reached on the question whether there were any such extenuating features in the case as would make the punishment awarded, though it may have been necessary in the interests of Government, unduly hard on the individual. In considering this question, it has been the practice to take into account not only the actual misconduct or course of misconduct which occasioned the dismissal or removal of the officer, but also the kind of service he has rendered. Where the course of misconduct carries with it the legitimate inference that the officer's service has been dishonest, there can seldom be any good case for a Compassionate Allowance. Poverty is not an essential condition precedent to the grant of a Compassionate Allowance, but special regard is also occasionally paid to the fact that the officer has a wife and children dependent upon him, though this factor by itself is not, except perhaps in the most exceptional circumstances, sufficient for the grant of a Compassionate Allowance."

12. Learned counsel for the petitioner has also placed reliance on judicial precedents reported at 1998 5 SLR 480 **Anna Deoram Londhe (deceased by L.Rs) vs. State of Maharashtra** : 2004 (3) SLR 485 **Mithlesh Sharan Sharma vs. The State of Rajasthan & Ors.** and 2008 V AD(Delhi) 3 **Shadi Ram (Ex.ASI) vs. Government of NCT of Delhi & Ors.** wherein the courts were concerned with record to the manner in which discretion to grant compassionate allowance had arisen for consideration.

13. We find that a Division Bench of the Bombay High Court in **Anna Deoram Londhe (deceased by L.Rs) vs. State of Maharashtra** (supra) was called upon to consider the case of a petitioner who had been removed from service for misconduct on account of his conviction under section 325 of the Indian Penal Code. It was observed that such conduct was not connected with the discharge of his duties. The petitioner had put in more than 30 years of service and as such was found otherwise eligible for superannuation or retiring pension. It was held that merely because the petitioner was removed from service for such misconduct, that alone would not furnish a ground to deny him the benefit of compassionate pension. The court had set aside the order rejecting the application for compassionate pension of the employee and held that he was entitled to the compassionate pension. Consequential orders directing the respondents to pay the compassionate allowance to the legal heirs of the deceased employee were made.

14. The decision of the Rajasthan High Court in 2004 (3) SLR 485 **Mithlesh Sharan Sharma vs. The State of Rajasthan & Ors.** (supra) is similar. In this case, the employee served as a sepoy since 17th November, 1949 till 17th April, 1979 when he was removed from service. As a result, this petitioner had served for approximately 30 years which was more than qualifying service for pension. The court also noticed the fact that he was 75 years old on the date of consideration of the writ petition and might be burdened with numerous liabilities as being head of the family. It is noteworthy that the services of this petitioner had been also terminated on grounds of unauthorized absence from duty. In this background, the court had directed that it would be in the interest of justice to allow compassionate allowance on a special consideration to the petitioner.

15. At this stage, we may notice the authoritative pronouncement of a Division Bench of this court which is reported at 2008 V AD(Delhi) 3 **Shadi Ram (Ex.ASI) vs. Government of NCT of Delhi & Ors.** (supra) which authoritatively lays down the applicable principles so far as the manner in which discretion for granting compassionate allowance in terms of rule 41 of the CCS(Pension) Rules and the Guidelines thereunder, has to be exercised. The observations and the findings of the court relevant for the present adjudication may usefully be extracted and read as follows :-

> "13. In its judgment, particularly in paragraph 15 thereof, the learned Tribunal has agreed with the respondents' contention to

the effect that the main ground emphasized by the Guidelines against grant of Compassionate Allowance under Rule 41, is dishonesty, and the main reason for the petitioner's dismissal was also dishonesty, therefore, the petitioner's case cannot be said to be one that deserves special consideration. To put it differently, the Tribunal has concluded that the Guidelines peremptorily disentitle officers whose dismissal happens to be occasioned by misconduct involving dishonesty, to Compassionate Allowance. To my mind, this is clearly misconceived. The relevant portion of Rule 41 provides that the Competent Authority may, "if the case is deserving of special consideration, sanction a compassionate allowance..." (emphasis added). Nothing more is specified under the Rule. It is thus evident that the sole criterion is that the, "case", must be, "deserving of special consideration". The word, "case" here has clearly been used to denote, the 'state of affairs', or "the circumstances involved", [refer to the Concise Oxford Dictionary of current English, 8th edition], while the words, "deserving of" are defined as, "showing qualities worthy of...help etc"; and, "consideration," is defined as, "a fact or circumstance to be taken into account" (the Shorter Oxford English Dictionary, 3rd Edition). Therefore, in the context, the phrase, "if the case is deserving of special consideration", can only mean that if the state of affairs or the circumstances involved bring out qualities that are worthy of help or assistance, the applicant should be granted Compassionate Allowance. For arriving at this conclusion, the field is left wide open for the Competent Authority. All that is required for the Competent Authority to entertain the matter, and to apply its mind thereto, is that the applicant must have been dismissed from service and his pension and gratuity forfeited. In particular, there is nothing whatsoever in Rule 41 to suggest that the application of any officer who has been dismissed for misconduct involving dishonesty, is to be rejected peremptorily.

14. In addition to Rule 41, on 22.4.1940, the Government of India has issued the aforesaid Guidelines which have been reproduced by me in paragraph 9 above. They are titled, "Guiding Principles for the Grant of Compassionate Allowance". They have obviously been issued with a view to ensuring uniformity

in application and decision-making under Rule 41. At their very outset, the Guidelines make it clear that while each case has to be considered on its own merits, the question which is to be decided by the Competent Authority in every case is, whether the case has any such extenuating features that would make the punishment awarded unduly hard on the dismissed officer. They also seek to facilitate the task of decision-making entrusted to the Competent Authority under the said Rule by laying down certain principles for their application. Every aspect that is referred to in the Guidelines is aimed at determining the same question, i.e., whether the punishment awarded has been unduly hard on the dismissed officer. This approach is in consonance with the mandate of the Rule 41 that has been analysed by me above, which authorizes the Competent Authority to sanction Compassionate Allowance if the case is deserving of special consideration. It is in this context that the Guidelines have stated the following:

> "In considering this question, it has been the practice to take into account not only the actual misconduct or course of misconduct which occasioned the dismissal or removal of the officer, but also the kind of service he has rendered."

Immediately after this, and in the same context, that is, to examine and to see whether the punishment awarded has been unduly hard on the dismissed officer, a caution is added by the Guidelines qua those cases where the officer's dismissal was occasioned by a, "course of misconduct". This states as follows:

> "Where the course of misconduct carries with it legitimate inference that the officer's service has been dishonest, there can seldom be any good case for a compassionate allowance."

Unfortunately, the Tribunal appears to have taken this caution to mean that if the dismissal was the result of an incident that had an element of dishonesty, the Competent Authority is obliged to refuse the application peremptorily.

To my mind, the word, "service", has been used in both the portions of the Guidelines extracted above, to denote, "a state or

period of employment to work for an individual or organization", (refer the Concise Oxford Dictionary of current English, 8th edition). *At the same time, the phrase, "kind of service", denotes that it is the nature of the service rendered by the officer during his entire tenure that needs to be assessed, and is not confined to the incident that led to his dismissal. It follows therefore that the Guidelines enjoin the authority to look at the officer's entire service record and then decide whether the punishment awarded has been unduly hard on the officer, and this requirement for the officer's service to be looked at from the point of view whether the punishment awarded has been unduly hard on him, cannot be peremptorily dispensed with on the ground that his dismissal was based on an incident of misconduct which had an element of dishonesty*. Unfortunately, both the Competent Authority, as well as the learned Tribunal, appear to have overlooked this aspect.

33. I also agree with the submission of the petitioner's counsel that the punishment of dismissal from service is employed only in the most grievous cases of misconduct by an officer, and the provision contemplating the grant of Compassionate Allowance can be invoked only by someone who have been dismissed from service. It is obvious that conduct that leads to an officer's dismissal is bound to be of a kind that tends to tarnish the image of his employer. After all, that is also one of the reasons for his dismissal. For the Competent Authority to thereafter say that he doesn't deserve Compassionate Allowance because he lowered his employer's image by the very act, or acts, that led to his dismissal, is to render the provision otiose. Furthermore, in the light of foregoing analysis of Rule 41 as well as the Guidelines, the issue before the Competent Authority is only whether the punishment imposed has been unduly hard on the officer. That is the point of view from which the whole thing is to be examined. That the dismissed officer's conduct has tarnished the image of the Force is irrelevant to the issue at hand. Such an approach on the part of the Competent Authority shows a lack of understanding of the object and purpose of the rule and the circumstances under which it is invoked.

34. I might add that, in my view, there is an element of decision-

making involved in disposing of an application for grant of Compassionate Allowance. As the title suggests, it is an application seeking a, "compassionate" allowance. It is a plea whereby the authorities might be moved to show "compassion" for a former employee in straitened circumstances. I need hardly add that justice tempered with mercy always has a lasting effect. Furthermore, even in decisions taken by an Administrative Authority, there must be an element of uniformity and rationality. The power to grant or refuse Compassionate Allowance cannot be exercised on the mere whim of the officer who is designated as the Competent Authority at the relevant time."

(Outlining by us)

16. The Division Bench also considered the respondents' objection that the writ petition was grossly delayed in the following terms :-

"31. In addition to this, the learned Tribunal has also upheld the impugned order of the third respondent on the ground that the petitioner has applied for grant of Compassionate Allowance nearly 17 years after his dismissal, and that such a long lapse of time, demonstrates that the petitioner has managed to survive all this while without pension, and therefore he could not possibly require this allowance henceforth. In other words, the fact of the petitioner applying after nearly 17 years, has persuaded the Tribunal to conclude that the penalty of dismissal, and the consequent forfeiture of his pension and gratuity, was not unduly hard on him. To my mind, this is a completely erroneous approach. People manage to survive the most oppressive circumstances in life. That does not mean that since their adverse circumstances have not actually killed them, and they have managed to somehow survive, therefore it must be presumed that the circumstances through which they have passed have not been unduly harsh. Similarly, simply because the petitioner managed to stay alive all these years after his dismissal bereft of pension and gratuity, doesn't automatically warrant the conclusion that the punishment was not unusually harsh on him. It is entirely possible that the applicant has struggled all these years to make ends meet and felt ashamed to beg for a Compassionate Allowance, but his current circumstances have reduced him to such a state that he had no

alternative but to throw himself at the mercy of his former employer's compassion. It is also conceivable that for some years after his dismissal, the petitioner was not so badly off, and that his condition has deteriorated only much later.

32. In **Thankappan Nair v. State of Kerala** 2001 (3) Ker 464 (W.A. No. 2966/2000) decided on 03.10.2001, the Division Bench of High Court of Kerala thought fit to direct reconsideration of a dismissed officer's request for Compassionate Allowance for which he had applied 28 years after this dismissal. Similarly a Division Bench of Bombay High Court in **R.S. Sharma v. Union of India and Anr.** : (2004) IIILLJ 191 Bom directed reconsideration of a dismissed officer's request for Compassionate Allowance for which he had applied 11 years after his dismissal. Only recently, in a case where the dismissed officer happened to apply for Compassionate Allowance 30 years after his dismissal, the Andhra Pradesh High Court has set aside the order rejecting his application and directed reconsideration, see **Md. Abdul Samad v. General Manager, South Central Railways and Ors.**: 2007(3)ALD722 . However, in the case of **Idan Puri v. Union of India and Ors.** RLW (2007) 1 Raj 471, a Single Judge of the Rajasthan High Court thought fit to reject a petition challenging refusal to grant Compassionate Allowance to a dismissed officer on the ground that his claim was hit by delay and laches because he had applied for the same nearly 20 years after his dismissal. Be that as it may, as I have already concluded, it was inappropriate on the part of the learned Tribunal to have stepped into the shoes of the Competent Authority to decide whether the applicant's case is deserving of special consideration warranting the sanction of Compassionate Allowance. By the same line of reasoning, these questions are not for this Court to decide. Suffice to say that it is open to the Competent Authority to apply itself to every aspect and, while taking a decision on the matter, there is nothing to prevent the Competent Authority from fixing not only the quantum of allowance, but also the date from which it will be payable."

17. In view of the principles laid down in the judicial pronouncements noted hereinabove especially the binding adjudication in **Shadi Ram (Ex.**

ASI) vs. Government of NCT of Delhi & Ors. (supra), it is apparent that the respondents could not have premised the rejection of grant of compassionate allowance to the petitioner herein solely on his absence from duty in the year 1994 for which he stood dismissed from service. We may note that **Shadi Ram (supra)** had been dismissed from service on allegations of having accepted illegal gratification, certainly a very serious charge. The judicial precedents noted above are concerned with the employees who have been involved in serious offences and yet were found deserving compassionate allowance.

18. We may note that the order of dismissal from service imposed by the respondents upon the petitioner was not assailed by him. There is no allegation of the petitioner ever having been involved in any misdemeanour or misconduct involving moral turpitude.

19. The petitioner states that he belongs to a poor family, is not highly educated and is suffering from social backwardness as well. He explains that he was therefore not in a position to avail any proper remedies. It is only during the visit of the Poorva Sainik Sewa Parishad, Rajasthan (Regd.) in his village that the petitioner had sought legal advice from them and was advised to approach the authorities for grant of compassionate allowance.

As a result of this advice the petitioner approached an advocate who advised him to make a representation to the authorities for grant of the compassionate allowance.

It is averred that the petitioner and his wife have no land or property and are without any source of income to earn his day to day livelihood. He is passing hard days doing hard labour and surviving at the mercy of his relatives.

20. Learned counsel for the petitioner submits that on account of the intervention of the dismissal order, despite having been put in 23 years of pensionable service, the petitioner stands deprived of his monetary and retirement benefits. Furthermore for want of the finances as well as legal assistance, the petitioner was unable to take legal remedies to assail the order of dismissal and denial of the benefits of the fruit of his service.

21. We find that the petitioner had made the representation dated 27th November, 2009 to the Director General, CRPF. The office of the

Director General forwarded the petitioner's representation under cover of a communication dated 4th January, 2010 to the Inspector General of Police, Middle Sector, CRPF, Lucknow with the directions to examine and investigate the case as per the rules and to intimate the position to the petitioner and Director General, Headquarters, New Delhi by 4th February, 2010. It is pointed out by learned counsel for the petitioner that instead of informing the Director General as directed, the Deputy Inspector General of Police proceeded to examine the representation of the petitioner and rejected the same by the impugned order dated 11th March, 2010.

22. On an application of the principle laid down in the aforenoticed judgments, it has to be held that the respondents have erred in passing the order dated 11th March, 2010 and have failed to exercise discretion conferred upon them in accordance with law and the applicable rules. The respondents have failed to take into consideration the relevant factors relating to the service of the petitioner. The petitioner was dismissed from service as back as on 28th October, 1995 after 23 years of service and a long period of almost 15 years has passed since his dismissal. There is no material denial to the submissions relating to the petitioner's penury and financial hardship on the part of the respondents. The commendations, rewards and the positive comments about his service in the petitioner's ACRs have not been taken into account. Nothing has been pointed out which would disentitle the petitioner in the light of the guidelines dated 22nd April, 1940.

23. We find that not only the respondents have failed to exercise the discretion but the consideration is not even by a person to whom the representation has been made by the petitioner. None of the facts and circumstances brought out by the petitioner in his representation and noted hereinabove nor the service record of the petitioner has been considered by the authority who has passed the order dated 11th March, 2010.

In this background, in the peculiar facts and circumstances of the case, we hold that the petitioner is entitled to award of compassionate allowance in terms of the applicable rules and guidelines.

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

(i) The respondents shall make the appropriate order in accordance with rule 41 of the CCS(Pension) Rules of the amount and period for

which the compassionate allowance is admissible to him within a period of eight weeks from today. The order which is passed shall be communicated to the petitioner immediately on the same being made.

(ii) The respondents shall effect payment of all arrears of the compassionate allowance to the petitioner and the amount which may be due to him within a period of four weeks thereafter.

This writ petition is allowed in the above terms.

Dasti to parties.

ILR (2011) I DELHI 58
CR. MC

SANJAY BHARDWAJ & ORS. ....APPELLANT

VERSUS

THE STATE & ANR. ....RESPONDENTS

(SHIV NARAYAN DHINGRA, J.)

CRL. MC NO. : 491/2009 DATE OF DECISION: 27.08.2010

Protection of Women from Domestic Violence Act, 2005 (DV Act)—Section 12—Petitioner NRI was working in Luanda, Angola Africa as Manager—Wife had done MA and MBA and was working with a Multinational company—Metropolitan Magistrate allowed maintenance of Rs 5000/- per month to the wife against petitioner—Appeal against order dismissed—Held, maintenance awarded without considering that petitioner had lost his job in Angola and was unemployed in India—Maintenance can be fixed under the DV act as per the prevalent law regarding providing of maintenance by the husband to the wife as per which husband is to supposed to maintain his un-

earning spouse out of the income which he earns—No law provides that a husband has to maintain a wife living separately from him irrespective of the fact whether he earns or not—Court cannot tell husband that he should beg borrow or steal but give maintenance to the wife; more so when the husband and wife are almost equally qualified and almost equally capable of earning and both claim to be gainfully employed before marriage—Order fixing maintenance with out even prima facie proof of the husband being employed in India and with clear proof of fact that his passport was seized and he was not permitted to leave the country is contrary to law—Petition allowed.

A perusal of Domestic Violence Act shows that Domestic Violence Act does not create any additional right in favour of wife regarding maintenance. It only enables the Magistrate to pass a maintenance order as per the rights available under existing laws. While, the Act specifies the duties and functions of protection officer, police officer, service providers, magistrate, medical facility providers and duties of Government, the Act is silent about the duties of husband or the duties of wife. Thus, maintenance can be fixed by the Court under Domestic Violence Act only as per prevalent law regarding providing of maintenance by husband to the wife. Under prevalent laws i.e. Hindu Adoption & Maintenance Act, Hindu Marriage Act, Section 125 Cr.P.C - a husband is supposed to maintain his un-earning spouse out of the income which he earns. No law provides that a husband has to maintain a wife, living separately from him, irrespective of the fact whether he earns or not. Court cannot tell the husband that he should beg, borrow or steal but give maintenance to the wife, more so when the husband and wife are almost equally qualified and almost equally capable of earning and both of them claimed to be gainfully employed before marriage. If the husband was BSc. and Masters in Marketing Management from Pondicherry University, the wife was MA (English) & MBA. If the husband was working as

a Manager abroad, the wife with MBA degree was also working in an MNC in India. Under these circumstances, fixing of maintenance by the Court without there being even a prima facie proof of the husband being employed in India and with clear proof of the fact that the passport of the husband was seized, he was not permitted to leave country, (the bail was given with a condition that he shall keep visiting Investigating Officer as and when called) is contrary to law and not warranted under provisions of Domestic Violence Act. **(Para 4)**

Important Issue Involved: Court cannot tell husband that he should beg borrow or steal but give maintenance to the wife when there was no prima facie proof that husband was currently employed and they both were almost equally qualified and equally capable of earning and both claimed to be gainfully employed before marriage.

[Ad Ch]

APPEARANCES:

FOR THE APPELLANTS : Dr. Naipal Singh, Advocate.

FOR THE RESPONDENT : Mr. O.P. Saxena, APP for the State with Mr. Gajraj Singh, SI Mr. K.C. Jain, Advocate. for the Complainant/ wife.

RESULT: Petition is allowed.

SHIV NARAYAN DHINGRA, J.

1. The present petition under Section 482 Cr.P.C. assails an order of interim maintenance under The Protection of Women from Domestic Violence Act, 2005 (in short Domestic Violence Act) passed by the learned MM on 16th January, 2008 and confirmed by the learned Additional Sessions Judge in appeal by order dated 29th February, 2008.

2. The petitioner was a Non-Resident Indian, working in Luanda, Angola in Africa as a Manager. He came to India taking leave from his

job for marriage. Marriage between the petitioner and respondent no.2/ wife was settled through matrimonial advertisement. The respondent wife was MA (English) and MBA. As per her bio-data sent before marriage, she was doing job with a Multinational Company. The marriage between the parties was solemnized on 14th May, 2007 at a Farmhouse in Vasant Kunj and was got registered on 25th May, 2007. The parties lived together for a limited period of 10 days i.e. from 15th May, 2007 to 19th May, 2007 and from 2nd June to 6th June, 2007. While the allegations of husband are that marriage failed within 3 weeks since the wife was suffering from a chronic disease about which no information was given to him before marriage and a fraud was played. The allegations made by wife were as usual of dowry demand and harassment. Since the marriage did not succeed, the husband/petitioner filed a petition under Section 12 of Hindu Marriage Act for declaring the marriage as null and void and the wife first filed an FIR against the husband under Section 498A/406 IPC and then filed an application under Section 12 of Domestic Violence Act.

3. It is not relevant for the purpose of this petition to go into the details of allegations and counter allegations made by each other. Suffice it to say that the learned MM passed an order dated 16th January, 2008 directing husband to pay an interim maintenance of Rs. 5000/- pm to the wife. He fixed this maintenance without considering the contentions raised by the husband (as is stated in the order) that the husband lost his job in Angola (Africa) where he was working before marriage because his passport was seized by police and he could not join his duties back. After marriage he remained in India, he was not employed. In the appeal, learned Additional Session Judge noted the contentions raised by the husband that he had become jobless because of the circumstances as stated by him and he had no source of income, he was not even able to maintain himself and had incurred loan, but observed that since the petitioner had earlier worked abroad as Sales Manager and in view of the provisions of Domestic Violence Act, he had the responsibility to maintain the wife and monetary relief was necessarily to be provided to the aggrieved person i.e. wife. He observed that the wife was not able to maintain herself therefore husband, who earned handsomely in past while working abroad, was liable to pay Rs. 5000/- pm to the wife as fixed by the learned MM.

4. A perusal of Domestic Violence Act shows that Domestic Violence Act does not create any additional right in favour of wife regarding maintenance. It only enables the Magistrate to pass a maintenance order as per the rights available under existing laws. While, the Act specifies the duties and functions of protection officer, police officer, service providers, magistrate, medical facility providers and duties of Government, the Act is silent about the duties of husband or the duties of wife. Thus, maintenance can be fixed by the Court under Domestic Violence Act only as per prevalent law regarding providing of maintenance by husband to the wife. Under prevalent laws i.e. Hindu Adoption & Maintenance Act, Hindu Marriage Act, Section 125 Cr.P.C - a husband is supposed to maintain his un-earning spouse out of the income which he earns. No law provides that a husband has to maintain a wife, living separately from him, irrespective of the fact whether he earns or not. Court cannot tell the husband that he should beg, borrow or steal but give maintenance to the wife, more so when the husband and wife are almost equally qualified and almost equally capable of earning and both of them claimed to be gainfully employed before marriage. If the husband was BSc. and Masters in Marketing Management from Pondicherry University, the wife was MA (English) & MBA. If the husband was working as a Manager abroad, the wife with MBA degree was also working in an MNC in India. Under these circumstances, fixing of maintenance by the Court without there being even a prima facie proof of the husband being employed in India and with clear proof of the fact that the passport of the husband was seized, he was not permitted to leave country, (the bail was given with a condition that he shall keep visiting Investigating Officer as and when called) is contrary to law and not warranted under provisions of Domestic Violence Act.

5. We are living in an era of equality of sexes. The Constitution provides equal treatment to be given irrespective of sex, caste and creed. An unemployed husband, who is holding an MBA degree, cannot be treated differently to an unemployed wife, who is also holding an MBA degree. Since both are on equal footing one cannot be asked to maintain other unless one is employed and other is not employed. As far as dependency on parents is concerned, I consider that once a person is grown up, educated he cannot be asked to beg and borrow from the parents and maintain wife. The parents had done their duty of educating them and now they cannot be burdened to maintain husband and wife as

both are grown up and must take care of themselves.

6. It must be remembered that there is no legal presumption that behind every failed marriage there is either dowry demand or domestic violence. Marriages do fail for various other reasons. The difficulty is that real causes of failure of marriage are rarely admitted in Courts. Truth and honesty is becoming a rare commodity, in marriages and in averments made before the Courts.

7. I therefore find that the order dated 16th January, 2008 passed by the learned MM and order dated 29th February, 2008 passed by the learned Additional Sessions Judge fixing maintenance without there being any prima facie proof of the husband being employed are not tenable under Domestic Violence Act. The petition is allowed. The orders passed by Metropolitan Magistrate and learned Additional Sessions Judge are hereby set aside.

ILR (2011) I DELHI 63
WP

UOI **....PETITIONER**

VERSUS

ANIL PURI **....RESPONDENT**

(PRADEEP NANDRAJOG AND MOOL CHAND GARG, JJ.)

WP (C) NO. : 9493/2009 **DATE OF DECISION: 30.08.2010**

CCS Pension Rules, 1972—Rule 9—CCS (CCA) Rules, 1965—Rule 14—Charge Sheet issued to respondent set aside by Administrative Tribunal on grounds of delay, being mere formality as decision was already taken to punish the respondent and as respondent had already retired, penalty under Rule 9 could not be

inflicted—Order challenged in High Court—Held—Starting point while considering delay is not date or period when misdemeanour took place but when department gains knowledge of relevant facts constituting misdemeanour—40% time consumed by respondent and noting steps taken by department in pursuing matter, no delay in issuing charge sheet—Advice of UPSC that considering nature and seriousness of charge it was case of major penalty is prima facie view and not final view which must await evidence being brought on record and findings returned by IO—Under Rule 9, order which can be passed is to recover pecuniary loss caused to government or impose a cut in pension payable of gratuity or both in full or part upon proof of guilt but pertaining to grave misconduct or negligence—With rampant abuse and disabuse of financial power, it cannot be said if proved, such kind of misadventures are not grave misconduct—Order of Tribunal quashed.

Thus it could be said that the word misconduct though not capable of precise definition, on reflection, receives its connotation from the context, the delinquency in its performance and its effect on the discipline and nature of the duty. It may involve moral turpitude, it must be improper or wrong behaviour; unlawful behaviour, willful in character, forbidden act, a transgression of established and definite rule of action or code of conduct but not mere of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and it requires to maintain strict discipline. Laxity in this behalf erodes discipline in the service causing serious effect in the maintenance of law and order. **(Para 29)**

Important Issue Involved: (A) The starting point while considering the delay in issuing charge sheet is not the date or the period when the misdemeanour alleged took place. The starting point is when the department gains knowledge of the relevant facts constituting misdemeanour.

(B) Advice of UPSC after considering the charge about nature of penality to be levied is with reference to the prima facie view which one takes with reference to the allegations in the charge sheet and cannot ever be the final view which must await the evidence being brought on record and the findings returned by an Inquiry Officer.

(C) With rampant abuse and disabuse of financial power which is spreading like cancer in public life, it cannot be said that if proved, such kind of misadventures are not grave misconduct.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. H.K. Gangwani, Advocate.

FOR THE RESPONDENT : Mr. D.S. Mehandru, Advocate. Ms. Surbhi Popli, Advocate.

CASES REFERRED TO:

1. *Union of India* vs. *Dr. V.T. Prabhakaran,* W.P.(C) No.2292/2010.
2. *DDA* vs. *D.P. Bambah & Anr.* LPA No.39/1999.
3. *State of AP* vs. *N. Radhakishan* 1998 (4) SCC 154.
4. *Government* vs. *K. Munniappan* 1997 (4) SCC 255.
5. *Deputy Registrar Cooperative Societies Faizabad* vs. *Sachindra Nath Pandey & Ors* 1995 (3) SCC 134.
6. *B.C. Chaturvedi* vs. *UOI* 1995 (6) SCC 749.

7. *State of Punjab* vs. *Chaman Lal Goyal* 1995 (2) SCC 570.
8. *State Bank of Punjab & Ors.* vs. *Ram Singh Ex. Constable,* 1992 (4) SCC 54.
9. *State of MP* vs. *Banni Singh* AIR 1990 SC 1308.

RESULT: Allowed.

PRADEEP NANDRAJOG, J.

1. Vide impugned judgment and order dated 19.9.2008 the Central Administrative Tribunal has allowed OA No.1915/2007 filed by the respondent and has quashed the charge sheet issued against the respondent on the ground that there has been delay in initiating the disciplinary proceedings, secondly that it is a case where a decision has already been taken to punish the respondent and the proposed disciplinary proceedings are a mere ruse and lastly that the misdemeanour alleged against the respondent did not attract moral turpitude and since the respondent had retired from service penalty as contemplated by Rule 9 of the CCS Pension Rules 1972 could not be inflicted.

2. It may be noted at the outset that the Inquiry Officer was yet to complete the inquiry when the proceedings got interdicted as a result of the respondent petitioning the Central Administrative Tribunal.

3. Employed as a Superintending Engineer (Electrical) certain lapses pertaining to the working of the respondent and one Sh.O.P.Nayer, Executive Engineer came to the notice of the superior authorities in the year 1998. The alleged lapses pertained to certain decisions taken by the respondent on 5.5.1993. Accordingly, the matter was scrutinized at the departmental level resulting in a memo dated 4.9.1998 being served upon the respondent seeking his explanation regarding approval granted by him on 5.5.1993 for procurement of Mirror Optics Fluorescent Fittings alleging that existing fittings in working condition were unnecessarily replaced by purchasing expensive fittings and that too without examining the technical/ financial stability. It was further alleged against the respondent that on 8.6.1993, 7.7.1993 and 25.8.1993 he accorded five approvals to five estimated works totaling Rs.9,52,516/- in contravention of Section 1.8 of CPWD Manual Vol. II. The respondent was called upon to furnish explanation within 10 days.

4. The respondent did not furnish any explanation within the stipulated period of 10 days. Reminders were sent to him on 16.10.1998, 4.12.1998, 15.1.1999, 1.2.1999, 1.3.1999, 8.4.1999, 1.6.1999, 24.6.1999, 13.7.1999 and 9.12.1999.

5. It was only on 18.7.2000 that the respondent furnished a reply in which he gave what according to him was his justification for what he did.

6. Suffice would it be to note that the petitioner consumed one year, ten months and fourteen days to furnish a reply to the memorandum dated 4.9.1998.

7. The reply furnished by the respondent was analyzed and the file was sent to the Ministry of Urban Development on 25.1.2001 for first stage advice from the Central Vigilance Commission and after processing the file the Commission recommended initiation of minor penalty proceedings against the respondent which led to a charge sheet dated 6.2.2002 being issued to the respondent requiring his response to be submitted within 10 days.

8. The charge sheet was served upon the respondent on 28.2.2002 and vide letter dated 30.5.2002 he sought inspection of certain documents stating that the same was necessary for his defence. The respondent was intimated that he could inspect the documents on 28.6.2002. He did not do so. Reminder was sent to him on 20.9.2002 to inspect the documents, inspection whereof was sought by him. A further reminder was sent to him on 1.10.2002 to do the needful. Another reminder was sent on 6.1.2003. Another reminder was sent on 4.11.2003. Vide letter dated 25.11.2003 the respondent requested for two months, time to file a response to the charge sheet. The time was extended at the request of the respondent and he finally submitted the response on 28.5.2004.

9. Relevant would it be to note that in this manner the respondent delayed the matter by one year and eleven months.

10. Along with the charge sheet and the reply filed by the respondent, containing the comments of the department on the reply filed by the respondent the file was sent to the Nodal Ministry on 10.8.2004 which referred the same to the Union Public Services Commission for a second stage advice and this resulted in the commission advising that the gravity

of the charges warranted an inquiry for major penalty proceedings. On 24.1.2006 a charge sheet was issued under Rule 14 of the CCS (CCA) Rules 1965 alleging the following article of charge:-

"The said Shri Anil Puri, Superintending Engineer (E) accorded approval on the note dated 1.5.93 of Executive Engineer (E), ECD-III for procurement of expensive (i) 2032 nos. of 2 x 40w and Iii) 672 nos. of 1 x 40w fluorescent mirror optic fittings costing approximately Rs.23,36,864/- out of which 1510 nos. mirror optics fittings worth Rs.13,44,540/- were procured ad installed in the CGO Complex by the Executive Engineer (Elect.)/ ECD-III.

3 Nos. Supply Order as per detail given in Appendix-I were placed by Executive Engineer (E), ECD-III for 1550 Nos. mirror optic fittings costing Rs.13,84,540/- out of which sanction for 40 Nos. fittings (12 Nos. surface and 28 Nos. recessed type 4 x 20 w fitting costing Rs.40,000/-) was only available. Thus unwarranted & unauthorized large scale purchases of 1510 nos. mirror optics fittings (excluding 12 nos. surface and 28 nos. recessed type 4 x 20 w fittings) during 1993-94 were made without any requisition and without obtaining Administrative Approval and Expenditure Sanction from the competent authority, through THREE supply orders, as per details given in Appendix I.

The said Shri Anil Puri, Superintending Engineer (Electrical) allowed mass scale replacement of existing 1510 Nos. of box type fluorescent electrical fittings in CGO complex which were installed during 1982-83 as indicated in the five detailed estimates for special repairs amounting to Rs.9,52,516/-, by way of approving the estimates prepared by Executive Engineer (E), ECD-III, as per details given in Appendix II. Such mass scale replacement of fittings, which were in working order and were within 10 years of their installed life was uncalled for without preparing any detailed justification for such a replacement. More importantly, Shri Anil Puri allowed such a mass replacement of fittings without making any cost analysis to see whether the cost involved is justified by the better illumination provided and without considering whether the design based on which the light fittings were originally

provided was adequate or not.

The said Shri Anil Puri allowed the procurement of mirror optics fittings costing Rs.13,44,540/- besides the labour cost involved in replacing the fittings being charged to "Special Repairs" to EI & Fans at CGO Complex, New Delhi. The mass scale replacement of existing/working box type fittings with twice expensive mirror optics fittings, by charging the expenditure to "Special Repairs" to EI & fans at CGO Complex, New Delhi, is not in order. Since the replacement of existing box type fittings in bulk, resulted in increase in the capital cost of the buildings, the expenditure should have been charged to "Original Works". Even if the replacement was warranted, Shri Anil Puri should have followed proper procedure and not formal Administrative Approval and Expenditure Sanction from the competent authority. Thus Shri Anil Puri contravened the provisions of Para 1.8 & para 2.2. of CPWD Manual Vol.II (1988 Edition).

By his above acts, Shri Anil Puri, Superintending Engineer (Elect.) exhibited lack of devotion to duty thereby contravening Rule 3 (1) (ii) of CCS (Conduct) Rules, 1964."

11. Inquiry Officer was appointed who fixed 22.9.2006 as the date for preliminary hearing which was not attended to by the respondent in spite of prior intimation. The Inquiry Officer directed the respondent to submit list of defence documents latest by 31.2.2006, which was not done. Only on 24.11.2006 the respondent furnished the list of defence documents. Thereafter, the respondent got the matter repeatedly postponed on ground of poor health and finally he filed a petition before the Central Administrative Tribunal praying that the disciplinary proceedings be quashed.

12. It be noted that in the meanwhile the respondent superannuated on 31.1.2006.

13. This is the factual backdrop relevant to be noted to decide the issues involved in the instant writ petition.

14. Let us deal with the issue of delay as a ground held as a good ground by the Tribunal to quash the charge sheet.

15. At the outset it may be recorded by us that the starting point while considering delay is not the date or the period when the misdemeanour alleged took place. The starting point, as observed by the Supreme Court in the decision reported as AIR 1990 SC 1308 **State of MP Vs. Banni Singh** (para 4) is when the department gains knowledge of the relevant facts constituting misdemeanour.

16. In the instant case this date is somewhere in the year 1996. The charge sheet, as noted above was finally issued on 24.1.2006. Nearly ten years were consumed.

17. We have already noted hereinabove that for two different periods, firstly when he was called upon to submit a reply to the memo dated 4.9.1998 the respondent delayed the matter by one year and ten months and secondly when the earlier charge sheet was served for a minor penalty proceedings the respondent consumed one year and eleven months. Thus, out of nearly ten years, time the respondent consumed nearly four years. The remaining nearly six years were consumed by the department and in respect thereof, what route was chartered by the file has been noted by us. As observed by the Supreme Court in the decision reported as 1995 (2) SCC 570 **State of Punjab Vs. Chaman Lal Goyal** the department has to be fair to its employee and must investigate the correctness or otherwise of the allegation against its employee before resorting to a departmental action and should not rush to the same. As observed in the decision reported as 1995 (6) SCC 749 **B.C.Chaturvedi Vs. UOI** the department must collect the necessary material in this regard and thus sufficient ply has to be given to the department in the time consumed to verify the correctness of the allegations against an employee and requisite time taken to collect the relevant material. In the decision reported as 1998 (4) SCC 154 **State of AP Vs. N.Radhakishan** it was observed that the delay caused by the employee has to be duly considered. It was observed that if the delay is unexplained or prejudice to the employee is writ large on the face of it, these alone would justify the disciplinary proceedings to be terminated. In the decision reported 1995 (3) SCC 134 **Deputy Registrar Cooperative Societies Faizabad Vs. Sachindra Nath Pandey & Ors**. as also the decision reported as 1997 (4) SCC 255 Secretary to **Government Vs. K. Munniappan** it was observed that where charges were serious, notwithstanding delay, the inquiry must be permitted to be taken to its logical conclusion.

18. In the decision dated 29.10.2003 deciding LPA No.39/1999 **DDA Vs. D.P.Bambah & Anr.** a Division Bench of this Court after taking note of the aforesaid decisions, summarized the legal position as under:-

"15. In our opinion the legal position, when an action is brought seeking quashing of a charge-sheet on grounds of issuance of the charge-sheet or grounds of inordinate delay in completion of the disciplinary inquiry may be crystalised as under:-

(i) Unless the statutory rules prescribe a period of limitation for initiating disciplinary proceedings, there is not period of limitation for initiating the disciplinary proceedings;

(ii) Since delay in initiating disciplinary proceedings or concluding the same are likely to cause prejudice to the charged employee, courts would be entitled to intervene and grant appropriate relief where an action is brought;

(iii) If bone fide and reasonable explanation for delay is brought on record by the disciplinary authority, in the absence of any special equity, the court would not intervene in the matter;

(iv) While considering these factors the court has to consider that speedy trial is a part of the facet of a fair procedure to which every delinquent is entitled to vis-a-vis the handicaps which the department may be suffering in the initiation of the proceedings. Balancing all the factors, it has to be considered whether prejudice to the defence on account of delay is made out and the delay is fatal, in the sense, that the delinquent is unable to effectively defend himself on account of delay.

(v) In considering the factual matrix, the court would ordinarily lean against preventing trial of the delinquent who is facing grave charges on the mere ground of delay. Quashing would not be ordered solely because of lapse of time between the date of commission of the offence and the date of service of the charge-sheet unless, of course, the right of defence is found to be denied as a consequences of delay.

(vi) It is for the delinquent officer to show the prejudice caused

or deprivation of fair trial because of the delay.

(vii) The sword of damocles cannot be allowed to be kept hanging over the head of an employee and every employee is entitled to claim that the disciplinary inquiry should be completed against him within a reasonable time. Speedy trial is undoubtedly a part of reasonableness in every disciplinary inquiry."

19. 40% time has been consumed by the respondent and discounting the same the period attributable to the department is about six years and noting the steps taken by the department in pursuing the matter, we are afraid, we cannot accord our imprimatur to the impugned decision with respect to its reasoning predicated on the issue of delay.

20. As regards the finding in para 10 that the advice from UPSC has to be treated as the final decision of the President to hold the respondent guilty and thus the departmental proceedings are a mere formality requiring the same to be quashed, we wonder as to wherefrom can the said conclusion be drawn.

21. As noted hereinabove the matter was sent to UPSC for second stage advice pertaining to the response of the respondent to the charge sheet dated 16.2.2002 when proceeding for minor penalty were initiated. UPSC opined that considering the gravity and the seriousness of the charge it was not a case to levy a minor penalty but was a case attracting major penalty. This advice is obviously with reference to the prima facie view which one takes with reference to the allegations in the charge sheet and cannot ever be the final view which must await the evidence being brought on record and the findings returned by an Inquiry Officer.

22. Thus, the impugned order, with reference to the second line of reasoning adopted by the Tribunal, is liable to be set aside.

23. It then remains to be answered whether the charge is ex facie not grave misconduct and hence the proceedings have to be dropped for the reason the respondent superannuated with effect from 31.1.2006 and the only penalty which can be levied upon him is a cut in pension and that too not merely for being found guilty of a misconduct, but found guilty of a serious misconduct.

24. Rule 9 of the CCS (Pension) Rules 1972 (here- in-after referred

Ahmad, J.)

to as the Rules) reads as under:-

"9. Right of President to withhold or withdraw pension

(1) The President reserves to himself the right of withholding a pension or gratuity, or both, either in full or in part, or withdrawing a pension in full or in part, whether permanently or for a specified period, and of ordering recovery from a pension or gratuity of the whole period, and of ordering recovery from a pension or a gratuity of the whole or part of any pecuniary loss caused to the Government, if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of service, including service rendered upon re-employment after retirement: Provided that the Union Public Service Commission shall be consulted before any final orders are passed:

Provided further that where a part of pension is withheld or withdrawn, the amount of such pensions shall not be reduced below the amount of rupees three hundred and seventy-five per mensem.

2(a) The departmental proceedings referred to in sub- rule (1), if instituted while the Government servant was in service whether before his retirement or during his re-employment, shall, after the final retirement of the Government servant, be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which they are commenced in the same manner as if the Government servant had continued in service:

Provided that where the departmental proceedings are instituted by an authority subordinate to the President, that authority shall submit a report recording its findings to the President.

(b) The departmental proceedings, if not instituted while the Government servant was in service, whether before his retirement, or during his re-employment, -

(i) shall not be instituted save with the sanction of the President,

(ii) shall not in respect of any event which took place more than four years before such institution, and

(iii) shall be conducted by such authority and in such place as the President may direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the Government servant during his service.

(3) Deleted.

(4) In the case of Government servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued under sub- rule (2), a provisional pension as provided in Rule 69 shall be sanctioned.

(5) Where the President decided not to withhold or withdraw pension but orders recovery of pecuniary loss from pension, the recovery shall not ordinarily be made at a rate exceeding one-third of the pension admissible on the date of retirement of a Government servant.

(6) For the purpose of this rule, -

(a) departmental proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the Government servant or pensioner, or if the Government servant has been placed under suspension from an earlier date, on such date; and

(b) judicial proceedings shall be deemed to be instituted

(i) in the case of criminal proceedings, on the date on which the complaint or report of a police officer, of which the Magistrate takes cognizance, is made, and

(ii) in the case of civil proceedings, on the date the plaint is presented in the Court."

25. A bare reading of the Rule shows that the order which can be passed under the Rule is to recover the pecuniary loss caused to the government or impose a cut in the pension payable or gratuity or both, in full or in part, upon proof of guilt but pertaining to a grave misconduct or negligence.

26. Misconduct, has been defined in Black's Law Dictionary, Sixth Edition at page 999, thus:

> ….."A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behaviour, willful in character, improper or wrong behaviour, its synonyms are misdemeanour, misdeed, misbehaviour, delinquency, impropriety, mismanagement, offence, but not negligence or carelessness.
>
> Misconduct in office has been defined as: "Any unlawful behaviour by a public officer in relation to the duties of his office, willful in character. Term embraces acts which the office holder had no right to perform, acts performed improperly, and failure to act in the face of an affirmative duty to act." In P.Ramanatha Aiyar's Law Lexicon, 3rd Edition, at page 3027, the term 'misconduct' has been defined as under:-
>
> The term "misconduct" implies, a wrongful intention, and not involving error of judgment. Misconduct is not necessarily the same thing as conduct involving moral turpitude. The word "misconduct" is a relative term, and has to be construed with reference to the subject matter and the context wherein the term occurs, having regard to the scope of the Act or statute which is being construed. "Misconduct" literally means wrong conduct or improper conduct."

27. The word misconduct is a relative term, and has to be construed with reference to the subject matter and the context wherein the term occurs, having regard to the scope of the Act or statute which is being construed. Misconduct literally means wrong conduct or improper conduct.

28. In the decision reported as 1992 (4) SCC 54 **State Bank of Punjab & Ors. Vs. Ram Singh Ex. Constable,** discussing misconduct the Supreme Court spoke thus: in usual parlance, misconduct means transgression of some established and defined rule of action, where no discretion is left, except that necessity may demand and carelessness, negligence and unskilfulness are transgressions of some established, but indefinite, rule of action, where, some direction is necessarily left to the actor. Misconduct is a violation of definite law; carelessness or abuse of

discretion under an indefinite law. Misconduct is a forbidden act; carelessness, a forbidden quality of an act, and is necessarily indefinite. Misconduct in office may be defined as unlawful behaviour or neglect by a public officer, by which the rights of a party have been affected.

29. Thus it could be said that the word misconduct though not capable of precise definition, on reflection, receives its connotation from the context, the delinquency in its performance and its effect on the discipline and nature of the duty. It may involve moral turpitude, it must be improper or wrong behaviour; unlawful behaviour, willful in character, forbidden act, a transgression of established and definite rule of action or code of conduct but not mere of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and it requires to maintain strict discipline. Laxity in this behalf erodes discipline in the service causing serious effect in the maintenance of law and order.

30. Deciding W.P.(C) No.2292/2010 **Union of India vs Dr.V.T.Prabhakaran,** on 26.7.2010 we had discussed whether lack of moral turpitude is an essential ingredient of a grave misconduct and had opined in the negative. Discussing various judgments, in para 33 and 34 of the said decision, we had observed as under:-

> "33. Acts of moral turpitude, acts of dishonesty, bribery and corruption would obviously be an aggravated form of misconduct because of not only the morally depraving nature of the act but even the reason that they would be attracting the penal laws. There would be no problem in understanding the gravity of such kind of offences. But that would not mean that only such kind of indictments would be a grave misconduct. A ready example to which everybody would agree with as a case of grave misconduct, but within the realm of failure to maintain devotion to duty, would be where a fireman sleeps in the fire office and does not respond to an emergency call of fire in a building which ultimately results in the death of 10 persons. There is no dishonesty. There is no acceptance of bribe. There is no

corruption. There is no moral turpitude. But none would say that the act of failure to maintain devotion to duty is not of a grave kind.

34. It would be difficult to put in a strait jacket formula as to what kinds of acts sans moral turpitude, dishonesty, bribery and corruption would constitute grave misconduct, but a ready touchstone would be where the 'integrity to the devotion to duty' is missing and the 'lack of devotion' is gross and culpable it would be a case of grave misconduct. The issue needs a little clarification here as to what would be meant by the expression 'integrity to the devotion to duty'. Every concept has a core value and a fringe value. Similarly, every duty has a core and a fringe. Whatever is at the core of a duty would be the integrity of the duty and whatever is at the fringe would not be the integrity of the duty but may be integral to the duty. It is in reference to this metaphysical concept that mottos are chosen by organizations. For example in the fire department the appropriate motto would be: 'Be always alert'. It would be so for the reason the integrity of the duty of a fire officer i.e. the core value of his work would be to be 'always alert'. Similarly, for a doctor the core value of his work would be 'duty to the extra vigilant'. Thus, where a doctor conducts four operations one after the other and in between does not wash his hands and change the gloves resulting in the three subsequent patients contacting the disease of the first, notwithstanding there being no moral turpitude involved or corruption or bribery, the doctor would be guilty of a grave misconduct as his act has breached the core value of his duty. The example of the fireman given by us is self explanatory with reference to the core value of the duty of a fireman to be 'always alert'."

31. Having noted the misdemeanour alleged against the respondent, the gravamen is of unwarranted and unauthorized large scale purchase of mirror optic fittings without any requisition or administrative approval or expenditure sanctioned. The financial implication is Rs.13,84,540/-. It is alleged that mass scale replacement of fittings which were in working order and were within ten years of their installed life was uncalled for. It is alleged that the respondent manipulated the head under which the

expenditure could be adjusted i.e. the charge suggests that the respondent knew that what he was doing was wrong for only then would he have contrived to do what he did.

32. The charge has yet to be investigated. The Inquiry Officer has yet to submit a report and thus the correctness or otherwise thereof cannot be commented upon at this stage. However, with rampant abuse and disabuse of financial power which is spreading like a cancer in public life, it cannot be said that if proved, such kind of misadventures are not grave misconduct.

33. We may note that upon the co-delinquent, O.P.Nayer Executive Engineer penalty levied is 15% cut in pension for a period of five years.

34. Thus, disagreeing with all three reasons given by the Tribunal and reciting the mantra that nothing said by us would be treated as an expression on the merits of the charge sheet issued against the respondent and that our observations with respect to the charge sheet are prima facie and are the result of the question which we have to answer: if proved, would the misconduct be a grave misconduct, we allow the writ petition and quash the impugned order dated 24.1.2006.

35. Noting that the matter has been sufficiently delayed, it is hoped and expected that Inquiry Officer would conclude the inquiry as expeditiously as possible, of course subject to the condition that the respondent cooperates.

36. No costs.

ILR (2011) I DELHI 79
LPA

J.K. SAWHNEY ....PETITIONER

VERSUS

PUNJAB NATIONAL BANK ....RESPONDENT

(DIPAK MISRA, CJ. AND MANMOHAN, J.)

LPA NO. : 437/2010 DATE OF DECISION: 06.09.2010

Constitution of India, 1950—Article 21 and 226—Appellant requested for reimbursement of medical expenses incurred after his retirement, on heart problem—Request declined as there was no such Scheme for retired employees—Writ challenging order of rejection dismissed by Ld. Single Judge—Order assailed in appeal—Held—Though it is constitutional obligation of state to safeguard right to life of every person and such right is right to lead healthy life and not a life of animal existence, but no law mandates that every citizen is entitled to free medical treatment without any limitation on the amount that can be claimed as reimbursement—Formation of a policy is within exclusive domain of executive and Courts should shy away from issuing directions for formation of policy which has financial, economic and other implications, which at best should be left to wisdom of executive.

Moreover, it is imperative to emphasise that the formulation of a policy is within the exclusive domain of executive and the Courts ˇshould shy away from issuing directions for formulation of a policy which has financial, economic and other implications, which at the best should be left to the wisdom of the executive. **(Para 6)**

Important Issue Involved: (A) Though it is the constitutional obligation of the State under Article 21 of the Constitution of India to safeguard the right to life of every person and such right to lead healthy life and not a life of animal existence, but no law mandates that every citizen is entitled to free medical treatment without any limitation on the amount that can be claimed as reimbursement.

(B) Formulation of a policy is within the exclusive domain of executive and the Courts should shy away from issuing directions for formulation of a policy which has financial, economic and other implications, which at the best should be left to the wisdom of the executive.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Piyush Sharma, Advocate.

FOR THE RESPONDENT : Mr. Rajat Arora, Advocate.

CASES REFERRED TO:

1. *Cannanore District Muslim Educational Association* vs. *State of Kerala* , (2010) 6 SCC 373.
2. *Food Corporation of India & Ors.* vs. *Parashotam Das Bansal & Ors.*, (2008) 5 SCC 100.
3. *State of Punjab & Ors.* vs. *Ram Lubhaya Bagga & Ors.* (1998) 4 SCC 117.

RESULT: Dismissed.

MANMOHAN, J.

CM 11563/2010

Allowed, subject to all just exceptions.

LPA 437/2010

1. The present Letters Patent Appeal has been filed challenging the

judgment and order dated 19th April, 2010 passed by the learned Single Judge in W.P.(C) No.6744/2007 whereby the learned Single Judge has dismissed the writ petition filed by the appellant.

2. The brief facts of the case are that the appellant was an employee of the respondent-Bank and he retired from services on 05th February, 2006. After his retirement, he developed acute heart problem and incurred expenses of Rs.3,14,487/-on his treatment at Escorts Heart Institute. The appellant requested for reimbursement of medical expenses from the respondent-Bank which was declined on the ground that there was no such scheme for reimbursement of medical expenses to the retired employees of the respondent-Bank.

3. Mr. Piyush Sharma, learned counsel for the appellant submitted that the right to health and medical care is an integral part of right to life which is a fundamental right of every citizen under Article 21 of the Constitution of India. He further submitted that the powers of the High Court to issue writ of mandamus are of wide import and they must be available to reach injustice wherever it is found. According to him, technicalities should not come in the way of granting relief under Article 226 of the Constitution. He submitted that it is within the competence of the High Court to direct the respondent-Bank to formulate a scheme for reimbursement of the medical expenses to the retired employees of the respondent-Bank. In this context, Mr. Sharma placed reliance upon Apex Court's decisions in **Food Corporation of India & Ors. Vs. Parashotam Das Bansal & Ors.,** (2008) 5 SCC 100 and **Cannanore District Muslim Educational Association vs. State of Kerala ,** (2010) 6 SCC 373.

4. Mr. Rajat Arora, learned counsel for the respondent-Bank submitted that appellant has no legal right to enforce his claim for grant of medical reimbursement by approaching this Court in writ jurisdiction. According to him, the appellant is governed by the bipartite settlement under which in lieu of absence of any scheme for reimbursement of medical claims after retirement, neither the appellant nor the other employees can claim the same.

5. Having heard learned counsel for the parties as well as having perused the paper book, we are of the opinion that though it is the constitutional obligation of the State under Article 21 of the Constitution of India to safeguard the right to life of every person and such right is

a right to lead healthy life and not a life of animal existence, but no law mandates that every citizen is entitled to free medical treatment without any limitation on the amount that can be claimed as reimbursement. In fact, even serving bank employees are governed by regulations put in place by the respondent-Bank keeping in view the financial and economic considerations. In this context, we may refer to a decision of the Apex Court in **State of Punjab & Ors. Vs. Ram Lubhaya Bagga & Ors.** (1998) 4 SCC 117 wherein the Supreme Court observed as under :

> "26. ……Since it is one of the most sacrosanct and valuable rights of a citizen and equally sacrosanct sacred obligation of the State, every citizen of this welfare State looks towards the State for it to perform its this obligation with top priority including by way of allocation of sufficient funds. This in turn will not only secure the right of its citizen to the best of their satisfaction but in turn will benefit the State in achieving its social, political and economical goal. *For every return there has to be investment. Investment needs resources and finances. So even to protect this sacrosanct right finances are an inherent requirement. Harnessing such resources needs top priority.*
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> xxxx xxxx xxxx xxxx
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> 29. *No State or any country can have unlimited resources to spend on any of its project. That is why it only approves its projects to the extent it is feasible. The same holds good for providing medical facilities to its citizen including its employees. Provision of facilities cannot be unlimited. It has to be to the extent finance permit.* If no scale or rate is fixed then in case private clinics or hospitals increase their rate to exorbitant scales, the State would be bound to reimburse the same. Hence we come to the conclusion that principle of fixation of rate and scale under this new policy is justified and cannot be held to be violative of Article 21 or Article 47 of the Constitution of India.
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> xxxx xxxx xxxx xxxx
>
> 31. The next question is whether the modification of the policy by the State by deleting its earlier decision of permitting reimbursement at the Escort and other designated hospital's rate is justified or not? This of course will depend on the facts and

circumstances. *We have already held that this court would not interfere with any opinion formed by the government if it is based on relevant facts and circumstances or based on expert advice.*

32. *Any State endeavor for giving best possible health facility has direct co-relation with finances. Every State for discharging its obligation to provide some projects to its subject requires finances. Article 41 of the Constitution gives recognition to this aspect. 'Article 41: Right to work, to educate and to public assistance in certain cases: The State shall, within the limits of its economic capacity and development, make effective provisions for securing the right to work, to education and to public assistance in cases of unemployment, old age sickness and disablement, and in other cases of undeserved want'"*

(emphasis supplied)

6. Moreover, it is imperative to emphasise that the formulation of a policy is within the exclusive domain of executive and the Courts should shy away from issuing directions for formulation of a policy which has financial, economic and other implications, which at the best should be left to the wisdom of the executive.

7. Consequently, we are in agreement with the learned Single Judge that it is not for the Court to formulate policies but certainly the Court can draw attention of the concerned authority to the issue involved so that appropriate steps can be taken for redressal of the grievances. In the context, learned Single Judge has rightly suggested that it is for various trade unions of the bank and the management of the Bank to make appropriate provisions in their bipartite settlement to make suitable policy to take care of the health of the retired employees and for their necessary medical reimbursement. Accordingly, the appeal, being bereft of merit, is dismissed.

ILR (2011) I DELHI 84
W.P.

VIKAS SAKSENA ....PETITIONER

VERSUS

UNION OF INDIA AND OTHERS ....RESPONDENTS

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

WP (C) NO. : 2674/2010 & 4390/2010 **DATE OF DECISION: 13.09.2010**

Constitution of India, 1950—Article 16—Public employment—Selection process—Change in process—Respondent issued advertisement dated 12.11.2009 inviting applications for, inter alia post of Deputy Commandment (Law) in the Indian Coast Guard Service—Said advertisement also contained selection procedure—Petitioners applied for said post—Issued call letter for appearance before preliminary and final selection board—Peitioners cleared preliminary and Final selection board (FSB)—Last step required Petitioners to appear before Base Hospital, Delhi Cantt. For medical examination—After leaving premises of selection board—Petitioners telephonically informed to have word with Chief Law Officer, Coast Guard Head Quarters ("CLO")—Prescribed procedure does not mention role of CLO—Petitioners then told to appear before new selection board chaired by CLO—Also told to undertake written test as well as interview on same day—Petitioners did not clear the same—Petitioners made representations in protest—No action taken on said representation—Hence present petitions—Interim application also filed for directions to Respondent to keep one post vacant for each Petitioner—Admitted position that advertisement did

not mention any further testing/interview after clearing FSB—Records produced by Respondent do not support averment that Proficiency Competency Board for those candidates recommended by FSB had due approval—Nothing made on 18.12.2009 proposes for first time a further interview after FSB—No specific decision taken—Proposal for short test and interview made on 21.12.2009—Said proposal not placed before any higher authority and entire decision taken by Deputy Director General himself—Held—Appointing authority has no jurisdiction to change or vary selection, process after its commencement—Supreme Court in NT Devin Katti's case held that selection only to be made in terms of rules applicable at time of commencement of selection process—Respondents had not only notified Petitioners of selection procedure through advertisement dated 12.11.2009—Respondent had also completed the said procedure—Procedure to only consist of two phases and nothing further—Even if Deputy Director General competent to approve "Professional competency and suitability" assessment—Such approval only made on 21.12.2009—Same clearly lacks jurisdiction or authority of law—Petitioners not informed of prescribed syllabi for new test—Not given opportunity to prepare—Professional competency assessed on subjects mentioned in "desirable qualifications" that too without notice—Pleas set up Respondents falsified by records and documents issued to Petitioner as well as records produced before the Court—Nothing on record to even suggest reference to manner in which testing and evaluation of professional competency would be effected—No disclosure on method of testing—Decision to adopt new procedure not made by authority competent to do so—Strong view taken with respect to false and misleading pleas taken by Respondent and attempt to conceal correct record—However since vacant seats remain—Possible to ensure justice without taking this

matter further—Selection process taken by Professional Competency Board set aside—If Petitioners found medically fit, Respondent to complete appointment of Petitioners to post of Deputy Commandant (Law) with consequential benefits from date of recommendation of FSB—Costs of rupees 25,000/- awarded to each petitioner.

Important Issue Involved: Appointing authority has no jurisdiction to change or vary selection process after its commencement—Supreme Court in NT Devin Katti's case held that selection only to be made in terms of rules applicable at time of commencement of selection process.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Ajay Kumar Porawali, Advocate.

FOR THE RESPONDENTS : Mr. A.K. Bhardwaj, Advocate with Mr. A.K. Chauhan, DIG, Chief Law Officer, Coast Guard, Commandant G. Singh.

CASES REFERRED TO:

1. *Ramesh Kumar* vs. *High Court of Delhi & Anr.*, (2010) 3 SCC 104.
2. *K. Manjushree* vs. *State of A.P.* (2008) 1 SCC (L&S) 841.
3. *Hemani Malhotra* vs. *High Court of Delhi & Anr.* (2008) 2 SCC (L&S) 203
4. *Maharashtra State Road Transport Corporation* vs. *Rajendra Bhimrao Mandve* MANU/SC/0737/2001 : (2002)ILLJ819SC.
5. *Maharashtra State Road Transport Corp. & Ors.* vs. *Rajendra Bhimrao Mandre & Ors.*, (2001)10 SCC 51.
6. *S.P.Chengalvaraya Naidu* vs. *Jagannath & Ors;* AIR 1994

SC 853.

7. *N.T. Devin Katti* vs. *Karnataka Public Service Commission & Ors.,* 1992 (2) SLR 379.

8. *Shri Durgacharan Misra* vs. *State of Orissa and Ors.* MANU/SC/0627/1987 : AIR 1987 SC 2267.

9. *P. Mahendra and Ors.* vs. *State of Karnataka and Ors.,* 1983(3) Speed Post Judgments 276 (SC).

10. *Dr.Vinay Rampal* vs. *The State of Jammu & Kashmir & Ors.* 1983 (3) SLR 293.

11. *Advocate-General, State of Bihar* vs. *M/s. Madhya Pradesh Khair Industries & Anr.;* 1980 Crl.LJ 684.

12. *T.Arvandandam* vs. *T.V. Satyapat ˇ& Anr.* (1978) 1 SCR 742.

RESULT: Petition allowed.

GITA MITTAL, J. (Oral)

1. These two writ petitions lay a challenge to the change in the selection process effected by the respondents for appointments to the post of Deputy Commandant (Law) in the Indian Coast Guard Service after the notified process stood completed and was at the stage of medical examination of the successful candidates. The petitioners also assail the denial of appointment to the said post to them despite their having admittedly successfully qualified in the notified selection process.

2. The undisputed facts giving rise to the writ petitions are noted hereafter. The respondents had issued an advertisement dated 12th November, 2009 inviting applications from Indian citizens for several posts including the posts of Deputy Commandant (Law) at a pay scale of Rs. 15,600-39100 (revised) with grade pay Rs. 6600/-.

3. So far as the procedure of selection was concerned, the advertisement has notified the applicants as follows:-

"SELECTION PROCEDURE

(a) Short listed candidates will be called for selection test/interview at CGSB, Noida (UP). Candidate's excellence in Academics, Sports and NCC will be given due weightage whilst short listing

the candidates through call up letters by Mid Dec 2009. Candidates who do not receive call up letter may assume that they have not come in the zone of short listing. Updated list of short listed candidates will be hosted on ICG website.

(b) The selection process consists of two phases

(i) Preliminary Selection Board (PSB), It consists of General Mental Ability Test in which the candidates will be tested for General Awareness, General Intelligence and Reasoning.

(ii) Final Selection Board (FSB), It consists of Psychological Test, Group Testing and Interview (Personality Test).

(c) Selection will be made only on the basis of performance of the candidate in FSB. Those found medically fit will be placed in the merit list. The candidates who qualify in the merit list vis-à-vis number of vacancies available will be issued with appointment letter.

(d) Medical examination will be held at Delhi."

(underlining by us)

4. Shri Vikas Saxena, petitioner in WP(C)No.2674/2010 and Shri Nagender Singh, Petitioner in WP(C)No.4390/2010 had fulfilled the eligibility requirements and submitted applications for undergoing the selection process and appointment to the said post pursuant to the advertisement dated 12th November, 2009. Their applications were found in order resulting in issuance of a call letter dated 3rd December, 2009 to Shri Vikas Saxena and a call letter dated 30th November, 2009 to the other writ petitioner for appearance before the preliminary and final selection board. The directives contained in this letter as well have a bearing on the issue raised before this court and read as follows:-

"4. Only those candidates who are qualified in Preliminary Selection Board (PSB) will appear in Final Selection Board (FSB) from 13-17 DEC 2009 at Coast Guard Selection Board, Noida. Those candidates who are finally recommended by FSB will undergo medical examination."

(underlining by us)

5. It is noteworthy that the Preliminary Selection Board (PSB hereafter) was conducted by the respondents from 10th December, 2009 and was held for three days. Out of the total of 32 candidates who appeared in the Preliminary Selection Board, only five candidates including the petitioners were recommended for appearance in the final selection process. It is an admitted fact that the Final Selection Board ('FSB' hereafter) was held between 13th and 17th December, 2009. Out of five candidates who appeared in the Final Selection Board, three candidates, again including the two petitioners, were declared as successful.

6. In terms of the notified procedure, the Commandant (JG) on 17th December, 2009 issued the medical examination forms in the prescribed format to both the petitioners requiring them to appear before the Base Hospital, Delhi Cantt. for the medical examination, which was the only remaining step of the selection procedure.

7. The petitioners have complained that after leaving the premises of the Coast Guard Selection Board, they were telephonically informed to have a word on 18th December, 2009 with the Chief Law Officer at the Coast Guard Head Quarter, New Delhi. The submission is that as per the applicable and prescribed procedure, the Chief Law Officer has no role in the selection process for appointment to the post of Commandant (Law).

8. In terms of this telephonic direction, the petitioners submit that they reached the Coast Guard Head Quarter, New Delhi on 18th December, 2009 at 10:00 hrs. when they were directed to return on 21st December, 2009. To their surprise on 21st December, 2009, the petitioners were directed to appear before a new selection board chaired by the Chief Law Officer and undertake a written test as well as an interview on that very day. The result of this new selection procedure was informed on ˇ23rd December, 2009 when the petitioners were informed that they had failed in the interview which had been conducted, and consequently not selected.

9. The petitioners separately represented against the procedure which had been adopted and the refusal of the respondents to appoint them to the post for which they had successfully undertaken the prescribed selection procedure. Upon failure of the respondents to accept the representation of the petitioners and do justice to them, Shri Vikas Saxena filed WP(C)No.2674/2010 on or about 28th March, 2010 seeking a

declaration that the selection made by the respondents for the post of Deputy Commandant (Law) is illegal, arbitrary and violative of Article 14 and 16 of the Constitution of India and issuance of the writ of mandamus quashing the selection made by the respondents for the said post. A further prayer was made for a direction to the respondents to make the selection in accordance with the notified procedure and for completion of selection in terms of the notified procedure and permit the petitioner to undertake the medical examination.

10. We may note that along with the writ petition, the petitioner has filed an application seeking interim orders against the respondents to keep one post of Deputy Commandant (Law) vacant so as to enable the petitioner to get appointment during the pendency of the writ petition. When the writ petition came up for hearing on 22nd April, 2010, notice was issued to the respondents to show cause and so far as the stay application was concerned, the following directions were made:-

"CM No.5342/2010 (Stay)

Notice. Mr. Gaurav Khanna, Advocate for Union of India accepts notice.

It is directed that appointment, if any, made by the respondents shall be subject to the final outcome of the writ petition. The respondents shall inform the appointees in terms of the order passed by this Court during the pendency of the writ petition.

Dasti to the parties."

11. Shri Nagender Singh has filed WP(C)No.4390/2010 shortly thereafter also seeking directions to the respondents to act upon the recommendation of the Final Selection Board in terms of the advertisement dated 12th November, 2009 and to appoint the petitioner to the post of Deputy Commandant (Law) in terms of the notified norms and procedure with all consequential benefits. In as much as these writ petitions raise identical questions of law and fact, we have heard them together and propose to decide them by the single judgment.

12. The petitioners have primarily made a grievance that the respondents had no authority to change the selection process mid way after its commencement and after the petitioners had successfully undertaken the entire notified selection process. Mr. G.D. Gupta, learned

Senior counsel appearing for Shri Nagender Singh has submitted that the petitioners had been in fact recommended for appointment and, for this reason, only the formality of the medical examination was remaining to be undergone by them. In this behalf reliance has been placed upon the forms in prescribed format for undergoing the medical examination at the Base Hospital, Delhi Cantt. duly signed by the Commandant which had been handed over to the petitioners on 17th December, 2009.

13. The writ petitions are opposed by the respondents who have filed counter affidavits taking an identical stand in the matters.

14. So far as the procedure which was adopted on 21st December, 2009 is concerned, the respondents have in the counter affidavits stated that "the decision for appearance of the candidates recommended by the final selection board for the post of Deputy Commandant (Law) had been approved before hand by the competent authority on 24th November, 2009." It is further stated that in this background, the three candidates who had been selected in the final selection board were required to appear before the Professional Competency Board held at the Coast Guard Head Quarters on 21st December, 2009.

15. With regard to information to the candidates with regard to the Professional Competency Board is concerned, in the counter affidavit the respondents have stated that "before commencement of PSB/FSB, the candidates who reported for the Deputy Commandant (Law) selection were informed during the inaugural address that those qualifying FSB will have to appear before a Professional Competency Board (PCB) since Deputy Commandant (Law) is a higher rank."

16. These assertions of the respondents have been vehemently contested by both the petitioners who have on affidavit submitted that no such information was given at any stage till they were compelled to undergo the testing on 21st December, 2009.

17. We may notice yet another plea which has been taken in the counter affidavit. The respondents have further stated that the board conducted the professional competency assessment through a "short test of general law and basic maritime law, followed by interview both aimed at assessing the professional knowledge, legal awareness and suitability of candidate for induction into the post of Deputy Commandant (Law)." A further prescription that "it is expected that the candidates would score

at least 50% marks in the written test" is mentioned in the counter affidavit.

18. It is an admitted position that in the advertisement which had been issued on 12th November, 2009, the respondents did not notify that candidates who were successful in the final selection board would be required to appear before a further professional competency board or the manner of its testing. No syllabi or distribution of marks was also provided.

19. In view of the pleas which have been set up in the counter affidavit, we called upon the respondents to produce the relevant records. A file bearing No.RT/0103/FAST TRACK captioned as "RECRUITMENT OF ASST COMDTS-FAST TRACK – 01/2010 BATCH" was produced before us. This file refers to the advertisement which was issued for fast track selection of Assistant Commandants of GD/GD P/N/CPL/Tech which had been published all over India in national daily newspapers on 10th November, 2009 and telecast on six T.V. channels. Interestingly, there is not even a reference to any issue involving Deputy Commandants in this file.

20. In this file, on 18th November, 2009, a Note 9 was recorded by Shri Braj Kishore Commandant (JG) which included at Sl.No.3 the proposed schedule for the recruitment of Assistant Commandants (Fast Track) commencing from the stage of the last date of receipt of applications till the commencement of basic training on 4th of January, 2010. At Sl.No.4, of Note 9 the following was also proposed:-

> "4. The Preliminary Selection Board of officers for Fast Track Selection will comprise of total 06 members (one set of 03 assessors including the President and 03 other members as nominated by the Admin directorate). The Board will conduct written test (GMAT-verbal and Non-verbal) as well as Stage-I screening during the PSB. (10-12 Dec 09). On completion of PSB, the FSB will be conducted at CGSB, Noida w.e.f. 13-17 Dec 09."

The above schedule was recommended for the DDG's approval on 20th November, 2009 by Shri B.K. Patasahani, DIG, PD (HRD).

21. This file then went up to the Deputy Director General who on 20th November, 2009 called upon the Chief Law Officer to comment

thereon. A noting of the Chief Law Officer (`CLO. for brevity) made on 23rd November, 2009 was relied upon by the respondents before us as the proposal for assessment by a Professional Competency Board in the cases in hand and deserves to be considered in extenso. The same reads as follows:-

> "Since candidates for Sl(e) of Encl 1A are for higher rank, propose suitability be assessed by professional board also in addition."

22. This proposal and the file was then on 24th of November, 2009 placed before the Deputy Director General who has endorsed the following comments thereon:-

> "Para 5 of noting 10, and C.L.O. proposal above approved."

23. As noted above, this file relates to the selection for Assistant Commandants only. Obviously this noting also refers to the same selection. No other record was placed before the Court. On the contrary, it was stated before us that the counter affidavit is premised on this record.

24. In view of the noting dated 18th November, 2009 on which this decision appears to have been taken, it is clearly evident that there is no issue relating to selection of deputy commandant (law) which was put up to the Deputy Director General. Therefore, the averment in the counter affidavit to the effect that the Proficiency Competency Board of those candidates recommended by the FSB for the post of Deputy Commandant (Law) had been approved by the competent authority on 24th November, 2009 is not supported by official record and is incorrect.

25. Certain further queries which arose during the hearing could not be answered on behalf of the respondents and time was sought to produce further record. It is only in the hearing in the afternoon that the respondents placed file No.RT/0103/LAW OFFICER captioned "RECRUITMENT OF LAW OFFICERS (DY COMDT) – 01/2010 BATCH" before the court. It is unfortunate that this record was not produced before this court in the earlier hearing and appears to be an attempt to deliberately mislead this court. We were not even informed that there is any other record available on the issue.

26. The notings which have been made by the Commandant (JG) on 18th December, 2009 with regard to the present selection and thereafter

on this file deserves to be considered in extenso and reads as follows:-

-1-

"Extract of Advt for the Post of Dy. Comdt (Law)-01/2010 Batch - 1A

-2-

1. Refer to Encl 1A.

2. It is submitted that the advertisement was published for DY. Comdt (Law) as approved by the competent authority. Total 168 applications were received at CGSB. After scrutiny and vetting, 62 call letters were issued. Only 05 candidates qualified PSB (comprising GMAT) Verbal and Non Verbal and stage-1) conducted 10-12 Dec 09 at CGSB Noida.

3. Out of these 05 candidates, 03 have qualified during Final Selection Board (FSB) conducted w.e.f. 13-17 Dec 09 at CGSB Noida as follows:

Sl.No.	Name	Roll No.
a.	Vaishali Sood	DLW/GEN/1592
b.	Vikas Saxena	DLW/GEN/1451
c.	Nagender Singh	DLW/GEN/1290

4. Since these candidates are likely to be inducted at a relatively elevated level (Dy. Comdt) in the Law branch It is opined that their professional competence and suitability, may appropriately be ascertained by the Directorate of Law, prior to sending them for the medicals and issuance of appointment letters.

5. Submitted for perusal and approval please.

Sd/-

(Brij Kishore)
Comdt (JG)
DD(Rectt)
18 Dec 09
I.Com: 3953"

27. It is evident from the above that no decision at all with regard

to any further testing of the persons who had successfully qualified the final selection board for the post of Deputy Commandant (Law) had been taken even till 18th December, 2009. In fact, it is proposed for the first time then. This matter travelled through various authorities in the chain of command.

28. On the above proposal, we may note here the comments of the Chief Law Officer dated 21st December, 2009 which read as follows:-

> "It is proposed to conduct a short test and interview for judging professional competence, if approved pl,
>
> Sd/-
> CLO
> 21 Dec 09"

It is clearly evident from the above that the proposal for holding a test or interview for assessing professional competency of the candidates was mooted for the first time only on the 21st of December, 2009. The legal experts guiding the functioning of the respondents would be expected to know the well settled applicable legal principles with regard to change of selection criteria and method after commencement of the selection process laid down by the Supreme Court in the plethora of judgments noticed herein as well as the consequences of concealment of material records.

29. The record also shows that matter moved very fast on 21st December, 2009. On the very same day, the Deputy Director General proposed to constitute a Board (for the professional competency testing) and recorded the following noting:-

> "1. Further to note 2, it is proposed to constitute a Board (for Professional Competency Test) comprising of following officers.
>
> | Sl.No. | Rank Name | No. | |
> |---|---|---|---|
> | a. | DIG AKS Chauhan | (0161-P | – President |
> | b. | Comdt. SS Malik | (5002-Q) | – Member |
> | c. | Comdt. Donny Michael | (0258-L) | – Member |
>
> 2. If approved, the Board is required to assemble on 21 Dec 09, at CGHQ. The BPs along with recommendations to be submitted by 22 Dec 09 to facilitate medical examination of successful candidates.
>
> 3. Submitted for perusal and approval please.
>
> Braj Kishore
> COMDT.(JG)
> 4082.C
> DD(Rectt)
> **21 Dec -09**
> I. Com 3953"

30. The above narration of facts also would show that there was no decision at all to conduct any further test of the candidates till 21st December, 2009. So far as the approval of this proposal is concerned, the file would disclose that the matter was not placed before any higher authority and the entire decision to conduct the professional competency test and suitability examination has been taken by the Deputy Director General of the service himself.

31. This is also manifested from the fact that in terms of the notified procedure, the Commandant had issued the medical examination forms to the candidates declared selected by the FSB.

32. The present case raises a basic question on well settled first principles. It is trite that the appointing authority has no jurisdiction at all to change or vary the selection process after its commencement. In view of the above, the issue raised before this court is the jurisdiction of the respondents to vary the selection procedure which they had notified to the candidates in the advertisement dated 12th November, 2009, more so after the candidates had undertaken the entire notified selection procedure and had been declared successful.

33. In this regard, reference can usefully be made to the pronouncements of the Supreme Court on the same issue which have been placed before us by learned senior counsel for the petitioner.

34. The law in this issue was laid by the Supreme Court as back as in the judgment reported at 1983 (3) SLR 293, **Dr. Vinay Rampal Vs. The State of Jammu & Kashmir & Ors.** in the following terms:-

> "3. If the petitioner's eligibility for admission to the course for

which he had applied is to be judged on the qualifications as set out in the advertisement, it is indisputable that he was eligible for admission under Clause (b)(iv) of the advertisement. Mr. Altaf Ahmed, however drew our attention to item No. 12 in Notification No. 4 of 1981 issued by the Government Medical College at Jammu, which recited that the selection of the candidates will be made strictly in accordance with the instructions issued by the Government. That may be so. But can it be urged that advertisement was issued ignoring Government instruction if any relevant to the subject. In any event such a vague direction that the selection of candidates will be made strictly in accordance with the instructions issued by the Government, in the face of advertisement, leave us cold because any such instruction must be in conformity with some rules and if there be rules the same must be in conformity with the Regulations framed by Indian Medical Council if its jurisdiction extends to Jammu and Kashmir. It was never suggested at any point of time that in issuing the advertisement there was any error. If that be so the College authority including Principal issuing advertisement and inviting applications for admission must be held bound by it unless shown otherwise.xxxxx"

35. In 1992 (2) SLR 379, **N.T. Devin Katti Vs. Karnataka Public Service Commission & Ors.,** statutory rules for selection and appointment were amended after the commencement of the selection process. The Supreme Court set aside the selection which was effected pursuant to the amended rules and held that the selection could have been made only in terms of the rules which were in vogue and applicable at the time of commencement of the selection process. In this regard the observations of the Court deserve to read in extenso and read as follows:-

"11. There is yet another aspect of the question. Where advertisement is issued inviting applications for direct recruitment to a category of posts, and the advertisement expressly states that selection shall be made in accordance with the existing Rules or Government Orders, and if it further indicates the extent of reservations in favour of various categories, the selection of candidates in such a case must be made in accordance with the then existing Rules and Government Orders. Candidates who

apply, and undergo written or viva voce test acquire vested right for being considered for selections in accordance with the terms and conditions contained in the advertisement, unless the advertisement itself indicates a contrary intention. Generally, a candidate has right to be considered in accordance with the terms and conditions set out in the advertisement as his right crystalises on the date of publication of advertisement, however he has no absolute right in the matter. If the recruitment Rules are amended retrospectively during the pendency of selection, in that event selection must be held in accordance with the amended Rules. Whether the Rules have retrospective effect or not, primarily depends upon the language of the Rules and its construction to ascertain the legislative intent. The legislative intent is ascertained either by express provision or by necessary implication, if the amended Rules are not retrospective in nature the selection must be regulated in accordance with the Rules and orders which were in force on the date of advertisement. Determination of this question largely depends on the facts of each case having regard to the terms and conditions set out in the advertisement and the relevant Rules and orders. Lest there be any confusion, we would like to make it clear that a candidate on making application for a post pursuant to an advertisement does not acquire any vested right for selection, but if he is eligible and is otherwise qualified in accordance with the relevant Rules and the terms contained in the advertisement, he does acquire a vested right for being considered for selection in accordance with the Rules as they existed on the date of advertisement. He cannot be deprived of that limited right on the amendment of Rules during the pendency of selection unless the amended Rules are retrospective in nature.

13. xxxx It is a well accepted principle of construction that a statutory rule or Government Order is prospective in nature unless it is expressly or by necessary implication made to have retrospective effect. Where proceedings are initiated for selection by issuing advertisement, the selection should normally be regulated by the then existing rules and Government Orders and any amendment of the rules or the Government Order pending the selection should not affect the validity of the selection made

by the selecting authority or the Public Service Commission unless the amended rules or the amended Government orders issued in exercise of its statutory power either by express provision or by necessary intendment indicate that amended Rules shall be applicable to the pending selections. See **P. Mahendra and Ors. v. State of Karnataka and Ors.,** 1983(3) Speed Post Judgments 276 (SC)."

(Underlining by us)

36. Mr. G.D. Gupta, learned senior counsel has drawn our attention to the following observations in (2001)10 SCC 51, **Maharashtra State Road Transport Corp. & Ors. Vs. Rajendra Bhimrao Mandre & Ors.,** which are also instructive and clearly state the position thus:-

"5. xxxx. It has been repeatedly held by this Court that the games of the rules meaning thereby, that the criteria for selection cannot be altered by the authorities concerned in the middle or after the process of selection has commenced.xxx"

37. In similar facts, another decision of the Supreme Court reported at (2008) 2 SCC (L&S) 203, **Hemani Malhotra Vs. High Court of Delhi & Anr.** is topical and reads as follows:-

"14. It is an admitted position that at the beginning of the selection process, no minimum cut off marks for viva-voce were prescribed for Delhi Higher Judicial Service Examination, 2006. The question, therefore, which arises for consideration of the Court is whether introduction of the requirement of minimum marks for interview, after the entire selection process was completed would amount to changing the rules of the game after the game was played …xxx."

xxxx

"15. There is no manner of doubt that the authority making rules regulating the selection can prescribe by rules the minimum marks both for written examination and vive-voce, but if minimum marks are not prescribed for vive-voce before the commencement of selection process, the authority concerned, cannot either during the selection process or after the selection process add an

additional requirement/qualification that the candidate should also secure minimum marks in the interview. Therefore, this Court is of the opinion that prescription of minimum marks by the respondent at vive-voce, test was illegal."

38. We may note that in the aforenoticed precedents the court placed reliance on its earlier pronouncement reported at (2008) 1 SCC (L&S) 841, **K. Manjushree Vs. State of A.P.** which placed reliance on an earlier precedent, and in para 32 held as follows:-

"32. In **Maharashtra State Road Transport Corporation v. Rajendra Bhimrao Mandve** MANU/SC/0737/2001 : (2002)ILLJ819SC , this Court observed that "the rules of the game, meaning thereby, that the criteria for selection cannot be altered by the authorities concerned in the middle or after the process of selection has commenced." In this case the position is much more serious. Here, not only the rules of the game were changed, but they were changed after the game has been played and the results of the game were being awaited. That is unacceptable and impermissible.

In a judgment reported at (2010) 3 SCC 104, **Ramesh Kumar Vs. High Court of Delhi & Anr.,** the court was concerned with the situation where the appointing authority had not prescribed any minimum marks as the cut off marks in the interview for the selection till long after its commencement. This action was assailed before the Supreme Court which held as follows:-

"13. In **Shri Durgacharan Misra v. State of Orissa and Ors.** MANU/SC/0627/1987 : AIR 1987 SC 2267, this Court considered the Orissa Judicial Service Rules which did not provide for prescribing the minimum cut-off marks in interview for the purpose of selection. This Court held that in absence of the enabling provision for fixation of minimum marks in interview would amount to amending the rules itself. While deciding the said case, the Court placed reliance upon its earlier judgments in **B.S. Yadav and Ors. v. State of Haryana and Ors.** MANU/SC/0409/1980 : AIR 1981 SC 561; **P.K. Ramachandra Iyer and Ors. v. Union of India and Ors.** MANU/SC/0395/1983 : AIR 1984 SC 541; and **Umesh Chandra Shukla v. Union of**

India and Ors. MANU/SC/0050/1985 : AIR 1985 SC 1351, wherein it had been held that there was no "inherent jurisdiction" of the Selection Committee/Authority to lay down such norms for selection in addition to the procedure prescribed by the Rules. Selection is to be made giving strict adherence to the statutory provisions and if such power i.e. "inherent jurisdiction" is claimed, it has to be explicit and cannot be read by necessary implication for the obvious reason that such deviation from the rules is likely to cause irreparable and irreversible harm.

14. Similarly, in **K Manjusree v. State of Andhra Pradesh and Anr.** MANU/SC/0925/2008 : AIR 2008 SC 1470, this Court held that selection criteria has to be adopted and declared at the time of commencement of the recruitment process. The rules of the game cannot be changed after the game is over. The competent authority, if the statutory rules do not restrain, is fully competent to prescribe the minimum qualifying marks for written examination as well as for interview. But such prescription must be done at the time of initiation of selection process. Change of criteria of selection in the midst of selection process is not permissible."

39. Our attention has also been drawn to the Recruitment Rules which have been notified by the Government of India in exercise of power conferred under Section 123 of the Coast Guard Act 1978 which are titled as Coast Guard Officer (Law Officer) Recruitment Rules, 1984. The advertisement which was issued and published by the respondents on 12th November, 2009 was in terms of these recruitment rules.

40. The eligibility conditions which were notified in the advertisement dated 12th November, 2009 are stated to be in terms of these recruitment rules. The Supreme Court has struck down the action of the authorities even in fixing cut off marks or allocating marks for different stages of the selection process as illegal and impermissible.

41. So far as the selection procedure is concerned, we have been informed by learned counsel for the respondents that the procedure notified in the advertisement dated 12th November, 2009 was the procedure which was adopted and followed by the respondents for effecting appointments for the last 30 years.

42. The above discussion would show that the respondents had not only notified the candidates/applicants seeking appointment to the post of Deputy Commandant (Law) of the selection procedure in the advertisement dated 12th November, 2009 but had in fact completed the process pursuant thereto.

43. The respondents had clearly notified the candidates that the applicants would undergo scrutiny process when eligible candidates would be shortlisted and call letters for the entrance test would be issued only to such shortlisted candidates. So far as the selection process thereafter was concerned, the respondents had clearly indicated that the same would consist of "two phases alone" and nothing further. The two phases about which the respondents notified the applicants included the preliminary selection and the final selection. The respondents had unequivocally notified the applicants that the selection would be made only on the basis of performance of the candidate in the final selection board. It was further stated that those candidates who were found medically fit would be placed in the merit list and the merit list would be prepared according to the number of vacancies which were available.

44. An admitted position is that the petitioners had successfully undertaken the Preliminary Selection Board as well as the Final Selection Board and had been given the prescribed medical forms for undergoing the medical examination. It is only thereafter that the respondents mooted for the first time a proposal to conduct "Professional competency and suitability" assessment. Even if it was to be assumed the Deputy Director General was the competent authority for approving such assessment, it is noteworthy that such proposal was put up to and approved even by this authority only on 21st December, 2009. In view of the legal position noticed hereinabove, it has to be held that such decision and action requiring the assessment of the competency and suitability long after the commencement of the selection process, so much so that the Final Selection Board stood completed and results declared, is clearly without jurisdiction or authority of law and not sustainable.

45. We may also notice the manner in which the respondents have conducted the proceedings on 21st December, 2009. It is an admitted position that the candidates who were so tested and assessed were not put to notice of the fact that they would be required to undergo such

procedure and testing. They were admittedly not informed about the prescribed syllabi for the tests and were given no opportunity to get ready or come prepared for the written test and examination. No syllabus or schedule was announced. Whereas the advertisement drew a distinction between 'essential' and 'desirable' qualifications in the prescripted eligibility conditions in the advertisement, the professional competency was assessed on the 21st of December, 2009 on subjects mentioned in the 'desirable' qualifications, that too without notice. On this basis the declared result has been changed.

46. We are informed that Shri Vikas Saxena, (petitioner in WP(C)No.2674/2010) was placed at the top of the selection list by the Final Selection Board. He was followed by Shri Nagender Singh, (petitioner in WP(C)No.4390/2010). Ms. Vaishali Sood, was placed in the third position by the Final Selection Board. This position has been reversed by the so called Professional Competency Board in its testing and interviews held and conducted on 21st December, 2009 without opportunity to prepare to the candidates. In the result declared, the petitioners have been failed, while the third candidate declared as passed.

47. The pleas set up by the respondents in the counter affidavits are falsified by the records and documents which were issued to the petitioner as well as the records produced before us. On 30th November, 2009, the respondents issued a call letter to Shri Nagender Singh whereas this call letter was issued to Shri Vikas Saxena on 3rd December, 2009. Even these call letters refer to only the preliminary and final selection boards and do not even suggest any professional competency board. These letters were in the format prescribed for appointment to the post of Assistant Commandant with the necessary corrections have been effected in hand by the respondents.

48. The files produced before us do not contain any noting to the effect that information about the professional competency board was given to the candidates in the inaugural address. It is obvious that no such information could have been given for the reason that there was no decision till 21st December, 2009 for the candidates to undergo the assessment by a "Professional Competency Board."

49. There is nothing on record produced which even suggests a reference to the manner in which the testing and evaluation of the

professional competency would be effected. The constitution of the board was effected by the Deputy Director General on 21st December, 2009 which proceeded to conduct its proceedings on the same day. There is no disclosure of any decision on or the method of testing. There is no prescription of a written test or the nature thereof. The counter affidavit refers to "short written test" but its nature is not disclosed even in the counter affidavit. Even this court has been kept in the dark with regard to the prescribed curriculum and syllabi for the written test and the authority which had set the question papers thereof.

50. So far as the proceedings which were conducted by the above appointed board are concerned, it appears that this board assembled on 21st December, 2009 and required the three candidates who had successfully cleared the Final Selection Board to undertake a fresh written test as well as the interview.

51. We may notice that the petitioners contend that they had been telephonically informed on 17th December, 2009 to contact the Chief Law Officer on 18th December, 2009 which they did. The proposal to conduct such a professional competency test and interview was made only on 21st December, 2009.

52. The respondents submit that the board subjected the three candidates shortlisted by the Final Selection Board, to an initial thirty minutes objective test on general law and basic maritime law followed by the interview to assess their professional knowledge. The consideration of the professional competency by the board was based on the performance of the candidates in the written test and interview. It is also not disclosed anywhere, either in the counter affidavit or in the record which has been produced before us, as to which was the authority who set the questions papers and evaluated the same. It is stated before us that the board which was constituted on 21st December, 2009, has followed a unique procedure and itself decided the method of evaluation, format of testing and set the question papers which the candidates were required to answer on the same day.

53. So far as the questions which were posed to the candidates during the interview is concerned, the submission before this court is that these were jointly prepared "in advance" by the president and the members of the board. The questions were asked by the President with

further additional questions being asked by the Members, wherever necessary, depending on the reply of the candidate. Interestingly this entire narration in the counter affidavit does not set out as to which was the authority which had approved this syllabus or the procedure which was adopted by the board. Admittedly, there was no approval by any competent authority. This matter was not even examined by any officer even at the level of Deputy Director General, let alone the appointing authority under the provisions of Indian Coast Guard Act or by any person to whom such authority was legally or validly delegated. The same has been left to the absolute discretion of the board which had been appointed by him. We are orally informed by Mr. A.K.S. Chauhan, DIG, Chief Law Officer, Coast Guard, who is present, that this board took all the decisions and steps and that it also corrected the answer sheets itself, announced the result and also conducted the interviews apart from making the recommendations in respect of the result on the same day.

54. So far as the result or grading of this assessment is concerned, the respondents said that the professional competency board submitted its proceedings on 22nd December, 2009 which were approved by the "competent authority". The result was thereafter intimated to the candidates by the Directorate of Manpower, Recruitment and Training concerned with the subject. The respondents have contended that the result of the assessment by this board was declared on 23rd December, 2009 when both the petitioners were declared as having failed in the interview while the third candidate, Ms. Vaishali Sood was found to be the sole candidate with an average professional competency and was accordingly selected for appointment to the post of Deputy Commandant (Law) and she was sent for medical examination.

55. Mr. G.D. Gupta, learned senior counsel appearing for Sh. Nagender Singh has urged that under the provision of Coast Guard Act, 1978, only the Central Government is the competent authority to effect appointments to the force. This power stands delegated to the Director General of the Coast Guard Service and has not been delegated to any other person or authority within the Coast Guard Service. This position is not disputed on behalf of the respondents. There appears to be substance in the objection of the petitioners that the decision to adopt the new procedure was not by an authority competent to do so.

56. Before parting with this case, it is necessary to notice one

extremely distressing fact. The relevant file was not placed before this Court till the final stage of hearing. We find that in the counter affidavits a completely false plea has been taken to the effect that the candidates who reported for the selection process were further informed during the inaugural address that those qualifying the final selection board would have to appear before such board. According to the respondents, this address was effected before holding the preliminary selection board. The above discussion amply shows that the respondents had not even proposed the holding of a professional competency board on the date when the inaugural address was allegedly given to the candidates. Such plea taken on affidavit filed at the highest level not supported by any record is reprehensible and deserves to be condemned.

57. We were inclined to take strong view in the matter and proceed against the authorities concerned in respect of such a plea and the attempt to conceal the correct record from this Court. (Ref : AIR 1994 SC 853, **S.P.Chengalvaraya Naidu Vs. Jagannath & Ors;** 1980 Crl.LJ 684, **Advocate-General, State of Bihar Vs. M/s.Madhya Pradesh Khair Industries & Anr.;** (1978) 1 SCR 742, **T. Arvandandam Vs. T.V. Satyapat & Anr.** and of this Court in 71(1998)DLT 1= 1998(44)DRJ 109, **T.Arvandandam Vs. T.V. Satyapat & Anr.**) However, our attention has been drawn to the communication dated 31st March, 2010 addressed by DIG B.K. Patasahani to Shri Nagender Singh (petitioner in WP(C)No.4390/2010) wherein he has been informed that there were five vacant seats of the post of Deputy Commandant which existed on 31st December, 2009 for which the selection process was undertaken.

58. We are informed by Ms. Barkha Babbar, learned counsel on instructions from the officers present, that the directions made by this court in the order dated 22nd April, 2010 in W.P.(C)No.2674/2010 have been complied with by the respondents. We are further informed that the respondents have effected one appointment to the post of Deputy Commandant (Law) following the new procedure which was adopted on 21st December, 2009.

59. It is noteworthy that despite our directions made on 22nd April, 2010, no other person has come forward to contest these writ petitions.

60. It is admitted before us that the petitioners have been found successful in the Final Selection Board in terms of the notified procedure.

Only the medical examination, for which the requisite medical forms have been issued to the petitioners by the competent authority, remained to be completed. It is an admitted position that other than filling up one post, the other four posts remain vacant for completing the procedure of selection pursuant to the advertisement dated 17th December, 2009. It is, therefore, possible to ensure justice to the petitioners without taking this matter further. In view of the order passed by us on 22nd April, 2010 in W.P.(C) No.2674/2010, the respondents are required to effect restitution in terms of the same.

61. In view of the above, we hold and direct as follows:-

(i) The selection process undertaken by the Professional Competency Board on 21st December, 2009 and the result thereof declared on the 23rd of December, 2009 are held to be illegal and hereby set aside and quashed.

(ii) The respondents are directed to complete the selection process effectuated pursuant to the advertisement dated 12th November, 2009 and to give effect to the result of the Final Selection Board conducted between 13th and 17th December, 2009.

(iii) The petitioners shall be permitted to undertake the medical examination in terms of the documents issued to them on 17th December, 2009 by the Base Hospital, Delhi Cantt.,

(iv) The respondents shall issue necessary orders in terms of the above including the requisite intimation to the Base Hospital, Delhi Cantt. within a period of six weeks from today with written notice to both the petitioners.

(v) In case the petitioners are found medically fit, the respondents shall complete the appointment of the petitioners to the post of Deputy Commandant (Law) within a period of four weeks of the medical examination.

(vi) The respondents shall ensure that the seniority and any other consequential benefits of the petitioners shall be maintained strictly in terms of the recommendation of the Final Selection Board dated 17th December, 2009.

(vii) Each of the petitioners shall be entitled to costs of 25,000/- each which shall be paid within a period of four weeks from today. This writ petition is allowed in the above terms.

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ALPINE AGENCIES PVT. LTD. .....APPELLANT

VERSUS

COMMISSIONER OF VALUE ADDED TAX & OTHERS .....RESPONDENT

(A.K. SIKRI AND REVA KHETRAPAL, JJ.)

S.T.APPEAL NO. : 4/2010 & CM NO. : 11439/2010 DATE OF DECISION: 14.09.2010

Delhi Sales Tax Act, 1975—Section 5,43 (6), 45—Central Sales Tax Act, 1956, Section 8—Appellant/assessee a Private limited company, traded in electric, electronic and refrigeration items which were notified to be first point items U/s 5 of the Act—As per, assessee/ appellant, it purchased these goods from registered dealers and was not first seller of the goods, therefore had no liability to pay sales tax—Assessee/appellant had put up said claim before Assessing Officer for assessment for year 1996-97—Assessment done both under Delhi Sales Tax Act as well as Central Sales Tax Act and demand of Rs. 3679144 and Rs. 90172 respectively raised under the Acts—Assessee/ appellant preferred two rounds of appeal but failed to get full relief—Ultimately, last order of Income Tax Appellant Tribunal resulted in writ petition in which

appellant/assessee agitated the plea, registered dealers from whom it purchased goods had paid sales tax—Therefore, not necessary for assessee to charge sales tax on those very items of goods when assessee sold same to consumers—Assessee/appellant failed to produce original books of accounts or invoices before Assessing Officer as same were lost for which FIR was lodged—Percontra, respondent pleaded appellant/assessee not entitled to relief in absence of original invoices. Held : provisions of Delhi Sales Tax Act and rules framed thereunder were mandatory in nature and it was necessary to construe them strictly in order to avoid misuse—Rule 9 requires the dealer to produce a declaration in or ST-3 duly filled in and signed by the dealer selling the goods which has to be produced in original—No doubt when these original forms ST-3 are lost or destroyed because of circumstances beyond the control of the assessee he should not be punished and denied the benefit - To avail the benefit the dealer has to necessarily seek exemption in the manner as provided in the rules - As the appellant failed to file satisfactory proof in the manner provided under the Act and rules, not entitled to the benefit as claimed.

Having regard to the ratio of the judgment of the Supreme Court in **Indian Agencies (Regd.), Bangalore** (supra), we need to give strict interpretation to the aforesaid provisions. It would mean that there has to be strict compliance by the dealer, in order to avail the benefit under these provisions. Rule 9 of Delhi Sales Tax Rules requires the dealer to produce a declaration in Form ST-3 duly filled in and signed by the dealer selling the goods. This would clearly signify that Form ST-3 has to be produced in original. No doubt, when these original Forms ST-3 are lost or destroyed because of the circumstances beyond the control of the assessee, he should not be punished and denied the benefit. The rule making authority has taken care of such a

situation, so that no unnecessary hardship is caused. Sub-Rule (3) is specifically added to take care of these circumstances. Sub-rule (3) is an exception and if the circumstances contained therein exist, the Commissioner can exempt a dealer from furnishing original ST 3 From. However, for doing so the conditions laid down therein are to be satisfied, which are specifically incorporated in the provision. To avail the benefit, the dealer has to necessarily seek exemption in the manner provided therein.

It would be one of the exercises, exercise in the process, that the other evidence, which is relied upon by the dealer in the absence of original evidence, is sufficient to show that the tax has been paid at the first point and the dealer is entitled to adjustment thereof. **(Para 27)**

Important Issue Involved: Provisions of Delhi Sales Tax Act and rules framed thereunder are mandatory in nature and it is necessary to construe them strictly in order to avoid misuse— For claiming deduction the procedure laid down in the Act and Rules, is to be strictly followed.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Rajesh Jain, Advocate.

FOR THE RESPONDENT : Mr. H.L. Taneja, Advocate.

CASES REFERRED TO:

1. *CCE* vs. *Stelko Strips Ltd.* [2010 (255) ELT 397 (P&H)].
2. *CCE, Ludhiana* vs. *Ralson India Ltd.*[2006 (202) ELT 759 (P & H).
3. *Kothari General Foods Corpn. Ltd.* vs. *CCE, Bangalore* [2002 (144) ELT 338 (T)].
4. *B. Narasaiah & Co.* vs. *State of Andhra Pradesh* [2002 (127) STC 606 (AP)].
5. *Shanmuga Traders Etc.* vs. *State of Tamil Nadu* [1999

(114) STC 1 (SC).

6. *State of Tamil Nadu* vs. *V. Balu Chettiar* [1996 (100) STC 120 (Mad.).

7. *State of Tamil Nadu* vs. *Raman & Co. & Ors.* [1994 (93) STC 185 (SC).

8. *Manganese Ore (India) Ltd.* vs. *Commissioner of Sales Tax, Madhya Pradesh* STC Vol.83 1991.

9. *State of Andhra Pradesh* vs. *Tungbhadra Inds. Ltd.* [1986 (62) STC 71 (AP).

10. *Dy. Commissioner* vs. *Saivakumar & Co.*[1980 (45) STC 436 (Mad.).

11. *Govindan & Co.* vs. *Raichael Chacko* [1975 (35) STC 50 (SC).

12. *State of Madras* vs. *R. Nandlal and Co., :* [1967]3SCR645.

13. *Kedarnath Jute Manufacturing Co.* vs. *Commercial Tax Officer, Calcutta and Ors.* [1965]3SCR626.

14. *Indian Agencies (Regd.), Bangalore* vs. *Additional Commissioner of Commercial Taxes, Bangalore* [139 STC 329].

RESULT: Appeal dismissed.

A.K. SIKRI, J.

1. This second appeal has been filed by the appellant (hereinafter referred to as 'the assessee') under Section 45 of the Delhi Sales Act, 1975. The appellant feels aggrieved by the order dated 1st April, 2010 passed by the Appellate Tribunal, Value Added Tax, Delhi under Section 43 (6) of the Delhi Sales Act, 1975. Before we pin-point the substantial question of law which arises, it would be proper to traverse the facts under which the question of law has cropped up.

2. The assessee is a private limited company. It is trading in electric, electronic and refrigeration items. All these goods in which the appellant is trading were notified to be the first point items under Section 5 of the Delhi Sales Act (hereinafter referred to as 'the Local Act'). The implication thereof is that liability to pay the sales tax is of the first seller from whom

the assessee was buying these goods, as the assessee was not the first seller of the goods. It was in the case of the assessee that it had been purchasing these goods from the registered dealers namely M/s Videocon International Ltd., M/s. Whirlpool India Ltd. and M/s. Expo Machinery Ltd., etc.

3. The assessment order in question, relating to the local Act is 1996-97. For this assessment year, the assessment orders which were framed by the Assessing officer were ex-parte and framed on 25th February, 2000. The assessment was made applying the best judgment assessment for want of requisite material given by the assessee who also did not participate in the proceedings and remained ex-parte. The assessment was done both under the local Act as well as Central Sales Tax Act (hereinafter would be referred to as 'the Central Act') raising a demand of Rs. 3679144 and Rs. 90172 respectively, under the aforesaid Acts. This order reads as under:

> "The trader runs AC and Refrigeration work. The quarterly return were filed late, hence penalty of `1000 for the same is imposed on the trader. The penalty for the fourth quarterly return has already been imposed. The tax was also deposited late and interest thereon is charged. The trader has shown sale of Rs. 2,00,63,689 in the quarterly returns and in the absence of Account Books of the trader, I declare the total sale of the trader this year at Rs. 2,25,00,000 out of which tax at the rate of 12% in local is levied on Rs. 2,00,00,000 and interest is also levied on this due tax. On remaining amount, tax at the rate of 12% under Central Act is to be levied. The benefit of tax deposited by the trader is allowed to the trader."

4. The assessee preferred an appeal against this order before the First Appellate Authority alongwith the stay application. In the said stay application, the First Appellate Authority passed the orders dated 29th March, 2000 directing the assessee to deposit entire amount of tax as a condition of hearing the appeal. In appeal, this order was modified by the Tribunal on 31st January, 2001 directing the assessee to deposit Rs. 10 lacs under the local Act and Rs. 19,000/- under the Central Act. Still not satisfied, the assessee challenged that order by filing Writ Petition No.7171 in this Court. This writ petition was decided on 17th January, 2002 whereby order of the Tribunal was further modified allowing the assessee

to now deposit Rs. 1,00,000 under the Local and Rs. 50,000 Under the Central Act.

5. The appeal was ultimately heard by the First Appellate Authority (i.e. Additional commissioner) who vide orders dated 27th March, 2003 remanded the case back to the Assessing Authority for passing fresh orders after providing an opportunity to the assessee.

6. At this stage, we may state that the entire controversy relates to the payment of sales tax on the sales made by the assessee. As pointed out above, the items in which the assessee deals incurred sales tax at first point, thus, according to the assessee, the registered dealers from whom it had purchased the goods had paid the sales tax. Therefore, it was not necessary for the assessee to charge the sales tax on those very items of goods when the assessee sold the same to the consumers. However, in order to claim exemption of sales tax liability, it was necessary for the assessee to produce the invoices vide which it had purchased the goods from the registered dealers reflecting sales tax having paid to those registered dealers. Since ex-parte assessment order was made on 25th February, 2000, naturally, the assessee had not produced those bills in the absence whereof tax liability was raised while framing the assessment order. The plea of the assessee in appeal filed by it and also in the proceedings arose out of interim orders passed by the First Appellate Authority and as noted above, was that since sales tax had already been paid at the point of first sale, there was no liability on the part of the assessee to pay this tax and the assessment of sales tax was without jurisdiction.

7. When the matter was remanded back to the Assessing Officer, the assessee again failed to produce these invoices. According to the assessee, it lost its books of accounts in September, 2001 for which FIR was lodged on 9th September, 2001 and, therefore, it was not in possession of the books of accounts or original invoices. Again the assessee, though, attended the proceedings before the Assessing Officer in the beginning when it was given repeated opportunities to produce the books of accounts, the assessee did not turn up on 10th January, 2005 which was the final opportunity given for this purpose. In these circumstances, again an ex-parte assessment order was passed confirming the original assessment order dated 25th February, 2000. The assessee again went in appeal and also filed stay application. It was again directed to pay the entire amount

before the appeal could be heard. This controversy again reached this Court when the assessee filed Writ Petition (C) 4568/2007 challenging the order of pre-deposit. The order dated 24th September, 2007 was passed in that writ petition directing the assessee to deposit a sum of ` 1 lac and directing the First Appellate Authority to decide the appeal on merits.

8. The appeal was heard once again on merits by the First Appellate Authority i.e. Additional Commissioner and was disposed of vide orders dated 29th May, 2009. The assessee was given part relief. However, as the assessee again failed to produce the original invoices or books of accounts, which were purportedly lost, it was ready to produce the photocopy of those bills which he allegedly collected from the dealers. The First Appellate Authority observed that it was for the assessee to submit proof to the satisfaction of the Assessing Officer that the sale made by it was not liable to be taxed. The first Appellate Authority also observed that as far as enhancement of sale was made by the Assessing Officer, no reasons in support thereof are given. The First Appellate Authority again remanded the case back to the Assessing Officer with the direction to assess the turnover on the basis of available records and pass speaking order for any enhancement of sale.

9. Since the first appellate Authority had observed in the impugned order that the assessee was not entitled to get the relief in the absence of original invoices and on the basis of photocopy of the invoices, the assessee took the same as an order adverse to it as it was not in a position to produce the original books of accounts or the original invoices which were purportedly lost and could clearly foresee the outcome of the fresh assessment orders had it gone to the Assessing Officer back on the basis of direction given by the First Appellate Authority. Therefore, the assessee decided to challenge this order by filing appeal before the Tribunal. Along with this appeal, as usual, stay application was also moved. This application was heard on 16th December, 2009 and the Tribunal dispensed with the condition of pre-deposit of tax. The Tribunal heard the appeal also on merits finally there and then and reserved the orders. The orders were pronounced on 31st March, 2010 dismissing the appeal. This is how the assessee has approached this Court by way of present appeal challenging the said order of the Tribunal.

10. Though, many questions of law are proposed, according to us

controversy highlighted above gives rise to the following two questions of law:

(i) Whether the inference drawn by the Tribunal that the appellant was in possession of the books of accounts and, therefore, there is no reason for them not to produce them before the Assessing Authority is not contrary to the facts of the case, especially when an FIR regarding the loss of books of accounts had been lodged on 9.9.2001 and the remanded assessment order in this matter was passed on 13.1.2005 (and not 25.2.2000)?

(ii) When the goods dealt in by the appellant were first point goods on which liability to tax is on first sale, then could the liability be fastened on the appellant when:-

(a) they were not the first seller of the said goods,

(b) in discharge of their onus in terms of notification dated 31.02.1988, they had produced photocopies of the purchase invoices before the Additional Commissioner and had also submitted the list of such purchases before the Tribunal, and

(c) There is a recording of admission of the respondent in the order dated 18.2.2002 passed by this Court in CWP No.7173/2001 that appellant has paid all the taxes?"

11. It was highlighted by Mr. Jain, learned counsel appearing for the assessee that the goods in question dealt with by the assessee attracted sales tax on first sale and admittedly first sale was by the registered dealers to the assessee and, therefore, that sale could not be without charging the sales tax. Thus, it could clearly be inferred and implied that due sale tax was paid by the assessee. In such circumstances, there was no question of any liability to pay sales tax again when the sales were made by the assessee to the ultimate consumers Though, it was conceded that in order to avail this benefit, it was necessary for the assessee to produce the books of accounts and the purchase invoices showing sales tax charged by the dealers from the assessee at the time of making first sale to it, his grievance was that the authorities below failed to appreciate that when the books of accounts had been lost, the assessee had no alternative but to produce the photocopies of the purchase invoices which

the assessee had collected from the dealers He submitted that loss of books of accounts etc. took place in September, 2001 and FIR was lodged in that behalf as these books of accounts were available earlier, he had shown the same to the Additional Commissioner (the First Appellate Authority) when in the first round of appeal before the said authority, the assessee had pressed its application for stay. This contention of the assessee is noted by the said Authority in its order dated 3th August, 2005 in the following terms:-

> "Out of the total sales made for Rs. 1,76,30,139, sales worth Rs.1,33,98,488 had been claimed as Tax paid sales. Since the tax had been paid at first point the same could not be subjected to tax again in the hands of the petitioner. The details of tax paid purchases worth Rs. 1,62,97,112 had been filed before the Ld. AA at the time of assessment as well as before the Hon'ble Appellate Tribunal, Sales Tax at the time of appeal and also the purchase vouchers were produced before the Hon'ble Sales Tax Appellate Tribunal at the time of hearing of appeal U/S 43(5). It amply proves that the appellant had the requisite purchase voucher/ bills in respect of the tax paid purchases which were subsequently lost along with the books of accounts on 9.9.2001, however, copies of purchase bills are available."

12. We may again clarify that this was the contention of the assessee before the said authority.

13. His further submission was that in order to get the benefit, there was no requirement of producing the original bills. The Assessing Officer had only to satisfy itself about the fact that tax had been paid which could be gathered from the fact that items in which the assessee was dealing were liable to tax on first sale whereas the sales made by the assessee to the consumers were second sale. Further, the assessee had produced the photocopies of the bills duly verified by the registered dealers evidencing the payment of sales tax.

14. Mr. Jain referred to the following judgments in support of his plea that when the first seller of the goods is identifiable who alone is liable to tax, then subsequent tax is exempted from taxation:

(1) **B. Narasaiah & Co. Vs. State of Andhra Pradesh**

[2002 (127) STC 606 (AP)];

(2) **Shanmuga Traders Etc. Vs. State of Tamil Nadu** [1999 (114) STC 1 (SC);

(3) **State of Tamil Nadu Vs. V. Balu Chettiar** [1996 (100) STC 120 (Mad.);

(4) **Dy. Commissioner Vs. Saivakumar & Co.**[1980 (45) STC 436 (Mad.);

(5) **Govindan & Co. Vs. Raichael Chacko** [1975 (35) STC 50 (SC);

(6) **State of Tamil Nadu Vs. Raman & Co. & Ors.** [1994 (93) STC 185 (SC); and

(7) **State of Andhra Pradesh Vs. Tungbhadra Inds. Ltd.** [1986 (62) STC 71 (AP).

15. He also relied upon the Notification dated 30.12.1988, which reads as under:

> "… the only condition imposed upon a dealer for claiming exemption is to produce bill(s)/cash memo(s) in support of purchase of such goods in Delhi. Photocopies of such bills are available with the appellant which are produced before this Court. Such purchases stand confirmed from the sellers either by stamping the invoices or supported with their letters. These have been recorded in thes books of account and payments too have been made by cheques."

16. He further tried to distinguish the judgment of the Supreme Court in the case of **Indian Agencies (Regd.), Bangalore Vs. Additional Commissioner of Commercial Taxes, Bangalore** [139 STC 329] relied upon by the Tribunal. In support of his submission that when the original copies of the cash memos/books of accounts had been lost, non-production thereof would not attract denial of the benefit when the payment of taxes at first point or purchases from registered dealer had not been disputed and referred to the following judgment in support of this plea:

(a) **CCE, Ludhiana Vs. Ralson India Ltd.**[2006 (202) ELT 759 (P & H);

(b) **CCE Vs. Stelko Strips Ltd.** [2010 (255) ELT 397

(P&H)]; and

(c) **Kothari General Foods Corpn. Ltd. Vs. CCE, Bangalore** [2002 (144) ELT 338 (T)].

17. Mr. Taneja, learned counsel appearing for the respondent/Revenue relied upon the reasons given by the Tribunal in its detailed judgment and the case law referred by the Tribunal in the impugned order was extensively read by Mr. Taneja in support of his plea that in a case like this, no indulgence could be given to the assessee who had been negligent throughout and had ultimately failed to produce the requisite evidence in support of its plea that sales tax had been paid. He placed strong reliance upon the judgment of the Supreme Court in the Case of **Indian Agencies (Regd.), Bangalore** (supra).

18. We have considered the rival submissions. We find from the order of the Tribunal that it has drawn its conclusion, based upon the judgment of the Supreme Court in the case of **Indian Agencies (Regd.), Bangalore** (supra). The attempt made by the learned counsel for the appellant is to distinguish that judgment. Therefore, it would be appropriate to start discussion from that judgment and to find out as to what that case actually decides.

19. That case arose out of Central Sales Tax Act, 1956. Section 8 of the said Act provides for rates of tax on sales in the course of inter-state trade and commerce. Sub-section (4) whereof lays down the circumstances under which the sales tax to any sale in the course of inter-state trade and commerce would not be leviable. Clause (a) thereof provides that the dealer selling the goods shall not be liable to pay this tax if he furnishes to the prescribed authority in the prescribed manner, a declaration duly filled and signed by the registered dealer to whom the goods are sold containing the prescribed particulars in a prescribed form obtained from the prescribed authority. These prescribed forms are known as 'Form-C'. The appellant/dealer in the said case had claimed exemption from payment of tax at the prescribed rate, but wanted the same at concessional rate. This was, however, disallowed by the Additional Commissioner of Commerce Taxes, as the appellant had not produced original 'Form-C' and instead wanted the benefit of concessional rate of tax on the basis of 'Form-C' marked as duplicate. He had pleaded that since 'Form-C' marked as original had been lost, he was producing

duplicate 'Form-C', which contention was not accepted by the Assessing Officer. The appeal was preferred before the Joint Commissioner of Commerce Taxes (Appeals), Bangalore, which was allowed holding that the Assessing Authorities should not have rejected the duplicate of the 'C-Forms' and the indemnity bonds filed by the appellant and should not have denied the benefit of concessional rate of tax on such turnover covered by duplicate 'C-Forms'. The Revenue preferred appeal thereagainst before the Additional Commissioner Commercial Taxes, who allowed the appeal by setting aside the order of the Joint Commissioner of Commerce Taxes (Appeals) to the extent that it allowed concessional rate of tax on the inter-state sales effected by the controller on the basis of the 'C-Forms' marked as duplicate and the indemnity bonds furnished by the dealer for the loss of the 'C-Forms' marked as original. The appellant/ assessee approached the High Court of Karnataka by filing the Sales Tax Appeal No.75 of 1998, which was dismissed. In these circumstances, the appellant knocked the door of the Supreme Court. It was the contention of the appellant before the Supreme Court that as 'original.' C-Form had been lost, it was permissible for the appellant to produce 'duplicate' C-Forms, which was also primary evidence of the said document by virtue of the principles enshrined in Section 62 of the Evidence Act, 1872. It was also argued that in any event, filing of the 'original' C-Form was not mandatory, but directory and filing 'duplicate' C-Form was sufficient compliance for levy of lower rate of tax under Rule 12(1) of Central Rules read with Rule 6(b)(ii) of the State Rules and Section 8 of the Central Act. It was also argued that when the original document is lost, duplicate, in any case, would be the best secondary evidence admissible under Section 65/66 of the Evidence Act. Many other submissions were made, which are not relevant for our purposes.

20. The Supreme Court referred to the provision of Section 8 of the Central Act as well as Rule 12 of the Central Sales Tax (Registration and Turnover) Rule, 1957 made by the Central Government in exercise of its power conferred under Section 13 of the Central Act. Proviso (2) and (3) to this Rule deal with the situation where original Forms are lost and reads as under:

> "Provided also…
>
> (2) Where a blank or duly completed form of declaration is lost, whether such loss occurs while it is in the custody of the purchasing dealer or in transit to the selling dealer, the purchasing dealer shall furnish in respect of every such form so lost an indemnity bond in Form G to the notified authority from whom the said form was obtained, for such sum as the said authority may having regard to the circumstances of the case, fix. Such indemnity bond shall be furnished by the selling dealer to the notified authority of his State if a duly completed form of declaration received by him is los, whether such loss occurs while it is in his custody or while it is in transit to the notified authority of his State.
>
> Provided that where more than one form of declaration is lost, the purchasing dealer or the selling dealer, as the case may be, may furnish one such indemnity bond to cover all the forms of declaration so lost.
>
> (3) Where a declaration form furnished by the dealer purchasing the goods or the certificate furnished by the Government has been lost, the dealer selling the goods, may demand from the dealer who purchased the goods or, as the case may be, from the Government, which purchased the goods, a duplicate of such form or certificate, and the same shall be furnished with the following declaration recorded in red ink and signed by the dealer or authorized officer or the Government, as the case may be, on all the there portions of such form or certificate."

21. The Court also took note of Rule 6 of Central Sales Tax (Karnataka) Rules, 1957. Clause (ii) of sub-Rule (ii) thereof is relevant and reads as under:

> "(ii) A registered dealer who claims to have made a sale to another registered dealer or to Government shall, in respect of such claim, attach to his return to be filled in Form IV the portion marked 'original' of the declaration or the certificate in Form D, received by him from the purchasing dealer or Government, as the case may. The assessing authority may, in his discretion, also direct the selling dealer to produce for inspection the portion marked 'duplicate' or the declaration or certificate in Form D, as the case may be."

22. On the basis of the aforesaid provisions, the Apex Court came to the conclusion that merely by producing 'duplicate' C-Form instead of 'original' forms, the appellant had not complied with the provision of Section 8 (4) to enable it to claim the benefit of concessional rates. It observed:

> "12… … … In our view, the Rule has to be strictly construed. Admittedly, the appellant has not complied with the said provisions and, therefore, he is not entitled to the concessional rate of tax under Section 8 of the Central Sales Tax. Section 8(4) specifically provides that the provisions of sub-section (1) shall not apply to any sale in the course of inter-state trade or commerce unless the dealer selling the goods furnishes to the prescribed authority in the prescribed manner. Rule 8(4)(a) also provides that a declaration duly filled and signed by the registered dealer to whom the goods are sold containing the prescribed particulars in a prescribed form obtained from the prescribed authority. On the above provision, a registered dealer will not be entitled to the concessional rate of tax in respect of inter-state sales made by him without the production of the declaration referred under clause (a) of sub-section (4) noted above.
>
> 13. Under the Central Sales Tax (Karnataka) Rules, 1957, the dealer is required to submit along with his return the original of the prescribed forms. As could be seen from the rule extracted above a registered dealer who claims that he has made a sale to another registered dealer is required to attach the original of the declaration forms on the certificate in the prescribed form ˇreceived by him from the prescribed dealer along with his return filed by him… …. …
>
> … … … Thus, the dealer has to strictly follow the procedure and the Rule 6(b)(ii) and produce the relevant materials required under the said rule. Without producing the specified documents as prescribed thereunder a dealer cannot claim the benefits provided under Section 8 of the Act. Therefore, we are of the opinion that the requirements contained in Rule 6(b)(ii) of the Central Sales Tax (Karnataka) Rules, 1957 are mandatory… … …"

23. The Court gave the following rationale justifying strict compliance of the aforesaid provision:

> "15. The very purpose of prescribing the filing of C-Forms is that there should not be suppression of any inter-state sales by a selling dealer and evasion of tax to the State from where the actual sales are affected. Secondly, the purchasing dealer also cannot suppress such purchases once he issues C-Form to the selling dealer. Since the dealer should issue C-Form has to maintain a detailed account of such C-Forms obtained from the department prescribed under the States Taxation law. The C-Form is a declaration to be issued only by the sales tax authorities of concerned States. By issuing declaration in C-Form the purchasing dealer would be benefited as he is entitled to purchase goods by paying only concessional rate of tax of 4% as prescribed by the concerned State of purchasing dealer otherwise the purchasing dealer has to pay tax at a higher rate besides additional taxes on such sales effected within the State where selling dealer is situated."

24. The Supreme Court also discussed various precedents and entire discussion thereon would be relevant for us. Therefore, we reproduce the same:

> "18. In **Kedarnath Jute Manufacturing Co. v. Commercial Tax Officer, Calcutta and Ors.** [1965]3SCR626 , the question that arose in this case was whether under Section 5(2)(a)(ii) of the Bengal Finance (Sales Tax) Act, 1941, the furnishing of declaration forms issued by the purchasing dealers was a condition for claiming the exemption thereunder. This Court held as under:
>
> > "Section 5(2)(a)(ii) of the Act in effect exempts a specified turn-over of a dealer from sales tax. The provision prescribing the exemption shall, therefore, be strictly construed. The substantive clause gives the exemption and the proviso qualifies the substantive clause. In effect the proviso says that part of the turnover of the selling dealer covered by the terms of sub- clause (ii) will be exempted provided a declaration in the form prescribed is

furnished. To put it in other words, a dealer cannot get the exemption unless he furnishes the declaration in the prescribed form. It is well settled that 'the effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it. There is an understandable reason for the stringency of the provisions. The object of s. 5(2)(a)(ii) of the Act and the rules made thereunder is self-evident. While they are obviously intended to give exemption to a dealer in respect of sales to registered dealers of specified classes of goods, it seeks also to prevent fraud and collusion in an attempt to evade tax. In the nature of things, in view of innumerable transactions that may be entered into between dealers, it will wellnigh be impossible for the taxing authorities to ascertain in each case whether a dealer has sold the specified goods to another for the purposes mentioned in the section. Therefore, presumably to achieve the twofold object, namely, prevention of fraud and facilitating administrative efficiency, the exemption given is made subject to a condition that the person claiming the exemption shall furnish a declaration form in the manner prescribed under the section. The liberal construction suggested will facilitate the commission of fraud and introduce administrative inconveniences, both of which the provisions of the said clause seek to avoid."

16. In **State of Madras v. R. Nandlal and Co.,** : [1967]3SCR645 , this Court while construing the rule making power of Central Government has observed as under:-

"The Central Government has, in exercise of the power under S. 13(1)(d) prescribed the form of declaration and the particulars to be contained in the declaration. A direction that there shall be a separate declaration in respect of each individual transaction may appropriately be made in exercise of the power conferred under S. 13(1)(d). The State Government is undoubtedly

empowered to make rules under sub-ss.(3) and (4) of S. 13; but the rules made by the State Government must not be inconsistent with the provisions of the Act and the rules made under sub-s.(1) of S. 13 to carry out the purposes of the Act."

17. In a similar matter - Commissioner of Sales Tax, Delhi v. Delhi Automobiles (P.) Ltd., STC Vol. 48 1981, the Delhi High Court held that the production of a declaration form is a condition precedent for the availability of the concession. The Bench also has observed that these detailed provisions are intended as a measure of safeguard against possible miss-utilization of the forms and also to ensure that relief is not obtained by more than one selling dealer in respect of the same declaration form by using the various parts of it differently.

18. This Court has further held that the essence of these rules and regulations is that before a selling dealer is able to claim the benefit of concessional tax he should be able to produce the original and duplicate issued by him by the purchasing dealer in the first instance or the duplicate which will also contain these two portions of the forms issued along with a declaration subscribed to by the purchasing dealer subsequently on the strength of his earlier records and his personal knowledge and for which he will have to count in due course to the Sales Tax Authorities from whom he obtained these declarations. The bench was of the opinion that the production of the Photostat copy of the counter foil cannot be said to be strict or even substantial compliance of Rule 12(3) and that by merely producing the photostat copy of the counter foil, it cannot be said that the Act and the Rules have been complied with.

19. The case of **Manganese Ore (India) Ltd. v. Commissioner of Sales Tax, Madhya Pradesh** STC Vol.83 1991 was relied on by learned counsel for the appellant. In the above case, in order to obtain the benefit of Section 8(1) of the Central Sales Tax Act, it was

argued before the High Court that Form-C consists of three parts - original, duplicate and counter foil and all the three parts are identical in terms of them and form part of form-C and that Section 8(5) or Rule 12(1) does not say which part of the form is required to be filed before the Assessing Authority. In that case, the dealer filed the duplicate part of form-C instead of the original, the High Court held that there was sufficient compliance with the provisions of Section 8(4) of the Central Sales Tax Act and those of Rule 12(1) of the Central Sales Tax (R&T) rules so as to entitle the dealer to get the benefit of concessional rate of tax under Section 8(1) of the Central Sales Tax Act. The High Court as a result of their discussion held that the filing of original parts of declaration in C-Form is not mandatory but directory under the Central Sales Tax Act, 1956 read with rules thereunder and in the facts and circumstances of the case, the assessee was entitled to the concessional rate of tax as if it had filed the original parts of the declaration in C-Form as it had filed the original parts in Maharashtra. The Assessing Authority which was also sought to be summoned by an application for their production and further the duplicate parts thereof were filed before the Assessing Authority in Madhya Pradesh.

20. The above judgment does not help the appellant in the present case. The facts in the above case and the case on hand are different. This apart, there is no similar rule in this case to the one found in the case on hand, namely, Rule 6(b)(ii) of the Central Sales Tax (Karnataka) Rules, 1957 that makes of the difference for it is the rule 6(b)(ii) imposes the condition in the instant case.

21. Against the decision in **Commissioner of Sales Tax, Delhi v. Delhi Automobiles (P.) Ltd.,** (supra) of the High Court of Delhi, the Delhi Automobiles (P) Ltd. preferred an Appeal in this Court - **Delhi Automobiles (P) Ltd. v. Commissioner of Sales Tax, Delhi:** (1997)10SCC486 , which was dismissed by this Court. The learned judges of this Court has observed in para 7

as under:

In our view, in the first place, the assessee had not done all that it could; it could, and should, have preferred an appeal against the order of the learned Single Judge and persisted in his application for obtaining from the Official Liquidator duplicates of the 'C' Form declarations, as required by Rule 12(3). Since it did not, in the face of the clear language of the rule, its case can hardly be said to be a hard case. The judgment cited by the learned counsel has no application because that was a case where the language of the statute was found to be ambiguous The language of the provision here is clear and was rightly applied by the High Court."

25. It is, thus, clear that in view of the provisions contained in the Central Sales Tax Act and Rules framed thereunder as well as Karnataka Sales Tax Act, the Court opined that those provisions were mandatory in nature which required furnishing of 'original' C-Form and it was necessary to construe them strictly, in order to avoid misuse.

26. Keeping this rationale in mind, let us scan through the provisions of law with which we are concerned. As per Section 5 of Local Act, once the point of sale at which the classes of goods taxed, notified by the first sale, all subsequent sales of such goods shall be exempt from payment of tax. For claiming this deduction, procedure is laid down in Section 4 of the Local Act as well as Rule 9 of Delhi Sales Tax Rule and Notification dated 30.12.1988. We, thus, reproduce these provisions, i.e., Section 4, Section 5 of the Local Act, Rule 9 of Delhi Sales Tax Rule and Notification dated 30.12.1988:

"4. WHEN IS A SALE OR PURCHASE OF GOODS SAID TO TAKE PLACE OUTSIDE A STATE. - (1) Subject to the provisions contained in section 3, when a sale or purchase of goods is determined in accordance with sub-section (2) to take place inside a State, such sale or purchase shall be deemed to have taken place outside all other States.

(2) A sale or purchase of goods shall be deemed to take place inside a State, if the goods are within the State, - (a) in the case of specific or ascertained goods, at the time the contract of sale

is made; and

(b) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale by the seller or by the buyer, whether assent of the other party is prior or subsequent to such appropriation.

Explanation : Where there is a single contract of sale or purchase of goods situated at more places than one, the provisions of this sub-section shall apply as if there were separate contracts in respect of the goods at each of such places.

"5. WHEN IS A SALE OR PURCHASE OF GOODS SAID TO TAKE PLACE IN THE COURSE OF IMPORT OR EXPORT. - (1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India,

(2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India.

(3) Notwithstanding anything contained in sub-section (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export."

Rule 9 of Delhi Sales Tax Rules, 1975

"9. Conditions subject to which a dealer may claim deduction from his turnover on account of sales of goods at a point other than the last point in the series of sales

1. A dealer who wishes to deduct from his turnover the amount

in respect t of any sale on the ground that he is entitled to make such deduction under the provisions of sub-clause (i) of clause (a) of sub-section (2) of section 5 shall, unless otherwise exempted under the provisions of the second proviso to section 5, produce a declaration in From ST-3 duly filled in and signed by the dealer selling the goods:

Provided that a single declaration in From ST-3 may cover any number of transactions of sales by a dealer, effected during a quarter.

2. The declaration in From ST-3 shall be furnished by the dealer claiming the deduction to the appropriate assessing authority up to the time of assessment by it.

3. The provisions of sub-rule (3) of rule 7 shall mutatis mutandis apply to furnishing of declaration in Form ST-3."

Sub-rule (3) of Rule 7, which is made applicable here also deals with the situation where the dealer is not in a position to furnish all or any of the declarations on account of loss, etc. thereof. This would, therefore, be relevant for us and we take note of this provision as well:

"3. Notwithstanding anything contained in sub-rule (1) if the Commissioner on an application made by a dealer and after making such enquiries as he may consider necessary, is satisfied that the dealer is not in a position to furnish all or any of the declarations referred to in sub-rule (1) above on account of loss of such declaration or declarations due to the fire or flood or riots beyond the control of the dealer, and that the application of sub-rule (1) will cause undue hardship to the dealer, he may by an order in writing exempt such dealer from furnishing such declaration or declarations, subject to the conditions as are hereinbelow mentioned and to such further conditions as may be specified by the Commissioner in the order.

CONDITIONS

(1) That the application is made within 30 days of the event, i.e., fire or flood or riots, as the case may be, stating the fact and circumstances in which the loss took place and also shall state

the evidence on which he relies in support of such facts. The application shall be duly signed and verified by the dealer in the manner as is provided in respect of returns.

(2) That the loss had taken place at the place of business of the dealer.

(3) The provisions of sub-rule (3) of rule 7, shall mutatis mutandis apply to the furnishing of exemption certificates from the diplomatic missions, their personnel and specialized agencies as specified under rule 11."

Notification dated 30th December, 1988

" NOTIFICATION

Dated the 30th December, 1988

No.F..4(57)/86-Fin.(G): - Whereas the Administrator is of the opinion that it is not necessary to do so:

Now, therefore, in exercise of the powers conferred by second proviso to section 5 of the Delhi Sales Tax Act, 1975 (43 of 1975), the Administrator is pleased to **exempt all dealers selling goods or the class of goods notified to be taxable at first point goods in this** Administration's Notification No.F.4(1)/78-Fin.(G)(i) dated the 31st January, 1978 and further notified from time to time from furnishing under the first proviso to the said section 5 declaration in form ST-3 in respect of a sale of first point goods purchased **on or after the first day of February, 1978** subject to the condition that the dealer claiming exemption shall produce bill(s)/cash memo(s) in support of purchase of such goods in Delhi.

This notification shall be enforced w.e.f. 1st February, 1978.

By order and the name of
Administrator of the Union
Territory of Delhi

Sd/-

(T.C. Nakh)

Deputy Secretary (Finance)

Dated: 3.1.89

No.F.2(18)/77-PPR/PF/9426-9777"

27. Having regard to the ratio of the judgment of the Supreme Court in **Indian Agencies (Regd.), Bangalore** (supra), we need to give strict interpretation to the aforesaid provisions. It would mean that there has to be strict compliance by the dealer, in order to avail the benefit under these provisions. Rule 9 of Delhi Sales Tax Rules requires the dealer to produce a declaration in Form ST-3 duly filled in and signed by the dealer selling the goods. This would clearly signify that Form ST-3 has to be produced in original. No doubt, when these original Forms ST-3 are lost or destroyed because of the circumstances beyond the control of the assessee, he should not be punished and denied the benefit. The rule making authority has taken care of such a situation, so that no unnecessary hardship is caused. Sub-Rule (3) is specifically added to take care of these circumstances. Sub-rule (3) is an exception and if the circumstances contained therein exist, the Commissioner can exempt a dealer from furnishing original ST 3 From. However, for doing so the conditions laid down therein are to be satisfied, which are specifically incorporated in the provision. To avail the benefit, the dealer has to necessarily seek exemption in the manner provided therein. It has to be in the following manner:

(1) The application is to be made by the dealer within 30 days of the occurrence of any event specified in the sub-rule.

(2) In this application, the dealer is to state the facts and circumstances in which the loss took place.

(3) The dealer has also to state in the application the evidence on which he would rely in the absence of original documents.

(4) On making this application, the Commissioner shall make appropriate inquiry to satisfy himself that the dealer is not in a position to furnish all or any of the declarations referred to in sub-rule(1).

(5) He shall also be convinced that cause of non-supply of those documents shall cause undue hardship to the dealer.

It would be one of the exercises, exercise in the process, that the other evidence, which is relied upon by the dealer in the absence of original evidence, is sufficient to show that the tax has been paid at the first point and the dealer is entitled to adjustment thereof.

28. In the present case, no application was made by the dealer at all, what to talk of moving an application within 30 days. The appellant herein did not request the Commissioner to make an inquiry and satisfy himself to the effect that the appellant was not in a position to furnish these ST 3 Forms. This itself is a moot question whether the appellant could avail this benefit on the ground that there was a theft, as such a contingency is not provided to enable a dealer to seek exemption under this provision. Be that as it may, when the appellant did not even move the Commissioner for exemption from filing the original ST-3 form, the conditions specified in Rule 9 of Delhi Sales Tax Rules were not satisfied by the dealer. In the absence thereof, the appellant could not claim deduction without producing the original ST-3 Forms. The appellant merely wanted to rely upon the photocopies of such forms. That would not amount to fulfilling the conditions to enable the appellant to claim deduction from his turn over on account of sale of goods at first point. The purpose of furnishing ST-3 Form is to prove that sales tax has already been collected. In the absence of such forms, the appellant has not been able to demonstrate this.

29. The authorities cited by the learned counsel for the appellant to the effect that when the first seller of the goods is identified who alone is liable to tax, then subsequent tax is exempted from taxation, is not applicable to the present situation. It is not a case of fixing the responsibility. Here, the appellant wants the benefit of tax, which allegedly is already paid. However, the appellant has to file satisfactory proof thereof, in the manner provided under the Act and Rules.

30. The learned counsel for the appellant had also cited certain judgments to show that when the original copies of the cash memos/ books of accounts had been lost, non-production thereof would not attract denial of the benefit, moreso when the payment of taxes at first point or purchases from registered dealer had not been disputed. Those judgments are mentioned at Para 14 above. However, these judgments are based on the interpretation of specific Rules, which govern the issue

in those cases. It is stated at the cost of repetition that in the present case, if the cash memos/books of accounts had been lost, the appellant should have been taken recourse of sub-rule (3) of Rule 7 of Delhi Sales Tax Rules by moving appropriate application before the Commissioner. It is through this channel that he could seek the exemption from filing the original form ST-3. Having not done so in the manner prescribed, it is difficult to give benefit to the appellant.

31. Keeping in view the ratio of Supreme Court judgment in **Indian Agencies (Regd.), Bangalore** (supra), we have no option but to dismiss the appeal.

32. However, there shall be no order as to costs.

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WP

GOVT. OF NCT OF DELHI & ORS. ....PETITIONERS

VERSUS

NARESH KUMAR ....RESPONDENT

(PRADEEP NANDRAJOG AND MOOL CHAND GARG, JJ.)

WP(C) NO. : 22658-60/2005 DATE OF DECISION: 20.09.2010
AND WP (C) NO. : 22669/2005

CCS (Temporary Service) Rules, 1965—Rule 5—Indian Penal Code, 1860—Section 363/366/376—Respondents appointed on probation against temporary post of Warder Prison in Tihar—Pursuant to registration FIR, respondents sent to judicial custody—Competent Authority terminated services by non stigmatic orders of discharge simpliciter—Representations made to appointing authority to re-induct respondents in service after their acquittal in criminal trial rejected—

Representations styled as appeals also rejected—Impugned orders challenged before Administrative Tribunal to set aside order of termination—Plea taken, order terminating services being penal in nature, department was obliged to hold enquiry—Administrative Tribunal allowed application—Order of Tribunal challenged in High Court—Plea taken, applications before Tribunal were time barred—Respondents being accused of serious offences and arrest was motive and not foundation of order terminating their services—Held, Non statutory representation can never extend limitation—Merely by labelling representation as appeal and said work being reflected in order communicating rejection of representation would not make representation appeal—It is substance which matters not label—Representations questioning order terminating services were highly belated and barred by limitation before Tribunal—Employer has legal right to dispense with services of employee without anything more during or at end of prescribed period—Where no findings are arrived at any inquiry or no inquiry is held but employees chooses to discontinue services of employee against whom complaints are received it would be a case of complaints motivating action and would not be bad—Order of Tribunal quashed.

We may only add by stating that nobody acts for no reasons and indeed if somebody were to act on account of no reasons, that itself would vitiate an action as not only being unintelligible but as being perverse. Obviously, something has to impel or propel an employer to terminate the services of his employee. It is only when the termination is by way of penalty would the principles of natural justice and opportunity to participate at an inquiry where guilt to be determined is the object of the inquiry would come into play. Obviously, where on the finding of guilt an order terminating the services of an employee is passed it can safely be said that the employee has been penalized for a wrong. But where

the misdemeanour is not treated as proved and no inquiry is held, and where an inquiry is held, the report is not made the foundation of the order, but what is opined by the employer is that the employee has lost the confidence of the employer, an order of termination cannot be said to be founded on the misdemeanour and the misdemeanour would remain as the motive for the action. This situation would not attract the principle that the termination is penal.

(Para 44)

Important Issue Involved: (A) Non statutory representation can never extend the limitation. Merely by labelling a representation as an appeal and the said work being reflected in the order communicating rejection of the representation would not make the representation an appeal. It is the substance which matters and not the label.

(B) An employer has a legal right to dispense with the services of the employee without anything more, during or at the end of the prescribed period, which is styled as the period of limitation.

(C) Where the termination of services of a probationer visits him with a stigma or is penal or mala fide, the probationer would have a right to justify that the cause which resulted in his being removed is other than relating to his personal capacity, suitability, utility or capacity to work.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONERS : Ms. Avnish Ahlawat, Advocate with Ms. Latika Chaudhary, Ms. Simran Singh and Mr. Nitesh Kumar Singh, Advocates.

FOR THE RESPONDENT : Mr. P.P. Khurana, Sr. Advocate with

Mr. Sunil Magon and Mr. H.K. Bajpai, Advocates.

CASES REFERRED TO:

1. *Pavanendra Narayan Verma* vs. *Sanjay Gandhi P.G.I. of Medical Sciences & Anr.,* AIR 2002 SC 23.
2. *Dipti Prakash Banerjee* vs. *Satvendera Nath Bose National Centre for Basic Sciences* AIR 1999 SC 983.
3. *Kamal Kishore Lakshman* vs. *Pan Amercian World Airways* 1987 (1) SCC 146.
4. *Gujarat Steel Tube* vs. *Gujarat Steel Tubes Majdoor Sangh* 1980 (2) SCC 593.
5. *S.Sukhwant Singh* vs. *State of Punjab,* AIR 1962 SC 1711.
6. *State of Orissa* vs. *Ram Narayan Dass* AIR 1961 SC 177.
7. *Purshottam Lal Dhingra* vs. *UOI,* AIR 1958 SC 36.

RESULT: Allowed.

PRADEEP NANDRAJOG, J.

1. Respondents of the two writ petitions being WP(C) No.22658-60/2005 and WP(C) No.22669-72/2005 i.e. Naresh Kumar and Satish Kumar respectively, were appointed on probation against the temporary post of Warder Prison in Tihar Jail, Delhi vide memorandum dated 23.1.1996 relevant part whereof reads as under:-

"MEMORANDUM

On the recommendation of Staff Selection Board, the undersigned is hereby please to offer to Sh.Satish Kumar a temporary/post of Warder on a pay of Rs. 9050/- per month in the scale of Rs. 950-20-1150-EB-25-1400 in Central Jail, Tihar, New Delhi. The appointee will also be entitled to draw dearness allowance and other allowance at the rates admissible under the Rule and subject to the conditions laid down in the Rules and Orders governing the grant of such allowances in force from time to time. Other Terms and conditions are as follows:-

1. Sh.Satish Kumar will be on a probation for a period of two

years from the date of appointment. Failure to complete the period of probation to the satisfaction of the Competent authority will render him liable to discharge from service without any notice.

2. The appointment will be terminated at any time by one month notice given by the either side viz, the appointee or the appointing authority without assigning any reasons. The appointing authority, however reserves the right of terminating the service of the appointee forth with or before expiry of the stipulated period of notice by making payment to him of a sum of equivalent to pay and allowances for the period of notice or unexpired portion thereof. "

2. A bare perusal of the relevant terms of the memorandum aforesaid reveals that Satish and Naresh were to be on probation for a period of 2 years and within the period the probation their services could be terminated without assigning any reasons. Satish Kumar joined duty as Warder Prison in Tihar Jail, Delhi on 10.7.1996 and Naresh Kumar joined duty as Warder Prison in Tihar Jail, Delhi on 23.7.1996.

3. Pursuant to an FIR registered for the offences punishable under Section 363/366/376 IPC Naresh Kumar and Satish Kumar were arrested on 13.10.96 and were sent to judicial custody along with a third co-accused Jaswant Kumar.

4. Information pertaining to Naresh Kumar and Satish Kumar being accused of having committed the offence of kidnapping and rape and being arrested and denied bail was received by the jail authorities and the competent authority took a decision that services of Naresh Kumar and Satish Kumar should be terminated. On 16.10.1996 services of both the respondents were terminated under rule 5 of the CCS (Temporary Service) Rules 1965.

5. Order terminating services of Naresh Kumar reads as under:-

In pursuance of the proviso to Sub-rule (1) of Rule 5 of the Central Civil Services (Temporary Service), Rules, 1965, I, R.S.Gupta, I.G.(Prisons) hereby terminate forthwith the services of Sh.Naresh Kumar S/o Sh.Ram Chander, Warder and direct that he shall be entitled to claim a sum equivalent to the amount

of his pay plus allowances for the period of notice at the same rates which he was drawing immediately before the termination of his service, or, as the case may be, for the period by which such notice falls short of one month.

6. Order terminating service of Satish Kumar reads as under:-

In pursuance of the proviso to Sub-rule (1) of Rule 5 of the Central Civil Services (Temporary Service), Rules, 1965, I, R.S.Gupta, I.G.(Prisons) hereby terminate forthwith the services of Sh.Satish Kumar S/o Sh.Danbir Singh, Warder and direct that he shall be entitled to claim a sum equivalent to the amount of his pay plus allowances for the period of notice at the same rates which he was drawing immediately before the termination of his service, or, as the case may be, for the period by which such notice falls short of one month.

7. A perusal of the two orders afore-noted shows that the orders are non-stigmatic and are orders of discharge simpliciter.

8. After 7 years of being accused of having committed the offences punishable under Section 363/366/376 IPC, Naresh Kumar, Satish Kumar and the third co-accused Jaswant Kumar were acquitted vide judgment and order dated 16.10.2003.

9. On 10.11.2003 they filed separate representations to the Authority appointing them and requested that in view of they being acquitted at the criminal trial the order terminating their services be revoked and they be re-inducted into service. The representations were rejected by the Appointing Authority and were communicated to them in identical words. We note the rejection communicated vide memorandum dated 4.12.2003 to Naresh Kumar. It reads as under:-

Reference his application dated 10.11.2003 regarding the revocation of termination of order dated 16.10.1996. Sh.Naresh Kumar, Ex-Warder is informed that as per rules, the case cannot be reopened after the expiry of 3 month, from the date of termination of service by the Head of Department.

10. Styling it as an Appeal, Naresh Kumar and Satish Kumar submitted representations to the Principal Secretary Home, probably for the reason the order of termination and the order rejecting their

representations for re-induction in service was passed by the Inspector General Prisons, and the two thought that the Executive Administrative Head of Prisons being the Principal Secretary Home, Government of NCT Delhi could be the Authority to which they could appeal.

11. Vide order dated 22.6.2004 the Secretary Home rejected the representation styled as an Appeal filed by Naresh Kumar. The order reads as under:-

This concerns an appeal filed by Shri Naresh Kumar, Ex-Warder at Tihar Jail against his termination by an order dated 16.10.1996 of the then I.G. (Prisons), Central Jail Tihar.

2. I had given a personal hearing to the appellant on 21.4.2004 in the course of which he stated that he had been wrongly terminated. He mentioned that his termination was a consequence of a criminal case against him and two others before the court of the Addl. Sessions Judge. The charges against Sh.Naresh Kumar and two others concern the abduction of a lady, with dishonest intentions, and that he had later on raped her. Charges u/s 366/376 IPC have been framed against Sh.Naresh Kumar. He stated that all three had been acquitted by an order dt.16.10.03 of the Addl. Sessions Judge, and in view of this, he may be reinstated in jail service.

3. On going through the order of the termination, it is observed that the then I.G. (Prisons) had terminated the services of Sh.Naresh Kumar on 16.10.1996 in exercise of powers vested under the proviso in Sub-rule (1) of Rule 5 of the Central Civil Services (Temporary Service) Rules, 1965. The Prisons Deptt. have stated in their comments regarding the appeal filed by Sh.Naresh Kumar, that this termination order is a termination simplicitor without attaching any stigma. The official was then still in temporary service and his services had been terminated as his work was not satisfactory during the period of probation. This has been done after allowing him one month's pay in lieu of notice of one month. It has further been pointed out by the Prison Deptt. that in the circumstances, termination is possible without assigning any reason.

4. On going through the wording of order of termination dt.16.10.1996 of the then IG (Prisons) it is clear that there is no mention whatsoever of Sh.Naresh Kumar's involvement in another criminal case. In fact, there is no mention whatsoever of any ground or reason which could be construed as causing a stigma on Sh.Naresh Kumar. This is, in fact, the correct procedure for termination under the Temporary Services Rules, where the ground should normally be confined to circumstances concerned with performance during the period of probation. In these circumstances there is no need for any departmental inquiry. Such procedure would have been essential if there had been any grounds which could cause a stigma on the character or conduct of the charged official, necessitating the conduct of a full-fledged departmental inquiry in which he would be afforded an opportunity to defend himself. This is not the case in the matter regarding termination of Sh.Naresh Kumar.

5. Given the above facts, I see no reason to intervene in the matter and confirm the order already passed and the appeal is dismissed. Sh.Naresh Kumar and the D.G.(Prisons) may be informed accordingly."

12. Vide order of even date the Secretary Home, Government of NCT Delhi rejected the representation, styled as an Appeal, filed by Satish Kumar. The order reads as under:-

This concerns an appeal filed by Sh.Satish Kumar, Ex-Warder, Central Jail Tihar requesting that he may be reinstated to his post at Tihar Jail. By way of a background it may be mentioned that by an order dated 16.10.1996 passed by the then Inspector General (Prisons), Shri R.S.Gupta, in pursuance of the proviso to Sub-rule (1) of Rule 5 of the Central Civil Services (Temporary Service) Rules, 1965, the services of Sh.Satish Kumar, present petitioner had been terminated. It may be mentioned here that Sh.Satish Kumar had been tried by the court of the Addl.Sessions Judge in Sessions Case No.26/1997 based on a FIR No.26/1996, having been charged u/s 363/366/376 IPC. The complaint against the petitioner and some others was to the effect that they had abducted the complainant, Ms.Savita and outraged her modesty in a conference hall on 12.10.1996 and raped her on the same

date at the house of one Jaswant Sharma at Vijay Enclave. After weighing the evidence, the Addl. Sessions Judge had disbelieved the story of Ms.Savita and had acquitted the present petitioner, Sh.Satish Kumar and two others. During the period of trial the three persons were in judicial custody, and they were ordered to be released. This order of the Addl.Sessions Judge was passed on 16.10.03. It is the contention of the petitioner in his appeal received in this office on 2.1.04 that following his acquittal, he may be restored to his position as a warder in Tihar Jail.

2. In this connection he has mentioned that he had earlier requested the Director General (Prisons) for revocation of the termination order dt.16.10.03 by his application dated 10.11.03, to which he had received a reply on 4.12.03 from the Officer Incharge (Vigilance) in the Directorate General of Prisons, rejecting his request for revocation of the termination order dated 16.10.2003 by his application dated 10.11.2003, to which he had received a reply on 4.12.2003 from the Officer Incharge (Vigilance) in the Directorate General of Prisons, rejecting his request for revocation of the termination order pointing out that the case cannot be re-opened after expiry of three months from the date of termination by the Head of Department. I had given the petitioner an opportunity for personal hearing on 9.6.2004 and he had availed of the same. During the hearing he had mentioned that his family circumstances were very difficult owing to his financial position and requested for revocation of the termination order. He had also contested the reasons given by the Director General (Prisons) for rejecting his request.

3. I have carefully gone through the impugned order dated 16.10.1996 passed by the then Inspector General (Prisons) under Central Civil Services (Temporary Service) Rules, 1965. This order is strictly in pursuance of Rule 5 of the Central Civil Services (Temporary Service) Rules, 1965 and it does not make any mention whatsoever of the criminal case which was then pending against the petitioner. In short, the inference one can draw is that his involvement in the criminal case was not the ground for his termination. In view of this it cannot be said that any stigma had been cast on the petitioner in the process of terminating his service under Central Civil Services (Temporary

Service) Rules. Also within the framework of the Central Civil Services (Temporary Service) Rules, 1965 there is a prescription under Rule 5 (2) for a Head of Deptt. or Competent Authority to reopen the case 'suo moto' and re-instate the government servant in service or such other order as may be considered proper. There is a specific stipulation that no case shall be reopened under the Sub rule after the expiry of three months except in special circumstances. No such special circumstances exist in this case.

4. I have also considered the comments of the Director General (Prisons) received in this office on 16.2.04 on the appeal filed by the petitioner. The Prisons Deptt. have pointed out that the termination order passed by the Inspector General (Prisons) is termination simplicitor without attaching any stigma. It has been stated that his termination from service took place because his work was not satisfactory during the probation period.

5. Taking the above circumstances into consideration, there is no substance in the petitioner's appeal and the same is accordingly dismissed. The petitioner and the Director General (Prisons) may be informed accordingly."

13. It may be noted by us that the IG Prisons rejected the representations filed by Naresh Kumar and Satish Kumar holding that the order terminating their services was dated 16.10.1996 and as per rules the case could not be reopened after the expiry of three months. Same is the reasoning adopted by the Principal Secretary Home who additionally held that the orders terminating their services were non-stigmatic and there was no necessity of conducting a full-fledged inquiry before terminating their services.

14. Aggrieved by the said order rejecting their representations styled as an Appeal, Satish Kumar and Naresh Kumar filed Original Application No.1914/2004 and Original Application No.1800/2004 respectively before the Central Administrative Tribunal praying that the order dated 16.10.1996 terminating their services and the order dated 22.6.2004 passed by the Appellate Authority be quashed, it was also prayed that they be re-inducted in service with all consequential benefits.

15. Briefly noted, it was pleaded by both that the order terminating

their services in the year 1996 was by way of penalty imposed upon them as they were an accused on the allegation of having committed offences punishable under Section 363/366/376 IPC and that being penal in nature the department was obliged to hold an inquiry. Both of them pleaded that having joined service on 10.7.1996 and 23.7.1996 nothing adverse pertaining to their working was intimated to them till their services were terminated on 16.10.1996. Additional plea taken by Satish Kumar was that the order terminating his services was stigmatic.

16. The response of the department was that the services of Satish Kumar and Naresh Kumar were rightly terminated as within two months of the two joining service they were arrested by the police for having committed an offence punishable under Section 363/366/376 IPC. It was stated that the two were still under probation and the letter of appointment permitted the department to terminate their services without assigning any reasons. It was stated that the order terminating their services were non-stigmatic. It was pleaded that the Tribunal could not pry into the reasons which weighed with the Authority to terminate their services. Unfortunately, pertaining to Naresh Kumar it was pleaded that his work was not satisfactory. In the case of Satish Kumar, it was pleaded that the order dated 16.10.1996 could not be challenged by way of Original Application filed in the year 2004.

17. The Tribunal has allowed the petitions filed by the respondents. The Original Application filed by Satish Kumar was allowed vide order dated 21.4.2005. After copiously noting various judgments pertaining to when could the Court lift the veil and look for reasons behind an innocuous order of discharge, but without digesting them, the Tribunal held that the foundation of the order discharging the services of Satish Kumar was his being accused of having committed an offence punishable under Section 363/366/376 IPC and thus his services were terminated by way of penalty and the same not being preceded by an inquiry rendered the order liable to be set aside. On the bar of limitation, the Tribunal held that since the appeal filed by Satish Kumar was entertained by the Appellate Authority and rejected vide order dated 22.6.2004, the Original Application filed before the Tribunal within one year thereof was within limitation.

18. Pertaining to the Original Application filed by Naresh Kumar, the Tribunal chartered a different route. In view of the justification given by the department in its pleading by way of reply to the Original Application

that Naresh Kumar's unsatisfactory service was the cause to terminate his service, after calling upon the department to produce the record and justify the said plea, and finding none, the Tribunal held that it is apparent that the order of termination was motivated on the basis of some serious misconduct for which no inquiry was held and hence the order terminating the services of Naresh Kumar was illegal.

19. The Government of NCT Delhi has challenged the order dated 21.4.2005 allowing OA No.1914/2004 filed by Satish Kumar by and under WP(C) 22669-72/2005. The order dated 25.8.2005 allowing OA No.1800/2004 filed by Naresh Kumar has been challenged by and under WP(C) No.22658-60/2005.

20. Three issues were debated at the Bar between learned counsel for the parties. The first was whether the original applications were within limitation and the rival viewpoints projected at the debate were that: as per the petitioners the memorandum styled as an appeal was a non-statutory representation since no statutory provision prescribes any appeal against an order terminating the services of a probationer and the rejection of a non-statutory representation could not extend the limitation. The response of the respondents was that the order dated 22.6.2004 passed by the Principal Secretary Home refers to his deciding the appeals filed by Naresh Kumar and Satish Kumar and thus the bar of limitation did not come in the way of the respondents. The second debate was whether Naresh Kumar and Satish Kumar being accused for having kidnapped and abducted a girl was the motive or the foundation for the action taken. Whereas the petitioners urged that the two being accused of serious offences and arrested was the motive and not the foundation of the order terminating their services, the respondents urged to the contrary by pleading that the order terminating their services was founded on the misdemeanour. The third issue of debate pertained to Naresh Kumar and the debate was whether Naresh Kumar's services were terminated on account of deficiency in work for which there was no proof and which was the justification pleaded before the Tribunal, to which the response of learned counsel for the petitioners was that an ignorant lawyer pleaded an ignorant defence and that the same had to be ignored and reality had to be seen.

21. On the bar of limitation, it is settled law that non-statutory representation can never extend the limitation. The order terminating the

services of the respondents is dated 16.10.1996. Learned counsel for the respondents could show to us no statutory provisions providing the remedy of appeal against said order. In fact, the memorandums filed by Naresh Kumar and Satish Kumar under the label of an appeal is against the order/memorandum dated 4.12.2003 rejecting their representations for revocation of the order dated 16.10.1996. No statutory provision has been shown to us which provides for the remedy of an appeal against an order rejecting a representation to recall or revoke an order of termination. That apart, order dated 4.12.2003 passed by the appointing authority rejecting the representations dated 10.11.2003 and 14.11.2003 filed by Naresh Kumar and Satish Kumar against the order dated 16.10.1996 terminating their services, clearly states that the representations were rejected as the case could not be reopened after the expiry of three months of the date when order terminating their services was passed. It is apparent that the representations made to the Appointing Authority were highly belated and were rejected as barred by limitation. Merely by labeling a representation as an Appeal and the said work being reflected in the order communicating rejection of the representation would not make the representation an appeal. It is settled law that it is the substance which matters and not the label.

22. Thus, we hold that not only was the representation dated 10.11.2003 and the representation dated 14.11.2003 filed by the respondents questioning the order terminating their services highly belated, the remedy before the Tribunal was barred by limitation.

23. We deal with the two further issues debated at the Bar.

24. The issue of termination of a probationer has cropped up time and again. It has received judicial attention over four decades. Tests have been evolved, found to be difficult to apply; they have been reformulated from time to time.

25. What is the final position of the law?

26. A person undergoes selection along with others and on being found more meritorious finds employment. This person cannot contend that since the employer has tested his suitability he is entitled to serve till he attains the age of superannuation.

27. Till date no test has been devised where a person's capacity,

integrity, suitability, utility and capacity to work in harmony with the others can be tested at one go. Therefore, law vests a right in the employer, to keep under watch the services of the person he has employed, but for a duration of time. This is to guard against errors of human judgment in selecting a suitable candidate. The employee remains on test for a specified duration i.e. the period of probation before he gets a right to be permanently absorbed. This period of probation affords to the employer the locus to watch the efficiency, ability, integrity, sincerity, suitability and the competent of the probationer employee. This is the period of reassurance for the employer to reassure that his initial judgment was right. Therefore, an employer has a legal right to dispense with the services of the employee without anything more, during or at the end of the prescribed period, which is styled as the period of probation.

28. In the light of the aforesaid concept of probation as understood under Service Jurisprudence, termination of the services of the probationer, during or at the end of the period of probation does not affect any right of his, as indeed has no right to continue to hold the post, save and except after confirmation.

29. The period of probation affords an opportunity to an employer to observe the work, conduct, efficiency, utility, integrity and suitability of the probationer to make up his mind whether to permanently absorb the probationer or dispense with his services.

30. In the decision reported as AIR 1962 SC 1711, **S.Sukhwant Singh Vs. State of Punjab,** the Supreme Court observed:-

> "12. .....But the very fact that a person is a probationer implies that he has to prove his worth, his suitability for the higher post in which he is officiating if his work is not found to be satisfactory, he will be liable to be reverted to his original post even without assigning any reason, it would, therefore, not be correct to say that a probationer has any any right to the higher post in which he is officiating or a right to be confirmed. A probationer being merely made eligible for being absorbed in a permanent post is in no better position."

31. However, where a probationer is stigmatized, evil consequences flow. He has to live with the stigma all his life. This stigma would affect his future prospects of finding suitable employment elsewhere. Therefore,

harmonizing the right of the employer and the right of the employee the service jurisprudence has recognized that where the termination of services of a probationer visits him with a stigma or is penal or mala fide, the probationer would have a right to justify that the cause which has resulted in his being removed is other than relating to his personal capacity, suitability, utility or capacity to work.

32. In the decision reported as AIR 1958 SC 36 **Purshottam Lal Dhingra vs. UOI,** the Supreme Court held that it is not the form of the termination order but the substance thereof which would determine whether it is penal and that, in an appropriate case, the Court can tear the veil behind a termination order which is innocuous on its face and is a discharge simplicitor.

33. What is a stigma?

34. In the decision reported as 1987 (1) SCC 146 **Kamal Kishore Lakshman Vs. Pan Amercian World Airways** it was observed: According to Webster's New World Dictionary, it (stigma) is something that detracts from the character or reputation of a person….. The Legal Thesuras by Burton gives the meaning of the word 'to be blemish, defect, disgrace, disrepute, imputation, mark of disgrace or shame'.

35. In the decision reported as AIR 1961 SC 177 **State of Orissa Vs. Ram Narayan Dass** it was held that the words 'unsatisfactory work and conduct' in the termination order will not amount to a stigma.

36. The reason is obvious. Notwithstanding subjecting a new recruit to the rigors of a selection process, the employer has a right to see whether the recruit is able to perform the duties assigned to him. Being on probation, the recruit is kept under a watch to ascertain his performance. Not only is the recruit under the scrutiny but even the initial judgment of the employer is under a scrutiny for the reason even the employer has to consider and decide whether his initial judgment was correct. Logic demands that where the new recruit is able to discharge the duties assigned to him he should be permanently absorbed. It would be most illogical to say to the recruit that I find nothing wrong with your work but still I do not permanently absorb you. That is why some decisions have taken the view that it would be unfair not to point out the shortcomings in the work of a probationer thereby depriving him an opportunity to improve himself and all of a sudden discharge him from

service stating that his work is not up to the mark.

37. In the instant case the order terminating the services of Naresh Kumar and Satish Kumar, contents whereof have been noted by us in paras 5 and 6 above do not refer to any fact which casts a stigma on the two and thus we need not debate on the language of the orders with respect to the controversy that ex facie the orders are stigmatic in nature.

38. With respect to the plea that they being an accused for having committed offences punishable under Section 363/366/376 IPC and this was the foundation for the action, we note that the said controversy has to be resolved by noting the fact that in the orders terminating their services no reference has been made to said fact and on the language of the orders it cannot be said that the orders are founded on the ground that they have committed the offence of which they were charged of.

39. We have only to look to the fact whether by lifting the veil we can determine that the order terminating their services is founded on the fact that they have committed the offences which they were charged of. This process of inquiry would of necessity require us to determine whether the circumstance of they being accused of having committed serious penal offences was the motive propelling the formation of the opinion that it was no longer desirable to retain the two in service.

40. We have enough case law, where pertaining to a misconduct detected during the probation of an employee, a show cause notice is issued to respond as to why on account of the stated misconduct the services be not terminated, but ignoring the show cause notice, a simple order of discharge from service is issued. When questioned in a Court on the plea that the veil be lifted to see as to what was the foundation of the order, it was held that motive and foundation are two different concepts. We may quote only from one decision reported as 1980 (2) SCC 593 **Gujarat Steel Tube Vs. Gujarat Steel Tubes Majdoor Sangh.** As to foundation, it was observed:-

> "…….a termination effected because the master is satisfied of the misconduct and of the desirability of terminating the service of the delinquent servant, it is a dismissal, even if he had the right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case, the grounds are recorded in different proceedings from the formal order, does not detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the inquiry and proceeds to terminate. Given an alleged misconduct and a live nexus between it and the termination of service, the conclusion is dismissal, even if full benefits as on simple termination, are given and non-injurious terminology is used."

41. As to motive, it was observed:-

> "On the contrary, even if there is suspicion of misconduct, the master may say that he does not wish to bother about it and may not go into his guilt but may feel like not keeping a man he is not happy with. He may not like to investigate nor take the risk of continuing a dubious servant. Then it is not dismissal but termination simpliciter, if no injurious record of reasons or pecuniary cut-back on his full terminal benefits is found. For, in fact, misconduct is not then the moving factor in the discharge."

42. Suffice would it be to state that if an inquiry is conducted into an alleged misconduct behind the back of the employee and a simple order of termination is passed, 'founded' on the report of the inquiry indicting the employee, the action would be tainted but where no findings are arrived at any inquiry or no inquiry is held but the employer chooses to discontinue the services of an employee against whom complaints are received it would be a case of the complaints motivating the action and hence order would not be bad as observed in the decision reported as AIR 1999 SC 983 **Dipti Prakash Banerjee Vs. Satvendera Nath Bose National Centre for Basic Sciences** (para 22).

43. To conclude on the issue, we note the decision of the Supreme Court reported as AIR 2002 SC 23 **Pavanendra Narayan Verma Vs. Sanjay Gandhi P.G.I. of Medical Sciences & Anr.,** where in para 28 thereof, how the issue has to be dealt with by Courts was stated. It was held: *Therefore, whenever a probationer challenges his termination the Courts' first task will be to apply the test of stigma or the form test. If the order survives this examination the substance of the termination will have to be found out.*

44. We may only add by stating that nobody acts for no reasons and indeed if somebody were to act on account of no reasons, that itself

would vitiate an action as not only being unintelligible but as being perverse. Obviously, something has to impel or propel an employer to terminate the services of his employee. It is only when the termination is by way of penalty would the principles of natural justice and opportunity to participate at an inquiry where guilt to be determined is the object of the inquiry would come into play. Obviously, where on the finding of guilt an order terminating the services of an employee is passed it can safely be said that the employee has been penalized for a wrong. But where the misdemeanour is not treated as proved and no inquiry is held, and where an inquiry is held, the report is not made the foundation of the order, but what is opined by the employer is that the employee has lost the confidence of the employer, an order of termination cannot be said to be founded on the misdemeanour and the misdemeanour would remain as the motive for the action. This situation would not attract the principle that the termination is penal.

45. We need to reemphasize the fact that Naresh Kumar and Satish Kumar joined service on 23.7.1996 and 10.7.1996 respectively and their services were terminated on 16.10.1996. Naresh Kumar worked for 2 months and 24 days and Satish Kumar worked for 3 months and 6 days. Within this short period they became an accused for having committed serious penal offences punishable under Section 363/366/376 IPC and were arrested and denied bail. They were taken on probation to the post of Warder Prison, which required them in discharge of their duties to keep an eye on prisoners and ensure that neither does a prisoner escape nor does a prisoner indulge in activities which are prohibited as per the jail manual. If a warder is accused of kidnapping/abducting a girl, certainly he would lose the confidence of the employer qua his suitability to work as a warder and the decision taken by the employer as to the lack of the suitability of the warder cannot be labeled as the ipse dixit of the employer.

46. As regards the issue that the petitioners sought to justify terminating services of Naresh Kumar on the plea that his working was found to be deficient, in respect of which plea no material could be shown to the Tribunal, suffice would it be to state that the plea appears to be the result of an over enthusiastic lawyer who did not understand the law on the subject on the issue of a misdemeanour being the motive or the foundation of an order of discharge simpliciter and though that it would be better to plead deficient and unsatisfactory service, being blissfully

ignorant of the fact that there was no material in support of the said plea. The fact of the matter remains, on which neither party was at variance that it was the involvement of Naresh Kumar and Satish Kumar in the alleged crime committed pertaining to a girl being kidnapped and raped. Though not very relevant but it would be of some importance to note vis-à-vis Satish that at the criminal trial he examined as DW-1, the Assistant Superintendent Jail Sh.Subhash Batra to prove that in the intervening night of 12th and 13th October 1996, from 12:00 midnight till 6:00 AM he was posted on duty and the witness stated that though posted on duty, Satish was found absent during the night. It be noted that the victim, as per the FIR in question, did not return home when night fell on 12th October 1996 and reached home the next day. As per the victim Naresh Kumar had kidnapped her and had raped her in the house of co-accused Jaswant Sharma in the night and thereafter the other two accused which included Satish Kumar had also raped her. The accused were acquitted on account of contradictions made by the prosecutrix at the trial. There was a serious dispute as to the age of the prosecutrix and the learned Trial Judge held her to be a major by reading the opinion of the medical expert pertaining to her age by adding years on the plus side for the reason Medical Jurisprudence tells us that the exact age of a person cannot be determined on medical examination and there is always an error of plus or minus one year on either side of the age opined by the medical expert.

47. Be that as it may we have noted the aforesaid facts to bring home the point that Satish Kumar was absent from duty on the night when the victim was away from her house and if not more, it establishes the propensity of Satish Kumar to abandon duties.

48. Before concluding we may observe that the respondents were acquitted at the criminal trial is irrelevant when the issue of their termination is being considered for the reason we have held that the order terminating the services of the respondents was not founded on proof of the misdemeanour of having committed the offences charged of. The same was a motive for the action. The involvement of the two in a criminal offence, keeping in view the nature of the offence, has been held by us as a justifiable ground for the employer to opine that the two had lost the confidence of the employer.

49. We thus hold that the Original Applications filed by the respondents

questioning the orders terminating their services were highly belated and were barred by limitation. We further hold that the orders terminating the services of the respondents were not founded on any misdemeanour and thus there was no requirement to hold an inquiry. The orders are innocuous and non-stigmatic and even lifting the veil we find no stigma. Thus, we allow the writ petitions and quash the impugned order dated 25.8.2005 and dismiss OA No.1800/2004 filed by Naresh Kumar as also the impugned order dated 21.4.2005 and dismiss OA No.1914/2004 filed by Satish Kumar.

50. However, we refrain from imposing any costs keeping in view the financial status of the respondents.

ILR (2011) I DELHI 151
WP (C)

VINOD KUMAR KANOJIA ....PETITIONER

VERSUS

UOI AND ORS. ....RESPONDENTS

(DIPAK MISRA CJ. AND MANMOHAN, J.)

WP (C) NO. : 6302/2010 DATE OF DECISION: 22.09.2010

Constitution of India—Article 226—Public Interest Litigation—Petition filed on behalf of Hindustan Kanojia Organisation—Said organization a community of "Dhobis", a scheduled caste—Community's feelings affected by use of "Dhobi Ghat" as name of film—Alleging that the said name is violative of Section 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 ("1989 Act") Held—Failed to see how naming of movie/film can be offensive to caste in question—Cinema is public medium to communicate to the society—Governed by

Cinematograph Act and Rules framed thereunder—Said Act prohibits use and presentation of visual or words contemptuous of racial or religious groups—Use of "Dhobi Ghat" cannot be construed to violate provisions of 1989 Act—Public interest litigation—Reliance on ratio of Ashok Kumar Pandey case—Present litigation initiated marely to satisfy one's own egoism or megalomania—A public cause is required to be espoused in public interest litigation—Present litigation is abuse of the process of the Court—Defeats basic concept of public interest litigation for public good—Petition dismissed with costs of Rs. 25,000/-.

Important Issue Involved: Public interest litigation must necessarily espouse a public good. Present litigation defeats the basic concept of public interest litigation for public good. This is not permissible and not to be countenanced.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Ajay Kumar Bhatia, Advocate.

FOR THE RESPONDENTS : Mr. A.S. Chandhiok, ASG with Mr. Jatan Singh, Advocate for R-1.

CASES REFERRED TO:

1. *Swaran Singh and others* vs. *State and another*, (2008) 8 SCC 435.
2. *Ashok Kumar Pandey* vs. *State of West Bengal*, (2004) 3 SCC 349.
3. *Kazi Lhendup Dorji* vs. *Central Bureau of Investigation*, 1994 Supp. (2) SCC 116.
4. *K.R. Srinivas* vs. *R.M. Premchand*, (1994) 6 SCC 620.
5. *Ramjas Foundation* vs. *Union of India*, AIR1993 SC 852.

RESULT: Petition dismissed with costs.

DIPAK MISRA, CJ.

1. The petitioner, Vinod Kumar Kanojia, has preferred this public interest litigation on behalf of the Hindustan Kanojia Organization (a community of 'Dhobis', scheduled caste in India) after coming to know from a news item published in 'Amar Ujala' Dehradun Hindi newspaper on 20th July, 2010 that a film in the name of 'Dhobi Ghat' is going to be released in December, 2010 and the name of the film has affected the sensitivity and created a dent in the feeling of the community.

2. Mr. Ajay Kumar Bhatia, learned counsel for the petitioner, has referred to the long history of the depressed and also reproduced the storyline in the writ petition to highlight the contention that the said storyline has nothing to do with the 'dhobi ghat' and further the use of the word 'dhobi' is an insult to the Scheduled Caste and has affected the feelings of the persons belonging to the said particular caste. It is urged by the learned counsel for the petitioner that the name of the movie as 'Dhobi Ghat' violates Section 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short 'the 1989 Act.). The learned counsel has also commended us to the decision in **Swaran Singh and others v. State and another,** (2008) 8 SCC 435. He has placed heavy reliance on paragraphs 14 and 27 and for the sake completeness, we reproduce the said paragraphs:-

> "14. Before the coming of the British into India, the chamar were a stable socio-economic group who were engated in manufacturing leather goods by handicraft. As is well known, feudal society was characterized by the feudal occupation division of labour in society. In other words, every vocation or occupation in India became a caste e.g. dhobi (washerman), badhai (carpenter), lohar (blacksmith), Kumbhar (potter), etc. The same was the position in other countries also during feudal times. Thus, even now many Britishers have the surnames Baker, Butcher, Taylor, Smith, Carpenter, Gardener, Mason, Turner, etc. which shows that their ancestors belonged to their professions.
>
> 27. Learned counsel then contended that the alleged act was not committed in a public place and hence does not come within the purview of Section 3(1)(x) of the Act. In this connection it may

> be noted that the aforesaid provision does not use the expression "public place", but instead the expression used is "in any place within public view". In our opinion there is a clear distinction between the two expressions."

On a reading of the provision contained in the 1989 Act and the decision referred to in **Swaran Singh and others** (supra), we really fail to fathom how the provisions of the Act and the said decision are applicable to the case at hand. In **Swaran Singh and others** (supra), the Apex Court was dealing with the offences committed under Section 3(1)(x) of the 1989 Act against various castes and further what is the difference between 'public place' and 'in any place within public view'. It has nothing to do with the name of a movie which can be christened as 'Dhobi Ghat'. We have been apprised by Mr. Chandhiok, learned Additional Solicitor General, that "dhobi ghat" is a description of a place where clothes are washed. Thus, it has a place oriented description. We really fail to understand how naming of a movie/film of this nature can be offensive to the caste in question.

3. At this juncture, we may note with profit that cinema as a medium of expression and as a mode of entertainment has reached an enviable status in the modern world. The Indian cinema has a different conception from its inception inasmuch as myths, historical events, poignant novels, biographical sketches along with melodious songs have dominated the silver screen. The term 'cinema' is an abbreviation of the term 'cinematograph' or 'kinematograph'. In the first half of the 20th century, it became popular and gained the status of qualitative entertainment. Initially, it was regarded as a trick photography and thereafter, it earned the status of an art. With the passage of time, certain pictures were contrived and there was no sound. In the third decade of the last century, 'talkies' arrived and in the year 1926, introduction of sound transformation and technical form of film production took place and slowly colour photography was introduced and factors in size and quality of the image changed.

4. The cinema as a public medium has something to communicate to the society. The grant of certification of cinema is governed by the Cinematograph Act and the Rules framed thereunder. There is a Censor Board under the Act which screens the movies. The said Act prohibits use and presentation of visual or words contemptuous of racial, religious

or other groups. In the case at hand, the name of the movie is 'Dhobi Ghat'. It is difficult to understand how an association which is represented by the petitioner can conceive the idea that if a movie is named 'Dhobi Ghat', it is offensive or plays foul of the provisions contained in the 1989 Act. Therefore, we are of the considered opinion that there is actually no public interest.

5. At this stage, we are inclined to reproduce few passages from **Ashok Kumar Pandey v. State of West Bengal,** (2004) 3 SCC 349 which read as under:-

> "4. When there is material to show that a petition styled as a public interest litigation is nothing but a camouflage to foster personal disputes, the said petition is to be thrown out. Before we grapple with the issue involved in the present case, we feel it necessary to consider the issue regarding public interest aspect. Public interest litigation which has now come to occupy an important field in the administration of law should not be "publicity interest litigation" or "private interest litigation" or "politics interest litigation" or the latest trend "paise income litigation". If not properly regulated and abuseaverted it also becomes a tool in unscrupulous hands to release vendetta and wreak vengeance, as well. There must be real and genuine public interest involved in the litigation and not merely an adventure of a knight errant or poke one's nose into for a probe. It cannot also be invoked by a person or a body of persons to further his or their personal causes or satisfy his or their personal grudge and enmity. Courts of justice should not be allowed to be polluted by unscrupulous litigants by resorting to the extraordinary jurisdiction. A person acting bona fide and having sufficient interest in the proceeding of public interest litigation will alone have a locus standi and can approach the court to wipe out violation of fundamental rights and genuine infraction of statutory provisions, but not for personal gain or private profit or political motive or any oblique consideration. These aspects were highlighted by this Court in Janta Dal case (1992) 4 SCC 305 and **Kazi Lhendup Dorji v. Central Bureau of Investigation,** 1994 Supp. (2) SCC 116. A writ petitioner who comes to the court for relief in public interest must come not only with clean hands like any other writ petitioner

> but also with a clean heart, clean mind and clean objective. See **Ramjas Foundation v. Union of India,** AIR 1993 SC 852 and **K.R. Srinivas v. R.M. Premchand,** (1994) 6 SCC 620.
>
> 11. It is depressing to note that on account of such trumpery proceedings initiated before the Courts, innumerable days are wasted, which time otherwise could have been spent for the disposal of cases of genuine litigants. Though we spare no efforts in fostering and developing the laudable concept of PIL and extending our long arm of sympathy to the poor, the ignorant, the oppressed and the needy whose fundamental rights are infringed and violated and whose grievances go unnoticed, unrepresented and unheard; yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to civil matters involving properties worth hundreds of millions of rupees and criminal cases in which persons sentenced to death and facing the gallows under untold agony, persons sentenced to life imprisonment and kept in incarceration for long years, persons suffering from undue delay in service matters - government or private, persons awaiting the disposal of cases wherein huge amounts of public revenue or unauthorized collection of tax amounts are locked up, detenus expecting their release from the detention orders etc. etc. are all standing in a long serpentine queue for years with the fond hope of getting into the courts and having their grievances redressed, the busybodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no public interest except for personal gain or private profit either of themselves or as a proxy of others or for any other extraneous motivation or for the glare of publicity break the queue muffling their faces by wearing the mask of public interest litigation and get into the courts by filing vexatious and frivolous petitions and thus criminally waste the valuable time of the courts and as a result of which the queue standing outside the doors of the court never moves, which piquant situation creates frustration in the minds of genuine litigants and resultantly, they lose faith in the administration of our judicial system.
>
> 12. Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be

extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity-seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity-oriented or founded on personal vendetta. As indicated above, court must be careful to see that a body of persons or a member of the public, who approaches the court is acting bona fide and not for personal gain or private motive or political motivation or other oblique consideration. The court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busybodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs."

6. We have quoted in extenso from the aforesaid decision as we are disposed to think that the present litigation, styled as a public interest litigation, has been initiated just to satisfy one's own egoism or megalomania. It is to be borne in mind that a public cause is required to be espoused in a public interest litigation. It must have some kind of nexus with the public interest. We are not oblivious of the fact that if the Censor Board grants a certificate in violation of the Act, Rules, Regulations and the Guidelines, the same can be assailed in a court of law regard being had to the other provisions but definitely christening of a movie as 'Dhobi Ghat' would not come in the said realm or sphere. We have no hesitation in holding that this is an abuse of the process of the Court and defeats the basic concept of public interest litigation for public good. The present litigation has only exhibited ostentatious proclivity of a personality who intended to occupy the centre stage as a protagonist harbouring the notion that the Court is a laboratory and he can come to play at his own whim and fancy. This is not permissible and not to be countenanced.

7. In view of our preceding analysis, the present writ petition stands dismissed with costs of Rs.25,000/- which shall be deposited

within a period of four weeks in favour of The Blind Relief Association, Lal Bahadur Shastri Marg, Near Oberoi Hotel, New Delhi – 110 003. If the petitioner would fail to deposit, liberty is granted to Mr. Chandhiok, learned Additional solicitor General, to move an application before this Court so that the petitioner can be booked under appropriate law.

ILR (2011) I DELHI 158
CRL.M.C

DHARMENDRA KR. LILA ....PETITIONER

VERSUS

REGISTRAR OF COMPANIES ....RESPONDENT

(A.K. PATHAK, J.)

CRL.M.C. NO. : 6249/2006, 6263/2006 & 6278/2006 **DATE OF DECISION: 23.09.2010**

Code of Criminal Procedure, 1973—Section 482—Indian Companies Act, 1956—Quashing of criminal complaint filed by the Registrar of Companies u/s 62 r/w section 68 of Companies Act in court of ACMM—Allegation that petitioners were signatories to prospectus containing misstatement of facts—Company had collected Rs 210 lakhs from public issue but had failed to accomplish the promises made in the prospectus—Held, compensation in respect of violation of Section 62 can be claimed by filing appropriate civil suit and no criminal complaint under Section 62 would be maintainable—U/s 68 prior sanction of the competent authority is required before launching prosecution which was not done in the case—Petition allowed and proceedings pending before ACMM quashed.

Important Issue Involved: Compensation in respect of violation of Section 62 of the Indian Companies Act can be claimed by filing appropriate civil suit and no criminal complaint under Section 62 would be maintainable.

[Ad Ch]

APPEARANCES:

FOR THE APPELLANT : Mr. Sidharth Luthra, Senior Advocate with Mr. P.S. Singhal, Ms. Smriti Sinha & Mr. Arshdeep Singh, Advocate.

FOR THE RESPONDENT : Mr. Baldev Malik, Advocate.

CASES REFERRED TO:

1. *Manju Yadav* vs. *Registrar of Companies* 2007 (98) DRJ 312.
2. *Rajeev Shukla & Anr.* vs. *Registrar of Companies* 135 (2006) Delhi Law Times 599.

RESULT: Petition allowed.

A.K. PATHAK, J. (ORAL)

1. By these petitions under Section 482 of the Code of Criminal Procedure, 1973, petitioners seek quashing of criminal complaint No.805/2002 under Section 62 read with Section 68 of the Indian Companies Act, 1956 (for short hereinafter referred to as "the Act") filed by Registrar of Companies against them. This complaint is pending in the court of Additional Chief Metropolitan Magistrate (ACMM), Delhi. It was alleged in the complaint that the petitioners were signatories to the prospectus dated 28th April, 1994 containing misstatement of facts. The company had collected Rs. 210 lakhs from the public issue but had failed to accomplish the promises made in the prospectus.

2. Learned Senior counsel for the petitioners has contended that no criminal complaint can be filed under Section 62 of the Act as this provision deals with the "civil liability" for making misstatement in the prospectus. With regard to the complaint under Section 68 of the Act,

it has been submitted that for filing of a complaint under this section, prior sanction of competent authority was required. Neither such sanction was obtained by the Registrar of Companies prior to filing of the complaint nor had the same been placed on record. In nutshell, it has been canvassed that the complaint under Section 62 read with Section 68 of the Act was liable to be quashed. Reliance has also been placed on **Rajeev Shukla & Anr. vs. Registrar of Companies** 135 (2006) Delhi Law Times 599 and **Manju Yadav vs. Registrar of Companies** 2007 (98) DRJ 312.

3. Section 62 of the Act reads as under:-

"62. Civil liability for misstatements in prospectus.

(1) Subject to the provisions of this section, where a prospectus invites persons to subscribe for shares in or debentures of a company, the following persons shall be liable to pay compensation to every persons who subscribes for any shares or debentures on the faith for the prospectus for any loss or damage he may have sustained by reason of any untrue statement included therein, that is to say,……..

xx xx xx xx"

4. Bare perusal of the aforesaid provision clearly indicates that violation thereof entails civil liability inasmuch as, it provides payment of compensation in case of misstatement in the prospectus. In my view, the compensation in respect of violation of Section 62 of the Act can be claimed by filing appropriate civil suit and no criminal complaint under Section 62 of the Act would be maintainable in this regard. Similar view has been expressed in **Rajiv Shukla and Manju Yadav's** cases (supra).

5. As regards the complaint under Section 68 of the said Act is concerned, learned counsel for the respondent has not disputed that prior sanction of the competent authority is required before launching prosecution under the said provision. However, he contends that such sanction was granted for initiating prosecution by the Department of Company Affairs vide its letter dated 13th March, 2002. I have perused the copy of so called sanction letter and find that the same is general permission granted to the Regional Director by the Department of Law & Justice for initiating prosecution in respect of violations of Sections 62, 63 read with 628 of the said Act. This sanction nowhere includes launching of prosecution

under Section 68 of the Act. In **Rajiv Shukla's** case (supra) also this very sanction letter was involved and was adversely commented upon. No other sanction letter has been placed on record. In absence of any such sanction, the only presumption which can be drawn is that no sanction was obtained for launching prosecution under Section 68 of the Act against the petitioners. In absence of prior sanction, the complaint under Section 68 of the said Act would also be not maintainable.

6. For the foregoing reasons, petitions are allowed and complaint case bearing no. 805/2002 pending before the ACMM and all further proceedings arising therefrom qua the petitioners are hereby quashed.

7. All the above mentioned petitions are disposed of in the above terms.

ILR (2011) I DELHI 161
LPA

DR. RAJIVA KUMAR TIWARI ....APPELLANT

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(DIPAK MISRA, CJ. AND MANMOHAN, J.)

LPA NO. : 653/2010 & CM NO. : 16272/2010 **DATE OF DECISION: 27.09.2010**

Constitution of India—Article 226—Scope of interference—Appellant filed writ petition alleging manipulation in marks awarded in answer sheets—Learned Single Judge dismissed petition—Held that mere overwriting need not mean manipulation or fudging—Hence Present appeal—Held—Revaluation of answer sheet not permissible unless rules of conducting organization allow for the same—

Concerned Rules do not permit revaluation. Indian Evidence Act—Section 73: Held not applicable to writ proceedings—Nonetheless answer sheets scrutinized—Change of marks with regard to a particular question is normal and not indicative of malice or manipulation—Appellant failed to name even one officer of Respondent No. 3 who was inimical towards Appellant—Appeal dismissed.

Important Issue Involved: Revaluation of answer sheet not permissible unless rules of conducting organization allow for the same. Change of marks with regard to a particular question is normal and not indicative of malice or manipulation.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. H.P. Sharma, Advocate with Mr. Sanjay Katyal and Mr. Saurabh, Advocates.

FOR THE RESPONDENTS : Dr. Rakesh Gosain, Advocate for R-2 and 3 Mr. Rakesh Tiku and Mr. Aman Wlesha, Advocate for UOI.

CASES REFERRED TO:

1. *H.P. Public Service Commission* vs. *Mukesh Thakur & Anr.,* 2010 (6) SCALE 79).
2. *Pramod Kumar Srivastava* vs. *Chairman, Bihar Public Service Commission, Patna and Others* (2004) 6 SCC 714.
3. *Board of Secondary Education* vs. *Pravas Ranjan Panda and Another,* (2004) 13 SCC 383.
4. *Shivajirao Nilangekar Patil* vs. *Dr. Mahesh Madhav Gosavi & Ors.* (1987) 1 SCC 227.
5. *Maharashtra State Board of Secondary and Higher*

Secondary Education vs. *Paritosh Bhupeshkumar Sheth,* (1984) 4 SCC 27.

REULT: Appeal dismissed.

MANMOHAN, J.

1. The present Letters Patent Appeal has been filed challenging the judgment and order dated 02nd August, 2010 by virtue of which the Learned Single Judge has dismissed in limine the appellant's writ petition being W.P.(C) No.5135/2010.

2. Mr. H.P. Sharma, learned counsel for the appellant submitted that respondent No.3 had intentionally failed the appellant by manipulating his answer sheets by reducing his marks from 7 to 5 against Questions No.1 and 7 and further by changing the total marks on the opening page of the answer sheet. In this connection, Mr. H.P. Sharma, drew our attention to pages 78, 85 and 109 of the present appeal paper book. Mr. H.P. Sharma referred to Section 73 of the Indian Evidence Act to submit that this Court should compare the signatures and writing of the examiner and give a finding thereon. Mr. Sharma also placed reliance upon a judgment of the Supreme Court in **Shivajirao Nilangekar Patil Vs. Dr. Mahesh Madhav Gosavi & Ors.** (1987) 1 SCC 227 wherein it has been held as under:

> "36. The allegations made in the petition disclose a lamentable state of affairs in one of the premier universities of India. The petitioner might have moved in his private interest but enquiry into the conduct of the examiners of the Bombay University in one of the highest medical degrees was a matter of public interest. Such state of affairs having been brought to the notice of the court, it was the duty of the court to the public that the truth and the validity of the allegations made be inquired into. It was in furtherance of public interest that an enquiry into the state of affairs of public institution becomes necessary and private litigation assumes the character of public interest litigation and such an enquiry cannot be avoided if it is necessary an essential for the administration of justice."

3. It is pertinent to mention that similar arguments were advanced before the learned Single Judge who has dismissed the appellant's writ

petition by observing as under:-

> "4. The marks given against answer to question no.1 do appear to have been changed from 7 to 5 marks, both against the answer as well as in the tabulation on the opening sheet of answer book. However, there is no such indication whatsoever with respect to the marks given against answer to question no.7 neither against the answer nor in the tabulation aforesaid…….
>
> Moreover, even if there were to be a difference, as long as it clearly reads as 5 and does not appear to be changed, it cannot be said that the marks against question no.7 have been changed.
>
> 5. The mainstay of the petitioner is that in the tabulation on the opening sheet of answer book, the totaling of the marks against each question, appears to have been done, initially as 57; subsequently changed to 55 and ultimately to 53.
>
> 6. The totaling to 57 appears to be a case of error……..
>
> 7. The petitioner even if said to be scoring 55 marks would still have a total score of 148 marks only and would not clear the examination.
>
> 8. I also do not find the change from 7 to 5 marks (qua answer to question no.1) also to be such, as to call for any inquiry. Often, while checking the answer books, the examiner may have second thought and may change the marks. Merely because there is overwriting, would not show any manipulation or fudging.
>
> xxx xxx xxx
>
> 10. Even otherwise the said investigation cannot be done in writ jurisdiction and the question whether the answer deserves 7 to 5 marks out of 10 marks cannot be the subject matter of judicial review.
>
> 11. The counsel for the petitioner has been sought to urge that there is an inconsistency in the guidelines given to the examinees and to the examiners. The counsel for the petitioner however fairly admits that such contradiction even if any, would affect all the examinees……"

4. It is settled position of law that revaluation of an answer sheet is not permissible unless the rules of an organization which conducted the examination permits so. (Refer to **Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupeshkumar Sheth,** (1984) 4 SCC 27, **Pramod Kumar Srivastava v. Chairman, Bihar Public Service Commission, Patna and Others** (2004) 6 SCC 714, **Board of Secondary Education v. Pravas Ranjan Panda and Another,** (2004) 13 SCC 383 and **H.P. Public Service Commission v. Mukesh Thakur & Anr.,** 2010 (6) SCALE 79). The admitted position in the present case is that the rules of respondent No.3 do not permit revaluation. Consequently, the scope of interference by this Court is limited.

5. We are further of the opinion that Section 73 of the Indian Evidence Act has no applicability to the present proceedings. However, we have scrutinized the appellant's answer sheet to see if there was any manipulation by respondent No.3.

6. In fact, upon a perusal of pages 78, 85 and 109 of the paper book, we are in agreement with the findings of the learned Single Judge that it appears that the appellant's marks have been changed from 7 to 5 only with respect to Question No.1. Neither the marks with respect to Question No.7 have been changed against the said question nor on the tabulation sheet. Moreover, in our opinion, change of marks by an examiner with regard to a particular question is quite normal and on this score no malice or manipulation can be attributed to the respondent. As far as the totaling error on the front page or the tabulation sheet is concerned, we are of the view that the same is only an arithmetical mistake and it can confer no right in favour of the appellant. Consequently, the aforesaid judgment in the case of **Shivajirao Nilangekar Patil** (supra) has no application to the facts of the present case.

7. It is also pertinent to mention that though the appellant has alleged manipulation of his answer sheet, yet he has not named even a single officer of the respondent No.3 who was inimical to him. Consequently, the appeal and the pending application, being devoid of merit, are dismissed, but with no order as to costs.

ILR (2011) I DELHI 166

TEST CASE

MAHABIR PRASAD & ANOTHER ....PETITIONERS

VERSUS

STATE ....RESPONDENT

(S. RAVINDRA BHAT, J.)

TEST CASE NO. : 30/1989 & IA NOS. : 6806/2000, 815/2009 AND 1618/2010

DATE OF DECISION: 27.09.2010

(A) Limitation Act, 1963—Applicability to Probate Petitions—Testator bequeathed his property entirely to petitioner—Contention of other heirs—Will not genuine and fabricated-Testator was an old and infirm man-did not possess testamentary capacity—Delay of seven years in propounding the Will—Held—The Limitation Act mention applicability to applications, suits and appeals but it does not mention Petition in form of probate claims or any proceedings under the Indian Succession Act.

(B) Indian Succession Act, 1925—Intention of testator in propounding the Will—Which interferes or disturbs the natural line of succession—Mere fact some heirs excluded is not a ground to conclude that Will was executed in suspicious circumstances—When all facts point to a valid Will—Delay in overall circumstances—Not fatal.

The fact that Satyawati's jewellery was used to construct the property, acknowledged in a letter written by the testator in 1971, only establishes that aspect, as also another previous letter of 1965. However, there is a long gap between these two periods, and a decade after 1971. The will itself mentions

that the testator and Govind had arrived at a settlement, whereby the latter had been paid Rs. 20,000/- and a large part of a Civil Lines plot in Barielly. The evidence also suggests that Govind had some shops, and lived from the rental income derived. The testator, in one of his letters, suggests that Gopal, i.e Govind's son, should start working and take charge of his responsibilities. Yet, these facts or taken with the others do not mean that the testator wished to bequeath any share in the property to the objectors. It would be worth noticing at this stage that the third son of the testator did not object to the will and has apparently accepted the bequests. As regards the letter written to the petioner by Satyawati is concerned, it cannot establish the existence of any other will. In any case, no evidence has been placed, on the record to dispel the inference that the will propounded in this case was the last will and testament of the petitioner. The court is mindful of the fact that more often than not, testators wish to make dispositions or bequests which disturb the natural line of succession. Having regard to all these aspects, the fact that the will does not provision for Govind's heirs, is not sufficient to set the will aside, or hold that its execution was clouded by suspicious circumstances. **(Para 39)**

The last aspect to be considered is whether the delay in approaching the court, and seeking probate is fatal to the petition. **Kunvarjeet Singh Khandpur** is an authority for the proposition that the court can reject a claim or relief, primarily based on a will, if the petitioner does not approach it in time. It is to be noticed at this stage that the said decision was rendered a good 73 years after enactment of the Succession Act. The nature of proceedings, and the procedure to be adopted under the Act, was well known to Parliament, which made no mention of any period of limitation. The Limitation Act, significantly mentions about its applicability to applications, suits, and appeals; it does not mention Petitions, in the form of probate claims, or any proceedings under the Succession Act. Therefore, the observations in Khandpur have to be read in the context of the statute,

when the Parliament was aware of existing law, which had provided a special procedure for grant of probate. In the present case, when all other facts point to a valid and genuine will, with no foul play, or the testator having suffered from any incapacity or disability impairing his fair judgment, that the petitioner has approached the court after some delay in the overall circumstances cannot be fatal to the claim. **(Para 40)**

Important Issue Involved: The Limitation Act mentions applicability to applications, suits and appeals but it does not mention Petition in form of probate claims or any proceedings under the Indian Succession Act. When all facts point a genuine will, overall delay is not fatal to the claim.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONERS : Mr. Sidharth Yadav, Advocate.

FOR THE RESPONDENT : Sh. Amit S. Chadha, Sr. Advocate with Mr. Rajat Navet and Mr. Jitender Ratta, Advocate for Respondents 4 and 5. Mr. Ritesh Sharma Advocate for Objector No. 6.

CASES REFERRED TO:

1. *Bharpur Singh & Ors.* vs. *Shamsher Singh* AIR 2009 SC 1766.
2. *Shyamal Kanti Guha (Dead) Through L.R.s & Ors.* vs. *Meena Bose* 2008 (8) SCC 115.
3. *Kunvarjeet Singh Khandpur* vs. *Kirandeep Kaur & Ors.* 2008 (8) SCC 463.
4. *Hazara Bradri & Ors.* vs. *Lokesh Datta Multani* 2005 (13) SCC 278.

5. *Janki Narayan Bhoir* vs. *Narayan Namdeo Kadam* (2003) 2 SCC 91.
6. *Gurdial Kaur* vs. *Kartar Kaur* 1998 (4) SCC 384.
7. *Sadasivam* vs. *K. Doraiswamy* 1996 (8) SCC 624.
8. *Vrindavanibai Sambhaji Mane* vs. *Ramchandra Vithal Ganeshkar* (1995) 5 SCC 215.
9. *Rabindra Nath Mukherjee* vs. *Panchanan Banerjee* 1995 (4) SCC 459.
10. *P.P.K. Gopalan Nambiar vs. P.P.K. Balakrishnan Nambiar 1995 Supp (2) SCC 664).*
11. *Jaswant Kaur* vs. *Amrit Kaur & Ors.* 1977 (1) SCR 925.
12. *Jaswant Kaur* vs. *Amrit Kaur* 1977 (1) SCC 369.
13. *Seth Beni Chand* vs. *Kamla Kanwar* AIR 1977 SC 63.
14. *Navneet Lal* vs. *Gokul* (1976) 1 SCC 630.
15. *Surendra Pal* vs. *Dr. Saraswati Arora* 1974 (2) SCC 600.
16. *Ramachandra Shenoy* vs. *Hilda Brite* AIR 1964 SC 1323.
17. *Rani Purnima Debi* vs. *Khagendra Narayan Deb* : AIR 1962 SC 567.
18. *H. Venkatachala Iyengar* vs. *B.N. Thimmajamma & Ors.* AIR 1959 SC 443.

RESULT: Petitioner held entitled to probate and petition allowed.

S. RAVINDRA BHAT, J.

1. This proceeding concerns the claim for probate in respect of the Will of late Sh. Krishna Prasad, who died on 13.03.1982. The petitioner (hereafter called "Mahabir Prasad") is concededly the son of the testator; the Will of which Probate is sought is dated 28.01.1982. The testator had three children – Gobind Prasad, Mahabir Prasad and Kanti Prasad. Gobind Prasad had pre-deceased the testator and was survived by his children – i.e. Gopal Prasad, Gita Chatterjee, Jagriti Gaur and Yamini Mishra. Gobind Prasad was survived by his widow, Smt. Satyawati Prasad, who during the pendency of the present case, died on 24.04.2007.

2. It is contended that in terms of the recitals of the Will, the

testator bequeathed his property, i.e. A-16 Maharani Bagh to Sh. Mahabir Prasad entirely, besides all other movables and personal assets. The petitioner seeks probate only in respect of the said immovable property. It is contended that the cause for approaching the Court arose on 13.02.1982 when the testator died.

3. After citation was published and notices were issued to the testator's heirs, Sh. Gopal Prasad, the third objector, filed his reply, submitting that the Will is not genuine. Sh. Gopal Prasad also contends that the plot upon which the subject property was constructed was purchased out of HUF funds and amounts invested by late Sh. Gobind Prasad, the pre-deceased son of the testator. Sh. Gopal Prasad also contends that the Will was forged and is a fabricated document and that the property has to devolve in one-third proportion to each branch of the testator's family. In the additional pleas, Sh. Gopal Prasad argues that the property was purchased in 1965 from the Maharani Bagh Cooperative House Building Society of which the testator became a member in 1959; it is also submitted that the testator was karta of HUF and that he invested ` 21,000/-on 20.04.1959 in the Society – an amount which had accrued on him on sale of Zamindari Abolition Bonds in 1958 and partly from rent and so on. It is also submitted that Gopal's father, i.e. Sh. Gobind Prasad had sent ` 16,000/-in 1961 from Bareilly and was used to acquire the suit property. Sh. Gopal Prasad argues that the late testator was trying hard to raise amounts for constructing upon the suit property for which purpose Sh. Gobind Prasad, his father had given total amount of ` 19,500/-during the period 1966-1968. It is submitted, therefore, that the testator had no bequeathable interest which he could have parted through the Will.

4. Ms. Yamini Mishra filed objections sometimes in 1993, contending that the Will propounded in this case is not genuine or enforceable as it was executed only 14 days before the death of the testator who was allegedly suffering physically for some months before its execution. Ms. Yamini Mishra mentions about a previous registered Will dated 08.10.1969 which was revoked by the Will sought to be propounded in this case. She also alleges that the testator was not permitted to meet his relatives before his death and that he requested her (Yamini) not to meet him by letter dated 28.10.1981. It is alleged that the circumstances under which the Will was executed are shrouded in suspicion. Ms. Yamini Mishra also

contends that there is sufficient evidence suggesting that the property in question was bought and built with the funds of one of the objectors and that the common HUF amounts and even Streedhan and, therefore, he (the testator) was not its absolute owner. The objection refers to a letter dated 03.04.1971 in which the testator mentioned about his having sold her jewelleries and using them for construction of the house on the suit property. It is also contended that the Will was procured by fraud, coercion and undue influence.

5. Ms. Gita Chatterjee and Ms. Jagriti Gaur preferred common objections – in 1995 through an application alleging that the signatures of the testator were obtained under force and coercion and that the Will was not known to any objector. They also submitted that the testator, at the time of his death, was under Mahabir Prasad's control and influence, and was an old, infirm man of about 90 years not possessed of conscious mental faculties and thereby denuded of requisite testamentary capacity. They also submit that the testator had invested HUF funds in the purchase of the property derived of Zamindari Bonds and, therefore, he did not possess testamentary capacity. These objectors, further, argued that no cause of action arose and that the petition seeking probate is not maintainable as it is vitiated by delay.

6. On 28.04.2008, this Court framed the following issues for consideration:

(i) Whether the Will dated 28.01.1982 was executed by late Sh. Krishna Prasad while in sound, disposing mind of his own free. OPP;

(ii) Whether the petitioner is entitled to probate in respect of the Will. OPP;

(iii) Relief.

Issue No.1 & 2 –

7. The Will is marked as Ex. P-1; the material portions of the same are extracted below:

"XXXXXX XXXXXX XXXXXX

I had three sons, namely Govind Prasada, Mahabir Prasada and Kanti Prasada. The eldest Govind Prasada passed away last

year.

Govind Prasada incurred considerable losses in his businesses and I met them from my personal income. At the time of the family settlement, he desired to be paid off completely on that occasion as part of family settlement not only his full share of ancestral property but also all the further inheritances that I wished to settle upon him or his family, to enable him to make a fresh start of life at Bareilly. Accordingly, I gave him a much larger slice of land in plot No. 179, Civil Lines, Bareilly, and also a sum of Rs. 20,000/-from my pocket.

Govind Prasada has left his property in disarray, and his wife and children are suffering hardship. It is my duty to help them set on their feet.

My son Mahabir Prasada also incurred losses in his business and I have met a part of them out of my personal income.

I have been staying for more than 25 years with Mahabir Prasada and his wife Girish Kumari Prasada in their house, and they have lavished much hospitality and love and bestowed every care upon me.

My third son Kanti Prasada emigrated to Canada nearly 30 years ago and has settled down there. By grace of God, he is in affluent circumstances.

Govt. of India agreed to allow me to remit Rs. 75,000/-to him, which I have done. His two daughters Usha and Uma also are self-reliant and above want.

Out of my personal earnings, I have acquired on sub-lease from Govt. of India through Maharani Bagh House Building Coop. Society, New Delhi, a plot of land bearing No. A-16 (revised No.2, 'A' Rd.) and on it have constructed a two-unit bungalow completely detached except for a common drive-way. That bungalow and my savings bank accounts in the State Bank of India, Main Office, Parliament Street, New Delhi, and in the Bank of India, East of Kailash Branch, New Delhi, are all the property I possess.

I am deeply impressed by Sant Kabir Das's concept of wealth:

"(in hindi) sai itna dijiye jaa mein kutumb samaye Main bhi bhuka na rahun, sadhu na bhuka jaye"

Of course, one's wants and those of one's family have prior claim on one's wealth. But there is a larger family outside – the family of humanity – which suffers from deep misery on account of poverty and disease. It also deserves consideration. Out of fellow-feeling for them, I have Instituted the Pandit Het Ram, C.I.E., Public Charitable Trust (named after my father). The Secretary-cum- Treasurer of Trust is Shri M.M. Bhagat (address: 3-B 'Vandhana', 11, Tolstoy Marg, New Delhi-110001). It is my ardent wish that it should be kept alive for at least six years from now, i.e., upto 1981-.88.

I appoint my son Mahabir Prasada and his wife Girish Kumari Prasada to be the joint executors of this my Will.

I direct them to pay all taxes and the death duty and to discharge all my liabilities form the property I am leaving behind.

I direct them to make the following payments after my death:

(i) Rs. Ten Thousand per year upto 31st March 1988, to Pandit Het Ram, C.I.E., Public Charitable Trust;

(ii) Rupees Five thousand per year for five years commencing from within 12 months of my death to Gopal Prasada, S/o Govind Prasada, or, in the event of his prior death, to his mother or sisters;

(iii) Rupees five thousand per year to each of Usha and Uma, daughters of Kanti Prasada, within 5 years of payment of estate duty, if it is leviable. If not leviable, within 5 years of my death;

(iv) Rupees One hundred per month to my servant Dal Chand during his lifetime. The payment to start immediately on his attaining the age of 65 – his age on 1-1-1982 may be assumed to be 58 – or when he ceases to earn his livelihood owing to old age or ill health, whichever contingency occurs earlier. Subject to the charges created above, I give, devise and bequeath all my personal estate and all the property to which I am entitled at the

time of my death to my son Mahabir Prasada and his wife Girish Kumari Prasada, Joint Executors of this my Will, in equal shares absolutely and foreover.

XXXXXX XXXXXX XXXXXX"

8. To prove the Will, the petitioner relied upon the statement of Lt. General Jasbir Singh Bawa (PW-1), who deposed by affidavit dated 10.05.1994. PW-1 claimed acquaintanship with the testator in connection with the DPS Society of which he (the witness) became a member in 1980. The testator was a senior and respected member of the society, previously for many years and had held the office of Chairman. PW-1 deposed that he and the testator were members of the Working Committee of the Society to which he (PW-1) had been elected after joining the Society. The Committee used to meet frequently at least once every three months; the deponent talked about creation of a Working Group for suggesting the financial systems of the Society, to which the testator was nominated as a Convenor and PW-1 was a member. PW-1 mentions about several meetings of the two in January and February 1982 and about the report having been submitted in the beginning of March 1982. The deponent, PW-1 mentioned about the testator visiting his office (PW-1's) office at East of Kailash and expressing his desire to make a Will. The testator requested him to attest the Will; he also requested Smt. Sheela Markan, working as his Secretary (i.e. that of PW-1) also to attest the Will. He further deposed that on 28.01.1982 at approximately 11.00 am, the testator visited his office and placed a typed Will upon which he signed on each page in his (PW-1's) presence and in the presence of Smt. Sheela Markan. PW-1 also further deposed about having signed on the Will in front of the testator and in front of Smt. Sheela Markan. He also said that at the time of execution of the Will, the testator was of sound mind and health; he further deposed that at the time of execution and even thereafter the testator attended the meeting of the Working Group of the DPS Society and was Convenor of the Working Group as well as an active participant. He deposed that the testator was an active golfer and played at the Delhi Golf Club 3-4 times a week.

9. In cross-examination, PW-1 denied having disclosed about what to depose in Court with Ms. Sheela Markan. He mentioned about not attending any family function of the testator or of his relatives; he deposed that the testator had not discussed his family matters or even revealed

with whom he had good relations or otherwise. PW-1 said that he did not read the Will before attesting it and that he did not consider it necessary to do so; likewise, he also stated that Ms. Sheela Markan had not read the Will in his presence when it was attested in presence of both of them. He also clarified that the testator did not read the Will over to him. In cross-examination, he reiterates that he used to meet the testator once or twice a month and had no social relationship with him nor did he speak to him about registration of the Will. He also denied knowledge of any other Will executed by the testator or that he had consulted any Advocate before preparing the Will. He mentioned about the testator having visited him on 23.01.1982, asking him to attest the Will and also requesting if Ms. Sheela Markan, his Secretary, could attest the same and that Ms. Sheela Markan agreed to do so in his presence. PW-1 denied the suggestion that the testator was not maintaining good health and clarified that he was a fit man. He mentioned about there being no occasion to tell anyone that he had attested the Will of the testator and mentioned that about two years after his (the testator's) death, the petitioner had visited him requesting him to depose in the case. In further cross-examination, he clarified that there were about 20 members in the DPS Society and that meetings used to take place approximately once in three months. He agreed to a suggestion that the Will was typed by Ms. Sheela Markan since she had informed him about it. In his statement he volunteered about being Secretary of the DPS Society due to which he had frequent communication with the testator and that the Will was first signed by him (the testator) after which he signed it in the presence of Ms. Sheela Markan who then signed the same. He again denied any knowledge of what was in the Will and any awareness as to whether it was the same Will typed by Ms. Sheela Markan.

10. PW-2, Smt. Sheela Markan, in her affidavit, mentioned about having worked with the DPS Society since 1979 and that the testator was its member at the time of her joining and continued to be so thereafter and that her knowledge and acquaintanship with the testator was because of that working relationship. She deposed that on 23.01.1982, the testator went to the office of the DPS Society at about 11.00 AM when she was working with PW-1 and requested her to attest his Will. She agreed to the request and stated that in her presence he had requested PW-1 also to attest the Will which he agreed. She too mentioned about the testator asking for attestation of the Will signed by him on 28.01.1982 and her

having attested it in the presence of the testator and PW-1. She also identified the places where she, PW-1 and the testator had signed on the Will. She deposed that the testator was of sound mind and health at that time and was talking and behaving in sensible and rational manner. She also stated that the testator was an active member of the DPS Society and a Working Committee thereof and had been elected Convenor of a Committee in January 1982.

11. In cross-examination, PW-2 submitted that the Will (Ex. PW-1) was typed by her at the DPS Society office; she did not remember if the Will was shown to her by the petitioner but volunteered that she had seen the Will. She could not remember whether the meetings of the school's Working Group took place in 1981 or 1982; she had no idea how many children did the testator have or about his family particulars since they did not interest her. She had not visited his house nor was aware of his wife's name. She knew the testator only in her official capacity. The witness of her own accord stated that after she had typed the Will, she gave it to the testator who took it away and brought it after a few days and signed it in the presence of both the attesting witnesses on 28.01.1982. She denied the suggestion that when the Will was brought, the testator had already signed the other pages except the last one and denied the suggestion that the Will was brought to her by the petitioner; she denied acquaintanship with the petitioner and reiterated that the testator used to attend the meeting regularly. She deposed about not being aware of the testator having any failing health and further stated that he had attended the meeting of the Working Group in January, February and early March 1982. PW-2 stated that he gave the report of the Working Group in 1982 after which he passed away at the end of March 1982. She did not produce any copy of the minutes of meeting of the DPS Society.

12. Gita Chaterjee, who deposed as DW-1, mentioned that the testator became member of Maharani Co-operative Society by investing Rs. 10,000/-funds of his HUF Kalawati Kanweri, mother of Satyawati, maternal grandmother of DW-1 died in 1958-59, leaving behind Rs. 5,00,000/-. Testator helped DW-1's mother to secure letters of Administration, under which he got total property of mother and jewellery. She relies on a letter dated 03.12.1961 whereby he told her mother (Satyawati) that her jewellery worth Rs. 2,00,000/-had been sold, and

used for construction. Letters dated 03.04.1971 (DW-1/2) confirms that. Letters dated 22.06.1979 (DW1/3), 27.01.1981 (DW-1/4) and 25.02.1981 (DW-1/5) were exhibited, to show the testator's fondness for Geeta's mother and children. In the summer of 1981, a family settlement was reached whereby 1/4share went to deponent and sister, 1/4to Satyawati; 1/4to Gopal Prasad and 1/4th to Mahabir Prasad. The Will was not executed in exercise of free volition, but due to influence of Mahabir Prasad; the testator's health was failing in 1981. The testator did not mention anything to DW-1 (when she visited him in February 1982 before his death), about the Will. Even otherwise, he could not bequeath the property as it was HUF property.

13. In the cross-examination, DW-1 stated that she used to visit the testator several times before her marriage when he was living in Lodhi Estate. She admitted to not visiting the testator after her marriage and further deposed that her father was a doctor practicing at Lucknow. During cross-examination, she submitted that her husband became a Sadhu in 1970 and that she shifted to her mother. To a suggestion that after 1958, her father never lived with her mother, DW-1 deposed that her father used to live with them at Lucknow. Her father's source of livelihood, according to DW-2, was the rent received from shops at Bareilly; she was not aware when those shops were constructed. She expressed her ignorance of the Will in question and claimed that she became aware of it in 1994. DW-2 stated that a case had been filed by her brother Gopal Prasada against her father at Bareilly and that the testator had advised him to do so. She admitted awareness about a Vakalatnama signed by her in CS (OS) 1608/1991. She also admitted knowledge about a lengthy litigation in respect of the suit property with Sh. Sanjeevan Sawhney and Ms. Kusum Sawhney and claimed that the source of knowledge was through her brother, who used to visit them. DW-1 mentioned that her father's address at Bareilly was 179, Civil Lines, and that he passed away in January 1981. She admitted that her father had shifted from Lucknow to Bareilly where he died though she was not aware of the exact year when he did so. He owned eight shops but was not aware of his yearly income. She stated that her family did not shift with her father to Bareilly and that a partition had taken place of the open land at Bareilly which was adjacent to her uncle Kanti Prasada's bungalow which was rented.

14. The witness, DW-1 was unable to state whether the shops were constructed with the money given by the testator but denied that he and his children were not having good relations. DW-1 identified two letters written by her mother which were exhibited as DW-1/PX-2 and DW1/PX-3. She also mentioned that the estate left by her maternal grandmother, Smt. Kalawati Kanwari consisted of jewelleries and Zamindari Bonds which were valued at Rs. 5,00,000/-out of the jewellery was worth Rs. 2,00,000/-.

15. The defendants rely upon certain documents; the letter dated 30.12.1961 Ex. DW-1/1 is a letter written by the testator to his daughter-in-law, Smt. Satyawati. The letter contains a reference to investment of her amount in the purchase of the suit property and an assurance that the money was absolutely safe. Ex. DW-1/2 is a letter written by the testator to Smt. Satyawati, his daughter-in-law, on 03.04.1971, acknowledging his awareness about the compromise in her family. The letter states that her jewelleries as per her request, were sold and invested in construction of the bungalow. The letter also states that the bungalow is for the benefit of her family also, i.e. for Shri Govind Prasad, the testator's son. The third document, Ex. DW-1/3 is another letter – written by the testator to his son, Sh. Govind Prasad, referring to his dispute with Gopal (his grandson), and advising him to have the same referred to arbitration.

16. The fourth document, Ex. DW-1/4 is a letter written to Gopal Prasad, the testator's grandson, alluding to his father (Govind's) lack of balance in his life. This letter is concededly written after Govind's death and enquires about application for Succession Certificate; issues with regard to tenancy; sorting-out legal and tax terms and so on. The letter states that the testator wanted to visit Bareilly to help Gopal and his mother but was not physically fit and not allowed to move freely. DW-1/5 is a letter written to Govind's wife, Satyawati, on 25.08.1981, expressing the testator's happiness at the birth of a daughter to his grandson, Gopal. The testator cautions that Gopal should stand on his feet and not expect money from him (the testator). The letter states that the testator was improving slowly and was not able to do anything with is left hand and further that he did not go for a walk or to the club. The last two documents relied upon by the parties were letters put to DW-1 in cross-examination, i.e. DW-1/PX-2 and DW-1/PX-3. DW-1/PX-2 is

written by Satyawati to the petitioner, which states that her son, Gopal had met the testator, who had submitted about execution of two Wills and requested that they should be deposited in the Court to avoid injustice to anyone. Similarly, Ex. DW-1/P-63 is a letter to the petitioner written by Satyawati on 12.10.1982. In the letter, family compromise are mentioned and Satyawati requests the petitioner to give ` 5,000/-in order to tide-over financial difficulties and also refers to some other amounts previously given to them.

17. The respondents argued that there is no explanation why the Will was propounded seven years after its alleged execution. In this respect, it is contended that the testator died on 13.03.1982 but this Court was approached in 1989. Reliance is placed upon para 7 of the probate petition which states that cause of action for approaching the Court arose on the date of the testator's death. It is submitted that there is no much less any valid or cogent explanation in this regard. Reliance was placed upon the judgment reported as **Kunvarjeet Singh Khandpur v. Kirandeep Kaur & Ors.** 2008 (8) SCC 463, to say that such Will is sought to be propounded within time. In the absence of any explanation, the delay is itself an important suspicious circumstance which the Court should consider and desist from granting probate.

18. It was next argued that there are several circumstances and inferences deducible from the depositions of the attesting witnesses, PW-1 and PW-2, which the Court should not ignore. It is submitted that there is a material discrepancy between the two depositions so far as concerns execution of the Will. The objectors point to the fact that to a specific query, the witnesses mentioned that the Will was typed on plain paper whereas it is actually on a letterhead. It is further argued that the Will was prepared by PW-2, a fact which she did not depose nor that the same was even spoken by PW-1. Learned counsel also pointed-out that PW-2 never mentioned that the testator had instructed her to type the contents. These material discrepancies and omissions are also suspicious circumstances, according to the Objector/respondents which should persuade the Court to deny probate.

19. The Objectors argue that inexplicably, despite materials on record showing that the testator's son, Govind was financially weak and unsound, and despite his fondness for Govind's family, that branch has been completely cut-out from the estate. On the other hand, submit the

respondents, only the petitioner who lived in Delhi and had access to the testator, was given the entirety of the most valuable property. This, coupled with the old age and infirmity of the testator – apparent from two letters written by him to his daughter-in-law, are strong circumstances pointing to undue influence being brought to bear upon him. The Objector's learned senior counsel emphasized that these circumstances, i.e. the unnatural bequest in favor of the single branch of the testator's family to the exclusion of all others and his advanced age, coupled with his illness and the important fact that the Will was executed a few days before his death, are crucial circumstances which the petitioner has been unable to explain.

20. It is argued that though PW-1 mentions about his being acquainted with the testator for two years before his death, there is no material or documentary evidence in support of the statement. Learned senior counsel argued that if indeed the testator and PW-1 had attended meetings or had participated in Committee deliberations, the least that was expected was production of some minutes of meeting or copies of the Committee reports, as the case may be. Though the petition was pending for a long time, no effort to produce such documents was made. In these circumstances, the Court should not accept the version of PW-1 at its face-value. The respondents also highlight that PW-1 did not know the testator's relatives or family members and was a stranger to them. In the facts and circumstances, since the testator was well-known and had been living in Delhi for a long time, there was apparently no reason to place faith in an utter stranger in regard to execution of the Will.

21. Learned senior counsel lastly argued that the documents, particularly the letter written by the testator's daughter-in-law and by the testator himself vividly point to the fondness for that branch of the family and also that his daughter-in-law's jewellery had been sold to construct on the plot which formed part of the testator's estate. These letters also held-out clear assurances that the suit property was meant for all and further that the testator was in touch with Govind's branch of the family right till the end. The testator's letters also establish that he was unwell and barely able to move around or use his left hand. Under these circumstances, having regard to the old age, the delay in propounding the Will, reliance placed on utter strangers and the execution of the Will just before the testator's death were all suspicious circumstances for not

granting the probate claimed.

22. The Objectors, in support of their submissions, placed reliance on the judgments of the Supreme Court reported as **H. Venkatachala Iyengar v. B.N. Thimmajamma & Ors.** AIR 1959 SC 443; **Jaswant Kaur v. Amrit Kaur & Ors.** 1977 (1) SCR 925; **Jaswant Kaur v. Amrit Kaur** 1977 (1) SCC 369 and **Bharpur Singh & Ors. v. Shamsher Singh** AIR 2009 SC 1766. It was emphasized that wherever the execution of the Will is shrouded in suspicion, the mere proof of due execution is insufficient, and the propounder must dispel from the Court's mind that such suspicious circumstances existed at the time of execution. In this respect, the decision in **Jaswant Singh Kaur** (supra) that delay in propounding the Will has to be cogently explained as also the fact that the attesting witnesses were strangers and most importantly that the dispositions in the Will were unfair and unnatural.

23. The petitioner argues that the evidence of the attesting witnesses are worthy of acceptance and that the so-called discrepancies pointed out by the respondents are minor omissions which cannot be blown out of proportion. It is submitted that PW-1 was a high ranking retired military officer with no motive to perjure himself. His deposition and voluntary statements clearly establish acquaintanship though not friendship, with the testator, based on both being members of the Delhi Public School Society and their involvement in its affairs. Being acquainted with each other for about two years was deemed appropriate by the testator, who, having regard to what he wished to bequeath, apparently wanted to be discreet about execution of the Will. Similarly, says the petitioner, PW-2 was working with the DPS Society as a Secretary and the testator had occasion to see her work. It was but natural, under the circumstances, that he reposed confidence in these two individuals who had no connection with his family. Aside from alleging that PW-2 had been contacted by the petitioner, no other motive was and could be ascribed to the attesting witnesses, who testified as to the genuineness of the circumstances under which the Will had been propounded.

24. The petitioner argues that the omission to mention the letterhead and the mention of stamp paper or other paper, the omission to mention that PW-2 had typed the Will or the precise date when it was typed, and whether PW-1 was aware of it can hardly be called as important discrepancies that can affect the genuineness of an otherwise validly

signed Will. Both attesting witnesses clearly proved that the Will (Ex. P-1) was signed by the testator in their presence and that they had signed in his presence, which is what Section 63 of the Indian Succession Act requires. So far as the question of their being strangers are concerned, learned counsel argued that there is no law which prescribes that only family members or friends of an individual can act as attesting witnesses. So long as the plea who can testify and are aware of the character of the documents, act as attesting witnesses, there is no bar in anybody performing that task.

25. It is next argued that the letters relied upon by the respondents/ Objectors, even though written by the testator, do not establish anything more than that Govind, his son, had done badly. At the same time, the evidence on the record in the form of DW-1's deposition show that Govind himself possessed properties, some of which came down from the family at Bareilly. He had started living away from his own family, i.e. wife and children – the latter lived in Lucknow The letters, particularly of 1961 and 1972 assuring that some amounts belonging to Govind's wife or her jewellery had been used in the construction of the suit property cannot be construed as conferring or creating any interest in it. The title and ownership of the suit property vested exclusively in the testator who could deal with it in any manner he liked. Learned counsel further pointed-out that besides saying that mere amounts which belonged to his daughter-in-law had been spent in the construction put-up on the suit property, there was no other material on the record which could suggest or establish or compel the Court to draw an inference one way or the other that the Will was executed under suspicious circumstances. These two letters were written in a span of 20 years before the testator's death. On the other hand, there are letters written by the testator which clearly demonstrate that the petitioner used to assist his brother, Govind's family even after the testator's death and that the testator was aware of Govind's propensity to spend money. Learned counsel submitted that the testator bequeathed the suit property to the petitioner since he was looked after by him all the time and specially during his old and infirm age. On the other hand, it could be safely inferred that Govind's branch had been taken care of by the testator during his lifetime. As a result, there was neither anything unfair nor unnatural in the manner as regards the depositions made in the Will.

26. The petitioner also argues that the Will itself takes care of and provides for Govind's branch of the family and other members of the testator's family by providing for allowances in favor of Gopal, of Rs. 5,000/-per year for five years, and Rs. 5,000/-per year to each daughter of the third son, Kanta Prasad and a bequest of Rs. 100/-per month to the testator's servant, Bhola Chand, during his lifetime, after his attaining the age of 65. The petitioner submits that the concern for Govind Prasad, who had pre-deceased the testator during his lifetime is borne from the Will and the statement made in it about a settlement which granted him full share of ancestral property and all further inheritances, to enable him to start a fresh life at Bareilly. The petitioner submits that as a result of this settlement during the testator's lifetime, Govind had been given a soil of land in Plot No. 179, Civil Lines, Bareilly as well as Rs. 20,000/-.

27. The petitioner's counsel relied upon the judgment reported as **Hazara Bradri & Ors. v. Lokesh Datta Multani** 2005 (13) SCC 278, to say that the Court should not lightly disturb the wishes of the testator, once it is proved that the Will was duly executed in front of the attesting witnesses. The petitioner also relies on **Shyamal Kanti Guha (Dead) Through L.R.s & Ors. v. Meena Bose** 2008 (8) SCC 115, to say that the Court should always lean in favor of giving effect to the wishes of a testator once it is duly proved rather than otherwise. Reliance is also placed upon a judgment reported as **Ramachandra Shenoy v. Hilda Brite** AIR 1964 SC 1323. 28. Before analyzing the evidence, and the respective positions of the parties, it would be necessary to briefly discuss the law relating to testate succession. Section 63 of the Succession Act and Section 68 of the Evidence Act spell out the essential requirements of wills, and their proof, in a court of law. Section 63 (of the Succession Act) states that:

> **"63. Execution of unprivileged wills.**--Every testator, not being a soldier employed in an expedition nor engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules--
>
> (a) -(b) * * *
>
> (c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by

> the direction of the testator, or has received from the testator a personal acknowledgement 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 the Evidence Act enacts that:

> "68. Proof of execution of document required by law to be attested.--If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least 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:…"

29. Section 68 of the Evidence Act provides the manner of proof of a document required by law to be attested. It states that such a document cannot be used as evidence till at least one attesting witness is called for the purpose of proving its execution, (if there such an attesting witness is alive), and subject to the process of the court and capable of giving evidence. Such witness has to be examined before the document can be used in an evidence. A combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, reveals that the propounder of a will has to prove that the will was duly and validly executed. That can be done by not merely by proving the testator's signature on the will, but also establishing that attestations were made properly as required by Clause (c) of Section 63 of the Succession Act. Section 68 of the Evidence Act does not require the examination of both or all the attesting witnesses. Yet, at least one attesting witness should be examined to prove the due execution of a will as mandated by Section 63. Although Section 63 of the Succession Act requires that a will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the court. Therefore, it is imperative that one attesting witness has to be examined and he (or she) should be in a position to prove the execution of a will. The sole attesting witness so examined, should be able to

establish the attestation of a will by him and the other attesting witness for proving there was due execution of the will. (See **Janki Narayan Bhoir v. Narayan Namdeo Kadam** (2003) 2 SCC 91; **Seth Beni Chand v. Kamla Kanwar** AIR 1977 SC 63; **H. Venkatachala Iyengar** (supra)). The first task of the court is to, therefore, see whether the Petitioner proves that the will was executed in accordance with law.

30. Apart from the legal requirements spelt out by Section 63 (of the Succession Act) and Section 68 (of the Evidence Act) discussed previously, the court which considers a plea about validity (or otherwise) of a will has to see other significant facets. The court has to be satisfied generally that the tesatator (or testatrix) was of a sound and disposing mind, in possession of his or her senses, with the ability to perceive that the document executed was indeed a will which she or he desired, and was also aware of its contents, which accorded with her (or his) wishes. These essentials were clarified by the Supreme Court, in **H. Venkatachala Iyengar v. B.N. Thimmajamma (**supra), in the following terms:

> "There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature, in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may

> have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.
>
> 21. Apart from the suspicious circumstances to which we have just referred, in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present such suspicious circumstances that decisions of English courts often mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word "conscience" in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive."

31. The reasoning in this decision has been applied subsequently in several judgments: **Rani Purnima Debi v. Khagendra Narayan Deb :** AIR 1962 SC 567; **Surendra Pal v. Dr. Saraswati Arora** 1974 (2) SCC 600; **Gurdial Kaur v. Kartar Kaur** 1998 (4) SCC 384, etc. Courts have emphasized that usually it is the cumulative effect, rather than a stray circumstance, which would weigh in concluding that a will is shrouded in suspicion. Ultimately, it is the conscience of the court, which should be satisfied that the will is a genuine document, and expresses what is intended by the testatrix or testator, apart from being satisfied that the technical legal requirements mandated by the joint operation of Section

63 of the Succession Act, and Section 68 of the Evidence Act, are fulfilled.

32. It is well established that the intention of a testator, in executing a will, is to disturb or interfere with the normal line of succession. Therefore, unless something unusual and grossly unfair is shown in the disposition, the mere fact that some heirs are excluded is not a ground to conclude that it was executed under suspicious circumstances. (See **Rabindra Nath Mukherjee v. Panchanan Banerjee** 1995 (4) SCC 459; **Sadasivam v. K. Doraiswamy** 1996 (8) SCC 624; **P.P.K. Gopalan Nambiar v. P.P.K. Balakrishnan Nambiar** 1995 Supp (2) SCC 664). In **Vrindavanibai Sambhaji Mane v. Ramchandra Vithal Ganeshkar** (1995) 5 SCC 215 the Supreme Court listed out what are the unnatural circumstances which would make courts pause, and consider whether such features are "suspicious circumstances ": (1) The propounder taking a prominent part in the execution of a Will which confers substantial benefits on him; (2) Shaky signature; (3) A feeble mind which is likely to be influenced; (4) Unfair and unjust disposal of property.

33. The court, at the same time, is also bound by another principle, which is that while construing a will, every attempt must be made to give effect to the testator's intention (if it is proved that the will is a genuine and validly executed one). **Navneet Lal v. Gokul** (1976) 1 SCC 630 is a decision, where the court summarized the principles applicable in such circumstances, as follows:

> "8. From the earlier decisions of this Court the following principles, inter alia, are well established:
>
> (1) In construing a document whether in English or in vernacular the fundamental rule is to ascertain the intention from the words used; the surrounding circumstances are to be considered; but that is only for the purpose of finding out the intended meaning of the words which have actually been employed. (**Ram Gopal v. Nand Lal**)
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> (2) In construing the language of the will the court is entitled to put itself into the testator's armchair (**Venkata Narasimha v. Parthasarathy**) and is bound to bear in mind also other matters than merely the words used. It must consider the surrounding circumstances, the position of the testator, his family relationship,

> the probability that he would use words in a particular sense.... But all this is solely as an aid to arriving at a right construction of the will, and to ascertain the meaning of its language when used by that particular testator in that document. (**Venkata Narasimha case and Gnanambal Ammal v. T. Raju Ayyar**)
>
> (3) The true intention of the testator has to be gathered not by attaching importance to isolated expressions but by reading the will as a whole with all its provisions and ignoring none of them as redundant or contradictory. (**Raj Bajrang Bahadur Singh v. Thakurain Bakhtraj Kuer**)
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> (4) The court must accept, if possible, such construction as would give to every expression some effect rather than that which would render any of the expressions inoperative. The court will look at the circumstances under which the testator makes his will, such as the state of his property, of his family and the like. Where apparently conflicting dispositions can be reconciled by giving full effect to every word used in a document, such a construction should be accepted instead of a construction which would have the effect of cutting down the clear meaning of the words used by the testator. Further, where one of the two reasonable constructions would lead to intestacy, that should be discarded in favour of a construction which does not create any such hiatus. (**Pearey Lal v. Rameshwar Das**)
>
> (5) It is one of the cardinal principles of construction of wills that to the extent that it is legally possible effect should be given to every disposition contained in the will unless the law prevents effect being given to it. Of course, if there are two repugnant provisions conferring successive interests, if the first interest created is valid the subsequent interest cannot take effect but a Court of construction will proceed to the farthest extent to avoid repugnancy, so that effect could be given as far as possible to every testamentary intention contained in the will. (**Ramachandra Shenoy v. Hilda Brite Mrs.**)...."

34. The evidence here is in the form of deposition of the two attesting witness, i.e. of Lt. General Bawa PW-1, and Mrs. Markan, PW-2. They deposed that the will was executed by the testatator on 28th

January 1982 and attested by each other. In cross examination, both stated having met the testator on two occasions; they could recollect that the will was executed by him. PW-1 mentioned about his previous association with the testator as member of the DPS governing Council, and that they had participated in committee deliberations. He volunteered about his acquaintanceship with the testator, on that basis, and denied the suggestion that he was unwell on date of the execution of the will. He also said that the testator used to play golf regularly. He was aware that the testator had visited him previously, and that PW-2 had been requested to attest the will as a witness. PW-2 corroborated this version; she was a personal secretary in the DPS society. In cross examination, she conceded having typed the will according to the testator's directions, given previously. The respondents could not elicit anything to say that the testator was unwell or infirm.

35. The respondents object to the witnesses' depositions, arguing that there are grave discrepancies, in as much as PW-1 did not mention about the other witness typing the will, both of them, omitting to say that the will contained something in Hindi, and that there was omission to say when the testator visited the office to give a draft to PW-2 for typing the final will. It was also argued that both versions did not say that the will was typed on a letterhead. These are trivial inconsistencies or discrepancies, in the opinion of the court. The standard of proving a will in this context is the same as in other case, i.e. the propounder should establish through preponderance of probabilities that the will was validly executed. The respondents have not led any evidence to show infirmity, illness or mental incapacity of the kind that would have deprived the testator of his capacity to make a valid testamentary disposition. The discrepancies pointed by them pertain to a period of over 25 years before the two attesting witnesses were examined. Human memory cannot have the same vividity and constancy to retain every little detail, and describe it as if the act were performed the day before the deposition. Predictably, witnesses' faded recollections inevitably tend to throw up some inconsistencies, which are natural. What would however be worrisome, is if the tale is picture perfect in all detail. That would be a circumstance impelling the court to scrutinize the testimonies and the materials, rather closely, as human fallibility, rather than perfection, is the norm. On an overall consideration of the materials, the court is of the opinion that there is sufficient proof, contemplated by Section 63 of the Succession

Act and Section 68 of the Evidence Act about due execution of the will by the late testator.

36. The next question is whether the will was executed under suspicious circumstances. The objectors argue that the testator was ill; that he confided in total strangers, that he was of advanced age, and that the will made unnatural dispositions, for no reason -as grounds to establish suspicious circumstances which should dissuade the court from granting probate. Now, in this regard, the court has to take into consideration the evidence presented before it. The testimonies of PW-1 and PW-2 are credible. Nothing has been shown disclosing that they had any ill-motive against the objector, or were interested. Indeed, PW-1 is a retired Lt. General. He cannot possibly have any motive other than to depose to what was witnessed by him. He -as well as PW-2 consistently deposed that the testator was in his senses when he signed the will, in their presence. The objectors have not led any positive evidence of chronic ailment or disease that would have rendered the testator mentally incapacitated, or incapable of understanding his actions. Indeed, by all accounts, he was alert, when he signed the will; he was actively involved in the affairs of the DPS society and convenor of a reforms committee. PW-1 even said that he used to play golf. The testator concededly was a retired high ranking bureaucrat of the ICS cadre. The petitioner's evidence is sufficient to rule out any serious mental incapacity or ailment which rendered the testators judgment or understanding suspect, when the will was made and signed by him. No doubt, he was aged; but there is nothing to show that such advanced age alone was enough to incapacitate him, or more importantly, impair his judgment. In one of his letters, he did mention about inability to use one hand. Yet, the objectors did not deem that circumstance serious enough to visit him, or inquire or gather any evidence to establish their case that he was incapacitated by any such condition, from exercising sound judgment, while signing the will.

37. As far as confiding in total strangers, for executing the will is concerned, the court is of the opinion that the previous judgments are to be viewed as broad guidelines, and not rigid formulae to be applied in every fact situation. They are broad markers, to be kept in the mind of the court, whose conscience is to be ultimately satisfied that the will was indeed signed by the testator, while in a sound and disposing mind. The mere fact, in the circumstances of this case, that the testator confided

in relative strangers, and not in close friends or family members, should not cloud the court's vision in examining whether those "strangers" established due execution of the will. There is no law or rule which obliges individuals -even of advanced age, to seek the aid of friends or family members while executing a will. Indeed, it could arguably be said that testators, having regard to the nature of bequests, may sometimes wish to keep "under wraps" the execution of the will, away from prying eyes of relatives, and friends, who may be seen as threats, wanting to seek their share in the inheritance. Therefore, it is natural, under circumstances, to involve third parties or slight acquaintances to act as attesting witnesses. As stated earlier, the objectors were unable to point out to any possible motive or ill will on the part of the attesting witnesses, in perjuring themselves. Therefore, that they were strangers, is insufficient to say that there were suspicious circumstances vitiating the will in question.

38. The next question is whether the objectors show that the disposition or bequest made was unnatural. The testator was survived by two sons, and the family of another predeceased son. The objectors have relied on certain letters to say that the daughter in law, Satyavati, used to correspond with the testator, who was fond of her, and his grandchildren, i.e. son and daughter of Govind. These letters also indicate that her money was used for constructing upon the suit plot, and that the testator appears to have assured that the house could be used by all, including Govind's branch of the family. The question is whether this can persuade the court into concluding that the will made an unnatural disposition, by excluding the heirs of a predeceased son altogether.

39. The fact that Satyawati's jewellery was used to construct the property, acknowledged in a letter written by the testator in 1971, only establishes that aspect, as also another previous letter of 1965. However, there is a long gap between these two periods, and a decade after 1971. The will itself mentions that the testator and Govind had arrived at a settlement, whereby the latter had been paid Rs. 20,000/-and a large part of a Civil Lines plot in Barielly. The evidence also suggests that Govind had some shops, and lived from the rental income derived. The testator, in one of his letters, suggests that Gopal, i.e Govind's son, should start working and take charge of his responsibilities. Yet, these facts or taken with the others do not mean that the testator wished to bequeath any

share in the property to the objectors. It would be worth noticing at this stage that the third son of the testator did not object to the will and has apparently accepted the bequests. As regards the letter written to the petioner by Satyawati is concerned, it cannot establish the existence of any other will. In any case, no evidence has been placed, on the record to dispel the inference that the will propounded in this case was the last will and testament of the petitioner. The court is mindful of the fact that more often than not, testators wish to make dispositions or bequests which disturb the natural line of succession. Having regard to all these aspects, the fact that the will does not provision for Govind's heirs, is not sufficient to set the will aside, or hold that its execution was clouded by suspicious circumstances.

40. The last aspect to be considered is whether the delay in approaching the court, and seeking probate is fatal to the petition. **Kunvarjeet Singh Khandpur** is an authority for the proposition that the court can reject a claim or relief, primarily based on a will, if the petitioner does not approach it in time. It is to be noticed at this stage that the said decision was rendered a good 73 years after enactment of the Succession Act. The nature of proceedings, and the procedure to be adopted under the Act, was well known to Parliament, which made no mention of any period of limitation. The Limitation Act, significantly mentions about its applicability to applications, suits, and appeals; it does not mention Petitions, in the form of probate claims, or any proceedings under the Succession Act. Therefore, the observations in Khandpur have to be read in the context of the statute, when the Parliament was aware of existing law, which had provided a special procedure for grant of probate. In the present case, when all other facts point to a valid and genuine will, with no foul play, or the testator having suffered from any incapacity or disability impairing his fair judgment, that the petitioner has approached the court after some delay in the overall circumstances cannot be fatal to the claim.

41. In view of the above findings, it is held that the testator was of sound and disposing mind, while signing the will in question in this case. The petitioner has proved its due execution; the court is satisfied that there were no surrounding suspicious circumstances, which disentitle the petitioner's claim. Therefore, he is entitled to probate in respect of the will dated 28th January, 1982.

Issue No. 3

42. For the reasons mentioned and findings rendered in respect of the first two issues, the petition is allowed. The petitioner shall be granted probate of his father's will, and shall act as executor in respect thereof. The same shall be granted subject to the petitioner furnishing Administration and Surety Bonds, within eight weeks, and also ensuring that the valuation of the suit property is placed on the record. The petition is therefore, allowed in the above terms, without any order as to costs.

ILR (2011) I DELHI 193
CRL. REV. P.

SARDAR GURDIAL ....PETITIONER

VERSUS

DR. SANDEEP SHARMA ....RESPONDENT

(HIMA KOHLI, J.)

CRL. REV. P. NO. : 280/09 DATE OF DECISION: 29.09.2010

Code of Criminal Procedure, 1973—Section 200, 397, 401—Indian Penal Code, 1860—Section 500—Quashing of order of ASJ upholding order of MM dismissing the complaint filed by the petitioner u/s 200 Cr.PC against the respondent for defaming him—Mother of petitioner had filed criminal complaint against respondent and others u/s 133 Cr. PC before SDM—Responsdent vide a notice was called upon to reply—In response to notice respondent submitted reply which was considered as defamatory by the petitioner—Complaint u/s 200 filed before MM—Complaint dismissed—Contention of petitioner that the court below could not have gone into the merits of the case, as at the

stage of presummoning, statement made by the petitioner have to be accepted as true and correct—Held, eight exception to Section 499 IPC applicable—Reply filed by respondent in proceedings initiated by the mother of the Petitioner u/s 133 Cr.PC were filed in the Court of Law which had authority over subject matter in dispute—Reply was filed in good faith to get complaint dismissed—Not case of petitioner that apart from filing on record the reply was circulated to any person—No infirmity in order—Petition dismissed.

Important Issue Involved: It is not defamation to prefer in good faith an accusation in legal proceedings against any person to any of those who have lawful authority over that person with respect to the subject matter of accusation.

[Ad Ch]

APPEARANCES:

FOR THE PETITIONER : Mr. Ashutosh Gupta, Advocate.

FOR THE RESPONDENT : Mr. Manish Makhija, Advocate.

CASES REFERRED TO:

1. *S.P. Satsangi* vs. *Krishna Kumar Satsangi* reported as 142(2007) DLT 192.
2. *Dr. P. Sharma* vs. *P.S. Popli and another* reported as 2002 I AD (DELHI) 569.
3. *Sunil Sareen* vs. *Govt.of NCT of Delhi & Anr.* reported as 83 (2000) DLT 380.
4. *Mohinder Singh* vs. *Gulwant Singh & Ors.* reported as JT 1992 (1) SC 542.

RESULT: Petition allowed.

HIMA KOHLI, J. (Oral)

1. The present revision petition is filed by the petitioner under Section 397 read with Section 401 of Cr.P.C. praying inter alia for

quashing of the order dated 31.1.2009 passed by the learned District Judge-cum-ASJ in Crl.Appeal.No.6/08, upholding the order dated 1.12.2006 passed by the learned Metropolitan Magistrate, who had dismissed the complaint filed by the petitioner against the respondent for allegedly committing an offence punishable under Section 500 IPC.

2. The main grievance of the counsel for the petitioner against the impugned order is that the courts below erred in dismissing the complaint of the petitioner by going into the merits of the case, whereas at the stage of ˘pre-summoning, the evidence and statements made by the petitioner have to be accepted as true and correct. In support of the said submission, he draws the attention of this Court to the complaint filed by the petitioner against the respondent under Sections 190 & 199 Cr.P.C. praying inter alia for trying and punishing him for the offence under Section 500 IPC, the statement on oath made by the petitioner before the learned Metropolitan Magistrate recorded on 14.3.2005, and the order of the learned Metropolitan Magistrate, passed on 1.12.2006.

3. In short, facts of the case are that Smt. Jaswant Kaur, the mother of the petitioner filed a criminal complaint against the respondent and others under Section 133 Cr.P.C. before the learned Sub-Divisional Magistrate, Delhi Cantt. The basis of the said complaint was the fact that the respondent, who is the next door neighbour of the petitioner, was running an X-ray clinic from his premises. Vide order dated 5.9.2002, notice was issued to the respondent in the aforesaid complaint calling upon him to file a reply thereto. In response to the notice, the respondent submitted a reply dated 13.9.2002 to the court of the learned SDM. In para 1 of the said reply, the respondent stated as below:

> "Para No.1: The complainant is in the habit of harassing my family and me on the grounds of false, frivolous, baseless and malicious complaints. The reality is that her notorious son Shri Gurdiyal Singh s/o Shri Pyara Singh mostly signs the complaint in her name and sends them to various authorities to harass us. He is the main culprit."

4. Pertinently, the complaint filed by Smt. Jaswant Kaur was finally dismissed by the learned SDM vide order dated 31.8.2004.

5. As per the petitioner, he had been merely acting as an attorney of his mother, Smt.Jaswant Kaur and had nothing to do with the complaint,

except to represent her in the said proceedings and hence he was unable to protect himself from the aforesaid defamatory remarks made by the respondent against him. He further averred that by publishing the aforesaid remarks by way of reply submitted by the respondent before the learned SDM, the respondent has defamed the petitioner for which he was liable to be punished under Section 500 IPC.

6. On receiving the aforesaid complaint, the learned Metropolitan Magistrate recorded the statement of the petitioner on oath (CW-1). The orderly from the court of the ASJ, Patiala House Courts, New Delhi(CW-2) was summoned with the judicial file of the court of SDM Kapashera, New Delhi, vide Case No.65/SDM/2002 under Section 133 Cr.P.C., which was filed by Smt. Jaswant Kaur, mother of the petitioner against the respondent. After perusing the aforesaid records and the testimony of the CW-1 & CW-2, the learned Metropolitan Magistrate arrived at a conclusion that the contents of the reply(Ex.CW-2/A) filed by the respondent in the proceedings initiated by the mother of the petitioner, were not made with the intention of causing any harm to his reputation and further, that the petitioner has not examined any person, apart from himself to show such imputations as made by the respondent in his reply(Ex.CW-2/A) had really defamed him. As a result, no grounds were found to summon the respondent in the complaint case and the same was dismissed.

7. Aggrieved by the aforesaid dismissal order, the petitioner filed an appeal before the learned ASJ. After hearing the petitioner and perusing the records, the learned ASJ rejected the appeal on the ground that the reply filed by the respondent before the learned SDM, Vasant Vihar, was bona fide and was filed to explain his position in the complaint filed by the mother of the petitioner and further, that there was no element of mens rea to lower the reputation of the petitioner.

8. This Court has heard the counsels for the parties and perused the documents placed on the record, as also the judgments dated 1.12.2006 passed by the learned Metropolitan Magistrate and the order dated 31.1.2009 passed by the learned ASJ.

9. The submission of the counsel for the petitioner that at the pre-summoning stage, the learned Metropolitan Magistrate has no option, but to accept the evidence and the statements made by the petitioner as true and correct, has to be examined in the light of the provisions contained

in Chapter XV of the Cr.P.C., which deals with `Complaints to Magistrates'. Section 200 Cr.P.C. postulates examination of the complainant and requires a Magistrate to take cognizance of the offence on complaint, to examine the complainant on oath and the witnesses present, if any, and reduce into writing the substance of such an examination to be signed by the complainant and the witnesses. Section 203 Cr.P.C. deals with dismissal of complaint and stipulates that if, after considering the statements on oath of the complainant and the witnesses and the result of the inquiry or investigation under Section 202, the Magistrate is of the opinion that there is insufficient ground for proceeding, he shall dismiss the complaint, with reasons to be recorded for doing so.

10. The very fact that Section 203 of the Cr.P.C. requires the Magistrate to examine the statements made by the complainant and the witnesses, as also the result of the inquiry or investigation and only after considering the same, if the he/she is of the opinion that there are not enough grounds to proceed on the basis of the complaint, he has the option to dismiss the same by passing a reasoned order shows that discretion vests with the trial court to take a decision either ways, i.e., to proceed to register the case, or to dismiss the complaint. Hence, the contention of the counsel for the petitioner that at the pre-summoning stage, the Magistrate has no option, but to accept the statements made by the complainant and the witnesses as the gospel truth and proceed to register the complaint, is contrary to the provision itself. Rather, the option is available with the Magistrate to apply his mind to arrive at a conclusion as to whether the testimony of the complainant and the witnesses or the result of the inquiry or investigation reveal sufficient ground for proceeding in the complaint, and if not, to dismiss the same.

11. In the instant case, the order passed by the both the learned Metropolitan Magistrate as also the learned ASJ are reasoned orders. The fact that the respondent filed a reply in the criminal complaint lodged by the petitioner, as a power of attorney holder of his mother, whereupon a notice was issued by the learned SDM to him, calling upon him to file a reply, shows that the respondent was under an obligation to take a stand, putting forth his defence in the matter. Section 499 IPC postulates that in case there are accusations made in good faith in the said defence as set out in the Exception clauses to the said Section, then, defamation would not be made out. In the present case, the Eighth Exception is

applicable to the facts in hand, which is as below :

> "Eighth Exception – **Accusation preferred in good faith to authorized person.** - It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation."

12. Reliance has rightly been placed by the counsel for the respondent on the judgment of this Court in the case of **S.P.Satsangi Vs. Krishna Kumar Satsangi** reported as 142(2007) DLT 192 wherein the petitioner therein sought quashing of the summoning orders passed by the learned Metropolitan Magistrate in a complaint filed by the respondent (wife of the petitioner therein) under Sections 499 & 500 IPC alleging that in the divorce petition preferred by the petitioner, in order to prove cruelty, he had filed on the record, a tape recorded conversation which contained some utterances on his part which the complainant felt offended by on account of the imputations contained therein, to bring down her image and reputation. The learned Single Judge allowed the petition of the husband by holding that the annexure filed by the petitioner on the record of the divorce petition was with the Court of law, which had the authority on the subject matter in dispute and hence it could not be said that the intention was to defame the complainant. While holding so, the court observed that apart from filing Annexure-A on the judicial record, there was nothing in the complaint made by the respondent therein that the petitioner had circulated tape-recorded version to any other person, relations, friends etc.

13. In the case of **Dr. P. Sharma Vs. P.S. Popli and another** reported as 2002 I AD (DELHI) 569, a criminal complaint filed by the respondent therein against the petitioner was dismissed by the Magistrate. The respondent preferred a revision petition before the learned ASJ who allowed the same and the accused persons were ordered to be summoned and put on trial. Against the order passed by the learned ASJ, the petitioner came up in revision to the High Court, which was dismissed. Aggrieved by the said dismissal order, the petitioner preferred a SLP in the Supreme Court wherein he pleaded that the complaint filed by the respondent was false, mischievous and intended to blackmail him. The SLP was allowed by the Supreme Court and the complaint and the order of summoning were quashed. In the second round of litigation, the respondent filed a

complaint against the petitioner under Section 500 IPC alleging that the imputations made by him in the SLP were intended to harm his reputation. The petitioner was summoned for offence punishable under Section 500 IPC in the complaint. Upon appearing, he sought recalling of the summoning order by filing an application, which was dismissed. Aggrieved by the said dismissal order, the petitioner filed a revision petition before the High Court, which was allowed and the complaint and the proceedings thereon were quashed, as the court concluded that copy of the complaint and any other connected documents were filed with the SLP before the Supreme Court with the intention of getting the complaint quashed and the imputation preferred in good faith by the petitioner to get the summoning order quashed, could not be said with the intention or knowledge to cause harm to the reputation of the complainant. It was further observed that accusation were made before the Supreme Court which has authority over the subject matter in dispute.

14. Same is the position even in the present case. The reply filed by the respondent in the proceedings initiated by the mother of the petitioner under Section 133 Cr.P.C. was filed in the Court of law, which had the authority over the subject matter in dispute. The said reply was filed in good faith to get the complaint dismissed. It is not the case of the petitioner that apart from filing the said reply on the record, the same was also circulated to any person, relations or friends so as to treat it as a publication.

15. The position in the case of **Sunil Sareen Vs. Govt.of NCT of Delhi & Anr.** reported as 83 (2000) DLT 380 relied upon by the counsel for the petitioner is not different. In the said decision, the court held that the scope of inquiry under Section 202 Cr.P.C. is extremely restricted only to finding out the truth or otherwise of the allegations made in the complaint and that a full dress trial in the case only takes place after process is issued under Section 204 Cr.P.C. In the aforesaid case, reliance was placed on the decision of the Supreme Court in the case of **Mohinder Singh Vs. Gulwant Singh & Ors.** reported as JT 1992 (1) SC 542, and it was noticed that during the course of enquiry conducted under Section 202 of the Code, the enquiry officer had to satisfy himself on the evidence adduced by the prosecution, whether prima facie case had been made out so as to put the proposed accused on a regular trial and that no detailed enquiry was called for during the course of such an enquiry. Undoubtedly,

an enquiry under Section 202 Cr.P.C. is extremely restricted, but the option is still with the trial court to determine from the material placed on the record as to whether the process under Section 204 Cr.P.C. should be issued or whether the complaint should be dismissed under Section 203 Cr.P.C. on the ground that there is insufficient material to proceed further against the accused.

16. In the present case, after examining the evidence on the record, the learned Metropolitan Magistrate rejected the complaint of the petitioner for cogent and valid reasons. The aforesaid order dated 1.12.2006 was duly considered by the learned ASJ in appeal, before upholding the same by the impugned order dated 31.1.2009. The said decisions have been arrived at on the basis of a prima facie finding. As noted above, it is not obligatory on the part of the learned Metropolitan Magistrate to accept the testimony of the complainant as the gospel truth, and issue summons to the accused without applying his mind to the complaint. This Court does not find any illegality, arbitrariness or miscarriage of justice in the present case so as to entertain the present petition. The same is therefore dismissed as being devoid of merits, while leaving parties to bear their own costs.

ILR (2011) I DELHI 200
WRIT PETITION

EX-CONST. VIJENDER SINGH .....PETITIONER

VERSUS

UNION OF INDIA AND ORS. .....RESPONDENTS

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

W. P. (C) NO. : 14098/2009 DATE OF DECISION: 01.10.2010

Border Security Force Act, 1968—Section 117(2)—Border Security Force Rules, 1969—Rule 142—Petitioner charged with attempt to commit suicide—

Respondents contend petitioner entered plea of guilty before Summary Security Force Court (SSFC) and dismissed him from service—Order challenged in High Court—Plea taken, petitioner had never pleaded guilty to charge—Per contra, plea taken petitioner had prayed for mitigation of punishment—Held—Proceedings of court do not contain signatures of petitioner at any place at all in SSFC which militate against petitioner having so pleaded—Court is required to test legality and validity of findings returned by SSFC based on material before court and conviction of petitioner cannot be premised on any thing which may have come before them subsequently—Record made by hospital authority and police does not support charge for which petitioner was arraigned—Petitioner reinstated with all consequential benefits.

Learned counsel for the petitioner has contended that despite the explanation given by the petitioner and the fact that the police had found no substance or culpability for any penal offence of the petitioner, the respondents had found the petitioner guilty of the charge. The plea set up by the petitioner after such finding had been returned by the court as a last resort to seek mitigation of sentence cannot be treated as an admission of guilt.

In any case, this court is required to examine the material which was before the court in arriving at the conclusion of the petitioner's guilt. Certainly the conclusion cannot be tested on the basis of any statement which is attributed to the petitioner after the decision making. **(Para 20)**

Important Issue Involved: This court is required to test the legality and validity of the findings returned by Summary Security Force Court based on the material before the court and the conviction of the petitioner can not be premised on anything which may have come before them subsequently.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Anil Gautam and Mr. D.S. Ahluwalia, Advs.

FOR THE RESPONDENTS : Mr. Anjum Javed, Adv. along with Assistant Commandant Bhupinder, BSF.

CASES REFERRED TO:

1. *Sukanta Mitra* vs. *Union of India & Ors.*, MANU/JK/0017/2007 : 2007 (2) JKJ 197.
2. *Ex. Naik Subhash Chander* vs. *UOI & Ors.* W.P.(C) No.6036/2005.
3. *Lachhman (Ex.Rect.)* vs. *Union of India & Ors.*, 2003 II AD (Delhi) 103.
4. *The Chief of Army Staff & Ors.* vs. *Ex. 14257873 K. Sigmm Trilochan Behera*, LPA No. 254/2001.
5. *Vimal Kumar Singh* vs. *Union of India & Ors.* WP (C) No.236/2000.
6. *Shri Sukhbir Singh* vs. *Union of India and others* W.P.(C) No. 2683/1992.
7. *Union of India and Ors.* vs. *Ex-Havildar Clerk Prithpal Singh and Ors.* KLJ 1991 page 513.
8. *Uma Shanker Pathak* vs. *UOI & Ors.* 1989 (3) SLR 405.
9. *Prithpal Singh* vs. *Union of India & Ors.*, 1984 (3) SLR 675.

RESULT: Allowed.

GITA MITTAL, J. (Oral)

1. Rule D.B.

2. With the consent of both the parties, the petition is taken up for consideration and final disposal.

3. The respondents have produced the record before us in terms of the order dated 22nd December, 2009. Learned counsel for the parties have also been heard with regard to the issue raised by the petitioner.

Learned counsel for the respondents has relied upon the record of the case to make submissions.

4. It appears that so far as the factual matrix is concerned, there is really no dispute.

5. The petitioner was enrolled as Constable with the Border Security Force ('BSF' hereafter) in the year 2000. The available record of Summary Security Force Court ('SSFC' hereafter) shows that the petitioner had rendered satisfactory service of little over eight years before passing of the impugned order of dismissal on the 13th of October, 2008.

6. It appears that on the night intervening 30th June/1st July, 2008, there was an incident of firing and the petitioner is stated to have suffered a bullet injury from his own rifle on his left shoulder. The question which has been raised by the petitioner is that the same was on account of accidental firing for the reason that the petitioner had slipped while returning from late night duty while crossing a ditch as a consequence of which, the trigger of his rifle which was slung over his left shoulder got pressed resulting in the rifle going off and the bullet piercing the flesh of his left shoulder. The petitioner contends that he had reached the border outpost in such injured condition and informed the officers about the incident of firing whereafter the petitioner was medically treated for the injury received by him.

7. The respondents on the other hand have placed reliance on a record of evidence made under the provision of Border Security Force Act between 17th August, 2008 and 8th October, 2008 into the said incident. On a consideration thereof, the Commandant of the petitioner's Battalion passed an order on 8th October, 2008 itself that the petitioner be tried by the Summary Security Force Court ('SSFC' hereafter).

8. The original record of the proceedings of the SSFC have been placed before us.

9. The petitioner was arraigned on the following charges:-

"CHARGE SHEET

The accused No.00005142 Constable Vizender Singh of E Coy, 43 BN BSF is charged with:-

BSF ACT 1968 ATTEMPTING TO COMMIT

U/SEC-41(c) SUICIDE AND IN SUCH ATTEMPT DOING AN ACT TOWARDS THE COMMISSION OF THE SAME.

In that he,

A BOP Sowarwali on 01st July, 2008 at about 010020 hrs attempted to commit suicide by firing one round from his personal weapon 5.56 Insas Rifle bearing Butt No.138, body No.16609458."

10. The respondents have contended that the petitioner entered a plea of 'guilty' to the charge before the SSFC on 13th October, 2008. As a result he was found guilty thereof and sentence to dismissal from service.

11. It is an admitted position that there was no witness to the incident of firing. We find that the only evidence which has been relied upon the respondents to return a finding of conviction and guilt for the said charge is the said plea of guilt by the petitioner. It is submitted that in view of this plea, no trial proceedings were required to be conducted and no evidence was recorded by the SSFC.

12. The primary challenge to the proceedings of the SSFC laid by the petitioner rests on the contention that he had never pleaded guilty to the charge. It has been contended that for this reason, the proceedings of the court do not contain his signatures at any place. Perusal of the original record shows that the proceedings dated 13th October, 2008 of the SSFC do not contain the signatures of the petitioner. Rule 142 of the BSF Rules, 1969 prescribes as to how a plea of guilty or not guilty should be recorded by a Security Force Court which reads as follows :-

"142. General plea of "Guilty" or "Not Guilty".- (1)The accused person's plea of 'Guilty' or 'Not Guilty' (or if he refuses to plead or does not plead intelligibly either one or the other), a plea of 'Not Guilty' shall be recorded on each charge.

(2) If an accused person pleads 'Guilty' that plea shall be recorded as the finding of the Court but before it is recorded, the Court shall ascertain that the accused understands the nature of the charge to which he has pleaded guilty and shall inform him of

the general effect of that plea, and in particular of the meaning of the charge to which he has pleaded guilty, and of the difference in procedure which will be made by the plea of guilty and shall advise him to withdraw that plea if it appears from the record or abstract of evidence (if any) or otherwise that the accused ought to plead not guilty.

(3) Where an accused person pleads guilty to the first two or more charges laid in the alternative, the Court may after sub-rule (2) has been complied with and before the accused is arraigned on the alternative charge or charges, withdraw such alternative charge or charges as follow the charge to which the accused has pleaded guilty without requiring the accused to plead thereto, and a record to that effect shall be made in the proceedings of the Court".

13. In as much as, the respondents rely on a plea of guilt of the petitioner, it becomes necessary to consider the well settled principles laid down by the courts with regard to the manner in which such a plea is to be recorded. In this behalf, reference can be usefully made to the previous pronouncements of this court including the judgment dated 3rd August, 2010 in W.P.(C) No. 2683/1992 entitled **Shri Sukhbir Singh Vs. Union of India and others** and the judgment dated 31st May, 2010 in WP (C) No.236/2000 entitled **Vimal Kumar Singh Vs. Union of India & Ors.** The several binding judicial on the issue were considered and had been held as follows:-

"59. If an accused person pleads guilty to the charges, the Security Force Court is required to comply with the requirements of sub-rule 2 of rule 142. Such plea is mandatorily to be recorded as the finding of the court but before it is so recorded, the court is required to ascertain that the accused understands the nature of the charge to which he has pleaded guilty. The court is required to inform him of the general effect of that plea, and in particular of the meaning of the charge to which he has pleaded guilty. The court is also required to inform the accused person of the difference in procedure which will be followed by the court upon the accused entering a plea of guilty and shall advise him to withdraw that plea if it appears from the record or abstract of evidence (if any) or otherwise that the accused ought to plead not guilty.

Sub-rule 2 casts a duty on the court to ascertain from the accused, before recording of the plea of guilt, as to whether he understands nature of the charge to which he has pleaded guilty and shall inform him of the general effect of his plea after ensuring that he has understood the nature of the charge. The court shall enter the plea only thereafter and proceed with the trial accordingly.

60. Rule 81 stipulates the procedure which is to be followed on a plea of guilty. When the court has so recorded a finding of guilty in respect of the charge, the prosecutor then is required to read the record or the abstract of evidence, as the case may be to the court or inform the court of the facts contained therein. Thereafter, under sub-rule (3) of rule 81, the accused person may (a) adduce evidence of character and in mitigation of punishment; (b) address the court in mitigation of punishment, (c) proceed under Rule 101 when sub-rule (3) has been complied with. In accordance with Rule 101, the court shall take evidence of the general character, age, previous conviction and record of the conduct of accused person; decorations, reward, period spent in custody or confinement etc. The court would give an opportunity to the accused person to cross examine witnesses, to produce such record and address the court in mitigation of his punishment.

61. Similar statutory provisions governing army personnel are to be found in the Army Act & Rules thereunder. In the context of recording of pleas of guilt by court martials exercising jurisdiction thereunder, the courts have repeatedly emphasized that signatures of the accused especially on a plea of guilt, even though they are not statutorily required, ought to be taken as a matter of abundant caution.

62. The statutory scheme with regard to recording of a plea of guilt under the Border Security Force Act is similar to the scheme under the Army Act. The observations of the Jammu and Kashmir High Court on the manner in which a plea of guilt is to be recorded in 1984 (3) SLR 675 **Prithpal Singh Vs. Union of**

India & Ors., which arose in the context of the Army Act, shed valuable light on the issue which has been argued before us. On this question, in para 9 of the judgment, the court held as follows:-

> "10. The most important aspect of the case is as to whether the petitioner had pleaded guilty to the charges as is suggested by Mr. Hussain or not. Plea of guilt recorded by Lt. Col. Mehta is dehors Rule 115 of the Army Rules. In the first place the alleged plea of guilt is unsigned by the authorities. Surprisingly the petitioner also has not signed the alleged plea of guilt. At what stage word 'guilty' was recorded against each charge is not known. If it was recorded in presence of the accused/petitioner obviously his signatures would have been obtained on it. Then the minutes of the enquiry should have contained an advice to the petitioner not to plead guilty as enjoined by Rule 115 of the Army Rules. This important mandate of the Rule has been flagrantly violated. Therefore the proceedings conducted by the Summary Court Martial which have affected the petitioner's fundamental rights as he is deprived of his job are vitiated. The protection afforded by the procedure should not have been denied to the petitioner if it was intended to proceed against him under the Army Rules. As to whether charges were correct or not as already observed this Court cannot go into that aspect of the matter. But certainly this Court will set aside the punishment which is awarded to the petitioner on the ground that the decision to punish the petitioner was taken by contravening the mandate of Rules. Such a decision would be arbitrary and shall be violative of the guarantees contained in Article 14 of the Constitution. The argument of the learned Counsel for the respondent that the petitioner was not prejudiced in any manner during the Summary Court Martial proceedings is devoid of force. The petitioner has suffered punishment of dismissal from service and the punishment is awarded by conducting proceedings in such a manner which were neither fair not judicial. Could the Summary Court Martial observe the Rules governing the conduct of Summary Court Martial in breach. Answer

> to this question will be emphatic no in view of the glory of the Constitution and rights guaranteed by it."

The court had thus observed that if the statement was recorded in the presence of the accused/petitioner, obviously, his signatures would have been obtained on it.

63. On this very issue, in MANU/JK/0017/2007 : 2007 (2) JKJ 197 **Sukanta Mitra Vs. Union of India & Ors.,** the court observed as follows:-

> "9. This apart the fact remains that the appellant has been convicted and sentenced on the basis of his plea of guilt. The plea of guilt recorded by the Court does not bear the signatures of the appellant. The question arising for consideration, therefore, is whether obtaining of signatures was necessary. In a case **Union of India and Ors. v. Ex-Havildar Clerk Prithpal Singh and Ors.** KLJ 1991 page 513, a Division Bench of this Court has observed:
>
> "The other point which has been made basis for quashing the sentence awarded to respondent-accused relates to clause (2) of rule 115. Under this mandatory provision the court is required to ascertain, before it records plea of guilt of the accused, as to whether the accused undertakes the nature of the charge to which he has pleaded guilty and shall inform him of the general effect of that plea and in particular of the meaning of charge to which he has pleaded guilty. The Court is further required under this provision of law to advise the accused to withdraw that plea if it a appears from summary of evidence or otherwise that the accused ought to plead not guilty. How to follow this procedure is the main crux of the question involved in this case. Rule 125 provides that the court shall date and sign the sentence and such signatures shall authenticate of the same. We may take it that the signature of the accused are not required even after recording plea of guilt but as a matter of caution same should have been taken."
>
> xxx xxx
>
> 11. Admittedly, in the present case signatures of the

accused/appellant have not been obtained on the plea of guilt recorded by the BSF Court which as a matter of caution must have been obtained and nor it is revealed from the record that the appellant was ever informed about the general effect of the plea of guilt."

64. Our attention has also been drawn to the judgment of this court dated 17th January, 2008, passed in LPA No. 254/2001 entitled **The Chief of Army Staff & Ors. Vs. Ex. 14257873 K. Sigmm Trilochan Behera,** wherein the court had occasion to consider the case where plea of guilt of the respondent was recorded on a printed format. The court deprecated the non-recording of complete plea which was not signed by the respondents as well. This case had also arisen in the context of recording of a plea of guilty by a court martial under the Army Act and in a similar situation, the court observed as under.

> "5. Secondly, the signatures of the respondent were not obtained on any of these proceeding. The plea of the respondent was recorded on a printed format. The column of arraignment reads as under :
>
> "By the Court-How say you No. 14257873K ULNK Trilochan Behera are you guilty or not guilty of the ..... charge preferred against you?
>
> The answer is recorded as "Guilty". It does not mention what was the charge though a separate chargesheet has been placed on record which is dated 22nd March, 1994, which is not signed by the respondent. The complete plea of guilt of the respondent was not recorded."

No date was mentioned on the paper where this was recorded. The record did not bear the signatures of the judges as well. Certain other procedural guidelines had also not been complied. The court held that failure to comply with the prescribed procedure amounted to violation of the procedural safeguards provided in Army Rule 115(2) and were violative of the rights of the accused under Article 14 of the Constitution of India.

65. On the same issue, in 2003 II AD (Delhi) 103 **Lachhman (Ex.Rect.) v. Union of India & Ors.,** it was held :-

> "13. The record of the proceedings shows that the plea of guilty has not been entered into by the accused nor has it been recorded as per Rule 115 inasmuch neither it has been recorded as finding of court nor was the accused informed about the general effect of plea of guilt nor about the difference in procedure which is involved in plea of guilt nor did he advise the petitioner to withdraw the plea if it appeared from the summary of evidence that the accused ought to plead not guilty nor is the factum of compliance of Sub-rule (2) has been recorded by the Commanding Officer in the manner prescribed in Sub-rule 2(A). Thus the stand of the respondents that the petitioner had entered into the plea of guilt stands on highly feeble foundation."

66. In **Uma Shanker Pathak vs. UOI & Ors.** 1989 (3) SLR 405 Allahabad High Court had occasion to deal with this question and held that :-

> "10. The provision embodies a wholesome provision which is clearly designed to ensure that an accused person should be fully forewarned about the implications of the charge and the effect of pleading guilty. The procedure prescribed for the trial of cases where the accused pleads guilty is radically different from that prescribed for trial of cases where the accused pleads 'not guilty'. The procedure in cases where the plea is of 'not guilty' is far more elaborate than in cases where the accused pleads 'guilty'. This is apparent from a comparison of the procedures laid down for these two classes of cases. It is in order to save a simple, unsuspecting and ignorant accused person from the effect of pleading guilty to the charge without being fully conscious of the nature thereof and the implications and general effect of that plea, that the framers of the rule have insisted that the court must ascertain that the accused fully understands the nature of the charge and the implications of pleading guilty to the same."

67. In the decision dated 8th September, 2008 in W.P.(C) No.6036/2005 **Ex. Naik Subhash Chander Vs. UOI & Ors.**

this court had occasion to test the propriety and legality of a record of a summery security force court which is identical to that in the present case. Ex Naik Subhash Chander was tried for committing an offence under section 20 of the BSF Act. The plea of guilt against the petitioner had been recorded in identical terms. The observations of the court can also be usefully extracted and read as follows:-

> "11.....The possibility of its being manipulated cannot be ruled out. Such like certificates can be prepared at any time. This justifies the need for obtaining the signatures of the accused viz. to lend authenticity to such a record."

68. In the above background, compliance with the statutory mandate has to be real. No cosmetic satisfaction or compliance could meet the requirements of law and a bald certification by the respondents that statutory provisions have been complied with is insufficient. Such certification certainly does not satisfy the legal requirements.

69. Our attention is drawn to the photocopy of these proceedings which has been placed on record by the petitioner. The plea of guilt of the petitioner has been recorded on a typed format, the columns whereof reads as follows :-

> "Q-1. How say you No. 860014234 L/NK Vimal Kumar Singh, are you guilty or not guilty of the charge, which you have heard read?
>
> Ans. GUILTY"
>
> Only the word "Guilty" is handwritten.

70. We find that the following had already been typed below the space for the above answer:-

> "The accused having pleaded guilty to the charge, the court read and explained to the accused the meaning of the charge to which he has pleaded guilty and ascertains that the accused understands the nature of the charge to which he has pleaded guilty. The court also informed the accused the general effect of that plea and the difference in procedure which will be followed consequent to the said plea. The court satisfies itself that the accused understands the charge and the effect of that plea and the difference in procedure which will be followed consequent to the said plea. The court satisfy itself that the accused understands the charge particularly the difference in procedure."

The above indicates that the SSFC had at the outset assumed that the petitioner would plead guilty and has proceeded on that basis.

xxx xxx xxx

72. Perusal of this document does not show as to what was the charge to which was explained to the petitioner to which he pleaded guilty and it is left to presumption that it was actually the contents of the charge sheet dated 28th December, 1998 which was put to the petitioner and that he pleaded guilty to the same.

73. It is noteworthy that a separate charge sheet has been placed on record dated 17th February, 1999. This charge sheet also does not bear the signatures of the petitioner.

74. Even if it was to be held that no illegality can be founded in the failure to obtain signatures by the court, it is clearly evident that there was no real trial of the petitioner at all and that the respondents had proceeded against the petitioner in a premeditated manner after having predetermined the result of the proceedings."

14. In view of the legal position and principles laid down in the several judicial pronouncements noted hereinabove, so far as the alleged plea of guilt before the SSFC is concerned, the same does not inspire any confidence. The proceedings of the court do not contain the signatures of the petitioner at any place at all in the SSFC which would militate against the petitioner having so pleaded.

15. It is an admitted position that the petitioner was admitted to Civil Hospital, Fazilka which had referred the petitioner to Guru Gobind Singh Medical College, Faridkot for further treatment.

16. The respondents have placed before this court the record of the petitioner's treatment both at the Civil Hospital, Fazilka as well as Guru

Gobind Singh Medical College, Faridkot. When the petitioner was produced before the Civil Hospital on the 1st of July, 2008, we find that the doctor noted that the petitioner had suffered an "alleged accidental gun-shot injury". The petitioner was referred and admitted to the Guru Gobind Singh Medical College also on the 1st of July, 2008 and discharged therefrom on 10th July, 2008. A final diagnosis was recorded by the hospital and mentioned in the discharge form issued to the petitioner which also states the injuries suffered by the petitioner were by "alleged accidental gun-shot injury".

17. It is noteworthy that during the course of inquiry into the matter, the Police Station, Sadar Fazilka had recorded a diary No.24 on the 3rd of July, 2008. A true copy thereof has been placed by the petitioner before us. In this daily diary, the police had recorded the statement of the petitioner which is to the following effect:-

> "I, Constable Vajinder Singh of BSF No.00005142, „E. Company, 43 Battalion S/O Shri Dalip Singh resident of village Nidana Distt Jind, PS Julana, Haryana, was deployed at BSF BOP Sawarwali, PS Sadar Fazilka. On the intervening nigt of 30.06.08 and 01.07.08 I was coming back while performing my duty along with border fencing near out BSF BOP. Because of night my foot got slipped over some ditch ad while I was falling on the ground the trigger of my INSAS Rifle, which was on my left shoulder, got pressed with the result the bullet pierced through the flesh on my left shoulder. I reached my BOP in the injured condition and infirmed my officers about the fire. They who got me admitted in Civil Hospital Fazilka they referred me to Guru Gobind Singh Medical College Faridkot for further treatment. This incident of accidental fire had taken place because of sudden slip of my foot over some ditch while I was coming back fromˇ my duty and for that accidental fire nobody else is to be blamed and also I do not want to take action against any person. The above statement heard, signed by the individual in English as Correct".

It appears that a complaint to this effect was lodged by the BSF with the civil police as well which after investigation had closed the case supporting the conclusion that the case of suicide was not made out.

18. We may notice that based on the investigation conducted by the police and the first statements of the petitioner recorded by the doctor on the 1st of July, 2008 and the police on the 3rd of July, 2008, it is manifest that the petitioner had consistently explained that he had suffered injury on account of an accidental firing. This stand has been accepted by the police.

In this background, all these circumstances taken together would support the plea set up by the petitioner that he had not pleaded guilty to the charge levelled against him.

19. Learned counsel for the respondents has drawn our attention to the petitioner's prayer for mitigation of the punishment which is stated to have been set up in a signed communication purportedly addressed by the petitioner to the SSFC. Interestingly, the original document relied before us is a type written document which contains no date at all. This document sets up a plea of sickness of the petitioner's wife and daughter, who were dependent upon the petitioner's service, in support of his prayer for mitigation of the sentence.

20. Learned counsel for the petitioner has contended that despite the explanation given by the petitioner and the fact that the police had found no substance or culpability for any penal offence of the petitioner, the respondents had found the petitioner guilty of the charge. The plea set up by the petitioner after such finding had been returned by the court as a last resort to seek mitigation of sentence cannot be treated as an admission of guilt.

In any case, this court is required to examine the material which was before the court in arriving at the conclusion of the petitioner's guilt. Certainly the conclusion cannot be tested on the basis of any statement which is attributed to the petitioner after the decision making.

21. Interestingly, the respondents have placed reliance on this undated communication available in the record which has been purportedly received by them on 25th November, 2008. Perusal of this communication shows that a completely new story has been mentioned therein more than 16 months after the incident. Neither of these petitions inspires any confidence and are clearly desperate pleas of a person without means and resource seeking to protect his employment.

The petitioner submitted a statutory petition under Section 117(2) of the Border Security Force Act assailing the finding and sentence of the SSFC which was addressed to the Director General of the BSF. The petitioner has specifically challenged the plea of guilt attributed against him and reiterated that the incident arose out of accidental firing. The statutory petition was rejected by the authorities by the order dated 22nd April, 2009.

22. As noted hereinabove, this court is required to test the legality and validity of the findings returned by the SSFC based on the material before the court and the conviction of the petitioner cannot be premised on anything which may have come before them subsequently.

23. In any case, there are material contradictions between the contents of this undated communication received by the respondents on 25th November, 2008 and the explanation rendered by the petitioner in the statutory petition dated 7th March, 2009.

24. Mr. Anil Gautam, learned counsel appearing for the petitioner has further explained that after the respondents found him guilty and convicted him for the charge of committing suicide, the petitioner made a request for restoration of his service keeping in view the extreme sickness of his wife and daughter.

25. In any case, the independent record made by the hospital authority as well as police does not support the charge for which the petitioner was arraigned.

26. For all these reasons, we find substance in the challenge laid by the petitioner to his conviction by the SSFC by the order dated 13th October, 2008. For the same reasons, the punishment of dismissal imposed upon the petitioner and the order dated 29th April, 2009 passed by the respondents rejecting the petition under Section 117(2) of the Border Security Force Act are also not sustainable.

27. In view of the above discussion, the order of conviction and sentence dated 13th October, 2008 passed by the SSFC and the order dated 29th April, 2009 are hereby set aside and quashed.

28. As a consequence, the petitioner shall be entitled to reinstatement in service with all consequential benefits including back wages and

restoration of seniority, etc. in accordance with the prescribed procedure.

29. The respondents shall pass an appropriate order in terms of above directions within a period of twelve weeks from today which shall be communicated to the petitioner.

30. For the reasons that we have awarded back wages, we are not inclined to award costs.

31. Dasti to the parties.

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LPA

ABW INFRASTRUCTURES LTD. & ANR. ....APPELLANTS

VERSUS

RAIL LAND DEVELOPMENT AUTHORITY ....RESPONDENT

(DIPAK MISRA, CJ. AND MANMOHAN, J.)

LPA NO. : 264/2010 DATE OF DECISION: 18.10.2010

Constitution of India, 1950--Order passed by Ld. Single Judge in Writ Petition (C) Challenged by appellants as their prayer for issuance of mandamus to respondent to agree to suggestions and amendments proposed by them to draft agreement, dismissed—Respondent urged, petitioner awarded project for development of plot being highest bidder with stipulation that bid amount was to be paid in installments—Appellants did not pay the first installment and only gave a performance guarantee and made payments towards interest and success fee—This resulted in series of breach on part of appellants, hence, termination of contract took place—Appellants filed writ petition in

which respondent directed to abide by the contract - Even thereafter appellants did not pay first installment but approached respondent for amendment of tender terms and also sought renegotiation of terms of tender—Thereupon Respondent vide letter informed appellants, rejecting suggestions for amendment and modifications and it also invoked bank guarantee furnished by the appellants—Aggrieved appellants, then again filed writ petition which was dismissed by the Ld. Single Judge—According to appellants, Writ Court has jurisdiction to address itself even with regard to unfair practice adopted before entering into agreement and also after entering into the agreement—Held : it may, however, be true that where serious disputed questions of fact are raised requiring appreciation of evidence, and, for determination thereof, examination of witnesses would be necessary; it may not be convenient to decide the dispute in a proceeding under Article 226 of the Constitution of India—From the entire gamut of facts which have been brought on record and projected, it is well nigh impossible to say whether the termination of contract and the forfeiture of the earnest money by the respondent is unreasonable or arbitrary and thereby invites the frown of Article 14 of the Constitution of India—It is extremely difficult to state that there are no disputed questions of fact—The petitioner should approach the appropriate legal forum as advised in law.

Thereafter, their Lordships referred to the decision in **Century Spg. and Mfg. Co. Ltd. v. Ulhasnagar Municipal Council,** (1970) 1 SCC 582 wherein it has been held that merely because a question of fact was raised, the High Court will not be justified in requiring the party to seek relief by somewhat lengthy, dilatory and expensive process by a civil suit against a public body. The questions of fact raised by the appellants in this case were elementary. **(Para 29)**

Eventually, as is perceivable, the Apex Court adverted to the facts and came to hold as follows:

> "51. …Merely because the first respondent wants to dispute this fact, in our opinion, it does not become a disputed fact. If such objection as to disputed questions or interpretations is raised in a writ petition, in our opinion, the courts can very well go into the same and decide that objection if facts permit the same as in this case. We have already noted the decisions of this Court which in clear terms have laid down that mere existence of disputed questions of fact ipso facto does not prevent a writ court from determining the disputed questions of fact. [See: **Gunwant Kaur** (supra)]." **(Para 31)**

In the said case, ultimately, their Lordships interfered holding that in such a factual situation, the facts of the case do not and should not inhibit the High Court or the Apex Court from granting relief sought for by the petitioner. **(Para 32)**

Important Issue Involved: Where serious disputed questions of fact are raised requiring appreciation of evidence, and, for determination thereof, examination of witnesses would be necessary; it may not be convenient to decide the dispute in a proceeding under Article 226 of the Constitution of India. An appropriate legal forum as advised in law is the remedy.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANTS : Mr. Sunil Kumar, Senior Advocate with Mr. Harsharan Singh and Mr. Dhiraj, Advocates

FOR THE RESPONDENT : Mr. Soli J. Sorabjee, Senior Advocate with Mr. Amit Kumar. Mr. Ashish Kumar, Mr. Ritesh Ratnam and Mr.

Shashank, Advocate.

CASES REFERRED TO:

1. *Purvankara Projects Ltd.* vs. *Hotel Venus International,* (2007) 10 SCC 33.
2. *Noble Resources Ltd.* vs. *State of Orissa & Anr.,* (2006) 10 SCC 236.
3. *ABL International Limited and Anr.* vs. *Export Credit Guarantee Corporation of India Limited and Ors.,* (2004) 3 SCC 553.
4. *Cochin International Airport Ltd.* vs. *Cambatta Aviation Ltd. & Ors.,* (2000) 2 SCC 617.
5. *Air India Ltd.* vs. *Cochin International Airport Ltd.,* (2000) 2 SCC 617.
6. *Air India Limited* vs. *Cochin International Airport Limited,* (2000) 2 SCC 617.
7. *Monarch Infrastructure Private Limited* vs. *Commissioner, Ulhasnagar Municipal Coropration,* (2000) 5 SCC 287.
8. *Mahabir Auto Stores and others* vs. *India Oil Corporation and others,* AIR 1990 SC 1031.
9. *Assistant Excise Commissioner & Ors.* vs. *Issac Peter & Ors.,* (1994) 4 SCC 104.
10. *Whirlpool Corporation* vs. *Registrar of Trade Marks,* (1998) 8 SCC 1.
11. *Dwarkadas Marfatia and Sons* vs. *Board of Trustees of the Port of Bombay,* (1989) 3 SCC 293.
12. *Life Insurance Corporation of India* vs. *Escorts Limited and others,* 1986 (8) ECC 189.
13. *Gujarat State Financial Corporation* vs. *Lotus Hotels Private Limited,* AIR 1983 SC 848.
14. *Ajay Hasia* vs. *Khalid Mujib Sehravardi,* (1981) 1 SCC 722: (AIR 1981 SC 487).
15. *New Bihari Biri Leaves Co.* vs. *State of Bihar,* (1981) 1 SCC 537.

16. *R.D. Shetty* vs. *International Airport Authority of India,* (1979) 3 SCC 489 : (AIR 1979 SC 162).
17. *Radhakrishna Agarwal* vs. *State of Bihar,* (1977) 3 SCC 457.
18. *E.P. Royappa* vs. *State of Tamil Nadu,* (1974) 4 SCC 3: (AIR 1974 SC 555).
19. *South Kheri and others* vs. *Ram Sanehi Singh,* AIR 1973 SC 205.
20. *K.N. Guruswamy* vs. *State of Mysore and others,* 1955 (1) SCR 305.

RESULT: Appeal dismissed.

DIPAK MISRA, CJ.

1. In this intra court appeal, the legal substantiality and vulnerability of the order dated 10.12.2009 passed by the learned Single Judge in W.P.(C) No.13590/2009 is called in question.

2. The factual scores as undraped are that the appellants – petitioners (hereinafter referred to as 'the appellants'), M/s ABW Infrastructure Ltd., on the basis of the highest tender bid of Rs.1026 crores, was awarded project for development of plot at Sarai Rohilla, Kishanganj, New Delhi as per letter of acceptance dated 19.5.2008 with the stipulation that the said amount was to be paid by the appellants to the respondent, Rail Land Development Authority (for short 'the RLDA'), in installments. The first installment was fixed at Rs.513 crores which was to be paid within 30 days from 19.5.2008, i.e., the date of issue of letter of acceptance. The appellants did not pay the first installment. It had only given a performance guarantee of Rs.10 crores and had made other payments amounting to Rs.29 crores to the respondents towards interest and success fee.

3. It is worth noting, at one point of time, the RLDA, the respondent herein, desired to review the project allotted to the appellants and resile from the letter of acceptance which compelled the appellants to file WP(C) No.4320/2008 wherein this Court, on 12.8.2008, directed the respondents to abide by the contract awarded to the appellants vide letter dated 19.5.2008. Be it noted, in the said order, this Court had quashed

the communication dated 24.5.2008 by which the respondent had taken a decision to review the order.

4. After the said order was passed, the appellants did not pay Rs.513 crores but approached the RLDA for amendment of the tender terms. The said amendment was sought on 24.4.2009 after expiry of 8 months from the date of order passed in WP(C) No.4320/2008, i.e., 12.8.2008. The appellants sought renegotiation of the terms of the tender. Similar request was reiterated by letter dated 16.7.2009. As set forth, the RLDA, by letter dated 20.8.2009, agreed to examine the request of the appellants for modification of the existing agreement to the extent mentioned therein. The learned Single Judge, as is evincible from the order impugned, has referred to the said letter and analysed the same to arrive at the conclusion that the said communication clearly mentions that the modifications suggested and pending consideration would be applicable and valid only if a renewed Joint Bidding Agreement was submitted to the RLDA and the agreement was signed and, hence, till the signing of the agreement, the parties were obligated to be bound by the original obligations. The learned Single Judge further held that on a scrutiny of the said letter, it was clear as crystal that the appellants should communicate their willingness to go ahead with the project within 10 days of issuing the aforesaid letter. In pursuance of the aforesaid letter, the appellants sent a letter dated 29.8.2009 which indicated, according to the learned Single Judge, no unconditional and absolute acceptance. Thereafter, the RLDA, on 18.9.2009, circulated a draft modified development agreement asking the appellants to offer comments on the said document clearly outlining the paragraph / clause which was not in accord with the decision communicated by the RLDA through their letter dated 20.8.2009. It has further clarified that the agreement sent to the appellants for their comments was merely a draft and would be finalized only after approval of the competent authority. As is evincible, the appellants, on 7.10.2009, entered into correspondence with the RLDA raising various objections to several clauses of the draft agreement and suggested amendment. They gave a list of suggestions / amendments for favourable consideration and incorporation in the modified development agreement. The RLDA, by letter dated 9.10.2009, informed the appellants that on consideration of the suggestions for amendment and modification, the same were not acceptable. Thereafter, the appellants sent two letters dated 16.10.2009 and 19.10.2009 which were responded to by the RLDA expressing its

inability to accept the same. The RLDA invoked the bank guarantee and the appellants, vide CM No.15228/2009, assailed the action for invoking the bank guarantee and for quashment of the communications dated 1.12.2009 and 2.12.2009.

5. Before the writ court, it was prayed that a mandamus should be issued to the RLDA to agree to the suggestions and the amendments proposed by them to the draft agreement since the stand of the RLDA is absolutely arbitrary and smacks of unreasonableness. The learned Single Judge, after exposition of the facts and the stand and stance put forth by the parties, came to hold that the appellants had themselves accepted the communication dated 19.5.2008 and this Court had opined that the letter of acceptance would constitute the contract between them; that the appellants wanted to renegotiate the terms of the contract which was considered by the RLDA and a draft agreement was circulated and the appellants wanted change in the draft agreement which was not accepted by the RLDA; that in the case at hand, there has been no wrongful termination of a contract by a government company which enjoys monopoly status; that the State or instrumentalities of the State can evolve rational method to arrive at a decision and can fix their own terms of invitation to tender which are normally not to be interfered with; that on the earlier occasion, the appellants had filed a writ petition contending, inter alia, that there was a concluded contract and the amendments and suggestions requested by the appellants have not been accepted by the RLDA; that the appellants had not deposited Rs.513 crores till the date of filing of the writ petition; that the decisions referred in **Mahabir Auto Stores and others v. India Oil Corporation and others,** AIR 1990 SC 1031, **ABL International Limited and Anr. v. Export Credit Guarantee Corporation of India Limited and Ors.,** (2004) 3 SCC 553, **K.N. Guruswamy v. State of Mysore and others,** 1955 (1) SCR 305, the DFO, **South Kheri and others v. Ram Sanehi Singh,** AIR 1973 SC 205, **Gujarat State Financial Corporation v. Lotus Hotels Private Limited,** AIR 1983 SC 848 and **Life Insurance Corporation of India v. Escorts Limited and others,** 1986 (8) ECC 189, **Purvankara Projects Ltd. v. Hotel Venus International,** (2007) 10 SCC 33, **Air India Limited v. Cochin International Airport Limited,** (2000) 2 SCC 617 and **Monarch Infrastructure Private Limited v. Commissioner, Ulhasnagar Municipal Coropration,** (2000) 5 SCC

287 are not applicable to the case at hand and that the writ petition was devoid of any substance. Being of this view, the learned Single Judge dismissed the writ petition.

6. Questioning the legal sustainability of the order passed by the learned Single Judge, Mr. Sunil Kumar, learned senior counsel for the appellants, has raised the following contentions:

(i) The learned Single Judge has failed to appreciate the necessity for making suitable and necessary changes in the draft development agreement failing which the project had become unworkable and the said amendments were imperative in the facts and circumstances of the case.

(ii) The writ court has not appreciated that the appellants were not praying for issue of mandamus to the respondents to accede to the suggestions and amendments proposed by the appellants to the draft agreement, but were agitating a plea that the respondents, after having accepted to revise the development agreement in terms of the suggestions made by the appellants, as is evincible from the communication dated 20.8.2009, declined to carry out the consequential changes which exhibits unfair and arbitrary action on the part of the respondents which is impermissible in law.

(iii) The respondent has acted totally arbitrarily and unreasonably inasmuch as the lease deed which had been executed for the first track of land could not have been cancelled and the amount paid on that score could not have been forfeited. The respondent is under obligation to permit development of area in proportion to the investment made enabling private equity players and others referred to by the appellants in its communications dated 16.10.2009 and 19.10.2009 to invest in the project and achieve financial closure. The action of the respondent smacks of unfairness since during the pendency of the writ petition, the respondent issued a notice of termination dated 1.12.2009 requiring the appellants to make the payment within seven days but invoked the bank guarantee furnished by the appellants on 2.12.2009.

(iv) The learned Single Judge has committed illegality by not taking note of the fact that the issue of entering into a contract or not entering into a contract by an instrumentality of the State rests on the touchstone of reasonableness and when it is manifest that the respondent has shown total unreasonableness, the writ court would have been well advised to

interfere and not throw the writ petition as not being entertainable.

6. Mr. Soli J. Sorabjee, learned senior counsel appearing for the RLDA, resisting the aforesaid submissions and supporting the order of the learned Single Judge, has advanced the following proponements:

(i) The appellants committed breach of contract on many an occasion putting the RLDA to immense jeopardy and, therefore, it is not entitled to invoke the equitable and extra-ordinary jurisdiction of this Court.

(ii) The RLDA has not acted in an arbitrary or unfair manner but as a prudent owner would behave under such circumstances within the reasonable parameters and, hence, the communication terminating the contract cannot be found fault with.

(iii) Once a finding had been arrived at in the earlier writ petition that there was a concluded contract and was binding on the parties, the appellants could not have sought amendments in the original contract in a unilateral manner putting forth terms which suited them.

(iv) The amendments which were proposed by the appellants were considered by the Board of RLDA and the same were not accepted by the Board and such non-acceptance is based on a commercial principle and, therefore, the writ court has correctly not delved upon the same.

(v) The conduct of the appellants, as is evident from the communications and actions, would not entitle them to any kind of relief in exercise of jurisdiction under Article 226 of the Constitution of India inasmuch as it no only pertains to disputed questions of fact but also certain aspects which are founded on commercial norms and are difficult to be delved into in a writ petition.

(vi) The changes sought for in the agreement and denial thereof by the RLDA involve many a factor and the said aspects cannot be adverted to by the writ court and, therefore, the learned Single Judge has appositely declined to entertain the writ petition.

7. To appreciate the rivalised submissions raised at the Bar, it is essential to refer to certain chronology of events. The Railways (Amendment) Act, 2005 [No.47 of 2005] came into force on 15.9.2005 by bringing certain amendments to the Railways Act, 1989. The purpose of bringing the amendment was to supplement their financial resources

through non-tariff measures like commercial utilization of land and the air space by constituting a separate authority called the RLDA under the Railways Act, 1989 which could exclusively deal with the commercial development of railway land and the air space above such land. Section 4-E confers power on the authority to enter into agreements and execute contracts. In pursuance of the amended provisions, the Railways took certain areas for development and, accordingly, the bids were called for a project for development of plot at Sarai Rohilla, Kishanganj, New Delhi. A letter of acceptance was sent on 19.5.2008. In the said letter of acceptance, it was mentioned that the financial bid of Rs.1026 crores (rupees one thousand and twenty six crores only) was accepted and the consortium of the appellants had been declared as the 'Selected Bidder' for the project subject to the fulfillment of certain terms and conditions incorporated therein. Clause (g) of the said letter of acceptance dealt with 'Payments by the Developer'. The relevant clauses (g)(i) and (g)(vii), being germane for the present purpose, are reproduced below:

> "Payments by the Developer
>
> (g) You shall pay to RLDA the Upfront Lease Premium quoted by you/your Consortium as under:
>
> (i) A sum of Rs.513,00,00,000/- (Rupees Five hundred and thirteen Crores only) being the First Instalment i.e. 50% (Fifty percent) of the Upfront Lease Premium, vide demand draft / banker's cheque in favour of Rail Land Development Authority and payable at Delhi, within 30 days from the date of the issue of this Letter of Acceptance. You shall also furnish alongwith the first instalment, Bank Guarantees in the format prescribed in the RFP, for the amounts equal to the second and third instalments of the Upfront Lease Premium plus applicable taxes, as mentioned in paras (ii) and (iii) below, which shall remain valid for a period of 30 days beyond the respective due dates. (vii) If at the time of handling over of the land, the area of the plot leased is found to be at variance from that stated in the RFP document, then the difference in Upfront Lease Premium payable to RLDA / receivable by you will be determined pro-rata, based on the total Upfront Lease Premium payable. It is clarified that such adjustment in area shall be effected only for the leased site area, without any

> change in the Redevelopment Area of 4.37 Hectares given on license basis."

8. Clause (4) deals with execution of the development agreement and lease deed and the same, being relevant, is reproduced below:

> "(4) RLDA shall execute the Development Agreement with the Developer after all the following conditions have been met:
>
> (a) Receipt of the first installment of the Upfront Lease Premium along with bank guarantees for the second and third installments from the Developer within the specified time limit,
>
> (b) Receipt of Performance Bank Guarantee from the Developer
>
> (c) Incorporation of the SPV (the Developer)
>
> (d) Minimum paid up capital subscribed by the SPV as required under law.
>
> (e) Payment of Success Fees to IL&FS Infrastructure Development Corporation Limited as mentioned above.
>
> (f) Any other condition mentioned in this LOA."

9. From the aforesaid communication, it is clear as crystal that the first, second and third installments were to be paid by 18.6.2008, 18.2.2009 and 18.11.2009 respectively. When the matter stood thus, the RLDA issued communication dated 24.5.2008 for review as the Government was desirous of reviewing the allotment of the Railway land. Being grieved by the said communication, the appellants preferred W.P.(C) No.4320/2008 which was disposed of on 12.8.2008 by a Division Bench of this Court and it was held as follows:

> "7. We have perused the records of the case and heard the Counsel for the Parties. In the circumstances and the submissions made hereinabove, we are of the view that the grievances of the Petitioners are justified. The concluded contract had come into existence evidenced by the Letter of Acceptance issued on 19th May, 2008 to the Petitioners. The said contract is also in public interest as the bid of the Petitioners is about Rs. 250 Crores higher than the next bidder. The Petitioners, after the acceptance

of the contract, have committed themselves financially. Even upto date no decision on the proposed review has been taken. The Respondent No. 1 cannot be permitted to frustrate the said contract when no decision on the review has been taken.

8. We, therefore, allow this writ petition. The impugned communication dated 24.5.2008 is quashed and the Respondents are directed to abide by the Contract awarded to the Petitioners vide letter dated 19th May, 2008. We, however, make it clear that, as also agreed by the Counsel for the petitioners on instruction that the Petitioner shall not claim any equity or damages against the Respondents for any delay caused by the issuance of impugned communication and will abide by the terms of the Original Letter of Acceptance dated 19th May, 2008, deeming as if the same was issued with effect from today. All financial and other commitments/obligations will be completed on the basis of the said Letter ofAcceptance dated 19th May, 2008. No order as to costs.

10. On a perusal of the aforesaid order, it is clear as crystal that the Division Bench held that the contract was a concluded one and the appellants cannot claim any equity or seek damages against the respondent for any delay caused by the issuance of the impugned communication and would abide by the terms of the original letter of acceptance dated 19.5.2008 deeming the same was issued with effect from that day and all financial and other commitments / obligations would be completed on the basis of the said letter of acceptance dated 19.5.2008. It is not in dispute that extensions were granted for payment of the amount as earlier agreed. Despite the aforesaid verdict, the appellants did not pay Rs.513 crores but approached the RLDA for amendment of the tender notice. The first communication was made on 24.4.2009. The said letter was a communication to the respondent whereby the respondent had required the appellants to honour the obligations by 30.4.2009. As is patent, in the said communication, the appellants had asked for amendments and renegotiation of the terms of the tender. In the said letter, many a term and condition was incorporated. We think it appropriate to quote the following portion from the said letter:

"In such a scenario, there is a pressing need for the RLDA to apprise itself more fully of actions taken by other Government

organization seeking to preserve existing contracts and not having to face the rigors of retendering in rapidly changing market conditions.

Further, the following facts would reveal that RLDA don't want to appreciate the prevailing economic and financial downturn in the market and is not interested in successful execution of the subject project.

1. That whereas the reserve price for the subject project by RLDA was fixed at Rs.675 crores, the second highest bidder had offered a price of Rs.757 crores only. It was our Consortium which had given an offer of Rs.1,026 crores representing, even at that point of time an excellent value realization for the RLDA. It would be apparent to mention here that since the award of the contract, the property prices have gone down by 35 to 40% and the present market value of the subject Plot is not more than INR 650 Crores.

2. That surprisingly, after accepting our bid and creating a valid contract, RLDA signified to us its intention to "review" the matter of allotment of railway land at Sarai Rohilla on 90 years lease for essentially residential purpose. This step of RLDA forced us to seek necessary remedy through the courts at Delhi. After a crucial period of three months, the sanctity of the contract was upheld by the Honorable Delhi High Court by its judgment order dated 12th August, 2008. Even after the judgment of the Honorable High Court the uncertainty remained in the matter as RLDA intended to file appeal in the Apex Court against the judgment. As such, the position of uncertainty created by the RLDA affected our efforts to tie up the financial arrangements with various institutions. The time when the Project was awarded was ripe and the banks / financial institutions were anxious to finance the project. Had RLDA not created uncertainty in the matter after the issue of Letter of Award, we would have certainly achieved the financial closure in due time. With the prevailing uncertainty in the matter the banks and the financial institutions started loosing their interest in the Project.

3. That since November, 2008 we have been requesting RLDA

to consider the alternative proposals submitted by us. Although, time and again RLDA has been convening meetings with us but they remain inconclusive even after spending long hours in the meetings.

4. That in the last few months there has been an unprecedented economic and financial crisis all over the world. Real estate has been especially hard hit. Correct in real estate prices, globally and in India, is a well documented fact which requires little elaboration. All over the globe, the governments and authorities are giving bail out packages to the companies to protect them from financial meltdown. Apex bank has given guidance to Banks / Financial Institutions to revise the payment schedule of loans given to real estate companies."

After so stating, the appellants referred to their earlier letter dated 21.1.2009 and ultimately stated thus:

"We also propose to submit a Development Agreement Plan before signing of the development agreement in which we will demarcate the entire project size of 11.37 hectares of land five equal parts including the structures to be built thereon and one part will be leased to us with the respective installment.

We guarantee that we will not have any claim on the land until the same is specifically leased to us on payment of installment as specified herein above.

We are also enclosing herewith the business plan mentioning clearly how the payments will be made to RLDA over the period of time. We would like to mention here that we shall bring our contribution for payment of the upfront lease premium through internal accruals / Pvt. Equity and Bank Loan over the period of time.

We wish to reiterate that we are committed to pay the contractual amount of Rs.1,026 crores to the RLDA and are keen to execute the project without any further delay."

11. After the said letter, the correspondences continued between the parties and the respondent intimated the appellants on 29.6.2009 that

the letter of acceptance is liable to be terminated and the Bid Security submitted by the appellants shall be forfeited by the RLDA without being liable for any consideration to them whatsoever in case of failure by the consortium/ developer to comply with the terms and conditions contained in the letter of acceptance and the provisions of the RFP document. Thereafter, the appellants, vide letter dated 16.7.2009, apart from enumerating many aspects, stated thus:

"In case the Development Agreement is executed and the contract proceeds, the maximum period for which the interest could be payable by us would be only for about three months (viz. 12.10.08 to 18.11.08 and 12.03.2009 to 30.04.2009. The decision for implementation and payment of first installment was conveyed by RLDA only on 11.09.2008 after the court case).

As an alternative and to be fair to both the parties, we request that the issue of amount of accrued interest payable till the date of payment of first installment of the upfront lease premium may be referred to arbitration by an independent committee or arbitrator for decision on the matter. We undertake to abide by the decision of the committee in this regard and will pay the interest as determined within 18 months from the date of signing of the Development Agreement, in installments.

Though we have no doubt on the success of the project and payment of upfront lease premium to RLDA as proposed, yet for the comfort of RLDA and to allay its fears we would like to inform you that we have a 'Land Bank' of about 200 Acres at Manesar, Gurgaon, under our various group companies. These group companies are under the same management as of ABW Infrastructure Limited. The approximate value of this land is around 600 crores as substantiated by the valuation reports attached herewith.

Although the present market value of land is highly discounted and realty sector have not been able to attract the clients despite their best efforts, we still wish to execute the project and tender the entire amount of bid as per the above revised payment schedule. We do hope that RLDA will now accord their approval to our above proposal leaving apart the payment of interest which

we hereby undertake to pay if so determined by the independent committee constituted by RLDA. Alternatively, if RLDA agrees for charging interest for a reasonable period of about three months, we agree to pay the same without any demur provided the Development Agreement is executed as per our above proposal."

12. Thereafter, as is evident from the material brought on record, a letter was issued by the respondent on 20.8.2009 indicating the revised payment consideration of lease premium. The same reads as follows:

"Revised payment consideration of lease premium

The payment schedule for lease premium of Rs.1026 crores has been agreed to be revised as under:

(i) First installment to be paid shall be of Rs.380 crores (Rupees Three Hundred and Eighty Crores only). Second installemt of Rs.200 crores (Rupees Two Hundred Crores only) shall be paid within 12 months from the date of payment of first installment. Third installment of Rs.446 crores (Rupees Four Hundred and Forty Six Crores only) shall be paid within 18 months from the date of payment of first installment. The Consortium/Developer shall make payment of the First installment within 60 days of issue of this letter or within 15 days of issue of draft modified Development Agreement whichever is later.

(ii) Interest @15% p.a. on the outstanding lease premium shall continue to be payable. The interest accrued on the second and third installment of lease premium shall be paid alongwith the respective installment on the due dates.

(iii) The accrued interest on the outstanding amount of Rs.1026 crores for the entire period w.e.f 11.9.2008 upto the date of payment of first installment shall be paid by the developer to RLDA within 24 months from the date of signing of Development Agreement as per the RFP."

In the said letter, it was also mentioned as follows:

"2. Above terms shall be applicable and valid if and only if renewed Joint Bidding Agreement is submitted to RLDA. The renewed Joint Bidding Agreement and SPV documents shall be

submitted to RLDA within 30 days of issue of this letter.

3. In view of the above, please communicate your willingness to go ahead with the execution of the project within 10 days of the issue of this letter.

4. The Draft Development Agreement suitably modified on the lines enumerated in para-1 above will be sent to you on compliance of action under para 2 & 3 above.

5. It may be noted that till such time the documents / compliances as mentioned under para 2 & 3 above are submitted to RLDA and all other obligations including signing of Development Agreement as per above terms are met with by the developer, you continue to remain obligated to comply with the original obligations as per RLDA's letter No.RLDA/2008/Project/Sarai Rohilla/RFP/Vol.II dated 31.1.09 and 02.02.09.

It may also be noted that communication of the above relaxations by RLDA will neither entitled you for any claim whatsoever against RLDA nor does it restrict RLDA's rights to seek the compliance of the terms and conditions of LOA as partially modified vide this office letter dated 31.01.09 & 02.02.09 and take appropriate consequential action and any other alternative remedy in case of your failure-

(i) to communicate your willingness as per para – 3 above; or

(ii) to submit the joint Bidding Agreement within the stipulated time as in para – 2 above; or

(iii) to deposit the First installment of Rs.380 crores within the stipulated time as above."

13. The appellants responded to the said letter vide letter dated 29.8.2009. The same has been reproduced by the learned Single Judge. We think it apt to reproduce the relevant portion of it:

"We hereby convey our willingness to go ahead with execution of the project as per the terms and conditions contained in your above said letter. However, as regards payment of accrued interest on the upfront lease premium of Rs. 1026 crore for the entire

period with effect from 11.09.2008 upto the date of payment of the first installment, we have already conveyed our reservations vide our various letters to you. In this regard we reserve our right to seek an amicable settlement through dispute resolution mechanism."

14. Thereafter, the RLDA, on 18.9.2009, sent a modified draft development agreement requiring the appellants to offer comments on the said document outlining the paragraph / clause which was not in accord with the decision communicated by the RLDA through their earlier letter dated 20.8.2009. It was also clarified in the said communication that the agreement that was sent to the appellants for their comments was merely a draft and was to be finalized only after approval of the competent authority. The appellants, on 7.10.2009, communicated to the RLDA raising various objections to several clauses of the draft agreement and suggested certain amendments. The said letter was responded by the RLDA on 9.10.2009. The relevant portion of the same reads as follows:

"There are no signs so far on your part for compliance of any of the actionable points leading to signing of Development Agreement except extension of bid security BG, and there appears to be a deliberate attempt on your part to delay the process.

Your attention is again invited to para 5 of this office letter dated 20.8.2009 under reference (i) above. It was clearly advised to you that till such time the documents / compliances as mentioned under para 2 and 3 above are submitted to RLDA and all other obligations including signing of Development Agreement as per above terms are met with by the developer, you continue to remain obligated to comply with the original obligations as per RLDA's letter No. RLDA/2008/Project/Sarai Rohilla/RFP / Vol.II dated 31.01.09 and 02.02.09. The same is once again reiterated.

Despite not receiving the JBA from you, the Draft Development Agreement was sent to you on 18.09.09 vide letter under reference (iii) above. While your comments on the Draft Development Agreement have been received vide reference (v) above, they do not deserve to be given any cognizance in the absence of JBA. Nevertheless, your observations have been considered and RLDA's response is enclosed. Modified Development Agreement proposed

to be signed with the SPV on compliance of various requirements listed under RLDA's letter dated 20.08.09 & 16.09.09, is enclosed herewith.

Thus RLDA has given you all reasonable opportunity for survival of this contract and the onus of failure squarely lies on you.

Now through this letter you are hereby notified that the first installment of Rs.380 crore be paid to RLDA on or before 19.10.2009 (60 days of issue of RLDA's letter dated 20.08.09) along with compliance of various requirements well before the same, failing which the Contract will be terminated and consequential action will follow. In case of failure to make the payment this may be treated as Notice of Termination."

15. On 12.11.2009, the RLDA again notified the appellants to comply with the documentary requirements and to make payment of the first installment within a fortnight. As the same was not done, on 1.12.2009, the following letter was issued:

"Your attention is invited to RLDA's letter dated 12.11.2009 under reference (vii) above wherein you were notified to comply with the documentary requirements and to make payment of first installment of Rs.380 crores within 15 days (Fifteen days) of receipt of the letter failing which consequential action for default would follow. It is observed that you have failed to deposit the first installment of Rs.380 crores and also failed to submit other required documents even after lapse of 15 days days.

2. Despite being given adequate and all reasonable opportunities by RLDA to make payment of first installment and to comply with the documentary requirements, your consortium has failed to honour the obligations and it appears that your consortium is not in a position to honour the obligations."

16. After terminating the rent lease, the respondent invoked the bank guarantee and, on 10.12.2009, issued the final termination of agreement on the ground that the appellants have failed to implement any of the obligations by the stipulated date and the contract (LOA and modified terms thereof) stood terminated with immediate effect and the bid security of Rs.10 crores and all other payments made to the RLDA

stood forfeited accordingly.

17. Be it noted, in the writ petition as well as in the LPA what is vehemently urged is that the respondent has acted in an extremely arbitrary and unfair manner whereby the whole action invites the wrath of Article 14 of the Constitution of India. The stand and stance of the respondent is that there is no unfair act on the part of the respondent but there is a series of breach on the part of the appellants and, hence, the termination took place. At this juncture, it is apposite to note that this Court, on 6.7.2010, had passed the following order:

> "Heard Mr. Raju Ramchandran, learned senior counsel for appellants and Mr. Soli J. Sorabjee, learned senior counsel for respondent.
>
> In course of hearing this appeal, a consensus was arrived at being initiated by Mr. Soli J. Sorabjee that if the appellants deposit a sum of Rs. 75 Crores by 20th July, 2010, the financial bid shall not be opened. Needless to emphasise that the debate went on for some time with regard to reduction of area and prorata reduction of amount and as a consequence, the factum installment. The aforesaid aspects shall be dwelled upon on the next date of hearing.
>
> As further conceded to, if the amount as agreed is not deposited, it would tantamount that appellants have conceived the idea that Court is a laboratory where children come to play. It needs no special emphasis to state that the LPA shall meet the fate of dismissal, as an inevitable corollary.
>
> List on 22nd July, 2010. The matter shall be taken up at 2.15 p.m.
>
> Order dasti under the signature of Court Master."

18. On 22.7.2010, the following order came to be passed:

> "This Court on 6th July 2010 on the basis of a consensus arrived at had directed that if the appellants deposit a sum of Rs.75 crores by 20th July, 2010, the financial bid shall not be opened and if the amount is not deposited, the appeal shall meet the fate of dismissal. We have been apprised at the bar that a sum of Rs. 75 crores has been deposited within the stipulated time. In course of further hearing, we have been told that the first instalment is Rs.380 crores. A suggestion was given to the learned counsel for the parties that if the appellant deposits Rs.135 crores by 25th August, 2010 and further depositing Rs.135 crores on 25th September, 2010, the draft Agreement, keeping in view the pro rata reduction of the land and increase F.A.R., shall be handed over to the appellant. Be it noted, we have calculated the sum regard being had to the factum that Rs.35 crores was forfeited by the respondent after termination of the contract. We must appreciably state that Mr.Soli J.Sorabjee, learned senior counsel appearing for the respondent fairly submitted that the appellant must deposit the amount barring the amount that has been forfeited and then only a draft Agreement, as has been suggested by this Court, can be filed before this Court."

19. On 27.7.2010, the following order came to be passed:

> "In pursuance of the aforesaid order, a sum of Rs.75 crores has been deposited with the respondent-corporation. It is submitted by Mr. Raju Ramachandran, learned senior counsel appearing for appellant and Mr. Soli J. Sorabjee, learned senior counsel appearing for respondent-corporation that there is difficulty to carry out the said arrangement that was recorded on 22nd July, 2010.
>
> In view of the aforesaid as agreed to by learned counsel for parties, the sum of Rs.75 crores that has been deposited by the appellant with the respondent-corporation shall be refunded within a period of one week from today."

20. The purpose of referring to the aforesaid orders is that despite the initial efforts, no consensus could be arrived at.

21. The singular question that emanates for consideration in this intra court appeal is whether the learned Single Judge committed any illegality in not entertaining the writ petition. The submission of the learned counsel for the appellants is that the conclusion arrived at by the learned Single Judge is sensitively susceptible inasmuch as a writ court has jurisdiction to address itself even with regard to an unfair practice adopted before entering into the agreement and also after entering into the agreement. In support of the same, he has placed reliance on **Mahabir**

Auto Stores (supra). In the said case, it has been held thus:

> "12. …Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a Governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. In this connection reference may be made to **E.P. Royappa v. State of Tamil Nadu,** (1974) 4 SCC 3: (AIR 1974 SC 555); Maneka Gandhi v. (1978) 1 SCC 248 : (AIR 1978 SC 597); **Ajay Hasia v. Khalid Mujib Sehravardi,** (1981) 1 SCC 722: (AIR 1981 SC 487); **R.D. Shetty v. International Airport Authority of India,** (1979) 3 SCC 489 : (AIR 1979 SC 162) and also **Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay,** (1989) 3 SCC 293 : (AIR 1989 SC 1642). It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case."

22. The said observations were made as the Indian Oil Corporation discontinued the supply of lubricants. Their Lordships observed that when the State enters into a contractual arena, it would be governed by the terms of the contract but in appropriate case, the writ court, in exercise of power under Article 226 of the Constitution of India, can interfere and interdict when the acts of the State smack of arbitrariness.

23. In **Air India Ltd. v. Cochin International Airport Ltd.,** (2000) 2 SCC 617, it has been ruled thus:

> "The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedure laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness."

24. In **New Bihari Biri Leaves Co. v. State of Bihar,** (1981) 1 SCC 537, their Lordships have opined thus:

> "48. It is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim is qui approbate non reprobate (one who approbates cannot reprobate). This principle, though originally borrowed from Scots Law, is now firmly embodied in English Common Law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say, no party can accept and reject the same instrument or transaction."

25. In **Assistant Excise Commissioner & Ors. v. Issac Peter & Ors.,** (1994) 4 SCC 104, it has been held that the doctrine of fairness and reasonableness can be read into the contracts to which the State is a party on the ground that the State has acted unreasonably or unfairly

while acting under a contract involving State power. It has been further opined that duty to act fairly cannot be sought to be imported into the contract to modify and alter its term and to create an obligation upon the State which is not there in the contract.

26. The aforesaid principle was reiterated in **Puravankara Projects Ltd. v. Hotel Venus International and Ors.,** (2007) 10 SCC 33. 27. In **Cochin International Airport Ltd. v. Cambatta Aviation Ltd. & Ors.,** (2000) 2 SCC 617, it has been ruled thus:

> "6. Challenging this decision of the High Court, Air India has filed Civil Appeal No. 3641 of 1999 and CIAL has filed Civil Appeal No. 3642 of 1999. Mr. Nariman, learned senior counsel appearing for Air India and Mr. Venugopal, learned senior counsel appearing for CIAL contended that the Division Bench had gone wrong in its conclusion as it adopted a wrong approach in a matter of this type. They submitted that the Division Bench committed a grave error in considering this to be a case of public tender. They also submitted that the decision of CIAL to award the contract to Air India was taken bona fide in the financial and overall interest of CIAL and, therefore, the High Court while exercising its power under Article 226 ought not to have interfered as no substantial amount of public interest was involved.
>
> 7. …The award of contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not

> amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene."

28. In **ABL International Ltd. & Anr.** (supra), the question arose with regard to the maintainability of the writ petition. The Apex Court referred to the decision in **Gunwant Kaur v. Municipal Committee, Bhatinda,** (1969) 3 SCC 769 and adverted to the concept of applicability of public law principles into government contracts and the liability of State in contractual matters and keeping in view the facts which arose before the Apex Court, it was held as follows:

> 16. …A perusal of this judgment though shows that a writ petition involving serious disputed questions of facts which requires consideration of evidence which is not on record, will not normally be entertained by a court in the exercise of its jurisdiction under Article 226 of the Constitution of India. This decision again, in our opinion, does not lay down an absolute rule that in all cases involving disputed questions of fact the parties should be relegated to a civil suit…"

29. Thereafter, their Lordships referred to the decision in **Century Spg. and Mfg. Co. Ltd. v. Ulhasnagar Municipal Council,** (1970) 1 SCC 582 wherein it has been held that merely because a question of fact was raised, the High Court will not be justified in requiring the party to seek relief by somewhat lengthy, dilatory and expensive process by a civil suit against a public body. The questions of fact raised by the appellants in this case were elementary.

30. After analyzing the facts, it was opined thus:

"28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power [See: **Whirlpool Corporation v. Registrar of Trade Marks,** (1998) 8 SCC 1]. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the court thinks it necessary to exercise the said jurisdiction."

31. Eventually, as is perceivable, the Apex Court adverted to the facts and came to hold as follows:

"51. …Merely because the first respondent wants to dispute this fact, in our opinion, it does not become a disputed fact. If such objection as to disputed questions or interpretations is raised in a writ petition, in our opinion, the courts can very well go into the same and decide that objection if facts permit the same as in this case. We have already noted the decisions of this Court which in clear terms have laid down that mere existence of disputed questions of fact ipso facto does not prevent a writ court from determining the disputed questions of fact. [See: **Gunwant Kaur** (supra)]."

32. In the said case, ultimately, their Lordships interfered holding that in such a factual situation, the facts of the case do not and should not inhibit the High Court or the Apex Court from granting relief sought for by the petitioner.

33. In **Noble Resources Ltd. v. State of Orissa & Anr.,** (2006) 10 SCC 236, the Apex Court, referring to number of authorities how the State action is to be tested on the touchstone of Article 14 of the

Constitution of India and thereafter referring to the decisions in **Radhakrishna Agarwal v. State of Bihar,** (1977) 3 SCC 457 and **ABL International Ltd.** (supra), held thus:

"18. It may, however, be true that where serious disputed questions of fact are raised requiring appreciation of evidence, and, thus, for determination thereof, examination of witnesses would be necessary; it may not be convenient to decide the dispute in a proceeding under Article 226 of the Constitution of India.

19. On a conspectus of several decisions, a Division Bench of this Court in **ABL International Ltd.** (supra) opined that such a writ petition would be maintainable even if it involves some disputed questions of fact. It was stated that no decision lays down an absolute rule that in all cases involving disputed questions of fact, the party should be relegated to a civil court."

34. The obtaining factual matrix is required to be adjudged on the aforesaid enunciation of law. We have referred to the facts in extenso. The appellants, as is demonstrable, had preferred the writ petition and this Court, on earlier occasion, had come to hold that there was a concluded contract as there had been offer and acceptance. Be that as it may, after the concluded contract came into existence, the parties entered into correspondences. Certain terms were put forth by the appellants and they were not acceded to in entirety by the respondent. The appellants requested for amendment in the original contract. While entering into communication, it put forth its conditions and emphasis was laid on leasehold or prorata reduction and many other facets. The respondent, as we have stated hereinbefore, had sent a draft agreement and the communication. The same was not accepted by the appellants. The claim of the appellants is that they should be granted permission for development of the area in proportion to the investment made. That apart, the appellants contend that the respondent has acted in a manner by which certain conditions of the contract were not workable. Therefore, prorata should be computed and the benefit should have been extended. Resisting the same, it is urged by the respondent that the appellants never showed their bonafide by depositing the first installment of Rs.513 crores and, hence, there has been breach of the terms and conditions of the agreement, which had attained finality as is evident from the order of the

earlier writ petition. It is also highlighted that though discussions and negotiations went on, the appellants unilaterally tried to impose certain conditions. From the entire gamut of facts which have been brought on record and projected, it is well nigh impossible to say whether the termination of contract and the forfeiture of the earnest money by the respondent is unreasonable or arbitrary and thereby invites the frown of Article 14 of the Constitution of India. It is extremely difficult to state that there are no disputed questions of fact. Thus, we are inclined to think that the view expressed by the learned Single Judge that the petitioner should approach the appropriate legal forum as advised in law cannot be found fault with.

35. Consequently, we perceive no substance in the appeal and, accordingly, the same stands dismissed. However, we hasten to add that if the appellants approach the appropriate legal forum, neither the observations of the learned Single Judge nor our observations made in this appeal shall be pressed into service as they have only been stated for the adjudication of the writ petition as regards its entertainability in a controversy of this nature. There shall be no order as to costs.

ILR (2011) I DELHI 243
CRIMINAL MC

CHANCHAL BHATTI & ORS. ....PETITIONERS

VERSUS

STATE (NCT OF DELHI) ....RESPONDENT

(SANJIV KHANNA, J.)

CRIMINAL MC NO. : 1810/2007 DATE OF DECISION. : 19.10.2010

Code of Criminal Procedure, 1973—Section 2(h), 468, 469, 470, 472, 473 & 482—Limitation for taking cognizance—Quashing of FIR—Setting aside of order issuing NBW and order initiating proceedings u/s 82 and 83—FIR 107/2003 u/s 379 regd on receiving complaint of one car being stolen—Petitioners arrested in another case along with stolen car—Intimation of arrest given to police station with reference to FIR 107/2003—Possession of stolen car taken by IO and warrants issued by MM—Petitioners could not be arrested—No further steps taken to arrest or conduct investigation in case till subsequent IO wrote note dated 5.06.2006 to ACP informing that earlier IO had not carried out any proceedings and seeking permission to reinvestigate—Application made before MM for issue of NBWs—NBWs issued returned unexecuted—Process u/s 82/83 commenced—Contention of petitioners that Section 397 IPC punishable with imprisonment of three years, so in view of Section 468 Cr PC MM not competent to take cognizance after expiry of three years since barred u/s 468 Cr PC so no NBWs could be issued or process u/s 82/83 initiated—Held, Section 468 deals with cognizance of offences and does not prescribe any limitation period for investigation of offences—It does not bar investigation of offences by the police even if the period of limitation prescribed u/s 468 for taking cognizance has expired—Till chargesheet is filed the stage of taking cognizance does not arise and it is at the stage of taking cognizance that court decides whether or not to condone delay u/s 473—Investigation cannot be stopped and FIR quashed on ground of delay—Petition dismissed.

Important Issue Involved: Section 468 Cr PC which prescribes limitation period for taking cognizance does not bar investigation of offences by the police even if the period of limitation prescribed under it for taking cognizance has expired since it is at the stage of taking cognizance after chargesheet is filed that the court decides whether or not to condone delay.

[Ad Ch]

APPEARANCES:

FOR THE PETITIONER : Mr. S.C. Sagar, Advocate,

FOR THE RESPONDENTS : Ms. Fizani Hussain, APP.

CASES REFERRED TO:

1. *Chief Enforcement Officer* vs. *Videocon International Ltd.* (2008) 2 SCC 492.
2. *H.N. Rishbud* vs. *State of Delhi* (1955) 1 SCR 1150.

RESULT: Petition dismissed.

SANJIV KHANNA, J.

1. The petitioners, Chanchal Bhati, Ranvijay and Kalu, by this Petition under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Code, for short) have prayed for quashing of FIR No. 173/2003 dated 23rd February, 2003 under Section 379 of the Indian Penal Code, 1860 (hereinafter referred to as IPC, for short). They have also prayed for setting aside of the order dated 26th March, 2007 passed by the Metropolitan Magistrate issuing non-bailable warrants and the subsequent proceedings thereafter. The petitioners further pray for setting aside of the order dated 19th April, 2007 initiating of proceedings under Sections 82 and 83 of the Code against the petitioners.

2. FIR No. 107/2003 under Section 379, IPC was registered at P.S. Shalimar Bagh on 23rd February, 2003 on a complaint made by one Navdeep Khurana that his car bearing no. DL-2CG-1022 was stolen in the night intervening 18/19th February, 2003. It is submitted that the petitioners and one Rakesh were arrested in FIR Nos.167, 168 and 169/2003 P.S. Kavi Nagar, Distt. Ghaziabad, U.P. along with the said car on 1st March, 2003. An unnumbered FIR had also been registered against Ranvijay Singh. Intimation of the arrest of the petitioners was given to P.S. Shalimar Bagh with reference to FIR No.107/2003 vide D.D. entry 40B dated 4th March, 2003. Possession of the stolen car was taken by the Investigating Officer on 21st March, 2003 and warrant was issued by the Metropolitan Magistrate under Section 72 of the Code on 27th March, 2003. However, the petitioners could not be arrested as they were released on bail on 13th March, 2003 from the Ghaziabad jail.

Thereafter no steps were taken by the Investigating Officer to arrest the petitioners or conduct further investigation till H.C. Satbir Singh wrote a note dated 5th June, 2006 that the earlier Investigating Officer HC Dinesh Singh had not carried out any proceedings, had not written the case diary or arrested the accused persons. This note was addressed to ACP Rohini and permission was sought to order reinvestigation.

3. An application dated 16th March, 2007 was made to the court of Metropolitan Magistrate for issue of non bailable warrants. It was stated in the application that the petitioners could not be arrested and were absconding. Learned Metropolitan Magistrate issued non bailable warrants for 19th April, 2007 vide order dated 26th March, 2007. The petitioners could not be arrested and the court was informed that non bailable warrants could not be executed and an application under Section 82 of the Code was filed on 19th April, 2007. On this application, order dated 19th April, 2007 was passed by the Metropolitan Magistrate for initiation of proceedings under Sections 82 and 83 of the Code against the petitioners.

4. The contention raised by the petitioners is that the offence under Section 397 IPC is punishable with imprisonment of three years and therefore in view of Section 468 of the Code, Metropolitan Magistrate is not competent to take cognizance of the offence under Section 397 IPC after expiry of three years. It is submitted that the trial court could not therefore have issued non-bailable warrants or initiated proceedings under Sections 82 and 83 of the Code. It is submitted that the investigation by the police is barred and prohibited as the court cannot now take cognizance in view of the limitation period prescribed in section 468 of the Code.

5. To decide the said contention, provisions of Chapter XXXVI – 'Limitation for taking cognizance of certain offences' relating to limitation are required to be examined.

6. Sections 468, 469, 470, 472 and 473 of the Code are reproduced below:-

> **"Section 468. Bar to taking cognizance after lapse of the period of limitation.-** (1) Except as otherwise provided elsewhere in this Code, no Court shall take cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation.

(2) The period of limitation shall be-

(a) Six months, if the offence is punishable with fine only;

(b) One year, if the offence is punishable with imprisonment for a term not exceeding one year;

(c) Three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

[(3) For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment.]

Section 469. Commencement of the period of limitation—(1) The period of limitation, in relation to an offender, shall commence,—

(a) on the date of the offence; or

(b) where the commission of the offence was not known to the person aggrieved by the offence or to any police officer, the first day on which such offence comes to the knowledge of such person or to any police officer, whichever is earlier; or

(c) where it is not known by whom the offence was committed, the first day on which the identity of the offender is known to the person aggrieved by the offence or to the police officer making investigation into the offence, whichever is earlier.

(2) In computing the said period, the day from which such period is to be computed shall be excluded.

Section 470. Exclusion of time in certain cases.—(1) In computing the period of limitation, the time during which any person has been prosecuting with due diligence another prosecution, whether in a Court of first instance or in a Court of appeal or revision, against the offender, shall be excluded:

Provided that no such exclusion shall be made unless the prosecution relates to the same facts and is prosecuted in good

faith in a Court which from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) Where the institution of the prosecution in respect of an offence has been stayed by an injunction or order, then, in computing the period of limitation, the period of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

(3) Where notice of prosecution for an offence has been given, or where, under any law for the time being in force, the previous consent or sanction of the Government or any other authority is required for the institution of any prosecution for an offence, then, in computing the period of limitation, the period of such notice or, as the case may be, the time required for obtaining such consent or sanction shall be excluded.

Explanation.—In computing the time required for obtaining the consent or sanction of the Government or any other authority, the date on which the application was made for obtaining the consent or sanction and the date of receipt of the order of the Government or other authority shall both be excluded.

(4) In computing the period of limitation, the time during which the offender—

(a) has been absent from India or from any territory outside India which is under the administration of the Central Government, or

(b) has avoided arrest by absconding or concealing himself, shall be excluded.

Section 472. Continuing offence.—In the case of a continuing offence, a fresh period of limitation shall begin to run at every moment of the time during which the offence continues.

Section 473. Extension of period of limitation in certain cases.—Notwithstanding anything contained in the foregoing provisions of this Chapter, any Court may take cognizance of an offence after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay

has been properly explained or that it is necessary so to do in the interests of justice."

7. Section 468(1) of the Code stipulates that no court shall take cognizance of an offence after the period of limitation prescribed in sub-section (2) has expired. Thus there is a bar or prohibition on the court from taking cognizance. The term 'cognizance' has not been defined in the Code. It is well settled that 'cognizance' means judicial notice of an offence taken by a Magistrate, in order to initiate proceedings in respect of such offence. It requires application of mind by the Magistrate to the content or the allegations made in the chargesheet or the complaint or suo motu on the information received by the court. Taking of cognizance of an offence by the Magistrate depends upon the facts and circumstances of the particular case. It has been observed in **Chief Enforcement Officer v. Videocon International Ltd.** (2008)2SCC492 that cognizance of an offence under Section 190 of the Code is said to have been taken by the Magistrate, when he applies his mind not only to the content of the complaint or police report but also when he has done so for the purpose of proceeding under Section 200 of the Code. On the other hand, when the Magistrate has applied his mind only to the extent of ordering for an investigation under section 156(3) or issue of search warrant for investigation, it cannot be said that he has taken cognizance of the offence.

8. The term 'investigation' has been defined in Section 2(h) of the Code and includes all proceedings under the Code for collection of evidence conducted by the police officer or any person, other than the Metropolitan Magistrate, who has been authorized by the Metropolitan Magistrate in this behalf. The term 'investigation' has been interpreted by the Supreme Court in **H.N.Rishbud v. State of Delhi** (1955) 1 SCR 1150 and it has been held;

> **"5.** ……..Thus, under the Code investigation consists generally of the following steps: (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places or seizure of things

> considered necessary for the investigation and to be produced at the trial, and (5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet under Section 173. …..

9. The Code also deals with investigation of offences by the police in Chapter XII. Section 167 of the Code deals with the procedure when investigation cannot be completed within 24 hours. Sections 167(5) and (6) of the Code reads as under:-

> **"Section 167. Procedure when investigation cannot be completed in twenty-four hours. —**
>
> (1) xxxxx
>
> (2) xxxxx
>
> (3) xxxxx
>
> (4) xxxxx
>
> (5) If in any case triable by Magistrate as a summons case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary.
>
> (6) Where any order stopping further investigation into an offence has been made under sub-section (5), the Sessions Judge may, if he is satisfied, on an application made to him or otherwise, that further investigation into the offence ought to be made, vacate the order made under sub-section (5) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify."

10. Under section 167(5) of the Code time limit of six months from the date the accused is arrested, has been fixed for investigation in summons cases. A magistrate can, for special reasons and in the interest

of justice, permit investigation even after six months. In case of refusal and stoppage of investigation the State can approach the Sessions Court. No such time limit has been fixed in non-summon cases. Offence under Section 379 IPC is punishable upto three years and is therefore a warrant case and not a summons case. In any case, the accused in the present petition were not arrested and therefore Section 167(5) of the Code has no application.

11. It is clear from the above, that Section 468 of the Code only deals with cognizance of offences and does not prescribe any limitation period for investigation of offences. Section 468 of the Code does not bar investigation of offences by the police even if the period of limitation, prescribed under the said section, for taking cognizance by the court, has expired.

12. There is a good reason why Section 468 of the Code cannot be applied and should not be interpreted as fixing an outer time limit for investigation of offences. Section 469 of the Code states when the period of limitation for an offence shall commence. In some cases, it may be doubtful and debatable as to which of the three clauses under Section 469(1) is applicable. This determination or dispute has to be decided by the courts and not by the police. Similarly, Section 470 of the Code provides for ˇexclusion of time in certain cases. Again whether or not time should be excluded has to be determined and adjudicated by the court and not by the police.

13. For the purpose of the present case, clause (b) of Section 470(4) may be noted. The said clause stipulates that for computing the period of limitation the time during which an offender has avoided arrest by absconding or concealing himself has to be excluded. The said clause may be applicable in the facts of the present case as FIR under Section 397 IPC was registered in February, 2003 but the petitioners were not apprehended or arrested. The case of the police/State is that the petitioners were absconding. This aspect/question can be decided by the court when it decides whether or not cognizance should be taken. However, investigation by the police cannot be stopped or barred.

14. Disputes can also arise whether an offence is a continuing offence. This again is a matter for the court to be decided and not for the police to make self judgment.

15. Section 473 of the Code is a non-obstante provision and gives liberty to the court to take cognizance of an offence after expiry of the period of limitation, if it is satisfied that in the said case delay has been properly explained or it is necessary to take cognizance in the interest of justice. The two conditions stipulated in Section 473 of the Code are in alternative and distinct and not conjoint. An order under Section 473 of the Code is to be passed by a court and not by the police. Till investigation is done and a chargesheet under Section 173 of the Code is filed by the police, the stage of taking cognizance by the court does not arise. It is at the stage of taking cognizance that the court decides whether or not delay should be condoned under Section 473 of the Code and till that stage, the court cannot condone delay.

16. In view of the aforesaid reasoning, the contention of the petitioners that investigation should be stopped and FIR should be quashed cannot be accepted. In the present case, it is noticed that on the applications filed by the police on 16th March, 2007 and 19th April, 2007, the Metropolitan Magistrate had passed an order for issue of non-bailable warrants against the petitioners on 26th March, 2007 and proceedings under Sections 82 and 83 of the Code on 19th April, 2007. Sometimes while the FIR is pending investigation the police/Investigating Officer can move applications before the court with the prayer for orders or directions. The court while deciding any application does not act as a rubber stamp of the prosecution and orders are passed after due consideration and discretion is exercised keeping in mind the relevant facts including contentions raised, public interest, case of the prosecution, statutory and constitutional rights of the victim and accused, delay in investigation, reasons thereof etc. In a given case, delay in investigation etc. may be a relevant consideration for the exercise of discretion by the court. However, at this stage, the court does not consider and decide the question of cognizance, whether or not cognizance should be taken. Application of provisions of Chapter XXXVI of the Code is to be decided by the court at the time of taking cognizance.

17. With the aforesaid observations, the present petition is dismissed. It is clarified that the observations made in this order are for the purpose of disposal of the present petition and will not be construed as observations on merits/facts binding on the trial court. This court has not expressed any opinion on whether or not proceedings under Sections 82 and 83 of

the Code are justified and valid. The petitioners will have to approach the trial court for the said purpose at the first instance.

ILR (2011) I DELHI 253
W.P.

M/S KUNDAN INFRASTRUCTURES ....PETITIONER

VERSUS

NDMC & ANR. ....RESPONDENTS

(RAJIV SAHAI ENDLAW, J)

W.P (C) NO. : 6058/2002 & CM NO. : 11771/2004 (U/O 1 R-10 CPC)

DATE OF DECISION: 20.10.2010

Constitution of India , 1950—Petitioner preferred writ petition impugning condition imposed by respondent NDMC on petitioner to deposit dues of electricity connection earlier installed in property which was purchased by petitioner—As per petitioner, after taking possession of the flat purchased by him, electricity connection was not found existing and electricity meter detached—Petitioner applied to NDMC for electricity connection but NDMC claimed previous dues but petitioner not liable to pay electricity arrears of earlier owner/occupant of flat—Respondent NDMC urged duty of petitioner to ascertain about electricity dues before acquiring property, demand of electricity arrears reasonable and in public interest and necessary to prevent dishonest consumers transferring property without clearing dues. Held : If any statutory rules govern the condition relating to sanction of a connection or supply of electricity, the distributor can insist upon fulfillment of requirement of such rules

and regulations—If the rules are silent, can stipulate such terms and conditions as it deems fit and proper to regulate its transactions and dealings—So long as such rules and regulations or the terms and conditions are not arbitrary and unreasonable, Courts will not interfere with them—The conditions of Supply whereunder such arrears are demanded are statutory—The petitioner is liable to pay the dues of the earlier owner/occupant.

Insofar as the reference to the definition of "consumer" in the Indian Electricity Act, 1910 is concerned, the said definition was noticed in para 35 of the judgment in **Isha Marbles** and the said definition was not held to include the subsequent purchaser of the property. **(Para 17)**

The argument of the senior counsel for the respondent NDMC of the right of the NDMC on the basis of the clause reproduced above in the affidavit obtained by the NDMC from the petitioner also has no force. The said affidavit was obtained admittedly in consideration of grant of electricity connection. However the electricity connection did not come to be granted by the respondent NDMC to the petitioner and the petitioner immediately on the earlier dues being intimated to it preferred this writ petition. Thus the question of the petitioner being bound by the said affidavit, does not arise. Moreover, it is quite clear that the affidavit was in the format prescribed by the respondent NDMC itself and thus the contention of the petitioner that the affidavit was not given voluntarily has merit and the petitioner having immediately protested thereagainst cannot be held to be bound by it. Reference in this regard can be made to the judgment of the Supreme Court in **National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd.** MANU/SC/4056/2008 holding that when such standard terms and conditions are immediately protested against, no reliance can be placed thereon.

(Para 18)

Notwithstanding having disagreed with all the contentions of the respondent NDMC, I am still unable to grant relief to the petitioner. I do not agree with the contention of the counsel for the petitioner that the judgment of the Full Bench of this Court in Saurashtra Color Tones is not applicable, being in relation to the Delhi Electricity Reforms Act, 2000, not applicable in the present case. **(Para 19)**

Important Issue Involved: If any statutory rules govern the condition relating to sanction of a connection or supply of electricity, the distributor can insist upon fulfillment of such rules and regulations. If the rules are silent, it can stipulate such terms and conditions as it deems fit and proper to regulate its transactions and dealings. So long as such rules and regulations or the terms and conditions are not arbitrary and unreasonable, Court will not interfere with them.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Siddharth Khattar & Mr. Faisal Zafar, advocates.

FOR THE RESPONDENT : Mr. H.L. Tinku, Sr. advocate, with Mr. Arjun Pant, Advocate for NDMC.

CASES REFERRED TO :

1. *BSES Rajdhani Power Ltd.* vs. *Saurashtra Color Tones Pvt. Ltd.* AIR 2010 Delhi 14.
2. *State Electricity Board* vs. *Hanuman Rice Mills* CA No.6817/2010.
3. *Vidyut Vitran Nigam Ltd.* vs. *DVS Steels & Alloys Private Ltd.* (2009) 1 SCC 210.
4. *National Insurance Co. Ltd.* vs. *Boghara Polyfab Pvt. Ltd.* MANU/SC/4056/2008.

5. *Mrs. Madhu Garg* vs. *North Delhi Power Ltd.* 129 (2006) DLT 213.
6. *M/s Hyderabad Vanaspati Ltd.* vs. *A.P. State Electricity Board* (1998) 2 SCR 620.
7. *Bihar State Electricity Board* vs. *Parmeshwar Kumar Agarwala* (1996) 4 SCC 686.
8. *Isha Marbles* vs. *Bihar State Electricity Board* (1995) 2 ˇSCC 648.
9. *Punjab State Electricity Board* vs. *Bassi Cold Storage* 1994 Supp(2) SCC 124.

RESULT: Writ petition dismissed.

RAJIV SAHAI ENDLAW, J.

1. The petitioner filed this writ petition impugning the condition imposed by respondent NDMC on the petitioner of the dues of the electricity connection earlier provided in Flat No.4 (Second Floor), Building No.3, Scindia House, Connaught Place, New Delhi purchased by the petitioner for granting electricity connection in the name of the petitioner in the said flat.

2. This Court vide interim order dated 23rd September, 2002, while issuing notice of the writ petition and relying upon the judgment of the Supreme Court in **Isha Marbles Vs. Bihar State Electricity Board** (1995) 2 SCC 648, directed the respondent NDMC to grant electricity connection in the name of the petitioner in the said flat subject to the petitioner depositing Rs. 8,00,000/- only with the NDMC instead of sums of Rs. 8,26,493/- and Rs.3,55,935/- demanded by the respondent NDMC as dues towards the earlier electricity connections provided in the flat. The petitioner is informed to have deposited the said sum of Rs. 8,00,000/- and electricity connection granted to the petitioner. Rule was issued in the writ petition on 8th April, 2003. On 7th September, 2010 attention of the counsel for the petitioner was invited to the subsequent judgment of the Supreme Court in Paschimanchal **Vidyut Vitran Nigam Ltd. Vs. DVS Steels & Alloys Private Ltd.** (2009) 1 SCC 210 and the Full Bench judgment of this Court in **BSES Rajdhani Power Ltd. Vs. Saurashtra Color Tones Pvt. Ltd.** AIR 2010 Delhi 14 which have taken a different view from that taken in earlier judgment in Isha Marbles.

3. The senior counsel for the respondent NDMC has today at the outset argued that before taking up the writ petition for consideration, the application of the petitioner under Order I Rule 10, CPC being CM No.11771/2004 has to be taken up for consideration. The petitioner by the said application seeks striking off of the name of M/s Kundan Infrastructures and the substitution of M/s Vanshika Buildtech Ltd. as the petitioner in the present writ petition. It is stated in the application that the writ petition was mistakenly filed in the name of M/s Kundan Infrastructures and in the body of the writ petition, the said M/s Kundan Infrastructures was mistakenly described as a Company incorporated under the Indian Companies Act, 1956; it is stated that M/s Kundan Infrastructures was a Partnership Firm instituted by Partnership Deed dated 3rd May, 2002; that the name of the partnership was changed to M/s Vanshika Buildtech and a fresh Partnership Deed dated 17th March, 2004 was executed; that thereafter M/s Vanshika Buildtech Ltd. was got incorporated on 31st March, 2004 and all the business and assets of the partnership of M/s Vanshika Buildtech was taken over by the said Company. The respondent NDMC has not filed any reply to the said application. However the senior counsel for the respondent NDMC with reference to the copies of the Partnership Deeds annexed to the application argued that the said Partnerships Deeds have been fabricated and the petitioner is none else but the previous owner of the flat and for this reason only is liable for the electricity dues of the previous owner of the flat. The senior counsel for the respondent NDMC has also argued that if the petitioner is not able to make out a title to the flat, it would in any case be not entitled to maintain the present writ petition and the writ petition would be liable to be dismissed.

4. In the absence of any reply of the respondent NDMC to the application, it is not open to the NDMC to take up such factual pleas orally and without any basis therefor. I have enquired from the senior counsel for the respondent NDMC whether NDMC in its counter affidavit or in any other pleading has even taken the plea of the identity of the present owner of the flat and of the earlier owner of the flat being the same. The answer is in the negative. In the absence of any pleading, such pleas cannot be permitted to be urged orally.

5. Moreover, the Sale Certificate with respect to the flat issued by the Debt Recovery Tribunal (DRT) pursuant to the auction of the said

flat is in the name of M/s Kundan Infrastructures; it was the said M/s Kundan Infrastructures who had applied to the NDMC for electricity connection in the said flat and the petitioner in the writ petition has paid the sum of Rs.8,00,000/- as aforesaid to the respondent NDMC and the respondent NDMC cannot convert this writ petition into a proceeding for the petitioner to establish its title to the flat.

6. The application being CM No.11771/2004 (u/O 1 R-10) is thus allowed and the name of the petitioner is permitted to be changed from M/s Kundan Infrastructures to M/s Vanshika Buildtech Ltd.

7. Coming to the merits of the matter, the case of the petitioner is that the aforesaid flat was earlier owned by M/s Surya Agro Oils Ltd.; that in a recovery proceeding filed by State Bank of Travancore against the said M/s Surya Agro Oils Ltd. before the Debt Recovery Tribunal, Delhi, a Recovery Certificate was issued against the said M/s Surya Agro Oils Ltd.; that in pursuance to the said Recovery Certificate, the said flat was auctioned and bid therefor made by the petitioner was accepted and Certificate of Sale dated 12th August, 2002 issued in favour of the petitioner and possession of the flat delivered to the petitioner; a Conveyance Deed is also stated to have been executed in favour of the petitioner. It is the case of the petitioner that after taking possession of the flat it found that there was no electricity connection existing therein and the electricity meter had also been detached; that upon approaching the respondent NDMC it was required to submit an application for electricity connection along with documents including an affidavit in the prescribed form; that the proforma of the affidavit required to be submitted by the petitioner inter alia provided:-

> "The said premises is installed with electricity connection against K.No._____NA_____. We undertake to pay the dues of electricity against the said existing electricity connection if found subsequently after the sanction of New / Additional load in this premises."

That the petitioner accordingly submitted the affidavit in the prescribed proforma; that after the petitioner had submitted the aforesaid affidavit, the respondent NDMC demanded the sums of Rs. 8,26,493/- and Rs. 3,55,935/- from the petitioner claiming the same to be due towards electricity connection in the name of M/s Cooke and Kelvey and

M/s Aditya Cables Ltd. respectively earlier provided in the said flat. The petitioner contending that in terms of judgment in Isha Marbles it was not liable to pay the electricity arrears of the earlier owner/occupant of the flat, filed the present writ petition as aforesaid. The petitioner also claimed the relief of declaration that the clause aforesaid in the affidavit obtained by the respondent NDMC from the petitioner is ultra vires the provisions of the Indian Electricity Act, 1910, Electricity (Supply) Act, 1948 and the New Delhi Municipal Council (NDMC) Act, 1994.

8. The respondent NDMC in its counter affidavit has inter alia stated that it was the duty of the petitioner to before acquiring the property ascertain the electricity dues, if any therein; that the petitioner had by submitting the affidavit aforesaid expressly agreed to pay the arrears and cannot wriggle out of the said commitment; that its demand of electricity arrears from the petitioner is reasonable and in public interest and is necessary to prevent dishonest consumers transferring the properties without clearing the dues.

9. The counsel for the petitioner has today argued:

(i) that the judgments in **Paschimanchal Vidyut** (supra) and in **Saurashtra Color Tones** (supra) are in the context of the Delhi Electricity Reforms Act, 2000; however, the said Act is not applicable to the area of the New Delhi Municipal Committee. Attention in this regard is invited to Section 1(2) of the Delhi Electricity Reforms Act, 2000;

(ii) that there is no provision in the NDMC Act, 1994 or in the Indian Electricity Act, 1910 or in the Electricity (Supply) Act, 1948 in force at the relevant time, entitling the respondent NDMC to recover the electricity dues owed by the earlier owner/occupant of the property from the new owner thereof;

(iii) that the respondent NDMC in its counter affidavit is seeking to justify the recovery only on the basis of the clause aforesaid in the affidavit obtained from the petitioner but protest in which regard was lodged immediately upon the respondent NDMC informing the petitioner of the arrears and the petitioner can thus not be held bound by the said affidavit;

(iv) that the respondent NDMC being the sole supplier of electricity

in the area, enjoys a position of monopoly and in exercise of such monopolistic practice had obtained the affidavit in the prescribed format from the petitioner and which the petitioner was bound to give and the said affidavit cannot now be used against the petitioner;

(v) Without prejudice to the aforesaid and in the alternative, it is argued that the aforesaid arrears are claimed to be for the period of 1996 to 2001; that the respondent NDMC in any case is not entitled to recover arrears beyond three years and could at best have recovered arrears for three years prior to 2002 from the petitioner and which as per the computations delivered by the respondent NDMC to the petitioner are of not more than `50,000/-. It is contended that the respondent NDMC cannot recover time barred arrears from a subsequent purchaser of the property.

10. The senior counsel for the respondent NDMC has sought to justify the power of NDMC to recover such electricity arrears from the subsequent purchaser of immovable property by referring to Sections 200, 363 & 102 of the NDMC Act, 1994 which are as under:-

"Section 200-Charges for supply of electricity—Subject to the provisions of any law for the time being in force, charges shall be leviable for the supply of electricity by the Council at such rates as may, from time to time, be fixed by the Council.

Section 363-Mode of recovery of certain dues—In any case not expressly provided for in this Act or any bye-law made thereunder any sum due to the Council on account of any charge, costs, expenses, fees, rates or rent or on any other account under this Act or any such bye-law may be recoverable from any person from whom such sum is due as an arrear of tax under this Act.

Provided that no proceedings for the recovery of any sum under this section shall be commenced after the expiry of three years from the date on which such sum becomes due.

Section 102—Recovery of Tax—(1) If the person liable for the payment of the tax does not, within thirty days from the service of the notice of demand, pay the amount due, such sum together

with all costs and the penalty provided for in Section 101 may be recovered under a warrant, issued in the form set forth in the Seventh Schedule, by distress and sale of the movable property or the attachment and sale of the immovable property of the defaulter:

Provided that the Chairperson shall not recover any sum the liability for which has been remitted on appeal under the provisions of this Act.

(2) Every warrant issued under this section shall be signed by the Chairperson."

11. It is argued that dues of electricity are a charge under Section 200; under Section 363 any sum due to the NDMC on account of charge, is recoverable "from any person" and which would include a subsequent purchaser; that under Section 102 the said charge being in the nature of a tax is recoverable as arrears of land revenue by attachment and sale of immovable property.

12. Attention is also invited to Section 2(15) of the Electricity Act, 2003 containing the definition of a "consumer" and which on enquiry is informed to be the same as definition of a consumer under the Indian Electricity Act, 1910. It is argued that under the said definition, the subsequent owner/occupant of the premises where the electricity connection is provided is also covered.

13. It is next contended by the senior counsel for the respondent NDMC that the petitioner had bound itself in the affidavit aforesaid, as a condition of supply of electricity to pay the arrears of the earlier owner/occupant and cannot now be permitted to be wriggle out.

14. The counsel for the petitioner in rejoinder has controverted that electricity charges are a tax. Attention is invited to the proviso to Section 363 laying down a limit of three years from the date when the "sums become due", for instituting proceedings for recovery thereof to buttress the argument that dues beyond three years cannot be recovered. The counsel for the petitioner has also invited attention to the recent dicta dated 20th August, 2010 of the Supreme Court in CA No.6817/2010 titled Haryana **State Electricity Board Vs. Hanuman Rice Mills** laying down that electricity arrears do not constitute a charge over the property

and therefore in general law, a transferee of a premises cannot be made liable for the dues of the previous owner/occupier and further holding that only where the statutory rules or terms and conditions of supply which are statutory in character, authorize the supplier of electricity, to demand from the purchaser of a property claiming re-connection or fresh connection of electricity, the arrears due by the previous owner/occupier in regard to supply of electricity to such premises, can the supplier recover the arrears from the purchaser.

15. The senior counsel for the respondent NDMC has also drawn attention to the terms and conditions of the auction held by the DRT to show that the flat aforesaid was put to auction together with all liabilities and claims attaching to the said flat. It is contended that the electricity charges are a liability attaching to the flat.

16. I am unable to accept any of the contentions of the senior counsel for the respondent NDMC. The contention that electricity dues are a charge on the immovable property to which they pertain has been expressly negatived even in **Paschimanchal Vidyut;** the Supreme Court therein held that a transferee of the premises or a subsequent occupant of the premises with whom the electricity supplier has no privity of contract cannot be asked to pay the dues of his predecessor in title or possession as the amount payable towards supply of electricity does not constitute a "charge" on the premises. For the same reason the attempt of the senior counsel for the respondent NDMC to, by referring to the provisions aforesaid of the NDMC Act contend that the electricity charges are a charge on the property cannot be accepted. The provisions of the NDMC Act relied upon by the senior counsel for the respondent NDMC also do not create a charge with respect to the electricity dues on the property to which the dues pertain. Section 363 makes the electricity dues recoverable only from the person from whom the same are due and not from the property with respect to which the same are due. Section 102 deals with the recovery of tax and not of electricity charges. The senior counsel for the respondent NDMC himself did not even attempt to justify that electricity charges are a tax except for making a bare submission. In any case even if Section 102 of the NDMC Act were to be applicable, the same makes the taxes recoverable from attachment and sale of immovable property of the defaulter and not from the immovable property to which the taxes pertain. The defaulter in the present case

would be the person in whose name the connection with respect to which the dues pertain was and cannot mean the subsequent purchaser of the property.

17. Insofar as the reference to the definition of "consumer" in the Indian Electricity Act, 1910 is concerned, the said definition was noticed in para 35 of the judgment in **Isha Marbles** and the said definition was not held to include the subsequent purchaser of the property.

18. The argument of the senior counsel for the respondent NDMC of the right of the NDMC on the basis of the clause reproduced above in the affidavit obtained by the NDMC from the petitioner also has no force. The said affidavit was obtained admittedly in consideration of grant of electricity connection. However the electricity connection did not come to be granted by the respondent NDMC to the petitioner and the petitioner immediately on the earlier dues being intimated to it preferred this writ petition. Thus the question of the petitioner being bound by the said affidavit, does not arise. Moreover, it is quite clear that the affidavit was in the format prescribed by the respondent NDMC itself and thus the contention of the petitioner that the affidavit was not given voluntarily has merit and the petitioner having immediately protested thereagainst cannot be held to be bound by it. Reference in this regard can be made to the judgment of the Supreme Court in **National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd.** MANU/SC/4056/2008 holding that when such standard terms and conditions are immediately protested against, no reliance can be placed thereon.

19. Notwithstanding having disagreed with all the contentions of the respondent NDMC, I am still unable to grant relief to the petitioner. I do not agree with the contention of the counsel for the petitioner that the judgment of the Full Bench of this Court in Saurashtra Color Tones is not applicable, being in relation to the Delhi Electricity Reforms Act, 2000, not applicable in the present case.

20. A close perusal of each of the judgment mentioned above shows:-

(a) Though the Supreme Court in Isha Marbles also held that electricity is public property and law requires such public property to be protected but held the law, in that case relating to Bihar,

to be inadequate to enforce the liability of the previous owner of the property on the subsequent owner of the property.

(b) A Division Bench of this Court in **Mrs. Madhu Garg Vs. North Delhi Power Ltd.** 129 (2006) DLT 213 cited with approval in **Saurashtra Color Tones** had occasion to examine the law as applicable to Delhi. Reference was made to 'General Conditions of Supply (of electricity), as applicable in Delhi, clause 2.1(iv) whereof provides for the applicant for supply of electricity depositing inter alia outstanding dues against the premises and/ or disconnected connection(s). The judgment refers to the said Clause being contained in General Conditions of Supply contained in the Tariff Orders of 1997-98 and 2001-02 also and which was continued. It was further held that the said General Conditions of Supply had been framed under Section 21(2) of the Indian Electricity Act, 1910 as well as Section 49 of the Electricity (Supply) Act, 1948 and hence is a piece of delegated legislation.

It was further held that in view of the aforesaid conditions of supply, it was irrelevant whether the subsequent purchaser was aware of the electricity dues or not.

The Division Bench further held that the binding and statutory nature of the Conditions of Supply was upheld by the Supreme Court in **Punjab State Electricity Board Vs. Bassi Cold Storage** 1994 Supp(2) SCC 124, **Bihar State Electricity Board Vs. Parmeshwar Kumar Agarwala** (1996) 4 SCC 686 and in **M/s Hyderabad Vanaspati Ltd. Vs. A.P. State Electricity Board** (1998) 2 SCR 620.

The Division Bench further held that an interpretation of law which furthers the preservation and protection of public property ought to be adopted; if arrears of electricity supply to a premises were to be equated with contractual claim of damages, it would encourage dishonest consumers to raise some dispute or other in respect of such arrears and evade the consequences of non-payment of electricity charges.

The Division Bench held the decision in Isha Marbles to be distinguishable being in the context of inadequacy of law applicable in the State of Bihar. It was held that law applicable in Delhi

being different inasmuch as there is a statutory condition of supply which requires payment of such outstanding dues before resumption/continuation of electricity supply.

It was also held that clause 2.1(iv) of the General Conditions of Supply was formulated by DESU (DVB) as far back as in 1997-98 and thereafter adopted by DERC in 2001-02.

(c) The judgment of the Full Bench in **Saurashtra Color Tones** also though referring to the provisions of the Delhi Electricity Reforms Act, 2000 (not applicable in the present case) also referred to the Clause 2.1 (iv) of the General Conditions of Supply applicable as far back as in 1997-98 and also to the provisions of the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948. Reference was also made to Section 21(2) of the Indian Electricity Act, 1910 empowering the licensee to regulate its relations with persons who are intended to become consumers. Reference was also made to Section 49(1) of the Electricity (Supply) Act, 1948 empowering the licensee to supply electricity to the real consumer upon such terms and conditions as it may be deem fit. It was reiterated that the clause 2.1(iv) (supra) in the General Conditions of Supply was the same as in the regime of DVB.

It was noticed that the licensee was not required to enter into a contract with an individual consumer and even in the absence of individual contract, the terms and conditions of supply would be applicable to the consumers and the consumers would be bound by the same.

It was held that the licensee in performance of a statutory duty supplies energy on certain specific terms and conditions framed in exercise of a statutory power and the terms and conditions are statutory in character and cannot be said to be contractual.

It was further held the Conditions of Supply have sacrosanctity since Rule 27 of the Indian Electricity Rules, 1956 framed by the Central Electricity Board (in exercise of powers under Section 37 of the Indian Electricity Act, 1910) read with Annexure VI

thereof provided the model Conditions of Supply required to be adopted by the State Boards and that it was on the basis of the statutorily prescribed model that energy was being supplied by the Board to the consumer.

It was held that there was no illegality or unconstitutionality in Clause 2.1(iv) of the General Conditions of Supply aforesaid and the same was held to have been framed under Section 21 (2) of the Indian Electricity Act, 1910 and Section 49 of the Electricity (Supply) Act, 1948.

The Full Bench held that the statutory void or in adequacy of law found by the Supreme Court in **Isha Marbles** had been correctedinsofar as the city of Delhi was concerned inasmuch as there is a statutory Condition of Supply which requires payment of such outstanding dues before resumption/continuation of electricity supply.

(d) The Supreme Court in **Paschimanchal Vidyut** held that if any statutory rules govern the conditions relating to sanction of a connection or supply of electricity, the distributor can insist upon fulfillment of requirement of such rules and regulations—if the rules are silent, it can stipulate such terms and conditions as it deems fit and proper to regulate its transactions and dealings. So long as such rules and regulations or the terms and conditions are not arbitrary and unreasonable, Courts will not interfere with them. A stipulation by the distributor that the dues in regard to the electricity supplied to the premises should be cleared before electricity supply is restored or a new connection is given to a premises was held to be not unreasonable or arbitrary.

(e) The same Hon'ble Judge who delivered the judgment in Paschimanchal Vidyut laying down that even in the absence of the statutory rules, the distributor was entitled to stipulate such terms and conditions as it may deem fit, in **Hanuman Rice Mills** (supra), restricted the right to recover dues of earlier owner/occupant only when statutory rules or terms and conditions of supply existed.

21. Though the judgments in **Madhu Garg** (supra) and Saurashtra

Color Tones did not relate to the NDMC areas but I find that under Section 197 of the NDMC Act, the NDMC has all the powers and obligations of a licensee under the Indian Electricity Act, 1910. Section 199 empowers the NDMC to enter into agreements regarding sale and price of electricity. Section 200 also empowers the NDMC to levy charges for electricity at such rates as may be fixed by the NDMC. The Full Bench in Saurashtra Color Tones has approved the judgment of the Division Bench of the Bombay High Court in Maharashtra State Electricity Board Vs. Maharashtra Electricity Regulatory Commission AIR 2003 Bom 398 laying down that the terms and conditions for supply of electricity go with the costs of electricity and while fixing the tariff for electricity, the terms and conditions of supply insofar as they add to the costs of electricity have to be considered. The recovery of dues of the earlier owner/occupant was thus held to be a part of the tariff.

22. Since the respondent NDMC neither in its counter affidavit nor in its arguments has dealt with the aforesaid aspect of the matter, the occasion did not arise to place before this Court documents to show that the General Conditions of Supply with Clause 2.1 (iv) as aforesaid apply to NDMC area. However, I have no doubt in my mind in this regard. The very fact that the format of the affidavit demanded by the respondent NDMC from the petitioner included a clause for payment of dues of earlier owner/occupant also indicates that the said General Conditions of Supply were applicable to respondent NDMC also.

23. The Division Bench and Full Bench of this Court in Madhu Garg and Saurashtra Color Tones respectively have held that the Conditions of Supply aforesaid whereunder such arrears are demanded are statutory. The said judgments are binding on the undersigned.

24. Resultantly, it is held that the petitioner is liable to pay the dues of the earlier owner/occupant and the writ petition fails and is dismissed. The alternative argument of counsel for the petitioner of the said claim or bulk of it being barred by time also cannot be accepted. Such recovery has been held to be in public interest. The limitation would commence only on demand being raised on subsequent purchaser and from which date it is within time. As aforesaid, the petitioner instead of Rs. 8,26,493/- and Rs. 3,55,935/- i.e. total Rs. 11,82,428/- has deposited only Rs.8,00,000/- with therespondent NDMC. The petitioner remains liable to pay the balance amount of Rs. 3,82,428/-. The petitioner is granted four

weeks time to pay the balance amount to the respondent NDMC failing which the respondent NDMC shall be entitled to disconnect the electricity connection granted to the petitioner under interim orders in this writ petition. Though the petitioner has availed the benefit of stay but in view of the aforesaid complex legal position and in view of the respondent NDMC having not taken the stand on which the writ petition has failed, I refrain from awarding any interest on the stayed amount or costs of the writ petition to the respondent NDMC.

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FAO

MACHINE TOOLS (INDIA) LTD. .....APPELLANT

VERSUS

THE EMPLOYEES STATE INSURANCE CORPORATION .....RESPONDENT

(MOOL CHAND GARG, J.)

FAO NO. : 322/2001 DATE OF DECISION: 26.10.2010

Employees State Insurance Act, 1948—Section 45A, 82—Aggrieved appellant, challenged judgment passed by ESI court, urging appellant though registered as Establishment under Delhi Shops & Establishment Act, but is not a shop as not covered by notification dt.30.09.1988—Therefore—appellant cannot be assessed under Section 45A of the Act—Also, less than 20 employees working in Establishment which was not involved in any manufacturing activity—As per Respondent, appellant covered within purview of Act w.e.f. 02.10.1988 and appellant failed to furnish complete and correct particulars in Form—01, thus liable to be assessed under Section 48-Held: It is not

that a place where goods are sold is only a shop—A place where services are sold on retail basis is also a shop—When services are being sold, it becomes a commercial activity—Since the Act is intended for social benefit of the workers, it has to be given an extended meaning—Petitioners are not providing anything for free—Petitioner also admitted the strength of their employees on a particular day as 65, thus they are covered under the Act.

There is no dispute that the appellants are also rendering service and activities carried out from their premises and are registered under the Shop & Establishment Act. The appellants act as commission agents and gets commission on machinery manufactured by foreign or Indian companies. Since the appellants despite service of notice failed to supply the necessary particulars, they were rightly issued a show cause notice under Section 45A of the Act where again they were given an opportunity to clarify their position. **(Para 16)**

Moreover, as regard the submissions made by the appellants that their establishment was not covered even if they were to be considered as a 'shop' as they were not employing requisite number of employees, the answer lied in the judgment reported in **M/s Hindu Jea Band Jaipur Vs. Regional Director, Employees' State Insurance Coporation, Jaipur,** AIR 1987 SC 1166, referred to by the appellants, which was dealt with by the ESI Court in the impugned judgment. The relevant observations are as under :

> "27. In an authority reported as **M/s Hindu Jea Band Jaipur Vs. Regional Director, Employees' State Insurance Coporation, Jaipur,** AIR1987 SC 1166, it was observed:-
>
> "It is not that a place where goods are sold is only a shop. A place where services are sold on retail basis is also a shop. The place of business of a firm carrying on the business of playing music on occasion, such as marriages and other social functions which made available on payment of the stipulated price the services of the members of the group of musicians employed by it on wages is a shop to which the Act is applicable by virtue of the notification, the fact that the services are rendered by the employees engaged by the firm intermittently or during marriages does not entitle the firm to claim any exemption from the operation of the Act. The firm cannot rely on sub-s.(4) of S.1 of the Act which refers to factories only in support of its case. Moreover, the services of the employees of the firm are not confined only to marriages. It cannot also be said that marriages take place only during a specified part of the year. Nowadays marriages take place throughout the year." **(Para 20)**

Important Issue Involved: It is not a place where goods are sold is only a shop—A place where services are sold on retail basis is also a shop—When services are being sold, it becomes a commercial activity. Since the Act is intended for social benefit of the workers, it has to be given an extended meaning.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Kailash Vasdev, Sr. Advocate With Mr. Siddharth Dias, Advocate

FOR THE RESPONDENT : Mr. Wadhwa, Sr. Advocate with Mr. Saurabh Dhawan, Advocate.

CASES REFERRED TO:

1. *M/s. Cochin Shipping Company* vs. *ESIC,* 1993 (II) LLJ795 (SC).

2. *M/s Hindu Jea Band Jaipur* vs. *Regional Director, Employees' State Insurance Coporation, Jaipur*, AIR1987 SC 1166.

RESULT: Appeal dismissed.

MOOL CHAND GARG, J.

1. This appeal has been filed under Section 82 of the Employees State Insurance Act, 1948 (hereinafter referred to as "the Act") against the judgment dated 7.4.2001 passed by the ESI court, Delhi in ESI Case No.15/90, whereby the learned ESI court has dismissed the petition filed by the appellant under Section 75 of the Act.

2. Briefly stating, the facts of this case are that the appellant, a Limited company, filed a petition before the ESI court through its Director and authorized representative Sh. K.J. Gandhi on the allegations that the appellant is registered as an 'establishment' under the Delhi Shops and Establishment Act and is providing professional services as their Engineers visit their clients. factories and establishments to advise and guide them about the machine tools, inspection equipments and other engineering equipments which the clients should acquire for the use of manufacturing the goods in their factories/establishments.

3. The respondents alleged that an Inspector of the respondent-corporation visited the appellant-company in the month of October, 1988 and collected some information about the appellant-company and then sent a letter dated 12.11.1988 informing the appellants that on the basis of the inspection conducted by the Inspector on 6.10.1988 the establishment of the appellant-company was covered under the Act by virtue of the Notification dated 30.09.1988 which gives effect to the coverage of the 'shops' also. The appellants were called upon to furnish complete and correct particulars in Form-01 within 15 days from the date of issue of the impugned order.

4. It is the case of the appellants that their representative visited the office of the respondent and explained their case that the appellant was not a shop and as such, it was not covered by the said notification. Thereafter, the respondent called upon the appellants to show cause as to why the assessment of the establishment of the appellants should not be made under Section 45A of the Act for the period from 2.10.1988 to

30.9.1988. It was submitted that explanation was furnished by the appellants to the respondent stating that they were not covered under the Act and that invocation of Section 45A of the Act was unwarranted. It was also submitted that there were less than 20 employees and that the establishment of the appellant was not involved in any manufacturing activity.

5. However, the pleas taken by the appellants were not accepted by the respondent. They contested the matter.

6. The ESI court framed the following issues on the pleadings of the parties:-

> "(i) Whether the demand raised by the respondent vide letter dated 8.3.90 is illegal and requires to be quashed as alleged by the petitioner in his petition? OPP
>
> (ii) Relief."

7. The ESI court also framed the following additional issue on 30.4.1998:-

> "Whether the factory in suit is coverable under the ESI Scheme and whether Sec.45-A of ESI Act could be invoked without the coverage of the factory?"

8. Another additional issue was also framed on 03.01.2001 to the following effect:-

> "Whether the employees getting salary beyond the limit of `1600/- per month have been counted for the ˇpurpose of coverage of the petitioner under the ESI Act?"

9. Thereafter, the parties led their evidence. The appellants examined PW-1 Sh.Subhash Gupta, who is an account officer, and PW-2 Sh.R.K.Gupta, Manager (Finance). On the other hand, respondents have examined RW-1 Sh.Raj Kanwal, Deputy Director, & one Inspector who conducted the inspection. The ESI Court however had not agreed with the appellant and dismissed their petition under Section 75 of the Act.

10. On the question as to whether the establishment of the appellant was not covered under the Act, relying upon the Notification dated 30.09.1988 the Court held that the establishment of the appellants was

covered within the definition of the „shop.. With respect to the objections raised that the appellants was not doing manufacturing activities and the employees who were employed by the employer were less than 20, the ESI court has observed that the appellant company did not fill up Form 01 given to them for supplying necessary particulars and in such a situation when a factory/establishment is not filing the return in the light of the Act, invocation of Section 45A of the Act was fully justified. Consequently, the learned ESI court held that once the respondent has proved that the appellants are employing requisite number of workers, which fact was also admitted by a witness of the appellants, who admitted that on a particular day the employees strength in the establishment of the appellants was 65 employees, claim of the appellants that they were exempted from the operation of the Act is not sustainable. Consequently, the claim petition filed by the appellants was dismissed as without any merit.

11. Before this Court, the learned counsel appearing for the appellants has assailed the impugned order by making submissions that the ESI Court has failed to appreciate that:-

(i) The Employee's State Insurance Act will apply to an Establishment when the Establishment as a fact employs 20 or more personnel drawing a salary of Rs ,600/- per month (as applicable at the relevant time). In the absence of such a determination, the provisions of the Act cannot be unilaterally extended to an Establishment. In this regard, it has been submitted that the ESI court failed to appreciate that it was a specific stand taken by the appellants that there were less than 20 number of employees and therefore, the employees of the appellant come within the definition of the 'employees' as stated under Section 2(9) of the Act. It has also been submitted that the question as to how many employees working under the appellant should have been considered at the relevant time i.e. when the inspection took place and notice was sent by the respondent i.e. between 1988 to 1990.

(ii) Merely because no reply was filed on behalf of the appellant to the queries made by the respondent, no presumption can be raised that more than 20 employees were working and therefore, the appellants were covered under the provisions of the Act as

claimed by the respondent.

(iii) The learned Judge has failed to appreciate that that the activities of the Appellant constituted activities where the services rendered and the machinery/equipments imported were never brought to the premises of the Appellant and/or delivered there. The services rendered by the petitioner company did not constitute activities which would come under the definition of Shop.

(iv) It has been submitted that in their reply it was specifically stated by them that:-

> "We rendered requisite assistance to our client in procuring the equipment as required by them from the manufacturers in India as well as from the overseas country. That after the machine tools and other equipments are received by our clients in their factories and establishments from the manufacturers, our engineers, technical personnel, visit them to advise them on the installation of such machine tools and other equipments, their operation, maintenance, training of their operations etc., all such type of services are rendered at their premises i.e. in their Factories and Establishments."

(v) It has also been submitted by them that the action of the respondent corporation was against the principles of natural justice for the following reasons:-

a. No report was prepared in the presence of the appellants. Further, no copy of the said report was ever served upon the petitioner company.

b. there was no compliance of notice under Section 44(2) by the respondent corporation and they straightaway proceeded with the determination of contribution under Section 45-A without giving a hearing to the petitioner company.

c. There is no compliance on the part of the respondent corporation of Regulation 10B (c) & (d) before proceeding under Section 45A of the ESI Act. (vi) It has also been submitted that the entire proceedings conducted by the

respondents were based on assumptions in the absence of any evidence to show that the premises of the appellant were used for the business of the Shop.

(vii) It has also been submitted that the respondents did not cross-examine the witnesses of the petitioner with regard to the number of eligible employees for purposes of coverability under the Act.

12. On the other hand, the learned counsel appearing for respondent submitted that in view of the Notification dated 30.09.1988 the 'shops' covered even the establishment of the appellants company and thus, they were covered within the purview of Section 1(5) of the Act w.e.f. 2.10.1988. Relying upon the judgment delivered in the case of **M/s Hindu Jea Band Jaipur Vs. Regional Director, Employees' State Insurance Coporation, Jaipur,** AIR1987 SC 1166 pleaded that branches of appellant also covered under the notification.

13. It was also submitted that the appellants were thereafter called upon to furnish a complete and correct particulars in Form 01 within 15 days of the date of issue of the impugned order. However, they failed to supply the necessary particulars and therefore, it became necessary for the respondent to assess the appellants under Section 45A of the Act for the period in question and for which they propose to assess the appellants at ` 49,630.25p on ad hoc basis despite affording an opportunity of personal hearing, which was fixed on 12.03.1990 at 2 pm. The appellants though sent their representative but did not file a reply to the show cause notice for which they took time and finally made a representation. It is also submitted that their establishment was not a 'shop' and that they were not liable to coverage under Section 1(5) of the Act or that no assessment order could have been passed against the appellants under Section 45A of the Act on ad hoc basis, is not sustainable.

14. It was further submitted that in view of non-submission of Form 01 by the appellants their claim that they were employing less 20 number of employees was also not sustainable.

15. I have heard the submissions made on behalf of the parties and have perused the order passed by the ESI Court. A bare reading of the Notification dated 30.09.1988 read with Section 2(9) and Section 2(27)

of the ESI Act goes to show that even a shop has been covered under the Act, which in fact extends the scope of the applicability of the Act to all such establishments.

16. There is no dispute that the appellants are also rendering service and activities carried out from their premises and are registered under the Shop & Establishment Act. The appellants act as commission agents and gets commission on machinery manufactured by foreign or Indian companies. Since the appellants despite service of notice failed to supply the necessary particulars, they were rightly issued a show cause notice under Section 45A of the Act where again they were given an opportunity to clarify their position.

17. I may also take note of Section 45A of the Act, which reads as under:-

"45A. Determination of contributions in certain cases

(1) Where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of section 44 or any Inspector or other official of the Corporation referred to in sub-section (2) of section 45 is prevented in any manner by the principal or immediate employer or any other person, in exercising his functions or discharging his duties under section 45, the Corporation may, on the basis of information available to it, by order, determine the amount of contributions payable in respect of the employees of that factory or establishment :

PROVIDED that no such order shall be passed by the Corporation unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard.

(2) An order made by the Corporation under sub-section (1) shall be sufficient proof of the claim of the Corporation under section 75 or for recovery of the amount determined by such order as an arrear of land revenue under section 45B or the recovery under section 45C to section 45-I ."

18. It is apparent from the record that the appellants have not filed a return as was required to have been filed under Section 45A of the Act.

They have not done so despite receiving a notice from the respondent to do so.

19. Before the court, the respondents have proved on record the survey report Ex.RW1/1, which was signed by PW-2 Sh. R.K. Gupta even though he denied having signed the same. RW-1 Raj Kanwal has deposed in his cross-examination that it was Sh.R.K.Gupta who signed the same. It was not in dispute that Form 01 was supplied to PW-2 Sh.R.K.Gupta which has not been filled up and filed. The ESI Court has rightly observed that:-

> "There is no reason to disbelieve his testimony. Form 01 is supplied as per Regulation 10-B of the Employees State Insurance (General) Regulations, 1950 which contains necessary information about the employees employed by the employer. The petitioner-company did not fill up the form 01 nor the same was supplied to the respondent. In such a situation, when the petitioner-company was inspected by the Inspectors of the respondent, they were given the Form 01 and as per the record of the petitioner, they were shown to be employing the requisite number of employees, it was obligatory on the petitioner-company to file their return or to produce their record before the respondents but there is nothing in the evidence of PW-1 Sh. Subhash Chand Gupta and PW-2 Sh.R.K.Gupta that they had pursued the matter to a logical end with the respondents excepting visiting the office of the respondents and thereafter leaving the matter to them as the respondents had assured them to take appropriate action. In such a situation, when a factory or establishment is not filing return, in the light of above legal and factual discussion, the invocation of section 45-A of the Act is fully justified."

20. Moreover, as regard the submissions made by the appellants that their establishment was not covered even if they were to be considered

as a 'shop' as they were not employing requisite number of employees, the answer lied in the judgment reported in **M/s Hindu Jea Band Jaipur Vs. Regional Director, Employees' State Insurance Coporation, Jaipur,** AIR 1987 SC 1166, referred to by the appellants, which was dealt with by the ESI Court in the impugned judgment. The relevant observations are as under :

> "27. In an authority reported as **M/s Hindu Jea Band Jaipur Vs. Regional Director, Employees' State Insurance Coporation, Jaipur,** AIR1987 SC 1166, it was observed:-
>
> > "It is not that a place where goods are sold is only a shop. A place where services are sold on retail basis is also a shop. The place of business of a firm carrying on the business of playing music on occasion, such as marriages and other social functions which made available on payment of the stipulated price the services of the members of the group of musicians employed by it on wages is a shop to which the Act is applicable by virtue of the notification, the fact that the services are rendered by the employees engaged by the firm intermittently or during marriages does not entitle the firm to claim any exemption from the operation of the Act. The firm cannot rely on sub-s.(4) of S.1 of the Act which refers to factories only in support of its case. Moreover, the services of the employees of the firm are not confined only to marriages. It cannot also be said that marriages take place only during a specified part of the year. Nowadays marriages take place throughout the year."
>
> 28. It is the admitted case of the petition that they are providing services. When services are being sold, it becomes a commercial activity. Since the Act is intended for social welfare of the workers, it has to be given an extended meaning. The petitioners are not providing anything for free as is conceded by PW-1 in his cross-examination that the advice is given free. This is not the case of the petitioner.

21. Similar proposition has been laid in the case of **M/s.Cochin Shipping Company Vs. ESIC,** 1993 (II) LLJ795 (SC).

22. In this case, it is not in dispute that the appellants were supplied with Form 01, they were also given a show cause notice dated 12.11.1988 and again an opportunity of hearing but they have not supplied the necessary information. However, their own witness, namely, PW-1 Sh.Subhash Gupta has admitted that strength of their employees on a particular date was 65, which clearly takes the establishment of the appellant within the meaning of 'an establishment employing more than 20 employees' on a particular day and thus, covers the appellants under the Act. There is no reason to interfere with the order of the ESI Court in this appeal. Accordingly, the appeal is dismissed with no order as to costs. Trial court record, if any, be sent back forthwith.

ILR (2011) I DELHI 209
WRIT PETITION (CIVIL)

M/S. GENESIS PRINTERS ....PETITIONER

VERSUS

SHRI RATI RAM JATAV ....RESPONDENTS
PRESIDING OFFICERS & ORS.

(VALMIKI J. MEHTA, J.)

W.P. (CIVIL) NO. : 61/1997 DATE OF DECISION: 27.10.2010

(A) Constitution of India, 1950—Article 226 and 227—Code of Civil Procedure, 1908—Order IX Rule 13—Industrial Disputes Act, 1947—Section 11—Labour Court by ex parte award directed reinstatement of workman with back wages and dismissed application of petitioner for setting aside exparte award—Orders challenged in HC—Plea taken, counsel without any reason stopped appearing in the case—Held—Ex parte award can be

set aside on account of giving valid reasons for non appearance—A client can not be made to suffer for fault of his advocate—This can not be a general rule and facts of each case have to be seen—There is no grave prejudice in setting aside ex parte proceedings as at best on setting aside exparte proceedings case will be decided considering respective merits—Impugned order set aside.

In my opinion, the Labour Court has clearly fallen into an error in dismissing the application of the petitioner under Section 9 Rule 13 read with Section 11 of the Industrial Disputes Act inasmuch as a client cannot be made to suffer for the fault of his advocate. This is the position right from the decision of the Supreme Court in the case of **Rafiq Vs. Munshi Lal** AIR 1981 SC 1400 in which it was laid down that a party should not suffer for the inaction, deliberate omission or mis-demeanour of his lawyer. No doubt, this cannot be a general rule, and, facts of each case have to be seen, however, I am of the firm belief in the facts of the present case that considering that only an amount of only Rs.2,400/- was liable to be paid in compliance of Section 25-F there was no reason for the management not to contest the case. Further, the status of the petitioner, at the relevant point of time when the workman was employed was a partnership firm and which was subsequently dissolved whereby one of the partner who is the present sole proprietor ship concern took over the business of the partnership firm. It is possible that on account of this reason there may have been miscommunication or lack of communication with the counsel or that the counsel otherwise failed to appear inasmuch as it was the other partner who was in touch with the Advocate, however, it cannot be said that there is a deliberate and conscious negligence of the petitioner to contest the proceedings so as to deny the relief of setting aside the ex parte proceedings. At best on setting aside ex parte proceedings the case will be decided considering the respective merits. There is therefore no grave prejudice in setting aside ex parte proceedings.

I, therefore, set aside the impugned order dated 18.12.1996 by

which the application under Order 9 Rule 13 read with Rule 11 of the Industrial Disputes Act was dismissed. **(Para 4)**

(B) Industrial Disputes Act, 1947—Section 2(oo) and 25 F—Services of workman were terminated vide termination letter service of which is not disputed—Plea of workman that action of requiring workman to come and collect dues instead of sending amount due alongwith letter is illegal—Per contra. plea of petitioner is that this technical defect is not such that any huge benefit would have accrued as to employer if provision of payment of dues was to have been complied with—Held—It is discretion of courts as to whether facts of case justify reinstatement or compensation would be adequate relief—Reinstatement is not automatic and facts of each case have to be seen to whether reinstatement should be granted or compensation is adequate remedy—Various factors such as industry in question, financial capacity of employer, peculiar circumstances of each case, nature and period of employment have to be seen—Employment of workman was towards working on printing machine which was sold—Plea of workman that there is no inherent right to retrenchment and valid reasons must be given for retrenchment rejected—Only requirement for retrenchment is it must be of type falling under Section 2 (oo) and letter must be accompanied by amount which would be 15 days pay for each year of service and a 30 days notice pay—There is indeed retrenchment but there is a technical violation in that instead of sending amount alongwith termination letter, workman was asked to collect amount—Employment is not of a very large number of years—Award set aside in that it directs reinstatement—Instead of reinstatement, workman should receive a sum of Rs. 1 lac as

compensation for illegal retrenchment.

Let us therefore examine the facts of the present case to decide whether reinstatement ought to be granted or compensation is enough. Firstly, the fact of the matter is that the employment letter specifically states that the workman was wanting to be employed for working of the Mercedes Super Machine pertaining to printing. I have already held above, that it cannot be said that this letter has been obtained by any coercion or undue influence. The employment of the workman was therefore specifically towards the working of the Mercedes Super Machine used in the printing business. This printing machine was thereafter sold by the employer on account of change in the technology of printing and also because of rapid decline of the work of the company and due to financial problems faced by the management. These aspects as stated in the notice dated 9.5.1988 have not been replied as denied to as per the records in the present case. On behalf of the respondent, it was sought to be contended that there is no inherent right of retrenchment and there must be given valid reasons for retrenchment. I do not agree. The only requirement of Section 2(oo) and Section 25 is that the retrenchment must be of the type falling under Section 2(oo) and in accordance with Section 25F i.e., retrenchment letter must be accompanied by the amount which would be 15 days pay for each year of service and a 30 days notice pay and the retrenchment must be of the type which is mentioned under Section 2(oo). The facts of the present case show that there is indeed a retrenchment in terms of the Section 2(oo) but there is a technical violation in that instead of sending the amount along with the termination letter, the workman was asked to collect the amount. As already stated, it is not as if the amount was very huge and the employer would have derived great benefit in not sending the amount of Rs.2,400/-. Another aspect which emerges in the facts of the present case is that the employment is not of a very large number of years that the reinstatement should automatically follow. The

employment was for a period of just about 3 years and that too, which came to an end way back in the year 1988. I am also guided by the fact that though the total compensation payable under Section 25-F would have been Rs. 2,400/- the respondent-2/workman has in fact till date pursuant to the an order under Section 17-B received a sum of about Rs.2,01,702/-from 1.5.1997 at a monthly amount of Rs.960/- per month. In the ultimate analysis, in my opinion, the impugned Award deserves to be set aside in that it directs reinstatement. In the opinion of this court, the facts and circumstances of the case as set out above are such that compensation would be an adequate relief and remedy to the workman. Taking a sum of Rs.2,400/- in the year 1988 and giving a reasonable rate of return considering that the amount would stand doubled in about roughly 7 to 10 years, the sum of Rs.2,400/-, even as on date from 1988 would at the very best be an amount of about Rs.40,000/-. On the other hand, the workman has already received amount in excess of Rs.2 lacs. Therefore, in the facts and circumstances of the case, I find that instead of reinstatement, the workman should receive a sum of Rs.1 lac as compensation for illegal retrenchment in violation of Section 25-F. **(Para 11)**

(C) Industrial Disputes Act, 1947—Section 17B—Payment under Section 17B can not be treated as subsistence allowance, if workman is having other sources of income—Workman directed to file affidavit alongwith copies of his bank accounts that he had no other source(s) of income during period he received payment pursuant to order under section 17B so that there is no need of any recovery from him.

The object of the ratio of the judgment of the Supreme Court in the case of **Dena Bank** (supra) that the workman should not be asked to refund any amount received under Section 17B was because the workman is not a rich person who has various sources of income and his only source of

income is the payment that he would be receiving under Section 17B. It is for this purpose, the payment under Section 17B has therefore being categorized "subsistence allowance" by the Supreme Court in **Dena Bank's** case. Surely, the payment under Section 17B cannot be treated as a subsistence allowance, if the workman is having other sources of income. Accordingly, in the opinion of this court in case, the workman during this period after passing of the order under Section 17B from 1.5.1997 is not having any other source of income except the payment which is received under Section 17B, then the workman will not be bound to refund the amount in excess of Rs.1 lac which has been decided by this court as compensation for illegal termination, however, in case during the said period if the workman has other additional source(s) of income including from other employment, then, the workman is bound to refund to the petitioner the amount in excess of Rs.1 lac. I may note that in compliance of the order under Section 17B, the petitioner has been making payments by cheque to the respondent and this amount of cheque is being regularly credited every month in the bank account of the workman/respondent no.2. The respondent/workman is therefore directed within a period of four weeks from the passing of this order to file an affidavit along with copies of his bank accounts that he had no other source(s) of income during the period he received payment pursuant to an order under Section 17B so that there is no need of any recovery from him.

With the aforesaid orders, the present petition is disposed of by setting aside the impugned Award dated 24.2.1996 and it is directed that compensation as stated above would be appropriate relief to workman instead of reinstatement. Parties are left to bear their own costs. **(Para 13)**

Important Issue Involved: (A) An ex parte award can be set aside on account of giving valid reasons for non appearance. A client can not be made to suffer for the fault of his advocate. No doubt, this can not be a general rule,

and, facts of each case have to be seen.

(B) Reinstatement is not automatic and facts of each case have to be seen as to whether reinstatement should be granted or compensation is an adequate remedy. Various factors such as the industry in question, financial capacity of the employer, peculiar circumstances of each case, the nature and period of employment and so on have to be seen.

(C) Payment under Section 17 B can not be treated as a subsistence allowance, if the workman is having other sources of income.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Sandeep Prabhakar, Ms. Prerna Mehta and Mr. Amit Kumar, Advocates.

FOR THE RESPONDENTS : Mr. Vinay Sabharwal, Advocate.

CASES REFERRED TO:

1. *Senior Superintendent Telegraph (Traffic) Bhopal* vs. *Santosh Kumar Seal & Ors.* (Civil Appeal No. 3815 of 2010) decided on April 26,2010.
2. *Harjinder Singh* vs. *Punjab State Warehousing Corporation* MANU/SC/0060/2010.
3. *Incharge Officer and Anr.* vs. *Shankar Shetty* 2010 (8) Scale 583.
4. *Jagbir Singh* vs. *Haryana State Agriculture Marketing Board and Anr.* MANU/SC/1213/2009.
5. *U.P. State Brassware Corporation Ltd.* vs. *Uday Narain Pandey* MANU/SC/2321/2005: (2006)ILLJ496SC.

6. *Anil Sood* vs. *Presiding Officer, Labour Court* II (2001) 10 SCC 534.
7. *Dena Bank* vs. *Kirtikumar T.Patel* (1999) 2 SCC 106.
8. *Rafiq* vs. *Munshi Lal* AIR 1981 SC 1400.

RESULT: Allowed.

VALMIKI J. MEHTA, J (ORAL)

1. By means of the present petition under Articles 226 and 227 of the Constitution of India the petitioner/employer/sole-proprietorship concern challenges the ex parte Award dated 24.2.1996 passed by the Labour Court directing the reinstatement of the workman with back wages, and also the order dated 18.12.1996 dismissing the application moved under Order 9 Rule 13 CPC read with Section 11 of the Industrial Disputes Act, 1947 for setting aside the ex parte Award. The issue with regard to the merits of the Award can only be examined if the order dated 18.12.1996 dismissing the application under Order 9 Rule 13 CPC ˘is set aside. This is for the reason that the documents which have been filed in this court on behalf of the petitioner were not before the Labour Court when the impugned Award came to be passed. This court will therefore first have to see the validity of the order dated 18.12.1996 dismissing the application under Order 9 Rule 13 CPC read with Section 11 of the Industrial Disputes Act.

2. That an ex parte Award can be set aside on account of giving valid reasons for non-appearance is no longer res integra inasmuch as it has been held by the Supreme Court in the case of **Anil Sood Vs. Presiding Officer, Labour Court** II (2001) 10 SCC 534 that such an application is indeed maintainable and it cannot be said that the Labour Court has no jurisdiction to set aside the ex parte Award.

3. The reason pleaded by the petitioner for setting aside the ex parte Award was that its counsel without any reason stopped appearing in the case, although, for a few dates he appeared. It is contended that there was no reason for the management not to contest the present case because not only the notice dated 9.5.1988 specifically asked the workmen to come and collect the dues under Section 25-F but also because the dues under Section 25-F were only a sum of Rs.1440+960 i.e., a total sum of Rs.2,400/-, being the amount calculated as per 15 days pay for

each year of service and also a notice pay of 30 days.

4. In my opinion, the Labour Court has clearly fallen into an error in dismissing the application of the petitioner under Section 9 Rule 13 read with Section 11 of the Industrial Disputes Act inasmuch as a client cannot be made to suffer for the fault of his advocate. This is the position right from the decision of the Supreme Court in the case of **Rafiq Vs.Munshi Lal** AIR 1981 SC 1400 in which it was laid down that a party should not suffer for the inaction, deliberate omission or mis-demeanour of his lawyer. No doubt, this cannot be a general rule, and, facts of each case have to be seen, however, I am of the firm belief in the facts of the present case that considering that only an amount of only Rs.2,400/- was liable to be paid in compliance of Section 25-F there was no reason for the management not to contest the case. Further, the status of the petitioner, at the relevant point of time when the workman was employed was a partnership firm and which was subsequently dissolved whereby one of the partner who is the present sole proprietor ship concern took over the business of the partnership firm. It is possible that on account of this reason there may have been miscommunication or lack of communication with the counsel or that the counsel otherwise failed to appear inasmuch as it was the other partner who was in touch with the Advocate, however, it cannot be said that there is a deliberate and conscious negligence of the petitioner to contest the proceedings so as to deny the relief of setting aside the ex parte proceedings. At best on setting aside ex parte proceedings the case will be decided considering the respective merits. There is therefore no grave prejudice in setting aside ex parte proceedings.

I, therefore, set aside the impugned order dated 18.12.1996 by which the application under Order 9 Rule 13 read with Rule 11 of the Industrial Disputes Act was dismissed.

5. The question then is what follows. Once an application under Order 9 Rule 13 CPC is to be allowed, then, normally a case, should thereafter be remanded back to the original forum for decision in accordance with law. My initial reaction was to remand the matter back to the Labour Court for a decision in accordance with law, but, considering that the retrenchment in question is of the year 1988 i.e. 22 years back, and the impugned Award is dated 24.2.1996-fourteen years old, I find that the present is a fit case for exercising my jurisdiction under Articles

226 and 227 of the Constitution of India to decide the main case itself. I, therefore, proceed to decide the main case inasmuch as the petition as filed in this court is supported by documents and reply thereto has also been filed by the workman. Certain admitted position emerges from the records and the documents filed, which enables this court to itself decide the case on merits considering the long pendency of litigation.

6. The facts of the case are that the workman was employed for the purpose of running of a Mercedes Super Machine relating to printing. The employment letter is dated 6.6.1985 (a holograph) and which specifically makes reference to the fact of the prayer for the employment of the workman for running the Mercedes Super Machine. ˇThe counsel for the respondent states that the appointment letter does not reflect this position but he has not been able to show any such appointment letter. In the counter-affidavit filed in this court, the workman has not disputed the writing of this letter, however, it is stated that the letter was written at the dictates of the management. The workman therefore contends that this letter was written under undue influence and coercion. In the opinion of this court, if there was undue influence or coercion, then, surely either the workman would have preferred not to take up the employment or may have complained to any appropriate authority, including the Labour Commissioner, as to the unfair means adopted for the purpose of granting of an employment at any time after employment, but this admittedly is not the position. Therefore, it does not stand to reason that the workman would have written this letter under any coercion or undue influence as claimed. The facts of the case and the conduct of the workman belie this stand which is taken up in the counter-affidavit.

7. The workman who was employed on 6.6.1985, his services were terminated vide the termination letter dated 9.5.1988. The fact that this letter was received by the workman is not disputed. What is contended on behalf of the workman is that such an action of requiring the workman to come and collect the dues instead of sending the amount due along with the letter is illegal. On behalf of the petitioner, it is not seriously disputed that the amount in question namely the sum of Rs.2,400/- ought to have been sent with the termination letter dated 9.5.1988, but, it is pleaded that this technical error is not such that any huge benefit would have accrued to the employer at the relevant point of time because as stated above only a sum of Rs.2,400/- was payable if the provision of

Section 25-F was to have been complied with.

8. There is no dispute as to the legal proposition that it is the discretion of the courts as to whether the facts of the case justify a reinstatement or that compensation would be an adequate relief. It is however contended by the learned counsel for the respondent that this court should not exercise its discretion under Section 226 and 227 of the Constitution of India because the Labour Court has allowed reinstatement and it cannot be said that exercise of discretion is illegal. It is also contended that the facts with regard to whether reinstatement should be granted or compensation should be paid was a matter to be decided by the Labour Court.

I am of the opinion that since this court has been persuaded to decide the main case itself in the peculiar facts and circumstances of this case, it is this court which would decide the issue of whether reinstatement is the appropriate remedy or compensation would be justified in the facts and circumstances of the present case because the Labour Court had no occasion to examine the issue of compensation in lieu of reinstatement as the Award is an ex parte Award.

9. A lot of water has flown since the early 80's when reinstatement was considered to be automatic and a matter of right on account of violation of Section 25-F. There are atleast now a few dozen judgments of the Supreme Court that reinstatement is not automatic and facts of each case have to be seen as to whether reinstatement should be granted or compensation is an adequate remedy. Various factors such as the industry in question, financial capacity of the employer, peculiar circumstances of each case, the nature and period of employment and so on have to be seen. In a recent judgment in the case of **Incharge Officer and Anr. Vs. Shankar Shetty** 2010 (8) Scale 583, the Supreme Court has referred to its various earlier judgments and has held that reinstatement is not automatically a matter of right because of violation of Section 25 F. Paras 2 and 3 of this judgment are relevant and the same read as under:-

> **"2.** The only question to be considered in this appeal by special leave is with regard to the relief of reinstatement granted to the respondent by the Single Judge of the High Court of Karnataka in his judgment and order dated August 13, 2001 and affirmed

by the Division Bench vide its judgment and order dated December 9, 2004 in the writ appeal. Should an order of reinstatement automatically follow in a case where the engagement of a daily wager has been brought to end in violation of Section 25F of the Industrial Disputes Act, 1947 (for short 'ID Act')? The course of decisions of this Court in recent years has been uniform on the above question. In the case of **Jagbir Singh v. Haryana State Agriculture Marketing Board and Anr,** delivering the judgment of this Court, one of us (R.M.Lodha, J.) noticed some of the recent decisions of this Court-namely, **U.P.State Brassware Corporation Ltd. & Anr. V. Uday Narain Pandey; Uttranchal Forest Development Corporation vs. M.C. Joshi; State of M.P.& Ors v. Lalit Kumar Verma; Madhya Pradesh Admn v. Tribhuban; Sita Ram & Ors. V. Motil Lal Nehru Farmers Training Institute; Jaipur Development Authority v. Ramasahai & Anr; Ghaziabad Development Authority & Anr. v. Ashok Kumar & Anr. and Mahboob Deepak v. Nagar Panchayat, Gajraula & Anr.** and stated as follows:

"It is true that the earlier view of this Court articulated in many decisions reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in a long line of cases, this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is in contravention of the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice. It would be, thus, seen that by a catena of decisions in recent time, this Court has clearly laid down that an order of retrenchment passed in violation of Section 25-F although may be set aside but an award of reinstatement should not, however, be automatically passed. The award of reinstatement with full back wages in a case where the workman has completed 240 days of work in a year preceding the date of termination, particularly, daily wagers has not been found to be proper by this Court and instead compensation has been awarded. This Court has distinguished between a daily wager who does

not hold a post and a permanent employee".

3. Jagbir Singh has been applied very recently in the case of **Senior Superintendent Telegraph (Traffic) Bhopal v. Santosh Kumar Seal & Ors.** (Civil Appeal No. 3815 of 2010) decided on April 26,2010 wherein this Court stated:

"In view of the aforesaid legal position and the fact that the workmen were engaged as daily wagers about 25years back and they worked hardly for 2 or 3 years, relief of reinstatement and back wages to them cannot be said to be justified and instead monetary compensation would subserve the ends of justice."

The learned counsel for the petitioner has also relied upon the case of **Jagbir Singh Vs. Haryana State Agriculture Marketing Board and Anr.** MANU/SC/1213/2009 and in which the Supreme Court has held that reinstatement is not automatic. Paras 3, 6, 7, 8 and 12 of the said judgment are relevant and the same read as under:-

"3. The Presiding Officer, Industrial Tribunal-cum-Labour Court, Panipat, after recording evidence and hearing the parties held that the appellant had worked for more than 240 days in the year preceding the date of termination and that the Respondent No. 1 violated the provisions of Section 25F of the Act 1947 by not giving him notice, pay in lieu of notice and retrenchment compensation before his termination. The Labour Court, accordingly, vide its award dated September 16, 2005 declared that the appellant was entitled to reinstatement with continuity of service and full back wages from the date of demand notice, i.e., January 27, 1997.

6. The learned Counsel for the appellant strenuously urged that once the termination of service of the appellant was held to be in violation of Section 25F of the Act 1947, the Labour Court rightly ordered reinstatement with continuity of service and full back wages and the High Court was not justified in interfering with the just award passed by the Labour Court. On the other hand, the learned Counsel for the respondents supported the order of the High Court.

7. It is true that earlier view of this Court articulated in many

decisions reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in long line of cases, this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is in contravention to the prescribed procedure. Compensation instead of ˇreinstatement has been held to meet the ends of justice.

8. In **U.P. State Brassware Corporation Ltd. v. Uday Narain Pandey** MANU/SC/2321/2005: (2006)ILLJ496SC , the question for consideration before this Court was whether direction to pay back wages consequent upon a declaration that a workman has been retrenched in violation of the provisions of the Section 6N of the U.P. Industrial Disputes Act, 1947 (equivalent to Section 25F of `the Act, 1947') as a rule was proper exercise of discretion. This Court considered a large number of cases and observed thus:

41. The Industrial Courts while adjudicating on disputes between the management and the workmen, therefore, must take such decisions which would be in consonance with the purpose the law seeks to achieve. When justice is the buzzword in the matter of adjudication under the Industrial Disputes Act, it would be wholly improper on the part of the superior courts to make them apply the cold letter of the statutes to act mechanically. Rendition of justice would bring within its purview giving a person what is due to him and not what can be given to him in law.

42. A person is not entitled to get something only because it would be lawful to do so. If that principle is applied, the functions of an Industrial Court shall lose much of their significance.

43. The changes brought about by the subsequent decisions of this Court, probably having regard to the changes in the policy decisions of the Government in the wake of

prevailing market economy, globalisation, privatisation and outsourcing, is evident.

44. ...

45. The Court, therefore, emphasised that while granting relief, application of mind on the part of the Industrial Court is imperative. Payment of full back wages, therefore, cannot be the natural consequence.

12. In this case, the Industrial Court exercised its discretionary jurisdiction under Section 11A of the Industrial Disputes Act. It merely directed the amount of compensation to which the respondent was entitled had the provisions of Section 25F been complied with should be sufficient to meet the ends of justice. We are not suggesting that the High Court could not interfere with the said order, but the discretionary jurisdiction exercised by the Industrial Court, in our opinion, should have been taken into consideration for determination of the question as to what relief should be granted in the peculiar facts and circumstances of this case. Each case is required to be dealt with in the fact situation obtaining therein." (Emphasis added)

10. A reading of the aforesaid judgment in the case of **Incharge Officer** (supra) and also various other judgments which have been referred to show that the reinstatement is not automatic and the facts and circumstances of each case have to be examined by the court. The learned counsel for the respondent sought to place reliance upon **Harjinder Singh Vs. Punjab State Warehousing Corporation** MANU/SC/0060/2010 to contend that this court should not interfere with the exercise of discretion by the labour court for granting reinstatement in service. I do not find that the reading of the judgment shows that the decisions referred to in the case of **Incharge Officer** (supra) are said to have laid down the incorrect law. Whether or not reinstatement is to be granted or only a compensation should be granted is surely in the realm of facts of each case, a legal position ˇwhich is not disputed even by the counsel for the respondent. And, in the facts of this case, as already stated, the Labour Court had no occasion to examine the issue as to whether compensation should be granted instead of reinstatement as the Award is an ex parte Award.

11. Let us therefore examine the facts of the present case to decide whether reinstatement ought to be granted or compensation is enough. Firstly, the fact of the matter is that the employment letter specifically states that the workman was wanting to be employed for working of the Mercedes Super Machine pertaining to printing. I have already held above, that it cannot be said that this letter has been obtained by any coercion or undue influence. The employment of the workman was therefore specifically towards the working of the Mercedes Super Machine used in the printing business. This printing machine was thereafter sold by the employer on account of change in the technology of printing and also because of rapid decline of the work of the company and due to financial problems faced by the management. These aspects as stated in the notice dated 9.5.1988 have not been replied as denied to as per the records in the present case. On behalf of the respondent, it was sought to be contended that there is no inherent right of retrenchment and there must be given valid reasons for retrenchment. I do not agree. The only requirement of Section 2(oo) and Section 25 is that the retrenchment must be of the type falling under Section 2(oo) and in accordance with Section 25F i.e., retrenchment letter must be accompanied by the amount which would be 15 days pay for each year of service and a 30 days notice pay and the retrenchment must be of the type which is mentioned under Section 2(oo). The facts of the present case show that there is indeed a retrenchment in terms of the Section 2(oo) but there is a technical violation in that instead of sending the amount along with the termination letter, the workman was asked to collect the amount. As already stated, it is not as if the amount was very huge and the employer would have derived great benefit in not sending the amount of Rs.2,400/-. Another aspect which emerges in the facts of the present case is that the employment is not of a very large number of years that the reinstatement should automatically follow. The employment was for a period of just about 3 years and that too, which came to an end way back in the year 1988. I am also guided by the fact that though the total compensation payable under Section 25-F would have been Rs. 2,400/- the respondent-2/workman has in fact till date pursuant to the an order under Section 17-B received a sum of about Rs.2,01,702/-from 1.5.1997 at a monthly amount of Rs.960/- per month. In the ultimate analysis, in my opinion, the impugned Award deserves to be set aside in that it directs reinstatement. In the opinion of this court, the facts and

circumstances of the case as set out above are such that compensation would be an adequate relief and remedy to the workman. Taking a sum of Rs.2,400/- in the year 1988 and giving a reasonable rate of return considering that the amount would stand doubled in about roughly 7 to 10 years, the sum of Rs.2,400/-, even as on date from 1988 would at the very best be an amount of about Rs.40,000/-. On the other hand, the workman has already received amount in excess of Rs.2 lacs. Therefore, in the facts and circumstances of the case, I find that instead of reinstatement, the workman should receive a sum of Rs.1 lac as compensation for illegal retrenchment in violation of Section 25-F.

12. The issue then arises is what should happen to the excess amount received by the workman pursuant to the orders under Section 17-B. Though an order under Section 17B is only an interim order which is subject to the final decision in the case, however, the Supreme Court in the case of **Dena Bank Vs. Kirtikumar T.Patel** (1999) 2 SCC 106 has held that the payment under Section 17 B is in the nature of subsistence allowance which would not be refundable or recoverable even if the Award is set aside by a higher court. On a careful reading of this judgment, I am of the opinion that this judgment cannot be said to be laying down an intractable position that even if the employee has other sources of income, although he has simultaneously received the payment under Section 17B, even then there can be no recovery of the amount received in excess of the compensation which is finally determined by the Court.

The stand as taken on behalf of the petitioner by its counsel is quite far as it is urged that as long as the Award is set aside, the petitioner is agreeable to not press the issue of recovery of compensation and that whatever amount which stands paid to the respondent /workman should be taken as full and final settlement of dues of the petitioner towards the workman for illegal retrenchment provided of course that the workman did not have other sources of income when he was receiving the payment under Section 17B. The counsel for the petitioner however submits that as per the information received by the petitioner, it is not as if the respondent workman is a poor person and has no source of income except the monies which were paid under Section 17B. The counsel for the petitioner states that the workman in fact owns a premises and he has let out a floor of these premises and is earning rent therefrom. This

aspect of course has not been established on record and is also strongly disputed by the learned counsel for the workman.

13. The object of the ratio of the judgment of the Supreme Court in the case of **Dena Bank** (supra) that the workman should not be asked to refund any amount received under Section 17B was because the workman is not a rich person who has various sources of income and his only source of income is the payment that he would be receiving under Section 17B. It is for this purpose, the payment under Section 17B has therefore being categorized "subsistence allowance" by the Supreme Court in **Dena Bank's** case. Surely, the payment under Section 17B cannot be treated as a subsistence allowance, if the workman is having other sources of income. Accordingly, in the opinion of this court in case, the workman during this period after passing of the order under Section 17B from 1.5.1997 is not having any other source of income except the payment which is received under Section 17B, then the workman will not be bound to refund the amount in excess of Rs.1 lac which has been decided by this court as compensation for illegal termination, however, in case during the said period if the workman has other additional source(s) of income including from other employment, then, the workman is bound to refund to the petitioner the amount in excess of Rs.1 lac. I may note that in compliance of the order under Section 17B, the petitioner has been making payments by cheque to the respondent and this amount of cheque is being regularly credited every month in the bank account of the workman/respondent no.2. The respondent/workman is therefore directed within a period of four weeks from the passing of this order to file an affidavit along with copies of his bank accounts that he had no other source(s) of income during the period he received payment pursuant to an order under Section 17B so that there is no need of any recovery from him.

With the aforesaid orders, the present petition is disposed of by setting aside the impugned Award dated 24.2.1996 and it is directed that compensation as stated above would be appropriate relief to workman instead of reinstatement. Parties are left to bear their own costs.

ILR (2011) I DELHI 226
W.P.

SHAHID PARVEZ ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(S. MURALIDHAR, J.)

W.P. NO. : 4800/2008 DATE OF DECISION: 27.10.2010

Narcotic Drugs and Phychotropic Substances Act, 1985—Section 68-I (3) & 68-A (2) (d) & 68-B(g)—Writ petition by petitioner against order passed by Appellant Tribunal for forfeiture of property, dismissing petitioner's appeal against order passed by Competent Authority U/s 68-I (3) of Act—Petitioner urged his brother detained for indulging in illicit trafficking of drugs and subsequently order of detention passed against him for period of two years—Property belonging to petitioner frozen by police on ground that petitioner being brother of detenu also covered under section 68-A (2) (d) of Act—Police suspected source of said property as well as another shop belonging to petitioner illegal acquired properties of detenu, brother of petitioner—Detenu filed writ petition challenging order of detention—Only initial period of detention of three months sustained and subsequent period of detention held to be vitiated—As per petitioner, for operation of section 68-A (2) (d) of Act subsisting valid order of detention required and as order of detention of his brother, declared void ab initio and only initial period of detention of 3 months sustained, therefore property of petitioner not liable to be forfeited —Also, respondent failed to discharge initial burden of showing nexus between properties

acquired by petitioner with alleged illicit earnings of his brother—Respondent argued entire detention order not held to be illegal thus burden shifted on petitioner to show property was acquired by him from his own source of income. Held, If there is a violation of Article 22 (5) in not informing the detenu that he had an opportunity to represent to the declaring authority, upon the Court quashing the Section 9 declaration, the order is impliedly declared void from its inception and on that basis, the benefit of extension of the period of 5 weeks to 4 months and 2 weeks, and the benefit of extention of 11 weeks to 5 month and 3 weeks in Section 9 (2), cease to apply—As the period of 3 months of detention was held valid, the detention order was itself held to be void ab initio and the show cause notice was issued to the petitioner thereafter when there was no valid detention order against his brother—Consequently the essential condition for invoking section 68-A of the Act had been rendered non-existent.

First the effect of this Court's order dated 16th May 2002 quashing the detention of the Petitioner's brother's detention requires to be considered. The decision of the Full Bench of this Court in Akhilesh Kumar Tyagi, was in the context of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1975 ('COFEPOSA Act'). The relevant provisions of COFEPOSA Act are more or less similar to the corresponding provisions in Chapter V-A of the NDPS Act with which the present case is concerned. In **Maqudoom Meera Hameem v. Joint Secretary to Govt. of India** (Crl Writ Petition No. 83 of 1995 decided on 17th August 1995), the Division Bench of this Court had held that in case where the reference to the Advisory Board was

made beyond 5 weeks and the Advisory Board gave its opinion beyond 11 weeks, the continued detention during the extended period became bad. In Akhilesh Kumar Tyagi, the correctness of the decision in Maqudoom Meera Hameem was questioned by the Union of India. It was contended that till such time the detention order was quashed, it remained valid. It was urged by the Union of India that the respective periods of 5 weeks and 11 weeks in Maqudoom Meera Hameem which got extended to '4 months and 2 weeks' and '5 months and 3 weeks' respectively, did not get contracted or reduced back to 5 weeks and 11 weeks respectively when the declaration under Section 9 COFEPOSA Act was quashed. Consequently, it was contended by the Union of India that the detention beyond three months did not become illegal automatically. **(Para 14)**

It may be recalled that in **Akhilesh Kumar Tyagi** the detention was set aside on the ground that the Petitioner had not been informed by the declaring authority that he had a right to make a representation against the order of detention to the Advisory Board and the Central Government and also to the declaring authority. **(Para 15)**

Important Issue Involved: When, there is a violation of Article 22 (5) in not informing the detenu that he had an opportunity to represent to the declaring authority, upon the Court quashing the Section 9 declaration, the order is impliedly declared void from its inception and on that basis, the benefit of extension of the period of 5 weeks to 4 months and 2 weeks, and the benefit of extension of 11 weeks to 5 month and 3 weeks in Section 9 (2), cease to apply—Moreover, when detention order held to be void ab initio but some period of detention under the order sustained if show cause notice for forfeiture of property under Section 68-A (2) (d) issued after period of sustained detention order over, the essential condition for invoking Section 68-A is rendered non-existent.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Vinoo Bhagat with Mr. M.R. Mishra, Advocate.

FOR THE RESPONDENT : Mr. Atul Nanda Advocate for R-1 to R-3.

CASES REFERRED TO:

1. *Union of India* vs. *Harish Kumar* (2008) 1 SCC 195.
2. *Meena Jayendra Thakur* vs. *Union of India* (1999) 8 SCC 177.
3. *Maqudoom Meera Hameem* vs. *Joint Secretary to Govt. of India* (Crl Writ Petition No. 83 of 1995 decided on 17th August 1995.
4. *Akhilesh Kumar Tyagi* vs. *Union of India* 60 (1995) DLT 203 (FB).
5. *Akhilesh Kumar Tyagi* vs. *Union of India* held in para 30 as under (DLT@ p. 213).

RESULT: Petition allowed.

S. MURALIDHAR, J.

1. This writ petition has been filed against an order dated 1st February 2006 passed by the Appellate Tribunal for Forfeited Property ('Appellate Tribunal') dismissing the Petitioner's appeal against an order dated 7th July 1999 passed by the Competent Authority ('CA') under Section 68-I (3) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act').

Background facts

2. The Petitioner's brother Mohd. Azad Parvez of Balasore Town, Orissa was detained on 10th July 1991 for the alleged offence of indulging in illicit trafficking of drugs punishable under the NDPS Act. This was subsequent to an order of detention passed against Mohd. Azad on 26th July 1989 passed by the Joint Secretary to the Government of India. After Mohd Azad was arrested, he was served with the order of detention

and grounds of detention on 10th July 1991. On 30th July 1991, a reference was made to the Advisory Board under Section 9 (1) of the NDPS Act. The Advisory Board held that there was sufficient cause for the detention and a confirming order was passed by the Central Government under Section 9(1) read with Section 10(2) of the NDPS Act for a period of two years with effect from 10th July 1991.

3. It is stated that Mohd. Azad served out the entire detention period. However, while under detention, Mohd. Azad filed a Writ Petition (Criminal) No. 315 of 1992 in this Court challenging the said order of detention. However, the said writ petition was not taken up for hearing for many years and not before he completed the period of detention.

4. Meanwhile, the property belonging to the Petitioner Shahid Parvez, brother of Mohd. Azad being immovable property located in Balasore Town, which was purchased in his name under a sale deed dated 11th February 1998, was frozen by the Inspector In-charge, Police Station (PS) Balasore on 18th January 1999. This was confirmed by the CA on 12th February 1999. The said action was taken on the ground that the order of detention dated 26th July 1989 against Mohd. Azad had not been revoked by any Court and the Petitioner being his brother was a person covered under Section 68-A (2) (d) of the NDPS Act. It was suspected that the source of the above immovable property at Balasore in the name of the Petitioner as well as another motor parts shop belonging to the Petitioner also located at Balasore, Orissa were illegally acquired properties in terms of Section 68B (g) of the NDPS Act.

5. According to the Respondents, on 17th February 1999 and 9th March 1999, notices were issued to the Petitioner under Section 68-H (1) of the NDPS Act calling upon him to indicate the sources of his income, earnings or assets, out of which or by means of which he had acquired the said two properties, the evidence on which he relies and other relevant

information and particulars. It is stated that the above notices were served on the Petitioner on 13th May 1999. However, there was no response to the above notice. Thereafter, a notice under Section 68-I (1) of the NDPS Act was issued to the Petitioner on 14th June 1999, which was served on him on 23rd June 1999, informing him of the date of hearing of 5th July 1999 before the CA. It is stated by Respondents that despite service of notice the Petitioner did not appear before the CA. Consequently, the proceedings were concluded ex parte with a presumption being drawn against the Petitioner that the assets mentioned in the Schedule were the illegally acquired properties of his brother Mohd. Azad under Section 68-B (g) of the NDPS Act. The said properties were declared to have been forfeited to the Central Government free from all encumbrances. Thereafter, the Petitioner filed an appeal before the Appellate Tribunal which was pending before it.

6. In the meanwhile, on 16th May 2002 the petition of Mohd. Azad being Writ Petition (Criminal) No. 315 of 1992 was taken up for hearing by this Court and disposed of on that date by the following order:

> "Crl.W. No. 315/92
>
> It is agreed between the parties that this matter is covered by the decision of this Court in **Akhilesh Kumar Tyagi v. Union of India** reported in 1995 IV AD (Delhi) 107. The writ petition is allowed in terms thereof. The initial period of detention of three months is sustained.
>
> It is contended by learned counsel for the Petitioner that the original detention for a period of three months is only valid and any detention subsequent thereto is vitiated. On the contrary, the learned ASG submits that even if there is no declaration of continued detention yet detention of a period of one year would not suffice but further detention would be bad. I have heard the learned counsel, it appears to me that the contention raised by Mr. Sood, learned ASG is not borne out from the law laid down by the Supreme Court. I, therefore, hold that the detention for a period of three months is valid and continue detention is vitiated. The writ petition is allowed accordingly."

7. Meanwhile the Appellate Tribunal, on 1st October 1999, directed

that the Petitioner "should be given an opportunity to produce his evidence and submit his contentions before the CA." The CA was asked to consider the documents and submissions and pass fresh orders. Pursuant thereto, on 11th October 1999 the Petitioner appeared before the CA and presented documents. The CA informed the Appellate Tribunal on 15th October 1999 that the certificates produced by the Petitioner about receipt of salary and commission from the three different firms in Calcutta could not be verified as such firms did not exist at the addresses given. However, before the Appellate Tribunal the Petitioner pointed out that he was an employee in these concerns during the period 1979-80 to 1985-86 and that the inquiry was made after a long time-gap of 15-20 years during which time his employers might have shifted to other places and, therefore, mere non-availability of the concerns at the addresses given should not have been a ground for the CA to disbelieve the Petitioner. The Appellate Tribunal, on 3rd December 2002, passed an order directing the CA to give a further opportunity to the Petitioner to prove the genuineness of those concerns. The CA was directed to make further enquiries. The proceedings were directed to be completed within three months. The appeal was again taken up before the Appellate Tribunal on 18th August 2005. It was noted that the supplementary findings of the CA that were called for by the Appellate Authority in its order dated 3rd December 2002 had not been submitted. Accordingly, a direction was issued to CA to submit the additional findings.

8. Subsequently, the appeal was taken up for hearing on 1st February 2006 before the Appellate Tribunal. None appeared for the Appellant (Petitioner herein). The Appellate Tribunal was informed of the order passed by this Court on 16th May 2002 setting aside the continued detention of the Petitioner's brother. The further findings of the CA had been submitted to the Appellate Tribunal. The CA reiterated that the Petitioner had not been able to produce any fresh document and, therefore, was unable to discharge the burden under Section 68-J of the NDPS Act. The Appellate Tribunal then concurred with the findings of the CA that the evidentiary documents filed by the Petitioner could not be believed. It was further concluded that the firms which issued the receipts of salary income and the commission to the Petitioner were shown as not existing at the given addresses. Consequently, it was difficult to believe that the Petitioner was having his own valid source of income. The Appellate Tribunal observed that as regards the second forfeited property,

the ˇPetitioner had taken a plea that he was a tenant. However, in the absence of any documentary evidence to prove the same, the Appellate Tribunal refrained itself from making any observations on that plea.

9. Since the appeal was decided ex parte, the Petitioner filed application MP-ND-29 & ND-30/CAL/2006 before the Appellate Tribunal for recalling of its order dated 1st February 2006. By order dated 4th October 2007, the Appellate Tribunal held that there is no explicit provision in the Appellate Tribunal for Forfeited Property Rules, 1989 for recalling of any order of the Appellate Tribunal passed on merits and no case was made out for recalling of the order dated 1st February 2006. It was also observed that since the detention for a period of three months was upheld, "the provisions of Chapter V-A will continue to apply to the Petitioner."

10. It was noticed by the Appellate Tribunal in the order dated 4th October 2007 that the Petitioner had initially challenged the order dated 1st February 2006 of the Appellate Tribunal before the High Court of Orissa, but he withdrew the petition which was dismissed as withdrawn on 17th July 2006. Therefore, the CA took the physical possession of the forfeited property in terms of the order dated 7th July 1999 of the CA.

11. While directing notice to issue in the present petition on 15th October 2008, this Court directed that the impugned order dated 1st February 2006 of the Appellate Tribunal shall remain stayed till the next date of hearing. The said interim order was continued on 7th August 2009, 26th November 2009 and 5th April 2010.

Submissions of Counsel

12. Mr. Vinoo Bhagat, learned counsel appearing for the Petitioner first submitted that for the operation of Section 68-A(2)(d) of the NDPS Act, there has to be a subsisting valid order of detention. The consequence of this Court's order dated 16th May 2002 setting aside the detention order of the Petitioner's brother Mohd. Azad, was that in terms of the decision of the Full Bench of this Court in **Akhilesh Kumar Tyagi v. Union of India** 60 (1995) DLT 203 (FB), the detention order was void ab initio. It is submitted that though the initial period of detention of three months was sustained, the detention order itself was being set aside from the date of its passing. It is further submitted that the Respondents had failed to discharge the initial burden of showing nexus between the

properties acquired by the Petitioner in 1998 with the alleged illegal earnings of the Petitioner's brother for which the detention order was passed at least nine years prior to the said acquisition and for which the Petitioner's brother had served term in jail for two years between 1991 and 1993. It is submitted that unless there was a prima facie material linking the alleged illegal earnings of the Petitioner's brother and the acquisition of the property in question by the Petitioner, the impugned order cannot be sustained.

13. On the other hand, it is submitted by Mr. Atul Nanda, learned counsel appearing for Respondents that as explained by the Supreme Court in **Meena Jayendra Thakur v. Union of India** (1999) 8 SCC 177 and **Union of India v. Harish Kumar** (2008) 1 SCC 195, the entire detention order was not held to be illegal by this Court in its order dated 16th May 2002. That being the position, the burden shifted on the Petitioner to show that the property was acquired by him from his own sources of income.

Effect of this Court's order dated 16th May 2002 quashing the detention

14. First the effect of this Court's order dated 16th May 2002 quashing the detention of the Petitioner's brother's detention requires to be considered. The decision of the Full Bench of this Court in Akhilesh Kumar Tyagi, was in the context of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1975 ('COFEPOSA Act'). The relevant provisions of COFEPOSA Act are more or less similar to the corresponding provisions in Chapter V-A of the NDPS Act with which the present case is concerned. In **Maqudoom Meera Hameem v. Joint Secretary to Govt. of India** (Crl Writ Petition No. 83 of 1995 decided on 17th August 1995), the Division Bench of this Court had held that in case where the reference to the Advisory Board was made beyond 5 weeks and the Advisory Board gave its opinion beyond 11 weeks, the continued detention during the extended period became bad. In Akhilesh Kumar Tyagi, the correctness of the decision in Maqudoom Meera Hameem was questioned by the Union of India. It was contended that till such time the detention order was quashed, it remained valid. It was urged by the Union of India that the respective periods of 5 weeks and 11 weeks in Maqudoom Meera Hameem which got extended to '4 months and 2 weeks' and '5 months and 3 weeks' respectively, did not get

contracted or reduced back to 5 weeks and 11 weeks respectively when the declaration under Section 9 COFEPOSA Act was quashed. Consequently, it was contended by the Union of India that the detention beyond three months did not become illegal automatically.

15. It may be recalled that in **Akhilesh Kumar Tyagi** the detention was set aside on the ground that the Petitioner had not been informed by the declaring authority that he had a right to make a representation against the order of detention to the Advisory Board and the Central Government and also to the declaring authority. In answering the question whether the declaration made under Section 9 of the COFEPOSA Act was valid till it was quashed or whether it becomes void ab initio, the Full Bench of this Court in **Akhilesh Kumar Tyagi v. Union of India** held in para 30 as under (DLT@ p. 213):

> "30. If, therefore, there is a violation of Article 22 (5) in not informing the detenu that he had an opportunity to represent to the declaring authority, upon the Court quashing the Section 9 declaration, the order is impliedly declared void from its inception and on that basis, the benefit of extension of the period of 5 weeks to 4 months and 2 weeks, and the benefit of extension of 11 weeks to 5 months and 3 weeks in Section 9 (2), cease to apply. It is indeed not a case of extension of the periods and a later contraction **but the order quashing the Section 9 declaration would make the declaration ineffective from the date it was issued** and in case either the reference to the Board is beyond 5 weeks and/or the report of the Board is beyond 11 weeks, then the "continued detention" beyond three months would be invalid." (emphasis supplied)

16. Analysing the order dated 16th May 2002 passed by this Court in the present case, the opening line appears to indicate that this Court held the initial period of three months' detention of the Petitioner's brother to be valid but the remaining period of detention to be invalid in terms of the judgment in **Akhilesh Kumar Tyagi.** What is also significant is that the contention of the learned ASG to the contrary was negatived and it was held that "the detention for a period of three months is valid and continued detention is vitiated." Extending the logic of the decision in **Akhilesh Kumar Tyagi** to the order dated 16th May 2002, while the

detention for a period of three months was held to be valid, the detention order itself was held to be void ab intio. It must be noted that the order dated 16th May 2002 passed by this Court attained finality with the Respondents accepting it. Further, while the period of three months of detention was held valid, the detention order was itself held to be void ab initio, i.e. from the date it was issued.

17. The resultant position is that, the order dated 16th May 2002 related back to the date of passing of the detention order i.e. 7th July 1989. Even if one were to extend the ratio of **Meena Jayendra Thakur** or **Harish Kumar** the detention order became void three months after the actual date of the detention of the Petitioner's brother on 10th July 1991. The show cause notice was issued to the Petitioner on 17th February 1999. In terms of this Court's order dated 16th May 2002 the detention order of the Petitioner's brother had been rendered void ab initio, i.e. void from 7th July 1989 or in any event from a date three months after 10th July 1991. Viewed from any angle, there was on 17th February 1999 no valid detention order against the Petitioner's brother. Consequently, the essential condition for invoking Section 68-A of the NDPS Act, had been rendered non-existent on account of the subsequent development of the passing of the order dated 16th May 2002 by this Court. The Petitioner is, therefore, entitled to succeed on this ground.

Impugned order of CA bad even on merits

18. The impugned order of the CA, affirmed by the Appellate Tribunal, cannot be sustained even on merits. The records of the CA have been perused by this Court. The relevant period is the one immediately preceding issuance of show cause notice to the Petitioner under Section 68-H (1) of the NDPS Act. It appears that following certain letters received from the Income Tax Office, Balasore, on 1st November 1996, the Investigating Officer/CA at Calcutta made a noting directing the Department "to ascertain the existence of Shri Shahid Parvez." He advised: "We may as well write to Branch Manager, Central Bank of India, Brahamansahi Branch, Soro, Balasore to furnish details of Bank Account No. 263 such as name of holder and address, name of introducer and address, date of opening and present position of the account."

19. This was followed by several reminders and the noting dated 17th June 1997 where it was acknowledged that the Branch Manager,

Central Bank of India had furnished address of the brother of the Petitioner and other required information. However, the notice sent under Section 68-H (1) NDPS Act appears to have been returned with the remark "left". It appears that previous to this, an order was already passed against the Petitioner on 10th August 1992 under Section 68-F (2) of the NDPS Act. The noting in the file CA/CAL/NDPS-86/92/93 do not show any investigation having been conducted to co-relate the details received from the Income Tax office in respect of source of the Petitioner's income to even form a prima facie view that the properties in question were acquired by him from the earnings of his brother Mohd. Azad on account of illicit trafficking in drugs. In file CA/Cal/NDPS/31/98-99, there are two identical notings dated 17th February 1999 and 9th March 1999 by the CA, Calcutta which reads as under:

> "I have perused the relevant records. I have applied my mind to all the facts and circumstances of the case. I have today recorded my reasons in terms of Section 68H (1) of the NDPS Act, 1985 and I am satisfied that this is a fit case for issue of notice under Section 68 H (1) of the NDPS Act, 1985.
>
> Issue notice under Section 68H (1) of the NDPS Act."

20. It is not known what records were perused by the CA before issuing the above orders. As far as this Court can find, there was no systematic enquiry or investigation preceding the passing of the above orders. It appears that prior to issuing a show-cause notice to the Petitioner under Section 68-H(1) of the NDPS Act, no effort was made by the CA to be *prima facie* satisfied that the essential conditions existed to attract that provision. Even before the CA or the Appellate Tribunal, the initial burden was on the office of the CA to show that the properties in the name of the Petitioner were acquired by him through the illegal earnings of his brother. The Petitioner on his part produced a 1998 sale deed in his favour in respect of one of the properties. However, the opinion formed by the CA, as extracted hereinbefore, fails to establish even prima facie any casual link existing between the Petitioner's properties and the illegal earnings of the Petitioner's brother. The order of the CA is a mere reproduction of the language of the statute which is inadequate for demonstrating application of mind to arrive at even a prima facie satisfaction that the essential ingredients of Section 68-H (1) NDPS act stood attracted.

Conclusion

21. The impugned order passed by the CA dated 7th July 1999 against the Petitioner and the order dated 1st February 2006 passed by the Appellate Tribunal affirming the CA's order dated 7th July 1999 are hereby set aside. The Petitioner will be restored the possession of the forfeited properties within four weeks.

22. The writ petition is allowed in the above terms with costs of Rs. 5,000/- which will be paid by Respondents to the Petitioner within four weeks from today.

ILR (2011) I DELHI 326
W.P.

M/S SOUTH DELHI MATERNITY & NURSING HOME (P) LTD. **.....PETITIONER**

VERSUS

MCD & OTHERS **.....RESPONDENTS**

(RAJIV SAHAI ENDLAW, J.)

W.P. (C) NO. : 1828/1994 **DATE OF DECISION: 28.10.2010**

Delhi Municipal Corporation Act, 1957—Section 126,129 and 346- Aggrieved petitioner filed Writ Petition against order of Joint Assessor & Collector of MCD fixing ratable value of his property—Petitioner urged upon completion of construction of his building he gave notice to Respondent MCD and applied for grant of occupancy certificate which was rejected—Subsequently MCD issued notice to petitioner under Section 126 of the Act for enhancing ratable value—Objections filed by petitioner were dismissed—Petitioner contended without issuance of Occupancy

Certificate and till when property was occupied, no property tax as of completed building could be levied—As per Respondent, under Section 129, liability for property tax accrues from date when notice of completion or occupation whichever is earlier, is given irrespective of grant of occupancy certificate—Also petitioner itself gave notice of completion, cannot be heard to contend that property is not assessable from date of notice—Question which arose for determination is whether notice of completion under building bye-law 7.5.2 can be treated as notice of completion under Section 129. Held:- The two notices cannot be equated and the notice under building Bye-Law 7.5.2 Cannot be a notice under Section 129—While the provision under the Building Bye-Law 7.5.2 is of "completion of works" under the Building Permit, the notice under Section 129 is of "completion of building"—Issuance of a notice of completion coupled with an application for Occupancy Certificate made under Bye Law 7.5.2 is not a notice of completion under Section 129 so as to make the property liable for property tax—The guiding factor has to be a building which is fit for being occupied both factually and in law before it can attract the incidence of tax.

The reasons for providing for the two notices are entirely different. While the notice under Building Bye-Law 7.5.2 is in the nature of intimation of completion of works within the time prescribed in the building permit under Section 341 and is also in the nature of an application for Occupancy Certificate and is required to be submitted through a licensed Architect/Engineer who has supervised the construction, the notice under Section 129 is intended to inform that the building is ready for occupation or has been occupied and has become liable for payment of property tax. Though "ready for occupation" can only mean "legally ready for occupation" but the Legislature in Section 129 has provided for levy of property tax even from the date of factual

occupation even if not legally ready for occupation. However such illegal occupation without the building being legally ready for occupation makes the property liable for property tax only if the same is before the property being legally ready for occupation, as is evident from the expression "whichever first occurs" in Section 129. It however cannot be said that because Section 129 permits levy of house tax on "actual occupation" even if without Occupancy Certificate, that the property tax becomes leviable on mere completion of construction and before the issue of Occupancy Certificate, even when there is no actual occupation. **(Para 12)**

The question which arises is whether a notice of completion under Building Bye-Law 7.5.2 can be treated as a notice of completion under Section 129. In my opinion, the two cannot be equated and the notice under Building Bye-Law 7.5.2 cannot be a notice under Section 129. The reasons for providing for the two notices are entirely different. While the notice under Building Bye-Law 7.5.2 is in the nature of intimation of completion of works within the time prescribed in the building permit under Section 341 and is also in the nature of an application for Occupancy Certificate and is required to be submitted through a licensed Architect/ Engineer who has supervised the construction, the notice under Section 129 is intended to inform that the building is ready for occupation or has been occupied and has become liable for payment of property tax. **(Para 12)**

Important Issue Involved: The two notices one under Section 129 and other under Building Bye-Law cannot be equated—The provision under the Building Bye-Law7.5.2 is of "completion of works" under the building permit, whereas the notice under Section 129 is of "completion of building"—Issuance of a notice of completion coupled with an application for Occupancy Certificate made under Bye Law 7.5.2 is not a notice of completion under Section 129 so as to make the property liable for property tax.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. B. Jain & Mr.Abhay Jain, Advocates

FOR THE RESPONDENT : Mrs. Amita Gupta with Mr. Parven Kumar, Adv.for R-1& 2 MCD.Mr. Y.R. Sharma, Adv. For R-3 & 4

CASES REFERRED TO:

1. *Claude-Lila Parulekar* vs. *Sakal Papers (P) Ltd* (2005) 11 SCC 73.
2. *Durga Enterprises (P) Ltd.* vs. *Principal Secretary, Government of UP* (2004) 13 SCC 665.
3. *MCD* vs. *Jain Brothers* ILR (2003) 1 Delhi 334.
4. *MCD* vs. *Nehru Place Hotel Ltd.* 108 (2003) DLT 715.
5. *MCD* vs. *Senaro Construction India Ltd.* 104 (2003) DLT 441.
6. *Municipal Corporation of Delhi* vs. *P. Chandrasekharan* MANU/DE/1761/2002.
7. *Bal Krishna Agarwal (Dr.)* vs. *State of UP* (1995) 1 SCC 614.
8. *The Municipal Corporation of Greater Bombay* vs. *M/s Polychem Ltd.* AIR 1974 SC 1779.
9. *Kailash Nath & Associates* vs. *New Delhi Municipal Committee* ILR 1976 Delhi 426.

RESULT: Petition Allowed.

RAJIV SAHAI ENDLAW, J.

1. The writ petition impugns the order dated 2nd February, 1994 of the Joint Assessor & Collector of the respondent MCD fixing the rateable value of Property No.14, Community Centre, Zamrudpur, New Delhi at Rs. 5,19,080/- w.e.f. 20th September, 1990. It was the contention of the petitioner in the writ petition itself that the writ petition involving similar questions of law as raised in the present writ petition had been

admitted by this Court. Notice of the writ petition was issued and the counsel for the respondent MCD on 14th July, 1994 agreed not to enforce the demand pursuant to the assessment aforesaid. After completion of the pleadings, Rule D.B. was issued on 13th February, 1995 and the operation of the impugned order stayed. On 25th March, 2010 the counsel for the petitioner stated that in the present writ petition there was no challenge to any provision of law but only to the order of assessment dated 2nd February, 1994 aforesaid and hence the matter was ordered to be listed before the Single Bench as per roster.

2. Though in the writ petition the rateable value assessed has also been challenged but the counsel for the petitioner has confined the argument to, whether the property is liable to be assessed at all for the purposes of the property tax or not.

3. The facts in this regard and which are not in dispute are:-

(i) the petitioner was granted a perpetual lease of a plot of land aforesaid i.e. plot no. 14, Community Centre, Zamrudpur, New Delhi admeasuring 218.50 sq. mtrs on 3rd February, 1984, though possession thereof had been delivered pursuant to allotment on 20th May, 1981;

(ii) upon the petitioner applying for sanction of building plan for construction of superstructure on the said plot, sanction was accorded on 1st February, 1984;

(iii) the petitioner on 20th September, 1990 gave notice to the respondent MCD of completion of construction and applied for grant of Occupancy Certificate;

(iv) the application of the petitioner for Occupancy Certificate was rejected on 20th September, 1991;

(v) that the respondent MCD issued notice dated 7th /11th March, 1991 to the petitioner under Section 126 of the Delhi Municipal Corporation Act, 1957 for enhancing the rateable value from the then existing (i.e. as of a plot) of Rs. 9,740/- to Rs. 14,69,000/- w.e.f. 1st April, 1988 for the reason of "assessment of land and/or building previously not included";

(vi) the petitioner filed objections to the said notice inter alia

contending that the Completion Certificate having not been issued till then and the building being incapable of occupation, the notice was bad.

4. The Joint Assessor & Collector of the respondent MCD in the impugned order has held that property tax is leviable from the date the building is occupied or complete; that the petitioner having applied for the Completion Certificate on 20th September, 1990 means that the property was completed in all respect and fit for occupation on that date; that rejection of the Occupancy Certificate was mainly on the ground of the same having not been applied by all the Directors of the petitioner Company and due to non submission of other relevant documents. It is recorded in the impugned order that it was submitted before the MCD that there was a dispute among the partners/Directors of the petitioner company. The Joint Assessor & Collector of respondent MCD held that the levy of property tax in respect of a building completed in all respects as declared by the petitioner himself could not be withheld only for the reasons of non-issuance of Occupancy Certificate and which also was attributable owing to internal disputes as to the management of the petitioner Company. The enhancement in property tax was made effective from 20th September, 1990 i.e. the date when the petitioner had given notice of completion.

5. The counsel for the petitioner has relied upon Sections 129 & 346(2) of the DMC Act to contend that without issuance of Occupancy Certificate and till when the property cannot be occupied, no property tax as of a completed building could have been levied. Reliance in this regard is placed on paragraphs 21 & 22 of Express Newspapers Ltd. Vs. Municipal Corporation of Delhi 31 (1987) DLT 369 holding that if a building has been erected, and in respect of which notice under Section 129 has been issued but permission to occupy is refused and the building is actually not occupied, there can be no annual rent because the building cannot be let from year to year.

6. The counsel for the respondent MCD has argued that the MCD cannot be deprived of property tax when a building has been erected and notice of completion thereof been issued, merely because the owner fails to pursue and obtain the Occupancy Certificate. It is contended that under Section 129, the liability for property tax accrues from the date when notice of completion or occupation whichever is earlier is given

and irrespective of the grant of Occupancy Certificate. It is urged that the grant of Occupancy Certificate and the prohibition against the occupation is the concern of the Building Department of the MCD and with which the House Tax Department is not concerned. The judgment in **Express Newspapers Ltd.** (supra) is sought to be distinguished by contending that it was in the context of illegal construction and will not apply when the construction is as per the sanction plan but the owner fails to take the Occupancy Certificate, as is the case here.

7. I have at the outset enquired as to what is the status of the property as of today. The counsel for the petitioner informs that the position is the same as then i.e. the Occupancy Certificate has not been granted and the building remains unoccupied. The counsel for the respondent MCD states that she has no instructions. I have also enquired as to whether any subsequent steps for assessment of property tax for any subsequent years have been taken by the MCD. The counsel for the petitioner again informs that no steps have been taken by the MCD. The counsel for the respondent MCD states that she has no instructions.

8. The aforesaid is relevant inasmuch as in the absence of any fresh notice, the impact of the order in this writ petition would be on the claim of tax since 20th September, 1990 i.e. for the last over 20 years.

9. Before dealing with the controversy aforesaid, a preliminary objection of the counsel for the respondent MCD as to the maintainability of the writ petition on the ground of availability of the alternative remedy of appeal may be dealt with. The rule of refusing to entertain a writ petition where alternative efficacious remedy is available, is a rule of discretion and not a rule of law. In the present case, the writ petition has remained pending before this Court for the last 16 years. Though the respondent MCD in its counter affidavit has also taken this plea but the order sheet does not reflect that the admission of the writ petition was opposed on this ground. I find it highly iniquitous now after 16 years instead of deciding the legal questions raised in the writ petition, dismiss the writ petition on the ground of availability of alternative remedy. The Supreme Court in **Durga Enterprises (P) Ltd. V. Principal Secretary, Government of UP** (2004) 13 SCC 665 deprecated the practice of summarily dismissing the writ petition on ground of existence of alternative remedy, after having entertained the writ petition and kept it pending for thirteen years in that case. To the same effect are **Claude-Lila Parulekar V. Sakal Papers** (P) Ltd (2005) 11 SCC 73 and **Bal Krishna Agarwal (Dr.) V. State of UP** (1995) 1 SCC 614. Even otherwise the writ petition raises a pure question of law and in which circumstance this Court has entertained writ petitions notwithstanding the alternative remedy of appeal. The said contention of the respondent MCD is thus not accepted.

10. Section 129 of the DMC Act is as under:-

> **"129. Notice of erection of building, etc.** – When any new building is erected or when any building is rebuild or enlarged or when any building which has been vacant is reoccupied, the person primarily liable for the property taxes assessed on the building shall give notice thereof in writing to the Commissioner within fifteen days from the date of its completion or occupation whichever first occurs, or as the case may be, from the date of its enlargement or re-occupation; and property taxes shall be assessable on the building from the said date."

The contention of MCD is that the petitioner itself having given notice dated 20th September, 1990 of completion, cannot be heard to contend that the property is not assessable from the date of notice.

11. However the notice dated 20th September, 1990 given by the petitioner to the respondent MCD was not under Section 129 of the DMC Act. The said notice was a notice under Bye-Law 7.5.2 of the Delhi Building Bye-Laws, 1983 which is as under:-

> **"7.5.2 Notice of Completion** – Every owner shall have to submit a notice of completion of the building to the Authority regarding completion of the work described in the building permit. The notice of completion shall be submitted by the owner through the licensed Architect/ Engineer/ Supervisor/Group as the case may be who has supervised the construction, in the proforma given in Appendix 'G' accompanied by three copies of completion plan and the following documents and along with a fee of Rs.20.
>
> (1) Copy of lease deed.
>
> (2) Copy of sewer connection permission.
>
> (3) Clearance from Chief Fire Officer, Delhi.
>
> (4) Clearance from Chief Controller of Explosives, Nagpur

as required.

(5) Clearance from DESU regarding provision of Transformers/Sub-Station/ancillary power supply system etc. as required.

(6) Structural stability certificate duly signed by the licensed Architect/Engineer.

(7) Certificate from the Lift Manufacturer, as required.

(8) Certificate from Air Conditioning Engineer, Manufacturers, as required.

(9) A certificate by the owner and architect/supervisor/ engineer for covering up the underground drain, sanitary and water supply work, under their supervision and in accordance with Building Bye Laws and sanctioned building plans stipulated in the Appendix B-3 as applicable.

(10) In case of large campus/complex, completion of individual block/building will be issued by the local body in accordance with the construction work completed phase-wise in the Proforma Appendix B-3.

(11) The Extension of Time up to the date of applying for completion certificate. In case, if the completion certificate is refused due to deviation, which cannot be compounded, the completion will be rejected and extension of time will be required accordingly.

(12) NOC for regular water supply and electricity may be issued only after the completion certificate is obtained.

It is only on receipt of such a notice under Building Bye-Law 7.5.2 that the procedure for grant of Occupancy Certificate under Building ByeLaw 7.6 is commenced. The necessity of such a notice under Building Bye-Law 7.5.2 arises because under Section 341 of the Act, when sanctioning the erection of building or execution of a work, a reasonable period within which the said work is to be completed is to be specified and if the work is not completed within the said period, there is a prohibition against continuing thereafter without obtaining fresh sanction or without obtaining an extension of the period.

12. The question which arises is whether a notice of completion

under Building Bye-Law 7.5.2 can be treated as a notice of completion under Section 129. In my opinion, the two cannot be equated and the notice under Building Bye-Law 7.5.2 cannot be a notice under Section 129. The reasons for providing for the two notices are entirely different. While the notice under Building Bye-Law 7.5.2 is in the nature of intimation of completion of works within the time prescribed in the building permit under Section 341 and is also in the nature of an application for Occupancy Certificate and is required to be submitted through a licensed Architect/ Engineer who has supervised the construction, the notice under Section 129 is intended to inform that the building is ready for occupation or has been occupied and has become liable for payment of property tax. Though "ready for occupation" can only mean "legally ready for occupation" but the Legislature in Section 129 has provided for levy of property tax even from the date of factual occupation even if not legally ready for occupation. However such illegal occupation without the building being legally ready for occupation makes the property liable for property tax only if the same is before the property being legally ready for occupation, as is evident from the expression "whichever first occurs" in Section 129. It however cannot be said that because Section 129 permits levy of house tax on "actual occupation" even if without Occupancy Certificate, that the property tax becomes leviable on mere completion of construction and before the issue of Occupancy Certificate, even when there is no actual occupation.

13. While the provision under the Building Bye-Law 7.5.2 is of "completion of works" under the Building Permit, the notice under Section 129 is of "completion of the building". The question which arises is, when can a building be said to have been "completed". Can a building be said to have been completed merely when the work of construction is complete even though Occupancy Certificate and in the absence whereof the building cannot be occupied legally, has not been granted. In my opinion, no. As held in **Express Newspapers Ltd.,** completion for the purposes of property tax is when the building is capable of having an annual rent and which cannot be without occupation. Thus the issuance of a notice of completion coupled with an application for Occupancy Certificate made under Bye Law 7.5.2 is not the notice of completion under Section 129 so as to make the property liable for property tax.

14. I am unable to accept the contention of the counsel for the

respondent MCD that the judgment in **Express Newspapers Ltd.** is distinguishable. Even though that may have been a case of illegal construction but the ratio of the judgment is in the favour of the petitioner herein and it is the ratio which constitutes a precedent.

15. I however find that another Single Judge of this Court in **MCD Vs. Nehru Place Hotel Ltd.** 108 (2003) DLT 715 without noticing the earlier judgment in **Express Newspapers Ltd.** did hold that rateable value is to be assessed with effect from fifteen days after the notice of completion is given and the argument that Section 346(2) is a bar to using the building without Occupancy Certificate was held to be not available qua property tax since the said provision deals with different aspect of the matter and was held to be not relevant for the purposes of property tax. Else, the consistent view of this Court appears to be in consonance with Express Newspaper Ltd. Mention in this regard can be made to:-

(a) **Kailash Nath & Associates Vs. New Delhi Municipal Committee** ILR 1976 Delhi 426, though in respect of NDMC area and under the provisions of the then Punjab Municipal Act, 1911 but negating the contention that assessment can be made even if the building is not completed. It was held that the guiding factor has to be a building which is fit for being occupied, both factually and in law before it can attract the incidence of tax. The issue of Completion Certificate or an Occupancy Certificate was held to be certainly a guiding factor. It was however held that it is not a general rule that only after the issue of Occupation Certificate or Completion Certificate that the incidence of tax is attracted. It was held that where a building is occupied even without taking a Completion Certificate, it will certainly attract the incidence of tax because the very fact of occupation would establish that the building is fit for occupation; if however the building cannot be occupied unless the Completion Certificate or an Occupation Certificate ˇis given, then it will not attract the incidence of tax. It was further clarified that if electricity connection, water connection or arrangement for sewage disposal is not

available, making it not possible for the building to be occupied, then also the incidence of taxation will not arise. Reliance was placed on the judgment of Supreme Court in **The Municipal Corporation of Greater Bombay Vs. M/s Polychem Ltd.** AIR 1974 SC 1779, where while construing the provisions of Bombay Municipal Corporation Act, 1888 it was held that so long as a building is not completed or construction to such an extent that at least a partial completion notice can be given so that the completed portion can be occupied and let, the land can, for the purpose of rating, be equated with or treated as vacant land. It was held that it is only when the building which is being put up is in such a state that it is actually and legally capable of occupation that the letting value of the building can enter into the computation.

(b) **Municipal Corporation of Delhi Vs. P. Chandrasekharan** MANU/DE/1761/2002; in this case though possession of a DDA flat was delivered but the area where the flat was situated was not electrified. Relying on Express Newspapers Ltd. it was held that till electrification, the flat was incapable of having any annual rent and thus liability for property tax was held from the date of electrification.

(c) **MCD Vs. Senaro Construction India Ltd.** 104 (2003) DLT 441 where, it was held that in the absence of any averment that the assessee was at fault for delay in obtaining Occupancy Certificate or that the building had unauthorized construction which was required to be rectified, MCD cannot take advantage of its own delay in issuance of Completion Certificate resulting in non-occupation of the building and cannot claim property tax from the date of notice of completion and can claim property tax only from the date of Occupancy Certificate.

(d) **MCD Vs. Jain Brothers** ILR (2003) 1 Delhi 334 also holding that if delay is on the part of the MCD in issuing the Completion Certificate, the date of issuance of the

Completion Certificate is to be the date under Section 129 of the Act.

16. Though some of the judgments of this Court have on their facts observed the property tax leviable with effect from the date of the Completion Certificate for the reason of delay in issue/grant of Occupancy Certificate being not attributable to the owner but in my opinion, the question whether delay in grant of occupancy certificate is attributable to the owner or to the MCD is really irrelevant. If the property tax is not leviable till either the Occupancy Certificate is granted or till the property is actually occupied, even if the delay in obtaining Occupancy Certificate is of the owner, as long as the owner does not actually occupy the property, the property cannot be made liable for property tax. The tax is on the property and as long as there is no property which can be legally occupied or which has been actually occupied, the incidence of tax is not attracted. Just like the MCD cannot levy property tax as on a built-up property, on a plot of land even if the owner delays construction thereon, so also the MCD cannot levy such tax if the owner though builds but does not occupy or obtains Occupancy Certificate. The remedy of MCD in a case where the owner delays obtaining Occupancy Certificate is by either revoking the sanction earlier granted and/or of demolishing the construction as unauthorized. However it cannot hold the property liable for property tax on that ground.

17. I have perused the impugned order and the counter affidavit of the respondent MCD carefully. It is not the case of MCD that the building even though without Occupancy Certificate has been occupied.

18. That being the position, there is no option but to strike down the order impugned in the present writ petition and to hold that the property is not liable for property tax till Occupancy Certificate with respect thereto is issued or till it is factually occupied.

19. The writ petition is therefore allowed. The Rule is made absolute. However no order as to costs.

ILR (2011) I DELHI 339
RC SA

THE VAISH COOP. ADARSHA BANK LTD. .....APPELLANT

VERSUS

SUDHIR KUMAR JAIN & ORS. .....RESPONDENT

(MOOL CHAND GARG, J.)

RC SA NO. : 8/2005 DATE OF DECISION: 29.10.2010

Delhi Rent Control Act, 1958—Section 14(1)(b), 16 & 39—Subletting—ARCT allowed appeal and set aside eviction order of additional Rent controller of u/s 14(1)(b)—Question of law: Whether the bequest of tenancy rights by way of Will (by tenant) to only one heir out of many heirs, whereby the other heirs are ousted and only one heir is granted the tenancy rights, amounts to subletting?—Held, tenancy rights in a property can be inherited by legal heirs which is let out for a commercial purpose, in accordance with the provisions of Hindu Succession Act after the death of tenant—In case of commercial tenancy, bequeathing the tenancy rights in such tenancy by a tenant, contractual or statutory, only in favour of one of the legal heirs who was otherwise going to succeed such rights in tenanted premises after the death of deceased tenant would not constitute subletting to attract Section 14(b)—A cause of action u/s 14(1)(b) arises only if a stranger (who would not inherit according to law of succession) is put in possession of suit property to the exclusion of the tenant who divests himself of the possession of the suit either in full or in part—Since in present case tenant had willed property to one of the heirs, it did not amount of subletting—Appeal dismissed.

Important Issue Involved: In case of a commercial tenancy, bequeathing the tenancy rights in such tenancy by a tenant contractual or statutory, only in favour of one of the legal

heirs who was otherwise going to succeed such rights in tenanted premises after the death of the deceased tenant, would not constitute subletting so as to attract the mischief of Section 14(1)(b).

[Ad Ch]

APPEARANCES:

FOR THE APPELLANT : Mr. Deepak Agarwal, Advocate.

FOR THE RESPONDENT : Mr. Sanjiv Kakra, Advocate for R-1 & 2.

CASES REFERRED TO:

1. *Jagdish Kishore Kakar* vs. *Krishna Baijal* 1996 AD (Del)-1-682.
2. *Vasant Pratap Pandit* vs. *Dr. Anant Trimbak Sabnis* (1994) 3 SCC 481.
3. *M/s Shree Chamundi Mopends Ltd.* vs. *Church of South India Trust Association* reported as AIR 1992 SC 1439.
4. *Mahant Karam Singh* vs. *Mulakh Raj,* 1992 (2) RCR 62.
5. *Tara Chand & Anr.* vs. *Ram Prasad* (1990) 3 SCC 526.
6. *M/s. Bharat Sales Ltd.* vs. *Life Insurance Corporation of India,* reported in AIR 1988 SC 1240.
7. *Smt. Daljit Kuar* vs. *Smt. Rukman & Ors.,* 1988 (2) 1988 (2) RCR 715.
8. *Bhavarlal Labhchand Shah* vs. *Kanaiyalal Nathalal Intawala* MANU/SC/0529/1986 : [1986]1SCR1.
9. *Bhavarlal Labhchand Shah* vs. *Kanaiyalal nathalal Intawala,* AIR 1986 SC 600.
10. *Jaspal Singh* vs. *tIhe Additional District Judge, Bulandshahr and Ors. :* AIR 1984 SC 1880.
11. *V. Dhanpal Chattiar* vs. *Yesodai Ammal,* 1980 1 SCR 334.
12. *Mohan Lal* vs. *Jaipur Hosiery Mills Pvt. Ltd.* reported in MANU/RH/0168/1973.
13. *Balkesh and Anr.* vs. *Shanti Devi and Ors.* reported in 1972 RCT 285.
14. *Sita Ram* vs. *Govind* MANU/RH/0013/1970.

RESULT: Appeal dismissed.

MOOL CHAND GARG, J.

1. This appeal filed under Section 39 of the Delhi Rent Control Act 1958 (hereinafter referred to as "the Act") is directed against the order dated 11.03.2005 passed by the Additional Rent Control Tribunal, Delhi, in RCA No.578/2002, whereby the learned Tribunal has allowed the appeal and set aside the order dated 02.07.2002 passed by the Additional Rent Controller, Delhi, whereby an eviction order has been passed in an Eviction Petition No. 221/1988 filed under Section 14(1)(b) of the Act on the ground of the alleged subletting etc. of the premises in question.

2. The relevant facts leading to the filing of this case are that suit premises situated on plot No. 3, Block A, Netaji Subhash Marg, Darya Ganj, Delhi bearing Municipal No. 5055, Ward No. XI (hereinafter referred to as 'premises') were purchased by the appellant from its previous owner on 28.02.1975 with Shri Jugmohinder Lal Jain a tenant in respect of one garage/shop (hereinafter referred to as the suit property). Consequently, Shri jugmohinder Lal Jain became a tenant of the appellant in the said property w.e.f. 01.03.1975. Shri Jugmohinder Lal Jain later died on 27.06.1987. During his life time he executed a Will dated 15.06.1987 whereby he bequeathed his interest in aforesaid property as a tenant in favour of one of his son i.e. the first respondent to the exclusion of other legal heirs.

3. According to the appellant after receiving a letter from the first respondent and came to know about the bequeath of the tenancy rights in the suit property by the deceased Shri Jugmohinder Lal Jain by executing a Will before his death on 15.06.1987 in favour of the first respondent only, who is admittedly one of the legal heirs of the deceased Shri Jugmohinder Lal Jain, without the written consent of the landlord and

considering this act on the part of the deceased tenant as an act of assignment/transfer/ subletting, the appellant filed eviction petition No. 221/1998 before the Additional Rent Controller Delhi on 06.07.1988 seeking eviction of the respondents under Section 14(1)(b) of Delhi Rent Control Act 1958. The said eviction petition was allowed in favour of the appellant. Against the said order dated 02.07.2002 the first respondent filed an appeal before the Addl. Rent Control Tribunal being (RCA No. 578/2002) primarily on the ground that in view of Section 2 (l) of the Act, succession of a commercial tenancy is inherited by all the legal heirs of the original tenant after his death as such bequeathing of the tenancy rights of the suit property in favour of one of the legal heirs out of many heirs would not constitute an act of subletting. The appeal was allowed.

4. This is the order which has been assailed by the appellant before me under Section 39 of the Act. According to the appellant this appeal raises following substantial question of law for the determination by this Court in this appeal i.e.

> "Whether the bequest of tenancy rights, by way of a Will to only one heir out of many heirs, whereby the other heirs are ousted and only one heir is granted the tenancy rights, does not amount to subletting?"

5. According to the appellant the Additional Rent Control Tribunal went wrong in having interfered with the well-reasoned order passed by the Additional Rent Controller and further failed to appreciate that after bequeathing the tenancy rights only in favour of one of the legal heirs by way of a Will by a deceased tenant who was not even in possession of the suit premises, was a clear case of assignment of the suit property by way of a Will in favour of the first respondent and thus constitute an act of subletting within the meaning of Sub-section (b) of Section 14 of the Act.

6. It is submitted by the appellant that the legal position in relation to the commercial tenancy in the Delhi Rent Control Act the issue of subletting as a ground of eviction in this case can only be examined in relation to the provisions of Delhi Rent Control Act and not in relation to the Rent Acts in other states. Under the Delhi Rent Control Act commercial tenancy is inheritable and, therefore, on the death of the deceased Shri Jugmohinder Lal Jain all his legal heirs became tenants as

per the definition of the 'tenant' under the Delhi Rent Control Act. There is statutory prohibition under the Delhi Rent Control Act against any assignment of the tenancy rights may be by way of a Will in favor of one of the legal heirs. Therefore, notwithstanding the will alleged to have been executed by the deceased Shri Jugmohinder Lal Jain in favour of one of his sons, the same was of no legal significance qua the other legal heirs, who became 'tenant' as defined in the Act on the day their father died.

7. It is further submitted that in view of provisions contained under Section 16 of the Act the tenancy rights cannot be transferred or assigned either in full or in any part thereof. The said provision reads as under:

> **"16. Restrictions on sub-letting-**
>
> (1) Where at any time before the 9th day of June, 1952, a tenant has sub-let the whole or any part of the premises and the sub-tenant is, at the commencement of this Act, in occupation of such premises, then notwithstanding that the consent of the landlord was not obtained for such sub-letting, the premises shall be deemed to have been lawfully sub-let.
>
> (2) No premises which have been sub-let either in whole or in part on or after the 9th day of June, 1952, without obtaining the consent in writing of the landlord, shall be deemed to have been lawfully sub-let.
>
> (3) After the commencement of this Act, no tenant shall, without the previous consent in writing of the landlord,-
>
> (a) sub-let the whole or any part of the premises held by him as a tenant; or
>
> (b) transfer or assign his rights in the tenancy or in any part thereof."

8. Relying upon the aforesaid provision it is stated that the execution of a Will in this case by transferring the tenancy rights to only one of the legal heirs after the death of the deceased tenant was an act of transferring/ assigning his rights in the tenancy by the deceased landlord to only one of the legal heirs to the exclusion of all others and thus, it was an act of assignment which constitute sub-letting and is prohibited

under the aforesaid clause.

9. It is submitted by the appellant that for the aforesaid reasons the order passed by the Tribunal is liable to be set aside because it amounts to mis-interpreting the provisions contained Section 14(1)(b) and Section 16 of the Act.

10. On the other hand, the counsel for the respondent has submitted that bequeathing tenancy to one of the legal heirs in exclusion to other legal heirs would not constitute sub-letting. In this regard he has relied upon the following judgments.

(i) **Bhavarlal Labhchand Shah Vs. Kanaiyalal nathalal Intawala,** AIR 1986 SC 600

(ii) **Mahant Karam Singh Vs. Mulakh Raj,** 1992 (2) RCR 62

(iii) **Smt. Daljit Kaur Vs. Smt. Rukman & Ors.,** 1988 (2) 1988 (2) RCR 715.

11. I have heard the submissions made by both sides and I have also gone through the judgments cited at bar and have perused the record of the case.

12. In the case of **Jagdish Kishore Kakar Vs. Krishna Baijal** 1996 AD (Del)-1-682 relied upon by the appellant a Learned Single Judge of this Court has held that bequeathing the rights to one of the legal heirs constitutes sub-letting while dealing with a case where the bequeath was only in favour of an adopted son. Para 15 to 17 of the said Judgment are relevant and reads as under:

> "15. It has next been contended by the learned counsel for the appellants that the deceased Sm. Brij Rani Baijal through the abovesaid will bequeathed the said tenancy rights in favour of the appellant No.1. Thus the appellant has become a legal and valid tenant of the disputed property under the said will (vide Ex. DW4/1). I am sorry I am unable to agree with the contention of the learned counsel.
>
> 16. Section 14(b) of the Delhi Rent Control Act deals with sub-letting, assigning or parting with possession over tenanted accommodation without the prior permission of the landlord. In

> case a tenant does so in that eventuality he is liable to eviction under the said provision of law. Thus, if the contention of the learned counsel for the appellant is to be accepted as correct, then the same would be in utter disregard and clear violation of Section 14(1)(b) of "that the tenant has on or after the 9th day of June 1952, sub-let assigned or otherwise parted with the possession of the whole or any part of the premises without obtaining the consent in writing of the landlord.
>
> 17. I thus feel that the courts below were correct in their conclusion that the tenancy rights cannot be the subject matter of a bequest."

13. It may however be observed that the tenancy was bequeathed in favor of the adopted son by the deceased tenant who does not come in the category of Class I legal heirs of the deceased tenant for the purpose of inheriting a commercial tenancy. In the aforesaid judgment a reference has also been made to the judgment of the Hon'ble Supreme Court delivered in the case of **Vasant Pratap Pandit Vs. Dr. Anant Trimbak Sabnis** (1994) 3 SCC 481 where the Apex Court while dealing with Section 15 of Bombay Rent Hotel & Lodging House Rates Control Act, 1947 which is para-materia with Section 14(1)(b) of Delhi Rent Control Act observed as follows:-

> "The matter may be viewed from another angle also. If the word 'heir' is to be interpreted to include a 'legatee' even a stranger may have to be inducted as a tenant for there is no embargo upon a stranger being a legatee. The contention of Mr. Sorabjee that 'heir' under a Will may be confined to only members of the family cannot be accepted for there is no scope for giving such a restrictive meaning to that word in the context in which it appears in the act as earlier noticed, unlike in other Rent Acts. Coming now to meaning of the words 'assign' or 'transfer' as appearing in Section 15 we find that 'transfer' has been qualified by the words in any other manner' and we see no reason why it should be restricted to only transfer inter vivos. As has been rightly pointed out by the High Court in the impugned judgment the Transfer of Property Act limits its operation to transfer inter vivos and therefore, the meaning of the word 'transfer' as

contained therein cannot be brought in aid for the purpose of the Act. On the contrary, the wide amplitude of the words in any other manner, clearly envisages that the word 'transfer' has been used therein a generic sense so as to include transfer by testament also."

14. Thus the Court was considering the circumstances where a will may be executed in favor of a stranger who may not be even a legal heir.

15. Reference has also been made to another judgment of the Supreme Court in **M/s Shree Chamundi Mopends Ltd. Vs. Church of South India Trust Association** reported as AIR 1992 SC 1439. In the aforesaid judgment it has been held:-

"It is clear from provisions of S.23 which prohibits sub-letting or transfer by the tenant that except in cases covered by the provisos to sub-section (1) of S.23, there is a prohibition for a tenant to sub-let whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein. This prohibition is however, subject to a contract to the contrary. A tenant who sub-lets or assigns or transfers the premises in contravention of this prohibition loses the protection of law and can be evicted by the landlord under Section 21 (1) (f). In the case of a statutory tenant, the relationship is not governed by contract. The prohibition against assignment and transfer is therefore, absolute and the interests of a statutory tenant can neither be assigned nor transferred. This means that the interest of the statutory tenant in the premises in his occupation, as governed by the Karnataka Rent Control Act is a limited interest which enables the surviving spouse or any son or daughter or father or mother of a deceased tenant who had been living with the tenant in the premises as a member of the tenant's family up to the death of the tenant and a person continuing in possession after the termination of the tenancy in his favour, to inherit the interest of the tenant on his death. The said interest of the tenant is however, not assignable or transferable."

16. On the facts of this case this judgment also does not lay down a law that the tenancy rights cannot be bequeathed to one of the legal heirs who are likely to succeed the tenancy rights in the case of the death

of statutory tenant in a commercial tenancy.

17. In **Bhavarlal labhchand Shah's** case (supra) the Hon'ble Supreme Court has made the following observations:-

"5. We are concerned in this case with a building which islet for business and insofar as business premises are concerned it provided in Section 5(ll)(c)(ii) that any member of the tenant's family carrying on business, trade or storage with the tenant in the premises at the time of the death of the tenant as may continue, after his death, to carry on the business trade or storage, as the case may be in the said premises and as may be decided in default of agreement by the Court shall be treated as a tenant. **It is significant that both Sub-clauses (i) and (ii) of Clause (c) of Sub-section (11) of Section 5 of the Act which deal with the devolution of the right to tenancy on the death of a tenant in respect of residential premises and premises let for business, trade or storage respectively do not provide that the said right of tenancy can devolve by means of testamentary disposition on a legatee who is not referred to in the respective Sub-clauses.** It has, therefore, to be understood that even the extended meaning given to the expression 'tenant by Sub-section (11) of Section 5 of the Act does not authorise the disposition of the right to the tenancy of the premises governed by the Act under a will. Ordinarily it is only an interest that can be inherited that can be bequeathed. But the heritability of a tenancy after the determination of the lease, which is protected by the Act is restricted in the case of residential premises only to the members of the tenant's family mentioned in Sub-Clause (i) of Clause (c) of Section 5(11) of the Act and in the case of premises let for business, trade or usage to members belonging to the family of the tenant carrying on business, trade or storage with the tenant as may continue after his death to carry on the business, trade or storage as the case may be in the said premises and as may be decided in default of the agreement by the Court as provided in Sub-Clause (ii) thereof. When the statute has imposed such a restriction, it is not possible to say that the tenant can bequeath the right to such tenancy in the case of premises let for business, trade or storage in favour of a person

not possessing the qualification referred to in Section 5(11)(c)(ii) of the Act. **The petitioner admittedly is not a person possessing the said qualification.** It is appropriate to refer here to the following observations made by A.N. Sen, J. who has written the main judgment of the case in Gian Devi v. AIR 1985 SC 796 :

"In the absence of the provision contained in Sub-Section 2(1)(iii), the heritable interest of the heirs of the statutory tenant would devolve on all the heirs of the 'so called statutory tenant' on his death and the heirs of such tenant would in law step into his position. This Sub-section (iii) of Section 2(1) seeks to restrict this right in so far as the residential premises are concerned. **The heritability of the statutory tenancy which otherwise flows from the Act is restricted in case of residential premises only to the heirs herein are entitled to remain in possession and to enjoy the protection under the Act in the manner and to the extent indicated in Section 2(1)(iii).** The Legislature which under the Rent Act affords protection against eviction to tenants whose tenancies have been terminated and who continue to remain in possession and who are generally termed as statutory tenants, is perfectly competent to lay down the manner and extent of the protection and the rights and obligations of such tenants and their heirs. Section 2(1)(iii) of the Act does not create any additional or special right in favour of the heirs of the 'so called statutory tenant' on his death, but seems to restrict the right of the heirs of such tenant in respect of residential premises. As the status and rights of a contractual tenant even after determination of his tenancy when the tenant is at times described as the statutory tenant, are fully protected by the Act and the heirs of such tenants become entitled by virtue of the provisions of the Act to inherit the status and position of the statutory tenant on his death, the Legislature which has created this right has thought it fit in the case of residential premises to limit the rights of the heirs in the manner and to the extent provided in Section 2(1)(iii). **It appears that the Legislature has not thought it fit to put any such restrictions with regard to tenants in respect of commercial premises in this Act.**

(underlining by us)

6. In the above decision this Court was considering the provisions of the Delhi Rent Control Act in which restriction had been placed on the heritability of the statutory tenancy in the case of residential premises only to the heirs mentioned in Section 2(1)(iii) of the Delhi Rent Control Act and-no such restriction had been placed with regard to the right of tenancy in respect of commercial premises. Proceeding further A.N. Sen, J. observed in the above decision at page 813 thus :

In the Delhi Act, the Legislature has thought it fit to make provisions regulating the right to inherit the tenancy rights in respect of residential premises. The relevant provisions are contained in Section 2(1)(iii) of the Act. With regard to the commercial premises, the Legislature in the Act under consideration has thought it fit not to make any such provision. It may be noticed that in some Rent Acts provisions regulating heritability of commercial premises have also been made whereas in some Rent Acts no such provisions either in respect of residential tenancies or commercial tenancies has been made. **As in the present Act, there is no provision regulating the rights of the heirs to inherit the tenancy rights of premises which is commercial premises, the tenancy right which is heritable devolves on all the heirs under the ordinary law of succession.** The tenancy right of Wasti Ram, therefore, devolves on all the heirs of Wasti Ram on his death.

7. In view of the above decision, we are of the opinion that **the right to occupy the premises after the determination of the lease cannot be bequeathed to any person under a will who does not satisfy the qualification, referred to in Section 5(11)(c)(ii) of the Act.** In **Gian Devi's** case (supra) the Court was not concerned with the right of a tenant to bequeath his right to remain in possession of a premises after the determination of the lease which he possessed under the statute in favour of a third party under a will. The Court was dealing with the case of persons who claimed that they had inherited such right by way of intestate succession. Naturally the Court was inclined to

take a view favourable to the members of the family of the tenant who would be exposed to grave difficulties if they were to be thrown out of the demised premises in which the tenant was carrying on his business till his death. This is clear from the following observations of A.N. Sen, J. at page 811 :

A tenant of any commercial premises has necessarily to use the premises for business purposes. Business carried on by a tenant of any commercial premises may be and often is, his only occupation and the source of livelihood of the tenant and his family; and the tenant, if he is residing in a tenanted house, may also be paying his rent out of the said income... The mere fact that in the Act no provision has been made with regard to the heirs of tenants in respect of commercial tenancies on the death of the tenant after termination of. the tenancy, as has been done in the case of heirs of the tenants of residential premises, does not indicate that the Legislature intended that the heirs of the tenants of commercial premises will cease to enjoy the protection afforded to the tenant under the Act. The Legislature could never have possibly intended that with the death of a tenant of the commercial premises, the business carried on by the tenant, however, flourishing it may be and even if the same constituted the source of livelihood of the members of the family, must necessarily come to an end on the death of the tenant only because the tenant died after the contractual tenancy had been terminated. It could never have been the intention of the Legislature that the entire family of a tenant depending upon the business carried on by the tenant should be completely stranded and the business carried on for years in the premises which had been let out to the tenant must stop functioning at the premises which the heirs of the deceased tenant must necessarily vacate, as they areafforded no protection under the Act. **We are of the opinion that in case of commercial premises governed by the Delhi Act, the Legislature has not thought it fit in the light of the situation at Delhi to place any kind of restriction on the ordinary law of inheritance with regard to succession.**

8. The reasons given by the Court in the above decision in support of the case of the heirs of a tenant who inherit his

business under the intestate succession would not however be available in the case of a person who is a stranger to the family who claims the right to the tenancy under a will of a deceased tenant. There can possibly be no justification either in law or in equity to extend the meaning of the expression 'tenant' so as to include such strangers also. If such a right of a tenant were to be recognised, what prevents him from transferring the building to any body he likes who is totally unconnected with him or who is not dependent on him such as a temple, a church, a mosque, a hospital, a foreigner, a multinational company and any other person of the counrty? The Legislature could never have intended to confer such a right on him and exclude the right of a landlord to get back possession of his building for ever even after the death of the tenant with whom he had entered into contract initially. Perhaps even in the case of a person who may succeed under Sub-clauses (i) and (ii) of Section 5(11)(c) there can be no further devolution after his death again under these Sub-clauses. This question however need not be pursued in this case. (However see Para 602 Vol. 27 Halsbury's Laws of England 4th Edn.). **When in the case before us the Legislature has restricted the right to inherit the right to the tenancy of the premises let out for business, trade or storage to any member of a tenant's family carrying on business, trade or storage with the tenant at the time of his death it is not open to the Court by judicial construction to extend the said right to persons who are not members of the tenant's family who claim under testamentary succession."**

18. The position was further clarified with regard to the bequeathing the tenancy rights in favour of somebody else's other than legal heirs in this judgment in paragraph 9 onwards:

"9. In **Jaspal Singh v. The Additional District Judge, Bulandshahr and Ors.** : AIR 1984 SC 1880, this Court had occasion to consider the validity of a bequest of the right of a tenant to continue to occupy the premises after the determination of the tenancy under U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 under a will. Section 3(a) of the U.P. Act referred to above defined the expression 'tenant' thus:

3. In this Act unless the context otherwise requires:

(a) 'tenant', in relation to a building means a person by whom its rent is payable, and on the tenant's death -

(1) in the case of a residential building, such only of his heirs as normally resided with him in the building at the time of his death ;

(2)in the case of a non-residential building, his heirs ;

10. The appellant in that case claimed the right to tenancy held by one Nuabat Singh under the will of Naubat Singh. This Court held that the appellant would be a tenant within the meaning of Section 3(a) of that Act only when he was an heir but the appellant was not a son but only nephew of Naubat Singh. The said U.P. Act also contained a provision in Section 12(2) thereof which stated that in the case of non-residential building where a tenant carrying on a business in the building admitted a person who was not a member of his family as a partner or a new partner, as the case may be, the tenant should be deemed to have ceased to occupy the building. Under those circumstances this Court held at page 1885 thus:

From a survey of these provisions it will be clear that if a tenant parts with possession of the premises in his possession, the same would be treated as vacant... **In the case of non-residential building, when a tenant is carrying on business in the building, admits a person who is not a member of his family as a partner or new partner as the case may be, the tenant shall be deemed to have ceased to occupy the building. If a tenant sublets the premises, he is liable to ejectment.** Obviously, therefore, there are restrictions placed by the Act on the right of the tenant to transfer or sublet the tenancy rights and he can keep possession for the purpose of his family, for his business and for the business of his family members. He obviously cannot be allowed to transfer a tenancy right. A fortiori, the scheme of the Act does not warrant the transfer the tenancy right to be effective after his lifetime."

19. However, Punjab High Court in a case relating to East Punjab Urban Rent Restriction Act while interpreting Section 2(i) and 13(2) of

the said Act held that a statutory tenant is competent to bequeath his tenancy right by executing a Will in favour of his son specifically excluding daughter. The relevant observations are in para 11 which are reproduced hereunder:-

"11. The competency of a statutory tenant to transfer his tenancy rights by Will is here a matter which directly arises in this case and cannot, therefore, be avoided. In dealing with this question, keeping in view the relevant provisions of the East Punjab Urban Rent Restriction Act, 1949 (hereinafter referred to as the Rent Act), it must be appreciated that a bequest of tenancy rights by a statutory tenant in favour of a stranger cannot but stand on a different footing than one to his legal heirs. Whereas in the former, it would be the thrusting of 'uncontemplated strangers' in the premises, in the latter it would be no more than the coming in of some, if not all, of those upon whom the legislature has conferred a right to succeed to such tenancy rights. It is also well settled that an interest that can be inherited can be bequeathed too. On principle, therefore, no exception can be taken to the entitlement of a statutory tenant to bequeath his tenancy rights by Will to one or more of his legal heirs who would have succeeded to them had he died intestate."

20. To the same affect is the other judgment delivered in the case of **Mahant Karam Singh Vs. Mulakh Raj** (supra).

21. In the light of the judgment delivered by the Apex Court in the case of **Bhavarlal** (supra) it has been clarified that the rights of a tenant are heritable in favour of the legal heirs like any other property and as long as inheritance of the property even under a Will is in favour of one of those i.e. the members of the family who are likely to inherit after the death of the deceased and are not in favour of some outsiders the said act on the part of the deceased tenant by executing a Will in favour of one of the legal heirs would not constitute an act of sub-letting.

22. Another judgment delivered in the case of **Tara Chand & Anr. Vs. Ram Prasad** (1990) 3 SCC 526, the Hon'ble Supreme Court has considered the rights of inheritance of the legal heirs of a deceased tenant who was having a tenancy in the suit property for commercial purposes. By making a reference to the Constitution bench judgment in **Gian Devi Anand Vs. Jeevan Kumar & Ors.** and also relying upon 7 Judges Bench of the Apex Court in **V. Dhanpal Chattiar Vs. Yesodai Ammal,** 1980 1 SCR 334 has extracted some observations made by the Constitution

Bench with reference to the inheritance of the commercial tenancy which is as under:

> "We are of the opinion that in case of commercial premises governed by the Delhi Act, the Legislature has not thought in fit in the light of the situation at Delhi to place any kind of restriction on the ordinary law of inheritance with regard to succession. It may also be borne in mind that in case of commercial premises the heirs of the deceased tenant not only succeed to the tenancy rights in the premises but they succeed to the business as a whole. It might have been open to the Legislature to limit or restrict the right of inheritance with regard to the tenancy as the Legislature had done in the case of the tenancies with regard to the residential houses but it would not have been open to the Legislature to alter under the Rent Act, the Law of Succession regarding the business which is a valuable heritable right and which must necessarily devolve on all the heirs in accordance with law. The absence of any provision restricting the heritability of the commercial tenancies notwithstanding the determination of the contractual tenancies will devolve on the heirs in accordance with law and the heirs who step into the position of the deceased tenant will continue to enjoy the protection afforded by the Act and they can only be evicted in accordance with the provisions of the Act. There is another significant consideration which, in our opinion, lends support to the view that we are taking. Commercial premises are let out not only to individuals but also to Companies, Corporation or anybody with juristic personality, question of the death of the tenant will not arise. Despite the termination of the tenancy, the Company or the Corporation or such juristic personalities, however, will go on enjoying the protection afforded to the tenant under the Act. **It Can hardly be conceived that the Legislature would intend to deny to one class of tenants, namely, individuals the protection which will be enjoyed by the other class, namely, the Corporations and Companies and other bodies with juristic personality under the Act. If it be held that commercial tenancies after the termination of the contractual tenancy of the tenant are not heritable on the death of the tenant and the heirs**

> **of the tenant are not entitled to enjoy the protection under the Act, an irreparable mischief which the Legislature would never have intended is likely to be caused."**

23. In view of the aforesaid the Apex Court observed:

> "6. On the facts of the case it was held that the tenant who continues to remain in possession even after the termination of the contractual tenancy till a decree for eviction against him is passed, continues to have an estate or interest in the tenanted premises and tenancy rights in respect of commercial premises are heritable. There is no provision in the Act regulating the rights of its heirs to inherits the tenancy rights of the tenanted commercial or business premises. The tenancy rights devolved on the heirs under the ordinary law of succession. Accordingly it was held that the tenancy rights of Wasti Ram devolved on all the heirs of Wasti Ram on his death. The ratio with equal force applies to the facts of this case."

24. By referring to the judgment in the case of **Bhavarlal Labhchand Shah** (supra) it was observed:

> "7. The ratio in **Bhavarlal Labhchand Shah v. Kanaiyalal Nathalal Intawala** MANU/SC/0529/1986 : [1986]1SCR1 does not help the respondent. The facts therein was that the tenant by testimentary disposition "will" bequeathed his occupancy rights in the tenanted property in favour of the stranger legatee. The question was whether such a legatee is entitled to the benefit of continuance of tenancy under Bombay Rents, Hotel and Lodging House Rules Control Act, 1947. It was held that since the bequest was in favour of the third party, the testator thereby, cannot confer rights under the provisions of the Rent Act on the stranger who was not a member of the family. The march of law culminated in Giani Devi Anandi's case knocked of the bottom of A.C. Chaterjee's ratio. Similarly the foundation in **Sita Ram v. Govind** MANU/RH/0013/1970, **Balkesh and Anr. v. Shanti Devi and Ors.** reported in 1972 RCT 285, **Mohan Lal v. Jaipur Hosiery Mills Pvt. Ltd.** reported in MANU/RH/0168/1973 has been shaken and no longer remain to be good law."

25. Taking note of the fact that the deceased tenant **Smt. Anandi,** in that case was inducted in the suit property for commercial purposes

& which was determined under notice of 106 of Transfer of Property Act even thereafter continued to remain in possession as statutory tenant and who expired subsequently, it was held that:

> "Smt. Anandi enjoyed the status as a statutory tenant of the premises even after the determination of the tenancy. Notwithstanding the termination of the contractual tenancy the jural relationship of the landlord and tenant between the respondent and Smt. Anandi under the Act was not snapped off. The heritable property or interest in the lease hold right in the tenancy continued to subsist in the tenant Anandi.
>
> On her death, the rights to succession to an estate of the deceased owner vested immediately on his/her than nearest heirs and cannot be held in abeyance except when a nearer heir is then in the womb. The vested right can not be divested except by a retrospective valid law. The appellants by virtue of intestate succession under Hindu Succession Act, being Class I heirs, succeeded to the heritable interest in the lease hold right of a demised premises held by Smt. Anandi. They, thereby, stepped into the shoes of the tenant. They continued to remain in possession as on the date of the suit as statutory tenants. Thereby, they are entitled to the protection of their continuance as a statutory tenant under the Act."

26. The fine distinction which has been made by the Hon'ble Supreme Court in the case of **Bhavarlal** (supra) has not been noticed in the later judgment of the Hon'ble Supreme Court in **Vasant Pratap Pandit's** case (supra).

27. From the aforesaid it is apparent that the tenancy rights in a property can be inherited by the legal heirs which is let-out for a commercial purpose in accordance with the provisions of the Indian Succession Act after the death of the tenant. Thus in case the landlord wishes to restrict the rights of inheritance only in favour of one of the legal heirs, such Act on the part of the tenant may not be a cause of action giving rise to a suit for eviction of the property on the ground of sub-letting. Of course it may be an issue between the other legal heirs inter-se which is not the case before us.

28. Even otherwise a cause of action for filing a suit of eviction under Section 14(1)(b) of the Act arises only when a stranger is put in possession of the suit to the exclusion of the tenant who divest himself of the possession of the suit either in full or part. This aspect has also been dealt with by the Apex Court in the case of **M/s. Bharat Sales Ltd. Vs. Life Insurance Corporation of India,** reported in AIR 1988 SC 1240, which is a celebrated judgment on the issue of sub-letting and which reads as under:-

> "4. Sub-tenancy or subletting comes into existence when the tenant gives up possession of the tenanted accommodation, wholly or in part, and puts another person in exclusive possession thereof. This arrangement comes about obviously under a mutual agreement of understanding between the tenant and the person to whom the possession is so delivered. In this process, the landlord is kept out of the scene. Rather, the scene is enacted behind the back of the landlord, concealing the overacts and transferring possession clandestinely to a person who is an utter stranger to the landlord, in the sense that the landlord had not let out the premises to that person nor had he allowed or consented to his entering into possession over the demised property. It is the actual, physical and exclusive possession of that person, instead of the tenant, which ultimately reveals to the landlord that the tenant to whom the property was let out has put some other person into possession of that property. In such a situation, it would be difficult for the landlord to prove, by direct evidence, the contract or agreement or understanding between the tenant and the sub-tenant. It would also be difficult for the landlord to prove, by direct evidence, that the person to whom the property had been sublet had paid monetary consideration to the tenant. Payment of rent, undoubtedly, is an essential element of lease or sub-lease. It may be paid in cash or in kind or may have been paid or promised to be paid. It may have been paid in lump-sum in advance covering the period for which the premises is let out or sublet or it may have been paid or promised to be paid periodically. Since payment of rent or monetary consideration may have been made secretly, the law does not require such payment to be proved by affirmative evidence and the court is

permitted to draw its own inference upon the facts of the case proved at the trial, including the delivery of exclusive possession to infer that the premises were sublet."

29. Applying the aforesaid principle to the facts of this case, it is not a case where any stranger has been brought into possession of the suit by the execution of the will by late tenant in favour of one of legal heirs. As a matter of fact, this aspect has not been dealt with in any of the judgments relied upon & cited at bar. However, the discussion which has undergone in various judgments of the Apex Court as discussed above and the judgment delivered by the Punjab and Haryana High Court on which reliance has been placed by the respondent crystallizes the issue. The position thus becomes clear i.e.

(i) In case of a commercial tenancy, bequeathing the tenancy rights in such tenancy by tenant contractual or statutory only in favour of one of the legal heirs who was otherwise going to succeed such rights in the tenanted premises after the death of the deceased tenant would not constitute subletting so as attract the mischief of Section 14(1)(b) of the DRC Act.

(ii) However, the Delhi Rent Control Act being a special Act and Section 14(1)(b) specifically imposing a restriction upon the tenant which would also be applicable upon a statutory tenant i.e. not to sublet, assign or otherwise part with the possession of the suit property to a stranger to the exclusion of the tenant, bequeathing the rights under the tenancy to a stranger i.e. a person who is not going to inherit the tenancy even by the law of successions may give a cause of action to the landlord to contend that the bequeath in favour of a stranger or a person who would not inherit the tenancy in accordance with the law of succession is an act of sub-letting to attract mischief of Section 14(1)((b) of DRC Act.

30. This can also be explained in this manner that in a given situation if the other legal heirs who are not living with the tenant or are involved in other business or if a family settlement between the legal heirs of the deceased as reached between the life time of the tenant, exclusion of

other legal heirs to succeed the tenancy rights would not give a cause of action for filing a suit in favour of the landlord on the ground of sub-letting under Section 14(1)(b) of the Act. Such action of the deceased may be a cause for an inter se fight between the legal heirs which is not a case before us.

31. In view of the aforesaid, I am of the considered view that it is not necessary for this Court to follow the view taken by another Judge of this Court in the case of **Jagdish Kishore Kakar Vs. Krishna Baijal** (supra), which was delivered in peculiar facts dealing with bequeath of tenancy rights in favour of adopted child of the deceased tenant. Consequently, the issue framed in paragraph 4 of this judgment is decided in favour of the respondents. Consequently, the appeal filed by the appellant is dismissed with no orders as to costs.

32. Copy of this order be sent to the first appellate Tribunal along with records forthwith. Interim orders, if any, stands vacated.

ILR (2011) I DELHI 238
W.P.

NEENA SHAD .....PETITIONER

VERSUS

MCD & ORS. ....RESPONDENT

(PRADEEP NANDRAJOG AND MOOL CHAND GARG, JJ.)

W.P. (C) NO. : 6423/2010 & 6113/2010 **DATE OF DECISION: 02.11.2010**

Constitution of India, 1950—Article 12, 226, 227 & 331—Administrative Tribunal Act, 1985 section 19,20 & 21—Aggrieved petitioners by orders of Administrative Tribunal filed writ petitions—As Per, Petitioners who are husband and wife, they were appointed as Medical Officers on contractual basis by MCD from time to time MCD extended their term of appointment and their remuneration also enhanced—Petitioner no. 1 filed

three complaints, levelling sexual harassment allegations against colleague and seniors—Sexual Harassment Committee dismissed those complaints and also recommended strict disciplinary action against both the petitioners—Accordingly, Commissioner MCD vide office letter, took decision not to continue with engagement of petitioners with MCD—Aggrieved by said office order petitioner no. 1 filed writ petition which was dismissed and appeal preferred by her also dismissed—Thereafter petitioner no. 1 filed another writ petition which was also dismissed—On the other hand, petitioner no. 2 after dismissal of application of petitioner no. 1 filed application before Administrative Tribunal which was dismissed and review filed by him also dismissed—Petitioners urged in writ petitions MCD discriminated against petitioners by not extending their term of appointment as term of other Medical Officers who were similarly placed and also who were juniors to petitioners were granted extension of term—Also MCD, did not hold inquiry in terms of Article 311 (2) before issuing office order. Held : In the case of an appointment to a permanent post in a government service on probation or on an officiating basis, the servant so appointed does not acquire any substantive right to the post and consequently cannot complain, any more than a private servant employed on probation or on an officiating basis can do, if his service is terminated at any time—Likewise, an appointment to a temporary post in a government service may be substantive or on probation or on an officiating basis—The servant so appointed acquires no right to the post and his service can be terminated at any time except in one case when the appointment to a temporary post is for a definite period—A person appointed on contractual basis does not enjoy the protection of Article 311 (2) as he is not a member of a Civil Service of the Union or a All India Services or

a Civil Services of a State or holds a civil post under the Union or a State.

Clause (1) of Article 311 is quite explicit and hardly requires any discussion. The scope and the ambit of clause (1) is that government servants are entitled to the judgment of the authority by which they were appointed or some authority superior to that authority and that they should not be dismissed or removed by a lesser authority in whose judgment they may not have the same faith. The underlying idea obviously is that a provision like this will ensure to them a certain amount of security of tenure. Clause (2) protects government servants against being dismissed or removed or reduced in rank without being given a reasonable opportunity of showing cause against the action proposed to be taken in regard to them. It is to be noted that in clause (1) the words "dismissed" and "removed" have been used while in clause (2) the words "dismissed" "removed" and "reduced in rank" have been used. **(Para 53)**

What is meant by the expressions "dismissed", "removed" and "reduced in rank" occurring in Article 311(2)? **(Para 54)**

This aspect of the matter was examined in great detail by Supreme Court in the decision reported as **Parshotam Lal Dhingra v Union of India** 1958 SCR 828. After tracing the history of service rules, Supreme Court observed as under:-

> "It follows from the above discussion that both at the date of the commencement of the 1935 Act and of our Constitution the words "dismissed", "removed" and "reduced in rank", as used in the service rules, were well understood as signifying or denoting the three major punishments which could be inflicted on government servants. The protection given by the rules to the government servants against dismissal, removal or reduction in rank, which could not be enforced by action, was incorporated in sub-sections

(1) and (2) of Section 240 to give them a statutory protection by indicating a procedure which had to be followed before the punishments of dismissal, removal or reduction in rank could be imposed on them and which could be enforced in law. These protections have now been incorporated in Article 311 of our Constitution. The effect of Section 240 of the 1935 Act reproduced in Articles 310 and 311, as explained by this Court in S.A. Venkataraman v. Union of India 25 has been to impose a fetter on the right of the government to inflict the several punishments therein mentioned. Thus under Article 311(1) the punishments of dismissal, or removal cannot be inflicted by an authority subordinate to that by which the servant was appointed and under Article 311(2) the punishments of dismissal, removal and reduction in rank cannot be meted out to the government servant without giving him a reasonable opportunity to defend himself. The principle embodied in Article 310(1) that the government servants hold office during the pleasure of the President or the Governor, as the case may be, is qualified by the provisions of Article 311 which give protection to the government servants. The net result is that it is only in those cases where the government intends to inflict those three forms of punishments that the government servant must be given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. It follows, therefore, that if the termination of service is sought to be brought about otherwise than by way of punishment, then the government servant whose service is so terminated cannot claim the protection of

Article 311(2) and the decisions cited before us and referred to above, insofar as they lay down that principle, must be held to be rightly decided." (Emphasis Supplied) **(Para 55)**

To put it simply, the principle is that when a servant has right to a post either under the terms of the contract of employment, express or implied, or under the rules governing the conditions of his service, the termination of the service of such a servant is by itself and prima facie a punishment, for it operates as a forfeiture of his right to hold that post or that rank and to get the emoluments and other benefits attached thereto. But if the servant has no right to the post, as where he is appointed to a post, permanent or temporary either on probation or on officiating basis, the termination of his employment does not deprive him of any right and cannot, therefore, by itself be a punishment. **(Para 65)**

Important Issue Involved: A person appointed on contractual basis does not enjoy the protection of Article 311 (2) as he is not a member of a Civil Service of the Union or a All India Services or a Civil Services of a State or holds a civil post under the Union or a State.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONERS : Petitioner in person.

FOR THE RESPONDENT : Mr. Gaurang Kanth & Ms. Biji Rajesh, Advocates.

CASES REFERRED TO:

1. *Union Public Service Commission* vs. *Girish Jayanti Lal Vaghela* (2006) 2 SCC 482).
2. *Vishaka* vs. *State of Rajasthan* (1997) 6 SCC 241
3. *Ramana Dayaram Shetty* vs. *International Airport Authority of India* (1979) 3 SCC 489).

4. *Parshotam Lal Dhingra* vs. *Union of India* 1958 SCR 828.

RESULT: Petition dismissed.

PRADEEP NANDRAJOG, J.

1. Between the years 2001-2002 Municipal Corporation of Delhi (hereinafter referred to as "MCD") appointed 41 doctors as Medical Officers (Ayurveda) on contractual basis, including the petitioners who are married to each other. The relevant portion of the letters containing the terms and conditions of the appointment of said Medical Officers issued by MCD reads as under:-

> "….With reference to his/her Walk-in-interview and approval of Commissioner, Municipal Corporation of Delhi, Dr.Neena Shad/ Dr.Sunil Chaudhary is hereby given Offer of Appointment to the post of Ayurvedic Vaid on contract basis at a fixed amount of Rs.10,000/- per month initially for a period of six months, or till such time the post is filled up on regular basis through UPSC, whichever is earlier subject to the following terms and conditions:-
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> 1. The post is purely on contract basis for a period of six months or till such time the post is filled up on regular basis by CED through UPSC, whichever is earlier. The appointment can terminated at any time on either side by giving one month's notice or by paying one month's salary without assigning any reason……" (Emphasis Supplied)

2. From time to time, MCD extended the term of appointment of the aforesaid Medical Officers including the petitioners. Remuneration of the said Medical Officers was also enhanced.

3. On 13.07.2007 a complaint was made to the Commissioner MCD by petitioner Neena Shad, who was then posted at Bihari Pur Ayurvedic dispensary, against one Shiv Dayal Kain, Compounder in the said dispensary, inter-alia alleging that she was sexually harassed by the said Compounder. In view of the complaint made by petitioner Neena Shad, Commissioner, MCD directed Dr.Ashok Garg, Chief Medical Officer to investigate into the matter and submit a report in said regard.

4. On 16.07.2007 Dr.Ashok Garg, Chief Medical Officer, submitted

a report wherein he opined that Mr.Shiv Dayal Kain ˇbe transferred from Bihari Pur dispensary to Ayurvedic dispensary of Swami Dayanand Hospital. He further opined that 'I found no harassment with MOI/C by the pharmacist. It has come to my notice that both are faulty one or the other issue.'

5. Thereafter one Mr.Shri Ram was appointed as Compounder in Bihari Pur Ayurvedic Dispensary. Petitioner Neena Shad alleged that since the said Compounder was not discharging his duties in a satisfactory manner she went to the office of Chairman, Medical Relief and Public Health Committee on 22.11.2007 to complain about Compounder Shri Ram where she was manhandled by Mr.Prakash Chand Dagar, Peon to the Chairman, while she was waiting to meet the Chairman. The petitioner filed a complaint with Commissioner, MCD regarding the said incident.

6. Considering the problems between petitioner Neena Shad and Compounder Shri Ram, a decision was taken by the higher officials of the Health Department of MCD on 23.11.2007 to transfer the petitioner from Bihari Pur dispensary to Nand Nagari dispensary.

7. On the same date i.e. 23.11.2007 Dr.Vidya Sagar Sharma, who was officiating as DHO (ISM) accompanied by Dr. Ashok Garg, Chief Medical Officer, visited Nand Nagari dispensary to facilitate petitioner Neena Shad in joining the said dispensary. Petitioner Neena Shad alleged that Dr.Vidya Sagar had touched her in a derogatory manner. The police was called on the spot to inquire into the matter.

8. In his defence, Dr.Vidya Sagar stated that on the directions of Chairman, Medical Relief and Public Health Committee he along with Dr.Ashok Garg had gone to Nand Nagari dispensary to facilitate petitioner Neena Shad in joining the said dispensary where petitioner Neena Shad was present along with her husband Dr.Sunil Chaudhary. Petitioner Neena Shad and her husband unnecessarily picked up a fight with him and thereafter called the police and falsely accused him of sexually harassing Neena Shad.

9. An enquiry was conducted into the aforesaid matter by the Office of Deputy Commissioner of Police and a report was submitted in said regard, which report reads as under:-

"Allegations leveled by the Complainant against her Senior Doctor

Vidya Sagar Sharma and Dr.Ashok Garg are uncalled for as the entire episode took place in public where her husband was also present. Allegations of molestation/Indecent behavior are false, baseless and motivated."

10. Thereafter petitioner Neena Shad filed a complaint against Dr.Vidya Sagar before Commissioner, MCD. In terms of the directions issued by Supreme Court in the decision reported as **Vishaka v State of Rajasthan** (1997) 6 SCC 241, Commissioner, MCD referred the afore-noted two complaints filed by petitioner Neena Shad against Prakash Chand Dagar and Dr. Vidya Sagar respectively to Sexual Harassment Complaints Committee (hereinafter referred to as "Committee") comprising of following members:- (i) Ms.Meera Akolia, Municipal Secretary, MCD; (ii) Mr.P.K. Gupta, Director (Printing & Stationary), MCD; (iii) Dr.Vireshwar, Chief Medical Officer, Town Hall Dispensary, MCD; (iv) Ms.Meenakshi Sobti, P.R.O., Kasturba Hospital and (v) Ms.Aparna Bhat, NGO Member.

11. During the pendency of proceedings of Sexual Harassment Complaints Committee, a report was submitted by Dr.M.L. Khatri, DHO (ISM) in March 2008 regarding the conduct of petitioner Neena Shad, the relevant portion whereof reads as under:-

"Dr.Neena Shad is working as Medical Officer (Ay.) on contract basis since 2001 and presently posted at Ay. Dispensary Nand Nagri. During her stay in various dispensaries her behavior towards with junior and subordinate staff was not found satisfactory. It came into notice that the officer who asked for her punctuality and behave properly to juniors, she always leveled allegations of sexual harassment upon everyone. It has happened with previous DHO Dr.V.P. Kanoji and the junior staff who worked/working under her supervision in a awful situation which is created by her for her own interest. It is pertinent to say that during last year Deptt. made so many transfers of pharmacists but none of them was interested to work under her with the fear of leveling false sexual harassment charges…." (Emphasis Supplied)

12. The first hearing of the Committee took place on 15.05.2008. In the said hearing, the notices for appearance before Committee were

issued to the petitioners, Ms.Sudesh Kumari, Ms.Renu Gill, Dr.Vidya Sagar Sharma and Dr.Ashok Garg. The hearing was adjourned to 22.05.2008.

13. On the next hearing i.e. 22.05.2008 Dr.M.L. Khatri, DHO (ISM), informed the Committee that the notices for hearing could not be served upon the petitioners. Regarding the non-service of notices to the petitioners, Dr.M.L. Khatri stated before the Committee that when contacted over telephone regarding the service of the notices the petitioners stated that they will personally collect the notices from the office but they did not come to the office. In view of non-service of notices to the petitioners, the Committee decided that the notices for appearance be delivered in the respective dispensaries where the petitioners are working and waited for the status of service of notices.

14. In the meantime, witnesses; Dr.Vidya Sagar, Dr.Ashok Garg, Ms.Renu Gill and Ms.Sudesh Kumari were examined.

15. Dr.Vidya Sagar reiterated the defence taken by him before the police. Dr.Ashok Garg duly corroborated the statement of Dr.Vidya Sagar and firmly denied that any incident of sexual harassment had taken place on 23.11.2007 as alleged by petitioner Neena Shad.

16. Ms.Renu Gill who had worked as ANM with petitioner Neena Shad for a period of over two months stated that petitioner Neena Shad used to cry for no reason and pick up fights with other members of staff. That husband of Neena Shad used to accompany her to the dispensary and attend patients even though he was posted at another dispensary. That Neena Shad used to come to the dispensary late, take away the attendance register of the dispensary to her residence and bring her child to the dispensary every day. That she had sought the transfer from the dispensary in question due to the behavior of Neena Shad.

17. Ms. Sudesh Kumari who was posted as Compounder in Nand Nagari dispensary stated that Neena Shad used to cry easily and pick up fights with people. Regarding incident of sexual harassment, she stated that Dr.Vidya Sagar had no occasion to touch Neena Shad.

18. Regarding the service of notice to petitioner Neena Shad, the pharmacist in Nand Nagari dispensary informed the Committee that Neena Shad had left the Committee around noon stating that she was going to

the office for some work. Regarding the service of notice to petitioner Sunil Chaudhary, the petitioner was not found present in the dispensary at the time when the dispatch rider reached there. Mr.Keshav Das, Compunder refused to receive the notice and stated that Dr.Sunil Chaudhary had left the office to collect the notice personally, which statement was found to be untrue by the Committee.

19. At about 04.00 P.M. one Keshav Dass, Compounder came in the office of Committee to collect the notice of Dr.Sunil Chaudhary. When questioned by the members of the Committee, he informed that Dr.Sunil Choudhary had sent him to collect the notice. When further inquiries were made from Keshav Dass he feigned fainting. The members of the Committee were of the view that Keshav Dass was under the tremendous influence of Dr.Sunil Chaudhary and feared his wrath.

20. In the meantime, the Committee sent the dispatch rider to the residence of the petitioners to serve the notices where the petitioners treated him very badly. First the petitioners refused to receive the notices falsely stating that they do not reside there. When the dispatch rider insisted upon serving the notices, the petitioners seized the keys of the motorcycle of the dispatch rider whereupon the police was called. It was only upon the intervention of the police that the petitioners returned the keys to the dispatch rider.

21. In view of the afore-noted uncooperative and obstructive behavior of petitioner Neena Shad, the Committee chose not to give any further opportunity to her to present her case before the Committee and submitted its report inter-alia opining that the allegations of sexual harassment leveled by petitioner Neena Shad against Dr.Vidya Sagar and Mr.Prakash Chand Dagar are false and baseless. The relevant portion of the report of the Committee reads as under:-

"CONCLUDING COMMENTS

This is one of the strangest cases that the Committee has received. The Complaints Committee on Sexual Harassment was set up to provide speedy redressal to the victims of sexual harassment. The Committee comprises of Senior Officers of MCD and the complaints are heard on priority basis to ensure that women are not harassed. However, the present case seems to be a case of total abuse of this fora. The Committee takes strong objection to

the conduct of the complainant due to the following reasons: a Although she was given a hearing of over 2 hours on the first day of hearing totally uninterrupted, the complainant chose to call the Chairperson of the Committee late at night to discuss the case and she had to be firmly told to refrain from making those calls;

b. The cross examination was fixed to facilitate the hearing. The complainant was advised that she would be intimated about the date and she should appear before the Committee. However, not only did she not appear, she misbehaved with the Dispatch Rider specially sent to her residence by calling the police. This incident also subjected senior officials of the MCD to harassment and humiliation late into the night;

c. After having got the notice, Dr.Shad feigned the illness by stating that both she and her husband have taken ill and cannot before the Committee;

d. The Complainant had made allegations against a Peon in the office of Chairman, MRPH Committee, a compounder, Shiv Dayal and Dr.Vidya Sagar Sharma. However, before the Committee she first stated that she does not want to pursue against the Peon and Shiv Dayal. She then changed her statement and stated that she would like to think about it. She has not intimate the Committee till about her decision;

e. When the Committee tried to contact her at the dispensary during working hours, she was found absent from the dispensary. She had not taken permission to leave the dispensary during working hours. She had informed her pharmacist that she was going out on official work and misled her;

f. Dr.Vidya Sagar in his statement before the Committee also brought to the attention of the Committee the manner in which the complainant along with her husband had threatened other staff by calling the police, going to their houses with hooligans etc. The Committee had looked at the file containing these complaints and is surprised as to why no action was taken by the department…..

The Committee's responsibility is only to look into the merits of the allegations of sexual harassment. However, due to the shocking conduct of the complainant, her husband Dr.Sunil Chaudhary and certain other persons of the Health Department, the Committee is constrained to make the following observations.

a. The doctor couple seem to have terrorized the department as the DHO, (ISM) Dr.M.L.Khatri, the pharmacists and other staff was visibly scared of them;

b. The administration of the DHO (ISM) is very weak. Although he was aware about the conduct of both the doctors and their indiscipline, he allowed them to go scot free;

c. The complainant herself has shown highly insubordinate behavior. She had herself admitted that she had questioned Dr.Vidya Sagar why he visited her dispensary. She never marked her attendance at the hospital, refused to receive the notices sent by this Committee. She also did not respect the hierarchy. She went above the departmental officers directly to the Commissioner and when it suited her also met the Chairman for routine administration matters;

RECOMMENDATIONS:

The Committee makes the following recommendations.

1. The present complaint of sexual harassment is rejected as there is no merit in the complaint;

2. Contract staff should not be given independent charge of the dispensaries.

3. Strict disciplinary action is recommended against both Dr.Neena Shad and Dr.Sunil Chaudhary for abusing the process of law, taking law onto their own hands and showing total disregard to the committee as well as other Senior Officers of their department;" (Emphasis Supplied)

22. In view of the recommendations contained in the afore-noted report of the Committee, Commissioner MCD took a decision on 17.06.2008 not to continue with the engagement of the petitioners with

MCD as both of them were a nuisance and no subordinate person was ready to work at the dispensary where they could be posted.

23. On 15.07.2008 an Office Order was issued by MCD extending the term of appointment of 35 out 39 Medical Officers who were similarly placed as the petitioners. The extensions could not be granted to 4 Medical Officers due to the fact that DHO (ISM) did not forward their Performance Appraisals to the concerned authority.

24. On 03.07.2008 Office Order(s) were issued by MCD dispensing with the services of the petitioners. The said Office Order(s) reads as under:-

> "Dr.Sunil Choudhary/Neena Shad was employed in MCD on contract basis as Medical Officer (Ayurveda). His/her period of contract has expired on 07.05.2008. The Competent Authority has not approved his/her re-engagement and hence, he/she is no more in Municipal services. This issues with the prior approval of the Competent Authority."

25. On 01.08.2008 Office Order(s) were issued by MCD granting extensions to 4 Medical Officers who were not granted extensions earlier due to non-receipt of their Performance Appraisals as also to 26 Medical Officers who were junior to the petitioners.

26. Aggrieved by the Office Order dated 03.07.2008 issued by MCD, petitioner Neena Shad filed a writ petition bearing ˇNo.7037/2008 under Articles 226 and 227 of Constitution of India before this Court. At this juncture, it would be most apposite to note some of the averments made by the petitioner in the said petition:-

> "1. That your humble Petitioner is aggrieved by the letter/order no 378/ADC (H)/2008 dated 03-07-2008 in which the services of the petitioner was removed on the pretext that the competent authority has no approved her re-engagement and hence she is no more in Municipal Services. While other persons whoare junior and the senior from the petitioner still working with the respondents…..
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> …
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> 15. That it is submitted that the said posts are still not filled by

the Union Public Service Commission and the other persons who was employed with the petitioner is still working with the respondents.

….

17. That it is submitted that the respondent twice appointed on the contract basis approx. 35 doctors with the same conditions as the same applied in the case of the petitioner.

18. That the services of the petitioner removed with no reason and except that the authorities did not extend the contract period. No reason has been assigned why the period of the petitioner and her husband have not been extended out of the complete list.

….

GROUNDS:

….

D BECAUSE the services of the petitioner was terminated on the basis of pick and choose;

E BECAUSE no reason has been assigned why only the petitioner and her husband's services were terminated/not extended while other persons are still working with the respondent;

F BECAUSE there were other person/doctors who are either junior or senior to the petitioner is still working with the respondents;

G BECAUSE the impugned order is the violation of Article 14 and 21 of Constitution of India;

….." (Emphasis Supplied)

27. Vide order dated 26.09.2008 this Court dismissed the said writ petition on the ground that a contractual appointment does not confer any legal right upon the holder of such a post and it is the prerogative of the employer to allow the contractual appointee to continue him in service and the court cannot interfere if such a discretion exercised is by the employer unless the discretion is found to be vitiated by mala fide or extraneous considerations.

28. Aggrieved by the order dated 26.09.2008 passed by this Court, petitioner Neena Shad filed letters patent appeal before a Division Bench of this Court, which appeal was dismissed vide order dated 24.10.2008.

29. Thereafter petitioner Neena Shad filed another writ petition bearing No.11791/2009 under Articles 226 and 227 of Constitution of India before this Court inter-alia highlighting that MCD had meted out a most discriminatory treatment to her by extending the term of appointment of all the 39 Medical Officers who were similarly placed as the petitioners including the four Medical Officers who were not given extension in the first instance as also of 26 Medical Officers who were junior to the petitioners, which petition stood transferred to Principal Bench, Central Administrative Tribunal, New Delhi for adjudication.

30. Vide impugned judgment and order dated 28.04.2010, the Tribunal dismissed the petition filed by petitioner Neena Shad on the ground that even though facts and circumstances of the case do suggest that a discriminatory treatment was meted out to petitioner Neena Shad, she is not entitled to any relief in view of the fact that the present application is based on the same cause of action as the Writ Petition No.11791/2009 filed by Neena Shad before this Court, which petition stood dismissed by this Court. The relevant portion of the impugned judgment is being noted herein under:-

> "5. Pursuant to notice issued by this Tribunal, the respondent has entered appearance and filed its reply contesting the claim of the applicant. It is significant to mention that on the basic facts with regard to employment of the applicant and her husband on contractual basis, the dates of their employment, and employment of others along with the applicant on same terms and conditions, there is no dispute at all. There is no dispute either with regard to 26 doctors being appointed after appointment of the applicant on same terms and conditions. The applicant, the basic facts as mentioned above, contends that she and her husband have been discriminated. There are hardly any arguments by the learned counsel representing the respondent to counter the plea raised by the respondent……
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> 9. Having heard the applicant and Shri Bhardwaj, learned counsel representing the respondent, we are of the view that even though,

the applicant may appear to have a case of discriminatory treatment meted out to her, but because of her filing writ petition for the same relief and on the plea of discrimination as well, it would be difficult to give any relief to her. We are of the firm view that the pleadings with regard to discrimination meted out to the applicant were indeed made in the earlier writ petition filed by her and the relief asked for, in any case, was the same as has been asked for in the present Application. The mere fact that nothing with regard to discrimination came to be referred to by the learned single Judge who dismissed the petition, may not entitle the applicant to file fresh petition for the same cause of action. Even though, as mentioned above, the plea of the applicant is based upon discrimination, the same did not come to be referred to or discussed, but once, it was taken, the applicant ought to have stressed upon the same, and if yet aggrieved, she could seek remedies like review or appeal against the orders passed by the learned single Judge/Division Bench, but fresh petition on the same plea would be impermissible. We are conscious that by virtue of provisions contained in Section 22 of the Act of 1985, the Tribunal is not bound by the procedure laid down in the Code of Civil Procedure, but, at the same time, as per the provisions contained in the same very section, it shall be guided by the principles of natural justice. Provisions contained in Section 11 CPC are in fact based upon the principle of natural justice that no one can be vexed twice for the same cause of action. Even if, therefore, provisions of Section 11 CPC may not be strictly applicable in the present case, principles of natural justice would come in the way of the applicant in asking for any relief having already lost her cause up to the Division Bench of the Hon'ble High Court of Delhi.

12. In view of the discussion made above, even though, prima facie it appears that the applicant may have a case for retention in service on the ground of discriminatory treatment meted to her, we are unable to grant any relief to her. The applicant appears to have chosen a wrong cause of action. As mentioned above, in our view, her remedy lay in requesting the Hon'ble High Court for review or else, approach the Hon'ble Supreme

Court for the relief. Second petition on the same ground for the same relief cannot be entertained. The same is thus dismissed. There shall, however, be no order as to costs." (Emphasis Supplied)

31. After the dismissal of the application filed by petitioner Neena Shad, her husband Sunil Choudhary filed an application under Section 19, Administrative Tribunals Act, 1985 before the Tribunal inter-alia taking the same grounds as taken by petitioner Neena Shad in her application.

32. Vide impugned judgment dated 02.07.2010, the Tribunal dismissed the application filed by petitioner Sunil Choudhary on the ground that the same is barred by limitation in view of Section 21 of Administrative Tribunals Act, 1985 which provides that an application should be filed before the Tribunal within a year of passing of final order by the concerned authority. It was held by the Tribunal that the cause of action for filing the present application arose on 03.07.2008 when MCD issued the office order dispensing with the services of the petitioner, which is a final order within the meaning of Section 20 of Administrative Tribunals Act, 1985 and thus petitioner ought to have filed the application on or before 02.07.2009 whereas he filed the same in the year 2010.

33. Aggrieved by the judgment dated 02.07.2010 passed by the Tribunal, petitioner Sunil Choudhary filed a review application before the Tribunal on the ground that the office order dated 03.07.2008 issued by MCD was not a final order within the meaning of Section 20 of Administrative Tribunals Act, 1985 inasmuch as a representation dated 28.01.2009 was filed by the petitioner against the said office order and the same was not considered by MCD.

34. Vide order dated 11.08.2010, the Tribunal dismissed the aforesaid review application filed by petitioner Sunil Choudhary on the ground that the petitioner has not been able to demonstrate that there was an error apparent on the face of the record in the judgment dated 02.07.2010 passed by the Tribunal.

35. Aggrieved by the judgments dated 28.04.2010 and 02.07.2010 and the order dated 11.08.2010 passed by the Tribunal, the petitioners have filed the above-captioned petitions under Articles 226 and 227 of Constitution of India.

36. During the hearing of the above captioned petitions, the petitioners, who appeared in person, advanced following 3 submissions:-

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