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सत्यमेव जयते

INDIAN LAW REPORTS
DELHI SERIES
2011

(Containing cases determined by the High Court of Delhi)

VOLUME-5, PART-II

(CONTAINS GENERAL INDEX)

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

Annual Subscription rate of I.L.R.(D.S.) 2011
(for 6 volumes each volume consisting of 2 Parts)

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

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Controller of Publications
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PRINTED BY : **J.R. COMPUTERS, 477/7, MOONGA NAGAR,
KARAWAL NAGAR ROAD DELHI-110094.
AND PUBLISHED UNDER THE AUTHORITY OF HIGH COURT OF DELHI,
BY THE CONTROLLER OF PUBLICATIONS, DELHI-110054—2011.**

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appellant firing a shot shot at deceased and would not disclose it to PW6 (wife of deceased)—While PW2 claimed, he did not give any information to PW12 (brother-in-law of deceased), PW12 claimed that he received telephone call from PW2 on the night of the incident informing about the deceased being shot at and taken away in his Santro car—Although IO joined a chance witness, PW9 to witness the recovery, the landlord of the premises was not even questioned, if the appellant resided in premises—Defies logic that appellant would keep country made pistol which was used by him for commission of crime with two other pistols and go to Anand Vihar, ISBT from where he was arrested—Recovery of cartridge from dashboard cannot be believed because of delay of 7 days and hole caused by fire cartridge too prominent in dash board to go un-noticed by police officers—In view of improbabilities and contradictions, not established beyond reasonable doubt that deceased was shot at by appellant—Regarding recovery of Arms and Explosives from appellant, recovery witness, PW54 denied having made any statement to the police or arms and ammunitions being recovered in his presence—Conduct of various officers including IO in recording successive disclosure statements and shifting the place of recovery to the place of their choice as per their convenience, does not inspire any confidence—Omission on the part of police witnesses, to notice hole created by bullet in dashboard till dashboard was opened and used bullet retrieved makes version of recovery of arms and ammunition suspect—Appellant acquitted—Appeal allowed.

Dhananjay Singh Bhadoria v. *State* *710*

CENTRAL EXCISE AND SALT ACT, 1944—Section 35G CEAC No. 5/2010 is directed against the order passed by the Customs Excise and Service Tax Appellate Tribunal, disposing of the application for waiver of pre-deposit with direction to deposit two amounts of Rs. 8,71,70,993/- and Rs. 3,07,55,877/- but granted waiver from payment of penalty and interest—CEAC No. 14/2010 is directed against the order passed by the Tribunal dismissing the original appeals filed by the appellant for failure to deposit the tax amount in terms of the earlier order dated 15th February, 2010 Held: Undue

hardship which entitles an appellant to seek waiver, means something which is not warranted by the conduct of the appellant or very much disproportionate to the said conduct—Undue hardship is caused when the hardship is not warranted by the circumstances. The other aspect which has to be kept in mind is the need and requirement to safeguard the interest of Revenue. Tribunals while disposing of applications for waiver of pre deposits have to keep in mind the said two factors—Tribunals order directing payment of principal amount does not require interference—However time upto 16th May, 2011 granted to appellant to make deposit of the entire tax amount and in case the said deposit was made, the appeals filed by the appellant to be heard by the Tribunal.

Golden Tobacco Limited v. *Commissioner of Central Excise, Delhi-I* *570*

CODE OF CIVIL PROCEDURE, 1908—Suit for declaration, permanent injunction mandatory injunction—Service Law—FCI (Staff) Regulation, 1971—Regulation 31-A—Regulation 63—Disciplinary proceedings—Probation of Offenders Act—S. 12—Plaintiff was appointed as draftsman with Food Corporation of India (FCI) on 16.04.1999—Convicted and sentenced for offence punishable u/s 325 and 149 IPC with imprisonment and fine—Sentence suspended-on 26.04.1999—Informed his employer only on 4.6.1999 of involvement and conviction—In revision against the sentence, sentence modified and was released on probation for two years vide judgment dated 12.07.2002—Respondent dismissed appellant from service vide order dated 31.07.2003—Plaintiff filed a suit against termination of service—Contended, release on probation did not carry any disqualification—Suit contested on the ground that plaintiff had not come to court with clean hands—Trial Court held: Mere release on probation does not mean that he is absolved of moral turpitude and had concealed material facts—Not informed department of his criminal proceedings pending against him —Services rightly terminated—In the first appeal, findings of court affirmed—Second appeal preferred—Held that interference with finding of fact are called for only if the same are perverse—Employee cannot claim a right to continue in the service merely on the

1939—Section 110-A (1) (c)—Respondent No. 1 suffered multiple injuries by a vehicle driven by Petitioner and filed claim petition for compensation against petitioner, respondent No. 2 and 3—Amendment application of respondent No. 1 to amend claim petition to aver claim petition is filed by petitioner through his father in a representative capacity, allowed by Tribunal—Order challenged before High Court plea taken, amendment has effect of filing of lacunae left by respondent No. 1 and that too when defence of petitioner was put to respondent No. 1 in cross examination, which is not permissible in law—Per Contra plea taken, perusal of petition would show same was filed by father of claimant as attorney—Inadvertently this fact was not mentioned in petition—Petitioner had not filed any reply opposing application and had cross examined respondent No. 1 at length after amendment was allowed—It was too late in day for petitioner to now raise objection to amendment—Held—Section 166(1) (d) of Act nowhere envisages that such authorization in favour of agent should be in writing—If legislature intended that injured person should authorize his agent in writing to institute a claim petition on his behalf, it would have stated so, but words ''in writing'' are conspicuously absent from said sub Section—Motor vehicle Act being a beneficent piece of legislation must be so construed so as to further object of Act—Strict rules of pleadings and evidence are not to be applied in motor accident claims cases—Petitioner waived his right to file a reply and it is no longer open to him to challenge amendment at appellate stage, more so, when he has thereafter cross examined claimant extensively—Injured had suffered grievous injuries in a motor accident allegedly on account of recklessness of petitioner and is undergoing treatment till date—Hyper technicalities cannot be allowed to defeat course of justice.

— Order 39 Rule 1 and 2 CPC—Infringement of design, registered under Design Act—Plaintiff manufacturer of Water Jugs—Design of Water Jugs registered in Class 07-01—Suit filed alleging defendant found selling Water Jugs with identical design—Claimed inter-alia by the defendant that the cap used

by the defendant on its Water Jugs altogether different from cap used by plaintiff on its water jug—Certificate imputed novelty in design to the shape and configuration of water jug—Held, to ascertain whether impugned design infringes another design, the products need not be placed side by side—Matter has to be examined from the point of view of a customer with average knowledge and imperfect recollection—Comparison showed that primary design of Water Jug of the plaintiff has been copied by defendant no. 1—Application of injunction allowed.

CONSTITUTION OF INDIA, 1950—Article 226—Petition challenging the preparation of seniority list on the basis of date of joining and not on merit—Petitioner was offered appointment to the post of Section Officer (Horticulture) in Central Public Works Department (CPWD) on the basis of selection in open competition through direct recruitment—Asked to report for duty latest by the forenoon of 10th August 1983—Communication did not reach him—Application requesting for extension of time to join the duty —Time extended—Petitioner joined the duty on 20.08.1983—In September 1992, petitioner came to know about the decision to prepare seniority list on the basis of date of joining—Made a representation on 29.09.1992 and he was informed that the seniority would follow the order of confirmation and not the original order of merit, which was different from the order of merit—Petitioner approached the Central Administrative Tribunal—Application dismissed—Review filed—Dismissed—Petition—Held—In view of the fact that there were instructions of 1959 with regard to the procedure for determination of inter-se seniority, there cannot be any scintilla of doubt that merit would be the governing factor for determination of seniority—In the case at hand, when the seniority list was published in the year 1995 and the petitioner had approached the Tribunal in 1997, the principle of delay and laches or limitation does not create a dent in the challenge—A seniority list had already been drawn on the basis of merit list and promotions had been conferred—The seniority list should have

been fixed on the criterion of merit and if the same has been done on the basis of the merit, it cannot be found fault with.

K.P. Dubey and Others v. *Union of India and Others* *632*

— Delhi School Education Act, 1973—Rule 120—The petition impugns the judgment dated 30th April, 2009 of the Delhi School Tribunal allowing the appeal of the respondent No. 2 Mr. A.A. Vetal and setting aside the order dated 27th February, 2001 of the Managing Committee of the Dayawati Syam Sunder Gupta Saraswati Bal Mandir of removal of the respondent No. 2 from the post of the Vice Principal and of dismissal from the service of the said school and reinstating the respondent no. 2 to his post and directing the Managing Committee of the School to decide the question of payment of salary, allowance and consequential benefits for the intervening period within two months thereof.—The respondent No. 2 was appointed in the year 1972 as Head Master of the Primary section of the School of the petitioner and was in the year 1976 promoted as a TGT and was appointed as a Vice Principal of the School in the year 1996. The school earlier filed Civil Writ No. 3754/1999 in the court and by interim order, the order dated 21st May, 1999 of the Director of Education was stayed—The charge sheet was signed by the Manager of the school on behalf of the Managing Committee of the school—The charges leveled against the respondent no. 2 had been proved to be true; that the offence committed by the respondent no. 2 being of continuing nature spread over a period of time and the inquiry having been conducted as per the provisions of the Delhi School Education Act, 1973 and Rules framed thereunder and in accordance with the principles of natural justice, the respondent no. 2 had been rightly held guilty of indulging in misbehavior towards female students and teachers; the Disciplinary Committee accordingly proposed the penalty of removal of service on the respondent no. 2 and forwarded the documents to the School Management—The Tribunal noticed that the School being an unaided recognized school, did not require prior approval of Directorate of Education before passing the order of removal of the respondent no. 2—With respect to the question of prior

approval of the Directorate of Education, attention is invited to letter dated 19th April 2001 of the Directorate of Education accorded approval sought by the School on 12th December, 2000—The Directorate of Education while appointing its nominees was fully aware of the charge sheet issued.—However, immediately after the objection in this regard being taken by the respondent No. 2, steps for constitution of the Disciplinary Committee in accordance with Rule 118 were taken and Disciplinary Committee constituted which did not choose to frame a fresh charge sheet and decided to proceed on the basis of the charge sheet already issued. The same is found to be sufficient/contextual compliance of Rule 120.

— Though an act by a legally incompetent authority is invalid but can be subsequently rectified by ratification of the competent authority. It was held that ratification by definition means the making valid of an act already done; the principle derived from the Latin maxim ratihabitio mandato aequiparatur—The Court cannot interfere with this discretion unless it is palpably arbitrary.—Impugned order of Tribunal quashed.

Samarth Shiksha Samiti (Regd.) v. *Directorate of Education & Anr.* *645*

— Article 226 & 227—Service Law—Fundamental Rule 56 (J)—Petition challenging the order whereby he was ordered to be prematurely retired w.e.f. Forenoon of 18.03.2010—Petitioner was appointed as Assistant Sub-Inspector (Ministerial) with Central Industrial Security Force on 22.08.1972—Earned promotion from time to time and reached the post of Commandant on 02.01.2006 at the age of 57-1/2 years; left with less than 2-1/2 years for retiremant—Screening Committee decided to put the name of the petitioner in list of such officers, whose further retention in service required to be considered in public interest or otherwise under Rule 56 (j) of the Fundamental Rules—Recommended being unfit for continuation of service, petitioner be prematurely retired w.e.f. 18.03.2010—Petitioner challenged that no opportunity was granted to respond to the below benchmark gradings i.e. 'Average' gradings for 3 years—Opportunity to make a

NBE guidelines the selection of the candidates for DNB (Broad Specialty) secondary seats was to be conducted based on the marks obtained by the candidates in their diploma courses followed by the aptitude test or in place of aptitude test it was to be done through the process of counseling not in dispute between the parties that as per the public notice issued by the respondents No.1 & 2 inviting applications for admission in DNB (Broad Specialty) secondary seats for the session January 2011 in the stream of Radiology, the method of selection was prescribed through counseling and not through the aptitude test—The respondent hospital has not disputed the fact that the petitioner having secured 66% marks in his P.G. course was top in the merit list amongst all the said four candidates who had participated in the said counseling/aptitude test, but since the respondent No.4 had secured more marks in the aptitude test, therefore, he surpassed the petitioner in the said selection. Held—The Court does not subscribe to the stand taken by the hospital that the aptitude test or interview is implicit in the term counseling—Had the hospital issued a proper public notice strictly in terms of the NBE guidelines, then the present imbroglio would not have arisen—Petitioner is a well qualified Doctor-not fathomable that he was so naive that he was not aware of the fact that he would be required to appear in the aptitude test/interview—Even if the respondent hospital committed an error in using the wrong term in the public notice, the petitioner cannot be allowed to take advantage of the same—The petitioner at no stage had lodged any protest, not only with the hospital, but even with the NBE and it is only when he came to know about his result of being unsuccessful in the said selection, he in utter desperation sought to challenge the selection process by way of filing the present writ petition before this court—It is a settled legal position that the correctness of the selection procedure cannot be challenged by an unsuccessful candidate who had fully participated in the selection process without any protest or demur not the function of the Court to sit over the decisions of the Selection Committee and to scrutinize the relative merit of the candidates unless there is illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the selection, or proved mala fides affecting

the selection etc. Taking into consideration the aforesaid legal principles, this Court does not find that the respondent No.2 hospital did not adhere to the laid down criteria as prescribed by the National Board of Education for selecting the candidates for DNB (Broad Specialty) secondary seats and the petitioner cannot be put to any advantageous position simply because an error or lapse was committed by the hospital in the public notice calling the candidates for counseling instead of appearing for the aptitude test/interview—However, a cost of Rs. 50,000/- payable to the Petitioner is imposed upon the respondent hospital for the negligence committed by them in notifying to the candidates the procedure of selection as counseling instead of aptitude test/interview—The hospital shall recover the same from those officers/doctors who were responsible for committing such a lapse/mistake by insertion of the said wrong information in the public notice.

Committee of the School to decide the question of payment of salary, allowance and consequential benefits for the intervening period within two months thereof.—The respondent No. 2 was appointed in the year 1972 as Head Master of the Primary section of the School of the petitioner and was in the year 1976 promoted as a TGT and was appointed as a Vice Principal of the School in the year 1996. The school earlier filed Civil Writ No. 3754/1999 in the court and by interim order, the order dated 21st May, 1999 of the Director of Education was stayed—The charge sheet was signed by the Manager of the school on behalf of the Managing Committee of the school—The charges leveled against the respondent no. 2 had been proved to be true; that the offence committed by the respondent no. 2 being of continuing nature spread over a period of time and the inquiry having been conducted as per the provisions of the Delhi School Education Act, 1973 and Rules framed thereunder and in accordance with the principles of natural justice, the respondent no. 2 had been rightly held guilty of indulging in misbehavior towards female students and teachers; the Disciplinary Committee accordingly proposed the penalty of removal of service on the respondent no. 2 and forwarded the documents to the School Management—The Tribunal noticed that the School being an unaided recognized school, did not require prior approval of Directorate of Education before passing the order of removal of the respondent no. 2—With respect to the question of prior approval of the Directorate of Education, attention is invited to letter dated 19th April 2001 of the Directorate of Education accorded approval sought by the School on 12th December, 2000—The Directorate of Education while appointing its nominees was fully aware of the charge sheet issued.—However, immediately after the objection in this regard being taken by the respondent No. 2, steps for constitution of the Disciplinary Committee in accordance with Rule 118 were taken and Disciplinary Committee constituted which did not choose to frame a fresh charge sheet and decided to proceed on the basis of the charge sheet already issued. The same is found to be sufficient/contextual compliance of Rule 120.

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EXPLOSIVE SUBSTANCE ACT, 1908—Section 4 & 5—As per prosecution, deceased and PW2 running partnership and suffered losses—Deceased and PW2 started racket of financing vehicles under fake names and used to disappear with the cash entrusted by intending car buyers—Appellant Dhananjay Singh and co-accused Shailender Kumar (since deceased) visited the deceased on motorcycle at his house—They both took PW2 and deceased out with them and on way back Shailender Kumar placed knife on PW2s throat and asked him to hand over valuables, his purse was snatched—PW2 noticed appellant firing shot on the neck of deceased—PW2 pushed Shalinder Kumar and ran away—PW2 rang up PW6, wife of deceased on her mobile and informed her that the deceased had been abducted by the appellant and his co-accused in his Santro Car—Later, deadbody of deceased found—Cause of death was opined as Spinal Shock consequent upon cervical vertebral and spinal cord injuries as a result of blast effect of fire arm—On receipt of secret information, appellant arrested with a bag carrying two loaded country made pistols and cartridges besides six crude explosive bombs—Santro car seized by police of District Moradabad as unclaimed property—Pursuant to disclosure of appellant, one country made pistol and his blood stained clothes recovered from his rented house—On secret information, co-accused Shailinder Kumar (since dead) arrested—On inspection of car, on opening dashboard from lower side by mechanic, a bullet recovered—Trial Court convicted appellant u/s 302, 392, 397, 201, 404—Arms Act Section 25/54/59 and Explosive Substance Act Section 4 &

5—Held, Too many improbabilities in prosecution story—Improbable that appellant and co-accused allowed PW2 to escape on foot when they were in possession of Santro Car and were well aware that PW2 had witnessed commission of murder—Appellant was armed with pistol and as a natural conduct, he and co-accused would not have allowed PW2 to escape—Not even scratch injury present on neck of PW2—If appellant and co-accused had robbed PW2 of three ATM cards, they would naturally have asked PW2 the PIN nos. of the cards or else ATM cards were worthless to them—Natural course of human conduct would be that the appellant and co-accused would have taken PW2 to the nearest ATM centre to withdraw the money using the cards—No evidence collected by prosecution showing ATM cards used to make purchases or if PW2 stopped all transations in respect of robbed ATM cards—Explanation given by PW2 for not informing police regarding incident that he apprehended harm to himself for doing business in false name, not natural conduct—Not believable that PW2 would have seen the appellant firing a shot shot at deceased and would not disclose it to PW6 (wife of deceased)—While PW2 claimed, he did not give any information to PW12 (brother-in-law of deceased), PW12 claimed that he received telephone call from PW2 on the night of the incident informing about the deceased being shot at and taken away in his Santro car—Although IO joined a chance witness, PW9 to witness the recovery, the landlord of the premises was not even questioned, if the appellant resided in premises—Defies logic that appellant would keep country made pistol which was used by him for commission of crime with two other pistols and go to Anand Vihar, ISBT from where he was arrested—Recovery of cartridge from dashboard cannot be believed because of delay of 7 days and hole caused by fire cartridge too prominent in dash board to go un-noticed by police officers—In view of improbabilities and contradictions, not established beyond reasonable doubt that deceased was shot at by appellant—Regarding recovery of Arms and Explosives from appellant, recovery witness, PW54 denied having made any statement to the police or arms and ammunitions being recovered in his

presence—Conduct of various officers including IO in recording successive disclosure statements and shifting the place of recovery to the place of their choice as per their convenience, does not inspire any confidence—Omission on the part of police witnesses, to notice hole created by bullet in dashboard till dashboard was opened and used bullet retrieved makes version of recovery of arms and ammunition suspect—Appellant acquitted—Appeal allowed.

Dhananjay Singh Bhadoria v. *State* *710*

HINDU MARRIAGE ACT, 1955—S. 13 (1) (ia) and (ib)—Cruelty—Desertion—Parties married at Delhi according to Hindu Rites and Ceremony—Problem started from the time of honeymoon which continued till they stayed together—Respondent alleged that the appellant was under the influence of her parents and would leave matrimonial home time and again—Disturbed due to cruel conduct—Appellant attempted to commit suicide—Trial court granted decree of divorce on the ground of cruelty—Preferred appeal—Contended inter-alia that respondent admitted in his cross-examination that appellant could not have inserted her finger into electric shocket due to narrow width of hole—Also admitted no power plugs in any portion of rented home where they were living together—Also failed to prove appellant made any attempt to commit suicide by laying herself in front of DTC Bus—Respondent submitted, no cross-examination of landlady with regards to the attempt made to\ commit suicide on two occasions by inserting finger in socket and threatening to come underneath the DTC bus—Court observed, the contention that the width of socket too narrow lack force as it was not the case of respondent that she literally put finger inside the socket—Held—Cruelty has not been defined—It is not possible to put concept in strait jacket formula—Cruelty can be physical or mental, intentional or unintentional—Respondent husband alleged behaviour of appellant caused him mental pain, sufferings and humiliation—Threat by wife to commit suicide would in the ambit of mental cruelty trial court judgment upheld—Appeal dismissed.

Smt. Suman Khanna v. *Shri Muneesh Khanna*..... *488*

INCOME TAX ACT, 1961—Section 148/149—Notice under Section 148 of the Act issued by the Assessing Officer (AO) whereafter the assessee appeared and participated in proceedings before the AO and thereafter AO prepared fresh assessment order—In appeal, Commissioner Income Tax (appellate) rejected the contention of the assessee that there was no valid service of notice—In further appeal the Income Tax Appellate Tribunal held that the notice was not properly served under Section 148 of the Act and as such, assumption of jurisdiction by AO to reassess the income of the assessee was bad in law—Hence, appeal before the Hon'ble High Court—Held, service of notice as a precondition before the assessment would be a question of fact and since in the present case, no objection was raised with regard to the non-issue of notice and rather the assessee by way of letter adopted the return originally filed as return in response to the notice and it is only thereafter that AO proceeded further with reassessment, during which proceedings certain queries were raised and assessee gave detailed response, notice issued at old address available on record would constitute valid service of notice—Further held, where the assessee appear before the AO and is given a copy of the notice before assessment whereafter assessee participates in the assessment proceedings, service of copy of notice also would be service of notice under Section 148. Appeal decided in favor of Revenue and matter remanded back to Tribunal to decide the remaining grounds.

The Commissioner of Income Tax-VI v. *Three Dee Exim Pvt. Ltd.* *534*

— Section 80 1B—Industries (Development and Regulations) Act, 1951—The appellant (hereinafter referred to as 'the assessee') herein was an individual running his proprietorship concern under the name and style of M/s Ragnik Exports. This concern is engaged in business of manufacturing and exports of readymade garments—To manufacture these garments for the purpose of exports, the assessee started to manufacture articles from 01.07.1997. The assessee could avail the benefit of Section 80 1B of the Act from the date of

manufacture of these articles, i.e., Assessment Year 1998-99, which was the first year of the assessee's manufacture, the assessee did not claim the deduction under the said provision in that assessment year. The assessee did not claim this benefit even in few succeeding years. Held: Section 80 1B of the Act provides that once an industrial undertaking which fulfils the condition stipulated therein gets the benefit, the same is available for 10 successive assessment years. The small scale industrial undertaking has been denied the benefit under Section 80 1B(14)(g) of the I.T. Act and having regard to the said provisions, it should have been registered as a small scale industrial unit in order to claim the status of SSI Unit. Since it was not so registered under the provision of Industries (Development and Regulations) Act, 1951 (hereinafter referred to as the 'IDR Act'), the assessee was not entitled to claim the benefit under Section 80IB of the I.T. Act—As far as second question of law is concerned, viz., whether the assessee can be denied the benefit of Section 80IB of the I.T. Act simply because of the reason that he did not avail this benefit in the initial assessment year, i.e., 1998-99—There is no reason not to give the benefit of this claim to the assessee if the conditions stipulated under Section 80IB of the I.T. Act are fulfilled.—The other question as to whether it is incumbent upon the assessee that it is registered under the IDR Act for claiming the benefit under Sub-Section (3) of Section 80 1B of the I.T. Act—Benefit was denied only on the ground that it is not registered under the provisions of I.D.R. Act. The registration under the I.D.R. Act will be of no consequence for availing the benefit under Section 80 1B of the I.T. Act—Clause (g) of sub-section (14) of Section 80IB of the I.T. Act only mandates that such an industrial undertaking should be regarded as small scale industrial undertaking under Section 11B of the I.D.R. Act—The assessee had realized his mistake in not claiming the benefit from the first Assessment Year 1998-99—At the same time, the assessee forgave the claim upto the Assessment Year 2003-04 and was making the same only for the remaining period—There is no reason not to give the benefit of this claim to the assessee since the conditions stipulated under Section 80IB of the I.T. Act are fulfilled—

deceased in almirah for over six days in his house, recovery of purse doubtful—Even if accepted that PW2 and PW3 had seen deceased for last time in the company of the appellants between 9-10 p.m., the previous night, it cannot be said that appellants were only responsible for the death of the deceased—Time gap of 3-4 hours sufficient to allow intervening circumstances and other persons to have entered the scene and caused death —Prosecution has to prove its case beyond reasonable doubt and cannot derive any strength from the weakness of defence put up by the accused—A false defence may be called into aid only to lend assurance to the court and that too where various links in the chain of circumstantial evidence are in themselves complete—Weakness of defence cannot by itself form a link of the chain but can only lend support to the other links which in themselves form a complete chain of circumstantial evidence pointing un-erringly towards the guilt of the accused—Appellants given benefit of doubt —Appeal Allowed—Accused Acquitted.

Ram Chander @ Ganju v. *State of Delhi*..... *676*

— Section 302, 392, 397, 201, 404—Arms Act, 1959—Section 25/54/59—Explosive Substance Act, 1908—Section 4 & 5—As per prosecution, deceased and PW2 running partnership and suffered losses—Deceased and PW2 started racket of financing vehicles under fake names and used to disappear with the cash entrusted by intending car buyers—Appellant Dhananjay Singh and co-accused Shailender Kumar (since deceased) visited the deceased on motorcycle at his house—They both took PW2 and deceased out with them and on way back Shailender Kumar placed knife on PW2s throat and asked him to hand over valuables, his purse was snatched—PW2 noticed appellant firing shot on the neck of deceased—PW2 pushed Shalinder Kumar and ran away—PW2 rang up PW6, wife of deceased on her mobile and informed her that the deceased had been abducted by the appellant and his co-accused in his Santro Car—Later, deadbody of deceased found—Cause of death was opined as Spinal Shock consequent upon cervical vertebral and spinal cord injuries as a result of blast effect of fire arm—On receipt of secret

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Dhananjay Singh Bhadoria v. *State* *710*

— Section 302—As per prosecution case, PW2 (informant) was residing at the place where incident occurred—His nephew, the deceased lived in the same premises—The deceased was involved in a quarrel, a few months before the incident with co-accused Shakti (sent for trial to JJB)—Shakti had threatened deceased—On the day of incident, Shakti along with the appellant came and caught hold of deceased from the back while appellant gave a knife blow to the deceased—On the basis of appellant's disclosure statement, knife recovered—Trial Court convicted appellant u/s 302—Held, death occurred at 10 p.m. While PW2's statement was recorded at 11.40 p.m. and FIR registered at 12.10 p.m.—Thus no unreasonable delay in lodging of FIR—Merely because PW2 was related to the deceased, this fact itself was insufficient to exclude his testimony—Testimony of PW2 reliable and credible—As per autopsy surgeon, cause of death was hemorrhagic shock due to the stab injury and was sufficient to cause death in the ordinary course of nature—Proved in evidence of PW2, that it was Shakti and not the appellant who had enmity against deceased—Having regard to the weapon with which injury

inflicted on the right side chest of the deceased, the palm injury of the appellant assumes some significance—Prosecution has a duty to the court to explain injuries of the accused and that absence of such explanation assumes importance about the fullness or correctness of the prosecution version—Having regard to the nature of injury, the one hour time taken to intimate the police and the two hour time to reach the hospital, there is an element of uncertainty as to whether something preceded the assault—No universal rule that infliction of single knife blow would or would not attract Section 302—Application of Section 302 would depend upon manner in which blow inflicted and the surrounding circumstances—Injured taken to hospital two hours after the incident, Shakti had been beaten by the deceased and had threatened deceased, appellant had no motive against deceased, injuries on the appellant's palm had not been explained, read with the fact that it had been recorded in the PCR form Ex. PW9/A about a quarrel, it could be inferred that something preceded the attack—Appellant had occasion to inflicit more than one injury however, he did not do so—It cannot be said that appellant had intention of causing injuries that could have in the normal course of nature resulted in death—Conviction of appellant altered to one u/s 304 part I and sentenced substitute to 8 years imprisonment—Appeal partly allowed.

Sagar @ Gyanender v. *State* *734*

INDIAN SUCCESSION ACT, 1925—Section 276—Petition for grant of probate/letters of administration against the relations of testator who died on 17.11.1986 after attaining the age of 75 years—Prior to that, he had executed a Will dated 16.09.1986 as his last Will and Testament—The main objections were that the Will of testator has been forged and he never executed the alleged Will and never presented himself before the Sub-Registrar for the execution of the Will—The petitioner has procured the alleged will with fraudulent and unfair means and the same is liable to be rejected—The petitioner has denied all the allegations raised by the respondents. Held—In probate cases, the Courts have to first determine whether the propounder of the Will has discharged the burden placed on him by law under Section 68 of Indian

challenged that no opportunity was granted to respond to the below benchmark gradings i.e. 'Average' gradings for 3 years—Opportunity to make a representation given only after the decision of the screening committee accepted—Except the last three years, service profile of the petitioner was either 'very good' or 'outstanding'—Screening Committee should not have considered the ACRs, which were not communicated—Held—The right to make a representation against a below benchmark ACR grading is the recognition of the right to be heard on a subject where some civil consequences may flow, but pertaining to uncommunicated adverse remarks being considered by the Screening Committees, the law has grown in a different direction; holding that uncommunicated adverse remarks can be considered by Screening Committees on the issue of compulsory or premature retirement and the reason thereof is that such an order is neither stigmatic nor does it take away any right of a civil servant, to whom right guaranteed is a minimum pensionable service and beyond that it is public interest which determines how long should he serve.

Shri Jagmohan Singh Negi v. *UOI & Ors.*..... *690*

TRADE MARKS ACT, 1996—Section 28, Section 29. Suit for permanent injunction, damages and delivery of infringing material—The Plaintiff company is engaged in the business of manufacturing and selling ''Spices and condiments'' under its registered logo—Plaintiff company claims its use throughout the world.—The written statement filed by the defendant rejected for non-payment of costs.—Section 28 of the Act, gives to the registered proprietor of the trade mark the exclusive right to the use of the trade mark in relation to the goods or services in respect of which the trade mark is registered and to obtain relief in respect of infringement of the trade mark in the manner provided by this Act.—It is thus settled proposition of law that in order to constitute infringement the impugned trademark need not necessarily be absolutely identical to the registered trademark of the plaintiff and it would be sufficient if the plaintiff is able to show that the mark being used by the defendant resembles his mark to such an extent that it is likely to deceive or cause confusion

and that the user of the impugned trademark is in relation to the goods in respect of which the plaintiff has obtained registration in his favour—In fact, any intelligent person, seeking to encash upon the goodwill and reputation of a well-established trademark, would make some minor changes here and there so as to claim in the event of a suit or other proceeding, being initiated against him that the trademark being used by him, does not constitute infringement of the trademark, ownership of which vests in some other person—No person can be allowed to sell goods either using the mark of another person or its imitation, so as to cause injury to that person and thereby enrich himself at the cost of a person who has spent considerable time, effort and money in building the brand reputation, which no amount of promotion or advertising can create-even if the defendant is able to show that on account of use of other word/mark of the plaintiff, there would be no confusion in the mind of the customer—That on account of the packaging, get up and the manner of writing trademark on the packaging, it is possible for the consumer to distinguish his product from that of the plaintiff, he would be liable for infringement of the registered trademark—The person coming across the product of the defendant, bearing the impugned trademark may not necessarily be having the product of the plaintiff bearing his registered trademark with him when he comes across the product of the defendant with the mark 'MHS' logo—Who may care to notice the features which distinguish the trademark of the defendant from that of the plaintiff—Similarity of the two trademarks, may induce him to believe that the product which he has come across was, in fact, the product of the plaintiff or had some kind of an association or connection with the plaintiff—The trademark being used by the defendant is visually similar to the trademark being used by the plaintiff, though phonetically, there may not be much similarity in the two trademarks on account of use of the letters 'S' in place of 'D' and re-arrangement of the letters—Considering the strong visual similarity, rather weak phonetic similarity, would not be of much consequence and would not permit the defendant to use the logo being presently used by him—It is also in the interest of the consumer that a well-established brand such as 'MDH' or its colourable

imitation, as is made out from the manner in which the logo 'MHS' has been used by the defendant, should not be allowed to be used by another person in such a deceptive manner—Therefore, the act of the defendant constitutes not only infringement, but also the passing off. This would, amount to putting premium on dishonesty and give an unfair advantage to an unscrupulous infringer over those who have a bona fide defence to make and therefore come forward to contest the suit and place their case before the Court.

M/s Mahashian Di Hatti Ltd. v. *Mr. Raj Niwas, Proprietor of MHS Masalay* *659*

TRANSFER OF PROPERTY ACT, 1882—The writ petitioners had sought various reliefs which included a direction to the respondent to provide them alternative accommodation—One of the petitioners apparently filed a previous proceeding WP(C) No. 3095/2001—That writ petition was dismissed.—Other similarly situated litigants were also writ petitioners in that proceedings—Whatever be that position the petitioners admit that their effort to have final order clarified was unsuccessful on three previous occasions. Having regard to these facts, the claim for compensation and the right to be put back into possession into alternative accommodation cannot be entertained in this manner. The petitioners have also not cared to throw light on whether the appeal against the eviction order succeeded and if at all the petitioners availed the liberty granted by the Court.

Urmila Punera & Anr. v. *UOI & Ors.* *529*

— The view that we are taking is consistent with the implication of CI. (b) of Section 101. When in an election petition which complies with Section 84 of the Act it is found at the hearing that some votes were obtained by the returned candidate by corrupt practices, the Court is bound to declare the petitioner or another candidate elected if, but for the votes obtained by the returned candidate by corrupt practice, such candidate would have obtained a majority of votes. In cases falling under Clause (b) of Section 101 the Act requires merely proof of corrupt practice, and obtaining votes by corrupt practice: it

does not require proof that the voters whose votes are secured by corrupt practice had notice of the corrupt practice. If for the application of the rule contained in Clause (b) notice to the voters is not a condition precedent, we see no reason why it should be insisted upon in all cases under Clause (a). The votes obtained by corrupt practice by the returned candidate, proved to be guilty of corrupt practice, are expressly excluded in the computation of total votes for ascertaining whether a majority of votes had been obtained by the defeated candidate and no fresh poll is necessary. The same rule should, in our judgment, apply when at an election there are only two candidates and the returned candidate is found to be under a statutory disqualification existing at the date of the filling of the nomination paper.''

Sh. Satish Kumar v. *Shri Vikas & Ors.* *453*

— Section 52—Doctrine of lis pendens contention of plaintiff, that subject matter of the suit cannot be transacted without the permission of the court and would be subject to the outcome of the decision—Rejected as the plaintiff will not suffer irreparable loss if the injunction is vacated.

Prakash Khattar v. *Smt. Shanta Jindal & Ors.*..... *801*

ILR (2011) V DELHI 453
LPA

SH. SATISH KUMAR ....APPELLANT

VERSUS

SHRI VIKAS & ORS. ....RESPONDENTS

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

LPA NO. : 334/2010 & 430/2010 DATE OF DECISION: 18.01.2011

(A) Delhi Municipal Corporation Act, 1957—Section 19(1)(C) Section 33 (5)—The appellant in LPA No. 430/2010, a candidate of the Indian National Congress (INC), had contested for the post of Councilor from ward No. 78 i.e. Majnu-Ka-Tila of the Municipal Corporation of Delhi (MCD) and was declared as elected. His election was called in question before the learned Additional District Judge (ADJ) Election Tribunal who, by order dated 4.6.2008, declared the election to be null and void and further held that in terms of Section 19(1)(c) of the Act, 1957 the respondent—Satish Kumar, the appellant in LPA No. 334/2010, of the Bharatiya Janata Party (BJP) should be declared elected as Councilor of the said ward—Writs filed by both appellants—The learned Single Judge affirmed the finding of the Tribunal to the effect that the election of the elected candidate has been correctly declared null and void, yet did not accept the conclusion arrived at by the Tribunal that the election petitioner could be declared as the elected councilor—LPA filed by both the appellants the election tribunal as well as the learned Single Judge has adverted to the oral and documentary evidence in detail to show that there was manipulation as regards the security deposit; that there was delayed submission of forms and the name of Vikas was not reflected in

Form 3 which has really not been explained by the authorities. The said conclusion has been rightly arrived at and, hence, there is no warrant to interfere with the said conclusion—On a reading of the Rules, clauses of the 1996 Order and the Forms, there can be no shadow of doubt that unless somebody is sponsored for allocation of symbol as a substitute candidate in case nomination of original candidate is rejected on scrutiny or his withdrawing from the contest the substitute cannot step into the shoes of the original candidate—Further the requirement of S.33(5) of the Act is extremely important at the stage of scrutiny and failure to produce the electoral roll must be deemed a failure to comply with a substantial provision of the statute—The requirement of S.33(5) is therefore mandatory and failure to comply with it is fatal to a candidate's claim to stand for election—Thus, the said non-reflection of the name is a substantial defect and is not curable. Also, When there are only two contesting candidates, and one of them is under a statutory disqualification, votes cast in favour of the disqualified candidate may be regarded as thrown away, irrespective of whether the voters who voted for him were aware of the disqualification—This is not to say that where there are more than two candidates in the field for a single seat, and one alone is disqualified, on proof of disqualification all the votes cast in his favour will be discarded and the candidate securing the next highest number of votes will be declared elected. In such a case, question of notice to the voters may assume significance, for the voters may not, if aware of the disqualification have voted for the disqualified candidate. Testing the present factual matrix on the anvil of the aforesaid enunciation of law, it is difficult to accept how the voting pattern would have been because there is a multi-cornered contest and it is very difficult, in the absence of any kind of pleading or evidence, to arrive

at the conclusion that the election petitioner should have been declared elected—Both appeals being sans substance, dismissed.

On a reading of the Rules, clauses of the 1996 Order and the Forms, there can be no shadow of doubt that unless somebody is sponsored for allocation of symbol as a substitute candidate in case nomination of original candidate is rejected on scrutiny or his withdrawing from the contest, the substitute cannot step into the shoes of the original candidate. As is evident from the material brought on record, there is no scintilla of doubt that the Forms A and B really did not accompany the nomination papers. We have referred to the evidence on record, the findings of the election tribunal and the reasonings of the learned Single Judge and we find that the factum that the Forms A and B accompanied the nomination papers has not been established from the documentary evidence as well as the cross-examination of the competent authority which we have reproduced hereinbefore. The submission of Mr.Krishnamani, learned senior counsel appearing for the appellant in LPA No.430/2010, is that the same might not have accompanied the nomination papers but if it is filed later on, it should be treated as a mere irregularity and on that ground, the election could not have been declared invalid. It is contended by him that it was curable in nature being in the realm of a technical defect and, therefore, the returning officer could have afforded an opportunity to him to rectify the same or accept the same with defects. **(Para 26)**

As is perceivable from the analysis made by the Election Tribunal and that of the learned Single Judge, the name of the elected candidate did not feature in the said publication and it was not accompanied by Forms A and B. It was contended before the learned Single Judge that it was an irregularity which can be condoned but the learned Single Judge has held that the same is not a mere formality as it is required to be put up on the notice board for being made known to other candidates as well as to the electorates and

other contesting candidates who can then scrutinize the forms and raise objections. Thus, the said non-reflection of the name is a substantial defect and is not curable. We are inclined to think that the learned Single Judge is absolutely correct in holding that the name of the elected candidate did not find place and hence, the nomination paper was invalid in law. **(Para 32)**

h **Thiru John v. The Returning Officer and others,** (1977) 3 SCC 540, the Apex Court referred to the dictum in **Vishwanatha Reddy** (supra) and opined thus:

> "59. The dictum of this Court in **Viswanatha v. Konappa** (supra) does not advance the case of the ˇappellant, Shri Subramanyam. In that case, the election in question was not held according to the system of a single transferable vote. There were only two candidates in the field for a single seat, and one of them was under a statutory disqualification. Shah, J. (as he then was) speaking for the Court, held that the votes cast in favour of the disqualified candidate may be regarded as thrown away, even if the voters who had voted for him were unaware of the disqualification, and the candidate securing the next highest number of votes was declared elected. The learned Judge was however careful enough to add:
>
> This is not to say that where there are more than two candidates in the field for a single seat, and one alone is disqualified, on proof of disqualification all the votes cast in his favour will be discarded and the candidate securing the next highest number of votes will be declared elected. In such a case, question of notice to the voters may assume significance, for the voters may not, if aware of the disqualification, have voted for the disqualified candidate.
>
> 60. The ratio decidendi of **Viswanatha v. Konappa** is applicable only where (a) there are two contesting

candidates and one of them is disqualified, (b) and the election is on the basis of single non-transferable vote. Both these conditions do not exist in the present case. As already discussed, Shri Subramanyam appellant was not the sole surviving continuing candidate left in the field, after exclusion of the disqualified candidate, Shri John. The election in question was not held by mode of single transferable vote, according to which a simple majority of votes secured ensures the success of a candidate, but by proportional representation with single transferable vote, under which system the success of a candidate normally depends on his securing the requisite quota.

61. However, the principle underlying the obiter in **Viswanatha v. Konappa,** which we have extracted, is applicable to the instant case because here, after the exclusion of the disqualified candidate, two continuing candidates were left in the field."

[Emphasis added] **(Para 41)**

h **Prakash Khandre v. Dr. Vijay Kumar Khandre and others,** (2002) 5 SCC 568, the Apex Court posed the question No. (1) as follows:

(1) In an election petition under the RP Act when contest for election to the post of MLA is by more than two candidates for one seat and a candidate, who was disqualified to contest the election – whether the Court can declare a candidate who has secured next higher votes as elected?

After posing the aforesaid question and referring to various decisions, their Lordships have expressed thus:

"In view of the aforesaid settled legal position, in our view, the impugned order passed by the High Court declaring the election petitioner as elected on the ground that the votes cast in favour of the elected

candidate (appellant) are thrown away was totally erroneous and cannot be justified. As held by the Constitution Bench in Konappa case that some general rule of election law prevailing in the United Kingdom that the votes cast in favour of a person who is found disqualified for election may be regarded as "thrown away" only if the voters had noticed before the poll the disqualification of the candidate, has no application in our country and has only merit of antiquity. We would observe that the question of sending such notice to all voters appears to us alien to the Act and the Rules. But that question is not required to be dealt with in this matter. As stated earlier, in the present case for one seat, there were five candidates and it would be impossible to predict or guess in whose favour the voters would have voted if they were aware that elected candidate was disqualified to contest election or if he was not permitted to contest the election by rejecting his nomination paper on the ground of disqualification to contest the election and what would have been the voting pattern. Therefore, order passed by the High Court declaring the election petitioner - Dr. Vijay Kumar Khandre as elected requires to be set aside."

[Underlining is ours] **(Para 42)**

Testing the present factual matrix on the anvil of the aforesaid enunciation of law, it is difficult to accept how the voting pattern would have been because there is a multi-cornered contest and it is very difficult, in the absence of any kind of pleading or evidence, to arrive at the conclusion that the election petitioner should have been declared elected. The principle that has been enunciated by the Constitution Bench in **Vishwanatha Reddy** (supra) is squarely applicable to the case at hand. **(Para 43)**

(B) The view that we are taking is consistent with the implication of Cl. (b) of Section 101. When in an

election petition which complies with Section 84 of the Act it is found at the hearing that some votes were obtained by the returned candidate by corrupt practices, the Court is bound to declare the petitioner or another candidate elected if, but for the votes obtained by the returned candidate by corrupt practice, such candidate would have obtained a majority of votes. In cases falling under Clause (b) of Section 101 the Act requires merely proof of corrupt practice, and obtaining votes by corrupt practice: it does not require proof that the voters whose votes are secured by corrupt practice had notice of the corrupt practice. If for the application of the rule contained in Clause (b) notice to the voters is not a condition precedent, we see no reason why it should be insisted upon in all cases under Clause (a). The votes obtained by corrupt practice by the returned candidate, proved to be guilty of corrupt practice, are expressly excluded in the computation of total votes for ascertaining whether a majority of votes had been obtained by the defeated candidate and no fresh poll is necessary. The same rule should, in our judgment, apply when at an election there are only two candidates and the returned candidate is found to be under a statutory disqualification existing at the date of the filling of the nomination paper.''

[Ch Sh]

APPEARANCES:

FOR THE APPELLANT : Mr. Maninder Singh, Senior Advocate with Mr. P.D. Gupta with Mr. Kamal Gupta and Mr. Abhishek Gupta, Advocates.

FOR THE RESPONDENTS : Mr. M.N. Krishnamani, Senior Advocate with Mr. Tariq, Mr. Amit Kumar and Mr. V.M. Srivastava, Advocates.

CASES REFERRED TO:

1. *Prakash Khandre* vs. *Dr. Vijay Kumar Khandre and others,* (2002) 5 SCC 568.
2. *Thiru John* vs. *The Returning Officer and others,* (1977) 3 SCC 540.
3. *Shri Banwari Dass* vs. *Shri Sumer Chand and others,* (1974) 4 SCC 817.
4. *Vishwanatha Reddy* vs. *Konappa Rudrappa Nadgouda and another,* AIR 1969 SC 604.
5. *Brijendralal Gupta & Anr.* vs. *Jwalaprasad and Ors.,* AIR 1960 SC 1049.
6. *Baru Ram* vs. *Sm.Parsanni & Anr.,* AIR 1958 Punjab 452.
7. *Rattan Anmol Singh & Anr.* vs. *Ch. Atma Ram & Ors.,* AIR 1954 SC 510.

RESULT: Appeals Dismissed.

DIPAK MISRA, CJ.

1. These two intra-Court appeals challenging the impugned order dated 13.4.2010 passed in WP(C) No.4603/2008 have been filed by the writ petitioner – Vikas [the appellant in LPA No.430/2010 and the respondent No.1 in LPA No.334/2010] and Satish Kumar [the appellant in LPA No.334/2010 and the respondent No.1 in LPA No.430/2010] from different spectrums. Regard being had to the composite nature of the order and their insegregable consequential impact on each other, they were heard analogously and are being disposed of by a singular order.

2. The facts, as unfurled, are that Vikas, the appellant in LPA No.430/2010, a candidate of the Indian National Congress (INC), had contested for the post of Councilor from ward No.78 i.e. Majnu-Ka-Tila of the Municipal Corporation of Delhi (MCD) and was declared as elected. His election was called in question before the learned Additional District Judge (ADJ) who, by order dated 4.6.2008, declared the election to be null and void and further held that in terms of Section 19(1)(c) of the Delhi Municipal Corporation Act, 1957 ("DMC Act.), the respondent – Satish Kumar, the appellant in LPA No.334/2010, of the Bharatiya Janata

Party (BJP) should be declared elected as Councilor of the said ward No.78. As is discernible, the learned ADJ, on the basis of the pleadings brought on record, framed an issue whether the nomination papers of the elected candidate were filed in time along with Forms A and B being the duly authorized substitute candidate of the INC. It was claimed by the writ petitioner – Vikas to be a substitute candidate for Sh. Charan Dass, the official candidate of INC for ward No.78 who had filed his nomination papers on 17.3.2007. His nomination papers were accompanied by Forms A and B. The said Form A was signed by Sh. Ashok Gehlot, the General Secretary of the INC and was dated 10.3.2007. Thereunder, Sh. Ram Babu Sharma, President of the Delhi Pradesh Congress Committee, New Delhi, was authorized to intimate the names of the candidates proposed to be set up by the party for ward No.78. The said Form A contained the specimen signatures of Sh. Ram Babu Sharma. In Form B, which was enclosed with the nomination Form of Sh. Charan Dass, the name of Sh. Charan Dass was shown in Column No. 2. Column No. 5, which is titled „name of the substitute candidate. (who will step in the event of the official candidate's nomination paper being rejected on scrutiny), was left blank.

3. The issues that emerged for consideration before the election tribunal are whether the filing of nomination papers by the elected candidate was in order or defective; whether the Forms A and B had, in fact, been enclosed with the nomination papers of the said candidate or not; and in case the election of the said candidate is treated to be invalid; whether the election petitioner could be declared to be the elected candidate as the councilor for the ward in question.

4. The learned Additional District Judge analyzed and appreciated the evidence of K.R. Kishore, the Secretary of State Election Commission and perused the documents, namely, Exhibit CW.1/1 – the complaint made by one Sohan Lal, Exhibit CW.1/2 – the acknowledgement dated 20th April, 2007, Exhibit CW.1/3 and CW.1/4 – Forms A and B, Exhibit CW.1/5 – the nomination papers of the returned candidate, Vikas, Exhibit CW.1/6, CW.1/7 and CW.1/8 – the nomination papers of other candidates and Exhibit CW.1/9 – the result of the election. The tribunal further adverted to the evidence of CW.2, Hira Lal Duggal, who was examined as a court witness and R.K. Sharma who was the Returning Officer of the ward in question and also scrutinized the evidence of the election

petitioner, Satish Kumar, the testimony of RW.1, Vikas, RW.2, Prahlad Singh Sahney, and came to hold that Forms A and B given by the Delhi Pradesh Congress Committee in favour of Charan Dass whose forms are Exhibit CW.1/3 and CW.1/4 did not bear any authorisation in favour of the elected candidate Vikas; that the original nomination papers of the said candidate, Exhibit CW.1/5, did not contain Forms A and B issued by the political party in his favour; that there was nothing on record to show that Forms A and B authorising the elected candidate had been filed before the Returning Officer or before the State Election Commission, NCT of Delhi before 3:00PM on the last date of making the nomination as per the provisions contained in the Delhi Election Symbol (Reservation and Allotment) Order, 2007 (for short 'the 2007, Order); that the stand of the respondent, namely, the elected candidate, that he was a covering/ substitute candidate was not borne out from the record and there is no corroborative evidence in that regard; that the said explanation has also not found corroboration from the testimony of RW.2, Prahlad Singh Sahney; that the issuance of Form B in favour of the Respondent No.1 had not been proved; that the check list shows that Forms A and B were shown in favour of the main candidate whose nomination papers were rejected; that there is specific admission by the Secretary of the State Election Commission that Forms A and B issued by the India National Congress in favour of the Respondent No.1 were not available in the documents handed over to him by the Returning Officer; that the elected candidate had himself admitted that he had not seen Form B but was so told by the party workers; that when the Secretary to the State Election Commission had categorically deposed that the requisite Forms were not placed before him by the Returning Officer, the onus shifted on the respondent to prove the issuance/acceptance of the subsequent Forms A and B and no evidence has been adduced in that regard by the said respondent; and that the allegation that Forms A and B had been removed from the nomination papers was only a mere suggestion and did not deserve acceptance and more so in the absence of any complaint in that regard.

5. It is worth noting that the tribunal also dealt with the factum as regards the security deposit and took note of the testimony of CW.1, the Secretary to the State Election Commission, that Form 3 is the notice of the nomination which was required to be maintained in accordance with Rule 17 of the Delhi Municipal Corporation (Election of Councillors)

Rules, 1970 (for short „the 1970 Rules.) showing the names of all the candidates who had filed their nominations. It is required to be filled up on day to day basis before the last date of nomination and as per the State records, except the nomination in respect of the candidates mentioned in Exhibit CW.1/12, no other nominations were received till 3:00PM on 17.03.2007 and in the said five names, the name of Vikas did not feature. The tribunal came to hold that the plea that the nomination papers were filed before 3:00PM was not acceptable since Exhibit CW.1/P9, the original Form 4 which bears the signature of the Assistant Returning Officer and the Returning Officer, contains only one single page and there is no mention of any page number on the same and Exhibit CW.1/P8 is the second page of Form 4 where the name of Vikas has been mentioned. The said page reflects that two sets of Form 4 were prepared and one page was sent to the Secretary of the State Election Commission that was produced before the Court and another was retained by the Returning Officer which had been produced, but no explanation had been proferred for the reason why the name of the respondent No.1 - Vikas was not mentioned on the first page of Form 4 despite there being sufficient space for mentioning the names of as many as six candidates, as has been done in the case of other wards; that from the oral and documentary evidence, it can safely be concluded that the name of Vikas was added on a separate page which was apparently done in the late hours of the night as the same were placed for the first time at 10:00PM on the date of scrutiny by the Assistant Returning Officer before the Returning Officer on 19.3.2008 and further there was no intimation by the Returning Officer to the State Election Commission about placing of the nomination papers of the respondent No.1 before him for the first time at 10:00PM or the lapses committed by the Assistant Returning Officer.

6. Because of the aforesaid aspects, the tribunal concluded as follows:

"1. That the nomination of the respondent No.1 Vikas who was a covering candidate of Charan Dass of India National Congress is not accompanied by Form A and B issued in his favour as required under the Municipal Corporation of Delhi Election Symbol (Reservation and Allotment) Order, 2007.

2. That the receipt regarding deposit of security amount is the

last receipt which does not bear the rubber stamp of the Assistant Returning Officer and the possibility of its being manufactured and created anti-datedly cannot be ruled out in view of the various discrepancies on the counterfoil as discussed above and also in view of the fact that both the Assistant Returning Officer and Returning Officer were in possession of the original receipt book on the last date of nomination and also on date of the scrutiny and had not deposited the same alongwith the security deposits received on day to day basis.

3. That the Form no.3 which is the list of the candidates and is required to be mandatorily maintained by the Returning Officer as per the provisions of Rule 17 of the DMC (Election of Councillors) Rules does not show the name of the respondent no. 1 Vikas who was a covering candidate of Charan Dass thereby depriving the electors of their right of effectively participating in the scrutiny of the present candidate and to raise objections. Had the nomination papers of Vikas been received on time on the last date of nomination the same would have been placed before the Returning Officer on the same date i.e. 17.3.2007 and the name of the respondent no.1 would have been mentioned in the said form.

4. That the Form no.4 as required to be maintained under Rule 18 of the DMC (Election of Councillors) Rules has been fabricated/manufactured by the Returning Officer in as much as page 1 of the original form no.4 which has been produced before this court by the Secretary to the State Election Commission does not bear the words page 1 whereas the certified copy supplied to the election petitioner by the Returning Officer and also the original produced by him bears the words 'Page 1'. Again page 2 of the Form 4 has been fabricated where the name of Vikas has been added by the Returning Officer and Assistant Returning Officer despite the fact that there was space of 6 names on page 1 and only three names have been written but instead of writing the name of Vikas at Sr. no.4 a separate page has been added where his name has been shown at the top which is not the practice/procedure adopted and followed by the same Returning Officer while maintaining of records pertaining ward nos. 77, 79

and 80.

5. That the scrutiny of the said documents of the respondent no.1 Vikas had taken place in the absence of other contesting candidates.

6. That the Returning Officer had never sent any information to the State Election Commission on the irregularities at any point of time.

7. That no formal complaint had ever been lodged by the respondent no.1 with regard to any theft of this Form A or B from the office of the Returning Officer and this defence has been taken by him in the court for the first time."

7. In view of the aforesaid, the tribunal set aside the election of Vikas and thereafter proceeded to address the issue whether the election petitioner - Satish Kumar deserved to be declared as elected candidate and, relying on the provisions contained in Section 19(1)(c) of the DMC Act, declared Satish Kumar as the elected councilor to the ward in question.

8. The learned Single Judge, as is demonstrable, has referred to the evidence of CW-1, Kishore, who had categorically deposed that the Returning Officer had placed all the documents before the State Election Commission but not the Forms A and B in favour of Vikas and the said record of nomination of candidate Vikas has been exhibited as Ex.CW1/5. Nothing discrepant or contradictory was elucidated in the cross-examination of the said witness which has been reproduced in the order of the learned Single Judge. It was contended before the learned Single Judge that during the subsequent inspection of the record, the respondent No.1 and one Sohan Lal had removed Forms A and B which were there on the file at that point of time, as is evident from the cross-examination of the respondent No.1, but the learned Single Judge, after referring to the cross-examination by the petitioner of the respondent No.1, came to hold that the candidate/petitioner had not been able to make out a case that the Forms A and B accompanying his nomination papers were surreptitiously removed by respondent No.1. It is further demonstrable that the learned Single Judge also perused the record and came to hold that there was no material to come to the conclusion that Forms A and

B were removed.

9. The next aspect which the learned Single Judge has adverted to is whether there has been a manipulation of the receipt of the security deposit purportedly received from the elected candidate. He referred to Ex.RW1/1 (the original of which is Ex.CW1/P1) wherein the ward No.78 does not find mention whereas in the carbon copy / counterfoil, Ex.PW1/3, the figure 78 has been written. The said receipt was issued by CW2, Hira Lal Duggal, who, according to the learned Single Judge, gave an improbable explanation that "sometimes the pen does not flow on the main copy as a result of which only on the carbon copy the words occur". Be it noted, the learned ADJ had observed that there is no imprint of Ex.RW1/1 showing that ward No.78 was ever written and therefore, the receipt for Vikas seems to have been hurriedly prepared which is evident from the fact that the security deposit receipt which is for a sum of Rs.1,500/- had the words written Rs.15/- at one place and Rs.1,500/- at another place. The learned Single Judge, on scrutiny of the record and analysis of the evidence brought on record, gave the stamp of approval to the said finding of the learned ADJ. The other aspect that has been adverted to by the learned Single Judge is whether the returning officer maintained the Form 3 in terms of Rule 17 of the Rules. The said Form, as found by the learned Single Judge, neither contained the name of the petitioner and the cover candidate / substitute candidate for Charan Dass nor the name of Sukhdev who was the substitute candidate for Satish Kumar. Thereafter, the learned Single Judge adverted to Form 4 which required to reflect the names of the contesting candidates whose nomination papers were found to be in order after scrutiny. The names of the candidates had been filled on one singular page in respect of ward Nos. 77 and 79 by the returning officer but in case of ward No.78, he had mentioned only three names on the first page of Form 4 and in a separate appended sheet, the name of Vikas was mentioned. The learned Single Judge has noticed that the tribunal, upon perusal of the record, has observed that no explanation had come forth as to why two sets of Form 4 were prepared of which one was sent to the Secretary to the State Election Commission which he had produced in the court and another was retained by the Returning Officer which he had produced in the court. He has also observed that there was sufficient space for mentioning the names of as many as six candidates and therefore, the explanation offered did not deserve acceptation. Because of the aforesaid analysis,

the learned Single Judge concurred with the finding returned by the learned ADJ – the election tribunal.

10. The second question that emerged before the learned Single Judge was whether the election of the elected candidate was liable to be declared null and void and set aside. The learned Single Judge, after scrutiny of the evidence of the Returning Officer and that of the ARO, expressed the view that the testimony of the said witnesses are unacceptable and untrustworthy. For the sake of completeness, it is necessary to reproduce the testimony of the returning officer:

> "It was only at 10:00 pm that Mr. Duggal had come along with the nomination papers of Vikas and prior to that I had already rejected the nomination of Charan Dass. Since the nomination of Vikas was never placed before me prior to 19.3.2007 I orally asked my ARO Mr. Duggal to furnish an explanation in writing as to why this nomination form was not put before me earlier on which he furnished the said explanation by way of a written note Ex.CW1/11 and his remarks on Ex.CW1/5 at point mark X3. I was not convinced earlier but after seeing the security deposit receipt and acknowledgement I was convinced and I considered the nomination of Vikas. I did not convey in writing to the State Election Commission the fact that Mr. Duggal the ARO had not placed the nomination of Vikas before me on time nor he had made any entry in Form 3."

11. It was contended before the learned Single Judge that these were mere irregularities and to set aside the election, a strong case has to be made out but the learned Single Judge did not treat them as irregularities and opined that lapses go to the very root of the matter and the mandatory requirement of the nomination papers of the returned candidate required them to be accompanied by Forms A & B and the same had not been complied with. Regard being had to the non-compliance of filing of Forms and the manner in which it was accepted, the learned Single Judge concurred with the view expressed by the learned ADJ and came to hold that the election of the elected candidate had been rightly declared null and void.

12. Though the learned Single Judge affirmed the finding of the tribunal to the effect that the election of the elected candidate has been

correctly declared null and void, yet he did not accept the conclusion arrived at by the tribunal that the election petitioner could be declared as the elected councilor. In the opinion of the learned Single Judge, the interpretation placed by the learned ADJ on Section 19(1)(c) of the DMC Act is not correct more so in the obtaining factual matrix of the case.

13. We have heard Mr. Maninder Singh, learned senior counsel for the Appellant in LPA No.334/2010 and for the Respondent No.1 in LPA No.430/2010 and Mr. M.N. Krishnamani, learned senior counsel for the Appellant in LPA No.430/2010 and the Respondent No.1 in LPA No.334/2010.

14. First, we shall advert to the legal sustainability of the finding of the tribunal and the concurrence thereof by the learned Single Judge that the election of the elected candidate was invalid.

15. The submission of Mr. Krishnamani, learned senior counsel appearing for the appellant Vikas in LPA No. 430/2010, is that the findings of the learned ADJ which have been concurred by the learned Single Judge as regards the rejection of nomination form are absolutely vulnerable. It is contended by him that the nomination form was in order and was not liable to be rejected and the finding that the appellant.s name was not mentioned in the list published in Form 3 is not correct. It is further urged by him that the finding that Forms A and B were not accompanied with the nomination form is totally unsustainable.

16. To appreciate the rival submissions raised at the bar, we will refer to Section 17 of the DMC Act which deals with 'Grounds for declaring elections to be void'. The relevant provision is sub-section (1) of Section 17 which reads as follows:

> "17. **Grounds for declaring elections to be void** – (1) Subject to the provisions of sub-section (2) if the court of the district judge is of opinion –
>
> (a) that on the date of his election a returned candidate was not qualified or was disqualified, to be chosen as a councillor under this Act, or
>
> (b) that any corrupt practice has been committed by a returned candidate or his agent or by any other person with the consent of a returned candidate or his agent, or

(c) that any nomination paper has been improperly rejected, or

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected –

(i) by the improper acceptance of any nomination, or

(ii) by any corrupt practice committed in the interests of the returned candidate by a person other than that candidate or his agent or a person acting with the consent of such candidate or agent, or

(iii) by the improper acceptance or refusal of any vote or reception of any vote which is void, or

(iv) by the non-compliance with the provisions of this Act or of any rules or orders made thereunder, the court shall declare the election of the return candidate to be void."

17. Keeping the said provision in view, we are required to advert to various rules of the 1970 Rules.

18. Part III of the Rules deals with 'Nomination of Candidates'. Rule 11 deals with 'Appointment of dates for nomination, etc.'. Rule 12 deals with 'Public notice of election'. Rule 13, which deals with Symbols, reads as under:

"13. Symbols – (1) For the purpose of election to the Municipal Corporation of Delhi, the National Parties and State Parties as are recognised for the time being by the Election Commission of India in the National Capital Territory of Delhi,under Section 29A of the Representation of the People Act, 1951 and rules and procedure made thereunder, shall be recognised as such by the State Election Commission. The Commission shall also adopt free symbols as have been notified by the Election Commission of India for the time being in respect of elections to Lok Sabha/ Legislative Assembly in the National Capital Territory of Delhi. The Commission shall recognize the parties and adopt symbols subject to the following conditions, namely :-

(a) The National Parties and the State Parties recognised by the Election Commission of India shall be recognised under the very same name by the Commission.

(b) The National Parties and the State Parties recognized by the Election Commission of India shall use only those very symbols which are reserved for them by the Election Commission of India and not any other symbol.

(c) The facsimiles of the symbols thus allowed shall not be different from the facsimiles prescribed and recognized by the Election Commission of India.

(1A) The Election Commissioner shall specify by notification in the Official Gazette, the symbols that may be chosen by candidates and the restrictions to which their choice shall be subject.

(2) Where at any such election, more nomination papers than one are delivered by or on behalf of a candidate, the declaration as to symbols, made in the nomination paper first delivered, and no other declaration as to symbols, shall be taken into consideration under rule 20 even if that nomination paper has been rejected.

(3) A failure to complete, or a defect in completing the declaration as to symbols in a nomination paper shall not be deemed to be a defect of a substantial character within the meaning of sub-rule,(4) of rule 18.

19. Rule 15, which deals with 'Presentation of nomination paper and requirements for a valid nomination', reads as follows:

"15. **Presentation of nomination paper and requirements for a valid nomination** – (1) On or before the date appointed under clause (a) of rule 11 each candidate shall, either in person or by his proposer, between the hours of eleven O'clock in the forenoon and three o.clock in the afternoon, deliver to the returning officer at the place specified in this behalf in the notice issued under rule 12 a nomination paper completed in Form 2 and signed by the candidate and by an elector of the ward as proposer.

["Provided that a candidate not set up by a recognised political party, shall not be deemed to be duly nominated for election from a ward unless the nomination paper is subscribed by ten proposers being electors of the ward".]

(2) In a ward where any seat is reserved, a candidate shall not

be deemed to be qualified to be chosen to fill that seat unless his nomination paper contains a declaration made by him specifying the particular Scheduled Caste of which he is a member.

[(2A) In a ward where any seat is reserved for woman, a candidate shall not be deemed to be qualified to be chosen to fill that seat unless her nomination paper contains a declaration made by her that she is a woman.]

(3) Where the candidate is a person who having held any office referred to in clause (K) of sub-section (1) of section 9 has been dismissed and a period of four years has not elapsed since the dismissal, such person shall not be deemed to be duly nominated as a candidate unless his nomination paper is accompanied by a certificate issued by the Central Government that the disqualification has been removed or by a certificate issued by the Election Commissioner to the effect that he has not been dismissed for corruption or disloyalty to the State.

(4) On the presentation of a nomination paper, the returning officer shall satisfy himself that the names and electoral roll numbers of the candidate and his proposer as entered in the nomination paper are the same as those entered in the electoral roll: Provided that the returning officer shall permit any clerical or technical error in the nomination paper in regard to the said names or numbers to be corrected in order to bring them into conformity with the corresponding entries in the electoral roll, and where necessary, direct that any clerical or printing error in the said entries shall be overlooked.

(5) Where the candidate is an elector of a different ward, a copy of the electoral roll of that ward or of the relevant part thereof or a certified copy of the relevant entries in such roll shall, unless it has been filed along with the nomination paper, be produced before the scrutinising officer at the time of scrutiny.

(6) Nothing in this rule shall prevent any candidate from being nominated by more than one nomination paper:

Provided that not more than four nomination papers shall be presented by or on behalf of any candidate or accepted by the

returning officer for election in the same ward.

20. Rule 17 stipulates 'Notice of nominations and the time and place for their scrutiny'. It reads as follows:

> **"17. Notice of nominations and the time and place for their scrutiny** – (1) The returning officer shall, on receiving the nomination paper under sub-rule (1) of rule 15, inform the person or persons delivering the same of the date, time and place fixed, and the scrutinising officer appointed, for the scrutiny of nominations and shall enter on the nomination paper its serial number, and shall sign thereon a certificate stating the date on which and the hour at which the nomination paper has been delivered to him and shall as soon as may be, thereafter cause to be affixed in some conspicuous place in this office a notice in Form 3 of the nomination containing description similar to those contained in the nomination paper, both of the candidate and the proposer.
>
> (2) The returning officer shall cause all the nomination papers to be delivered to the concerned scrutinising officer in sufficient time for being dealt with under rule 18."

21. Rule 18 deals with 'Scrutiny of nomination'. Sub-rules (3) and (4), being relevant, are reproduced below:

> "(3) Nothing contained in clause (b) or clause (c) of sub-rule (2) shall be deemed to authorise the rejection of the nomination of any candidate on the ground of any irregularity in respect of a nomination paper, if the candidate has been duly nominated by means of another nomination paper in respect of which no irregularity has been committed.
>
> (4) The scrutinising officer shall not reject any nomination paper on the ground of any defect which is not a substantial character."

22. Form 2 which has been framed under Rule 15(1) requires a candidate to say that "I am sponsored for this election by a particular party". Form 3 which is under Rule 17(1) postulates notice to be given about the nomination forms which have been received after 3.00 P.M. on the last date of filing of the nomination forms and reads as follows:

Form 3

Notice of Nomination

[See Rule 17(1)]

Election of the Delhi Municipal Corporation from Ward No…….Notice is hereby given that the following nominations in respect of the above election have been received upto 3 P.M. today:-

Serial Number of nomination paper	*Name of Candidate*	*Name of *father/ husband*	*Address*	*Particulars of case for candidates belonging to Scheduled Castes*	*Electoral roll number of candidate*	*Name of proposer*	*Electoral roll number of proposer*
1	2	3	4	5	6	7	8

Place …….

Date …….

*Strike off offence of the alternatives if necessary."

23. The election tribunal as well as the learned Single Judge has adverted to the oral and documentary evidence in detail which we have referred to hereinbefore to show that there was manipulation as regards the security deposit; that there was delayed submission of forms and the name of Vikas was not reflected in Form 3 which has really not been explained by the authorities. In our considered opinion, the said conclusion has been rightly arrived at and, hence, there is no warrant to interfere with the said conclusion. An ancillary issue to the said principal issue is whether Forms A and B had accompanied his nomination papers to show that he was really a sponsored candidate of the Indian National Congress for the said election.

24. Clause 3 of the Delhi Municipal Corporation Election Symbols (Reservation & Allotment) Order, 1996 (for short 'the 1996 Order') stipulates recognization of National and State Parties. Clause 4 deals with choice of symbol by candidates of National and State parties and allotment

thereof. Clause 5, which deals with authorisation by National & State Parties for allotment of Symbols, reads as follows:

"5. Authorisation by National & State Parties for allotment of Symbols:

(a) For the purpose of this order, a candidate shall be deemed to have been set up by a political party if and only if the candidate has made a declaration to that effect in the nomination paper first filed by them.

(b) the candidate has choosen only the 'reserved' symbol of his party in his nomination paper first filed and no 'other symbol';

(c) a notice in form 'B' of setting up the candidate been delivered not later than 5.00 P.M. on the last day of filing nomination in writing to the returning officer of the ward to which the candidate is contesting, by the party concerned.

(d) the said notice is signed by a person authorised in form 'A' by the President or the Secretary of the party.

(e) the name and specimen signature of such authorised person are communicated to the Returning Officer of the ward and to the Election Commission of NCT of Delhi not later than 5.00 P.M. on the last date for filing nomination.

(f) Form 'A' & 'B' as applicable, are prescribed as in schedule II respectively with this ORDER."

25. At this juncture, we may refer with profit to the relevant portion of Forms A and B. They are reproduced hereinbelow:

"FORM A

To,

1. The Election Commissioner, Govt. of NCT of Delhi,
Nigam Bhawan, Kashmere Gate,
Delhi – 110 006,
2. The Returning Officer for the
_____ Ward.

Sub:- General Elections to Delhi Municipal Corporation – Allotment of Symbols – Authorisation of person to intimate names of candidates

Sir,

In pursuance of Rule 13 Delhi Municipal Corporation, Election of Councillors Rules 1970 as amended up-to date, I hereby communicate that the following person(s) has/have been authorised by the party, which is a National Party/State Political Party to intimate the names of the candidates proposed to be set up by the party at the election cited above."

FORM B

To,

1. The Election Commission, NCT of Delhi,
Nigam Bhawan, Kashmere Gate,
Delhi – 110 006,
2. The Returning Officer for the
_____ Ward.

Sub:- General Elections to Delhi Municipal Corporation – Setting up of candidates

Sir,

In pursuance of Rule 13 Delhi Municipal Corporation, Election of Councillors Rules 1970 (as amended up-to date) I hereby give notice that the following persons have been set up by _____ Party as its candidates at the ensuing General Election to MCD from the Ward noted against each.

Name of the Candi-date	*Name of the approved candidate*	*Father's/ Husband's Name of approved candidate*	*Postal address of approved candidate*	*Name of the Substitute candidate (who will step in the approved candidates) nomination being rejected on scrutiny*	*Father's/ Husbands name of substitute candidate*	*substitute Postal Address of substitute candidate*

				or his withdrawing from the contest		
1	2	3	4	5	6	7

Yours faithfully,

Place:

Date: (Name and signature of the authorised person of the party)

N.B. – This must be delivered to the Returning Officer by 5 P.M. on the last date for nomination.

(Seal of the Party)"

26. On a reading of the Rules, clauses of the 1996 Order and the Forms, there can be no shadow of doubt that unless somebody is sponsored for allocation of symbol as a substitute candidate in case nomination of original candidate is rejected on scrutiny or his withdrawing from the contest, the substitute cannot step into the shoes of the original candidate. As is evident from the material brought on record, there is no scintilla of doubt that the Forms A and B really did not accompany the nomination papers. We have referred to the evidence on record, the findings of the election tribunal and the reasonings of the learned Single Judge and we find that the factum that the Forms A and B accompanied the nomination papers has not been established from the documentary evidence as well as the cross-examination of the competent authority which we have reproduced hereinbefore. The submission of Mr.Krishnamani, learned senior counsel appearing for the appellant in LPA No.430/2010, is that the same might not have accompanied the nomination papers but if it is filed later on, it should be treated as a mere irregularity and on that ground, the election could not have been declared invalid. It is contended by him that it was curable in nature being in the realm of a technical defect and, therefore, the returning officer could have afforded an opportunity to him to rectify the same or accept the same with defects.

27. To appreciate the said submission, we may refer with profit to certain citations in the field. Be it clarified, though they were delivered in the context of Representation of the People Act, 1951 (for short „the 1951 Act), yet the principles laid down therein shall apply in full force to a case under the DMC Act and the 1970 Rules.

28. In **Rattan Anmol Singh & Anr. v. Ch. Atma Ram & Ors.,** AIR 1954 SC 510, the Apex Court was dealing with the issue of compliance of Section 36(d) of Representation of the People Act (43 of 1951) (hereinafter referred to as 'the 1951 Act'). The nominations of the candidate were treated to be invalid as they were not properly subscribed. The Returning Officer had held that without attestation, they were invalid and, hence, rejected the same. The Apex Court adverted to the correctness of the said conclusion and also to the issue whether omission to obtain the required attestation amounts to a technical defect of an unsubstantial character or whether the said defect is of a substantial character. In that backdrop, their Lordships have held thus:

> "13. The four nomination papers we are concerned with were not "signed" by the proposers and seconders in the usual way by writing their names, and as their marks are not attested it is evident that they have not been "signed" in the special way which the Act requires in such cases. If they are not "signed" either in one way or the other, then it is clear that they have not been "subscribed" because "subscribing" imports a "signature" and as the Act sets out the only kinds of "signatures" which it will recognise as "signing" for the purposes of the Act, we are left with the position that there are not valid signatures of either a proposer or a seconder in any one of the four nomination papers. The Returning Officer was, therefore, bound to reject them under Section 36(2)(d) of the Act because there was a failure to comply with Section 33, unless he could and should have had resort to Section 36(4).

29. After so stating, their Lordships held that the jurisdiction vested with the Returning Officer to see whether the nominations are in order and to hear and decide the objections but he cannot, at that stage, remedy essential defects or permit them to be remedied.

30. In **Brijendralal Gupta & Anr. v. Jwalaprasad and Ors.,** AIR

1960 SC 1049, a three-Judge Bench of the Apex Court was dealing with a case of omission where the age was not specified in the nomination form. Their Lordships adverted to the word 'defect' used in Section 36(4) of the 1951 Act and came to hold that the same is a defect within the ambit and sweep of Section 36(4) of the 1951 Act and proceeded to advert to the facet whether such a defect is substantial in character and if the same could be removed. In that context, their Lordships proceeded to state as follows:

> "10. That takes us to the question as to whether the failure to specify the age in the nomination paper amounts to a defect of a substantial character under s.36(4) or not. There is little doubt that the age of the candidate is as important as his identity, and in requiring the candidate to specify his age the prescribed form has given a place of importance to the declaration about the candidate's age. Just as the nomination paper must show the full name of the candidate and his electoral roll number, and just as the nomination paper must be duly signed by the candidate, so must it contain the declaration by the candidate about his age. It is significant that the statement about the age of the candidate is required to be made by the candidate above his signature and is substantially treated as his declaration in that behalf. That being the requirement of the prescribed nomination form it is difficult to hold that the failure to specify the age does not amount to a defect of a substantial character. The prima facie eligibility of the person to stand as a candidate which depends under Art. 173 of the Constitution, inter alia, on his having completed the age of 25 years is an important matter, and it is in respect of such an important matter that the prescribed form requires the candidate to make the declaration. It would, we think, be unreasonable to hold that the failure to make a declaration on such an important matter is a defect of an unsubstantial character. In this connection, it is relevant to refer to the fact that the declaration as to the symbols which the prescribed form of the nomination paper requires the candidate to make is by the proviso to rule 5 given a subsidiary place. The proviso to rule 5 shows that any non-compliance with the provisions of sub-rule (2) of rule 5 shall not be deemed to be a defect of a substantial character within the

meaning of s.36, sub-sec.(4). In other words, this proviso seems to suggest that, according to the rule-making authority, failure to comply with the requirements as to the declaration of symbols as specified in rule 5, sub-rule (2), would have been treated as a defect of a substantial character; that is why the provisoexpressly provides to the contrary. This would incidentally show that the failure to specify the age cannot be treated as a defect of an unsubstantial character."

31. A Division Bench of the Punjab High Court in **Baru Ram v. Sm.Parsanni & Anr.,** AIR 1958 Punjab 452, while dealing with an appeal under Section 116A of the 1951 Act, has held thus:

"A nomination cannot be rejected merely because of a defect which is not substantial in character as is clearly indicated by S.36(4). But in respect of certain matters form and form alone can be, and is, of vital importance, and, in case Parliament has in the Act attached particular importance to form any failure to comply with that form would be fatal. Thus the requirement of S.33(5) of the Act is extremely important at the stage of scrutiny and failure of produce the electoral roll must be deemed a failure to comply with a substantial provision of the statute. The requirement of S.33(5) is therefore mandatory and failure to comply with it is fatal to a candidate's claim to stand for election."

32. As is perceivable from the analysis made by the Election Tribunal and that of the learned Single Judge, the name of the elected candidate did not feature in the said publication and it was not accompanied by Forms A and B. It was contended before the learned Single Judge that it was an irregularity which can be condoned but the learned Single Judge has held that the same is not a mere formality as it is required to be put up on the notice board for being made known to other candidates as well as to the electorates and other contesting candidates who can then scrutinize the forms and raise objections. Thus, the said non-reflection of the name is a substantial defect and is not curable. We are inclined to think that the learned Single Judge is absolutely correct in holding that the name of the elected candidate did not find place and hence, the nomination paper was invalid in law.

33. The next issue that had arisen before the learned Single Judge as well as in these appeals is that when the nomination of the returned candidate was rejected, whether it was obligatory on the part of the tribunal as well as the learned Single Judge to declare the next candidate to be the elected candidate. Mr. Maninder Singh, learned senior counsel, has placed heavy reliance on Section 19 of the DMC Act. The said provision reads as follows:

"Section 19 - Decision of the district judge

(1) At the conclusion of the trial of an election petition, the court of the district judge shall make an order--

(a) dismissing the election petition; or

(b) declaring the election of all or any of the returned candidates to be void; or

(c) declaring the election of all or any of the returned candidates to be void and the petitioner and any other candidates to have been duly elected.

(2) If any person who has filed an election petition has, in addition to calling in question the election of the returned candidate, claimed declaration that he himself or any other candidate has been duly elected and the court or the district judge is of opinion--

(a) that in fact the petitioner or such other candidate received a majority of the valid votes, or

(b) that but for the votes obtained by the returned candidate the petitioner or such other candidate would have obtained a majority of the valid votes,

the court shall, after declaring the election of the returned candidate to be void, declare the petitioner or such other candidate, as the case may be, to have been duly elected."

34. It is contended by Mr. Singh that if the language employed in Section 19(2)(b) is properly appreciated, it is quite vivid that the votes obtained by the returned candidate are to be excluded and on such exclusion, if such other candidate would obtain a majority of valid votes, it is the duty of the court to declare the election petitioner as the elected

candidate. It is worth noting that the elected candidate had secured 6399 votes and the election petitioner had obtained 6123 votes while the respondent No.2 and the respondent No.3 had polled 286 and 229 votes respectively. It is urged by Mr. Singh that the valid votes are 13037 and when the votes of the respondent No.1 would stand excluded, he would get the majority of valid votes. The learned counsel would submit that the learned Single Judge has fallen into grave error by interpreting the said provision on the anvil of the analogy of Section 101 of the 1951 Act which is couched in a different language, for the emphasis therein is on the votes obtained by the returned candidate by "corrupt practice" but under the present statute, it is per se exclusion. The learned counsel has commended us to the decision in **Shri Banwari Dass v. Shri Sumer Chand and others,** (1974) 4 SCC 817.

35. On a perusal of the order of the learned Single Judge, it is perceptible that he has held that in a multi-cornered contest like the present one, the application of Section 19(2)(b) is not a simple exercise. It has been opined by him that there has to be evidence on record to show that if the elected candidate is out of the fray as on the date of the poll, then the challenger would have obtained majority of the votes. He has drawn an analogy between Section 19(2) and Section 101 and arrived at such a conclusion.

36. In **Shri Banwari Dass** (supra), a two-Judge Bench of the Apex Court was dealing with the issue whether in an election petition under the DMC Act for getting an election declared void and for a further declaration that the petitioner has been duly elected, the returned candidate is entitled to plead and prove that the election petitioner was guilty of corrupt practice in the election in question, and was, therefore, not entitled to be declared as duly elected. Their Lordships scanned the anatomy of Sections 9, 15(1), 16(1), 17(1), 19(1) and 19(2) of the DMC Act and various provisions of the 1951 Act and expressed the view that the right to recriminate cannot be legitimately spelled out of Section 9(1)(d) without doing violence to its language or unduly stretching it. After so stating, their Lordships have held as follows:

> "17. The above interpretation fits better in the general scheme of the Corporation Act. As will be apparent from Section 19, quoted earlier, the tribunal i.e. the District Judge can pass only three kinds of final orders indicated in Clauses (a), (b) and (c) of sub-

> section (1) of that section. The District Judge's inquiry at the trial of an election petition is, therefore, limited to the investigation of those matters only which will enable him to make the orders specified in Section 19(1). But, where in a composite petition, like the one in the present case, relief is claimed that the petitioner be declared elected in place of the returned candidate, the District Judge is to investigate if either of the two conditions for the grant of a further declaration, specified in Section 19(2) is made out. That is to say, he has to confine his enquiry to the determination of either of these two questions namely: (a) whether in fact the petitioner received a majority of the valid votes, or (b) whether the petitioner would have but for the votes obtained by the returned candidate, obtained a majority of the valid votes. Rule 68(1) of the Rules framed under the Corporation Act, defines "valid vote" as "every ballot paper which is not rejected under Rule 67 shall be counted as one valid vote". The concept of "validity" of votes is different from that of "corrupt practices" defined in Section 22 on the basis of which an election petition can be instituted. In such a composite petition, apart from rebutting the allegations made against him in the petition, all that the returned candidate can further show is that the petitioner did not in fact receive the majority of valid votes and is therefore, not entitled to the further declaration of his due election. In the absence of a provision specifically conferring such a right, the returned candidate cannot allege and prove further that even if the petitioner had obtained a majority of valid votes, he could not be granted the declaration of his due election because he had committed corrupt practices. Such plea and proof will, in reality, be in the nature of a counter-attack, not necessary for legitimate defence."

37. Though this decision was rendered in a different context, yet the same throws some light on the interpretation to be placed on Section 19(2) of the DMC Act. As has been held by the Lordships, the District Judge can only pass three kinds of final orders as indicated in clauses (a), (b) and (c) of sub-section (1) of Section 19. In a composite petition, when there is a declaration made for declaring the election petitioner elected, it is obligatory on the part of the District Judge, the election tribunal, to ascertain whether in fact the election petitioner has received a majority of the valid votes, or whether he would have, but for the votes

obtained by the returned candidate, obtained a majority of the valid votes. Their Lordships have made a distinction between the concept of valid votes and that of corrupt practice. What is of signification is that it is obligatory on the part of the District Judge to enquire to determine the questions. Be it noted, it has been held that in the absence of the provisions specifically conferring a right of recrimination, the returned candidate cannot allege and prove further that even if the petitioner had obtained a majority of valid votes, he could not be granted the declaration of his due election because he had committed corrupt practices. It was stated to be counter attack but not a legitimate defence. It is noticeable that the whole case also related to the plea raised by a returned candidate but the submission of Mr. Singh is that the enquiry is limited and he is only required to do the arithmetical exercise. Per-contra, the contention of Mr. Krishnamani is that the analogy drawn by the learned Single Judge between Section 101 of the 1951 Act and Section 19(2)(b) of the DMC Act is fundamentally correct and cannot be flawed.

38. To appreciate the said submission, we may reproduce Section 101 of the Representation of the People Act (43 of 1951):

> "101. Grounds for which a candidate other than the returned candidate may be declared to have been elected, - (1) If any person who has lodged a petition has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and the High Court is of opinion –
>
> (a) that in fact the petitioner or such other candidate received a majority of the valid votes; or
>
> (b) that but for the votes obtained by the returned candidate by corrupt practices the petitioner or such other candidate would have obtained a majority of the valid votes.
>
> [the High Court shall after declaring the election of the returned candidate, as the case may be, to have been duly elected.]"

39. Mr. Singh has made an endeavour to draw a distinction between corrupt practice and valid votes. There can be no doubt that there are certain distinctions but the question that emerges for consideration is whether the tribunal can straight away exclude the votes of the elected

candidate and declare the election petitioner to be elected.

40. In this context, we may refer with profit to the Constitution Bench decision in **Vishwanatha Reddy v. Konappa Rudrappa Nadgouda and another,** AIR 1969 SC 604, wherein the Apex Court has held as follows:

> "……..When there are only two contesting candidates, and one of them is under a statutory disqualification, votes cast in favour of the disqualified candidate may be regarded as thrown away, irrespective of whether the voters who voted for him were aware of the disqualification. This is not to say that where there are ˇmore than two candidates in the field for a single seat, and one alone is disqualified, on proof of disqualification all the votes cast in his favour will be discarded and the candidate securing the next highest number of votes will be declared elected. In such a case, question of notice to the voters may assume significance, for the voters may not, if aware of the disqualification have voted for the disqualified candidate.
>
> 13. The view that we are taking is consistent with the implication of Cl. (b) of Section 101. When in an election petition which complies with Section 84 of the Act it is found at the hearing that some votes were obtained by the returned candidate by corrupt practices, the Court is bound to declare the petitioner or another candidate elected if, but for the votes obtained by the returned candidate by corrupt practice, such candidate would have obtained a majority of votes. In cases falling under Clause (b) of Section 101 the Act requires merely proof of corrupt practice, and obtaining votes by corrupt practice: it does not require proof that the voters whose votes are secured by corrupt practice had notice of the corrupt practice. If for the application of the rule contained in Clause (b) notice to the voters is not a condition precedent, we see no reason why it should be insisted upon in all cases under Clause (a). The votes obtained by corrupt practice by the returned candidate, proved to be guilty of corrupt practice, are expressly excluded in the computation of total votes for ascertaining whether a majority of votes had been obtained by the defeated candidate and no fresh poll is necessary. The same rule should, in our judgment, apply when at an election

there are only two candidates and the returned candidate is found to be under a statutory disqualification existing at the date of the filling of the nomination paper."

[Emphasis supplied]

41. In **Thiru John v. The Returning Officer and others,** (1977) 3 SCC 540, the Apex Court referred to the dictum in **Vishwanatha Reddy** (supra) and opined thus:

"59. The dictum of this Court in **Viswanatha v. Konappa** (supra) does not advance the case of the appellant, Shri Subramanyam. In that case, the election in question was not held according to the system of a single transferable vote. There were only two candidates in the field for a single seat, and one of them was under a statutory disqualification. Shah, J. (as he then was) speaking for the Court, held that the votes cast in favour of the disqualified candidate may be regarded as thrown away, even if the voters who had voted for him were unaware of the disqualification, and the candidate securing the next highest number of votes was declared elected. The learned Judge was however careful enough to add:

> This is not to say that where there are more than two candidates in the field for a single seat, and one alone is disqualified, on proof of disqualification all the votes cast in his favour will be discarded and the candidate securing the next highest number of votes will be declared elected. In such a case, question of notice to the voters may assume significance, for the voters may not, if aware of the disqualification, have voted for the disqualified candidate.

60. The ratio decidendi of **Viswanatha v. Konappa** is applicable only where (a) there are two contesting candidates and one of them is disqualified, (b) and the election is on the basis of single non-transferable vote. Both these conditions do not exist in the present case. As already discussed, Shri Subramanyam appellant was not the sole surviving continuing candidate left in the field, after exclusion of the disqualified candidate, Shri John. The election in question was not held by mode of single transferable

vote, according to which a simple majority of votes secured ensures the success of a candidate, but by proportional representation with single transferable vote, under which system the success of a candidate normally depends on his securing the requisite quota.

61. However, the principle underlying the obiter in **Viswanatha v. Konappa,** which we have extracted, is applicable to the instant case because here, after the exclusion of the disqualified candidate, two continuing candidates were left in the field."

[Emphasis added]

42. In **Prakash Khandre v. Dr. Vijay Kumar Khandre and others,** (2002) 5 SCC 568, the Apex Court posed the question No. (1) as follows:

> (1) In an election petition under the RP Act when contest for election to the post of MLA is by more than two candidates for one seat and a candidate, who was disqualified to contest the election – whether the Court can declare a candidate who has secured next higher votes as elected?

After posing the aforesaid question and referring to various decisions, their Lordships have expressed thus:

"In view of the aforesaid settled legal position, in our view, the impugned order passed by the High Court declaring the election petitioner as elected on the ground that the votes cast in favour of the elected candidate (appellant) are thrown away was totally erroneous and cannot be justified. As held by the Constitution Bench in Konappa case that some general rule of election law prevailing in the United Kingdom that the votes cast in favour of a person who is found disqualified for election may be regarded as "thrown away" only if the voters had noticed before the poll the disqualification of the candidate, has no application in our country and has only merit of antiquity. We would observe that the question of sending such notice to all voters appears to us alien to the Act and the Rules. But that question is not required to be dealt with in this matter. As stated earlier, in the present case for one seat, there were five candidates and it would be

impossible to predict or guess in whose favour the voters would have voted if they were aware that elected candidate was disqualified to contest election or if he was not permitted to contest the election by rejecting his nomination paper on the ground of disqualification to contest the election and what would have been the voting pattern. Therefore, order passed by the High Court declaring the election petitioner - Dr. Vijay Kumar Khandre as elected requires to be set aside."

[Underlining is ours]

43. Testing the present factual matrix on the anvil of the aforesaid enunciation of law, it is difficult to accept how the voting pattern would have been because there is a multi-cornered contest and it is very difficult, in the absence of any kind of pleading or evidence, to arrive at the conclusion that the election petitioner should have been declared elected. The principle that has been enunciated by the Constitution Bench in **Vishwanatha Reddy** (supra) is squarely applicable to the case at hand.

44. Consequently, both the appeals, being sans substance, stand dismissed without any order as to costs.

ILR (2011) V DELHI 488
FAO

SMT. SUMAN KHANNA ....APPELLANT

VERSUS

SHRI MUNEESH KHANNA ....RESPONDENT

(KAILASH GAMBHIR, J.)

FAO NO. : 439/2003 & CROSS OBJECTIONS NO. : 1788/2003 **DATE OF DECISION: 18.02.2011**

Hindu Marriage Act, 1955—S. 13 (1) (ia) and (ib)—Cruelty—Desertion—Parties married at Delhi according to Hindu Rites and Ceremony—Problem started from the time of honeymoon which continued till they stayed together—Respondent alleged that the appellant was under the influence of her parents and would leave matrimonial home time and again—Disturbed due to cruel conduct—Appellant attempted to commit suicide—Trial court granted decree of divorce on the ground of cruelty—Preferred appeal—Contended inter-alia that respondent admitted in his cross-examination that appellant could not have inserted her finger into electric shocket due to narrow width of hole—Also admitted no power plugs in any portion of rented home where they were living together—Also failed to prove appellant made any attempt to commit suicide by laying herself in front of DTC Bus—Respondent submitted, no cross-examination of landlady with regards to the attempt made to\ commit suicide on two occasions by inserting finger in socket and threatening to come underneath the DTC bus—Court observed, the contention that the width of socket too narrow lack force as it was not the case of respondent that she literally put finger inside the socket—Held—Cruelty

has not been defined—It is not possible to put concept in strait jacket formula—Cruelty can be physical or mental, intentional or unintentional—Respondent husband alleged behaviour of appellant caused him mental pain, sufferings and humiliation—Threat by wife to commit suicide would in the ambit of mental cruelty trial court judgment upheld—Appeal dismissed.

Now the question that arises before the court is that whether the above said acts proved by the respondent amount to 'cruelty' as envisaged under section 13(1) (ia) of the Hindu Marriage Act, 1955 for dissolution of marriage. Cruelty has not been defined in the Act and rightly so as it is not possible to put this concept in a strait jacket formula. Cruelty can be physical or mental, intentional or unintentional. The present is a case of mental cruelty where the respondent husband has alleged that the behaviour of the appellant caused him mental pain, suffering and humiliation. But it cannot be lost sight of the fact that the normal wear and tear of married life cannot be stretched too far to be regarded as cruelty for the purposes of this section. The conduct complained of should be grave and weighty so as to satisfy the conscience of the court that the relationship between the parties has deteriorated to such an extent that it cannot be reasonably expected by them to live together without mental pain, agony and distress. The Hon'ble Apex Court in the case of **Samar Ghosh vs. Jaya Ghosh** (2007) 4 SCC 511 after analyzing all the case laws of India and other countries gave a non exhaustive list of acts that may amount to mental cruelty. It was held that:

> "72. On proper analysis and scrutiny of the judgments of this Court and other Courts, we have come to the definite conclusion that there cannot be any comprehensive definition of the concept of 'mental cruelty' within which all kinds of cases of mental cruelty can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.

……

74. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behavior which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behavior of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be

very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behavior of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty." **(Para 20)**

Cruelty thus depends on case to case basis and what may be cruelty in one case may not be cruelty in the other. Sometimes a taunt or an insult may be more painful than a physical assault. The factors that may be considered are the social status of the parties, the economic background, education and upbringing, for coming to the conclusion whether the conduct complained of would touch the pitch of severity which would make it impossible for the parties to live with each other. The incidents alleged in the present case are of a nature where apart from the actual physical assault by the brother and father of the appellant on different occasions, evidently the appellant has herself not fulfilled her marital obligations. The parties got married on 13.4.90, and on the honeymoon itself there arose differences between them. The appellant left the house for the first time within two months of her marriage which is highly unusual for a newly married lady unless something catastrophic takes place. The petition for divorce was filed by the respondent on 15.1.92, just within a period of almost two years from the date of the marriage demonstrating that the desiderata of matrimony, understanding and tolerance were abysmally amiss between the parties. It was also proved on record by the respondent that the appellant had threatened to commit suicide on two occasions. It was held by the Apex Court in

the case of **N.G Dastane vs S.Dastane** AIR 1975 SC 1534 that the threat by the spouse to put an end to her own life would amount to cruelty. It was further reiterated by this court in the case of **Smt.Savitri Balchandani vs. Mulchand Balchandani** AIR 1987 Delhi 52 and now recently by the Bombay High Court in 2009 in the case of **Mrs. Sanjivani Vs. Mr. Bharat** that the threat by the wife to commit suicide would come in the ambit of mental cruelty. The threat of ending her life by the wife and constant bickering to the extent that the husband has to invariably make sure that she does not take an extreme step to commit suicide would undoubtedly create a hostile atmosphere where the wife would treat the husband as her enemy and would certainly cause great stress to the husband. Hence, the persistent piquing conduct of the appellant in the present case is antithetic to the natural love, affection, trust and conjugal kindness and has caused to the respondent mental pain, agony and suffering which amounts to mental cruelty as envisaged under section 13(1) (ia) of the Act. **(Para 21)**

It is often found that the malaise of the interference of parents in the married life of their daughters has become a major cause playing havoc with the matrimonial lives of young couples. All the parents guide, teach and discipline their daughters and are concerned about her welfare after marriage but it is imperative for the parents to draw a line as the prime concern should be that their daughter is happily settled in a new atmosphere at the husband's place but not with day–to-day monitoring of the affairs taking place at the matrimonial home of the daughter. Parents should not become uninvited judges of the problems of their daughter, becoming an obstacle in the daughter's married life, to plant thoughts in her mind and gain control over her and promoting disharmony in her family life. They are expected to advise, support and believe in their upbringing maintaining a discreet silence about the affairs of the matrimonial relationship. The present case is an unfortunate example where the parents of the appellant, instead of putting out the fire have fuelled

and fanned it, resulting in the disruption of the sacred bond of marriage. **(Para 22)**

Important Issue Involved: (i) The word cruelty is not defined and it is not possible to put concept of in strait jacket formula (ii) the cruelty can be physical or mental, intentional or unintentional.

[Gu Si]

APPEARANCES:

FOR THE PETITIONER : Mr. R.P. Shukla with Mr. Ganjanan Kumar, Advocates.

FOR THE RESPONDENT : Mr. K.R. Chawla, Advocate.

CASES REFERRED TO:

1. *Neelam Kumar* vs. *Dayarani* JT 2010 (6) SC 441.
2. *Sujata Uday Patil* vs. *Uday Patil* I (2007) DMC 6 SC.
3. *Samar Ghosh* vs. *Jaya Ghosh* (2007) 4 SCC 511.
4. *Pranati Chatterjee* vs. *Goutam Chatterjee* I (2007) DMC 89 DB Calcutta High Court.
5. *Rita Das Biswas* vs. *Trilokesh Das Biswas* I (2007) DMC 96 DB Gauhati High Court.
6. *Sanghamitra Ghosh* vs. *Kajal Kumar Ghosh* I (2007) DMC 105 SC.
7. *Naveen Kohli* vs. *Neelu Kohli* I (2006) DMC 489 SC.
8. *Mahant Mela Ram* vs. *SGPC* AIR 1992 P & H 252.
9. *Smt.Savitri Balchandani* vs. *Mulchand Balchandani* AIR 1987 Delhi 52.
10. *Traders Syndicate* vs. *Union of India* AIR 1983 Calcutta 337.
11. *N.G Dastane* vs. *S.Dastane* AIR 1975 SC 1534
12. *M/s Chunni Lal* vs. *Hartford Fire Insurance* AIR 1958 Punjab 440.

RESULT: Appeal Dismissed.

KAILASH GAMBHIR, J.

1. By this appeal filed under Section 28 of the Hindu Marriage Act, 1955 the appellant seeks to set aside the 3rd judgment and decree dated June, 2003 passed by the learned Addl. District Judge, Delhi, whereby the petition filed by the respondent under Section 13(1) (ia) and (ib) of the Hindu Marriage Act was allowed and the marriage between the parties was dissolved on the ground of cruelty under Section 13(1) (ia) of the said Act.

2. Brief facts of the case relevant for deciding the present appeal are that the parties got married on 13.4.90 at Delhi according to Hindu rites and ceremonies. Problems started from the very inception of the marriage from the time of the honeymoon and continued till the time they stayed together. The main allegation of the respondent was that the appellant was under the influence of her parents and would leave the matrimonial home time and again. Disturbed by the cruel conduct of the appellant, the respondent filed a petition for divorce on the ground of cruelty and desertion which vide judgment and decree dated 3. 6.03 was granted on the ground of cruelty. Feeling aggrieved with the same, the appellant has preferred the present appeal.

3. Mr.R.P.Shukla, learned counsel appearing for the appellant contended that the Exhibit PW-1/1, on which reliance has been placed by the learned trial court, was forcefully got signed from the appellant. The contention of the counsel was that the respondent husband clearly told the appellant that if she wanted to save her marriage then she had to sign the said agreement. Counsel thus submitted that the said agreement was not signed by the appellant out of her own will and volition, but only with a view to save her matrimony. So far the allegation of suicide against the appellant is concerned, counsel contended that the respondent in his own cross-examination has admitted the fact that the appellant could not have inserted her finger in the socket due to the narrow width of the hole. Counsel further submitted that the respondent had also admitted in his cross-examination that there were no power plugs in any portion of the tenanted home where the parties were living together. Counsel also submitted that the respondent also failed to prove the fact that the appellant made any attempt to commit suicide by laying herself in front of the

DTC bus. The contention of the counsel was that the appellant being a working woman has been travelling quite often in the DTC buses and, therefore, she was not expected to take such a step. Counsel also submitted that so far the affidavit Exhibit PW-1/2 is concerned, firstly the same was not proved in accordance with the law and secondly nobody would execute such an affidavit unless the same was to be filed in a court of law. Counsel for the appellant further submitted that the allegation of the respondent that he was not served with dinner when he visited his in laws in the month of May, 1990 is highly improbable. The contention of counsel for the appellant was that it would be inconceivable that once the husband was invited over dinner by the in-laws then he would not be served with dinner while the other family members would take dinner. Counsel thus stated that the learned Trial Court has wrongly placed much reliance on this incident, which in the given circumstances was highly improbable.

4. Counsel for the appellant further submitted that even the incident of 9.5.90 lacks any credibility as the respondent himself has admitted the fact that it was a working day when he extended invitation to his friend Mr. Kaushal Kumar Malik for lunch. The contention of counsel was that the appellant was also working in the same office and, therefore, on a working day it was highly improbable that the husband would send his wife to the residence to prepare lunch for all the three persons. Counsel also submitted that the said witness Mr. Kaushal Kumar Malik was not produced in evidence by the respondent and for withholding the said material witness the learned Trial Court ought to have drawn an adverse inference against the respondent. Counsel also submitted that the respondent in his cross examination admitted the fact that he reached back home at 4.00 P.M. on 9.5.1990 alongwith his friend which cannot be a usual time for taking lunch as the respondent in his cross examination admitted the fact that usually he took lunch at 2 p.m or 2.30 p.m. Counsel also submitted that no quarrel or any incident had taken place on 9.5.1990. PW—2 Smt. Nirmala Tiwari in her evidence clearly admitted the fact that no fight took place between the parties on 9.5.1990. Counsel contended that no evidence was led by the respondent to prove the fact that the appellant had cut short the honeymoon trip at the instance of her parents and even in the absence of any proof the learned trial court has heavily relied upon the said allegation. Counsel submitted that the respondent also did not prove the fact that after cutting short the said honeymoon

trip he had joined the office before the leave period expired. Counsel further submitted that the parties would not have stayed at Ambala after their return from honeymoon had there been any curtailment in the honeymoon period at the instance of the appellant. Counsel also submitted that it is not the case of the respondent that the appellant had immediately gone to the house of her parents after returning from honeymoon. Counsel submitted that the respondent failed to prove on record that any complaint was lodged by the appellant with the RBI Women Forum as no evidence was led by the respondent to prove such a fact. Counsel further submitted that a false allegation was leveled by the respondent that he was not being allowed to visit his parents' house at Ambala and the falsity of this allegation is apparent from the fact that even the delivery of the first child had taken place at Ambala while better medical facilities were available in Delhi. Counsel further submitted that the learned trial court has also given a wrong finding with regard to Ex. PW1/3 dated 14.8.90, as the said document was neither signed by the appellant nor by her parents. PW 3 Mr. B.L Chawla has also deposed in his evidence that the said document was not signed by the appellant. In support of his arguments, counsel for the appellant placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Neelam Kumar Vs. Dayarani** JT 2010 (6) SC 441.

5. Refuting the arguments of counsel for the appellant, Mr. Chawla counsel for the respondent submitted that the appellant in her cross examination as RW—1 has duly admitted not only her own signatures but the signatures of her mother and brother on Ex. PW1/1 and same is the position so far her affidavit Ex. PW1/2 is concerned. The contention of the counsel was that appellant is a well educated lady holding M.Com degree and therefore she had signed the said document after having fully gone through the contents of the same and it was never the case of the appellant that she had signed the said document to save her marriage.

6. Counsel further submitted that differences between the parties had arisen right at the beginning of their married life and the appellant had left the matrimonial house on 5.6.90. The contention of the counsel was that the said agreement dated 14.6.90 was signed by the appellant after fully realizing her faults and the respondent wanted to ensure that she would not repeat any such acts again. Counsel thus submitted that a detailed affidavit was signed by the appellant which was duly witnessed

by the parents of the appellant and father of the respondent and other witnesses. Counsel further submitted that the appellant in her cross-examination also admitted the fact that she was not happy during her stay at Shimla. Counsel also submitted that the appellant did not cross-examine PW—2, Smt. Nirmala Tiwari on her deposition with regard to the attempts made by the appellant to commit suicide, first time by making an attempt to insert her finger in the socket and second time by threatening to come under the DTC bus. PW—2 further confirmed the visit of Mr. Kaushal Malik on 9.5.90 and she was not cross-examined by the appellant so as to refute the visit of Mr. Kaushal Malik on that day.

7. Counsel for the respondent further argued that the respondent had duly proved on record the incident which had taken place on 05.06.1990 when the respondent was humiliated by the father of the appellant in the presence of the local people. Drawing attention of this Court to the cross-examination of PW-1, counsel submitted that the visit of the appellant's parents to the matrimonial house at Multan Nagar on 05.06.1990 has been duly admitted by the appellant herself, as suggestion was given by the appellant to the respondent confirming the visit of the appellant's parents on the said date. Counsel also stated that Ex.PW-1/1 and Ex.PW1/2 were executed by the appellant keeping in view the entire background of the facts of the preceding dates. Counsel also stated that the visit of Mr. Kaushal Kumar Malik has been duly admitted by the appellant herself, although she has taken a stand that he was invited for tea and there was no provision in the house to offer lunch to him. Counsel also stated that visit of Mr.Kaushal Kumar Malik has also been confirmed by PW-2 Smt.Nirmala Tiwari in her evidence. In support of his arguments, counsel for the respondent placed reliance on the following judgments:

(i) **Naveen Kohli vs. Neelu Kohli** I (2006) DMC 489 SC

(ii) **Sujata Uday Patil vs. Uday Patil** I (2007) DMC 6 SC

(iii) **Pranati Chatterjee vs. Goutam Chatterjee** I (2007) DMC 89 DB –Calcutta High Court

(iv) **Rita Das Biswas vs. Trilokesh Das Biswas** I (2007) DMC 96 DB –Gauhati High Court

(v) **Sanghamitra Ghosh vs. Kajal Kumar Ghosh** I (2007) DMC 105 SC

(vi) **M/s Chunni Lal vs. Hartford Fire Insurance** AIR 1958

Punjab 440

(vii) **Traders Syndicate vs. Union of India** AIR 1983 Calcutta 337

(viii) **Mahant Mela Ram vs. SGPC** AIR 1992 P & H 252

8. I have heard learned counsel for the parties at considerable length and gone through the records.

9. The respondent had filed a petition under Section 13(1) (ia) and (ib) of the Hindu Marriage Act, 1955 and vide judgment and decree dated 03.06.2003, the learned trial court allowed the petition of the respondent on the ground of cruelty under Section 13 (1) (ia) of the said Act, while on the ground of desertion, the petition was dismissed. Feeling aggrieved with the said judgment and decree, the appellant-wife has preferred the present appeal, while a cross-appeal was also filed by the respondent challenging the finding of the learned trial court dismissing the petition of the respondent under Section 13 (1) (ib) of the said Act on the ground of desertion.

10. During the course of arguments, learned counsel for the respondent did not press the cross-appeal filed by the respondent and, therefore, arguments were heard by this Court confining to the challenge made by the appellant to the said judgment and decree dated 03.06.2003.

11. The prime incidents of cruelty mainly relied upon by the learned trial court in the impugned judgment and decree dated 03.06.2003 can be enumerated as under:

(i) As per the respondent, the agreement and affidavit dated 14.6.90 duly proved on record by the respondent as Ex.PW-1/1 and Ex. PW-1/2 respectively, clearly reflect that there was a constant interference of the parents of the appellant in the matrimony as the appellant was under the constant influence of her parents and she used to leave the matrimonial house time and again at the instance of her parents.

(ii) The appellant made an attempt to commit suicide by inserting her finger in the socket in the first week of August, 1990 and once she also gave a threat to commit suicide by laying before the DTC bus.

(iii) The document Ex.PW-1/3 was proved on record by PW-3 Shri B.L.Chawla to prove the fact that the appellant had left the company of the respondent at the instance of her parents. By this document also, the respondent proved the continuous interference of the parents of the appellant in their matrimonial life.

(iv) Humiliation of the respondent when a colleague of the respondent Mr.Kaushal Malik was not served with lunch on 09.05.1990, although he was invited for lunch and the appellant was sent back home from her office to prepare lunch for them.

(v) On 5.6.90, both the parents of the appellant came to the matrimonial home at Multan Nagar and the father of the appellant was drunk and created a scene outside the house by alleging that the respondent had taken dowry in the marriage and that the appellant is not being given food.

(vi) Physical assault of the respondent by the father of the appellant at appellant's parental house in the presence of the appellant after the celebration of their first marriage anniversary at Ambala on 13.4.91.

(vii) Manhandling of the respondent by the brother of the appellant on 03.07.1991, the incident which happened in the presence of the land lady Mrs.Nirmala Tiwari and a tenant Mrs.Jain.

12. The marriage between the parties was solemnized according to Hindu rites and ceremonies on 13.04.1990 and the relationship between the parties soured right from the very beginning. As per the respondent, their honeymoon trip was curtailed due to the intervention of the parents of the appellant. Execution of the agreement and the affidavit just within a period of about two months of the marriage no doubt is an unusual step, but the precise question which would arise is that under what circumstances the need arose for the parties to execute the agreement Ex.PW-1/1 and for the respondent to sign the affidavit Ex.PW-1/2.

13. Learned counsel for the appellant vehemently argued that the said affidavit and the agreement were signed by the appellant just with a view to save her marriage, as otherwise she would not have agreed to

sign the said documents. Undoubtedly, both the parties are well educated and were employed in the same Bank and it cannot be easily believed that the appellant would have signed such a detailed agreement duly supported by her affidavit without there being any background of repeated visits of the appellant to her parental home and constant interference of the parents of the appellant in her matrimonial life. So far the averments of the agreement and affidavit highlighting the fact that there was no exchange of dowry articles and only a few articles were presented in the marriage and that the marriage was a simple affair , this Court does not find anything wrong in the same as due to stringent criminal provisions, the parents and the family members of the husband often become the easy targets and victims of humiliation and embarrassment visiting the Crime Against Women Cell, Police Stations and the Courts and sometimes to the extent of suffering imprisonment. It was probably to save such a situation, that the aforesaid assertions relating to dowry articles must have been inserted in the said agreement and affidavit. Through the said affidavit, the parents of the appellant also gave some sort of assurance to the respondent that they will not interfere in any manner whatsoever in the matrimonial lives of the parties. Such a written statement given by the parents of the appellant does give strength to the plea of the respondent that there was a constant interference from the side of the parents and family members of the appellant in their matrimonial life. The said agreement and the affidavit have not been disputed by the appellant. The agreement is also signed by the appellant, her parents as well as her brotherand from the side of the respondent, the respondent himself, his father Mr. Kedar Nath Khanna, Mr O.P Tiwari and Mr. K.K Malik. The plea taken by the appellant that the said affidavit and the agreement were signed by her under threat is not at all convincing as the said affidavit and the agreement were not only signed by the appellant herself but by her parents and brother as well. The appellant has also taken a plea in her written statement that the respondent had procured her signatures on blank papers and blank stamp papers and even she had signed the suicide note with a view to save her marriage, but no weightage can be given to such unsubstantiated pleas as the appellant has not produced her parents and her brother in the witness box to prove her defence that the said documents were executed by all of them under the alleged threat of the respondent. There is thus no reason to disbelieve the said documents duly proved on record as Ex.PW-1/1 and PW-1/2 which give a clear

picture about the continuous interference of the parents in the matrimonial life of the appellant and her husband.

14. The second incident, on which reliance was placed by the learned trial court to grant decree of divorce on the ground of cruelty, was that the appellant had once attempted to commit suicide by inserting her finger in the socket and second time when she had given a threat to lay down before the DTC bus. This testimony of the respondent-husband was duly corroborated by PW-2 Smt.Nirmala Tiwari, the land lady of the house, who is an independent witness. The learned trial court has rightly given due credence to the testimony of PW-2 Smt.Nirmala Tiwari, who in her cross-examination, deposed that in her presence the appellant gave a threat of committing suicide by coming in front of DTC bus. PW-2 also supported the testimony of the respondent-husband with regard to the attempt made by the appellant in the year 1990 to commit suicide by putting her finger in the socket. The argument of counsel for the appellant that the width of the socket was too narrow for the insertion of the finger lacks force as it is not the case of the respondent that literally she had put her finger inside the socket and had it been so then certainly the appellant would have received an electric shock, which is not the case of the respondent in the divorce petition.

15. Considering the next incident with regard to the document Ex. PW 1/3, the argument of counsel for the appellant was that Ex.PW-1/3 dated 14.08.1990 was neither signed by the appellant nor by her parents and, therefore, no weightage could have been given by the learned trial court to such a document. This argument of learned counsel for the appellant is devoid of any force as Mr.B.L.Chawla entered the witness box and proved the said document as Ex.PW-1/3. The appellant has not disputed the fact that she left the matrimonial house on 14.08.1990 when the said writing was executed by Mr.B.L.Chawla. Simply because the said document was not signed by the appellant and her parents would not imply that no meeting was arranged of the people of the locality on 14.08.1990 or that the appellant did not take the decision to leave the matrimonial home on 14.08.90.

16. Coming to the next incident of 9.5.1990 when a friend of the respondent husband was invited for lunch at their house, the argument of the counsel for the appellant was that the respondent did not suffer any humiliation, as the respondent could not have invited his friend for

lunch on a working day. The contention of counsel for the appellant was that the name of Mr.Kaushal Kumar Malik was duly enlisted in the list of witnesses of the respondent, but still he was not produced in the witness box to depose and therefore the learned trial court should have drawn an adverse inference against the respondent. This argument of counsel for the appellant is also devoid of any merit. No doubt Mr. Kaushal Kumar Malik would have been the best witness to prove the alleged humiliation inflicted by the appellant on the respondent on that day when he was invited for lunch, but considering the fact that PW2 Smt. Nirmala Tiwari, who is the landlady of the respondent and is residing in the same very property in her deposition confirmed the visit of the said friend Mr. Kaushal Kumar Malik on 9.5.1990 and also the fact that the appellant in her deposition also admitted the visit of Mr. Malik on the same day, therefore, withholding of the said evidence of Mr. Kaushal Kumar Malik will not prove fatal to the case of the respondent. The appellant in her examinationin-chief has admitted the fact that she had served the said friend with tea and biscuits and on that the respondent started quarrelling with her in the presence of the said friend on the ground that she had not prepared food for him. The explanation given by the appellant for not preparing the food in her examination-in-chief is that there was no provision in the house and secondly because it was not the time for dinner. This explanation given by the appellant cannot hold any water. To say that there was no provision in the house for preparing lunch and the time when the said friend of the respondent visited the house was not suitable for dinner, cannot be accepted as once the husband and wife are both earning and are residing together the kitchen of the house is expected to be properly equipped with necessary grocery and eatable items. So far question of timing for lunch is concerned, the same can always vary and lunch at 4 p.m in metropolitan cities like Delhi is not that unusual.

17. So far the incident of 05.06.1990 when the respondent was alleged to have been humiliated by the father of the appellant in the presence of the local people is concerned; it was proved on record by the respondent that the parents of the appellant had visited the matrimonial house at Multan Nagar on 05.06.1990. The affidavit and the agreement which were executed by the appellant and her parents on 14.06.1990 also clearly suggest that the said incident of 05.06.1990 was a pre-cursor to the execution of the said documents. The testimony of the respondent

about the said incident of 05.06.1990 remained unrebutted as nothing contrary to the same could be elicited by the appellant from the respondent during his cross-examination.

19. Without going into the other allegations of cruelty leveled by the respondent and the minor contradictions in the cross-examination of the evidence of the respondent and the two witnesses adduced by him, there is no room to disbelieve the case of the respondent duly proved by him with the help of the said two witnesses PW 2 and PW3. I also do not find any infirmity in the finding of the learned Trial Court taking a view that the agreement and the affidavit proved on record by the respondent as Exhibit PW 1/1, PW 1/2 explicitly show that there was a regular interference from the side of the parents of the appellant and she used to leave the matrimonial home at their provocation and instigation and due to that there arose a need to execute the said documents.

20. Now the question that arises before the court is that whether the above said acts proved by the respondent amount to 'cruelty' as envisaged under section 13(1) (ia) of the Hindu Marriage Act, 1955 for dissolution of marriage. Cruelty has not been defined in the Act and rightly so as it is not possible to put this concept in a strait jacket formula. Cruelty can be physical or mental, intentional or unintentional. The present is a case of mental cruelty where the respondent husband has alleged that the behaviour of the appellant caused him mental pain, suffering and humiliation. But it cannot be lost sight of the fact that the normal wear and tear of married life cannot be stretched too far to be regarded as cruelty for the purposes of this section. The conduct complained of should be grave and weighty so as to satisfy the conscience of the court that the relationship between the parties has deteriorated to such an extent that it cannot be reasonably expected by them to live together without mental pain, agony and distress. The Hon'ble Apex Court in the case of **Samar Ghosh vs. Jaya Ghosh** (2007) 4 SCC 511 after analyzing all the case laws of India and other countries gave a non exhaustive list of acts that may amount to mental cruelty. It was held that:

> "72. On proper analysis and scrutiny of the judgments of this Court and other Courts, we have come to the definite conclusion that there cannot be any comprehensive definition of the concept of 'mental cruelty' within which all kinds of cases of mental

cruelty can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.

……

74. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behavior which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behavior of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behavior of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

21. Cruelty thus depends on case to case basis and what may be cruelty in one case may not be cruelty in the other. Sometimes a taunt

or an insult may be more painful than a physical assault. The factors that may be considered are the social status of the parties, the economic background, education and upbringing, for coming to the conclusion whether the conduct complained of would touch the pitch of severity which would make it impossible for the parties to live with each other. The incidents alleged in the present case are of a nature where apart from the actual physical assault by the brother and father of the appellant on different occasions, evidently the appellant has herself not fulfilled her marital obligations. The parties got married on 13.4.90, and on the honeymoon itself there arose differences between them. The appellant left the house for the first time within two months of her marriage which is highly unusual for a newly married lady unless something catastrophic takes place. The petition for divorce was filed by the respondent on 15.1.92, just within a period of almost two years from the date of the marriage demonstrating that the desiderata of matrimony, understanding and tolerance were abysmally amiss between the parties. It was also proved on record by the respondent that the appellant had threatened to commit suicide on two occasions. It was held by the Apex Court in the case of **N.G Dastane vs S.Dastane** AIR 1975 SC 1534 that the threat by the spouse to put an end to her own life would amount to cruelty. It was further reiterated by this court in the case of **Smt.Savitri Balchandani vs. Mulchand Balchandani** AIR 1987 Delhi 52 and now recently by the Bombay High Court in 2009 in the case of **Mrs. Sanjivani Vs. Mr. Bharat** that the threat by the wife to commit suicide would come in the ambit of mental cruelty. The threat of ending her life by the wife and constant bickering to the extent that the husband has to invariably make sure that she does not take an extreme step to commit suicide would undoubtedly create a hostile atmosphere where the wife would treat the husband as her enemy and would certainly cause great stress to the husband. Hence, the persistent piquing conduct of the appellant in the present case is antithetic to the natural love, affection, trust and conjugal kindness and has caused to the respondent mental pain, agony and suffering which amounts to mental cruelty as envisaged under section 13(1) (ia) of the Act.

22. It is often found that the malaise of the interference of parents in the married life of their daughters has become a major cause playing havoc with the matrimonial lives of young couples. All the parents guide,

teach and discipline their daughters and are concerned about her welfare after marriage but it is imperative for the parents to draw a line as the prime concern should be that their daughter is happily settled in a new atmosphere at the husband's place but not with day–to-day monitoring of the affairs taking place at the matrimonial home of the daughter. Parents should not become uninvited judges of the problems of their daughter, becoming an obstacle in the daughter's married life, to plant thoughts in her mind and gain control over her and promoting disharmony in her family life. They are expected to advise, support and believe in their upbringing maintaining a discreet silence about the affairs of the matrimonial relationship. The present case is an unfortunate example where the parents of the appellant, instead of putting out the fire have fuelled and fanned it, resulting in the disruption of the sacred bond of marriage.

23. Based on the above discussion, this Court does not find any illegality or infirmity in the impugned judgment and decree passed by the learned Trial Court. The judgment of the Apex Court relied upon by the learned counsel for the appellant in the case of **Neelam Kumar** (supra) will be of no help to the case of the appellant as the ground of irretrievable break down of marriage has not been taken into consideration to uphold the order of the learned Trial Court.

24. In the light of the foregoing, there is no merit in the present appeal and the same is hereby dismissed.

ILR (2011) V DELHI 509
RSA

SHRI DEEP CHAND BHARTI ....APPELLANT

VERSUS

M/S FOOD CORPORATION OF INDIA ....RESPONDENT

(INDERMEET KAUR, J.)

RSA NO.: 121/2009 DATE OF DECISION: 16.03.2011

Constitution of India, 1950—Article 311 (2)—Code of Civil Procedure, 1908—Suit for declaration, permanent injunction mandatory injunction—Service Law—FCI (Staff) Regulation, 1971—Regulation 31-A—Regulation 63—Disciplinary proceedings—Probation of Offenders Act—S. 12—Plaintiff was appointed as draftsman with Food Corporation of India (FCI) on 16.04.1999—Convicted and sentenced for offence punishable u/s 325 and 149 IPC with imprisonment and fine—Sentence suspended-on 26.04.1999—Informed his employer only on 4.6.1999 of involvement and conviction—In revision against the sentence, sentence modified and was released on probation for two years vide judgment dated 12.07.2002—Respondent dismissed appellant from service vide order dated 31.07.2003—Plaintiff filed a suit against termination of service—Contended, release on probation did not carry any disqualification—Suit contested on the ground that plaintiff had not come to court with clean hands—Trial Court held: Mere release on probation does not mean that he is absolved of moral turpitude and had concealed material facts—Not informed department of his criminal proceedings pending against him —Services rightly terminated—In the first appeal, findings of court affirmed—Second appeal preferred—Held that

interference with finding of fact are called for only if the same are perverse—Employee cannot claim a right to continue in the service merely on the ground that he had been given benefit of u/s 12 of Probation of Offenders Act—The act of appellant in concealing the fact of his involvement in criminal proceedings and his resultant conviction being dishonest, amounts to moral turpitude; not entitled to benefit—Appeal dismissed.

In **Sushil Kumar Singhal** (supra) while dealing with the provisions of Section 12 of the Probation of Offenders Act the word "disqualification" attached to it the Apex Court had noted as follows:

> "18.In view of the above, the law on the issue can be summarized to the effect that the conviction of an employee in an offence permits the disciplinary authority to initiate disciplinary proceedings against the employee or to take appropriate steps for his dismissal/removal only on the basis of his conviction. The word "disqualification" contained in Section 12 of the 1958 Act refers to a disqualification provided in other statutes, as explained by this Court in the above referred cases, and the employee cannot claim a right to continue in service merely on the ground that he had been given the benefit of probation under the 1958 Act." **(Para 14)**

Moral turpitude has in fact been defined by the Supreme Court in the case reported in (1996) 4 SCC 17 **Pawan Kumar Vs. State of Haryana.** It is an expression which is used in legal as also at societal parlance to describe conduct which is inherently base, vile, depraved or having any connection showing depravity. In (1997) 4 SCC1 **Allahabad Bank Vs. Deepak Kumar** Bhola this expression "moral turpitude" was reconsidered to be explained as follows:

"The expression 'moral turpitude' is not defined anywhere. But it means anything done contrary to justice, honesty, modesty or good morals. It implies depravity and wickedness of character or disposition of the person charged with the particular conduct. Every false statement made by a person may not be moral turpitude, but it would be so it if discloses vileness or depravity in the doing of any private and social duty which a person owes to his fellow men or to the society in general. If therefore the individual charged with a certain conduct owes a duty, either to another individual or to the society in general, to act in a specific manner or not to so act he will still acts contrary to it and does so knowingly, his conduct must be held to be due to vileness and depravity. It will be contrary to accepted customary rule and duty between man and man." **(Para 15)**

Important Issue Involved: (i) The expression moral turpitude means anything done contrary to justice, honesty, modesty or good morals, (ii) The word disqualification contained in Probation of Offenders Act 1958 refers to disqualification provided in other statutes, (iii) an employee cannot claim right to continue in service merely on the ground that he had been given benefit of probation under Probation of Offenders Act, 1958.

[Gu Si]

APPEARANCES:

FOR THE PETITIONER : Mr. R.S. Hegde & Mr. Prakash Chandra Sharma, Advocate.

FOR THE RESPONDENT : Ms. Neelam Singh Advocate with Mr. Tapas Ranjan Sethi Manager (Legal).

CASES REFERRED TO:

1. *Sushil Kumar Singhal* vs. *Regional Manager, Punjab National Bank* (2010) 8 SCC 573.
2. *State of M.P.* vs. *Hazari Lal* (2008) 3 SCC 273.
3. *Allahabad Bank* vs. *Deepak Kumar* (1997) 4 SCC1.
4. *Pawan Kumar* vs. *State of Haryana* (1996) 4 SCC 17.

RESULT: Appeal Dismissed.

INDERMEET KAUR, J. (Oral)

1. This appeal has impugned the judgment and decree dated 5.6.2009 which had endorsed the finding of the trial judge dated 22.8.2007 whereby the suit filed by the plaintiff Deep Chand Bharti seeking declaration, permanent and mandatory injunction to the effect that the order terminating his service be declared null and void was dismissed.

2. On 18.8.1978 the plaintiff was appointed as a draftsman with the Food Corporation of India (hereinafter referred to as 'the FCI'). He had a unblemished record. On 16.4.1999 he was convicted under Section 325 and 149 of the Indian Penal Code (hereinafter referred to as 'the IPC'). He was sentenced on 17.4.1999. On 4.9.2009 he was suspended from his service. Plaintiff filed his appeal against his conviction order dated 16.4.1999; it was modified; plaintiff was released on probation vide judgment dated 12.7.2002. These facts were duly informed to the defendant department. Nevertheless the defendant vide order dated 31.7.2003 dismissed the plaintiff from his service. This has been challenged by way of the present suit. Contention is that the plaintiff had been released on probation under section 12 of the Probation of Offenders Act (hereinafter referred to as 'the act'). Plaintiff did not suffer from any "disqualification" in terms of Article 311(2) of the Constitution of India. He is liable to be reinstated.

3. In the written statement position was disputed. It was denied that the plaintiff had informed the department about the criminal proceedings which were initiated and pending against him. It was pointed out that the defendant had not come the court with clean hands.

4. Seven issued were framed by the trial judge. Oral and documentary evidence was led. FCI (Staff) Regulations 1971 were adverted to. The

order dismissing the services of the plaintiff is dated 31.7.2003. Trial judge was of the opinion that in view of the conviction which had been suffered by the plaintiff in a criminal case under Section 325 read with Section 149 of the IPC although he has been released on probation yet this did not mean that he had been absolved of a moral turpitude; he had suffered a disqualification; he had also concealed material facts and not disclosed the details of the criminal proceedings pending against him. His services were rightly terminated.

5. This finding of the trial judge was affirmed in appeal vide the impugned judgment. The finding returned is as follows:

> " The appellant/plaintiff was no doubt released on probation but he was not entitled to benefit of Section 12 of Probation of Offenders Act as the appellant/plaintiff was termination as he did not inform the department that he had been arrested in a criminal case. This act of the appellant/plaintiff amounted to moral turpitude.
>
> The termination of service of appellant/plaintiff was not on ground of conviction, but for concealment of the said fact from the Department. The respondent/defendant was therefore, authorzed to terminate the services of appellant/plaintiff as Food Corporation of India Staff Regulation 1971.
>
> The Ld. Trial court did not err in holding that as per Section 12 of Probation of Offenders Act the disqualification shall attach with the conviction by specific provisions and in the present case no such disqualification is given in IPC. Hence, Section 12 of Probation of Offenders Act is not applicable.
>
> The appellant/ plaintiff contended that he was terminated on 31.07.2003 without holding an inquiry which was against the principles of natural justice and in violation of Article 14. If the order dated 31.07.2003 is illegal, then the appellant/plaintiff is to approach the appropriate/competent authority so as to exhaust all alternative available remedies as the suit was not maintainable and the court cannot sit in appeal against the order of the Defendant/Respondent Department on 31.07.2003.

> If the plaintiff is aggrieved by order dated 31.07.2003 then the right course was to file an appeal in appropriate authority. The applicant/plaintiff did not exhaust all other remedies available to him and the Ld. Trial Court did not commit any error in holding that the suit was not maintainable."

6. On behalf of the appellant, it has been urged that finding of the two courts below are illegal. The impugned judgment suffers from a perversity. The punishment of dismissal awarded to the plaintiff for an offence under Section 325 of the IPC when admittedly he had also been released on probation is a penalty which is disproportionate to any misdemean or if any on the part of the appellant. Learned counsel for the appellant has placed reliance upon a judgment of the Apex court reported in (2008) 3 SCC 273 **State of M.P. Vs. Hazari Lal** to support this submission. It is pointed out that in this case also in similar circumstances where the employee had been convicted under the provision of Section 323 of the IPC and has been sentenced with a fine only, his dismissal from service without any enquiry was not called for; the Apex Court had interfered with this finding and set it aside. Learned counsel for the appellant has submitted that this judgment is applicable on all four corners of the case of the appellant. The impugned judgment is also accordingly liable to be set aside.

7. Arguments have been countered. It is pointed out that the FCI (Staff) Rules enable the department to dismiss an employee by following a special procedure without an enquiry. Reliance has been placed upon (2010) 8 SCC 573 **Sushil Kumar Singhal Vs. Regional Manager, Punjab National Bank** to support a submission that release on probation does not entitle a person to ask for reinstatement in service. Such a conviction suffers a disqualification.

8. This is a second appeal. Interference with the findings of fact are called for only if the same are perverse. The substantial questions of law have been embodied on page 22 of the appeal. They read as follows:

> "A. Whether the suit filed for declaration and other reliefs is maintainable in law?
>
> B. Whether the finding of the courts below that the suit is not maintainable without the plaintiff exhausting the alternative remedy

of appeal is sustainable in law?

C. Whether the order of termination passed without giving opportunity of hearing to the plaintiff is sustainable?

D. Whether in view of the binding decision of the Hon'ble Supreme Court in **State of M.P. Vs. Hazarilal**-(2008) 3 SCC 273 AIR 2008 SC 13000 whether the order of termination passed by the disciplinary authority without application of mind and without recording proper satisfaction is legal and valid?

E. Whether in the facts and circumstances of the case the impugned judgment of the courts below are sustainable in law?"

9. The order of the Disciplinary Authority dated 31.7.2003 dismissing the services of the plaintiff is a speaking order running into five pages (page-120 to 124) of the paper book. Admittedly the petitioner had been convicted for an office under Sections 323/325/326 read with Section 149 of the IPC vide judgment dated 16.4.1999. On 17.4.1999 he had been sentenced for a period of two years with a fine of `500/-; in default of payment of fine to undergo RI for two months under Section 325 read with Section 149 of the IPC; he has also been sentenced for the offence under Section 323 IPC to undergo RI for six months and to pay a fine of Rs. 300/-; in default of payment of fine to undergo RI for one month. On 26.4.1999 the sentence of the appellant was suspended. His revision before the ASJ was disposed of on 12.7.2002. His sentence was modified; he was released on probation for a period of two years. Conviction was maintained. The order of dismissal had recorded that the plaintiff had concealed material facts of his arrest and subsequent release on bail; he had informed his employer only vide his representation dated 04.6.1999. This amounted to a mis-conduct under Regulation 32-A of the FCI (Staff) Regulations. The penalty of dismissal was accordingly awarded.

10. The factual submissions as noted in the order dated 31.7.2003 are not in dispute. Learned counsel for the appellant has not been able to give the date as to when the criminal proceedings were initiated against him but admittedly when he was arrested for the said offence, he had not intimated it to the department. In fact till 4.6.1999 no information was given to the department about the criminal proceeding were pending against him. This was a dishonest concealment on the part of the plaintiff.

11. Regulation 63 of the FCI (Staff) Regulations, 1971 contains a special procedure in certain cases:

"63. Special procedure in certain cases:

Notwithstanding anything contained in Regulation 58 to Regulation 62:

(i) Where any penalty is imposed on an employee on the ground of conduct which had led to his conviction on a criminal charge; or

(ii) Where the disciplinary authority is satisfied for reasons to be recorded by it in writing that it is not reasonably practicable to hold an inquiry in the manner provided in these regulations.

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

The disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit."

12. Admittedly the plaintiff had been convicted in a criminal case. It is also admitted intimation of that all proceedings prior to this conviction (which was on 16.4.1999) had not been given by the plaintiff to the defendant. For the first time on 04.6.1999 the department had been informed. This was much after the date of his conviction. FIR would have been registered much prior thereto; learned counsel for the appellant has not been able to give the date of the registration of the FIR although specific query has been posed to him on this count. Disciplinary authority had passed a reasoned and speaking order. No interference is called for.

13. The facts of **Hazari Lal** (supra) are distinct. In that case the employee had been convicted under Section 323 of the IPC and had been sentenced to pay fine. He was a peon; it was noted that continuation of service in the department of such an employee would not bring a bad name. He was not convicted for any act involving moral turpitude. He was not punished for any heinous offence. In these circumstances, his order of dismissal was set aside. In the instant case, the petitioner has been convicted for a higher offence i.e. for the offence under Section 325 of the IPC and has been released on probation. His punishment is

also on a higher scale. That apart what had weighed utmost in the mind of the Disciplinary Authority was the fact that there was a dishonest concealment of facts by the appellant; there was not a whisper or any intimation made by him to his department about the criminal proceedings initiated and pending against him; even after his conviction which was on 16.4.1999, he waited up to 4.6.1999 to inform the department. This was a material and dishonest concealment, it amounted to a moral turpitude.

14. In **Sushil Kumar Singhal** (supra) while dealing with the provisions of Section 12 of the Probation of Offenders Act the word "disqualification" attached to it the Apex Court had noted as follows:

> "18.In view of the above, the law on the issue can be summarized to the effect that the conviction of an employee in an offence permits the disciplinary authority to initiate disciplinary proceedings against the employee or to take appropriate steps for his dismissal/removal only on the basis of his conviction. The word "disqualification" contained in Section 12 of the 1958 Act refers to a disqualification provided in other statutes, as explained by this Court in the abovereferred cases, and the employee cannot claim a right to continue in service merely on the ground that he had been given the benefit of probation under the 1958 Act."

15. Moral turpitude has in fact been defined by the Supreme Court in the case reported in (1996) 4 SCC 17 **Pawan Kumar Vs. State of Haryana.** It is an expression which is used in legal as also at societal parlance to describe conduct which is inherently base, vile, depraved or having any connection showing depravity. In (1997) 4 SCC1 **Allahabad Bank Vs. Deepak Kumar** Bhola this expression "moral turpitude" was reconsidered to be explained as follows:

> "The expression 'moral turpitude' is not defined anywhere. But it means anything done contrary to justice, honesty, modesty or good morals. It implies depravity and wickedness of character or disposition of the person charged with the particular conduct. Every false statement made by a person may not be moral turpitude, but it would be so it if discloses vileness or depravity in the doing of any private and social duty which a person owes to his fellow men or to the society in general. If therefore the individual charged with a certain conduct owes a duty, either to another individual or to the society in general, to act in a specific manner or not to so act he will still acts contrary to it and does so knowingly, his conduct must be held to be due to vileness and depravity. It will be contrary to accepted customary rule and duty between man and man."

16. The act of the plaintiff was clearly within the four corners of the moral turpitude; he was dishonest and actively concealed the fact that a criminal proceedings had been initiated and pending against him; that he had been convicted in the criminal proceedings. It was only after his conviction on 16.4.1999 that on 04.6.1999 he had chosen to make a representation to the department for the first time about these criminal proceedings against him.

17. The findings in the impugned judgment call for no interference. No substantial question of law has arisen. Dismissed.

ILR (2011) V DELHI 518
FAO

SATYA PAL CHOPRA ....APPELLANT

VERSUS

STATE & ORS. ....RESPONDENTS

(MOOL CHAND GARG, J.)

FAO NO. : 259/2009 DATE OF DECISION : 21.03.2011

Indian Succession Act, 1925—S.63 (c)-WILL—Grant of Probate—Indian Evidence Act, 1872—S. 68 Appreciation of evidence—Petition seeking probate of Will dated 5.8.1989 allegedly made by deceased with respect to her property in Pant Nagar Jungpura Extension bequeathing the same in favour of appellant to the exclusion of all other legal heirs—Deceased expired

on 8.1.1991 leaving behind three sons and two daughters—The sons and daughters except parents gave no objection—Respondent no. 2 gave no objection but described the Will as forged and fabricated by respondents No. 3 to 5—Also asserted Will dated 31.12.1989 in his favour—Filed separate probate petition—Appellant in order to prove Will examined himself and attesting witness, his brother Yaspal Chopra and one more attesting witness—Respondent no.4 examined himself and also examined attesting witnesses of the Will dated 31.12.1989—ADJ opined that deceased was of sound and disposing mind at the relevant time—Witnesses examined by appellant corroborated each other in their affidavit but material contradictions in cross-examination inter-alia witness specifically stated that his affidavit was typed and nothing was written in hand—Led to the inference that handwritten portion in his affidavit was written without his knowledge or witness telling lie—If the examination-in-chief ignored the entire statement of witnesses goes and cannot be considered or read in evidence—Hence not reliable—Also observed, PW-1 being son-in-law highly interested witness, had grouse against the respondent whose house he had to vacate—ADJ Held—There was suspicion regarding execution of Will dated 5.8.1989—Decided the issue against appellant—However found evidence of respondent with respect to the Will dated 31.12.1989 to be trustworthy—No effective cross-examination done on the manner of execution and attestation of Will—Granted probate in favour of fourth respondent—Court Held—Contradiction in the testimony of witnesses minor in nature since the evidence was recorded after a gap of many years and memory can fade—However, found one of the attesting witnesses i.e. son-in-law had reasons to depose against the respondent—Testimony of witnesses raises doubt about the veracity of their statements—Found the Will

dated 5.8.1989 shrouded with suspicious circumstances and Will dated 31.12.1989 was duly proved in accordance with requirement of Section 63 (c) of Indian Succession Act and Section 68 of Indian Evidence Act—Appeal Dismissed.

Further the contradictions in the statements of both the attesting witnesses of the first Will dated 05.08.1989, i.e. PW-1 and PW-2 though seems to be minor but still raises doubt, on the veracity of the statements made by both the attesting witnesses and gives an impression of something suspicious. On the other hand, a perusal of the statement deposed by the attesting witness , Shri Sanjeev Verma, RW4-1, appearing on behalf of the respondent is a clear statement inasmuch as appellant was unable to point out any contradiction in the statement of the witness, further no suggestions were made by the appellant that the second Will was forged and fabricated, in fact no effective cross-examination was done by the appellant on the point of manner of execution and attestation of the Will. The testimony of RW4-1 is in accordance with the requirements of Section 63(c) of Indian Succession Act and Section 68 of Evidence Act. More so, even the language of the second Will is quite clear in itself and specifies the reason behind the testatrix bequeathing her property in favour of the respondent, hence the second Will in totality along with the statement of the attesting witness do not raise any suspicion nor was appellant able to point out any such discrepancy either in the statement of the witness or in the Will. The second Will also supersedes any earlier Will and also describes the Will to be the last Will. **(Para 17)**

Important Issue Involved: (i) In order to prove the Will, the testimony of attesting witness should be trustworthy with respect to execution and attestation of Will.

[Gu Si]

APPEARANCES:

FOR THE APPELLANT : Mr. S.K. Mehra, Ms. Mamta Mehra, Advocates.

FOR THE RESPONDENTS : Ms. Padmini Handa, Ms. Monisha Handa, Mr. Mohit D. Ram, Advocates for R-4.

RESULT: Appeal dismissed.

MOOL CHAND GARG, J.

1. This appeal arises out of the order passed by the Addl. District Judge dated 18.05.2009 whereby the probate petition filed by the appellant for seeking letters of administration with Will dated 05.08.1989 annexed has been dismissed.

2. Briefly stating the facts of this case are; that a probate petition was filed by the appellant seeking probate of the Will dated 05.08.1989 alleged to have been executed by deceased Smt. Suhagwanti with respect to property No. 17/7, Pant Nagar, Jangpura Extension, New Delhi bequeathing that property in favour of the appellant to the exclusion of all other legal heirs of the deceased testatrix. Smt. Suhagwanti expired on 08.01.1991 leaving behind three sons, namely, Shri Satya pal Chopra the appellant, Shri Yash Pal Chopra, Shri Sushil Kumar Chopra the other two brothers of Satya Pal Chopra and two daughters, namely Smt. Usha Rani and Smt. Sunita. After the death of Smt. Sunita her legal heirs were also brought on record.

3. Respondent No.2 gave no objection. However, the Will was described as forged and fabricated by respondents No. 3 to 5. It was also the assertion of Sushil Kumar Chopra that Will dated 31.12.1989 was executed by the deceased in his favour. He also filed a separate probate petition subsequently on 07.08.2003 on the basis of the aforesaid Will which was contested by the appellant and Shri Yash Pal Chopra. On the pleadings, the following issues were framed by the Court:

"(1) Whether the Will dated 5.8.89 was the Will duly executed by the deceased and is the valid Will? OP-Satyapal

(2) Whether the Will dated 31.12.89 was duly executed by the deceased and is the valid will? OP-Sushil Kumar

(3) Which of the party is entitled to the probate in respect of what property?

(4) Relief"

4. In order to prove his case, appellant Shri Satya Pal Chopra examined himself as PW-3 and also examined two other witnesses namely S. Anil Vij, PW-1 and Shri Yash Pal Chopra PW-2 the attesting witnesses of the Will dated 5.8.89. Respondent No.4 Shri Sushil Kumar Chopra stepped into witness box as R4W-2 and also examined Shri Sanjeev Verma as R4W1 who is attesting witness of the Will dated 31.12.89.

5. Vide impugned order the Addl. District judge has opined that in the relevant period the deceased testator was of sound and disposing mind. In this regard it has been observed by the Addl. District Judge:

> "First of all question of sound disposing mind of the testatrix arises. Both the wills in question were executed within a period of five months whereas death took place after a gap of more than one year. Even if for the sake of arguments, it is presumed that deceased became sick in November, 1989 and she remained admitted in hospital for about fortnight and thereafter remained confined to bed till her death which took place on 8.1.1991, then also none of the witnesses of petitioner however alleged that due to sickness, mental capacity of the testatrix had also suffered to such an extent that she could not understand what was right or wrong. Mere old age and suffering from sickness itself is not sufficient to presume that testatrix was of unsound mind at the relevant time of alleged execution of will as propounded by the respondent. Otherwise also it is not the case of any party that deceased was of unsound mind at the relevant ˇtime either on 5.8.1989 or on 31.12.1989. No medical record of testatrix is produced to show her alleged mental incapacity to execute the Will so accordingly it is held that she was not mentally unsound on both the day of execution of the Wills."

6. With respect to the Will dated 05.08.1989 Ex. P1, PW1 and PW2 who were the witnesses examined by the appellant almost corroborated each other in their affidavits. However, when cross-examination of both these witnesses was considered and read along with the statement of PW3 both have been found contradicting each other in various aspects.

The contradiction noticed by the Addl. District Judge in the statement of PW1 and PW2 are as under:

> "PW-1 stated that he was called by the testatrix in her house on 5.8.89 through telephone at about 1 PM and he reached there at about 3.30/4 PM and stayed there till 4.45. However, PW-2 in his deposition stated that he had called PW-1 through telephone who reached there at about 2/2.30 PM.
>
> According to PW-1 when he entered the house of testatrix, she and PW-2 were present there, and no else was there in the house which is a flat consisting of two rooms. Wife of respondent was also not present in the house. But according to PW-2, at that time petitioner was also present in the house that consisted only of one room. PW-2 on the other hand not only shows presence of wife of respondent but also his both children at the time of execution of the Will even from 11 AM to 5 PM who had not gone anywhere. Version of petitioner PW-3 that he had gone to house of deceased in the morning but had not seen respondent or his family members present there, is contradictory from the own witness PW-2. It is very strange that PW-3 did not know when attesting witnesses of the Will came and when they left when as per PW-2, he was present in the small house consisting of one or two rooms only.
>
> PW-1 stated that Will was already typed and was in the hands of PW-2 when he reached in the house of deceased. Admittedly the Will was not typed in presence of PW-1 and PW-2 stated that he had already gone for getting Will typed and PW-1 reached in house during his absence.
>
> According to the cross-examination of PW-1, the Will was firstly signed by Testatrix, then by PW-2 and lastly by him but this sequence is changed by PW-2 who stated that after signatures of testatrix, PW-1 signed on the Will and he signed it lastly.
>
> PW-2 got the Will typed from one typist Shaji who as per this witness typed it himself but PW-2 already got draft of the Will from his office three days prior to the date of typing. It point out that Will was not got typed at the instructions of the testatrix

> which were allegedly given on the same day of execution in between 11 to 12 AM but petitioner had already planned to prepare the Will without any prior intention or instructions of the testatrix. This is a major fact which creates doubt about the genuineness of the Will as well as whether it was prepared at the instructions of the testatrix or not. Petitioner could not remove this doubt and thus the Will dated 5.8.89 cannot be relied upon. This obtaining of draft of Will before hand by PW-2 also falsify the deposition of this witness that testatrix desired on 5.8.89 itself to get her Will prepared.
>
> PW-1 in his cross examination stated that in the year 1989 he was doing private job in Kawality drycleaner shop situated in Ashok Vihar and telephone of testatrix was received at his residence and at that time he was in his shop. However, PW-2 made PW-1 owner of this shop and not an employee. After leaving the house of testatrix, PW-1 went to house of petitioner and took tea but PW-2 denied this fact of taking tea.
>
> There was no reason also to exclude the respondent from the benefits of estate of the decease when he was also looking after his deceased mother was admitted by PW-1 and was living in the same house with her. Petitioner and PW-2 during relevant period were residing in different houses though were situated adjacent to each other. Daughters of the deceased were excluded under both the Wills and they have not claimed any share in the property in any of the petitions. Hence, non-giving of any share in the Wills to daughters is not a ground to reject this Will.
>
> PW-1 also partly disputed the correctness of his own affidavit of evidence. In para No.2, 12 and 14 of his affidavit there are some handwritten corrections, deletion and additions, which are not initiated by him. PW-1 specifically stated that his affidavit was typed and nothing was written in hand. It leads to the inference that handwritten portion in his affidavit was either written by someone without his knowledge subsequently or this witness is telling lie. In both situations, the affidavit of evidence of PW-1 that is treated as examination in chief can be rejected being not valid. When examination in chief is ignored then the entire statement of witness goes and cannot be considered or

read in evidence. On these grounds as well keeping in view the various contradictions in statements of witnesses of the petitioner, their testimony can be declared as unreliable.

7. The learned ADJ also observed that PW1 is a highly interested witness being son-in-law of the appellant and for that had reasons to depose against the respondent. He was residing in a house in Shalimar Bagh during the year 1989 which once belonged to respondents. It is a matter of record that since the house was not being vacated it was sold by the respondents to somebody else's and the new purchaser instituted eviction suit in 2001 and got the possession decree against him. This has been taken as a reason for the said PW1 to depose against the first respondent. It was, thus, concluded that there was suspicious circumstances which hover a cloud over the genuineness, legality and validity of the Will dated 05.08.1989. The burden to explain these suspicious circumstances which are on the appellant was not discharged. It has been observed that the contradiction in the statement of these witnesses are not minor or having occurred due to old-age or passage of time but these contradictions go to the root of the case and cannot be ignored. In view of that, the learned ADJ has found suspicion regarding execution of the Will dated 05.08.1989 by the deceased testatrix and thus, as decided Issue No.1 against the appellant.

8. As regards the Will dated 31.12.1989 while referring to the objections of the appellant that the said Will was not a genuine Will and was not containing the signatures of the testatrix the Trial Court has observed that the appellant has not examined any hand-writing expert. To prove the execution of that Will the respondents have examined R4W-1 one of the attesting witness. Having gone through the statement of R4W-1 the Court observed that:

> "The evidence of R4W1 is reliable and can be accepted. He not only identified signatures of testatrix, his own and second witness's signatures but also proved the manner of execution of the Will Ex. R4W1/B. His testimony fulfils the requirements of Section 63 of Indian Succession Act. This witnesses was not totally stranger but was also in relation of the testatrix as respondent is his Mausa. Testatrix was living along with the respondent in the same house and this witness used to come there. Accordingly putting some faith upon him by the testatrix

> cannot be ruled out. The deposition of this witness that he got typed Will with dated 31.12.89 as per instructions of the testatrix on 25.12.89 who not only supplied necessary details but also supplied copy of the title documents of her property is found not unreliable fact. No effective cross examination of this witness was done on behalf of the petitioner on point of manner of execution and attestation of the Will. I find no ground to disbelieve the testimony of this attesting witness and do not find any material contradictions in the examination in chief and cross examination to disbelieve him. Similarly there are no major contradictions in the statement of respondent and his witness to reject their testimony or to find out who is telling lie and who is giving true version that was not the case of the petitioner whose witnesses contradicted on number of facts not only from each other but also from the petitioner."

9. In view of that it has been held by the Addl. District Judge that the Will dated 05.08.1989 was not proved but the Will dated 31.12.1989 Ex. R4W1/B as propounded by the respondent is reliable and genuine which is duly proved and established on record. Thus, the learned ADJ has decided Issue No.2 in favour of the respondent.

10. In view of the aforesaid, the Trial Court has dismissed the petition filed by the appellant but has allowed the petition filed by Shri Sushil Kumar Chopra bearing No. 416/06/03 on the basis of Will dated 31.12.1989. Accordingly, probate has been granted in his favour with respect to property No. 17/7, Pant Nagar, New Delhi subject to completion of necessary formalities including deposit of Court fee etc.

11. The appellant while assailing the order passed by the learned ADJ has submitted that the evidence led on behalf of the appellant was sufficient to prove the due execution of the Will dated 05.08.1989. The attestation of the said Will by the two witnesses was also proved. The contradictions which have been found in the statement of PW-1 and PW2 by the learned ADJ are not substantial. They are not material. They do not create any suspicious circumstances with respect to the execution of the Will dated 05.08.1989. However, the testimony of the witness examined by respondent No.3 regarding the second Will creates sever doubts. It is thus, submitted that judgment of the learned ADJ regarding Issue No.1 is not sustainable while it requires to be reversed with respect

to Issue No.2 and consequently, the appeal of the appellant must be decided and probate be granted in his favour with respect to the first Will.

12. The appellant also submits that respondent No.4 never claimed at any time after the death of mother Suhagwanti that he was in possession of any Will dated 31.12.1989 of his mother and intentionally avoided receiving notices issued from the court in probate case filed by the appellant. Another point strongly contested by the appellant is that the testimony of PW1 was rejected by the trial court on the ground that minor correction of typographical mistakes in para 2,12,14 in his affidavit by way of evidence not signed by PW1 but the trial court has grievously erred in ignoring the reply of PW1 in cross examination and has illegally rejected the evidence by way of affidavit of PW1 on this flimsy ground.

13. The appellant has further stated that the trial court also is taking the view by stating on one hand clearly that PW1 and PW2 have corroborated each other in their affidavits of due execution and attestation but during cross-examination they both are found contradicting each other on various aspects. Finally the appellant submits that respondent no.4 never produced any evidence to show that the will dated 5.08.1989 is forged and not bearing the signatures of the mother and knowing his mother well it is highly improbable for an old illiterate lady to put confidence on a stranger when she has 5 children of her own and since the relations in family were also cordial as has also been mentioned by respondent no. 4 thus the attesting witnesses to the will dated 31.12.1989 are strangers as alleged by the appellant and thus raises suspicious circumstances surrounding the will dated 31.12.1989.

14. The respondent no.4 in their written synopsis have submitted a table of the contradicting statements of PW1, PW2 and PW3 and have stated that the contradictions are not minor in nature and give rise to suspicious circumstances. Further respondent no.4 submits that he has discharged the burden of proving the will dated 31.12.1989 and he has gone onto state further that the respondent no.3 and respondent no.5 in their written statement have denied the execution of the will dated 5.08.1989 and thus the will dated 31.12.1989 has been duly proved.

15. I have heard the parties and gone through the written synopsis ˇfiled by both of them. In my opinion the contradictions in the statement

of PW1 and PW2 are minor since the Will got executed on 05.08.1989 whereas the evidence was recorded on 26.7.2005 so it is only practical to believe that after a gap of so many years the memory cannot remember every precise detail and over a period of time the memory fades and hence these contradictions are minor.

16. However, the fact that one of the attesting witness of the first Will, Anil Vij, PW-1, who is the son-in law of the appellant had reasons to depose against the respondent as he was residing in a house which belonged to respondent but refused to vacate it when asked for & ultimately had to suffer eviction at the instance of the new purchaser to whom respondent had sold the property, supplies good reasons to depose against respondent and this important fact was rightly noted by the Additional District Judge.

17. Further the contradictions in the statements of both the attesting witnesses of the first Will dated 05.08.1989, i.e PW-1 and PW-2 though seems to be minor but still raises doubt, on the veracity of the statements made by both the attesting witnesses and gives an impression of something suspicious. On the other hand, a perusal of the statement deposed by the attesting witness , Shri Sanjeev Verma, RW4-1, appearing on behalf of the respondent is a clear statement inasmuch as appellant was unable to point out any contradiction in the statement of the witness, further no suggestions were made by the appellant that the second Will was forged and fabricated, in fact no effective cross-examination was done by the appellant on the point of manner of execution and attestation of the Will. The testimony of RW4-1 is in accordance with the requirements of Section 63(c) of Indian Succession Act and Section 68 of Evidence Act. More so, even the language of the second Will is quite clear in itself and specifies the reason behind the testatrix bequeathing her property in favour of the respondent, hence the second Will in totality along with the statement of the attesting witness do not raise any suspicion nor was appellant able to point out any such discrepancy either in the statement of the witness or in the Will. The second Will also supersedes any earlier Will and also describes the Will to be the last Will.

18. Considering all the circumstances of this case and the fact that the Will dated 05.08.1989 is shrouded with suspicious circumstances and the testimony of PW-1 Anil Vij is also not clear from doubt, I do not find any reason to interfere with the order passed by the learned Addl. District

Judge granting probate of the second will dated 31.12.1989 in favour of the fourth respondent. As such, the appeal filed by the appellant is dismissed with no orders as to costs.

ILR (2011) V DELHI 529
W.P.

URMILA PUNERA & ANR. ....PETITIONERS

VERSUS

UOI & ORS. ....RESPONDENTS

(S. RAVINDRA BHAT, J.)

CM NO. : 3259/2011 IN W.P. (C) NO. : 19444-45/2006 **DATE OF DECISION: 25.03.2011**

The writ petitioners had sought various reliefs which included a direction to the respondent to provide them alternative accommodation—One of the petitioners apparently filed a previous proceeding WP(C) No. 3095/2001—That writ petition was dismissed.—Other similarly situated litigants were also writ petitioners in that proceedings—Whatever be that position the petitioners admit that their effort to have final order clarified was unsuccessful on three previous occasions. Having regard to these facts, the claim for compensation and the right to be put back into possession into alternative accommodation cannot be entertained in this manner. The petitioners have also not cared to throw light on whether the appeal against the eviction order succeeded and if at all the petitioners availed the liberty granted by the Court.

Important Issue Involved: The right to claim compensation is a substantive one and cannot be dealt with by the manner sought to be done, through an application in a disposed of writ petition.

[Ch Sh]

APPEARANCES:

FOR THE PETITIONERS : Ms. Lily Thomas, Advocate.

FOR THE RESPONDENTS : Ms. Shubhangi Tuli, Advocate for State of Maharashtra.

RESULT: Application is dismissed.

S. RAVINDRA BHAT (OPEN COURT)

% CM No.3259/2011 IN W.P. (C) 19444-45/2006

1. Heard counsel for the parties. The writ petitioners had sought various reliefs which included a direction to the respondent i.e. the State of Maharashtra to provide them alternative accommodation in the A Block, Sirmur plot, in Kasturba Gandhi Marg, New Delhi. One of the petitioners apparently filed a previous proceeding, WP(C) No.3095/2001. That writ petition was dismissed. Other similarly situated litigants were also writ petitioners in that proceeding.

2. By the final order dated 7th January, 2008, this Court had dismissed the writ petition in the following terms :

> "7. I have examined the materials on record. The residents of the Women's Hostel amongst whom the petitioners court themselves were represented in the first proceeding in WP(C) 3095/2001. Indeed the first petitioner was a party to those proceedings. Initially, an interim order was made not to be evicted the occupants till the eviction proceedings have been finalized. However, the final order rejected all their contentions and the Court expressed its view that the writ petition was not maintainable as it sought a declaration in respect of the title to the property, the review petition too was dismissed. The first petitioner then filed another writ petition which has not even been disclosed in these

proceedings. Here, the relief claimed was a direction against the respondents not to evict her and the other before giving suitable accommodation/relocation. Other petitioners occupants too had sought identical directions. That writ petition too was rejected and the court held that being an allottee was a relevant consideration for entitlement to relocation and that it did not, in any manner, implead the power of the authorities to issue eviction order.

8. After receiving notices of eviction in 2004 and 2005, writ petitioners in fact sought for accommodation and clearly stated that they would vacate the premises within a year. Having regard to the history of this litigation and the surrounding circumstances outlined, I am of the opinion that the reliefs claimed cannot be granted at this stage. Moreover, the petitioners had sought a one year's time to vacate the premises; even that period is now over. In these circumstances, if they have any grievance under the orders of eviction, it is open for them to prefer an appeal under Section 9 of the Public Premises (Eviction of Unauthorized Occupants) Act. Since these petitions have been pending interim orders were made. If such appeals are preferred within two weeks, the appellate authority shall consider and dispose off them in accordance with law without considering the issue of limitation. It is clarified that this order is not, in any manner, reflective of the petitioners. Claim for relocation. Subsequent to the letters of the Union Government and the previous orders of the Court, the right to enforce the claim for that purpose is hereby reserved.

9. The writ petitions and all pending applications are dismissed so far as the claim made in these petitions is concerned subject to the liberty reserved above."

3. The writ petitioners thereafter filed successive applications i.e. CM Nos.6974/2008 and 46/2009. Both of them were dismissed. In these circumstances, the writ petitioner again sought a direction from the Court through yet another application, CM No.1917/2009. That application was rejected in the order dated 11.2.2009 in the following terms:

"CM 1917/2009

The applicant/writ petitioner sought a direction to the State of Maharashtra to allot an alternative accommodation in „A. Block in Sirmur plot was heard by judgment dated 7th January, 2008. The writ petition was dismissed after considering all the contentions raised. The petitioners during the course of their submissions had relied upon a notice dated 29.12.1998 requiring vacation from the premises. The Court had also in its judgment referred to and considered the impact of the previous proceedings culminating in the judgment in WP(C) No.3095/2001.

The writ petitioner applied by filing CM 6974/2008, contending that she was entitled to Room Nos.36 and 37 'A' Block, given in relocation pursuant to order of the Court dated 27.12.2006. That application i.e. CM No.6974/2008 was rejected on 03.09.2008. Subsequently another application on same lines was moved being CM No.46/2009. The Court rejected that application too on 07.01.2009.

In the present application, the petitioner, has made the same averments and sought recall of order dated 03.09.2008 and 07.01.2009. It is contended in this application that CM No.6974/2008 was dismissed without hearing counsel for the respondent. The record of proceeding dated 03.09.2008 discloses that both parties were represented. In these circumstances, the order dated 07.01.2009, dismissing CM No.46/2009, cannot be found fault with.

Having considered the materials on record and the submissions of parties, the Court is of the opinion that the present application is not maintainable. It is accordingly rejected."

4. In these circumstances and the background, the writ petitioners have again sought directions from the Court by way of a clarification that the order dated 7th January, 2008 did not dismiss but had in fact allowed the writ petition and secondly also seeking a substantial amount i.e. Rs. 20 lakhs as compensation for allegedly defrauding the Court.

5. Learned counsel argues that the interim order crystallized into enforceable right which led the Court, while disposing the writ petition, on 7th January, 2008 to reserve liberty to claim the right to be put back

into possession. It is argued that the State of Maharashtra dispossessed the Petitioners and demolished the premises but did not comply with the Court directions.

6. This Court has considered the pleadings and overall circumstances of the case. The final order of 7th January, 2008 has traced the history of litigation concerning the plot upon which the history was built. The Court while dismissing the Writ Petition, 19444-45/2006, clarified that the writ petitioners could prefer an appeal under Section 9 of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971. The Court stated that the concerned appellate authority would entertain and dispose of the appeal if it was preferred within two weeks without being hindered by the question of limitation. It is unclear as to whether the writ petitioners availed the said liberty.

7. Whatever be that position the petitioners admit that their effort to have final order clarified was unsuccessful on three previous occasions. Having regard to these facts, the claim for compensation and the right to be put back into possession into alternative accommodation cannot be entertained in this manner. The petitioners have also not cared to throw light on whether the appeal against the eviction order succeeded and if at all the petitioners availed the liberty granted by the Court.

8. Furthermore, this Court is alive to the circumstance that the right to claim compensation is a substantive one and cannot be dealt with by the manner sought to be done by the petitioners, through an application in a disposed of Writ Petition.

9. In these circumstances, the application is not maintainable and accordingly dismissed.

ILR (2011) V DELHI 534
I.T.A.

THE COMMISSIONER OF INCOME TAX-VI ....APPELLANT

VERSUS

THREE DEE EXIM PVT. LTD. ....RESPONDENT

(A.K. SIKRI & M.L. MEHTA, JJ.)

I.T.A. NO. : 1604/2010 & I.T.A. NO. : 1778/2010 **DATE OF DECISION: 25.03.2011**

Income Tax Act, 1961—Section 148/149—Notice under Section 148 of the Act issued by the Assessing Officer (AO) whereafter the assessee appeared and participated in proceedings before the AO and thereafter AO prepared fresh assessment order—In appeal, Commissioner Income Tax (appellate) rejected the contention of the assessee that there was no valid service of notice—In further appeal the Income Tax Appellate Tribunal held that the notice was not properly served under Section 148 of the Act and as such, assumption of jurisdiction by AO to reassess the income of the assessee was bad in law—Hence, appeal before the Hon'ble High Court—Held, service of notice as a precondition before the assessment would be a question of fact and since in the present case, no objection was raised with regard to the non-issue of notice and rather the assessee by way of letter adopted the return originally filed as return in response to the notice and it is only thereafter that AO proceeded further with reassessment, during which proceedings certain queries were raised and assessee gave detailed response, notice issued at old address available on record would constitute valid service of notice—Further held, where the assessee appear

before the AO and is given a copy of the notice before assessment whereafter assessee participates in the assessment proceedings, service of copy of notice also would be service of notice under Section 148. Appeal decided in favor of Revenue and matter remanded back to Tribunal to decide the remaining grounds.

In view of our discussions as above, we are of the view that service of notice, a contemplated pre-condition before assessment would be a question of fact depending upon the facts and circumstances of each case. In the present case, not only that no objection was raised with regard to non-issue of notice dated 27.03.2006, the assessee vide its letter dated 11th December, 2006 adopted the return as originally filed as the return in response to the said notice under Section 148. It was only thereafter that the AO proceeded with the reassessment proceedings. During the assessment proceedings, certain queries were raised to which the assessee gave detailed response. Even during the reassessment proceedings no objection was raised of any kind with regard to defect or irregularity in the notice. In a given situation, as in the present case when the assessee appears before the Assessing Officer and is given copy thereof before assessment and also makes correspondence and participates in the assessment proceedings, notice issued at old address available on record may constitute service of notice. In such circumstances, the service of copy of notice also would be service of notice within the ambit of Section 148(1) of the Act. **(Para 18)**

Important Issue Involved: Service of notice under Section 148, Income Tax Act is a question of fact, depending upon facts and circumstances of each case and non-objection in this regard during the reassessment proceedings would go to show that the notice was validly served.

[G. K]

APPEARANCES:

FOR THE APPELLANT : Ms. Prem Lata Bansal, Senior Advocate with Mr. Deepak Anand, Advocate.

FOR THE RESPONDENT : Dr. Rakesh Gupta, with Dr. Raj Kumar Aggarwal, Ms. Poonam Ahuja and Mr. Johnson Bara, Advocates.

CASES REFERRED TO:

1. *Mayawati* vs. *CIT & Ors.* (2010) 321 ITR 349.
2. *Kanubhai M. Patel (HUF)* vs. *Hiren Bhatt or his Successors to Office & Others,* (2010) 43 DTR (Guj) 329.
3. *Haryana Acrylic Manufacturing Co.* vs. *Commissioner of Income Tax & Anr.* (2009) 308 ITR 38.
4. *CIT* vs. *Eshaan Holding P. Ltd.* ITA No. 1171 of 2008 dated 31-08-2009.
5. *CIT* vs. *Eshaan Holding,* ITA No.1171/2008.
6. *CIT* vs. *Shanker Lal Ved Prakash* (2007) 212 CTR (Del) 47: (2008) 300 ITR 243(Delhi).
7. *GKN Driveshafts (India) Limited* vs. *Income Tax Officer* (2003) 1 SCC 72.
8. *CIT* vs. *Jai Prakash Singh* (1996) 132 CTR SC 262: 219 ITR 737 (SC).
9. *CIT* vs. *Gyan Prakash Gupta* (1986) 54 CTR (Raj) 69: (1987) 165 ITR 501 (Raj).
10. *Fateh Chand Agarwal* vs. *CWT,* 97 ITR 701 (Orissa).
11. *B. Johar Forest Works* vs. *CIT,* 107 ITR 409 (J&K).
12. *R.L. Narang* vs. *CIT,* 136 ITR 108 (Del).
13. *CIT* vs. *Hotline International* Pvt. Ltd. 161 Taxman 104 (Del).
14. *R.K. Upadhyaya* vs. *Shanabhai P. Patel,* 166 ITR 163 (SC).

15. *CIT* vs. *Mintu Kalia,* 253 ITR 334 (Gau).

16. *Commissioner of Income Tax* vs. *Thayaballi Mulla Jeevaji Kapasi (Decd.),* 66 ITR 147 (SC).

17. *CIT* vs. *Harish J Punjabi* 297 ITR 424 (Del).

18. *CIT* vs. *Rajesh Kumar Sharma* 311 ITR 235 (Del).

19. *P. N. Sasikumar* vs. *CIT* 170 ITR 80 (Ker).

20. *CIT* vs. *Mani Kakar* 18 DTR 145.

RESULT: Appeal decided in favour of Revenue and matter remanded back to Tribunal.

M.L. MEHTA, J.

1. These appeals are filed against the common order dated 25th September, 2009 of the Income Tax Appellate Tribunal (hereinafter referred to as "the Tribunal") whereby cross-objections filed by the assessee for the assessment year 1999-2000 were allowed and consequently appeal of the Income Tax Officer, Ward 16(2), New Delhi (for short "the Revenue") was dismissed. Vide this common order both the appeals are being disposed.

2. The issue raised in the present appeal centered around a narrow compass. With the consent of the counsel for parties, we heard the matter finally and propose to dispose of the appeal on the following substantial question of law:

1. Whether ITAT was correct in law and on facts annulling the assessment framed by the AO under Section 147/ 143(3) of the Act?

2. Whether ITAT was correct in law in holding that since notice under Section 148 had not been served upon the assessee and therefore, assessment framed by the AO was bad in law?

3. The facts in brief are that the respondent/assessee filed return for the assessment year 1999-2000 declaring its income at Rs.4,91,550/ -, which was assessed under Section 143 of the Income Tax Act (for short "the Act"). Thereafter information was received from DIT (Inv) that the assessee had received accommodation entries from M/s.Parivartan

Financial Services Pvt. Ltd. and Victoria Advertising Pvt. Ltd. On this information, a notice dated 27.03.2006 under Section 148 of the Act was issued by the Assessing Officer (AO) at the address at which the return of the said year was filed by the assessee. A notice under Section 142(1) dated 28.02.2006 followed by another notice dated 6th November, 2006 was issued to the assessee. In response to this notice, counsel for the assessee appeared before the AO on 14th November, 2006 and sought adjournment. On that date, the counsel was given a photocopy of the notice dated 27th March, 2006 issued under Section 148 of the Act. Vide letter dated 11th December, 2006, assessee stated that the return originally filed by it may be treated as return filed in response to notice under Section 148 of the Act. The AO proceeded with the assessment proceedings. Certain queries were raised to which assessee filed details. Thereafter assessment order was framed by the AO at the income of Rs.2,11,67,640/- making various additions.

4. The order of the AO was challenged in appeal before the Commissioner, Income Tax (Appellate) [CIT(A)] on as many as eleven grounds. One of the grounds on which the impugned order was passed and which is challenged before us was with regard to want of service of notice under Section 148 of the Act on the assessee before finalization of the assessment for the assessment year 1999-2000. The CIT(A) repelled this contention of the assessee with the following reasoning:

> "It is true that the Assessing Officer has sent the notice dated 27.03.2006 at the address of 3/81 basement, Ramesh Nagar, New Delhi. It is also true that the assessee has been filing its return for A.Y.2004-05, 2005-06 and 2006-07 at another address i.e. 5/2, Punjabi Bagh Extn., New Delhi-110015. The Assessing Officer had also sent one notice under Section 271(1)(c) for AY 2001-02 on 14.02.20056 at the above said address of Punjabi Bagh only. However, the perusal of the assessment order reveals that the notice dated 27.03.2006 was dispatched by registered post which has been supported with the copy of postal receipt sent by Assessing Officer along with the remand report. The contention of AR is also that the postal receipt should be backed with the evidence of dispatch at RPAD and in absence of the same service is not in accordance with law. He has relied upon the judgment of Hon'ble Delhi High Court in the case of **CIT v.**

Hotline International Pvt. Ltd. 161 Taxman 104 (Del) holding that under order V, Rule 19A of the Code of Civil Procedure, the notice sent by registered post should have been sent along with acknowledgment due and in absence of the same service was not valid. I am not able to convince myself with the arguments of the Counsel for at least three reasons. One, this notice has not been received back. It is settled law that when the notice is sent by the registered post, it is presumed to be served. Second, it is further perused from the assessment order that in any case photo copy of the notice under Section 148 was served upon the AR of the appellant who appeared during the course of the assessment proceedings before the Assessing Officer on 24.11.2006. Therefore, the grievance of the assessee regarding non service of the notice no more survives. Three, it can be further sent that the AR of the assessee has been participating in the assessment proceedings from time to time. Queries were given by AO and details were filed by him. In any case it cannot be said that there was been violation of principles of natural justice. Therefore, the ground of the appellant on this issue is dismissed."

5. The Revenue filed appeal against the order of CIT(A) and assessee also filed cross-objections before the Tribunal. The Tribunal allowed the cross-objections of the assessee and dismissed the appeal of the Revenue on the following reasoning:

"5. …….Therefore, it could not be said that there had been violation of principles of natural justice. In the case before us it is not a question opportunity of being allowed to the assessee but it relates assumption of jurisdiction u/s 147 of the Act. Providing of opportunity of being head comes next to assumption of jurisdiction to reassess the income. From the above facts, it is clear that the assessee was not served in the notice under Section 148 of the Act. The notice was sent at the address other than the present address of the assessee. Therefore, the service of notice under Section 148 of the Act does not exist and hence the assessing officer, in the absence of proper notice under Section 148 could not have assumed jurisdiction to reassess the income of the assessee. Accordingly, in our considered opinion, the

assessment made is bad in law."

6. From the impugned order of the Tribunal, it is seen that while allowing the cross-objections of the assessee, the Tribunal annulled the assessment holding it bad in law on account of want of service of notice under Section 148 of the Act. The Tribunal did not choose to examine the findings of the CIT(A) on remaining grounds.

7. The question for our determination is to see if the assessment was bad in law as held by the Tribunal. The Tribunal has arrived at this finding on the ground that no valid notice under Section 148 of the Act was served upon the assessee before making assessment by Assessing Officer. This will require interpretation of Section 148 of the Act. Relevant part of this Section read as under:-

"148. Issue of notice where income has escaped assessment.

(1) Before making the assessment, reassessment or recomputation under Section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under Section 139.

8. Referring to the provisions of sub-Section (1) of Section 148 of the Act, learned counsel for the assessee has vehemently argued that the issue of notice before assessment was a pre-condition under the sub-Section (1) and since admittedly no notice was issued at the correct address of the assessee, notice issued at the wrong address could not be said to be a valid service in the eyes of law and as such the assessment based on such a notice was bad in law. In this context, he has relied upon the judgments of **R.K. Upadhyaya v. Shanabhai P. Patel,** 166 ITR 163 (SC), **CIT v. Mintu Kalia,** 253 ITR 334 (Gau), **Commissioner of Income Tax v. Thayaballi Mulla Jeevaji Kapasi (Decd.),** 66 ITR 147 (SC), **CIT v. Harish J Punjabi** 297 ITR 424 (Del), **CIT v. Rajesh**

Kumar Sharma 311 ITR 235 (Del), **P. N. Sasikumar v. CIT** 170 ITR 80 (Ker), **CIT v. Mani Kakar** 18 DTR 145 and an order of this court in **CIT v. Eshaan Holding P. Ltd.** ITA No. 1171 of 2008 dated 31-08-2009.

9. In the case of **R.K. Upadhyaya** (supra) it was held by the Supreme Court that since the Assessing Officer had issued notice of re-assessment under Section 147 by registered post on 31st March, 1970, which notice was received by the assessee on 3rd April, 1970, nevertheless, the notice was not barred by limitation and retained its legality. A distinction was drawn between "issue of notice" and "service of notice" on the following observations:-

> "...A clear distinction has been made out between "the issue of notice" and "service of notice" under the 1961 Act. Section 149 prescribes the period of limitation. It categorically prescribes that no notice under Section 148 shall be issued after the prescribed limitation has lapsed. Section 148(1) proves for service of notice as a condition precedent to making the order of assessment. Once a notice is issued within the period of limitation, jurisdiction becomes vested in the Income-tax Officer to proceed to reassess. The mandate of Section 148(1) is that reassessment shall not be made until there has been service. The requirement of issue of notice is satisfied when a notice is actually issued. In this case, admittedly, the notice was issued within the prescribed period of limitation as March 31, 1970, was the last day of that period. Service under the new Act is not a condition precedent to conferment of jurisdiction on the Income-tax Officer to deal with the matter but it is a condition precedent to the making of the order of assessment. The High Court, in our opinion, lost sight of the distinction and under a wrong basis felt bound by the judgment in **Banarsi Debi v. ITO** [1964]53ITR100(SC) . As the Income-tax Officer had issued notice within limitation, the appeal is allowed and the order of the High Court is vacated. The Income-tax Officer shall now proceed to complete the assessment after complying with the requirement of law. Since there has been no appearance on behalf of the respondents, we make no orders for costs."

10. In the case of **Mintu Kalita** (supra) following **R.K. Upadhyaya** (supra) it was held that service of notice under Section 148 for the purpose of initiating proceedings for reassessment is not a mere procedural requirement, but it is a condition precedent to the initiation of proceedings for reassessment. To the same effect was the finding in the case of **Thayaballi Mulla Jeevaji** (supra). In the case of **Harish J. Punjabi** (supra) no notice under Section 148 was sent or served upon the assessee, through any manner whatsoever and that being so assessment was held to be void.

11. The facts of the case of **Rajesh Kumar Sharma** (supra) are somewhat similar to the instant case inasmuch as in that case also notice under Section 148 was issued at the old address of the assessee. The assessee had also appeared before the AO in response to notice under Section 142(1) of the Act, but, the assessee had filed his return under protest making it abundantly clear that he has not received the notice under Section 148. However, in the present case, the notice under Section 148 was issued to the assessee at the address as given by it in the return of the relevant year. The counsel for the assessee had also appeared before the AO on 14th November, 2006 in response to notice under Section 142(1) of the Act and was given copy of the notice under Section 148 of the Act. Then the assessee had also written letter within a few days thereafter, i.e., on 11th December, 2006 stating that the return as originally filed under Section 143 of the Act be treated as return in pursuance to notice under Section 148 of the Act. Not only this, various queries were also raised to which detailed replies were filed by the assessee. It was only thereafter that the assessment was framed. That being the position in the present case, the case of **Rajesh Kumar Sharma** (supra) is distinguishable from the present case.

12. The reliance has also been placed on the order of this Bench in **CIT v. Eshaan Holding,** ITA No.1171/2008 decided on 31st August, 2009. In this case also, notice was said to have been served at the old address, whereas the assessee had filed return for the subsequent years at the new address. In this case, it was also held that before issuing the notice under Section 148 of the Act, it was expected of the AO to see if there was any change of address because valid service of notice is jurisdictional matter and this a condition precedent for a valid reassessment. The facts of the said case are also distinguishable from the present case

inasmuch as in this case the assessee had written a letter to the AO denying the service of notice under Section 148 of the Act and the entire proceedings were of the same assessment year. As noted above, in the present case, the counsel for the assessee had appeared and was given copy of the notice under Section 148 and a few days thereafter a letter was received from the assessee stating that the original return be treated as return in response to notice under Section 148 of the Act. Further in the present case, the assessment year was 1999-2000 for which notice was issued at the given address, whereas new address was given by assessee in the return of AY 2004-2005 & 2005-2006. Above all, another factor which weighed with the Court **Eshaan Holding** (supra) was the tax effect of that case being about Rs.4.00 lakhs and not thus appealable.

13. The learned counsel also relied upon the case of **Haryana Acrylic Manufacturing Co. v. Commissioner of Income Tax & Anr.** (2009) 308 ITR 38. The facts of this case are not applicable to the present case. This case came to be considered by the Division Bench of this Court in another case titled **Mayawati v. CIT & Ors.** (2010) 321 ITR 349, wherein, issues were substantially the same as before us in the present case. Before adverting to the facts and issues in that case, it may be noted as to what the Division Bench had noted about the factual matrix of the case of **Haryana Acrylic** (supra). The Court observed as under:-

> "Various issues had arisen in that case, none of which, in our opinion, are of any relevance to the determination of the questions which fall for determination by us. In Haryana Acrylic it had, inter alia, been opined that for Section 147 to become operational it is essential that it should be alleged that escapement of income is a consequence of the assessee having failed to fully and truly disclose all material facts necessary for the comprehensive completion of the assessment. What had transpired in that case was that whilst the initiation of the proceedings by the AO for approval of the Commissioner of Income Tax mentioned the failure on the part of the Assessee to disclose fully and truly all material facts relating to the alleged accommodation entries, the "reasons" disclosed to the Assessee on its request merely mentioned those accommodation entries as being the foundation for the belief that income to the extent of Rupees 5,00,000/- had

escaped assessment. The distinction between these two situations has been perspicuously emphasised and adumbrated. The finding was that a reason to believe, without the essential concomitant of it being a result of the failure of the assessee to fully and truly disclose all material facts, would render the reassessment under Sections 147/148 unsustainable. In order to overcome this difficulty, it has been argued on behalf of the Revenue that since the AO had duly recorded the failure on the part of the assessee to fully and truly disclose all material facts this notation should be acted upon and the reasons conveyed to the assessee which were predicated on the Commissioner's noting, should be ignored. The contention of the Revenue was that the assessee had been made aware of the opinion of the AO in the Counter Affidavit of the Revenue filed on 5.11.2007. It was in that context that it was observed in Haryana Acrylic that six years had elapsed by that time. **GKN Driveshafts (India) Limited v. Income Tax Officer** (2003) 1 SCC 72 was applied to emphasise the fact that the reasons should have been furnished within a reasonable time. It was clarified that "where the notice has been issued within the said period of six years, but the reasons have not been furnished within that period, in our view, any proceedings pursuant thereto would be hit by the bar of limitation inasmuch as the issuance of the notice and the communication and furnishing of reasons go hand-in-hand. The expression "within a reasonable period of time" as used by the Supreme Court in **GKN Driveshafts** (supra) cannot be stretched to such an extent that it extends even beyond the six years stipulated in Section 149". The factual matrix in Haryana Acrylic is inapplicable to the sequence of events before us…

14. In the case of **Mayawati** (supra) this Court referred to various decisions of different High Courts and noticed that in the context of Section 143(2) of the Income Tax Act, it has been held that the word "issuance of notice" and "service of notice" are not synonymous and interchangeable, and accordingly, the notice under this section would lose all its legal efficacy if it had not been actually served on the assessee within the scheduled and stipulated time. In this dialectic, a fortiori, since the word 'served' is conspicuous by its absence in Section 149, and the legislature has deliberately used the word 'issue', actual service ˇwithin

the period of four and six years specified in the section, would not be critical. It was further held as under:-

> 5. On a plain reading of these Sections it is palpably plain that Section 148 of the IT Act enjoins that the AO must serve on the assessee a notice requiring him to furnish a return of his income, in respect of which he/she is assessable under this Act during the previous year corresponding to the relevant assessment year. Firstly, the notice contemplated by this Section relates to the furnishing of a return and not to the decision to initiate proceedings under Section 147 of the IT Act; secondly, the period of thirty days (omitted by the Finance Act, 1996) is with regard to the furnishing of the return.
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> 6. In stark contrast, Section 149 of the IT Act speaks only of the issuance of a notice under the preceding Section within a prescribed period. Section 149 of the IT Act does not mandate that such a notice must also be served on the assessee within the prescribed period. Speaking for the Division Bench of this Court, I had occasion to observe in **CIT v. Shanker Lal Ved Prakash** (2007) 212 CTR (Del) 47: (2008) 300 ITR 243(Delhi) the decision in **CIT v. Jai Prakash Singh** (1996) 132 CTR SC 262: 219 ITR 737 (SC) to the effect that failure to serve a notice under Section 143(2) would not render the assessment as null and void but only as irregular. The decision of the Rajasthan High Court in **CIT v. Gyan Prakash Gupta** (1986) 54 CTR (Raj) 69: (1987) 165 ITR 501 (Raj) opining that an assessment order completed without service of notice under Section 143(2) is not void ab initio and cannot be annulled was noted. Furthermore, from a reading of that judgment, it is evident that it had not been seriously contended that the notice under Section 149 of the IT Act must also be served within the period set-down in that Section since the discussion centered upon Section 27 of the General Clauses Act, 1897 which specifies that service of such a notice would be presumed to be legally proper as it would be deemed to have been delivered in the ordinary course at the correct address. It had, inter alia, been expressed that: "while there would be no justification for enlarging the period of limitation prescribed by the statute itself, we should also not lose sight of the fact that

> disadvantage or discomfort of the assessee is only that he has to explain the correctness and veracity of the return filed by him. A reasonable balance of burden of proof must also, therefore, be maintained. In the facts and circumstances of the present case, we are satisfied that because notice was dispatched on August 25, 1998 and was duly addressed and stamped, the Department has succeeded in proving its service before August 31, 1998. On the other hand, the assessee has failed to prove a statement that he received the notice only on 1.9.1998. Where a statute postulates the issuance of a notice and not its service, a fortiori the presumption of fiction of service must be drawn on the lines indicated in Section 27 of the General Clauses Act, 1897.

15. We are in complete agreement with the reasoning of the Division Bench in the aforesaid case of **Mayawati** (supra) that what is contemplated under Section 149 is the "issuance of notice" under Section 148 and not the service thereof on the assessee and further that the "service of notice" under Section 148 is only required before the assessment, reassessment or re-computation.

16. Learned counsel also relied upon the case of **Kanubhai M. Patel (HUF) v. Hiren Bhatt or his Successors to Office & Others,** (2010) 43 DTR (Guj) 329 to substantiate that the notice issued six years after the expiry of assessment year was barred by limitation and assessment made thereon was void ab initio. In this case, a notice issued under Section 148 of the Act was apparently held to be issued after the expiry of six years and in that way of the matter, the notice was held to be bad in law. It was in this background that it was held that there was no need of filing of objection by the assessee against the reopening of the assessment under Section 147 of the Act as no useful purpose was to be served by asking the petitioner to undertake the said exercise. So, that case is also absolutely distinguishable from the present case.

17. Learned counsel for the assessee also relied upon the cases of **Fateh Chand Agarwal v. CWT,** 97 ITR 701 (Orissa); **B. Johar Forest Works v. CIT,** 107 ITR 409 (J&K) and **R.L. Narang v. CIT,** 136 ITR 108 (Del). All these cases relate to service of notice on persons, not authorised by of the assessee. That being not the position in the present case, these cases are not applicable.

18. In view of our discussions as above, we are of the view that service of notice, a contemplated pre-condition before assessment would be a question of fact depending upon the facts and circumstances of each case. In the present case, not only that no objection was raised with regard to non-issue of notice dated 27.03.2006, the assessee vide its letter dated 11th December, 2006 adopted the return as originally filed as the return in response to the said notice under Section 148. It was only thereafter that the AO proceeded with the reassessment proceedings. During the assessment proceedings, certain queries were raised to which the assessee gave detailed response. Even during the reassessment proceedings no objection was raised of any kind with regard to defect or irregularity in the notice. In a given situation, as in the present case when the assessee appears before the Assessing Officer and is given copy thereof before assessment and also makes correspondence and participates in the assessment proceedings, notice issued at old address available on record may constitute service of notice. In such circumstances, the service of copy of notice also would be service of notice within the ambit of Section 148(1) of the Act.

19. Learned counsel for the Revenue also submitted that the Tribunal has ignored the provisions of Section 292BB of the Act which lays down that where an assessee has appeared in any proceedings or co-operated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act, which is required to be served upon him, has been duly served upon him in time and the assessee shall be precluded from taking any objection in any proceedings or inquiry under the Act that notice was not served upon him or was served in an improper manner. In this regard, it may be stated that this provision came to be inserted by the Finance Act, 2008 with effect from 1st April, 2008 and is not applicable to the assessment year in question. However, this provision also substantiates our finding that in the given circumstances as in the present case, service of notice before assessment could be inferred. The participation by the assessee in the assessment proceedings on receipt of the copy of the notice can be deemed to be service of notice within the ambit of Section 148(1) of the Act. That is what is the legislative intent of "service of notice" on assessee under this section that no assessment under Section 147 can be finalized before the assessee has sufficient notice thereof.

20. Thus, we are of the view that the Tribunal was not correct on facts and law to annul the assessment framed by the Assessing Officer. Consequently, we answer the questions in affirmative in favour of the Revenue and against the assessee. Since the Tribunal has not dealt with the findings of the CIT(A) on the remaining ten questions, the matter is remanded back to the Tribunal to decide the appeals afresh keeping in view our above findings with regards to the notice under Section 148 of the Act.

ILR (2011) V DELHI 548
ITA

PRAVEEN SONI **....APPELLANT**

VERSUS

COMMISSIONER OF INCOME TAX **....RESPONDENT**

(A.K. SIKRI & M.L. MEHTA, JJ.)

ITA NO. : 1145/2009 **DATE OF DECISION: 29.3.2011**

Income Tax Act, 1961—Section 80 1B, Industries (Development and Regulations) Act, 1951—The appellant (hereinafter referred to as 'the assessee') herein was an individual running his proprietorship concern under the name and style of M/s Ragnik Exports. This concern is engaged in business of manufacturing and exports of readymade garments—To manufacture these garments for the purpose of exports, the assessee started to manufacture articles from 01.07.1997. The assessee could avail the benefit of Section 80 1B of the Act from the date of manufacture of these articles, i.e., Assessment Year 1998-99, which was the first year of the assessee's manufacture, the assessee did not claim the deduction

under the said provision in that assessment year. The assessee did not claim this benefit even in few succeeding years. Held: Section 80 1B of the Act provides that once an industrial undertaking which fulfils the condition stipulated therein gets the benefit, the same is available for 10 successive assessment years. The small scale industrial undertaking has been denied the benefit under Section 80 1B(14)(g) of the I.T. Act and having regard to the said provisions, it should have been registered as a small scale industrial unit in order to claim the status of SSI Unit. Since it was not so registered under the provision of Industries (Development and Regulations) Act, 1951 (hereinafter referred to as the 'IDR Act'), the assessee was not entitled to claim the benefit under Section 80IB of the I.T. Act—As far as second question of law is concerned, viz., whether the assessee can be denied the benefit of Section 80IB of the I.T. Act simply because of the reason that he did not avail this benefit in the initial assessment year, i.e., 1998-99—There is no reason not to give the benefit of this claim to the assessee if the conditions stipulated under Section 80IB of the I.T. Act are fulfilled.—The other question as to whether it is incumbent upon the assessee that it is registered under the IDR Act for claiming the benefit under Sub-Section (3) of Section 80 1B of the I.T. Act—Benefit was denied only on the ground that it is not registered under the provisions of I.D.R. Act. The registration under the I.D.R. Act will be of no consequence for availing the benefit under Section 80 1B of the I.T. Act—Clause (g) of sub-section (14) of Section 80IB of the I.T. Act only mandates that such an industrial undertaking should be regarded as small scale industrial undertaking under Section 11B of the I.D.R. Act—The assessee had realized his mistake in not claiming the benefit from the first Assessment Year 1998-99—At the same time, the assessee forgave the claim upto the Assessment Year 2003-04 and was

making the same only for the remaining period—There is no reason not to give the benefit of this claim to the assessee since the conditions stipulated under Section 80IB of the I.T. Act are fulfilled—Appeal allowed.

The purpose for industrial undertaking to be regarded as small scale industrial undertaking as per Section 11B of the I.D.R. Act is not far to seek. It was to maintain parity in prescribing the conditions which are required to be fulfilled by the industrial undertaking to qualify itself as small scale industrial undertaking. Since the Central Government has to prescribe such conditions by notification in view of provisions of Section 11B of the I.D.R. Act, the Legislature in its wisdom deemed it fit to incorporate those conditions for the purpose of I.T. Act as well. This issue came up for consideration before the Gujarat High Court, albeit, in the context of depreciation which is to be allowed to an assessee under Section 32 of the I.T. Act. We may point out that explanation (3) of Section 32(1) of the I.T. Act also gives special benefit to the small scale industrial undertaking and reads as under:

> "(3) an industrial undertaking shall be deemed to be a small-scale industrial undertaking, if the aggregate value of the machinery and plant installed, as on the last day of the previous year, for the purpose of the business of the undertaking does not exceed seven hundred and fifty thousand rupees; and for this purpose the value of any machinery or plant shall be, -
>
> (a) in the case of any machinery or plant owned by the assessee, the actual post thereof to the assessee; and
>
> (b) in the case of any machinery or plant hired by the assessee, the actual cost thereof as in the case of the owner of such machinery or plant." **(Para 15)**

The question which was posed for consideration before the

Gujarat High Court in the case of **Commissioner of Income-tax Vs. J.H. Kharawala** 208 ITR 691 was as to whether it was incumbent upon a small scale industrial undertaking to have registration under the I.D.R. Act to claim the benefit of depreciation under Section 32 of the I.T. Act. Replying in the negative and holding that there was no such requirement of such registration to avail the said benefit, the Gujarat High Court held as under:

> "Section 32 provides for depreciation. Sub-section (1) provides for depreciation in respect of building, machinery, plant or furniture owned by the assessee and used for the purposes of his business or profession. Clause (vi) of sub-section (1) provided for one time depreciation of 20 per cent. on the actual cost of ship, aircraft, machinery or plant. It gave an option to assessee to claim depreciation either in the year in which the machinery or plant was installed or the year in which the assessee had put it to use. But this special depreciation was confined to small scale industrial undertakings. Thus, it was a special provision made for the benefit of small-scale industrial undertakings. By the Explanation, "new ship" and "new machinery or plant" were defined. The Legislature also provided by that Explanation as to which ˇundertaking was to be regarded as a small-scale industrial undertaking. By the said Explanation, it also provided how the value of the machinery or plant was to be determined. Thus, it cannot be gainsaid that the Legislature thought it fit to make a special provision in this behalf. If registration of an industrial undertaking with the respective State department was to be regarded as sufficient for making such undertaking a small-scale industrial undertaking, then the Legislature would not have made this special provision. Moreover, that would have resulted in discrimination inasmuch as the test laid down for treating an industrial undertaking as a small-scale industrial undertaking might have varied from State to State. Thus, the Legislature, in order to see that there was uniformity, made this special provision and for that reason, it will have to be held that for the purpose of determining whether an industrial undertaking is a small-scale undertaking or not, resort had to be taken to the Explanation to section 32(1)(vi) and not to any other provision of law whereby an industrial undertaking was to be regarded as a small-scale industrial undertaking for other purposes. The Tribunal was, therefore, in error in proceeding on the basis that since the assessee was registered as a small-scale industrial undertaking with the Small-Scale Industries Department, the benefit of section 32(1)(vi) was available to it irrespective of different provision made by that Explanation in that behalf." **(Para 16)**

[Ch Sh]

APPEARANCES:

FOR THE APPELLANT : Mr. C.S. Aggarwal, Sr. Advocate with Mr. Prakash Kumar, Advocate.

FOR THE RESPONDENT : Mr. Suruchi Aggarwal, Sr. Standing Counsel with Ms. Shawana Bari, Advocate.

CASE REFERRED TO:

1. *Commissioner of Income-tax* vs. *J.H. Kharawala* 208 ITR 691.

RESULT: Appeal allowed.

A.K. SIKRI, J. (ORAL)

1. This appeal was admitted on the following substantial questions of law:

> "(i) Whether the Income Tax Appellate Tribunal was justified in law in upholding the order of Commissioner of Income Tax (Appeals) rejecting the claim of deduction of Rs. 7,49,065/-

under Section 80IB of the Income Tax Act, 1961?

(ii) Whether on true and correct interpretation of the provisions of Section 80IB of the Income Tax Act, 1961 the Income Tax Appellate Tribunal was justified in law in holding that assessee since had not claimed deduction under Section 80IB of the Income Tax Act, 1961, in the initial assessment year, i.e., 1998-99, became disentitled to claim such a deduction in the instant assessment year 2004-05, despite the fact the assessee's undertaking fulfils the stipulated conditions for claiming deduction under Section 80IB of the Income Tax Act, 1961?"

2. These questions have arisen in the following factual backdrop. The appellant (hereinafter referred to as 'the assessee') herein is an individual who is running his proprietorship concern under the name and style of M/s Ragnik Exports. This concern is engaged in business of manufacturing and exports of readymade garments. To manufacture these garments for the purpose of exports, the assessee started to manufacture articles from 01.07.1997. The assessee could avail the benefit of Section 80IB of the Income Tax Act (for brevity 'I.T' Act.) from the date of manufacture of these articles, i.e., Assessment Year 1998-99, which was the first year of the assessee.s manufacture, the assessee did not claim the deduction under the said provision in that assessment year. Obviously, since this claim was not raised in that assessment year, it could not be examined as to whether the assessee fulfilled the conditions prescribed in Section 80IB of the Act for claiming exemption under the said provision. The assessee did not claim this benefit even in few succeeding years. Section 80IB of the Act further provides that once an industrial undertaking which fulfils the condition stipulated therein gets the benefit, the same is available for 10 successive assessment years. The appellant claimed benefit under the aforesaid provision for the first time in the assessment year in question, i.e., Assessment Year 2004-05. On course, at the same time, the appellant pleaded that even if the appellant had not claimed this benefit for the past years, it should be allowed to him from 2004-05 till the remaining period of 10 years, i.e., upto 2007-08. This was on the premise that had the claim been allowed and given in the Assessment Year 1998-99, the assessee would have been entitled to the same for a period of 10 years, i.e., Assessment Year 2007-08. While claiming the benefit of the aforesaid provision, the assessee also filed requisite documents including

Form 10CCB to demonstrate that the assessee was investor undertaking which could fulfil conditions stipulated in the said provision.

3. The Assessing Officer (AO) took note of the report in Form 10CCB and also further details and funds provided by the assessee in support of his claim vide letter dated 15.12.2006. However, the claim was denied on the ground that the assessee had not availed the same in the first year in question, i.e., Assessment Year 1998-99. The AO also opined that the small scale industrial undertaking has been denied the benefit under Section 80IB(14)(g) of the I.T. Act and having regard to the said provisions, it should have been registered as a small scale industrial unit in order to claim the status of SSI Unit. Since it was not so registered under the provision of Industries (Development and Regulations) Act, 1951 (hereinafter referred to as the 'IDR Act'), the assessee was not entitled to claim the benefit under Section 80IB of the I.T. Act.

4. Appeals filed by the assessee before the CIT (A) as well as the Income Tax Appellate Tribunal ('the Tribunal' for brevity) were dismissed, as these two authorities have also held that the assessee was not entitled to claim benefit under Section 80IB of the I.T. Act.

5. It is, thus, clear that on two grounds, the benefit of Section 80IB was denied to the assessee-appellant and for these reasons, the aforesaid two substantial questions of law in respect of these two grounds were framed while admitting this appeal. As far as second question of law is concerned, viz., whether the assessee can be denied the benefit of Section 80IB of the I.T. Act simply because of the reason that he did not avail this benefit in the initial assessment year, i.e., 1998-99, it should not detain us for long. Section 80IB is a special provision giving benefits to certain class of industries. It provides for deduction in respect of profits and gains to industrial undertakings other than infrastructure development undertakings. The conditions for claiming this benefit are stipulated in sub-section (2) thereof. One of the conditions, with which we are concerned, is that the assessee manufactures or produces any article or thing, not being any article or thing specified in the list in the Eleventh Schedule, or operates one or more cold storage plant or plants, in any part of India. Special provision is made in respect of those industrial undertakings which fulfil the conditions prescribed in sub-section (2) of Section 80IB of the I.T. Act, if such industrial undertaking happens to

be small scale industries. This is incorporated in sub-section (3) of Section 80IB of the I.T. Act. In such a case, the amount of deduction in the case of an industrial undertaking shall be twenty-five per cent (or thirty per cent where the assessee is a company), of the profits and gains derived from such industrial undertaking for a period of ten consecutive assessment years.

6. If the assessee fulfils the requirement of small scale industrial undertaking (which aspect shall be dealt while answering other question of law), it is not in dispute that the assessee would have qualified for this deduction from the Assessment Year 1998-99. Had the assessee claimed this benefit in that year, he would have been allowed this benefit for 10 consecutive years, i.e., till Assessment Year 2007-08. The assessee, thus, becomes entitled to claim the benefit in the Assessment Year 1998-99. However, merely because of the reason that though the assessee ˇwas eligible to claim this benefit, but did not claim in that year would not mean that he would be deprived from claiming this benefit till the Assessment Year 2007-08, which is the period for which his entitlement would accrue. The provisions contained in Section 80IB of the I.T. Act, nowhere stipulates any condition that such a claim has to be made in the first year failing which there would be forfeiture of such claim in the remaining years. It is not the case of the assessee that he should be allowed to avail this claim for 10 years from the Assessment Year 2004-05. The assessee has realized his mistake in not claiming the benefit from the first Assessment Year 1998-99. At the same time, the assessee foregoes the claim upto the Assessment Year 2003-04 and is making the same only for the remaining period. There is no reason not to give the benefit of this claim to the assessee if the conditions stipulated under Section 80IB of the I.T. Act are fulfilled.

7. This question of law is thus answered in favour of the assessee and against the Revenue.

8. The other question as to whether it is incumbent upon the assessee that it is registered under the IDR Act for claiming the benefit under sub-section (3) of Section 80IB of the I.T. Act. The answer to this depends on the interpretation which is to be given to Clause (g) of sub-section (14) of Section 80IB of the I.T. Act, which reads as under:

> "(g) "small-scale industrial undertaking" means an industrial undertaking which is, as on the last day of the previous year, regarded as a small-scale industrial undertaking under section 11B of the Industries (Development and Regulation) Act, 1951."

9. As pointed out above, as per sub-clause (3) of Section 80IB of the I.T. Act where industrial undertaking is small industrial undertaking, it is entitled to deduction of 25% of the profits and gains derived from such industrial undertaking for a period of 10 consecutive years. Small scale industrial undertaking for this purpose is defined in Clause (g) sub-Section (14) of Section 80IB of the I.T. Act reproduced above. As per this provision, small scale industrial undertaking is regarded as "small-scale industrial undertaking under Section 11B of the IDR Act". The IDR Act is enacted to provide for development and regulation of certain industries. For the purpose of regulating those industries in the meaning prescribed under the Act, industrial undertaking is defined in Section 3(d) to mean any undertaking pertaining to a scheduled industry carried on in one or more factories by any person or authority including Government. The first schedule attached to the said Act specifies those industries. In order to regulate these scheduled industries, Section 10 mandates that all existing industrial undertaking have to get registered under this Act. Section 11 of the I.D.R Act deals with new industrial undertaking which would come into existence after the passing of the Act and establish any new industrial undertaking, except under and in accordance with a licence issued in that behalf by the Central Government. However, in case of small scale industrial undertaking, exemption and favourable benefits are provided which means those small scale industrial undertakings which fulfil the conditions of being small scale industrial are not to be regulated as per the provisions of I.D.R. Act. It is in this context, Section 11B is inserted in the statute which gives power to the Central Government to specify the requirements which shall be complied with by small scale industrial undertakings. Omitting those portions of Section 11B, which are not relevant for our purposes, rest of the Section is extracted below:

> **"11B. POWER OF CENTRAL GOVERNMENT TO SPECIFY THE REQUIREMENTS WHICH SHALL BE COMPLIED WITH BY THE SMALL SCALE INDUSTRIAL UNDERTAKINGS.**
>
> (1) The Central Government may, with a view to ascertaining

which ancillary and small scale industrial undertakings need supportive measures, exemptions or other favourable treatment under this Act to enable them to maintain their viability and strength so as to be effective in :-

(a) promoting in a harmonious manner the industrial economy of the country and easing the problem of unemployment, and

(b) securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common goods, specify, having regard to the factors mentioned in sub-section (2), by notified order, the requirements which shall be complied with by an industrial undertaking to enable it to be regarded, for the purposes of this Act, as an ancillary, or a small scale industrial undertaking and different requirements may be so specified for different purposes or with respect to industrial undertakings engaged in the manufacture or production of different articles :

Provided that no industrial undertaking shall be regarded as an ancillary industrial undertaking unless it is, or is proposed to be, engaged in :-

(i) the manufacture of parts, components, sub-assemblies, tooling or intermediates; or

(ii) rendering of services, or supplying or rendering, not more than fifty per cent of its production or its total services, as the case may be, to other units for production of other articles.

(2) The factors referred to in sub-section (1) are the following, namely :-

(a) the investment by the industrial undertaking in :-

(i) plant and machinery, or

(ii) land, buildings, plant and machinery;

(b) the nature of ownership of the industrial undertaking;

(c) the smallness of the number of workers employed in the industrial undertaking;

(d) the nature, cost and quality of the product of the

industrial undertaking;

(e) foreign exchange, if any, required for the import of any plant or machinery by the industrial undertaking; and

(f) such other relevant factors as may be prescribed."

10. Section 29B of the I.D.R. Act gives power to the Central Government to exempt, inter alia, such small scale industrial undertakings from the provisions of I.D.R. Act.

11. As is clear from the reading of Section 11B of the I.D.R. Act, it is for the Central Government to specify the requirements which shall be complied with by the industrial undertaking to enable it to be regarded for the purpose of the said Act as small scale industrial undertaking. Appropriate exercise in this behalf has been carried out by the Central Government by issuing notification dated 10.12.1997. Operative portion of the said notification lays down the following conditions to be fulfilled by the industrial undertakings before it could be regarded as a small scale or ancillary industrial undertakings:

"Now, therefore, in exercise of the powers conferred by sub-section (1) of Section 11B and sub-section (1) of section 29B of the said act, and in supersession of the notification of the Government of India in the Ministry of Industry (Department of Industrial Development) number S.O.232(E), dated the 2nd April, 1991, the Central Government hereby specifies the following factors on the basis of which an industrial undertaking shall be regarded as a small scale or as an ancillary industrial undertaking for the purposes of the said Act:-

1. **Small scale industrial undertaking:** An industrial undertaking in which the investment in fixed assets in plant and machinery, whether held on ownership terms of on lease or on hire purchase, does not exceed rupees three crores;

2. **Ancillary industrial undertaking:** An industrial undertaking which is engaged or is proposed to be engaged in the manufacturing or production of parts components, sub-assemblies, tooling or intermediates, or the rendering of services, and undertaking supplies or proposes or supply

or renders not more than fifty per cent of its production or services, as the case may be, to one or more other industrial undertakings and whose investment in fixed assets in plant and machinery, whether held on ownership terms or on lease or on hire purchase, does not exceed rupees three crores."

12. At the end of this notification, it is provided that every industrial undertaking which has been issued a certificate of registration under Section 10 of the said Act or a license under Sections, 11, 11A and 13 of the I.D.R. Act by the Central government and are covered by the provisions of paragraphs (1) and (2) above relating to the ancillary or small scale industrial undertaking, may be registered at the discretion of the owner as such within a period of 180 days from the date of publication of this notification. Two things follow from the reading of the aforesaid notification:

(a) To be regarded as a small scale industrial undertaking - such an undertaking should be given which has invested in fixed assets in plant and machinery either on ownership terms of on lease or on hire purchase.

(b) Worth of said asset does not exceed Rs. 3 Crores. The prescription of Rs. 3 Crores was reduced to Rs. 1 Crore vide amendment notification dated 04.12.1995.

13. It is not in dispute that the appellant-assessee fulfils these requirements. However, as mentioned above, benefit is denied only on the ground that it is not registered under the provisions of I.D.R. Act. We are of the considered opinion that the registration under the I.D.R. Act will be of no consequence for availing the benefit under Section 80IB of the I.T. Act. Clause (g) of sub-section (14) of Section 80IB of the I.T. Act only mandates that such an industrial undertaking should be regarded as small scale industrial undertaking under Section 11B of the I.D.R. Act. As per Section 11B of the I.D.R. Act, it is for the Central Government to lay down the conditions which are required to be fulfilled as regards small scale industries. In the aforesaid notification, the conditions which are mentioned for being regarded as small scale industries are the ownership of plant and machinery and value thereof. Registration of such an undertaking under the I.D.R. Act is not a condition for treating the same as small scale industrial undertaking. That registration

is prescribed for altogether different purpose, viz., to avail the benefit under the I.D.R. Act either of Section 11B or Section 29B. Thus, insofar as extending the provision of Section 80IB of the I.T. Act is concerned, the only aspect which is relevant and is to be considered is as to whether the conditions stipulated in the notification issued under Section 11B of the I.D.R. Act for regarding the same as small scale industrial Act are fulfilled or not. It would be of interest to note that Section 80IB (14)(g) used the expression 'regarded as small scale industrial undertaking' under Section 11B of the I.D.R. Act. Likewise, even the notification dated 10.12.1997 while laying down the conditions for claiming the benefit of small scale industrial undertaking used the same expression when it states 'following factors on the basis of which an industrial undertaking is regarded as small scale industrial undertaking'.

14. When we look into the mandatory Form prescribed for availing this benefit, viz., Form 10CCB, such a form has to be filled and submitted by the assessee to the AO for claiming the benefit. The details which are required to be given as per this form include the information which is to be supplied to ascertain, whether such industrial undertaking would be regarded as small scale industrial undertaking for the purpose of Section 11B of the I.D.R. Act inasmuch the assessee is called upon to give the value of machinery or plant, number of workers employed in the manufacturing process, total sales of the undertaking and also profits and gains derived by the undertaking from the eligible business and deduction under Section 80IB of the I.T.Act.

15. The purpose for industrial undertaking to be regarded as small scale industrial undertaking as per Section 11B of the I.D.R. Act is not far to seek. It was to maintain parity in prescribing the conditions which are required to be fulfilled by the industrial undertaking to qualify itself as small scale industrial undertaking. Since the Central Government has to prescribe such conditions by notification in view of provisions of Section 11B of the I.D.R. Act, the Legislature in its wisdom deemed it fit to incorporate those conditions for the purpose of I.T. Act as well. This issue came up for consideration before the Gujarat High Court, albeit, in the context of depreciation which is to be allowed to an assessee under Section 32 of the I.T. Act. We may point out that explanation (3) of Section 32(1) of the I.T. Act also gives special benefit to the small scale industrial undertaking and reads as under:

"(3) an industrial undertaking shall be deemed to be a small-scale industrial undertaking, if the aggregate value of the machinery and plant installed, as on the last day of the previous year, for the purpose of the business of the undertaking does not exceed seven hundred and fifty thousand rupees; and for this purpose the value of any machinery or plant shall be, -

(a) in the case of any machinery or plant owned by the assessee, the actual post thereof to the assessee; and

(b) in the case of any machinery or plant hired by the assessee, the actual cost thereof as in the case of the owner of such machinery or plant."

16. The question which was posed for consideration before the Gujarat High Court in the case of **Commissioner of Income-tax Vs. J.H. Kharawala** 208 ITR 691 was as to whether it was incumbent upon a small scale industrial undertaking to have registration under the I.D.R. Act to claim the benefit of depreciation under Section 32 of the I.T. Act. Replying in the negative and holding that there was no such requirement of such registration to avail the said benefit, the Gujarat High Court held as under:

"Section 32 provides for depreciation. Sub-section (1) provides for depreciation in respect of building, machinery, plant or furniture owned by the assessee and used for the purposes of his business or profession. Clause (vi) of sub-section (1) provided for one time depreciation of 20 per cent. on the actual cost of ship, aircraft, machinery or plant. It gave an option to assessee to claim depreciation either in the year in which the machinery or plant was installed or the year in which the assessee had put it to use. But this special depreciation was confined to small scale industrial undertakings. Thus, it was a special provision made for the benefit of small-scale industrial undertakings. By the Explanation, "new ship" and "new machinery or plant" were defined. The Legislature also provided by that Explanation as to which undertaking was to be regarded as a small-scale industrial undertaking. By the said Explanation, it also provided how the value of the machinery or plant was to be determined. Thus, it cannot be gainsaid that the Legislature thought it fit to make a

special provision in this behalf. If registration of an industrial undertaking with the respective State department was to be regarded as sufficient for making such undertaking a small-scale industrial undertaking, then the Legislature would not have made this special provision. Moreover, that would have resulted in discrimination inasmuch as the test laid down for treating an industrial undertaking as a small-scale industrial undertaking might have varied from State to State. Thus, the Legislature, in order to see that there was uniformity, made this special provision and for that reason, it will have to be held that for the purpose of determining whether an industrial undertaking is a small-scale undertaking or not, resort had to be taken to the Explanation to section 32(1)(vi) and not to any other provision of law whereby an industrial undertaking was to be regarded as a small-scale industrial undertaking for other purposes. The Tribunal was, therefore, in error in proceeding on the basis that since the assessee was registered as a small-scale industrial undertaking with the Small-Scale Industries Department, the benefit of section 32(1)(vi) was available to it irrespective of different provision made by that Explanation in that behalf."

17. The upshot of the aforesaid discussion is to answer this question of law in favour of the assessee, as otherwise, there is no dispute that the assessee fulfils eligibility conditions prescribed under Section 80IB of the I.T. Act and is to be regarded as small scale industrial undertaking. We direct the AO to give the benefit of deduction claimed by the assessee under Section 80IB of the I.T. Act for the Assessment Year in question, i.e., 2004-05.

18. This appeal is allowed in the aforesaid terms.

ILR (2011) V DELHI 563
EFA (OS)

Y.P. KHANNA & ORS. ....APPELLANTS

VERSUS

P.P. KHANNA & ORS. ....RESPONDENTS.

(VIKRAMAJIT SEN & SIDDHARTH MRIDUL, JJ.)

EFA (OS) NO. : 2/2010 & CM 1040/2010 **DATE OF DECISION : 30.03.2011**

Arbitration and Conciliation Act, 1996—Execution of arbitration Award—Appeal filed to assail the order of Learned Single Judge in Execution Petition wherein he allowed release of Rs. 1,06,26,000/- to Respondents No (i) to (iii)—A family arbitration Award was passed on 1st January, 1999—The Award settled the shares and claims between five brothers forming Group-A, B, C, D, E. —The Award has since been upheld by the Hon'ble Supreme Court vide order dated 15th May, 2009 subject to the amendment of the final Award by the Division Bench of this Court vide order dated 1st August, 2008.—The possession of Okhla Property was handed over to Group C on 8th June, 2009—Therefore, the issue for which damages/rent are being claimed relates to the period beyond the period of 45 days from the date of the family settlement dated 1st January, 1999 i.e.,15th February, 1999.—The appellants claimed compensation for the illegal and unauthorized occupation of Okhla Property by Group E during all these years—The order dated 13th January, 2010 in Execution Petition itself stated that the issue of inter-se liabilities would be examined and adjudicated after all statutory dues are paid to respective banks and financial institutions.—The contention on behalf of the Appellants that the Single Judge virtually dismissed the claims of Group C qua Group E without adjudicating the same are untenable, as the final adjustments were to be made after final adjustment of statutory dues—The order made was legal—Appeal dismissed.

It is seen from the impugned order dated 13th January, 2010 that, in the first instance, the learned Single Judge addressed issues of payment of the outstanding liabilities arising from the said family Award and the amounts to be paid towards all the said liabilities. Having come to the conclusion that the said liabilities in aggregate would not exceed Rs. 1 Crore, whereas the amount lying deposited in the Court by the parties to the Award was about Rs. 3.5Crore, the learned Single Judge directed that the liabilities be discharged in the first instance. Thereafter the learned Single Judge addressed the issue of releasing Rs. 1,06,26,000/- to Group 'E' under the family Award. At this stage Counsel appearing on behalf of the Appellants herein requested that the issue of outstanding rent between Group 'C' and Group 'E' in respect of Okhla Property be referred to mediation. Mr. Sandeep Sethi, Senior Advocate, was requested by the learned Single Judge to act as mediator with regard to the aforesaid dispute and see if the same can be resolved amicably between Group 'C' and Group 'E'. However, the learned Single Judge was of the view that the amount payable under the Award to Group 'E' should not be withheld in the meantime and in that view of the matter directed the Registry to release the aforesaid sum of Rs. 1,06,26,000/- in favour of Group 'C'. Simultaneously, the learned Single Judge made it very clear in the order dated 13th January, 2010 that the issue of inter-se liabilities would be examined and adjudicated after all statutory dues were paid to respective banks and financial institutions.**(Para 6)**

We find no infirmity in the impugned order for the following reasons. Firstly, the view taken by the learned Single Judge is a possible view in the facts and circumstances of the case and a view which could legally have been taken in the

matter. Secondly, it has not been shown that the order of the learned Single Judge is in any manner perverse or that the view taken by him was not a possible view (reference can be made on this proposition to the decision of the Supreme Court in **Wander Ltd. –vs.- Antox India Pvt. Ltd.,** 1990 (Supp) SCC 727). Thirdly, the learned Single Judge did not reject the claim of the Appellants qua the Respondent No.1(i) to (iii) and only deferred the adjudication to beyond the payment of all the statutory dues under the family Award. Thus, the claim of the Appellants for compensation from Group 'E' for illegal and unauthorized occupation of Okhla Property has yet to be adjudicated.

(Para 7)

Important Issue Involved: No appeal lies unless and until there is infirmity or perversity in the impugned order.

[Ch Sh]

APPEARANCES:

FOR THE APPELLANTS : Mr. Deepak Tyagi, Advocate.

FOR THE RESPONDENTS : Mr. Sanjeev Anand, Ms. Kajal Chandra and Ms. Prachi Gupta, Advocates for Mr. P.P. Khanna/ Respondent No. 1/Group 'E'. Mr. Ashwani Khanna for Group 'D'.

CASE REFERRED TO:

1. *Wander Ltd.* vs. *Antox India Pvt. Ltd.,* 1990 (Supp) SCC 727).

RESULT: Appeal dismissed.

SIDDHARTH MRIDUL, J.

1. The present Appeal assails the order dated 13th January, 2010 passed by the learned Single Judge in Execution Petition No.233/2009, whereby the learned Single Judge allowed release of an amount of Rs. 1,06,26,000/- to the Respondent No.1(i) to (iii).

2. The only grievance raised by the Appellants is that the learned Single Judge ought not to have released the aforementioned amount to the said Respondents without adjudicating the inter-se claims of the Appellants and Group 'E'.

3. The facts as are necessary for disposal of the present Appeal are that:

(a) A family arbitration Award was passed on 1st January, 1999. The Award settled the shares and claims between five brothers forming Group 'A', Group 'B', Group 'C', Group 'D' and Group 'E' respectively. The Award has since been upheld by the Hon'ble Supreme Court vide order dated 15th May, 2009 subject to the amendment of the final Award by the Division Bench of this Court vide order dated 1st August, 2008.

(b) As per the Award, Group 'E' (Respondent No.1(i) to (iii) herein) was to hand over vacant possession of a portion of the property bearing No. D-1, Okhla Industrial Area, Phase-I, Delhi (hereinafter referred to as 'Okhla Property') to Group 'C' (Appellants herein) within 45 days of passing of the Award and thereafter a sum of Rs. 1,06,26,000/- was to be released in favour of Group 'E'. However, subsequently objections were filed by members of Group 'A' and Group 'B' (Respondent No.2 and 3 herein) against the family Award dated 1st January, 1999 which were later on dismissed by the Hon'ble Supreme Court. Group 'E' remained in possession of Okhla Property even after 45 days of passing of the Award, inasmuch as, owing to the objections filed by the Respondent No.2 and 3 the family Award became unexecutable.

(c) It is the claim of the Appellants that Group 'E' was illegally withholding the possession of Okhla Property since 1997, when during the course of the family arbitration the Appellants i.e. Group 'C' had already handed over the factory premises No.C-7 and C-8 to Group 'E' i.e. Respondent No.1(i) to (iii) herein.

(d) The Appellants herein filed an Execution Petition No.398/

2008 before this Court for execution of the family Award dated 1st January, 1999. In the Execution Petition No.398/2008 the Appellants had sought for various claims against Group 'E' including claim of proportionate House Tax and Ground Rent in respect of Okhla Property which was ˇoccupied by Group 'E' since 1997. The House Tax liability has been paid by Group 'E' under the directions given by this Court for the period from 1974 to 1984.

(e) In a separate Execution Petition No.233/2009 filed by Group 'E', it has been prayed that an amount of Rs. 1,06,26,000/- be released to them keeping in view the outstanding liabilities.

(f) Vide the impugned order dated 13th January, 2010 the learned Single Judge came to the view, *inter alia,* that the amount payable under Award to Group 'E' should not be withheld. Consequently, the impugned order directed the Registry of this Court to prepare a cheque of Rs. 1,06,26,000/- in favour of the Respondent No.1(i) to (iii) herein and hand over the same to the learned Counsel for the respective Groups. At the same time it was made clear in the impugned order that all the rights and contentions including the issue of interest payable to the parties would be adjudicated upon subsequently.

(g) Simultaneously, in Execution Petition No. 398/2008 by an order of the same date, i.e. 13th January, 2010, the learned Single Judge directed that the issue of inter-se liabilities would be examined and adjudicated after all statutory dues are paid to the respective banks and financial institutions.

(h) The grievance raised by the Appellants is to the effect that contrary to the family Award, Group 'E' continued qua their possession of Okhla Property during all these years and vacated the same only on 8th June, 2009 and on the other hand raised massive construction on C-7 & 8, Okhla Industrial Area, Delhi, being vacated and handed over by Group 'C' to them and predicated on this the Appellants had asked for damages/rent in respect of 6,780 Square Feet approximately.

4. On behalf of the Appellants it is contended that the impugned order fell into error, inasmuch as, it released the sum of Rs. 1,06,26,000/- to Group 'E' without adjudicating the inter-se claims and liabilities between Group 'C' and Group 'E' and failing to appreciate the liability of Group 'E' to compensate Group 'C' for illegal and unauthorized occupation of part of premises of Okhla Property from 15th February, 1999 to 7th June, 2009.

5. In the present case, it is seen that the possession of Okhla Property was handed over to Group 'C' on 8th June, 2009. Therefore, the issue for which damages/rent are being claimed relates to the period beyond the period of 45 days from the date of the family settlement dated 1st January, 1999 i.e. 15th February, 1999. The Appellants claim compensation for the illegal and unauthorized occupation of Okhla Property by Group 'E' during all these years. In this behalf, it must be noticed that the order dated 13th January, 2010 in Execution Petition No.398/2008 itself states that the issue of inter-se liabilities would be examined and adjudicated after all statutory dues are paid to respective banks and financial institutions. Therefore, the contention on behalf of the Appellants that the Single Judge virtually dismissed the claims of Group 'C' qua Group 'E' without adjudicating the same are untenable.

6. It is seen from the impugned order dated 13th January, 2010 that, in the first instance, the learned Single Judge addressed issues of payment of the outstanding liabilities arising from the said family Award and the amounts to be paid towards all the said liabilities. Having come to the conclusion that the said liabilities in aggregate would not exceed Rs. 1Crore, whereas the amount lying deposited in the Court by the parties to the Award was about Rs. 3.5Crore, the learned Single Judge directed that the liabilities be discharged in the first instance. Thereafter the learned Single Judge addressed the issue of releasing Rs. 1,06,26,000/- to Group 'E' under the family Award. At this stage Counsel appearing on behalf of the Appellants herein requested that the issue of outstanding rent between Group 'C' and Group 'E' in respect of Okhla Property be referred to mediation. Mr. Sandeep Sethi, Senior Advocate, was requested by the learned Single Judge to act as mediator with regard to the aforesaid dispute and see if the same can be resolved amicably between Group 'C' and Group 'E'. However, the learned Single Judge was of the view that the amount payable under the Award to Group 'E' should not be withheld

in the meantime and in that view of the matter directed the Registry to release the aforesaid sum of Rs. 1,06,26,000/- in favour of Group 'C'. Simultaneously, the learned Single Judge made it very clear in the order dated 13th January, 2010 that the issue of inter-se liabilities would be examined and adjudicated after all statutory dues were paid to respective banks and financial institutions.

7. We find no infirmity in the impugned order for the following reasons. Firstly, the view taken by the learned Single Judge is a possible view in the facts and circumstances of the case and a view which could legally have been taken in the matter. Secondly, it has not been shown that the order of the learned Single Judge is in any manner perverse or that the view taken by him was not a possible view (reference can be made on this proposition to the decision of the Supreme Court in **Wander Ltd. –vs.- Antox India Pvt. Ltd.,** 1990 (Supp) SCC 727). Thirdly, the learned Single Judge did not reject the claim of the Appellants qua the Respondent No.1(i) to (iii) and only deferred the adjudication to beyond the payment of all the statutory dues under the family Award. Thus, the claim of the Appellants for compensation from Group 'E' for illegal and unauthorized occupation of Okhla Property has yet to be adjudicated.

8. In this view of the matter, we find no infirmity or perversity in the impugned order so as to warrant interference in appeal. In view of the above, we find no force in the Appeal which is hereby dismissed leaving the parties to bear their respective costs.

ILR (2011) V DELHI 570
CEAC

GOLDEN TOBACCO LIMITED ....APPELLANT

VERSUS

COMMISSIONER OF CENTRAL EXCISE, DELHI-I ....RESPONDENT

(DIPAK MISRA, CJ. & SANJIV KHANNA, J.)

CEAC NO. : 05/2010 & 14/2010 DATE OF DECISION: 30.03.2011

Central Excise and Salt Act, 1944—Section 35G CEAC No. 5/2010 is directed against the order passed by the Customs Excise and Service Tax Appellate Tribunal, disposing of the application for waiver of pre-deposit with direction to deposit two amounts of Rs. 8,71,70,993/- and Rs. 3,07,55,877/- but granted waiver from payment of penalty and interest—CEAC No. 14/2010 is directed against the order passed by the Tribunal dismissing the original appeals filed by the appellant for failure to deposit the tax amount in terms of the earlier order dated 15th February, 2010 Held: Undue hardship which entitles an appellant to seek waiver, means something which is not warranted by the conduct of the appellant or very much disproportionate to the said conduct—Undue hardship is caused when the hardship is not warranted by the circumstances. The other aspect which has to be kept in mind is the need and requirement to safeguard the interest of Revenue. Tribunals while disposing of applications for waiver of pre deposits have to keep in mind the said two factors—Tribunals order directing payment of principal amount does not require interference—However time upto 16th May, 2011 granted to appellant to make deposit of the entire tax

amount and in case the said deposit was made, the appeals filed by the appellant to be heard by the Tribunal.

[Ch Sh]

APPEARANCES:

FOR THE APPELLANT : Mrs. Nisha Bagchi, Mrs. S.K. Mongia, Mrs. Anupam Srivasastava, Mrs. Sujata Shirolar, Mrs. Shuchi Kakkar and Mr. Sameer Nandwani, Advocates.

FOR THE RESPONDENT : Mr. Mukesh Anand with Mr. R.C.S. Bhadoria, Mr. Shailesh Tiwari and Mr. J. Singh, Advocates.

CASES REFERRED TO:

1. *Union of India* vs. *Adani Exports Limited,* 2007 (218) ELT 164 (SC).
2. *Indu Nissan Oxo Chemicals Industries Ltd.* vs. *Union of India,* (2007) 13 SCC 487.
3. *GTC Industries Ltd.* vs. *Collector of Central Excise,* 2006 (198) E.L.T. 121 (Tri.- Del.).
4. *Indore Wire Company Limited* vs. *UOI,* 2006 (203) ELT 179 (SC).
5. *Benara Valves Ltd.* vs. *CCE,* (2006) 13 SCC 347.
6. *ITC Ltd.* vs. *Commissioner of Central Excise, New Delhi and Anr.* 2004 (171) ELT 433 (SC).
7. *Metal Box India Ltd.* vs. *CCE* (2003) 11 SCC 197.

RESULT: Partially allowed.

SANJIV KHANNA, J.

1. Golden Tobacco Company, formerly known as GTC Industries Limited, have filed the present appeals CEAC Nos. 5/2010 and 14/2010 under Section 35G of the Central Excise and Salt Act, 1944 (Act, for short). CEAC No. 5/2010 is directed against the order dated 15th February,

2010 passed by the Customs Excise and Service Tax Appellate Tribunal (Tribunal, for short), disposing of their application for waiver of pre-deposit, with the direction to deposit two amounts of Rs.8,71,70,993/- and Rs.3,07,55,877/-. The impugned order grants waiver of deposit of the cumulative penalty of Rs. 20 Crores. CEAC NO. 14/2010 is directed against the order dated 19th July, 2010 passed by the Tribunal dismissing the original appeals filed by the appellant for failure to deposit the tax amount in terms of the earlier order dated 15th February, 2010. In this manner, the two appeals are inter-connected.

2. Questions of law as formulated by the appellant in the two appeals read as under:-

CEAC 5/2010

A. Whether, in view of the specific direction of the Hon'ble Supreme Court directing that each Show Cause Notice must be limited to the case made out therein by the Revenue, it was open to the Learned Tribunal to refer to and rely upon the allegations contained in the third Show cause notice for the purpose of holding that there was no prima facie case in favour of the Appellants?

B. Whether, the requirement to pre-deposit the said amount will cause undue hardship to the Appellant as the impugned demand has been confirmed in violation of the directions of the Hon'ble Supreme Court as well as in violation of the principles of natural justice?

C. Whether, the requirement for pre-deposit ought to have been waived as the Respondent was bound by the provision of the Rehabilitation Scheme formulated by BIFR where under they had agreed not to insist on pre-deposit in respect of any appeal?

CEAC 14/2010

(a) Whether the Learned Tribunal not err in dismissing the Appellant's Appeal even though the issue of pre-deposit was pending before the Hon'ble Court?

(b) Whether, in view of the specific direction of the Hon'ble Supreme Court directing that each Show Cause Notice

must be limited to the case made out therein by the Revenue, it was open to the Learned Tribunal to refer to and rely upon the allegations contained in the third Show cause notice for the purpose of holding that there was no prima facie case in favour of the Appellants?

(c) Whether, the requirement to predeposit the said amount will cause undue hardship to the Appellant as the impugned demand has been confirmed in violation of the directions of the Hon'ble Supreme Court as well as in violation of the principles of natural justice?

(d) Whether, the requirement for predeposit ought to have been waived as the Respondent was bound by the provision of the Rehabilitation Scheme formulated by BIFR where under they had agreed not to insist on pre-deposit in respect of any appeal?

3. As the order dated 19th July, 2010 challenged in Appeal No. 14/2010 is consequential and sequitor to the earlier order dated 15th February, 2010, we have discussed and treated CEAC No. 5/2010 as the main appeal.

4. The law on the question of pre-deposit, when the statute requires the appellant to deposit the impugned tax or demand which is challenged in an appeal, has been lucidly and clearly expounded by the Supreme Court in their decisions in **Benara Valves Ltd. vs. CCE,** (2006) 13 SCC 347 and **Indu Nissan Oxo Chemicals Industries Ltd. vs. Union of India,** (2007) 13 SCC 487. 'Undue hardship' which entitles an appellant to seek waiver, means something which is not warranted by the conduct of the appellant or very much disproportionate to the said conduct. Undue hardship is caused when the hardship is not warranted by the circumstances. Undue hardship is normally associated with economic hardship but the use of word 'undue' before the word 'hardship' would show that it should be excessive hardship or hardship greater than what the circumstances warrant. The other aspect which has to be kept in mind is the need and requirement to safeguard the interest of Revenue. Tribunals while disposing of applications for waiver of pre deposits have to keep in mind the said two factors.

5. In the case of **Union of India vs. Adani Exports Limited,** 2007

(218) ELT 164 (SC), the Supreme Court examined a similar provision of pre-deposit in Section 129E of the Customs Act, 1962. It was held that prima facie case is one of the aspects which has to be taken into consideration to decide whether or not to grant full or partial stay but the interest of the Revenue is important and cannot be ignored. Right to appeal is neither an absolute right nor an ingredient of natural justice, principles of which must be followed in all judicial or quasi judicial adjudications. The right to appeal is a statutory right which can be circumscribed by the condition for the grant. (See **Govt. of Andhra Pradesh vs. P. Laxmi Devi,** (2008) 4 SCC 720.)

6. In the case of **Indu Nissan** (supra), reference was made to the earlier decision of the Supreme Court in **Metal Box India Ltd. vs. CCE** (2003) 11 SCC 197 and it was held that Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA, for short) does not by itself or ex facie entitle a "sick company" to claim waiver of pre-deposit in the appellate proceedings on the ground of undue hardship. Payment of pre-deposit does not fall under any of the categories mentioned in Section 22 of the SICA. Learned Tribunal in the order dated 15th February, 2010 has recorded the appellant's contention with reference to the Section 22 of the SICA and rejected the same relying upon the aforesaid decisions. It may be noted that rehabilitation scheme or the package was finalized by the BIFR by the order dated 17th December, 2002 and we are in the year 2010-11. BIFR order pertains to the past demands and cannot relate to demands which were to arise in future. As per the written arguments filed by the appellant, what was restructured under SICA was repayment of the confirmed duty amounts totaling Rs.5516.82 Lakhs in installments from the financial year 2005-06 onwards. It is the case of the appellant that Rs. 4120 Lakhs has been prayed to the Excise Department but the installment due on 30th September, 2010 was delayed in view of financial difficulty. It is pleaded by the appellant that disputed liability of excise was outside the purview of the scheme; yet it is submitted that the Excise Department had agreed not to impose condition of pre-deposit in future for hearing of an appeal on disputed liabilities during the rehabilitation period. The respondent has disputed the said contention and has stated that no such concession was agreed. The response of the respondent has been placed on records as Exhibit-DD to the counter affidavit. The respondent has placed on record a newspaper report that the appellant has sold immovable properties in Mumbai for Rs. 591 Crore. Along with

the counter affidavit the respondent has enclosed, the response of the appellant, admitting that they had entered into a development transaction to develop property measuring 8 acres in Vile Parle (West), Mumbai. This contention of the appellant relying upon SICA is accordingly rejected.

7. Examination of the grounds of appeal show that three other contentions have been raised by the appellant. Firstly, the adjudication order dated 12th March, 2009 passed by the Commissioner of Central Excise (Adjudication), New Delhi is ex-facie contrary to law and is liable to be set aside for the reason, it is based upon the third show cause notice dated 2nd September, 1985, which was struck down by the Supreme Court in its decision dated 22nd July, 1997, reported in 1997 (94) ELT 9 (SC). Secondly, the Tribunal has failed to take into consideration the earlier order dated 9th December, 2005 in **GTC Industries Ltd. v. Collector of Central Excise,** 2006 (198) E.L.T. 121 (Tri.- Del.), which dealt with same/ similar contentions of the Revenue and lastly, security deposit was a norm in the industry which was followed by other cigarette/ tobacco manufacturers. The Supreme Court in the case of **ITC Ltd. vs. Commissioner of Central Excise, New Delhi and Anr.** 2004 (171) ELT 433 (SC), has held that the excise duty can be charged on the basis of retail sale price.

8. The first contention is based upon the order of the Supreme Court dated 22nd July, 1997 in the first round of litigation. The operative portion of which reads as under:-

> "15. The Tribunal found no legal difficulty in holding that the allegations contained in the third show cause notice should be looked into for the purpose of adjudication of the first and second show cause notices. We find great difficulty in upholding the Tribunal's view. As we see it, each show cause notice must be limited to the case that is made out therein by the Revenue. It is not within the jurisdiction of the Tribunal to direct otherwise; to do so is to go beyond its purely adjudicatory function.
>
> 16. The appeals are allowed to the extent aforestated. The appeal filed by the Revenue before the Tribunal is held to be beyond time and it shall not be entertained. The hearing on remand of the first and second show cause notices shall proceed, but limited to the case made out in each on its own merits."

9. The aforesaid order was passed by the Supreme Court on a challenge made by the appellant herein to the order of the Tribunal, reported as 1996 (86) ELT 431 (Tribunal), on appeals filed by the appellant herein in respect of 3 show cause notices dated 26th August, 1983, 19th April, 1984 and 2nd September, 1985. The first and the second show cause notices were in respect of the factory at Bombay (now Mumbai) and the factory at Baroda (now Vadodra), respectively, relating to period 1978 to 1983. The third show cause notice which related to the period 1st July, 1978 to 30th June, 1980, was in respect of factories of the appellant at Bombay, Baroda, Universal Tobacco Hyderabad and J.K. Cigarettes, Jammu. The contention raised with regard to the third show cause notice was regarding limitation. In paragraph 11 of the order, the Tribunal held that the proceedings arising from the third show cause notice were required to be remanded for fresh consideration on the question of limitation. The Supreme Court held that the order passed by the Central Board of Excise under Section 35E was beyond the period prescribed. Thus, the third show cause notice was struck down. The effect of the said order has been elaborately considered by the order passed by the Commissioner (Adjn.) dated 12th March, 2009. He has held that there was a search and during the course of search several documents and material were seized. This additional evidence could be relied upon while deciding and going into the merits of the first two show cause notices. This as per the Commissioner (Adjn.) is permitted and as per law. He in this connection has referred to **Indore Wire Company Limited versus UOI,** 2006 (203) ELT 179 (SC) and decision of the Tribunal in the appellant's own case reported as 2002 (144) ELT 632 (Tri. – Del.).

10. The second and third contention of the appellant has also been noted by the Commissioner (Adjn.) and dealt with. It may be noted that the order of the Tribunal dated 9th December, 2005 related to different show cause notices which were issued in 1986 and related to a different period. The question and issue raised was decided vide order dated 9th December, 2005 on the evidence and material on record. The contention of the Revenue is that a finding of fact based upon the evidence and material available and on record, does not constitute a binding ratio decendi. Against the said order, the Revenue has filed appeals which are pending before the Supreme Court. This order dated 9th December, 2005 of the tribunal is reported in 2006 (198) E.L.T. 121 (Tri.- Del.). In

paragraph 13 of this order, the Tribunal has referred to lapses on the part of the Revenue in making enquiries and held that there was no material that there was direct or indirect flow back from the principal buyers to the appellant. In the case of **ITC Ltd.** (supra) the Supreme Court was concerned with interpretation of two exemption notifications dated 1st March, 1983 and 2nd September, 1985 and the period involved was from 1983 to 1987. A question arose whether the said manufacturer had wrongly availed concessional rate of duty under the said notifications by consciously and deliberately ensuring that the actual retail sale prices of the cigarettes were higher than the declared and printed sale prices. The Supreme Court interpreted the said notifications and applied them to the facts of said case. Accordingly, it was observed that the Supreme Court need not go into other questions which were debated. The other aspects were left open.

11. With regard to the second and third contention of the appellant, it may be appropriate to refer to the findings recorded in the order dated 12th March, 2009. For the sake of convenience, the relevant paragraphs of the said order on the question of allegations and the findings are reproduced below (paragraphs have not been reproduced in seriatim as per the order but have been appropriately placed to show the allegations and part evidence which is being relied upon by the Revenue) :

> I. "22.2 It is an undisputed position that after the budget of 1979, M/S GTC reduced in the ex-factory, selling price of their most popular brand 'Panama Plain' (PPL) from Rs.89.50 to Rs. 85.60 per 'M'. This drastic reduction by Rs.3.90 per 'M' resulted in bringing down the assessable value from Rs.26.58 to Rs.18.18, resulting in reduction in the payment of excise duty. The said reduction in the price of PPL was done, not because of any genuine commercial considerations but because M/s GTC wanted to keep the price to Wholesale buyers, practically unchanged, while on, the other hand increasing a fund called EPM by Rs.3.90 per 'M'. The New Deposit Scheme was devised and implemented from 6.3.79 to recover huge amounts from the WBs at the rate of Rs.3.90 per 'M' of PPL brands supplied to them. This recovery was to take away the extra EPM generated at the hands of the WBs by reducing the price charged to WB.
>
> II. 23.1 .....This scheme was further extended

> to other brands like Blue Bird Regular (BBR), Golden Gold Glake Filter King (GGFTK), Golden Gold Flake Regular (GGFTR), and Prince Filer Regular (PFTR). The WBs did not oppose the NDS because they did not loose any money of their own but were returning M/s GTC's money out of EPM created by lowering the invoice price of cigarettes.
>
> III. 22. It is observed that during 1979, GTC had devised a scheme called "New Security Scheme". They contended that the scheme was devised to safeguard their interest against risks involved in selling cigarettes on credit, against unfounded claims and dictates of such customer and transporters. M/s GTC contended that this was a normal feature of their business with the customers who purchased their cigarettes on credits and this practice prevailed almost in the entire cigarette industry.
>
> IV. 22.1 I observed that the two SCNs alleges that the real purpose of the NDS was to ensure a continuous flow of interest on sales outstanding at the rate of 15% to 20% depending on the prevailing rate while they were required to pay only 3% towards the accumulated deposits realized by the adjustment of sale proceeds towards outstanding on deposits. It is charged that M/s GTC had not accepted the full amount of the deposit from any of the buyers. Acceptance of a minor part of the deposits, in fact, had achieved in creating an outstanding in deposits by the buyers to assessee in subsequent period. It was further revealed that the sale proceeds were then adjusted, against such outstanding in deposits. By the adjustment of the above nature, it is observed that the assessee had created sales outstanding for which interest at the rate of 13% to 20% has been charged from time to time. This arrangement resulted in a situation where assessee gets a continuous flow of interest on sales outstanding at the rate of 15% to 20% depending on the prevailing rate while they were required to pay on 3% towards the accumulated deposits realized by the adjustment of sale proceeds towards outstanding on deposits. Thus, the declared purpose as disclosed to the department was not the real purpose. In fact, the security deposits were not taken from the wholesale buyers rather, only accounting jugglery was used to receive additional funds from the wholesale

buyers. The documentary evidences on record clearly establish that the NDS was operated in a fashion to receive a part of the sale proceeds in the guise of differential interest.

V. 24.1 Under the NSD Scheme, M/s GTC had devised some terms and conditions which were circulated. M/s GTC would ask the Whole sale buyers to deposit very huge amount as Security Deposit, knowing fully well that the WB would never be able to deposit the said security. It is not disputed that a format in cyclostyled form was also circulated by M/s GTC, according to which the WB would be asked to inform M/s GTC that he could not deposit the said amount and he would be willing to built up the said deposit in a phased manner by agreeing to apportion, the amounts in thousands, out of the payment made by him to M/s GTC against supply bills, towards the security deposit and to apportion the faction of the payment towards the supply account. In other words, if the WB paid an amount of Rs.1,20,175/- against the supply bill of FTC, then M/s GTC was liberty to divert Rs.1,20,000/- towards security deposit and to credit the balance of Rs.175/- only, in the supply A/c against the bill amount. Thereby Rs.1,20,000/-was shown as outstanding due to the company against the sales and it was considered as credit given to the WB. Under the NSD scheme M/s GTC would pay an interest at only 6% on the said deposit amount, artificially, built up as mentioned above and simultaneously M/s GTC would demand and recover an interest @ 18% on the amount due on the M/s GTC i.e. identical to the amount of deposit. As a result, on an artificially created deposit and a credit there would be surplus of interest, in favour of M/s GTC at the differential rate of 12%. Detailed instructions regarding the conditions and the procedure to be followed in this regard were circulated by M/s GTC and were binding on the WB. It is interesting to note that the rate of interest was unilaterally fixed and changed from time to time by M/s GTC without asking consulting the WB. The interest due to M/s GTC from WB at 18% was called "over due interest" (ODI) and it was calculated on daily basis or product method and demanded by way of a debit note every month. In this manner interest calculation report were prepared by M/s GTC and the seized records contain voluminous computerized

and other interest calculation reports. A credit note for the interest to be paid by M/s GTC on the artificial deposit amount was issued quarterly to the WB.

VI. 25.1 The quantum of new security deposit prescribed in March, 1979 was revised in November, 1979. A comparison of the old security deposit and the New Security deposit as initially fixed in March, 1979 and as revised in November, 1979 in respect of some of the wholesale buyer, is given below:-

SI No.	Name of the party	Amounts of deposit in Old Security Deposit as on 30th Nov. 1979 (Rs)	Amounts of deposit in new deposit as fixed initially in March 1979	Amounts of deposit in new security deposits w.e.f. 17th Nov, 1979
1)	Coimbatore Tobacco Co. Coimbatore	24,000	2,60,000	10,24,000
2)	M/s Raja V.S. Subramania Chettiar Sons Dindigul	37,500	72,000	36,38,000
3)	M/s P. Nala Chakraborthi Chettiar, Madras.	50,000	22,75,000	50,50,000
4)	M/s Mani Company, Madurai	35,000	65,000	50,35,000
5)	M/s Southern	6,000	82,000	30,06,000

(*) This is the amount inclusive of old security deposit.

The above charts shows that the so called security deposits were raised manifolds without any apparent reason in the form of proportionate increase in sale volume or actual credit."

12. Some other evidence/material relied upon in the Assessment order are:

I. "23.6 Further, the letter dated 25th September 1979 (Annexure-31) written by the Regional Office of M/s GTC to their Head Office in Bombay regarding issue of debit notes revealed the true nature of the transactions. Relevant extracts of the said letter are as under:-

"The total quantity of Panama Plain supplied to our area for the period March 79 to Aug. 79 comes to 5.83 crores and Rs.3.90 per M, the total debit note amount should have been for Rs.22.76 lakhs whereas we have received debit notes for Rs.27.79 lakhs as on 31.8.79. This reveals that you have raised excess debit notes to the tune of Rs.5.00 lakhs."

The above evidences clearly establish that the amounts collected by M/s GTC at rates prescribed per 'M' for each brand were collected as interest on sales balance created artificially by crediting the payment to security deposits instead of sales account. The interest on so called outstanding balance was not actually interest but was the part of the sale consideration and was based on quantity sold.

II. 24. The fact that M/s GTC collected money from its wholesale buyers per M specified for each brand is further corroborated by "Notes on NSD" prepared by Shri Prasad, Regional Manager of M/s GTC found in the files of M/s GTC. The relevant portion is extracted as under:

"Just after 1979 Budget we started an NSD system to recover EPM surplus amounts from WB's. The system started keeping in view that we will recover at rate of Rs.3.80 per 'M' on PPL Vol. From each buyer. Later, we included BBRI and other 5 brands @ Rs.4/- per 'M' GGFTD Rs.5/- GGFTR and Price FIR @ Rs.5.60 per 'M'.

The aforesaid extracts brings out the real nature of the "New Security Deposit Scheme' (NSD). The cover for the recovery of flow back from the Whole sale buyers was sought to be provided by NSD. As already observed, the collections were made at fixed

rates per 'M' of some popular brands, based on the supplies made under each invoice. These collection were made in advance and they were treated as "on account" payment. This clearly establish the true nature as part of sale consideration of the so called interest on credit balance.

III. 25.3 Notes on NSD, prepared by Shri G. Prasad, Regional Manager, of M/s GTC Bombay (**Annexure-36**) also reveal the fraudulent nature of the scheme. It is observed that the NSD System was started, just after 1979 Budget, to recover the EPM surplus amount from Whole sale buyers which started with Rs.3.80 (upto June'79) and Rs.3.90 per 'M' thereafter, on PPL volume, from each buyer. Later on it was extended to BBR and other 5-P brands at Rs.4/- per 'M' GGFTK at Rs.5/- GGFTR and Price FTR at Rs.5.60 per 'M'. The New Security Deposit Amount was worked out for each buyer, keeping in view the PPL Volume initially and on the basis of total generation minus Distribution, and Advertising, Sales Promotion Expenses for each buyer. Shri G. Prasad has confirmed the above position in his statement dated. 22.08.83 (Annexure-11).

IV. 25.6 …….GTC Bombay to the Bangalore Regional Office (Annexure-45), in reply to their letter of ˇNovember 10. The letter mentions "we do not see why you have written giving all the details whereas we have warned you on several occasions to be careful. Please note that henceforth such lapses will be taken seriously".

V. 30. The above evidences make it clear that the New Security Deposits were raised retrospectively to adjust to the "on account" collections made by M/s GTC based on rates per 'M' fixed for certain brands. Accordingly, wherever the actual inflow at fixed rates was more than the amount of interest as per the debit note, the security amount was adjusted to revise the differential interest. M/s GTC had never returned the excess collections to the wholesale buyers but the amounts of security Deposits had been raised retrospectively so that the outstanding amounts would also go up and correspondingly, the amount of interest would increase retrospectively to enable M/s GTC to mop up the entire "generations minus allowable expenses". Similarly, where the

amount of interest for a particular period was more than the actual 'on account' payments received during the period, no efforts were made to recover more amounts from the wholesale buyers but the security deposit amounts were reduced so that the outstanding amounts were also reduced to that extent resulting in lower interest debit note to match the "generations minus allowable expenses". These generations were out of the sale considerations which were over and above the invoice price.

VI. 37. It is seen from the various evidences discussed above that the purpose of this NSD Scheme was nothing but to give a cover to the flow back of the amounts recovered from the Whole sale buyers at fixed rates as mentioned earlier. No credit, in fact, was given to the WB because the WB had paid the full purchase price against the bill or before receipt of the consignments. Similarly, no deposit was in fact ever built up or paid by the WB. However, to give some cover to these fictitious transactions, income tax was deducted at source by both the parties, under instructions of M/S GTC. The tax deducted at source, (TDS) by the WB, initially from his own sources was allowed to be adjusted towards expenses out of EPM, by M/S GTC. This also shows that the WB was given an understanding that WB was to loose nothing in agreeing for the NSD Scheme. It was also noticed that later on the security deposit amounts were suddenly raised very high or reduced very low from time to time, at the sole discretion of M/s GTC and the amounts of ODI flowing from WB to M/S GTC and the amount of interest flow from M/s GTC to WB, were varying from time to time. However, the WB was not bothered about such fluctuation because he was assured that the real margin was fully protected and he had nothing to loose in the NSD Scheme. At the time of terminating the WB the amounts from the security deposit account would be set off or adjusted against the outstanding amounts in the supply accounts, which were artificially created and there would be no security deposit worth the name, to be returned to the WB."

13. In view of the aforesaid findings, it is apparent that the Commissioner (Adjn) has elaborately dealt with and has given due

weightage and consideration to the entire material on record. Prima facie or ex-facie it is not possible to hold that the said findings and the reasonings are laconic, perverse or based upon mere surmises and conjectures. Of course, the said reasoning has to be examined in detail by the Tribunal, but keeping in view the parameters laid down by the Supreme Court, we do not think there is any justification and reason to interfere with the impugned order passed by the Tribunal directing the appellant to deposit the principal amount of the tax. Tribunal has granted exemption/waiver from payment of penalty and interest. The impugned order dated 15th February, 2010, takes into consideration the relevant facts as well as the law as applicable. We do not think any question of law arises for consideration of this Court and accordingly Appeal No. 5/2010 does not have any merit and is liable to be dismissed.

14. As far as appeal No. 14/2010 is concerned, we are inclined to partially allow the said appeal. It may be noted that appeal No. 5/2010 was filed in May, 2010 and vide order dated 26th May, 2010, notice was directed to be issued. The Tribunal vide order dated 19th July, 2010 dismissed the appeal of the appellant on the ground of non-compliance of the order dated 15th February, 2010. Keeping in view the facts of the present case Question No. (a) in Appeal No. 14/2010 is answered in affirmative and it is held that Tribunal erred in dismissing the appeal of the appellant vide order dated 19th July, 2010. Time upto 16th May, 2011 is granted to the appellant to make deposit of the entire tax amount and in case the said deposit is made, the appeals filed by the appellant will be heard by the Tribunal. It is made clear that no further extension of time shall be granted for deposit of tax. Observations and findings recorded above are for the disposal of the present appeals, and will have no influence and will not be binding on the tribunal when the appeals before them are heard on merits. No order as to costs.

ILR (2011) V DELHI 585
FAO (OS)

ESSEL SPORTS PVT. LTD. ....APPELLANT

VERSUS

BOARD OF CONTROL FOR CRICKET IN INDIA & ORS. ....RESPONDENT

(VIKRAMAJIT SEN & MUKTA GUPTA, JJ.)

FAO (OS) NO. : 107/2010 & CM NOS. : 2517/10, 2520/10, 6557-58/2010, 6561-62/10 & FAO (OS) NO. : 154/2010 & CM 4243/2010

DATE OF DECISION : 31.03.2011

Code of Civil Procedure, 1908—Order XXXVIX, Rule 1 & 2—This judgment dispose of connected appeals No. FAO(OS) 107/2010 and FAO(OS) 154/2010 emanating from the common Order of the Ld. Single Judge—By means of which an interim injunction on the plaintiff's application, restrained the defendant (ESPL) from proceeding against the plaintiff (BCCI) in courts in England—Plaintiff submits that there is complete identity between the cause of action of the notified lis proposed and thereafter actually filed on 4.2.2010 in the High Court of Justice, Chancery Division, London and the dispute which is subject matter of suit—CS(OS) No. 1566/2007, filed by ESPL against the BCCI presently pending in High Court—By the subject Order, the Learned Single Judge vacated the injunction relating to the International Cricket Council (ICC) and the England & Wales Cricket Board (ECB)—The first question is whether the cause of action in both the suits is common—The Indian Suit, CS(OS) No. 1566/2007 filed on 24.8.2007, is a suit for Declaration,

Permanent and Mandatory Injunction—ESPL has filed this Suit against the Union of India, Karnataka State Cricket Association and BCCI—The suit alleges that BCCI, has not only publically opposed ICL but has overtly and covertly taken all possible steps to stultify its operations. It is also alleged that a de facto monopoly in the field of cricket is sought to be created in India by BCCI which is now acting arbitrarily in its own functioning as well as in the administration of the game.

After perusing the two claims and cogitating of the contentions of the adversaries, it is opined that the cause of action in two is substantially and materially the same.

The second argument is that the UK Suit is being prosecuted under the UK Competition Act and, therefore, the action is based on a distinct statutory cause of action, thereby making the UK action a single forum case.—Argument misconceived—A statutory cause of action arises from breach of a specific duty cast or right conferred by a statue on a person.

After comparing the reliefs sought in the two Claims, we are of the opinion that these declaratory and injunctive reliefs for the very same cause of action can be availed of under the Indian Competition Act or under the Indian Contract Act. We must immediately clarify that in the event of a challenge simplicitor to the ICC Regulations without any reference to the alleged machination of BCCI which are already sub judice the change would be drastic. Therefore, the argument that an anti-suit injunction takes away the juridical advantage is not tenable in the facts of the present case. **(Para 26)**

There cannot be any cavil to the propositions laid down in **Modi Entertainment Network,** that a subsequent suit, if held to be vexatious and oppressive, can be injuncted by the Indian Courts, provided other necessary ingredients are

also satisfied. Contrary findings of different Courts on same facts are an anathema to law, and if a party endeavours to invoke the jurisdiction of foreign Court to a cause of action already being prosecuted in the national forum, it would amounts to vexatious litigation. **(Para 29)**

h **Modi Entertainment Network,** the Hon'ble Supreme Court has opined that an anti-suit injunction can be granted where the foreign proceedings are vexatious, oppressive or *forum non conveniens*. Courts have the bounden duty to ensure that the ends of justice are not thwarted. Ergo, an anti-suit injunction should be passed. Legal proceedings by an Indian party in a foreign Court, in which the prayers predominantly concern another Indian party, even whilst a suit on similar allegations and reliefs is still pending in an Indian Court between the same parties, is, in our considered opinion, vexatious and oppressive. **(Para 30)**

Furthermore, the evidence sought to be adduced in the UK Court are of the same witnesses who have deposed in the Suit which is proceeding in India. If the UK Suit is allowed to proceed, it will only lead to a duplication of evidence and even more detrimentally to the possibility of conflicting or variant verdicts. **(Para 32)**

Important Issue Involved: (A) Where the lower Court acts arbitrarily, capriciously or perversely in the exercise of its discretion, the appellate court will interfere. Exercise of discretion by granting a temporary injunction when there is ''no material'', or refusing to grant a temporary injunction by ignoring the relevant documents produced, are instances of action which are termed as arbitrary, capricious or perverse. When its referred to acting on ''no material'' (similar to ''no evidence''), it refers not only to cases where there is total dearth of material, but also to cases where there is no relevant material or where the material, taken as a whole, it is not reasonably capable of supporting the exercise of discretion.

(B) If there is substantial overlapping of the two actions and that there would be a risk of conflicting judgments/orders if two parallel proceedings on the same issues are allowed to be preceded with. The tests laid down in Modi Entertainment Network for the grant of an anti-suit injunction have clearly been met since it appears to us also that the foreign suit is oppressive, vexatious and in a forum non conveniens. So far as the grant of the relief as a temporary injunction is concerned, the three factors that should co-exist, viz, prima facie case, balance of convenience, irretrievable loss and injury.

[Ch Sh]

APPEARANCES:

FOR THE APPELLANT : Mr. Harish Salve, Sr. Advocate, Mr. C.S. Vaidyanathan, Sr. Advocate, Mr. Maninder Singh, Sr. Advocate with Ms. Pratibha M. Singh, Ms. Surabhi Mehra & Mr. Nikhil Mehra, Advocates

FOR THE RESPONDENT : Mr. C.A. Sundaram, Sr. Advocate with Ms. Radha Rangaswamy, Mr. Raman Kumar, Mr. Harsh Kaushik & Mr. Amit Sibal, Advocates Mr. Ramji Srinivasan, Sr. Advocate with Ms. Dahlia Sen Oberoi, Ms. Manya Kumar & Mr. Zeyaul Haque Advocates for Respondent No. 2 and 3.

CASES REFERRED TO:

1. *Moser Baer India Ltd.* vs. *Koninklijke Phillips Electronics NV,* 151 (2008) DLT 180.
2. *Magotteaux Industries Pvt. Ltd.* vs. *AIA Engineering Limited,* 155(2008) DLT 73(DB).
3. *Seema Arshad Zaheer* vs. *Municipal Corpn. of Greater*

Mumbai, (2006) 5 SCC 282.

4. *Horn Linie Gmbh* vs. *Panamerica Formas E Impresas SA,* [2006 2 Lloyd's Reports 44].

5. *Ramdev Food Products (P) Ltd.* vs. *Arvindbhai Rambhai Patel,* (2006) 8 SCC 726.

6. *Seema Arshad Zaheer* vs. *Municipal Corpn. of Greater Mumbai,* (2006) 5 SCC 282].

7. *Modi Entertainment Network* vs. *W.S.G. Cricket Pte. Ltd.,* (2003) 4 SCC 341.

8. *Society of Lloyd's* vs. *Peter Everett White,* [2002] I.L.Pr.10.

9. *Donohue* vs. *Armco Inc,* (2002) 1 All ER 749 (HL).

10. *Laxmikant V. Patel* vs. *Chetanbhai Shah,* (2002) 3 SCC 65.

11. *SABAH Shipyard (Pakistan) Ltd.* vs. *Islamic Republic of Pakistan and Karachi Electrics Supply Corpn. Ltd.* (2002), 2002 EWCA Civ 1643 (CA).

12. *Bell'Oggetti International Inc.* vs. *Flooring and Lumber Company Ltd.,* 2001 O.T.C. 362.

13. *Airbus Industrie GIE* vs. *Patel,* (1998) 2 All ER 257 : (1999) 1 AC 119 : (1998) 1 WLR 686 (HL).

14. *C.S.R. Ltd.* vs. *Cigna Insurance Australia Ltd.,* (1997) 189 CLR 345 : (1997) 146 ALR 402 (Aust HC).

15. *Mitchell* vs. *Carter,* (1997 BCC 907).

16. *Amchem Products Inc* vs. *Workers' Compensation Board,* (1993) 102 DLR (4th) 96 (Can SC).

17. *British Aerospace Plc* vs. *Dee Howard Co.,* (1993) 1 Lloyd's Rep 368.

18. *Barclays Bank PLC* vs. *Homan,* (1992 BCC 757).

19. *British India Steam Navigation Co. Ltd.* vs. *Shanmughavilas Cashew Industries*(1990) 3 SCC 481.

20. *Wander Ltd.* vs. *Antox India P. Ltd.,* 1990(Supp) SCC 727.

21. *ONGC* vs. *Western Company of North America,* (1987) 1 SCC 496.

22. *SNI Aerospatiale* vs. *Lee Kui Jak,* [1987] 3 All ER 510.

23. *Oil and Natural Gas Commission* vs. *Western Co. of North America,* (1987) 1 SCC 496.

24. *Spiliada Maritime Corpn.* vs. *Cansulex Ltd.,* (1986) 3 All ER 843 : 1987 AC 460 : (1986) 3 WLR 972 (HL).

25. *British Airways* vs. *Laker Airways Ltd.,* [1984] 3 All ER 39.

26. *Midland Bank* vs. *Laker Airways Ltd.,* [1984] 3 All ER 526.

27. *Castanho* vs. *Brown & Root (U.K.) Ltd.* [1981] A.C. 557.

28. *Castanho* vs. *Brown & Root (U.K.) Ltd.,* 1981 AC 557 : (1981) 1 All ER 143 : (1980) 3 WLR 991 (HL).

29. *MacShannon* vs. *Rockware Glass Ltd.,* (1978) 1 All ER 625.

30. *MacShannon* vs. *Rockware Glass Ltd.* [1978] A.C. 795.

31. *Crofter Hand Woven Harris Tweed Co. Ltd.* vs. *Veitch* [1942] A.C. 435.

32. *Mogul Steamship Co. Ltd.* vs. *McGregor, Cow & Co.* [1892] A.C. 25

33. *North London Railway Co.* vs. *Great Northern Railway Co.* (1883) 11 Q.B.D. 30.

34. *Carron Iron Co.* vs. *Maclaren,* (1855) 5 HLC 416 : 24 LJ Ch 620 : 3 WR 597 (HL).

35. *Hilton* vs. *Guyot,* 159 US 113.

RESULT: Disposed off.

VIKRAMAJIT SEN, J.

1. This Judgment will dispose of connected Appeals No. FAO(OS) 107/2010 and FAO(OS) 154/2010 emanating from the common Order of the learned Single Judge dated 4.2.2010, by means of which an interim

injunction on the Plaintiff's application under Order XXXIX Rule 1 and 2 Code of Civil Procedure, 1908 (CPC for short) restrained the Defendant, Essel Sports Pvt. Ltd. (ESPL) from proceeding against the Plaintiff, the Board of Control for Cricket in India (BCCI), in Courts in England. The Plaintiff submits that there is complete identity between the cause of action of the notified lis proposed and thereafter actually filed on 4.2.2010 in the High Court of Justice, Chancery Division, London and the dispute which is subject matter of Suit, CS(OS) No.1566/2007, filed by ESPL against the BCCI presently pending in this High Court. By the subject Order, the learned Single Judge vacated the injunction relating to the International Cricket Council (ICC) and the England & Wales Cricket Board (ECB).

2. The facts, in a nutshell, are that ESPL started a cricket tournament in the name and style of the Indian Cricket League (ICL) wherein the competing teams constitute players of both Indian and foreign nationality at domestic and international level. It is alleged that the BCCI, by virtue of being the concerned Home-Board regulating cricket in India, publically opposed the Indian Cricket League tournament and also overtly and covertly took all possible steps to stultify its operations. The ESPL has alleged that the BCCI used its influence on various state agencies, ICC and the respective foreign Home-Boards to boycott the ESPL tournament, namely, the ICL. ESPL filed a Suit, CS(OS) No.1566/2007 on 24.8.2007 against the BCCI, in which the Union of India and Karnataka State Cricket Association were also made parties, seeking declaratory and mandatory injunctive reliefs against the Defendants. While the Suit is progressing in this High Court, BCCI filed the subject Suit for issuance of an anti-suit injunction against ESPL alleging that BCCI had received a Notice dated 16.11.2009 sent by the Solicitors of ESPL in England. This Notice states that ESPL intended to file a suit against BCCI in the Court of England & Wales in the United Kingdom. Similar notices were sent to ECB and ICC who were proposed to be made the co-defendants in that Suit. In this Suit in hand, CS(OS) No.2312/2009, BCCI has prayed for a perpetual injunction against ESPL from initiating any action against BCCI in any other judicial forum in respect of the allegations, subject matter and reliefs contained and covered in the earlier Suit, CS(OS) No.1566/2007 pending before Delhi High Court.

3. An interim injunction was granted on 25.1.2010 in favour of the Plaintiff/BCCI and Defendants No.2 and 3, namely, ECB and ICC, restraining ESPL from proceeding with its proposed claim before the U.K. Courts, till the next date of hearing. Vide impugned Order dated 4.2.2010, the learned Single Judge made the stay in favour of the BCCI permanent till the final disposal of the subject anti-suit injunction action. However, the stay qua ICC and ECB was vacated. All the adversaries, discontent with different parts of the Order of the learned Single Judge, have filed their respective Appeals. In FAO(OS) No.107/2010, ESPL has impugned that part of the Order wherein the learned Single Judge has restrained it from proceeding against BCCI in the U.K. Courts. In FAO(OS) No.154/2010, BCCI has impugned the decision of the learned Single Judge disallowing its prayer to extend the anti-suit injunction against ICC and ECB. Moreover, ICC and ECB have also filed their Cross-objections in FAO(OS) No.107/2010 filed by ESPL praying that ESPL should be injuncted from proceeding against them in the U.K. Suit filed by ESPL. It transpires that the very action which was initially proposed to be pursued against BCCI along with ICC and ECB has now been filed by ESPL, the only change being that BCCI has been dropped from the notified array of parties pursuant to the learned Single Judge's Order. Therefore, substantially BCCI, ICC and ECB are claiming the same relief from the Court, viz. that the action in U.K be injuncted in toto.

4. We shall first deal with the Appeal filed by ESPL, that is, FAO(OS) No.107/2010. Mr. Salve, the learned Senior Counsel for ESPL, has contended that the learned Single Judge has gravely erred in holding that the two Suits, that is, the one filed in India and the other filed in United Kingdom, are similar in substance and that, therefore, the U.K. Suit is oppressive and vexatious in nature. It is also argued that such a temporary anti-suit injunction is unknown in law and tantamounts to this Court managing the Board of a foreign Court, which is repugnant to the concept of international comity amongst Courts. Mr. Salve has laid great store on the fact that the action proposed in the notice of the Solicitors of ESPL in England is substantially distinct from the one already filed and under adjudication in this High Court. It is argued that in the pending Indian Suit, the actions of BCCI have territorial bearing in India; for instance, BCCI forbidding local bodies to permit the use of their stadia; banning of Indian players from playing in ICL and withdrawal of pension of former Indian players associated with ICL etc. Per contra, the U.K. Suit

only takes within its sweep complaints which are contextual to actions taken or intended to be taken in the U.K. It is emphasized that the reliefs sought in England are substantially different to those in the process of adjudication in India. Essentially, these claims are based on the U.K. Competition Act and the curial advantage that the Plaintiff may have by prosecuting its case in the foreign court ought not be nullified by an anti-suit injunction. It has also been submitted that the reliefs sought in the English action are not directed only to BCCI but are also against ICC and ECB which are foreign bodies amenable to the jurisdiction of English Courts. Predicated on this argument, it is urged that the English action is a single forum case; and that Indian Courts should not grant an injunction against actions proposed to be filed or actually filed in Courts ordinarily or naturally possessing jurisdiction over the dispute. With regard to this proposition, Mr. Salve has relied on **ONGC –vs- Western Company of North America,** (1987) 1 SCC 496, **Modi Entertainment Network –vs- W.S.G. Cricket Pte. Ltd.,** (2003) 4 SCC 341, **Moser Baer India Ltd. –vs- Koninklijke Phillips Electronics NV,** 151 (2008) DLT 180, **British Airways –vs- Laker Airways Ltd.,** [1984] 3 All ER 39, **Midland Bank –vs- Laker Airways Ltd.,** [1984] 3 All ER 526.

5. Secondly, Mr. Salve submits that the finding of the learned Single Judge that the proposed action is oppressive and vexatious is also erroneous because, as per the Appellants, the Courts in the U.K. are the natural forum. He has sought support from **SNI Aerospatiale –vs- Lee Kui Jak,** [1987] 3 All ER 510 and **MacShannon –vs- Rockware Glass Ltd.,** (1978) 1 All ER 625. Mr. Salve has also relied on the Explanation to Section 10 of the CPC to buttress his contention that even if the second action is based on the same cause of action, the rationale of Section 10 of the CPC will not bar the filing of the subsequent suit in a foreign court. To support this proposition, the Appellant has placed reliance on **Magotteaux Industries Pvt. Ltd. –vs- AIA Engineering Limited,** 155(2008) DLT 73(DB). Section 10 of the CPC is reproduced below for facility of reference:-

> **Section 10. Stay of suit.—**No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is

> pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.
>
> *Explanation.*—The pendency of a suit in a foreign court does not preclude the Courts in India from trying a suit founded on the same cause of action.

6. It is also urged by Mr. Salve that the English action ought not to be injuncted as being unconscionable or vexatious and oppressive only because BCCI, being an Indian party, will be compelled to defend an action in a foreign jurisdiction. Since the dispute is between commercial entities having international presence, defending their positions in the U.K. for the actions in U.K. jurisdiction, cannot be said to be vexatious. It is underscored that BCCI is the richest Board in the cricketing world and, therefore, the expenses likely to be incurred in defending the *lis* in the U.K. Courts cannot be viewed as oppressive.

7. Magotteaux Industries, no doubt, observed that the Explanation to Section 10 of the CPC provides that the pendency of a suit in foreign courts does not preclude Indian Courts from trying an action founded on the same cause of action. According to our learned Brothers, applying the said provision conversely, a foreign court should also not precluded from entertaining any suit based on some cause of action for which a suit is pending in an Indian Court. The dispute in that case concerned the breach of a patent by a party in different jurisdictions. An anti-suit injunction was prayed for in India against that party/defendant restraining it from prosecuting its rights in the U.S. Courts. The Court had observed that patent rights are sovereign rights granted by a sovereign state bestowing thereby limited monopoly rights to the inventor to the exclusion of others for a set period. The ratio decidendi of **Magotteaux Industries** is that since the foreign suit dealt with infringement of the patent granted by the U.S. laws, the U.S. action was based on a distinct territorial cause of action, the remedy for which would lie only in that particular jurisdiction; and, therefore, Indian Courts should not grant an anti-suit injunction predicated on an alleged infraction in India of patent rights granted by Indian law. It is contended that a similar situation arises in the present case as well, inasmuch as ESPL has threatened to invoke the jurisdiction of the UK Courts invoking the UK laws.

8. In **MacShannon,** the House of Lords declined the grant of an anti-suit injunction, inter alia, on the ground that the costs of prosecuting the suit in Scotland would be oppressive. The Court on this account held as follows:

> In the MacShannon and the Fyfe cases, the plaintiff's opposition to a stay rested on allegations in his solicitor's affidavit stating that (1) higher damages are awarded in the English than in the Scottish courts, (2) the Scottish system of pleading was inferior to the English system and might prejudice the plaintiff, increase the costs and lengthen the duration of the litigation, (3) party and party costs were less generously assessed in Scotland than in England.
>
> These allegations were all denied in an affidavit sworn by the defendants' Scottish solicitors. Neither Robert Goff J. nor the Court of Appeal attempted what they described as "the invidious and impossible task" of deciding which of the two sets of affidavits was to be preferred.
>
> The majority of the Court of Appeal concluded [1977] 1 W.L.R. 376, 385 that in each case the plaintiff's justification for bringing an action in England when its natural forum was Scotland, was-
>
> "the advice of responsible and experienced solicitors ... [the judge] was right to attribute weight to the plaintiffs' solicitors' unproven belief that it would be to the plaintiff's advantage to litigate in England and right to balance it against the disadvantages to the defendants deposed to in the affidavits of their solicitors."
>
> In my opinion this conclusion was wrong in law and vitiates the exercise of the judge's discretion and the decision of the majority of the Court of Appeal. Unproven belief cannot in law constitute a reasonable justification for bringing an action in England or make it unjust to send the plaintiff back to his own country where the action could be litigated more cheaply than in England and just as satisfactorily from everyone's point of view. Since the judge's discretion was based upon a wrong legal principle, that discretion and its approval by the majority of the Court of Appeal is open to review by your Lordships.

> When no justification has been shown for bringing an action in England it is, in my opinion, obviously unjust to make the defendant incur the substantial extra expense and inconvenience which he would suffer were he obliged to defend the action in England. The extra expense as shown in the defendants' affidavits consists of a substantial extra outlay for witnesses' travelling and accommodation expenses whether the trial takes place in Carlisle, Newcastle or London. The inconvenience consists of the harm which the defendants' business would suffer through the disruption caused by their employees being kept away from their work substantially longer than necessary.

9. In **British Airways,** an anti-suit injunction was sought against Laker Airways from prosecuting its claim in the United States under the Sherman Anti Trust Act and for 'intentional tort'. The plea of the British Airways was that the procedure in the US Courts under the Anti Trust Act was highly oppressive and distinct from that of British law and further that the action could as well be prosecuted in the British Courts. The Court observed that the circumstances in that case were such that even if the allegations against British Airways in the American action were to be proved, they would disclose no cause of action on the part of Laker Airways against British Airways which would be justiciable in an English Court; and that the Clayton Act which creates civil remedy with three-fold damages for criminal offences under the Sherman Act, is, under English rules of conflict of laws, purely territorial in its application. Therefore, in these circumstances, the Court found it to be the case of a 'single forum' in respect of which injunctions could not have been granted by the U.K. Courts. It would be relevant to reproduce the following paragraphs from this Judgment:-

> The proposition is that, even if the allegations against B.A. and B.C. in the complaint in the American action can be proved, they disclose no cause of action on the part of Laker against B.A. or B.C. that is justiciable in an English court. The Clayton Act which creates the civil remedy with threefold damages for criminal offences under the Sherman Act is, under English rules of conflict of laws, purely territorial in its application, while because the predominant purpose of acts of B.A. and B.C. that are complained of was the defence of their own business interests as providers

of scheduled airline services on routes on which Laker was seeking to attract customers from them by operating its Skytrain policy, any English cause of action for conspiracy would be ruled out under the now well-established principle of English (as well as Scots) law laid down in a series of cases in this House spanning 50 years of which it suffices to refer only to **Mogul Steamship Co. Ltd. v. McGregor, Cow & Co.** [1892] A.C. 25 and **Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch** [1942] A.C. 435.

In the result your Lordships are confronted in the civil actions with a case in which there is a single forum only that is of competent jurisdiction to determine the merits of the claim; and the single forum is a foreign court. For an English court to enjoin the claimant from having access to that foreign court is, in effect, to take upon itself a one-sided jurisdiction to determine the claim upon the merits against the claimant but also to prevent its being decided upon the merits in his favour. This poses a novel problem, different in kind from that involved where there are alternative fora in which a particular civil claim can be pursued: an English court and a court of some foreign country both of which are recognised under English rules of conflict of laws as having jurisdiction to entertain proceedings against a defendant for a remedy for acts or omissions which constitute an actionable wrong under the substantive law of both England and that foreign country.

Cases which have these characteristics can now conveniently be labelled as forum conveniens cases. In them the High Court has jurisdiction to control how the choice of forum shall be exercised. It does so by the use, as circumstances may require, either of its discretionary power to grant or refuse a stay of the action in the English court by the party who is a plaintiff there, or of its discretionary power to enjoin a party who is, or is threatening to become, a plaintiff in the foreign court from continuing or commencing proceedings in that court. Leaving aside claims that can immediately be identified as frivolous and vexatious, the High Court, at the stage at which it exercises this jurisdiction, is making no determination on the merits of the claim; it is deciding

by which court, English or foreign, the merits of the claim ought to be tried. The principles to be applied by the High Court in making this decision in forum conveniens cases have been developed over the last 10 years in a number of decisions of this House starting with The Atlantic Star [1974] A.C. 436, continuing with **MacShannon v. Rockware Glass Ltd.** [1978] A.C. 795 and **Castanho v. Brown & Root (U.K.) Ltd.** [1981] A.C. 557, and ending with The Abidin Daver [1984] A.C. 398; but the principles expounded in the speeches that were delivered in all these cases start from the premise that the claim by one party against an adverse party is a claim to a right that is justiciable in England. Except for a short passage in the opinion of my noble and learned friend, Lord Scarman, in **Castanho's** case [1981] A.C. 557 (with which all four other members of the Appellate Committee, including myself, agreed), I do not find the speeches in the forum conveniens cases of assistance in solving the novel problem which your Lordships have to face in the civil actions that are subjects of the instant appeals.

The answer to these appeals, in my opinion, clearly emerges from the application to the allegations that are crucial in Laker's case against B.A. and B.C. in the American action of what since the merger of the courts of common law and Chancery has been a fundamental principle of English legal procedure. That principle, originally laid down in **North London Railway Co. v. Great Northern Railway Co.** (1883) 11 Q.B.D. 30, was re-stated by me (albeit in terms that I recognise were in one respect too narrow) in **Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A. [1979] A.C. 210, 256:**

"A right to obtain an ... injunction is not a cause of action ... It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court."

10. Thirdly, the impugned Judgment is challenged on the ground that it transgresses the norms of judicial comity and amounts to regulating

the 'court diary' of another Court. It is contended that the question whether the U.K. Court is the appropriate Court to be seised of the proposed action should be left to that Court alone to decide; and the circumstances do not warrant the writ of this Court to interfere with the jurisdiction of the UK Court. It is contended that the question of *forum non conveniens* is a question to be decided by that forum itself which is said to be the *forum non conveniens*. It is not appropriate and, in turn, is violative of the principles of comity that one Court should injunct another foreign Court from hearing a matter on the ground that the other Court is *forum non conveniens*. Reliance is placed on **Mitchell –vs- Carter,** (1997) BCC 907 wherein an injunction was supplicated for against the liquidator of the defendants from proceeding against the assets of the company in the United States under the US Bankruptcy Code. The Court referred to the principle of comity and held that .there must be a good reason why the decision to stop foreign proceedings should be made here rather than there. The normal assumption is that the foreign judge is the person best qualified to decide if the proceedings in his Court should be allowed to continue. Comity demands a policy of non intervention.. Reference has also been made to **Barclays Bank plc –vs- Homan,** [1992] BCC 757 where the Court observed that .today the normal assumption is that an English Court has no superiority over foreign court in deciding what justice between the parties requires and in particular, that both comity and commonsense suggest that the foreign judge is usually the best person to decide whether in his own court he should accept or decline jurisdiction, stay proceedings or allow them to continue.. A reference has also been made to the view of the learned Single Judge of this Court in **Moser Baer India Ltd.** wherein a distinction was made between an anti-suit injunction and the doctrine of *forum non conveniens* in these succinct words:-

> **7.** The concepts of anti-suit injunction and forum non conveniens require some examination. An anti-suit injunction is granted by a Court preventing the parties before it from instituting or continuing with proceedings in another Court. On the other hand, the doctrine of forum non conveniens is invoked by a Court to not entertain a matter presented before it in view of the fact that there exists a more appropriate Court of competent jurisdiction which would be in a better position to decide the lis between the parties. So, in a sense the principle on which an anti-suit injunction is invoked

> is just the reverse of the principle on which the doctrine of forum non conveniens is employed.

11. We are, however, completely confined and bound by the opinion articulated by the Supreme Court in **Modi Entertainment Network**. Parties to the dispute had consented that their "agreement shall be governed by and construed in accordance with English law and the parties hereby submit to the non-exclusive jurisdiction of the English courts (without reference to English conflict of law Rules)". Their Lordships did ˇnot find any valid reason to grant an anti-suit injunction in disregard of this jurisdictional clause; it declined to restrain the Respondent from prosecuting the case in the chosen forum, that is, the English Courts. The Judgment perspicuously discusses several decisions spanning the globe, namely:-

1. **Donohue –vs- Armco Inc,** (2002) 1 All ER 749 (HL)
2. **SABAH Shipyard (Pakistan) Ltd. –vs- Islamic Republic of Pakistan and Karachi Electrics Supply Corpn. Ltd.** (2002), 2002 EWCA Civ 1643 (CA)
3. **Airbus Industrie GIE –vs- Patel,** (1998) 2 All ER 257 : (1999) 1 AC 119 : (1998) 1 WLR 686 (HL)
4. **C.S.R. Ltd. –vs- Cigna Insurance Australia Ltd.,** (1997) 189 CLR 345 : (1997) 146 ALR 402 (Aust HC)
5. **Amchem Products Inc –vs- Workers' Compensation Board,** (1993) 102 DLR (4th) 96 (Can SC)
6. **British Aerospace Plc –vs- Dee Howard Co.,** (1993) 1 Lloyd's Rep 368
7. **British India Steam Navigation Co. Ltd. –vs- Shanmughavilas Cashew Industries**(1990) 3 SCC 481
8. **SNI Aerospatiale –vs- Lee Kui Jak,** (1987) 3 All ER 510 : 1987 AC 871 : (1987) 3 WLR 59 (PC)
9. **Oil and Natural Gas Commission –vs- Western Co. of North America,** (1987) 1 SCC 496
10. **Spiliada Maritime Corpn. –vs- Cansulex Ltd.,** (1986) 3 All ER 843 : 1987 AC 460 : (1986) 3 WLR 972 (HL)
11. **Castanho –vs- Brown & Root (U.K.) Ltd.,** 1981 AC 557 : (1981) 1 All ER 143 : (1980) 3 WLR 991 (HL)

12. **MacShannon –vs- Rockware Glass Ltd.,** (1978) 1 All ER 625 : 1978 AC 795 : (1978) 2 WLR 362 (HL)

13. **Carron Iron Co. –vs- Maclaren,** (1855) 5 HLC 416 : 24 LJ Ch 620 : 3 WR 597 (HL).

We have mentioned these precedents for the reason that we think it entirely futile to analyse them as this exercise has already been completed in **Modi Entertainment Network.** The Supreme Court had delineated the parameters within which the grant of an anti-suit injunction would be justified, and we fall entirely within these frontiers. Even with regard to the decisions that have been delivered after **Modi Entertainment Network,** it is not possible for us to charter a course that is not in consonance with the principles culled out by their Lordships. For facility of reference paragraph 24 of **Modi Entertainment Network** is reproduced:-

24. From the above discussion the following principles emerge:

(1) In exercising discretion to grant an anti-suit injunction the court must be satisfied of the following aspects:

(a) the defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court;

(b) if the injunction is declined, the ends of justice will be defeated and injustice will be perpetuated; and

(c) the principle of comity — respect for the court in which the commencement or continuance of action/proceeding is sought to be restrained — must be borne in mind.

(2) In a case where more forums than one are available, the court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (forum conveniens) having regard to the convenience of the parties and may grant anti-suit injunction in regard to proceedings which are oppressive or vexatious or in a forum non-conveniens.

(3) Where jurisdiction of a court is invoked on the basis of jurisdiction clause in a contract, the recitals therein in regard to exclusive or non-exclusive jurisdiction of the court of choice of the parties are not determinative but are relevant factors and when a question arises as to the nature of jurisdiction agreed to

between the parties the court has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case.

(4) A court of natural jurisdiction will not normally grant anti-suit injunction against a defendant before it where parties have agreed to submit to the exclusive jurisdiction of a court including a foreign court, a forum of their choice in regard to the commencement or continuance of proceedings in the court of choice, save in an exceptional case for good and sufficient reasons, with a view to prevent injustice in circumstances such as which permit a contracting party to be relieved of the burden of the contract; or since the date of the contract the circumstances or subsequent events have made it impossible for the party seeking injunction to prosecute the case in the court of choice because the essence of the jurisdiction of the court does not exist or because of a *vis major* or force majeure and the like.

(5) Where parties have agreed, under a non-exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their disputes arising under the contract, ordinarily no anti-suit injunction will be granted in regard to proceedings in such a forum conveniens and favoured forum as it shall be presumed that the parties have thought over their convenience and all other relevant factors before submitting to the non-exclusive jurisdiction of the court of their choice which cannot be treated just as an alternative forum.

(6) A party to the contract containing jurisdiction clause cannot normally be prevented from approaching the court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the court of choice in which exclusive or non-exclusive jurisdiction is created, the proceedings in that court cannot per se be treated as vexatious or oppressive nor can the court be said to be forum non-conveniens.

(7) The burden of establishing that the forum of choice is a forum non-conveniens or the proceedings therein are oppressive or vexatious would be on the party so contending to aver and

prove the same.

12. We shall now anlayse the contentions of the rival parties. The first question is whether the cause of action in both the Suits is common. The Indian Suit, CS(OS) No.1566/2007 filed on 24.8.2007, is a Suit for Declaration, Permanent and Mandatory Injunction. ESPL has filed this Suit against the Union of India, Karnataka State Cricket Association and BCCI which is arrayed as Defendant No.5. The Suit alleges that BCCI, which is a private organization affiliated to ICC, has not only publically opposed ICL but has overtly and covertly taken all possible steps to stultify its operations. It is also alleged that a de facto monopoly in the field of cricket is sought to be created in India by BCCI which is now acting arbitrarily in its own functioning as well as in the administration of the game.

13. The portions of the Plaint containing the allegations against the State entities and the BCCI are reproduced below for facility of reference and comparison:-

> 27. In response to the Plaintiff's communication dated 03.04.2007 sent to the defendant No.5-BCCI the BCCI responded by its communication dated 21.06.2007 addressed to all the Presidents and Hony Secretaries of all the affiliated units of defendant No.5 and was also sent to a number of players-intimidating and threatening them with serious consequences in the event any of their affiliated units permitting any of its stadiums and/or cricket players with them in participating in the tournaments/matches to be organized by the ICL. The Plaintiff states that the reference to private tournaments in the communication is obviously a reference to the ICL as there is no other known tournament being organized. This communication is clearly an effort to intimidate, both, players wishing to play for ICL, as well as ICL itself, as well as a conspiracy that the defendant no.5 is formulating with its state affiliate units to cause wrongful loss, harm and damage to the plaintiff, in the light of the fact that the players have earlier been allowed to play in matches organized by event management companies (such as matches played between movie stars and cricket players), as well as matches organized by the ICC, which is also a private organization. In any event, the Plaintiff states that even though Defendant no.5 is a private

> body, it cannot discriminate against players on arbitrary grounds. The threat to disallow a player to participate in their tournament solely on the ground that he has also played in a tournament organized by the Plaintiff is clearly arbitrary.
>
> ……
>
> 29. Defendant no.5 has also threatened stalwarts such as Kapil Dev that in the event they provide their expertise for the objectives to be achieved by ICL in any manner, the welfare schemes launched by the defendant no.5 including pension scheme and benefit matches shall not be made available to them and all those benefits shall stand withdrawn.
>
> ……
>
> 31. The plaintiff states that the BCCI has directly and through its affiliate units etc. has started intimidating, threatening players that if they play in ICL, the players will not be able to be selected for 'Team India' irrespective of their performance. The plaintiff respectfully submits that defendant no.5 is systematically, with a malafide intention threatening the players and state associations. Defendant no.5- has threatened to disqualify players participating in ICL tournaments from being eligible to be selected for .Team India.. This threat is clearly designed to prevent young players from participating in ICL tournaments, hence damaging their scope of growth as players. This is also clearly a means of conspiring against and intimidating the plaintiff from succeeding in the formation of ICL, hence causing loss to the plaintiff.
>
> ……
>
> 34-C Defendant No.5-BCCI seeks to rely upon its purported Memorandum, Rules & Regulations, Players' Registration Form and the regulations annexed therewith by contending that it has the power/authority to prevent cricketers, past and present, from playing any match other than those organized by or under the auspices of the BCCI. Defendant no.5-BCCI also seeks to justify its conduct on the basis of the said Memorandum, Rules and Regulations, Players' Registration Form and the Regulations annexed therewith.

34-D The plaintiff states that during the proceedings in the present suit before this Hon'ble Court on 27.8.2007, on behalf of defendant no.5 BCCI-had placed reliance upon its purported .Memorandum and Rules & Regulations. seeking to contend that it has the power/authority under its Memorandum to, inter alia, control the game of cricket in India, select the Indian Team, makes rules for the game of cricket in India etc.

The relevant clauses of the Memorandum of the defendant no.5-BCCI are as under:-

Memorandum

.…2(a) **To control the game of cricket in India** and give its decision on all matters including Womens cricket which may be referred to it by any Member Associations in India...

…..

…2(g) **To frame the laws of cricket in India** and to make alteration, amendment or addition to the laws of Cricket in India whenever desirable or necessary.

…..

…2(s) **To select teams to represent India** in test matches. One day International and Twenty/20 matches played in India or abroad, and to select such other teams as the Board may decide from time to time.

……

…2(u) To appoint the Manager and/or other official of **Indian Teams**.

2(v) To appoint **India's representative** or representatives on the International Cricket Conference and other Conferences, Seminars connected with the game of cricket...

…..

34-F The defendant no.5-BCCI has also prescribed form for registration of the players for playing matches for Ranji Trophy etc. thereby incorporating therein an undertaking on behalf of

each of the player that he shall not play, either in India or abroad in any other match or tournament which is not registered with, not approved by the affiliate Association or BCCI or ICC ˇwithout the prior written permission of the BCCI. The relevant clause of the Players Registration Form of the BCCI is reproduced as under:-

...2 I shall not play or participate in any cricket match or tournament Organized as charity/festival/benefit match or tournament not registered with or not approved by the Association or BCCI or ICC or any of its affiliated members without the written permission of the BCCI either in India or abroad'.

34-G There are certain Regulations which are annexed with Players' Registration Form of the defendant no.5-BCCI, which also include similar clauses seeking to prohibit players from playing any other match organized by any other organization/agency. The relevant clauses of the said Regulations of the BCCI annexed with Players' Registration Form are reproduced as under:

...9. No registered player can play or participate in a Cricket match or Tournament not recognized by the Association or Board or the ICC or any of its affiliated members without the written permission of the Board either in India or abroad.

10. No registered player can play or participate in a Cricket match or Tournament organized as Festival/ Charity/Benefit match or Tournament not registered with or approved by the Association or Board or ICC or any of its affiliated members without the written permission of the Board either in India or abroad.

If any of the registered players participate in any of the Tournaments or matches not permitted by the BCCI or ICC and its affiliated members he will be liable for deregistration and will be registered only after a gap of one year which period the Board may waive at its discretion".

34-H Without prejudice to the aforesaid contention of the Plaintiff that the amendments carried out by the defendant no.5-BCCI from time to time in its Memorandum & Rules and Regulations have not been placed before the Registrar of Societies, Tamil

Nadu, for approval and the same being non-est and void- the plaintiff submits the Memorandum, the Rules and Regulations, Players Registration Form and the regulations annexed therewith of the BCCI- seeking to prevent the cricketers from participating in other tournaments without in any manner affecting the tournaments of the matches organized by BCCI, are clearly in unlawful restraint/restraint of trade. Further, the Memorandum and the Rules and Regulations etc. in so far as they seek to authorize the BCCI to represent its team as the Indian Team-are neither valid nor legal and are non-est and void. It is an admitted position that BCCI is a private organization as recognized by the Hon'ble Supreme Court in the case of Zee Telefilms Ltd v Union of India, (2005) 4 SCC 649, it is not having any jurisdiction or authority to take any action or decision with reference to Indian team and/or Cricket players for playing for the country. 34(I) The plaintiff further states that the defendant no.5-BCCI by virtue of its existing position, through the Memorandum, Rules & Regulations, Players' Registration Form and the regulations annexed therewith, purports to create a monopoly in favour of a private body in the game of cricket. The avowed stand of the defendant no.5 before the Hon'ble Supreme Court was that there is no bar on any other person from organizing matches or otherwise participating in the game of cricket. The plaintiff states that nonetheless in an abuse of its monopolistic position by having first mover advantage and having existing affiliations, defendant no.5 seeks to, in an unlawful and impermissible manner, restrict and control the game of cricket in a way that it continues to exercise sole and exclusive monopoly.

….

37-A The plaintiff submits that defendant no.5-BCCI has affiliate members/associations. These member associations have set up stadia for playing the game of cricket. The lands for these stadia have been allotted to the said associations by the State Governments/other authorities under State/Central Governments at concessional/token charges. It is submitted that the said lands have been allotted for promoting the game of cricket. In view thereof, the plaintiff is also entitled to the use of the stadia

alongwith defendant no.5 and its affiliated associations for organizing cricket matches. The refusal of the use of the stadia by the affiliate state associations is malafide and is at the behest and under intimidation and threat of the defendant no.5. Hence, the plaintiff submits that such conduct on the part of the defendant no.5 is in restraint of trade/unlawful restraint and against public policy.

The fact that defendant no.5 is using duress and coercion on all its members is evident, inter alia, from communication dated 29.8.2007 issued by the Cricket Club of India Ltd., Mumbai, which has become available to the plaintiff. The said communication quotes minutes of the meeting of the BCCI dated 28.8.2007 wherein action is taken against Mr Raj Singh Dungarpur, for issuing a press statement that the Brabourne Stadium would be available for the matches of the Plaintiff. This conduct of the BCCI clearly establishes it is threatening/ intimidating all its members and affiliate associations and office bearers and with action if they deal with the plaintiff-Indian Cricket League.

Also, by way of its communication dated 10.09.2007 the Tamil Nadu Cricket Association cancelled the registrations of some players on the ground that they opted to play for the Plaintiff League.

…..

38. The plaintiff states that by its threats and acts of intimidation the defendant no.5 has committed malfeasance with defendants no.1 to 4, have committed non feasance by their lack of action against defendant no.5. It is the obligation of defendants no.1,2 and 3 to prevent the misrepresentation of defendant no.5 that it alone has the power to choose the Indian cricket team, while it is the obligation of defendants no.1,2 and 3 to ensure that the grounds given by them to the affiliate units of defendant no.5 at token value for the promotion of sports such as cricket, are used for this purpose only and further are made available to anyone promoting such purpose. These grounds have often been used for other purposes, such as for beauty pageants, political rallies

etc. but when ICL was desirous of using the Chinnaswamy Stadium, being a stadium on one such ground, to organize a cricket tournament, the user of the ground was denied to it by defendant no.4 and none of the defendants no.1,2 and 3 fulfilled their obligations in this regard of ensuring the user of the said ground for the promotion of cricket in these circumstances the defendant no.5 is guilty of various acts such as intimidation, malafide actions, malfeasance, conspiracy, public nuisance and all such acts give rights to the plaintiff and constitute a valid cause of action for filing the present suit against the defendant's herein. The plaintiff submits that if the defendant no.5 is guilty of the aforesaid acts the defendants no.1 to 4 are also guilty and have committed an act of non-feasance and by allowing the defendant no.5 to continue with its public nuisance. The plaintiff therefore submits that due to the said acts committed by the defendants the plaintiff is entitled for relief as prayed.

39. It is submitted that an independent and individual right of any one cannot be curtailed or restricted by any private body. Even the State cannot impose any restrictions save and except under Article 19(2) of the Constitution of India. Defendant no.5-BCCI never had nor has been provided with any power or authority to impose any restriction on any one from promoting the Sports and/or from participating therein. Rights are independent rights. No player can be so restricted or be put under threat by BCCI. The threatened acts and conduct on the part of defendant no.5-BCCI clearly amounts to putting undue and illegitimate 'threat' and 'pressure'. The threat and intimidation by the defendant no.5 through restrictions sought to be imposed upon the Players as well as Associations are unfair, unjust, unreasonable, impermissible and illegal.

14. It is necessary underscore that neither the ICC nor the ECB are parties in the previously instituted lis which is presently pending in the Original Side of this Court, a feature that has been repeatedly emphasised by Mr. Salve. The reliefs which are claimed in the said Suit, CS(OS) No.1566/2007 by ESPL are as follows:-

(i) Pass a Decree of Permanent injunction restraining/

prohibiting Defendant no.5 its assigns, office bearers, employees, agents, successors or any other entity acting in the name and/or on its behalf from using the name and National Flag of India or representing to the public at large that the team of the defendant no. 5 represents India;

(ii) Pass a Decree of Mandatory Injunction against Defendants 1 to take all necessary steps in accordance with law in ensuring that Defendant no.5 its assigns, office bearers, employees, agents, successors or any other entity acting in the name and / or on its behalf do not use the name and National Flag of India or represent to the public at large that the team of the defendant no.5 represents India;

(iii) Pass a Decree of Permanent Injunction restraining/ prohibiting defendant no.5, its assigns, office bearers employees, agents, successors or any other entity acting in the name and/or on its behalf from intimidating, threatening in any manner whatsoever, inducing or inciting or in any other manner interfering with the attempts of the Plaintiff to sign up contracts with players-past and present – for participating in its tournaments and from interfering in any manner with the conduct of the activities of the plaintiff's Indian Cricket League;

(iv) Pass a Decree of Permanent Injunction restraining/ prohibiting the defendant no. 5 its assigns, office bearers, employees, agents, successors or any other entity acting in the name and/or on its behalf from issuing any threat inducement or any other statement whatsoever, publicly or privately, that interferes with the free will of any of its affiliate state units or the players who are members or associates of those affiliate units from in any manner entering into contracts with the Plaintiff;

(v) Pass a Decree of Permanent Injunction restraining/ prohibiting the defendant no.5 its assigns, office bearers, employees, agents, successors or any other entity acting in the name and / or on its behalf from, in any manner, directly or indirectly, inducing or in any manner being

instrumental in its affiliate state units declining the user of the cricket grounds allotted to them by the defendant no. 2&3 or any other state authorities or other authorities for organizing the cricket matches therein by the ICL;

(vi) Pass a Decree of Mandatory Injunction against Defendants 1-3 directing them to ensure that the State affiliates of Defendant no. 5 who are having Cricket stadiums on the lands allotted by the Government – to make available those Stadia to the plaintiff for ICL matches on such terms and conditions which this Hon'ble Court may deem fit and appropriate to be prescribed for that purpose;

(vii) Pass a Decree of Permanent Injunction restraining/ prohibiting the defendant no. 5 its assigns, office bearers, employees, agents, successors or any other entity acting in the name and/or on its behalf from withdrawing the benefits in any manner whatsoever which it has been extending or is proposing to extend to its past cricket players including the pension and benefit match scheme on account of the fact that they have participated in the matches organized by the ICL;

(viii) Pass a Decree in favour of the Plaintiff and against the defendants declaring that clauses 2(a), 2(g), 2(s), 2(u), 2(v) of the Memorandum of the BCCI and clauses 1(d), 9(c), 9(d),9(g), 13(v)(b), 13(v)(c) and 13(v)(f) of the Rules and Regulations are illegal, non-est and void.

(ix) Pass a decree in favour of the Plaintiff and against the defendants declaring that Rules 33-d, 33-e and 34 of the Rules and Regulations of the BCCI are illegal, non-est and void;

(x) Pass a decree in favour of the Plaintiff and against the defendants declaring that Clause 2 of the Form of Players' Registration – Ranji Trophy and also Regulations 9 and 10 of the Regulations annexed therewith as illegal, non-est and void;

(xi) Any other further orders as this Hon'ble Court deems fit and proper in the facts and circumstances of the present case;

(xii) Costs be awarded

15. We shall now compare the asseverations in the proposed action sent along with the Notice issued initially by the Solicitors of the Appellant, and the U.K. action now pending in the High Court of Justice, Chancery Division after the grant of anti-suit injunction by the learned Single Judge in favour of BCCI. The averments qua the BCCI in the draft accompanying Notice were as follows:-

> 3. The Second to [ ] Claimants ('the Players') are professional cricketers who wish to negotiate contracts to play for teams participating in the ICL. The Players are listed in Schedule A to these ˇParticulars of Claim together with brief details of their playing careers to date.
>
> .....
>
> 5. The Board of Control for Cricket in India (**"the BCCI"**) is a not for profit society registered in accordance with the Tamil Nadu Societies Registration Act under the laws of India. The membership of the BCCI comprises State cricket associations and various cricket clubs across India. It organizes international matches for the Indian cricket team and a number of domestic cricket competitions in India, for which it exploits the broadcasting rights.
>
> 6. In particular, the BCCI promotes a Twenty 20 cricket competition known as the Indian Premier League (**"the IPL"**). The first season of the IPL was launched in April 2008, the second season took place in South Africa in 2009 and the third is due to commence in India in March 2010. The worldwide broadcasting rights to the IPL were sold in February 2008 for ten years for a reported US$ 1.026 billion to a consortium of the Sony Television network and the Singapore-based World Sports Group (which outbid the ESPN-Star Sports network, jointly owned by News Corporation and Disney).
>
> .....
>
> 36. From its inception, ICL has received a hostile reaction from

the BCCI. Early approaches in correspondence in which ICL aimed to achieve co-operation between ICL and BCCI were rebuffed by BCCI.

37. On 21 August 2007, a resolution was adopted unanimously at a Special General Meeting of the BCCI, resolving that: "Every individual has a right to choose whether he wishes to associate himself with any other organization. However, if he chooses to associate himself with any other organization, he will not be entitled to derive any benefit from BCCI or be associated with any activities of the Board or its affiliated units".

38. BCCI has since engaged in a range of activities clearly calculated to deter and prevent prospective players (and others) from involving themselves with ICL, and intended to obstruct the activities of the ICL.

PARTICULARS

(1) Barring players associated with ICL from eligibility for the Indian national team.

(2) BCCI sacked Kapil Dev as head of the Indian National Cricket Academy because of his involvement with ICL. Other players have been barred from involvement in BCCI events by reason of their association with ICL.

(3) Interfering with existing and prospective contracts between players and the ICL through threats and intimidation.

(4) Instructing all local affiliates not to allow cricket grounds to be used for ICL games or otherwise to involve themselves or permit individuals to involve themselves with ICL, on penalty of exclusion from all BCCI activities and pensions.

(5) Preventing the use of state-owned stadia for use as ICL match venues through BCCI's monopolistic management of such venues (or through its control of the local BCCI affiliates which manage the use of those stadia).

(6) Amending the terms of the BCCI pension fund to discriminate against players who involve themselves with ICL.

(7) Putting pressure on potential advertisers not to advertise on ICL by threatening to withhold opportunities for sponsorship activity with the BCCI.

(8) Putting pressure on other country boards to ban their players from playing in the ICL and to bar them from playing for their country where they played in ICL (examples of such international bans include Shane Bond of New Zealand and Justin Kemp of South Africa).

(9) In 2008, the BCCI announced the intention (in conjunction with Cricket South Africa and Cricket Australia) to launch an international club Twenty 20 Champions League. Clause 2.4.6 of the invitation to tender for commercial rights in respect of the competition stated that involvement directly or indirectly with ICL would result in automatic disqualification of any bidder.

(10) The BCCI imposed a similar clause to that referred to in 38(9) above in the IPL broadcast rights tender document (see §6 above), thereby excluding the companies operating the Zee branded television channels from bidding as they are associated with ESPL (see §15 above).

….

50. The boycott of the ICL set out at §§ 36-49 has had a serious effect on the players.

16. The allegations against the BCCI which still remain in the action filed in the U.K. Courts even after the grant of anti-suit injunction are as follows:-

5. The Board of Control for Cricket in India (**"the BCCI"**) is a not for profit society registered in accordance with the Tamil Nadu Societies Registration Act under the laws of India. The membership of the BCCI comprises State cricket associations and various cricket clubs across India. It organizes international matches for the Indian cricket team and a number of domestic cricket competitions in India, for which it exploits the broadcasting rights.

6. In particular, the BCCI promotes a Twenty20 cricket

competition known as the Indian Premier League (**"the IPL"**). The first season of the IPL was launched in April 2008, the second season took place in South Africa in 2009 and the third is due to commence in India in March 2010. The worldwide broadcasting rights to the IPL were sold in February 2008 for ten years for a reported US$ 1.026 billion to a consortium of the Sony Television network and the Singapore-based World Sports Group (which outbid the ESPN-Star Sports network, jointly owned by News Corporation and Disney).

.....

35. From its inception, ICL has received a hostile reaction from the BCCI. Early approaches in correspondence in which ICL aimed to achieve co-operation between ICL and BCCI were rebuffed by BCCI.

36. On 21 August 2007, a resolution was adopted unanimously at a Special General Meeting of the BCCI, resolving that: "Every individual has a right to choose whether he wishes to associate himself with any other organization. However, if he chooses to associate himself with any other organization, he will not be entitled to derive any benefit from BCCI or be associated with any activities of the Board or its affiliated units".

37. BCCI has since engaged in a range of activities clearly calculated to deter and prevent prospective players (and others) from involving themselves with ICL, and intended to obstruct the activities of the ICL.

PARTICULARS

(1) Barring players associated with ICL from eligibility for the Indian national team.

(2) BCCI sacked Kapil Dev as head of the Indian National Cricket Academy because of his involvement with ICL. Other players have been barred from involvement in BCCI events by reason of their association with ICL.

(3) Interfering with existing and prospective contracts between players and the ICL through threats and intimidation.

(4) Instructing all local affiliates not to allow cricket grounds to be used for ICL games or otherwise to involve themselves or permit individuals to involve themselves with ICL, on penalty of exclusion from all BCCI activities and pensions.

(5) Preventing the use of state-owned stadia for use as ICL match venues through BCCI's monopolistic management of such venues (or through its control of the local BCCI affiliates which manage the use of those stadia).

(6) Amending the terms of the BCCI pension fund to discriminate against players who involve themselves with ICL.

(7) Putting pressure on potential advertisers not to advertise on ICL by threatening to withhold opportunities for sponsorship activity with the BCCI.

(8) Putting pressure on other country boards to ban their players from playing in the ICL and to bar them from playing for their country where they played in ICL (examples of such international bans include Shane Bond of New Zealand and Justin Kemp of South Africa).

(9) In 2008, the BCCI announced the intention (in conjunction with Cricket South Africa and Cricket Australia) to launch an international club Twenty20 Champions League. Clause 2.4.6 of the invitation to tender for commercial rights in respect of the competition stated that involvement directly or indirectly with ICL would result in automatic disqualification of any bidder.

(10) The BCCI imposed a similar clause to that referred to in 37(9) above in the IPL broadcast rights tender document (see §6 above), thereby excluding the companies operating the Zee branded television channels from bidding as they are associated with ESPL (see §14 above).

17. Paragraphs 3 and 50 of the Draft Plaint, which referred to the players as one of the Claimants have been deleted in the action presently pending before the Chancery Division, London. Plainly, the foreign (English) professional cricketers are no longer aggrieved by the alleged

machinations of BCCI. Further, although there is no pointed reference to BCCI as a Defendant, the action filed in England contains the same allegations against BCCI.

18. Thus, it is clear that the ESPL in the action filed by it in the U.K. after suffering an anti-suit injunction from the Delhi High Court has only made superficial and cosmetic changes by dropping BCCI as one of the Defendants but has retained all the averments and allegations against the BCCI as it is. Therefore, it cannot be said that the action with which the ESPL has now filed is different to that which had been articulated in the Notice.

19. The action initially intended to be initiated in the U.K. Court was predicated on the premise that .ESPL has plans to stage ICL matches in the future outside India, including in the U.K.. The main allegation in the said action is also directed against the BCCI. The hostile actions of the BCCI are described as "boycott of ICL" by the BCCI and/or .orchestration by the BCCI.. These allegations are contained in the following paragraphs of the proposed Plaint:-

> 36. From its inception, ICL has received a hostile reaction from the BCCI. Early approaches in correspondence in which ICL aimed to achieve co-operation between ICL and BCCI were rebuffed by BCCI.
>
> 37. On 21 August 2007, a resolution was adopted unanimously at a Special General Meeting of the BCCI, resolving that: "Every individual has a right to choose whether he wishes to associate himself with any other organization.. However, if he chooses to associate himself with any other organization, he will not be entitled to derive any benefit from BCCI or be associated with any activities of the Board or its affiliated units".
>
> 38. BCCI has since engaged in a range of activities clearly calculated to deter and prevent prospective players (and others) from involving themselves with ICL, and intended to obstruct the activities of the ICL.

20. The reliefs sought to be claimed by ESPL in their foreign action are as follows:-

> (1) A declaration against all Defendants to the effect that by agreeing and/or deciding to carry out and/or implement the boycott of the ICL each breached the Chapter I prohibition and/or the Chapter II prohibition and/or was in restraint of trade;
>
> (2) An injunction against each of the Defendants carrying out and/or implementing the boycott of the ICL;
>
> (3) An inquiry as to damages in respect of the infringements of the Chapter I prohibition and/or the Chapter II prohibition;
>
> (4) Further or other relief; and
>
> (5) Costs.

21. From a reading of the two Claims/Plaints as well as the Notice, it cannot be contended otherwise than that the main allegations are made against the BCCI for orchestrating the alleged boycott against ICL. No doubt, the Indian Suit is pegged against the BCCI together with the concerned Indian parties, and the UK action is directed against ICC and ECB, but the actions of the BCCI remain at the fulcrum of the contention in both the suits.

22. In the U.K. action, we may reiterate, the allegation is that BCCI has influenced ICC and ECB to amend their regulatory framework to the end that approval can be granted for organizing an unofficial approved cricket tournament, only upon the concerned Home-Board conveying its no-objection. The assertion of ESPL is that BCCI has, by this stratagem, prevented the ICL from getting the status of an ICC approved unofficial cricket tournament. As a consequence, the foreign players intending to be associated with different affiliate cricket Boards, including the ICB could not play in the ICL tournament scheduled to be held in India; since they would not receive permission from their Home-Boards owing to the opposition of BCCI in respect of matches to be held in India, which, in turn, would deleteriously affect the viewership in the U.K. where the viewership is substantially of persons from the Indian Subcontinent.

23. Drawing our attention to the prayers in the English action, Mr. Sundaram has contended that the provisions mentioned in the foregoing paragraph have not been challenged and no reliefs *qua* the Regulations of the ICC and the ECB have been claimed. Therefore, the argument that

the distinctiveness of cause of action in the UK action is because of the challenge to the Regulations of ICC and ECB has no foundation. In Rejoinder, Mr. Salve argues that since the relief of Declaration and Injunction against the entire "boycott" is sought, if it is granted, the Regulations will automatically get struck down. Furthermore, it is contended that the lacuna in drafting, if any, should properly be addressed before the UK Court and advantage of that cannot be obtained in this Court.

24. After perusing the two Claims and cogitating on the contentions of the adversaries, we are of the opinion that the cause of action in the two is substantially and materially the same. The alleged machination of the boycott of ICL by BCCI is the pivotal grouse around which the two actions revolve. The event, viz. ICL, is an international cricket tournament planned to be held in India. The permission sought in UK for the release of players and the status of an approved unofficial cricket tournament was also sought in respect of the tournament which is to be held in India only. Therefore, it presently seems to us that it cannot be said that merely because a letter seeking the approval was written to ICC in the U.K. the substantial cause of action occurred in U.K.; as we have already recorded, ICC is neither registered in the U.K. nor is its Headquarters located there. We are not persuaded that the action filed in England is distinct from the cause of action which is the subject matter of the Indian litigation. There is a bald averment that the ESPL wishes to hold the ICL event in the UK in future. However, in our view, this statement of its intent in future will not confer jurisdiction upon the UK Court until such event actually transpires. No material change would result, we think, even in this hypothetical situation. We say this because if it is presumed that BCCI would record its objection as a Home-Board, it would stultify an ICL outside India by directly banning Indian cricketers from participating in such a foreign ICL tourney.

25. The second argument is that the UK Suit is being prosecuted under the UK Competition Act and, therefore, the action is based on a distinct statutory cause of action, thereby making the UK action a single forum case. However, we think the argument to be misconceived. A statutory cause of action arises from breach of a specific duty cast or right conferred by a statute on a person. The existence or provision of a remedy being available under a statute would not, *ipso facto* without

more, create a cause of action of a single forum character. This is especially so when the same remedy can be invoked and prayed for in another forum under the laws and statutes of different countries. We shall merely make a mention of the Judgments cited by learned Senior Counsel for the Respondent, viz. **Bell'Oggetti International Inc. –vs- Flooring and Lumber Company Ltd.,** 2001 O.T.C. 362 and **Horn Linie Gmbh –vs- Panamerica Formas E Impresas SA,** [2006 2 Lloyd's Reports 44].

26. After comparing the reliefs sought in the two Claims, we are of the opinion that these declaratory and injunctive reliefs for the very same cause of action can be availed of under the Indian Competition Act or under the Indian Contract Act. We must immediately clarify that in the event of a challenge simplicitor to the ICC Regulations without any reference to the alleged machination of BCCI which are already sub judice the change would be drastic. Therefore, the argument that an anti-suit injunction takes away the juridical advantage is not tenable in the facts of the present case.

27. Having concurred with the learned Single Judge that the UK action is a two or multiple forum *lis*, we shall venture forward to assess whether the UK action is oppressive or vexatious. Mr. Salve's contention in this regard has already been noted by us above. We agree that in a commercial dispute, the compulsion to defend an action in a foreign jurisdiction may not invariably lead to the conclusion that the foreign proceedings are oppressive; however, having to defend the same allegations by the same party in two different jurisdiction is unquestionably oppressive.

28. We will now advert to Magotteaux Industries, on which Mr. Salve has placed reliance. The dispute pertained to a patent in respect of which the Plaintiff had filed a case for damages and for permanent injunction to restrain the Defendant from infringing its patent granted in India. The Defendant had taken a plea that there was already a case pending in the US Courts under US Tariff Act of a similar nature. The Division Bench observed that since a patent is a right granted by the sovereign State to the inventor, it is a creation of a statute. The privilege is a right, advantage or immunity granted to a person to exclusion of all others. Therefore, since the alleged infringement of the patent is a breach of a statutory right granted by a sovereign, its breach in that territory would give rise to a distinct and separate cause of action from the

infringement of a similar patent granted by a different sovereign state. Since in the present case there is no such breach of statutory right, this decision does not help the case of the Appellant. Our learned Brothers had observed that so far as the infringement of a patent in the US was concerned, these rights had been granted by a sovereign power and the cause of action pertaining to their violation had also arisen in a foreign jurisdiction. That being so, our learned Brothers had declined to grant an anti-suit injunction, even though there was allegedly a similar infringement perpetrated in India. With due respect to our learned and esteemed Brothers, the observation that the Explanation to Section 10 of the CPC would also apply conversely is in the nature of *obiter dicta*. Mr. Salve has strenuously canvassed that the Explanation to Section 10 of the CPC must enure to the benefit of the Appellants since the legal regime obtaining in this country in terms conceives of the jurisdictional legitimacy of a *lis* in India which is identical to that pending in a foreign jurisdiction. So far as we see it, the Explanation was in existence at the time when India was a dominion of a foreign power. The rationale of providing an appeal via Letters Patent may well have motivated the Legislators in going against the grain of the universal principle of law articulated in Section 10 of the CPC viz. a later action is required to be stayed. With due respect, we cannot concur with the reasoning that Explanation to Section 10 of the CPC would operate conversely to enable a foreign court to assume jurisdiction in respect of a cause of action which is pending adjudication in this country. Since it appears to us that the view of our learned Brothers in **Magotteaux Industries** was given *en passant* and is in the nature of *obiter dicta*, we think it unnecessary to refer this question to a Larger Bench.

29. There cannot be any cavil to the propositions laid down in **Modi Entertainment Network,** that a subsequent suit, if held to be vexatious and oppressive, can be injuncted by the Indian Courts, provided other necessary ingredients are also satisfied. Contrary findings of different Courts on same facts are an anathema to law, and if a party endeavours to invoke the jurisdiction of foreign Court to a cause of action already being prosecuted in the national forum, it would amounts to vexatious litigation.

30. In **Modi Entertainment Network,** the Hon'ble Supreme Court

has opined that an anti-suit injunction can be granted where the foreign proceedings are vexatious, oppressive or *forum non conveniens*. Courts have the bounden duty to ensure that the ends of justice are not thwarted. Ergo, an anti-suit injunction should be passed. Legal proceedings by an Indian party in a foreign Court, in which the prayers predominantly concern another Indian party, even whilst a suit on similar allegations and reliefs is still pending in an Indian Court between the same parties, is, in our considered opinion, vexatious and oppressive.

31. The argument of Mr. Salve that the proceedings in the UK Court cannot be vexatious and oppressive for the reason that the UK is the natural forum is also untenable. Both the Plaintiff/ESPL and its main antagonist, BCCI, are Indian parties. The Regulations which appears to be hurting ESPL are of ICC and the approval and the declaration sought for in the U.K. Courts is also directed against the ICC which is a body registered in Virgin Islands with working Headquarters in Dubai. U.K. Courts thus have territoriality because of the location of the ECB, but it cannot be ignored that the reliefs claimed against ICB as on date are consequential upon the granting of reliefs qua BCCI. Besides, as already stated, the boycott, allegedly orchestrated by BCCI, is of the cricketing event to be held in India; and loss of viewership in UK is not by itself sufficient to make UK the natural forum of the dispute. Moreover, it must be presumed that none of the professional cricketers having allegiance to the ECB have any grievance with regard to the present cause of action.

32. Furthermore, the evidence sought to be adduced in the UK Court are of the same witnesses who have deposed in the Suit which is proceeding in India. If the UK Suit is allowed to proceed, it will only lead to a duplication of evidence and even more detrimentally to the possibility of conflicting or variant verdicts. Therefore, in light of all these facts, it appears to us that the U.K. Courts cannot be held to be *forum conveniens*. The learned Single Judge was justified in holding UK Courts to be *forum non conveniens*.

33. In **Modi Entertainment Network,** the Apex Court observed that it is "commonplace that the Courts in India have power to issue anti-suit injunction to a party over whom it has personal jurisdiction in an appropriate case. This is because Courts of equity exercise jurisdiction

in personam. However, having regard to the rule of comity, this power will be exercised sparingly because such an injunction though directed against a person, in effect causes interference in exercise of jurisdiction by another Court". Thus, the *in personam* jurisdiction may be exercised against the Defendant if the Plaintiff is able to make out an appropriate case for its exercise. Indubitably, courts have to be circumspect in exercising its power to issue an anti-suit injunction, but it must do so where the ends of justice would otherwise be defeated.

34. We shall now analyse the argument of the Appellant that the temporary anti-suit injunction granted is against the principles of comity and amounts to Court Management of the UK Court. **Hilton –vs- Guyot,** 159 US 113 which was decided by the American Supreme Court in 1895 contains a definition of the term 'comity' which has also been accepted in Circa 1990 by the Canadian Supreme Court in **Morguaral Investment –vs- De Savoge**. It reads - "Comity in the legal sense is neither a matter of absolute obligation, on the one hand, nor of courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having regard both to international duty and convenience, and the rights of its own citizens or of other persons who are under the protection of its laws.. Comity does not demand of a Court possessing jurisdiction to abdicate its duty to decide a dispute in favour of a foreign Court possessing concurrent jurisdiction. It would be a dereliction of duty if the former declines to adjudicate so as to enable a *'forum non conveniens'* Court to proceed with the hearing of a *lis* filed or intended to be filed before it. In some vital respects, it is wholly dissimilar, or even the antithesis of the principle of "stay of the suit" as postulated in Section 10 of the CPC. We say this because the prior filing is not determinate so far as issuance of an anti-suit injunction is concerned; and the Court passing this injunction does not halt its own proceedings but brings proceedings in another Court to a standstill. It achieves this by commanding any or all the parties before it, over whom it holds sway, to take requisite action.

35. In **Society of Lloyd's –vs- Peter Everett White,** [2002] I.L.Pr.10, the Court had granted an ad interim anti-suit injunction against the Defendant till the disposal of action in its jurisdiction. The impugned Order is palpably not the first out of its kind, as has been alleged on

behalf of the ESPL.

36. The reasons for the grant of the anti-suit injunction by the learned Single Judge have been crystallized in the following paragraph of the impugned Judgment:-

> To summarize, having regard to the factors to which I have made a reference hereinbelow, I am persuaded to grant an anti-suit injunction only qua BCCI: (i) the plaintiff has chosen to file the Indian claim, the issues in which substantially overlap with the issues raised in the U.K. claim; (ii) the determination of the issues raised in the Indian claim would substantially do away with the grievance of ESPL which finds its reflection in the U.K. claim; (iii) the evidence in the Indian claim is at an advance stage. Out of the six (6) witnesses cited by the ESPL examination of four (4) witnesses is almost over. Moreover BCCI has already filed its affidavit by way of evidence (examination-in-chief) which is available with ESPL. To cite an instance of interlinkage of evidence, the affidavit of Mr Himanshu Mody is a case in point, in particular, his deposition in paragraph 15. In the said paragraph in no uncertain terms the deponent has alluded to the fact that BCCI is exerting pressure and intimidating not only players (both Indian and foreign) but also "international bodies" and "cricketing bodies" of other countries from the ICL. This conduct of BCCI is termed by the deponent as "monopolistic" and "unlawful" causing wrongful loss. The deponent in paragraph 15(a) and (b) of his affidavit has given an example of how influence has been exerted on the foreign cricket board ECB as also ICC. The policy of CSA and ECB, as contained in the e-mails of the deponent to the ICL representative, has been appended as exhibits to the affidavit of the deponent. There is every possibility of the said evidence being used by ESPL in its proceedings in U.K.; (iv) both the BCCI and the ESPL are Indian entities; a substantial part of the grievance raised with regard to the recognition of tournaments held by ICL is in India. This is not to say that ICL is not aggrieved by the non-recognition of tournaments held outside India. However, both form an inextricable part of ESPL's grievance in the U.K. claim; (v) on a comparative scale the disadvantage of BCCI in form of cost and expenses (see ONGC

case) would be greater, while the ESPL may have the advantage of a possibly higher monetary gain in the form of a damage, if it succeeds; (See SNI Aerospatiale case). In the Midland Bank case the possibility of Midland Bank being mulct with a greater quantum of damages was considered as a relevant factor in the grant of an anti-suit injunction. (vi) BCCI has a legitimate right to contend that the Indian court being the court with which issues raised qua BCCI have a real and substantial connection - it has a legitimate right to be sued in the Indian courts. The fact that in the U.K. claim and in the documents filed there is a substantial reference to the events of April/August, 2007 and that in respect of those issues the pendency of the Indian claim cannot be denied; and (vii) lastly, even if it is assumed that U.K. court is the only forum available to ESPL even then on a principle of unconscionablity (the reasons for which I have given hereinabove) BCCI is entitled to injunction qua itself.

37. The learned Single Judge, in our opinion, was correct in holding that the BCCI has established that there is substantial overlapping of the two actions and that there would be a risk of conflicting judgments/ orders if two parallel proceedings on the same issues are allowed to be preceded with. The tests laid down in **Modi Entertainment Network** for the grant of an anti-suit injunction have clearly been met since it appears to us also that the foreign suit is oppressive, vexatious and in a *forum non conveniens*. So far as the grant of the relief as a temporary injunction is concerned, the three factors that should co-exist, viz, prima *facie case*, balance of convenience, irretrievable loss and injury, have been shown so to exist by BCCI.

38. We, being the Appellate Court, would be justified in interfering with the impugned Order only if it is perverse. We do not detect any perversity. The view of the learned Single Judge is, at the lowest, a plausible one. In **Wander Ltd. –vs- Antox India P. Ltd.,** 1990(Supp) SCC 727, their Lordships had analysed the powers of the Appellate Court to interfere with the discretionary orders passed by the lower courts in these terms - "The appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored

the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion". This decision has been followed subsequently in **Seema Arshad Zaheer -vs- Municipal Corpn. of Greater Mumbai,** (2006) 5 SCC 282. The City Civil Court had granted a temporary injunction against the Corporation which was challenged before the Bombay High Court. Speaking for the Bench His Lordship R.V. Raveendran made the following pithy observations:-

> 32. Where the lower court acts arbitrarily, capriciously or perversely in the exercise of its discretion, the appellate court will interfere. Exercise of discretion by granting a temporary injunction when there is .no material., or refusing to grant a temporary injunction by ignoring the relevant documents produced, are instances of action which are termed as arbitrary, capricious or perverse. When we refer to acting on .no material. (similar to .no evidence.), we refer not only to cases where there is total dearth of material, but also to cases where there is no relevant material or where the material, taken as a whole, it is not reasonably capable of supporting the exercise of discretion. In this case, there was "no material" to make out a prima facie case and therefore, the High Court in its appellate jurisdiction, was justified in interfering in the matter and vacating the temporary injunction granted by the trial court.

39. In **Ramdev Food Products (P) Ltd. –vs- Arvindbhai Rambhai Patel,** (2006) 8 SCC 726, the Supreme Court has taken into consideration both Wander Ltd. and **Seema Arshad Zaheer -vs- Municipal Corpn. of Greater Mumbai,** (2006) 5 SCC 282. His Lordship, S.B. Sinha, J., has perspicuously propounded the law in these words:

The grant of an interlocutory injunction is in exercise of discretionary power and hence, the appellate courts will usually not interfere with it. However, the appellate courts will substitute their discretion if they find that discretion has been exercised arbitrarily, capriciously, perversely, or where the court has ignored the settled principles of law regulating the grant or refusal of interlocutory injunctions. This principle has been stated by this Court time and time again. [See for example **Wander Ltd. v. Antox India P. Ltd.,** 1990 (Supp) Supreme Court Cases 727, **Laxmikant V. Patel v. Chetanbhai Shah,** (2002) 3 SCC 65 and **Seema Arshad Zaheer -vs- Municipal Corpn. of Greater Mumbai,** (2006) 5 SCC 282].

The appellate court may not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion.

40. In view of the above, Appellant has failed to make out a case warranting interference with the order of the learned Single Judge. The Appeal filed by ESPL is, therefore, dismissed. Pending applications also stand dismissed.

41. We shall now deal with the Appeal filed by the BCCI which is FAO(OS) No.154/2010 and the Cross-Objections filed by ICC and ECB in the aforegoing ESPL Appeal. Both the Appeal and the Cross-Objections are directed against that part of the Order of learned Single Judge wherein the interim injunction qua ICC and ECB has been vacated. The reason for vacating the injunction sought in favour of ICC and ECB, as recorded by learned Single Judge, is that the injunction against ICC and ECB "cannot be entertained on the short ground that neither the ICC nor ECB is before me. The plaintiff in its suit cannot propound the case of a litigant for relief who has not sought relief from the Court".

42. In the Cross-Objections filed by ICC and ECB, Mr. Ramji Srinivasan, learned Senior Counsel for ICC and ECB sought to urge that the learned Single Judge erred in vacating the stay *qua* ICC and ECB

which was operating since 25.01.2010. His argument is that ICC and ECB are Defendants in BCCI Suit and thus were undeniably before the learned single Judge. Further, it is stated that a confusion was caused by the Order passed on 7.1.2010 in FAO(OS) No.20/2010 where the Division Bench observed that presence of ICC and ECB was not necessary at the hearing of the injunction application. Mr. Srinivasan states that this was taken to understand that ICC and EBC need not be present as necessary party and that the presence of BCCI would suffice before the learned Single Judge. Learned Senior Counsel for ESPL has vehemently refuted the stand of Mr. Srinivasan stating that ICC and ECB never submitted to the jurisdiction of the Hon'ble Delhi High Court, thus they cannot seek any protection from this Court and therefore the learned Single Judge was justified in not extending the anti-suit Injunction qua them. Secondly, it has been stated that FAO(OS) No.2/2010 was filed by ESPL against the Order dated 7.12.2009 injuncting ESPL from proceeding in the proposed action in UK. The Division Bench, after observing that since Order XXXIX Rules 1 and 2 application was still not decided finally, it was not appropriate to hear the Appeal until the application is finally disposed of. In view of the urgency, the Division Bench preponed the date of hearing and passed a direction that the application be disposed of by 30.1.2010 by the learned Single Judge. Further, it was also directed in light of the urgency that Memorandum of Appeal be treated as Reply to the Order XXXIX Rules 1 and 2 application and in that light only, the Court observed that presence of Defendant Nos. 2 and 3, that is, ICC and ECB, shall not be necessary for the purpose of the said hearing. This clarification, as per learned Senior Counsel for ESPL, was made so as to enable the learned Single Judge to dispose of Order XXXIX Rules 1 and 2 application expeditiously, even in the absence for any reason of ICC and ECB. We are in no manner of doubt that this did not mean that ICC and ECB were totally absolved from entering appearance and making the equitable prayers before the learned Single Judge. It is also stated that in light of the fact that ICC and ECB had not appeared before the learned Single Judge at the time of disposal of the application, nor have they submitted to the jurisdiction of Delhi High Court, the Cross-Objections filed by them in the ESPL Appeal should not be entertained. On the issue of maintainability of the Cross-Objections, Mr. Srinivasan has argued that both ICC and ECB have been made parties to the Suit filed by the BCCI, that both ICC and ECB have unconditionally subjected themselves to the

jurisdiction of Delhi High Court, which fact has been duly recorded in our Order dated 19.07.2010, in FAO(OS) 107/2010. It is also argued that ECB and ICC have filed their Written Statements in the Suit and that they have a substantial interest in the matter and therefore vacation of stay *qua* them severely works to their detriment.

43. Mr. Srinivasan further contends that the springboard of the action before the UK Court is the alleged boycott of ICL by BCCI. The cause of action that pertains to ICC and ECB ensued subsequent and consequent upon the said boycott. Since the admitted position by ESPL is that the BCCI is at the centre of the entire conspiracy hatched against ICL and the same is already being adjudicated before the Delhi High Court, it would be travesty of justice if ICC and ECB are sued in the U.K. Court for the said dispute which essentially is between ESPL and BCCI. ICC and ECB have now filed their respective Written Statements in which they have stated that the Indian Court may not have the territorial jurisdiction to adjudicate the allegations based on the events that occurred outside India, but since the entire grievance can be decided in the Indian Suit; therefore, ESPL may be injuncted from prosecuting its action also against ICC and ECB. Once the same is decided, and the Indian Court pronounces on the allegations of anti-competitive practices levied against the BCCI, ESPL can then based on that decision pursue its remedies, if any, against ICC and ECB in the U.K. Court. Mr. Srinivasan has drawn our attention to various portions of the impugned Order where it has been observed that the cause of action and issues in the two claims are overlapping and that adjudication of the Indian Suit would substantially render the cause in UK otiose. (These observations, however, are made in the context of the BCCI and not as regards ICC and ECB.)

44. Mr. Sundaram, in the Cross Appeal numbered FAO(OS) 154/2010 filed by the BCCI against the impugned Judgment, has pointed out that the mischief that is caused by excluding ECB and ICC from the protection of anti-suit injunction is that ESPL is proceeding with its proposed suit by dropping BCCI from the action initiated in the U.K., though it has retained all the allegations against BCCI. This, according to Mr. Sundaram, has caused a piquant situation where despite the BCCI not being a party to the action as a Defendant, all the allegations against the BCCI still survive and would require adjudication by the U.K. Court. Therefore, the purpose of the anti-suit injunction *qua* the BCCI also

stands defeated in effect. It is, therefore, urged that the entire action based on the alleged boycott by the BCCI of ICL and its consequential events be injuncted in toto as it contains the same factual allegations which have been narrated in the Indian Suit.

45. Mr. Vaidyanathan, learned Senior Counsel controverts these arguments on the basis that ICC and ECB have throughout shown reluctance to appear before the Indian Court and have not subjected themselves to the jurisdiction of this Court. It is further contended that the events on which the U.K. action is predicated are beyond the jurisdictional sway of this Court, and this fact has also been admitted by ICC and ECB in their Written Statements. Further, it is submitted by him that the Delhi High Court is not the appropriate or natural forum to entertain the English action. Thus, in the entire conspectus, an anti-suit injunction *qua* ICC and ECB cannot be granted. Learned Senior Counsel has placed reliance on **Mitchell –vs- Carter,** (1997 BCC 907) and **Barclays Bank PLC –vs- Homan,** (1992 BCC 757).

46. We shall now compare the asseverations in the proposed action sent along with the Notice issued initially by the Solicitors of the Appellant, and the U.K. action now pending in the High Court of Justice, Chancery Division after the grant of anti-suit injunction by the learned Single Judge in favour of BCCI. The averments *qua* the BCCI in the draft accompanying Notice as well as the action pending in the Chancery Division have already been reproduced above and it is noted that only cosmetic changes are made and there is no substantial difference in the two actions.

47. While upholding the injunction as regards BCCI, we have expressed the opinion that the English action substantially encompasses allegations that are also the subject matter of Indian Suit which must properly be tried by Indian Court only. Having decided so, we have to agree with Mr. Sundaram, learned Senior Counsel for the BCCI that if the allegations as regards the role of the BCCI are allowed to be adjudicated in the U.K. action in the absence of BCCI, the temporary anti-suit injunction granted in its favour would prove to be a pyrrhic victory. As we have injuncted ESPL from proceeding against the BCCI on the ground that the proposed UK action overlaps with the Indian Suit, the *lis* ought not to be allowed to proceed. Therefore, in the interest of justice, and to prevent the mischief that is caused by a partial stay it is expeditious and necessary

that the action which ESPL has now initiated which relies essentially on the allegations against the BCCI be also stayed. This position would obtain regardless of whether or not BCCI is a party to the U.K. litigation. It seems to us that if the Indian Suit is decided in favour of ESPL, the UK claim against ICC and ECB would become redundant in view of the nature of declaration and injunction claimed in the Indian Suit. It is the case of ESPL that the amendments in the Rules of ICC and the refusal to grant the status of an approved unofficial tournament was on the instance of the BCCI. The refusal to release players by ECB was allegedly is because of the pressure exerted by the BCCI and the provisions of ICC. If ESPL is able to prove anti-competitive practices on the part of the BCCI and obtain a mandatory injunction against all such actions, all its grievances can be met by a decree in the Indian Suit itself.

48. In this analysis, BCCI has been able to establish the vexatious and oppressive nature of the U.K. action which ESPL is currently pursuing against ICC and ECB. We think it appropriate and in the interest of justice to pass an interim injunction against ESPL from proceeding with the action against ICC and ECB pending in the Chancery Division, London in so far as that action contains allegations against BCCI or in the event that the adjudication of that action overlaps with the pending Indian Suit, viz. CS(OS) No.1566/2007.

49. The Appeal of BCCI as well as the Cross-Objections filed by ICC and ECB are allowed in the above terms. CM No.4243/2010 stands disposed off. There shall be no order as to costs.

50. Trial Court record be sent back forthwith.

ILR (2011) V DELHI 632
WRIT PETITION (CIVIL)

K.P. DUBEY AND OTHERS ....PETITIONERS

VERSUS

UNION OF INDIA AND OTHERS ....RESPONDENTS

(DIPAK MISRA, CJ. & SANJIV KHANNA, J.)

WRIT PETITION (CIVIL) NO. : 3818/1998 **DATE OF DECISION: 08.04.2011**

Constitution of India, 1950—Article 226—Petition challenging the preparation of seniority list on the basis of date of joining and not on merit—Petitioner was offered appointment to the post of Section Officer (Horticulture) in Central Public Works Department (CPWD) on the basis of selection in open competition through direct recruitment—Asked to report for duty latest by the forenoon of 10th August 1983—Communication did not reach him—Application requesting for extension of time to join the duty —Time extended—Petitioner joined the duty on 20.08.1983—In September 1992, petitioner came to know about the decision to prepare seniority list on the basis of date of joining—Made a representation on 29.09.1992 and he was informed that the seniority would follow the order of confirmation and not the original order of merit, which was different from the order of merit—Petitioner approached the Central Administrative Tribunal—Application dismissed—Review filed—Dismissed—Petition—Held—In view of the fact that there were instructions of 1959 with regard to the procedure for determination of inter-se seniority, there cannot be any scintilla of doubt that merit would be the governing factor for determination

of seniority—In the case at hand, when the seniority list was published in the year 1995 and the petitioner had approached the Tribunal in 1997, the principle of delay and laches or limitation does not create a dent in the challenge—A seniority list had already been drawn on the basis of merit list and promotions had been conferred—The seniority list should have been fixed on the criterion of merit and if the same has been done on the basis of the merit, it cannot be found fault with.

In view of the aforesaid enunciation of law and in view of the fact that there are instructions of 1959 with regard to the procedure for determination of inter se seniority, there cannot be any scintilla of doubt that merit would be the governing factor for determination of seniority. **(Para 18)**

In the case of **R.M. Ramual v. State of Himachal Pradesh and others,** (1989) 1 SCC 285, the Apex Court took note of the fact that the cause of action arose in the year 1982 when the seniority list was changed and the challenge was made in quite promptitude and hence the petition. The petition could not have been thrown overboard on ˇthe ground that the seniority list was finalized earlier. The emphasis was laid on the cause of action. In the case at hand, when the seniority list was published in the year 1995 and the petitioner had approached the tribunal in 1997, the principle of delay and laches or, for that matter, limitation does not create a dent in the challenge. Mr.R.K. Kapoor, learned counsel for the respondents, though has commended us to the decisions in **B.S. Bajwa** (supra), **Balkaran Singh** (supra), **H.S. Vankani** (supra), **Dharam Pal** (supra), **G.N. Nayak** (supra) and **Dr.Amarjit Singh Ahluwalia** (supra), yet they really have no assistance to throw the claim of the petitioner overboard. **(Para 20)**

At this juncture, we may note with profit that a seniority list has already been drawn on the basis of the merit list and promotions have been conferred. We have noted this fact

as this has been brought to our notice. The conclusion, we are disposed to think, has to be that the seniority list should have been fixed on the criterion of merit and if the same has been done on the basis of the merit, it cannot be found fault with. Needless to emphasize, we are concerned with the initial seniority list in the cadre of Section Officer.

(Para 21)

Important Issue Involved: Merit is the governing factor for determination of the seniority, in case of selection by recruitment.

[Vi Ba]

APPEARANCES:

FOR THE PETITIONERS : Mr. G.D. Gupta, Sr. Advocate with Mr. Satya Mitra Garg, Advocate.

FOR THE RESPONDENTS : Mr. Sachin Datta and Mr. Abhimanyu Kumar, Advocates for the UOI Mr. R.K. Kapoor and Ms. Anita Sharma Advocates for Resp. 8, 22, 25 and 31 Mr. R.N. Singh and Ms. Sangeeta Rai, Advocates for Resp. 20 and 51.

CASES REFERRED TO:

1. *Vankani and others* vs. *State of Gujarat and others,* (2010) 4 SCC 301.
2. *H.S. Union of India* vs. *Dharam Pal and others,* (2009) 4 SCC 170.
3. *Suresh Chandra Jha* vs. *State of Bihar and others,* (2007) 1 SCC 405.
4. *State of Punjab and another* vs. *Balkaran Singh,* (2006) 12 SCC 709.
5. *G.N. Nayak* vs. *Goa University and others,* AIR 2002 SC 790.
6. *B.S. Bajwa and another* vs. *State of Punjab and others,*

(1998) 2 SCC 523.

7. *G. Deendayalan Ambedkar* vs. *Union of India and others,* (1997) 2 SCC 638.

8. *V.P. Shrivastava and others* vs. *State of M.P. and others,* (1996) 7 SCC 759.

9. *Kuldip Chand* vs. *Union of India and others,* (1995) 5 SCC 680.

10. *Chairman, Puri Gramya Bank and another* vs. *Ananda Chandra Das and others,* (1994) 6 SCC 301.

11. *R.M. Ramual* vs. *State of Himachal Pradesh and others,* (1989) 1 SCC 285.

12. *Dr.Amarjit Singh Ahluwalia* vs. *State of Punjab and others,* AIR 1975 SC 984.

RESULT: Petition allowed.

DIPAK MISRA, CJ.

1. The petitioner was offered an appointment to the post of Section Officer (Horticulture) in the Central Public Works Department (CPWD) on the basis of selection in open competition through direct recruitment. By communication dated 18th July, 1983, he was asked to report for duty to the Deputy Director of Horticulture, West Division, CPWD, New Delhi by the forenoon of 1st August, 1983 and if he failed to report for duty latest by 10th August, 1983, the offer of appointment would stand cancelled.

2. As the petitioner was away from Delhi and the communication did not reach him, he submitted an application on 19th August, 1983 requesting the Director of Horticulture to grant him extension of time for joining the duty which was granted allowing him to join the duty by 23rd August, 1983 vide letter dated 20th August, 1983 enclosed as Annexure P-2. Thereafter, the petitioner joined the duty on 20th August, 1983.

3. In September, 1992, the petitioner came to know that the second respondent had taken a decision to prepare a seniority list on the basis of date of joining and, accordingly, he sent a representation on 29th September, 1992 stating, inter alia, that the determination of seniority in the grade of Sectional Officer (Horticulture) on the basis of date of

joining of an individual is contrary to the instructions contained in the office memorandum of the Ministry of Home Affairs dated 22nd December, 1959, which enumerates the principles for determination of seniority. On the basis of the said representation, a memorandum dated 14th January, 1993 was served on him seeking certain clarification and as set forth, the petitioner had sent his clarification on 17th March, 1993 as per Annexure P-6. Be it noted, a clarification that was sought from the petitioner was that he was not supplied a copy of the merit list.

4. The reply that was given by the petitioner categorically stated that the merit list was in the custody of the department and it was obligatory on the part of the department to follow the instructions dated 22nd December, 1959 which clearly stipulates that a seniority list is to be prepared on the basis of order of merit as reflected in the merit list. As the petitioner did not receive any communication, he submitted further representation seeking a copy of the merit list but he was time and again asked to submit the documentary proof in support of his claim. Eventually, the Director of Horticulture, vide office memorandum dated 21st July, 1994, informed the petitioner that in view of the instructions of the Ministry of Personnel and Public Grievances dated 18th March, 1988, the seniority would follow the order of confirmation and not the original order of merit when an employee was confirmed subsequently in an order which was different from the order of merit.

5. When the matter stood thus, the petitioner thought it appropriate to approach the Central Administrative Tribunal, Principal Bench, New Delhi (for short 'the tribunal') in OA No. 780/1995. As pleaded, eventually, a seniority list was issued in the year 1995. The tribunal took note of the fact that the petitioner had not produced any documentary proof to substantiate his claim about his merit position and further the seniority list has been prepared in accordance with the length of service and, therefore, there was no scope for interference by the tribunal. The tribunal eventually came to hold that as the seniority list had been prepared on the basis of length of service, which was founded on the date of joining, there was no merit in the application and an application for review was filed which did not meet with success.

6. Being dissatisfied with the aforesaid order, the petitioner invoked the jurisdiction of this Court. It is worth noting, as the merit list was

produced before this Court and in view of the undisputed position that the seniority is required to be determined in accordance with merit, this Court dislodged the order of the tribunal and directed that the seniority has to be determined in the order of merit. The Division Bench further opined that where the seniority is governed by the statutory rules, the doctrine of continuous officiation would not apply. After the decision was rendered, the persons who were affected and not impleaded as party approached the Supreme Court in Civil Appeal No. 1274/2004 whereby the Apex Court set aside the order of this Court and remitted the matter for disposing of the same after impleading all the necessary parties and by giving them a proper hearing. Thereafter, an application for impleadment has been filed and the parties have been brought on record.

7. We have heard Mr.G.D. Gupta, learned senior counsel along with Mr.Satya Mitra Garg, learned counsel for the petitioners. Criticizing the order of the tribunal, the learned counsel have raised the following contentions: -

(a) The instructions dated 22nd December, 1959 governs the procedure of determination of seniority and, therefore, the same has to prevail and not the date of joining. The continuous officiation is not a ground for determining the seniority.

(b) Though the letter of appointment dated 8th July, 1983 was issued in favour of the petitioner with a condition that he was to report latest by 10th August, 1983, yet on the basis of a request made by the petitioner, the same was extended and the petitioner had accordingly joined and, therefore, the date of joining cannot be pressed into service by the department. That apart, the grant of extension is covered by clause 4 of the Office Memorandum dated 6th June, 1978 and, hence, there was no illegality or irregularity in grant of extension to join.

(c) In case of a direct recruitment by selection, merit is the criteria for determination of seniority and the date of joining has no role to play and, hence, the tribunal has committed a grave irregularity by treating the date of joining to be the date of reckoning for fixation of seniority.

(d) When the seniority was finally determined in the year 1995, the petitioner approached the tribunal within the period of limitation and, therefore, his claim cannot be thrown out or he cannot be unsuited on the ground of delay and laches as put forth by the respondents who have been treated senior to him on erroneous basis.

To bolster the aforesaid proposition, Mr.G.D. Gupta, learned senior counsel, has placed reliance on **Chairman, Puri Gramya Bank and another v. Ananda Chandra Das and others,** (1994) 6 SCC 301, , **Kuldip Chand v. Union of India and others,** (1995) 5 SCC 680, **V.P. Shrivastava and others v. State of M.P. and others,** (1996) 7 SCC 759 and **Suresh Chandra Jha v. State of Bihar and others,** (2007) 1 SCC 405.

8. Mr.R.K. Kapoor, learned counsel appearing for the contesting respondents No. 8, 22, 25 and 31, resisted the aforesaid submissions and contended as follows: -

(a) The offer of appointment clearly laid a postulate that the offer of appointment shall be cancelled in case of non-joining and, therefore, the question of granting extension in relaxation of the aforesaid appointment does not arise inasmuch as the offer stood annulled and once a particular thing becomes extinct, it cannot be brought back to life.

(b) The seniority list was prepared in the year 1987 and 1989 but the petitioner approached the tribunal in the year 1995 after expiry of eight years, and such enormous delay in assail of fixation of seniority cannot be permitted as that would unsettle the settled position relating to seniority and other promotional prospects.

(c) The petitioner had accepted the seniority position from the date of his joining and, therefore, the cause of action for the same arose in the year 1983 or maximum in the year 1989 when the seniority list was prepared and, hence, the claim before the tribunal was barred under Section 21 of the Administrative Tribunals Act, 1985 (for brevity '1985 Act'). Therefore, the tribunal could not have dealt with the matter on merits and the writ petition deserves

to be dismissed on the ground that the tribunal lacked the jurisdiction to entertain a petition after expiry of three years.

(d) The department has been following the date of joining as the date of reckoning for seniority and, therefore, it could not have taken a somersault to determine the seniority on the grounds of merit. The said practice, as contended by Mr.Kapoor, is in vogue since 1965.

(e) The petitioner, in the relief clause before the tribunal, has not challenged any seniority list or seniority of any person and, therefore, the tribunal could not have addressed to the same. Hence, this Court in exercise of extraordinary jurisdiction should not interfere.

To buttress the aforesaid submissions, Mr.R.K. Kapoor, learned counsel for the respondents, has placed reliance on **Dr.Amarjit Singh Ahluwalia v. State of Punjab and others,** AIR 1975 SC 984, **B.S. Bajwa and another v. State of Punjab and others,** (1998) 2 SCC 523, **G.N. Nayak v. Goa University and others,** AIR 2002 SC 790, **State of Punjab and another v. Balkaran Singh,** (2006) 12 SCC 709, **H.S. Union of India v. Dharam Pal and others,** (2009) 4 SCC 170, and **Vankani and others v. State of Gujarat and others,** (2010) 4 SCC 301.

9. Mr.Sachin Datta, learned standing counsel for the Union of India, submitted that the merit list has been prepared on the basis of the merit following the instructions and both the petitioner and the respondents have been promoted to the cadre of Assistant Directors.

10. First, we shall deal with the issue whether by virtue of not joining within the time frame given in the initial offer of appointment, the order of appointment stood annulled and, therefore, the petitioner cannot put forth his claim for seniority and has to resign to his fate. It is not in dispute that the petitioner, as per the terms of the offer of appointment, was to join on 1st August, 1983 or latest by 10th August, 1983. It is evincible that he had sought an extension on the ground that he was out of Delhi. On the basis of his letter, the competent authority, vide letter dated 20th August, 1983, communicated to him as follows: -

"DIRECTORATE OF HORTICULTURE

CENTRAL PUBLIC WORKS DEPARTMENT

No.8(2)/83-DH/Estt./6184-86.

New Delhi, dated the 20th Aug.83

To,

Shri Kesho Prashad Dubey,
Quarter No.G-726, Sriniwaspuri,
NEW DELHI.

Sub: Recruitment of Sectional Officers (Hort.) – Extension of Joining time.

Ref.: Your letter dated 19.8.83

Please refer to this office Memo. No. 8(2)/83-DH-Estt./ ˇ5341, dated 18-7-83. Instead of joining on 1-8-83 or latest by 10-8-83, you are hereby allowed to join duty as Sectional Officer (Hort.) in the Office of Deputy Director of Horticulture, West Division, I.P. Bhawan, C.P.W.D., New Delhi on or before 23-8-83 failing which the vacancy will be allotted elsewhere.

Other terms and conditions of the offer of appointment will remain unaltered.

Sd/-

K. SADDY
DIRECTOR OF HORTICULTURE
C.P.W.D. C-117, I.P. BHAWAN,
NEW DELHI-110002"

11. On the basis of the aforesaid letter, he joined on 23rd August, 1983. It is a matter of fact that extension was granted. The question that emerges is whether the extension could have been granted and whether by virtue of his joining, as stipulated in the letter of appointment, his seniority would be affected. Mr. G.D. Gupta, learned senior counsel for the petitioner, invited our attention to the office memorandum dated 6th June, 1978. The relevant clauses of the said memorandum read as follows:-

"(i) In the offers of appointment issued by different Ministries/

Departments, it should be clearly indicated that the offer would lapse if the candidates did not join within a specified period not exceeding two or three months.

(ii) If, however, within the period stipulated, a request is received from the candidates for extension of time, it may be considered by the Ministries/Departments and if they are satisfied, an extension for a limited period may be granted but the total period granted including the extension during which the offer of appointment will be kept open, should not exceed a period of nine months. The candidates who join within the above period of nine months will have their seniority fixed under the seniority rules applicable to the service/post concerned to which they are appointed, without any depression of seniority."

12. On scrutiny of the aforesaid clauses, it is clear as day that if a candidate requests for an extension of time and an extension is granted, the same cannot exceed a period of nine months and the candidates who joined within the said period would have their seniority fixed under the seniority rules. Thus, the argument in oppugnation by Mr. Kapoor that the appointment stood annulled and the respondent has to resign to his fate to accept his seniority position melts into insignificance as the office memorandum clearly saves the appointment and also the fixation of seniority as per the rules and norms because the petitioner had joined within the period postulated in the office memorandum dated 6th June, 1978.

13. We may also note with profit that the prayer for extension was made on 19th August, 1983 and the authorities passed the order on 20th August, 1983. On a reading of the office memorandum, on a first blush, one may think that the application for extension could not have been entertained but the fact remains, in the present case that the extension was granted.

14. The next aspect that requires to be addressed to is whether the tribunal is justified in holding that the date of joining is the criterion for determination of seniority. The office memorandum dated 22nd December, 1959 issued by the Government of India, Ministry of Home Affairs provides for the general principle for determination of seniority in the central services. Clause 4 of the said instructions, which deals with

direct recruits, stipulates as follows: -

"4. **Direct Recruits.** - Notwithstanding the provisions of para 3 above, the relative seniority of all direct recruits shall be determined by the order of merit in which they are selected for such appointment, on the recommendations of the UPSC or other selecting authority, persons appointed as a result of an earlier selection being senior to those appointed as a result of a subsequent selection:

Provided that where persons recruited initially on temporary basis are confirmed subsequently in an order different from the order of merit indicated at the time of their appointment seniority shall follow the order of confirmation and not the original order of merit."

15. On a scrutiny of the said clause, there cannot be any doubt that merit is the criteria. In the merit list, the name of the petitioner featured at serial No. 8. In this context, we may refer to the decision in **Ananda Chandra Das** (supra) wherein it has been held as follows: -

"…….It is settled law that if more than one are selected, the seniority is as per the ranking of the direct recruits subject to the adjustment of the candidates selected on applying the rule of reservation and the roster. By mere fortuitous chance of reporting to duty earlier would not alter the ranking given by the Selection Board and the arranged one as per roster. The High Court is, therefore, wholly wrong in its conclusion that the seniority shall be determined on the basis of the joining reports given by the candidates selected for appointment by direct recruitment and length of service on its basis."

16. In **G. Deendayalan Ambedkar v. Union of India and others,** (1997) 2 SCC 638, a two-Judge Bench of the Apex Court has held thus-

"The learned counsel for the appellant contended that as per the Rule then in vogue, there was no option left to the authorities to determine the inter se seniority in the light of Rule 303(1)(a) of the Code, but on 31.5.1993, the Rule came to be amended amplifying what was latent with potential mischief for the arbitrary exercise of power in picking up and sending the candidates

batchwise for training and giving them accelerated seniority over the candidates who were put below in the order of select list by the Railway Recruitment Board or any of the competent authority; that Rule cannot be applied to the case of the appellant and the respondents as the Rule in vogue in 1985 alone has to be considered. Though prima facie we found force in the contention of the learned counsel for the appellant, but on deeper consideration of the legality and justice, we find that there is no force in the contention. It is not in dispute that respondents 6 and 7 were selected in the same batch and rank; in the order of merit they were seniors to the appellant. Under these circumstances, since they had not been sent for training, necessarily their ranking given in the list of candidates selected in the order of merit by the Recruitment Board cannot be given a go-by and they cannot be given accelerated seniority to the appellant and the like by picking and choosing the persons as per the whim of the authorities empowered to send them for training. It is settled legal position that the order of merit and ranking given by the Recruitment Board should be maintained ˇwhen more than one person are selected, the same inter se seniority should be maintained for future promotions unless Rules prescribe passing of departmental test as a condition for confirmation but was not passed as on the date of determining of inter se seniority."

17. In the case of **Suresh Chandra Jha** (supra), the Apex Court referred to the decision in **Ananda Chandra Das** (supra) and thereafter held thus: -

"Since there was no rule in operation, obviously the ranking in the merit list was to decide the respective seniority. The ratio in Chairman, Puri Gramya Bank case has full application to the facts of the case. The appellant's claim that he was to be treated as senior to Respondent 8 was rightly accepted by learned Single Judge. Unfortunately, the Division Bench did not address itself to the specific question and has placed undue stress on Respondent 8 having joined earlier."

18. In view of the aforesaid enunciation of law and in view of the fact that there are instructions of 1959 with regard to the procedure for determination of inter se seniority, there cannot be any scintilla of doubt

that merit would be the governing factor for determination of seniority.

19. The next issue that requires to be addressed to is whether the ˇclaim of the petitioner pertaining to seniority is to be thrown overboard on the ground of delay and laches and also on the ground that the tribunal could not have entertained the original application as it was barred under Section 21 of the 1985 Act. On a perusal of the order passed by the tribunal, it is perceptible that the tribunal has take note of the fact that the seniority list pertains to the year 1995 which was sought to be revised by the petitioner. Mr. G.D. Gupta, learned senior counsel, has also drawn our attention to paragraph 7 of the counter filed by the respondents therein wherein it has been stated that the seniority list of Sectional Officers in CPWD was issued vide office memorandum dated 10th January, 1995 and the same has been circulated in all the departments, divisions, etc.

20. In the case of **R.M. Ramual v. State of Himachal Pradesh and others,** (1989) 1 SCC 285, the Apex Court took note of the fact that the cause of action arose in the year 1982 when the seniority list was changed and the challenge was made in quite promptitude and hence the petition. The petition could not have been thrown overboard on the ground that the seniority list was finalized earlier. The emphasis was laid on the cause of action. In the case at hand, when the seniority list was published in the year 1995 and the petitioner had approached the tribunal in 1997, the principle of delay and laches or, for that matter, limitation does not create a dent in the challenge. Mr.R.K. Kapoor, learned counsel for the respondents, though has commended us to the decisions in **B.S. Bajwa** (supra), **Balkaran Singh** (supra), **H.S. Vankani** (supra), **Dharam Pal** (supra), **G.N. Nayak** (supra) and **Dr.Amarjit Singh Ahluwalia** (supra), yet they really have no assistance to throw the claim of the petitioner overboard.

21. At this juncture, we may note with profit that a seniority list has already been drawn on the basis of the merit list and promotions have been conferred. We have noted this fact as this has been brought to our notice. The conclusion, we are disposed to think, has to be that the seniority list should have been fixed on the criterion of merit and if the same has been done on the basis of the merit, it cannot be found fault with. Needless to emphasize, we are concerned with the initial seniority list in the cadre of Section Officer.

22. Consequently, the writ petition is allowed, the order passed by the tribunal is quashed and the writ petition is disposed of giving the stamp of approval to the drawing of the seniority list on the basis of merit in the cadre of Section Officer. There shall be no order as to costs.

ILR (2011) V DELHI 645
WP (C)

SAMARTH SHIKSHA SAMITI (REGD.) ....PETITIONER

VERSUS

DIRECTORATE OF EDUCATION & ANR. ....RESPONDENTS.

(RAJIV SAHAI ENDLAW, J.)

WP (C) NO. : 10628/2009 DATE OF DECISION: 26.04.2011

Constitution of India, 1950—Delhi School Education Act, 1973—Rule 120—The petition impugns the judgment dated 30th April, 2009 of the Delhi School Tribunal allowing the appeal of the respondent No. 2 Mr. A.A. Vetal and setting aside the order dated 27th February, 2001 of the Managing Committee of the Dayawati Syam Sunder Gupta Saraswati Bal Mandir of removal of the respondent No. 2 from the post of the Vice Principal and of dismissal from the service of the said school and reinstating the respondent no. 2 to his post and directing the Managing Committee of the School to decide the question of payment of salary, allowance and consequential benefits for the intervening period within two months thereof.—The respondent No. 2 was appointed in the year 1972 as Head Master of the Primary section of the School of the petitioner and was in the year 1976 promoted as a TGT and was appointed as a Vice Principal of the

School in the year 1996. The school earlier filed Civil Writ No. 3754/1999 in the court and by interim order, the order dated 21st May, 1999 of the Director of Education was stayed—The charge sheet was signed by the Manager of the school on behalf of the Managing Committee of the school—The charges leveled against the respondent no. 2 had been proved to be true; that the offence committed by the respondent no. 2 being of continuing nature spread over a period of time and the inquiry having been conducted as per the provisions of the Delhi School Education Act, 1973 and Rules framed thereunder and in accordance with the principles of natural justice, the respondent no. 2 had been rightly held guilty of indulging in misbehavior towards female students and teachers; the Disciplinary Committee accordingly proposed the penalty of removal of service on the respondent no. 2 and forwarded the documents to the School Management—The Tribunal noticed that the School being an unaided recognized school, did not require prior approval of Directorate of Education before passing the order of removal of the respondent no. 2—With respect to the question of prior approval of the Directorate of Education, attention is invited to letter dated 19th April 2001 of the Directorate of Education accorded approval sought by the School on 12th December, 2000—The Directorate of Education while appointing its nominees was fully aware of the charge sheet issued.—However, immediately after the objection in this regard being taken by the respondent No. 2, steps for constitution of the Disciplinary Committee in accordance with Rule 118 were taken and Disciplinary Committee constituted which did not choose to frame a fresh charge sheet and decided to proceed on the basis of the charge sheet already issued. The same is found to be sufficient/contextual compliance of Rule 120.

Though an act by a legally incompetent authority is invalid but can be subsequently rectified by ratification of the competent authority. It was held that ratification by definition means the making valid of an act already done; the principle derived from the Latin maxim ratihabitio mandato aequiparatur—The Court cannot interfere with this discretion unless it is palpably arbitrary.—Impugned order of Tribunal quashed.

I may notice that the School while writing to the Directorate of Education for appointing its nominees in the Disciplinary Committee had informed of the issuance of the charge sheet to the respondent no.2. The Directorate of Education while appointing its nominees was fully aware of the charge sheet issued. Similarly, the Disciplinary Committee constituted pursuant to the said nomination also proceeded on the basis of the charge sheet and appointed the Inquiry Officer to inquire into the said charge sheet and considered the report of the Inquiry Officer on the said charge sheet. All this is sufficient ratification of the charge sheet issued by the Manager on behalf of the Managing Committee of the School. The Supreme Court in **Maharashtra State Mining Corpn. V. Sunil** (2006) 5 SCC 96 held that though an act by a legally incompetent authority is invalid but can be subsequently rectified by ratification of the competent authority. It was held that ratification by definition means the making valid of an act already done; the principle is derived from the Latin maxim ratihabitio mandato aequiparatur. It was thus held that ratification assumes an invalid act which is retrospectively validated. Even though the Apex Court in **Marathwada University v. Seshrao Balwant Rao Chavan** (1989) 3 SCC 132 has held the principle of ratification to be not applicable with regard to exercise of powers conferred under statutory provisions but in the light of the words "as far as may be" the principle, in the present case would apply. I also find the Supreme Court in **Goa Shipyard Ltd. v. Babu Thomas** (2007) 10 SCC 662 to have after considering both **Marathwada University and Maharashtra State Mining Corpn.** (supra) extended the principle of ratification to service law also. **(Para 23)**

[Ch Sh]

APPEARANCES:

FOR THE PETITIONER : Mr. Rajesh Gupta and Mr. Sumit R. Sharma, Advocates.

FOR THE RESPONDENTS : Mr. Hem Kumar for Mr. Sanjeev Sabharwal, Advocate for R-1 with Mr. S.K. Nirmal, DOE Zone-19. Mr. K.P. Gupta, Advocate for R-2.

CASES REFERRED TO:

1. *Rajasthan* vs. *Veena Verma* (2009) 14 SCC 734.
2. *Goa Shipyard Ltd.* vs. *Babu Thomas* (2007) 10 SCC 662.
3. *Maharashtra State Mining Corpn.* vs. *Sunil* (2006) 5 SCC 96.
4. *Kathuria Public School* vs. *Director of Education* 113 (2004) DLT 703 (Delhi) and 123(2005) DLT 89 (DB).
5. *T.M.A. Pai Foundation* vs. *State of Karnataka* AIR 2003 SC 355.
6. *Sarwan Kumar* vs. *Madan Lal Aggarwal* (2003) 4 SCC 147.
7. *Lily Thomas* vs. *UOI* (2000) 6 SCC 224.
8. *Cipla Ltd.* vs. *Ripu Daman Bhanot* (1999) 4 SCC 188.
9. *Harinarayan Srivastav* vs. *United Commercial Bank* (1997) 4 SCC 384.
10. *Ravi S. Naik* vs. *UOI* 1994 Supp (2) SCC 641.
11. *State of Rajasthan* vs. *S.K. Dutt Sharma* 1993 Supp (4) SCC 61.
12. *Marathwada University* vs. *Seshrao Balwant Rao Chavan* (1989) 3 SCC 132.
13. *Subhash Chander* vs. *Rehmat Ullah* ILR 1973 (1) Delhi 181.

RESULT: Disposed off.

RAJIV SAHAI ENDLAW, J.

1. The petition impugns the judgment dated 30th April, 2009 of the Delhi School Tribunal allowing the appeal of the respondent no.2 Mr. A.A. Vetal and setting aside the order dated 27th February, 2001 of the Managing Committee of the Dayawati Shyam Sunder Gupta Saraswati Bal Mandir (School managed by the petitioner Society) of removal of the respondent no.2 from the post of the Vice Principal and of dismissal from the services of the said School and reinstating the respondent no.2 to his post and directing the Managing Committee of the School to decide the question of payment of salary, allowance and consequential benefits for the intervening period within two months thereof.

2. Notice of the petition was issued and vide order dated 3rd August, 2009 which continues to be in force, the implementation of the order of the Tribunal was stayed. The pleadings have been completed and the counsels have been heard.

3. The respondent no.2 was appointed in the year 1972 as Head Master of the Primary section of the School of the petitioner and was in the year 1976 promoted as a TGT and was appointed as a Vice Principal of the School in the year 1996. The respondent no.2 was placed under suspension on 7th December, 1998. It was the case of the respondent no.2 that he could not have been suspended without prior approval of the respondent no.1 Directorate of Education and he accordingly represented to the Directorate of Education in this regard. The Directorate of Education on 21st May, 1999 directed the School to revoke the suspension order. The School earlier filed Civil Writ No. 3745/1999 in this Court and by interim order wherein the order dated 21st May, 1999 of the Directorate of Education was stayed.

4. The respondent no.2 was served with a charge sheet dated 2nd April, 1999. He was charged with calling as many as 17 girl students of Class VII to class X of the School outside the classroom for one reason or the other and having touched their bodies and indulged in obscene acts with them. He was also charged with calling lady teachers for talks and embracing them and doing other obscene acts in their presence. The copies of the complaints against the respondent no.2 were attached to the charge sheet.

5. The charge sheet was signed by the Manager of the School on behalf of the Managing Committee of the School. The respondent no.2 in his reply dated 19th April, 1999 to the charge sheet took a preliminary objection that the charge sheet had not been issued by the Disciplinary Authority (constituted as per Rule 118), as required under Rule 120. Rule 118 of the Delhi School Education Rules, 1973 (School Education Rules) is as under:

> **"118. Disciplinary authorities in respect of employees.** – The disciplinary committee in respect of every recognized private school, whether aided or not, shall consist of –
>
> (i) the Chairman of the managing committee of the school;
>
> (ii) the manager of the school;
>
> (iii) a nominee of the Director, in the case of an aided school, or a nominee of the appropriate authority, in the case of an unaided school;
>
> (iv) the head of the school, except where the disciplinary proceeding is against him and where the disciplinary proceeding is against the Head of the school, the Head of any other school, nominated by the Director;
>
> (v) a teacher who is a member of the managing committee of the school, nominated by the Chairman of such managing committee."

6. Upon receipt of the reply aforesaid to the charge sheet, the School on 21st April, 1999 wrote to the Directorate of Education informing of the suspension and charge sheeting of the respondent no.2 and requesting nomination by the Directorate of Education to the five member Disciplinary Committee. The Directorate of Education vide order dated 25th August, 1999 appointed Smt. Maya Biswas, Education Officer, District South West and Smt. Usha Arora, Principal SKV Moti Bagh-I respectively as his nominees on the Disciplinary Committee setup to initiate disciplinary proceedings against the respondent no.2.

7. The Disciplinary Authority so constituted and comprising inter alia of the nominees aforesaid of the Directorate of Education, on 17th January, 2000 appointed Shri Rajesh Mahindru, Advocate as the Inquiry

Officer.

8. The Inquiry Officer so appointed submitted his report dated 30th May, 2000 in respect of the charge sheet dated 2nd April, 1999 (supra) served on the respondent no.2. The said report of the Inquiry Officer was considered by the Disciplinary Committee and the respondent no.2 given an opportunity to respond thereto. The Disciplinary Committee in its meeting held on 15th July, 2000, after considering the report of the Inquiry Officer and the reply of the respondent no.2 unanimously concluded that the charges aforesaid levelled against the respondent no.2 had been proved to be true; that the offence committed by the respondent no.2 being of continuing nature spread over a period of time and the inquiry having been conducted as per the provisions of the Delhi School Education Act, 1973 and Rules framed thereunder and in accordance with the principles of natural justice, the respondent no.2 had been rightly held guilty of indulging in misbehavior towards female students and teachers; the Disciplinary Committee accordingly proposed the penalty of removal of service on the respondent no.2 and forwarded the documents to the School Management.

9. The School Management vide order dated 27th February, 2001 imposed the penalty of removal from service with immediate effect on the respondent no.2 and against which order the respondent no.2 preferred the appeal aforesaid to the Tribunal.

10. The Tribunal in para 15 of its judgment has recorded that the challenge to the order dated 27th February, 2001 of the Managing Committee of the School was on three grounds, namely

i. that the Disciplinary Committee was not constituted as per rules.

ii. that the respondent no.2 was not allowed to have a lawyer/ retired Government servant/an outsider as his defence assistance.

iii. prior approval of the Directorate of Education was not taken before passing the order of removal against the respondent no.2.

11. The Tribunal decided the ground (ii) aforesaid in favour of the School/petitioner and against the respondent no.2. It was held that even

though the Inquiry Officer was an Advocate but the Presenting Officer was not a legally trained person and the charges against the respondent no.2 were simple, plain and understandable even to an average man and no complicated documents were to be proved or disproved and the respondent no.2 as the Vice Principal of the School was competent to defend his case and the Inquiry Officer was justified in refusing to allow a lawyer or a Government servant or an outsider to be appointed as defence assistance for the respondent no.2. It was further held that it was not a case where the respondent no.2 had requested any of his colleagues in the same School to act as defence assistance and they had refused to do so.

12. However, on the other two grounds the Tribunal decided against the School. It was held that under Rule 118 r/w Rule 120 of School Education Rules, the charges have to be framed by the Disciplinary Committee constituted under Rule 118 and the charge sheet in the present case was issued not by the Disciplinary Committee but by the Manager of the School on behalf of the Managing Committee and who were not entitled or empowered to issue the charge sheet. It was further held that the Disciplinary Committee was constituted after the issuance of the charge sheet and no definite charges were framed by the Disciplinary Committee after its due constitution. The disciplinary proceedings against the respondent no.2 were thus held to be vitiated.

13. The Tribunal though noticed that the School being an unaided recognized school, as per the judgments in **T.M.A. Pai Foundation v. State of Karnataka** AIR 2003 SC 355 and **Kathuria Public School v. Director of Education** 113 (2004) DLT 703 (Delhi) and 123(2005) DLT 89 (DB) did not require prior approval of Directorate of Education before passing the order of removal of the respondent no.2; however held that since the removal of the respondent no.2 on 27th February, 2001 was prior to the aforesaid judgments, and the judgments being not retrospective, the respondent no.2 would be governed by the law then prevalent and as per which the prior approval of the Directorate of Education was necessary. It was held that prior approval having not been obtained, the removal was illegal.

14. The counsel for the petitioner has argued that the Disciplinary Committee admittedly constituted in terms of Rule 118 (supra) even though after the issuance of the charge sheet, by proceeding on the basis

of the said charge sheet is deemed to have approved the same and the disciplinary proceedings could not have been held to be vitiated for the said reason. With respect to the question of prior approval of the Directorate of Education, attention is invited to letter dated 19th April, 2001 of the Directorate of Education according approval sought by the School on 12th December, 2000 for removal of the respondent no.2 from the service w.e.f. 7th February, 2001 "on account of the misconduct amounting to moral turpitude". It is contended that in the face of the said *ex post facto* approval, the Tribunal could not have interfered with the same.

15. *Per contra,* the counsel for the respondent no.2 has contended that the respondent no.2 in his long service from the year 1972 till 1996 in the School had an unblemished record and was during the time 1996 to 1998 when he is alleged to have misconducted himself, was about 58-59 years of age and cannot be believed to have indulged in misconduct alleged, particularly with girls as young as in class VII and class X. It is yet further contended that all the complaints against the respondent no.2 are sudden and no complaints were made during the time of two years when he is alleged to have misconducted himself. It is argued that the respondent no.2 had in the year 1998 asked the Management of the School for implementation of the report of the 5th Pay Commission and owing whereto the Management became inimical towards him and vindictively charged him with the incidents aforesaid. It is yet further alleged that the Management of the School was interested in granting admission to failed students of other schools by taking donation and which was also objected to by the respondent no.2.

16. It is further contended that the complaints of the students and the teachers against the respondent no.2 have been fabricated and the charge against him cooked up. It is contended that the judgments in **T.M.A. Pai Foundation and Kathuria Public School** (supra) laying down that unaided recognized schools do not require prior approval of the Directorate of Education for imposing punishment on their employees are of a date subsequent to the date of the order of removal of the respondent no.2 and as per law prevalent on which date, prior approval was required and sought by the School. It is further argued that the respondent no.2 was wrongly denied assistance of an Advocate even though the Inquiry Officer himself was an Advocate.

17. I have inquired from the counsel for the respondent no.2 whether the respondent no.2 had made the demand for implementation of the recommendation of the 5th Pay Commission in writing. The answer is in the negative. I have similarly inquired whether there was any record of the respondent no.2 having refused to grant admission to any student in whose admission the Managing Committee of the School was interested. The answer is again in the negative. The counsel for the respondent no.2 has rather fairly stated that no such pleas were taken in writing, neither in reply to the charge sheet nor before the Inquiry Officer nor before the Disciplinary Committee nor before the Disciplinary Authority of the School which meted out the punishment to the respondent no.2 and were taken for the first time in the appeal before the Tribunal. The Tribunal also has not returned any findings thereon.

18. In view of the aforesaid I am unable to give any credence whatsoever to the argument of animosity and the proceedings being vindictive.

19. As far as the argument of the respondent no.2 of having been denied assistance of the Advocate by the Inquiry Officer is concerned, the Tribunal itself has found in favour of the School and against the respondent no.2. The respondent no.2 has not been able to make any dent on the findings of the Tribunal in this regard. Significantly the respondent no.2 also did not press the said plea and rather chose to absent himself from the inquiry proceedings and not participate in the same. No such ground was urged before the Disciplinary Committee or the Disciplinary Authority also. No efforts were made at that stage to come to the Court seeking permission of representation through lawyer. It is even otherwise a settled position in law that there can be no insistence on legal representation in such departmental proceedings. Reference in this regard may also be made to **State of Rajasthan v. S.K. Dutt Sharma** 1993 Supp (4) SCC 61, **Cipla Ltd. v. Ripu Daman Bhanot** (1999) 4 SCC 188 and **Harinarayan Srivastav v. United Commercial Bank** (1997) 4 SCC 384.

20. The argument of the respondent no.2 of the entire case/charge/evidence against him being fabricated is unbelievable. The charges meted out to the respondent no.2 were serious in nature. In our society, girls/women hesitate in making such charges against anyone for the fear of stigma which they themselves suffer owing thereto. As many as 9 girl

students and several lady teachers of the School were examined by the Inquiry Officer and all of whom complained of the indecent behaviour of the respondent no.2. The School itself in proceeding on such ground against the respondent no.2 ran a risk of affecting its own reputation and parents especially of girls hesitating to admit them to the school. In view of all these, the said plea raised without any basis is but to be rejected.

21. As far as the finding of the Tribunal qua the charge sheet though required under Rule 120 to be issued by the Disciplinary Committee constituted under Rule 118, having not been so issued is concerned, Rule 120(1)(a) is as under:

> **"120. Procedure for imposing major penalty.** – (1) No order imposing on an employee any major penalty shall be made except after an inquiry, held, as far as may be, in the manner specified below:
>
> (a) the disciplinary authority shall frame definite charges on the basis of the allegation on which the inquiry is proposed to be held and a copy of the charges together with the statement of the allegations on which they are based shall be furnished to the employee and he shall be required to submit within such time as may be specified by the disciplinary authority, but not later than two weeks, a written statement of his defence and also to state whether he desires to be heard in person."

22. I have inquired from the counsel for the respondent no.2 as to what is the purport of the words "as far as may be" in the Rule aforesaid; the same appears to suggest that strict compliance of the Rules is not to be insisted upon and deviations as per necessity are permissible. Similarly it has been inquired from the counsel for the respondent no.2 as to whether the principle of ratification of the charge sheet by the Disciplinary Committee would not apply. No answers have been forthcoming.

23. I may notice that the School while writing to the Directorate of Education for appointing its nominees in the Disciplinary Committee had informed of the issuance of the charge sheet to the respondent no.2. The Directorate of Education while appointing its nominees was fully aware of the charge sheet issued. Similarly, the Disciplinary Committee constituted pursuant to the said nomination also proceeded on the basis

of the charge sheet and appointed the Inquiry Officer to inquire into the said charge sheet and considered the report of the Inquiry Officer on the said charge sheet. All this is sufficient ratification of the charge sheet issued by the Manager on behalf of the Managing Committee of the School. The Supreme Court in **Maharashtra State Mining Corpn. V. Sunil** (2006) 5 SCC 96 held that though an act by a legally incompetent authority is invalid but can be subsequently rectified by ratification of the competent authority. It was held that ratification by definition means the making valid of an act already done; the principle is derived from the Latin maxim ratihabitio mandato aequiparatur. It was thus held that ratification assumes an invalid act which is retrospectively validated. Even though the Apex Court in **Marathwada University v. Seshrao Balwant Rao Chavan** (1989) 3 SCC 132 has held the principle of ratification to be not applicable with regard to exercise of powers conferred under statutory provisions but in the light of the words "as far as may be" the principle, in the present case would apply. I also find the Supreme Court in **Goa Shipyard Ltd. v. Babu Thomas** (2007) 10 SCC 662 to have after considering both **Marathwada University and Maharashtra State Mining Corpn.** (supra) extended the principle of ratification to service law also.

24. Had the intent of the legislature been that the procedure prescribed in Rule 120 was to be strictly followed before imposition of any major penalty on an employee of the School, the legislature would not have used the words "as far as may be" in the said Rule. The Supreme Court recently in High Court of Judicature for **Rajasthan v. Veena Verma** (2009) 14 SCC 734 interpreted the words "as far as possible" as meaning that there is no hard and fast rule and such words give a discretion to the authorities and the Court cannot interfere with this discretion unless it is palpably arbitrary. Similarly a Seven Judge Bench of the Apex Court in **In Re Presidential Poll** (1974) 2 SCC 33 held the words "as far as practicable" to be indicative that in practice, there may be no uniformity owing to various other factors. A Division Bench of this Court also in **Subhash Chander v. Rehmat Ullah** ILR 1973 (1) Delhi 181 held that the words "as far as may be" are distinct from the words "shall apply" and further held that such expressions are obviously designed to free the proceedings from technicalities and rigours of a strict application.

25. In the present case, the charges against the respondent no.2 are grave. Need must have been felt to immediately proceed against him. The chargesheet appears to have been issued without noticing Rules 118 and 120. However, immediately after the objection in this regard being taken by the respondent no.2, steps for constitution of the Disciplinary Committee in accordance with Rule 118 were taken and Disciplinary Committee constituted and which did not choose to frame a fresh charge sheet and decided to proceed on the basis of the charge sheet already issued. The same is found to be sufficient/contextual compliance of Rule 120 (supra). The Tribunal does not appear to have considered the matter in the aforesaid context.

26. The Tribunal also appears to have confused the operation of a statute / Rule with the effect of a judgment. It is the settled proposition of law that a judgment interpreting a statute/provision thereof declares the meaning of the statute as it should be construed since the date of its enactment; wherever the Courts feel the need to make the operation of the judgment prospective, they expressly so provide in the judgment. On the contrary, it is the statute or the rule which is presumed to be prospective unless expressly made retrospective. Reference in this regard can be made to **Ravi S. Naik v. UOI** 1994 Supp (2) SCC 641. The Supreme Court similarly in **Sarwan Kumar v. Madan Lal Aggarwal** (2003) 4 SCC 147 reiterated that the interpretation by the Court of a provision relates back to the date of the law itself and cannot be prospective of the judgment. It was further held that when the Court decides that the interpretation given to a particular provision earlier was not legal, it declares the law as it stood right from the beginning as per its decision and it will be deemed that the law was never otherwise. It was yet further held that under the doctrine of "prospective overruling" the law declared by the Court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved; invocation of doctrine of "prospective overruling" is left to the discretion of the Court, to mould with the justice of the cause or the matter before the Court. However, if the Court interpreting the law does not hold that the interpretation given would be prospective in operation, it is not for another Court to say that the law as interpreted would be prospective in operation.

27. A reading of the judgment of the Division Bench in **Kathuria Public School** does not show that the interpretation given by the Division

Bench would be prospective in operation. It was thus not open to the Tribunal to declare so and the order of the Tribunal to the said extent is in the teeth of the dicta of the Apex Court in **Sarwan Kumar** (supra). The rationale behind the principle, as noted by the Apex Court in **Lily Thomas v. UOI** (2000) 6 SCC 224 is that the Court does not legislate but only gives an interpretation to an existing law.

28. It may be apposite to, at this stage, notice the judgment dated 27th August, 2010 of the Full Bench of this Court in O.Ref.1/2010 titled **Presiding Officer, Delhi School Tribunal v. GNCTD overruling Kathuria Public School** in so far as it held appeals to the Delhi School Tribunal maintainable against all grievances of the teachers and not merely against the orders mentioned in Section 8(3) of the Delhi School Education Act. However, the part of the judgment of the Division Bench in **Kathuria Public School** with which we are concerned, was not the subject matter of the reference to the Full Bench and remains unaffected thereby.

29. T.M.A. Pai Foundation or Kathuria Public School have not amended the Delhi School Education Rules but merely ascribed the meaning which they bear. Once the said judgments had been pronounced, the Tribunal could not have ascribed any other meaning to the Rules than as ascribed in the said judgments.

30. Thus both the grounds on which the Tribunal has found in favour of the respondent no.2 cannot be sustained. Axiomatically the order of the Tribunal impugned in this petition is quashed/set aside. Resultantly, the appeal preferred by the respondent no.2 to the Tribunal would stand dismissed and the order of the Managing Committee of the School of the petitioner removing the respondent no.2 from services of the School upheld. The petition is disposed of. No order as to costs.

ILR (2011) V DELHI 659
CS (OS)

M/S MAHASHIAN DI HATTI LTD. ....PLAINTIFF

VERSUS

MR. RAJ NIWAS, PROPRIETOR OF MHS MASALAY ....DEFENDANT

(V.K. JAIN, J.)

CS (OS) NO. : 326/2009 DATE OF DECISION: 04.05.2011

Trade Marks Act, 1996—Section 28, Section 29. Suit for permanent injunction, damages and delivery of infringing material—The Plaintiff company is engaged in the business of manufacturing and selling ''Spices and condiments'' under its registered logo—Plaintiff company claims its use throughout the world.—The written statement filed by the defendant rejected for non-payment of costs.—Section 28 of the Act, gives to the registered proprietor of the trade mark the exclusive right to the use of the trade mark in relation to the goods or services in respect of which the trade mark is registered and to obtain relief in respect of infringement of the trade mark in the manner provided by this Act.—It is thus settled proposition of law that in order to constitute infringement the impugned trademark need not necessarily be absolutely identical to the registered trademark of the plaintiff and it would be sufficient if the plaintiff is able to show that the mark being used by the defendant resembles his mark to such an extent that it is likely to deceive or cause confusion and that the user of the impugned trademark is in relation to the goods in respect of which the plaintiff has obtained registration in his favour—In fact, any intelligent person, seeking to

encash upon the goodwill and reputation of a well-established trademark, would make some minor changes here and there so as to claim in the event of a suit or other proceeding, being initiated against him that the trademark being used by him, does not constitute infringement of the trademark, ownership of which vests in some other person—No person can be allowed to sell goods either using the mark of another person or its imitation, so as to cause injury to that person and thereby enrich himself at the cost of a person who has spent considerable time, effort and money in building the brand reputation, which no amount of promotion or advertising can create-even if the defendant is able to show that on account of use of other word/mark of the plaintiff, there would be no confusion in the mind of the customer—That on account of the packaging, get up and the manner of writing trademark on the packaging, it is possible for the consumer to distinguish his product from that of the plaintiff, he would be liable for infringement of the registered trademark—The person coming across the product of the defendant, bearing the impugned trademark may not necessarily be having the product of the plaintiff bearing his registered trademark with him when he comes across the product of the defendant with the mark 'MHS' logo—Who may care to notice the features which distinguish the trademark of the defendant from that of the plaintiff—Similarity of the two trademarks, may induce him to believe that the product which he has come across was, in fact, the product of the plaintiff or had some kind of an association or connection with the plaintiff—The trademark being used by the defendant is visually similar to the trademark being used by the plaintiff, though phonetically, there may not be much similarity in the two trademarks on account of use of the letters 'S' in place of 'D' and re-arrangement of the letters—Considering the strong visual similarity, rather weak

phonetic similarity, would not be of much consequence and would not permit the defendant to use the logo being presently used by him—It is also in the interest of the consumer that a well-established brand such as 'MDH' or its colourable imitation, as is made out from the manner in which the logo 'MHS' has been used by the defendant, should not be allowed to be used by another person in such a deceptive manner—Therefore, the act of the defendant constitutes not only infringement, but also the passing off. This would, amount to putting premium on dishonesty and give an unfair advantage to an unscrupulous infringer over those who have a bona fide defence to make and therefore come forward to contest the suit and place their case before the Court.

It is thus settled proposition of law that in order to constitute infringement the impugned trademark need not necessarily be absolutely identical to the registered trademark of the plaintiff and it would be sufficient if the plaintiff is able to show that the mark being used by the defendant resembles his mark to such an extent that it is likely to deceive or cause confusion and that the user of the impugned trademark is in relation to the goods in respect of which the plaintiff has obtained registration in his favour. It will be sufficient if the plaintiff is able to show that the trademark adopted by the defendant resembles its trademark in a substantial degree, on account of extensive use of the main features found in his trademark. In fact, any intelligent person, seeking to encash upon the goodwill and reputation of a well-established trademark, would make some minor changes here and there so as to claim in the event of a suit or other proceeding, being initiated against him that the trademark being used by him, does not constitute infringement of the trademark, ownership of which vests in some other person. But, such rather minor variations or distinguishing features would not deprive the plaintiff of injunction in case resemblance in the two trademarks is found to be substantial, to the extent that

the impugned trademark is found to be similar to the registered trademark of the plaintiff. No person can be allowed to sell goods either using the mark of another person or its imitation, so as to cause injury to that person and thereby enrich himself at the cost of a person who has spent considerable time, effort and money in building the brand reputation, which no amount of promotion or advertising can create unless the quality of the goods being sold under that brand is also found to be good and acceptable to the consumer. In a case based on infringement of a registered trademark, the plaintiff need not prove anything more than the use of its registered trademark by the defendant. In such a case, even if the defendant is able to show that on account of use of other words by him in conjunction with the registered word/mark of the plaintiff, there would be no confusion in the mind of the customer when he come across the product of the defendant and/or that on account of the packaging, get up and the manner of writing trademark on the packaging, it is possible for the consumer to distinguish his product from that of the plaintiff, he would still be liable for infringement of the registered trademark. **(Para 12)**

The logo 'MDH' in three hexagons written in white colour on red colour background is an integral part of the registered mark/cartons of the plaintiff company in respect of various spices and condiments. The plaintiff is an established and well-reputed manufacturer and marketer of spices being sold using the aforesaid logo. It is settled proposition of law that in order to ascertain whether the impugned trademark constitutes infringement mark of the plaintiff or not, the two marks are not to be placed side by side. The person coming across the product of the defendant, bearing the impugned trademark may not necessarily be having the product of the plaintiff bearing his registered trademark with him when he comes across the product of the defendant with the mark 'MHS' logo. This is more so in the case of an average Indian citizen who may not necessarily be well-educated. This proposition of law would apply with a greater force in case

of products like spices which normally are purchased by housewives and domestic helps, who may not care to notice the features which distinguish the trademark of the defendant from that of the plaintiff. Therefore, if on coming across the product of the defendant bearing the impugned trademark, he forms an impression that this could be the product of the plaintiff, it may induce, on account of overall similarity of the two trademarks, him to believe that the product which he has come across was, in fact, the product of the plaintiff or had some kind of an association or connection with the plaintiff. **(Para 13)**

A comparison of the logo of the plaintiff along with the logo of the defendant would show the following prominent similarities:

(a) The defendant has used three hexagons for writing three different letters as has been done by the plaintiffs in writing the letters 'MDH'.

(b) The letters 'MHS' have been written in white colour and so are the letters 'MDH'

(c) The background colour used by the defendant for writing the letters 'MHS' is red and so is the background colour used by the plaintiffs.

(d) There is a white border on the hexagons of the plaintiffs and the same is the position in respect of the hexagons being used by the defendant.

(e) The shape of the letters used by the defendant for writing 'MHS' is identical to the shape of the letters used by the plaintiff for writing the letters 'MDH'.

Thus, the trademark being used by the defendant is visually similar to the trademark being used by the plaintiff. Though phonetically, there may not be much similarity in the two trademarks on account of use of the letter 'S' in place of 'D' and re-arrangement of the

letters.

The last letter in the trademark of the plaintiff is 'H', whereas it has been made second letter in the trademark of the defendant. The last letter in the trademark of the plaintiff is 'H', whereas it is 'S' in the trademark of the defendant. However, considering the strong visual similarity, rather weak phonetic similarity, would not be of much consequence and would not permit the defendant to use the logo being presently used by him. **(Para 14)**

Important Issue Involved: (A) If the defendant resorts to colourable use of a registered trade mark, such an act of the defendant would give rise to an action for passing off as well as for infringement.

(B) If punitive damages are not awarded in such cases, it would only encourage unscrupulous persons who actuated by dishonest intention, use the well reputed trademark of another person, so as to encash goodwill and requtation which that mark enjoys in the market.

[Ch Sh]

APPEARANCES:

FOR THE PLAINTIFF : Ms. Kiran Suri, Mr. Purvesh Buttan and Ms. Aparna Mattoo, Advocates.

FOR THE DEFENDANT : None.

CASES REFERRED TO:

1. *Larsen and Toubro Limited* vs. *Chagan Bhai Patel:* MIPR 2009 (1) 194.
2. *Corn Products Refining Co.* vs. *Shangrila Food Products Ltd.* 1960 (1) SCR 968.
3. *K.R. Chinna Krishna Chettiar* vs. *Shri Ambal and Co., Madras and Anr.,* AIR 1970 SC 146.

4. *Kaviraj Pandit Durga Dutt Sharma* vs. *Navaratna Pharmaceutical Laboratories,* PTC (Suppl) (2) 680 (SC).

5. *De Cordova and Ors.* vs. *Vick Chemical Coy.* (1951) 68 R.P.C.103.

6. *Parle Products (P) Ltd.* vs. *J.P. & Co., Mysore,* AIR 1972 SC 1359.

7. *Microsoft Corporation* vs. *Deepak Raval:* MIPR 2007 (1) 72.

8. *Time Incorporated* vs. *Lokesh Srivastava & Anr.,* 2005 (30) PTC 3 (Del).

9. *Hero Honda Motors Ltd.* vs. *Shree Assuramji Scooters,* 2006 (32) PTC 117 (Del).

RESULT: Allowed.

V.K. JAIN, J.

1. This is a suit for permanent injunction, damages and delivery up of infringing material.

The plaintiff company is engaged in the business of manufacturing and selling "spices & condiments", which are being sold under its registered logo (comprising 'MDH' within three hexagon device, on red colour background). The plaintiff claims to be using the aforesaid logo trademark since 1949 in respect of various spices titles as "Kashmiri Mirch", "Kasoori Methi", "Meat Masala", "Chat Masala", "Sambar Masala", "Kitchen King" and "Khushbudar Masala".

2. The aforesaid logo trademark is registered in the name of plaintiff company since 31st May, 1991 and the plaintiff company claims its use throughout the world. This is also the case of the plaintiff company that on account of long, continuous and extensive sale, sale promotion and wide publicity given to the products under the aforesaid logo and excellent quality of the products, the plaintiff company enjoys tremendous goodwill and reputation not only in India but worldwide, in respect of the goods sold under its registered logo trademark. The plaintiff company claims sale of Rs. 181,90,67,134/-, Rs.217,24,30,303/- and Rs.252,79,37,137/- and advertisement and publicity expenses of Rs.10,56,00,000/-, Rs.12,34,00,000/- and Rs.9,14,57,886/- in the years 2005-06, 2006-07

and 2007-08 respectively. During this period, the plaintiff company claims sales of Garam Masala, Chana Masala, Meat Masala, Kitchen King and Haldi powder weighing 2960748 Kg., 3931290 Kg., 2359890 Kg., 3798234 Kg and 1467072 Kg respectively.

3. The defendant has been using a logo 'MHS' within hexagen device with red colour background on carton is alleged to be similar to those being used by the plaintiff company. The case of the plaintiff is that this is being done with the sole intention to pass off the goods of the defendant as those of the plaintiff and amounts to not only infringement of its registered trademark but also passing off the goods of the defendant as those of the plaintiff. This is also the case of the plaintiff that the defendant had no justification for adopting the alphabets 'MHS' with hexagen device with red colour background and the use of the aforesaid mark by the defendant is likely to cause confusion and deception as the goods of the defendant are likely to be purchased by the consumer in a mistaken belief that they are the goods of the plaintiff company or its affiliate and the public is likely to be deceived as regards the source of the goods. The plaintiff company has accordingly sought an injunction restraining the defendant from using the infringing logo "MHS" or any other trademark identical with or deceptively similar to plaintiff's registered trademark 'MDH' logo. It has also sought injunction restraining the defendant from passing off its goods as those of the plaintiff besides seeking destruction of the infringing material and damages amounting to Rs.20 lakhs.

4. The defendant filed written statement contesting the suit and took preliminary objection that the suit is not maintainable since he had applied for registration of the trademark 'MHS' and there was no objection from the plaintiff with respect to the aforesaid registration. On merits, it is stated that the trademark 'MDH' logo has no similarity with the logo of the defendant since 'MDH' and 'MHS' sound differently. It is also claimed that the letters 'MHS' denote the first names of the family members of the defendant. 'M' stands for the name his late father Shri Meghram, 'H' and 'S' stand the name of his sons Hanshuman and Saurabh. It is also pointed out that the defendant is using a pretty girl for advertising its products whereas the plaintiff is using Mr. Mahashey Ji himself, who is aged about 85 years. It is further alleged that the defendant has been advertising its products for the last two years without any

protest from the plaintiff.

5. A perusal of the record shows that on 27th March, 2009 defendant appeared in the Court along with his counsel and stated that he would not use the impugned mark 'MHS' logo in respect of spices, condiments manufactured and marketed by him and was ready to suffer a decree for injunction against him. Learned counsel for the plaintiff took adjournment for visiting the business premises of defendant to take possession of the infringing packing material and dyes and then to move a joint compromise application. On 4th May, 2009, the learned counsel for the defendant took an adjournment to call the defendant for recording his statement in terms of the compromise suggested by defendant itself on 27th March, 2009. However, on 18th May, 2009, the defendant was represented by another counsel, who stated that defendant was not ready for any settlement. When this matter was taken up on 22nd November, 2010, his counsel stated that in fact defendant might not be willing even to contest the suit and might admit the claim of the plaintiff. It was directed that in case the defendant remains present in Court on the next date of hearing, he need not pay costs of Rs.10,000/- , which was imposed on him on that day, on account of his failure, to file documents, though it was incorrectly typed in the proceedings that a last opportunity was being given to defendant to file written statement within four weeks, subject to payment of Rs.10,000/- as costs. In fact, the cost was imposed on account of failure of the defendant to file documents and another opportunity to file documents was given to him, subject to payment of Rs.10,000/- as further costs. It would be pertinent to note here that a costs of Rs.3000/- imposed on the defendant on 25th February, 2010 had also not been paid. When the matter was taken up on 4th February, 2011, it was noticed that defendant had not paid costs amounting to Rs.13,000/- and he was given one last and final opportunity to pay the costs within two weeks failing which the written statement filed by him was to stand rejected on account of non-payment of costs. The written statement filed by the defendant stands rejected for non-payment of costs.

6. The plaintiff examined Mr. Sanjeev Bhardwaj by way of ex-parte evidence. In his affidavit, Mr. Bhardwaj has affirmed on oath the case set up in the plaint and has stated that 'MDH' logo was adopted by the plaintiff company in the year 1949 on an international level and is being

used by it for selling 'species & condiments' under various titles such as "Kashmiri Mirch", "Kasoori Methi", "Meat Masala", "Chat Masala", "Sambar Masala", "Kitchen King" and "Khushbudar Masala". He has further stated that for the last many years, large quantity of its products is being sold by the plaintiff company throughout the world under the trademark 'MDH' logo either itself or through its affiliated companies. He has further stated that 'MDH' logo of the plaintiff company has been extensively advertising in the newspapers as well as on television and has become a household name not only in India but also in Dubai, United Kingdom, USA, European countries and Pakistan. According to him, the plaintiff company had sale of Rs. 181,90,67,134/-, Rs.217,24,30,303/- and Rs.252,79,37,137/- and advertisement and publicity expenses of Rs.10,56,00,000/-, Rs.12,34,00,000/- and Rs.9,14,57,886/- in the years 2005-06, 2006-07 and 2007-08 respectively. He claims that the plaintiff company came to know about the logo adopted by the defendant when the newspaper Vyapar Kesar dated 26th December, 2008 was brought to its notice.

7. Ex.PW-1/3 is the certificate of registration of trademark logo 'MDH' in favour of the plaintiff company in Class 30 in respect of saffron (seasoning). Ex. PW-1/8 is the certificate of registration of the label/packaging bearing the logo 'MDH' of the plaintiff company being used in Jal Jeera masala. Ex.PW-1/9 is the registered packaging of the plaintiff bearing the logo 'MDH' being used in respect of Pav Bhaji masala. Ex.PW-1/10 is the registered label/packaging using the logo "MDH" for selling Chana masala. Ex.PW-1/11 is the registered label/packaging of the plaintiff bearing the aforesaid logo, being used for selling Chunky Chat masala. Ex.PW-1/13 is the registered label/packaging of the plaintiff in respect of Tava Fry stuffed vegetables masala bearing the aforesaid logo. Ex.PW-1/14 is the registered label/packaging of the plaintiff in respect of Pani Puri masala. Ex.PW-1/15 is the registered label/packaging of the plaintiff in respect of Dal Makhani masala. Ex.PW-1/16 is the registered label/packaging of the plaintiff in respect of Shahi Paneer masala.

8. Section 28 of Trade Marks Act, 1999 gives to the registered proprietor of the trade mark the exclusive right to the use of the trade mark in relation to the goods or services in respect of which the trade mark is registered and to obtain relief in respect of infringement of the

trade mark in the manner provided by this Act. The action for infringement is, thus, a remedy provided by Trade Marks Act to the registered proprietor of a registered trade mark in case there is an invasion of the statutory right provided to him for use of that trade mark in relation to the goods for which the trade mark has been registered in his name. Section 29(1) of Trade Marks Act, 1999 provides that a registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which is identical with, or deceptively similar to, the trade mark in relation to goods or services in respect of which the trade mark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trade mark.

9. It is also a settled proposition of law, which was reiterated by Supreme Court in **Kaviraj Pandit Durga Dutt Sharma v. Navaratna Pharmaceutical Laboratories,** PTC (Suppl) (2) 680 (SC), that if the defendant resorts to colourable use of a registered trade mark, such an act of the defendant would give rise to an action for passing off as well as for infringement. In an action based upon infringement of a registered trade mark if the mark used by the defendant is visually, phonetically or otherwise so close to the registered trade mark of the plaintiff that it is found to be an imitation of the registered trade mark, the statutory right of the owner of the registered trade mark is taken as infringed. In such a case, if it is found that the defendant has adopted the essential features of the registered trade mark of the plaintiff, he would be liable even if he is able to establish that on account of packaging, get up and other writings on his goods or on the container in which the goods are sold by him, it is possible to clearly distinguish his goods from the goods of the plaintiff. On the other hand in a case of passing off, if it is shown that on account of these factors it is very much possible for the purchaser to identify the origin of the goods and thereby distinguish the goods of the defendant from the goods of the plaintiff, the defendant may not be held liable.

10. In **Corn Products Refining Co. vs. Shangrila Food Products Ltd.** 1960 (1) SCR 968, the Supreme Court observed that the question whether two competing marks are so similar as to be likely to deceive or cause confusion is one of first impression and it is for the court to decide it. The question has to be approached from the point of view of

a man of average intelligence and imperfect recollection.

11. In **Parle Products (P) Ltd. v. J.P. & Co., Mysore,** AIR 1972 SC 1359, Supreme Court inter alia observed as under:-

> According to Karly's Law of Trade Marks and Trade Names (9th Edition Paragraph 838) "Two marks, when placed side by side, may exhibit many and various differences, yet the main idea left on the mind by both may be the same. A person acquainted with the one mark, and not having the two side by side for comparison, might well be deceived, if the goods were allowed to be impressed with the second mark, into a belief that he was dealing with goods which bore the same mark as that with which he was acquainted.
>
> It would be too much to expect that persons dealing with trademarked goods, and relying, as they frequently do, upon marks, should be able to remember the exact details of the marks upon the goods with which they are in the habit of dealing. Marks are remembered rather by general impressions or by ˇsome significant detail than by any photographic recollection of the whole. Moreover, variations in detail might well be supposed by customers to have been made by the owners of the trade mark they are already acquainted with for reasons of their own.
>
> It is therefore clear that in order to come to the conclusion whether one mark is deceptively similar to another, the broad and essential features of the two are to be considered. They should not be placed side by side to find out if there are any differences in the design and if so, whether they are of such character as to prevent one design from being mistaken for the other. It would be enough if the impugned mark bears such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with one to accept the other if offered to him.

12. It is thus settled proposition of law that in order to constitute infringement the impugned trademark need not necessarily be absolutely identical to the registered trademark of the plaintiff and it would be sufficient if the plaintiff is able to show that the mark being used by the defendant resembles his mark to such an extent that it is likely to deceive

or cause confusion and that the user of the impugned trademark is in relation to the goods in respect of which the plaintiff has obtained registration in his favour. It will be sufficient if the plaintiff is able to show that the trademark adopted by the defendant resembles its trademark in a substantial degree, on account of extensive use of the main features found in his trademark. In fact, any intelligent person, seeking to encash upon the goodwill and reputation of a well-established trademark, would make some minor changes here and there so as to claim in the event of a suit or other proceeding, being initiated against him that the trademark being used by him, does not constitute infringement of the trademark, ownership of which vests in some other person. But, such rather minor variations or distinguishing features would not deprive the plaintiff of injunction in case resemblance in the two trademarks is found to be substantial, to the extent that the impugned trademark is found to be similar to the registered trademark of the plaintiff. No person can be allowed to sell goods either using the mark of another person or its imitation, so as to cause injury to that person and thereby enrich himself at the cost of a person who has spent considerable time, effort and money in building the brand reputation, which no amount of promotion or advertising can create unless the quality of the goods being sold under that brand is also found to be good and acceptable to the consumer. In a case based on infringement of a registered trademark, the plaintiff need not prove anything more than the use of its registered trademark by the defendant. In such a case, even if the defendant is able to show that on account of use of other words by him in conjunction with the registered word/mark of the plaintiff, there would be no confusion in the mind of the customer when he come across the product of the defendant and/or that on account of the packaging, get up and the manner of writing trademark on the packaging, it is possible for the consumer to distinguish his product from that of the plaintiff, he would still be liable for infringement of the registered trademark.

13. The logo 'MDH' in three hexagons written in white colour on red colour background is an integral part of the registered mark/cartons of the plaintiff company in respect of various spices and condiments. The plaintiff is an established and well-reputed manufacturer and marketer of spices being sold using the aforesaid logo. It is settled proposition of law that in order to ascertain whether the impugned trademark constitutes

infringement mark of the plaintiff or not, the two marks are not to be placed side by side. The person coming across the product of the defendant, bearing the impugned trademark may not necessarily be having the product of the plaintiff bearing his registered trademark with him when he comes across the product of the defendant with the mark 'MHS' logo. This is more so in the case of an average Indian citizen who may not necessarily be well-educated. This proposition of law would apply with a greater force in case of products like spices which normally are purchased by housewives and domestic helps, who may not care to notice the features which distinguish the trademark of the defendant from that of the plaintiff. Therefore, if on coming across the product of the defendant bearing the impugned trademark, he forms an impression that this could be the product of the plaintiff, it may induce, on account of overall similarity of the two trademarks, him to believe that the product which he has come across was, in fact, the product of the plaintiff or had some kind of an association or connection with the plaintiff.

14. A comparison of the logo of the plaintiff along with the logo of the defendant would show the following prominent similarities:

(a) The defendant has used three hexagons for writing three different letters as has been done by the plaintiffs in writing the letters 'MDH'.

(b) The letters 'MHS' have been written in white colour and so are the letters 'MDH'

(c) The background colour used by the defendant for writing the letters 'MHS' is red and so is the background colour used by the plaintiffs.

(d) There is a white border on the hexagons of the plaintiffs and the same is the position in respect of the hexagons being used by the defendant.

(e) The shape of the letters used by the defendant for writing 'MHS' is identical to the shape of the letters used by the plaintiff for writing the letters 'MDH'.

Thus, the trademark being used by the defendant is visually similar to the trademark being used by the plaintiff. Though phonetically, there may not be much similarity in the two

trademarks on account of use of the letter 'S' in place of 'D' and re-arrangement of the letters.

The last letter in the trademark of the plaintiff is 'H', whereas it has been made second letter in the trademark of the defendant. The last letter in the trademark of the plaintiff is 'H', whereas it is 'S' in the trademark of the defendant. However, considering the strong visual similarity, rather weak phonetic similarity, would not be of much consequence and would not permit the defendant to use the logo being presently used by him.

15. Admittedly, both the parties are engaged in the similar business as both of them are manufacturing and selling spices. Therefore, the defendant, in my view, has infringed the registered trademark of the plaintiff by using the aforesaid logo 'MHS'. The adoption and use of the letters 'MHS' in the manners stated above appears to be deceptive intended to confuse the consumer and encash upon the goodwill which plaintiff's trademark 'MDH' enjoys in the market.

16. In **K.R. Chinna Krishna Chettiar vs. Shri Ambal and Co., Madras and Anr.,** AIR 1970 SC 146, the respondents had two registered trademarks. The first mark consisted of a label containing a device of a goddess Sri Ambal seated on a globe floating on water enclosed in a circular frame with the legend "Sri Ambal parimala snuff" at the top of the label, whereas the other mark consisted of expression "Sri Ambal". The appellant before Supreme Court was seeking registration of a label containing three panels. The first and the third panels contained equivalents of the words "Sri Andal Madras Snuff", whereas the central panel contained the picture of goddess Sri Andal and the legend "Sri Andal". Sri Andal and Sri Ambal are separate divinities. The question before the Court was whether the proposed mark of the appellant was deceptively similar to the respondents. mark. Noticing that the word Ambal was an essential feature of the registered trademarks, the Court was of the view that the name Andal proposed to be used by the appellant did not cease to be deceptively similar because it was used in conjunction with a pictorial device. Supreme Court referred to the case of **De Cordova and Ors. v. Vick Chemical Coy.** (1951) 68 R.P.C.103 where Vick Chemical Coy were the proprietors of the registered trade mark consisting of the word "Vaporub" and another registered trade mark consisting of a design of

which the words "Vicks Vaporub Salve" formed a part. The defendants advertised their ointment as 'Karsote vapour Rub" and the Court held that the defendants had infringed the registered marks. The view taken by Lord Radcliffe that "a mark is infringed by another trader if, even without using the whole of it upon or in connection with his goods, he uses one or more of its essential features" was affirmed by the Supreme Court. The appeal was accordingly dismissed by Supreme Court, despite the fact that the words Ambal and Andal had distinct meanings.

17. It is also in the interest of the consumer that a well-established brand such as 'MDH' or its colourable imitation, as is made out from the manner in which the logo 'MHS' has been used by the defendant, should not be allowed to be used by another person in such a deceptive manner. The consumer, on account of the confusion created in his mind, from use of the logo 'MHS' in the manner it has been used by the defendant may end up purchasing the product of the defendant believing the same to be that of the plaintiff. If the quality of the product of the defendant is found to be inferior to that of the products of the plaintiff that would result not only in diminishing the brand value which plaintiff's trademark 'MDH' enjoys in the market, but would also be detrimental to the interest of the consumer. Considering the manner in which the trademark 'MHS' has been used by the defendant, the defendant will be able to pass off his case as those of the plaintiff. Therefore, the act of the defendant constitutes not only infringement, but also the passing off.

18. Though the defendant has claimed that there was no protest from the plaintiff when he applied for registration of the trademark 'MHS', this is found to be incorrect since the plaintiff did file Notice of Opposition, a copy of which has been filed by it. Hence, it cannot be said that the plaintiff has acquiesced in the use of the trademark 'MHS' by the defendant or has otherwise condoned the use in any manner. As regards use of a pretty girl by the defendant for advertising its products as against Mr Mahashyaji himself appearing in the advertisement of the plaintiff, I am of the view that it would be of no consequence considering the similarities in the two trademarks used on their respective cartons.

During the course of arguments, the learned counsel for the plaintiff pressed not only for injunction, but also for grant of punitive damages though no other relief was pressed by her.

19. In the case of **Time Incorporated v. Lokesh Srivastava & Anr.,** 2005 (30) PTC 3 (Del), this Court observed that punitive damages are founded on the philosophy of corrective justice and as such, in appropriate cases these must be awarded to give a signal to the wrong doers that the law does not take a breach merely as a matter between rival parties but feels concerned about those also who are not party to the lis but suffer on account of the breach. In the case of **Hero Honda Motors Ltd. V. Shree Assuramji Scooters,** 2006 (32) PTC 117 (Del), this Court noticing that the defendant had chosen to stay away from the proceedings of the Court felt that in such case punitive damages need to be awarded, since otherwise the defendant, who appears in the Court and submits its account books would be liable for damages whereas a party which chooses to stay away from the Court proceedings would escape the liability on account of the failure of the availability of account books.

20. In **Microsoft Corporation vs. Deepak Raval:** MIPR 2007 (1) 72, this Court observed that in our country the Courts are becoming sensitive to the growing menace of piracy and have started granting punitive damages even in cases where due to absence of defendant, the exact figures of sale made by them under the infringing copyright and/or trademark, exact damages are not available. The justification given by the Court for award of compulsory damages was to make up for the loss suffered by the plaintiff and deter a wrong doer and like-minded from indulging in such unlawful activities.

In **Larsen and Toubro Limited vs. Chagan Bhai Patel:** MIPR 2009 (1) 194, this Court observed that it would be encouraging the violators of intellectual property, if the defendants notwithstanding having not contested the suit are not burdened with punitive damages.

21. Also, the Court needs to take note of the fact that a lot of energy and resources are spent in litigating against those who infringe the trademark and copyright of others and try to encash upon the goodwill and reputation of other brands by passing off their goods and/or services as those of that well known brand. If punitive damages are not awarded in such cases, it would only encourage unscrupulous persons who actuated by dishonest intention, use the well-reputed trademark of another person, so as to encash on the goodwill and reputation which that mark enjoys in the market, with impunity, and then avoid payment of damages by

remaining absent from the Court, thereby depriving the plaintiff an opportunity to establish actual profit earned by him from use of the infringing mark, which can be computed only on the basis of his account books. This would, therefore, amount to putting premium on dishonesty and give an unfair advantage to an unscrupulous infringer over those who have a bona fide defence to make and therefore come forward to contest the suit and place their case before the Court.

22. For the reasons given in the preceding paragraphs, the defendant is hereby restrained from manufacturing, selling or marketing any spices or condiments using the impugned logo 'MHS' or any other trademark which is identical or deceptively similar to the registered logo trademark 'MDH' of the plaintiff. The plaintiff is also awarded punitive damages amounting to Rs 1 lakh against the defendant.

Decree sheet be drawn accordingly.

ILR (2011) V DELHI 676
CRL. APPEAL

RAM CHANDER @ GANJU ....APPELLANT

VERSUS

STATE OF DELHI ....RESPONDENT

(BADAR DURREZ AHMED & VEENA BIRBAL, JJ.)

CRL. APPEAL NO. : 230/2010 DATE OF DECISION: 11.05.2011
CRL. APPEAL NO. : 537/2010

Indian Penal Code, 1860—Sections 394/397/302/34—Circumstantial Evidence—As per prosecution, deceased was on friendly terms with the appellants and was called by them and one Sanju in the night of the incident on the pretext of taking a stroll in the park—Taking of the deceased witnessed by PW2 and

PW3 brothers of deceased between 9 to 10 p.m. on 24.6.2005—Deadbody of deceased discovered next morning at 6.30 a.m. by chowkidar of park—Injuries found on the head of deceased—Circumstances relied upon by prosecution were that deceased last seen alive in company of appellants by PW2 and PW3 around 9 to 10 p.m. the previous night; deadbody of deceased discovered at 6.30 am next morning i.e. 25.06.2005; as per postmortem report, time of death around 1 a.m. on 25.6.2005 recovery of purse from house of appellant Vijay at his instance which contained photograph of deceased and appellants absconding after crime—Trial Court convicted appellants u/s 394/302—Held, recovery un-reliable as contradictions in evidence of recovery witness PW2 who at one point stated that Rs. 600/- were recovered alongwith the photograph of the deceased in the purse while at other point stated that no money was recovered—PW2 claimed that purse recovered on 25.6.2005, while recovery memo mentioned date as 1.7.2005—As per version of PW2, purse recovered even before appellant's arrest—Contradictions in testimony of PW16, recovery witness—Un-natural on part of accused Vijay Kumar to have kept empty raxin purse which apparently had no value with him with photograph of deceased—In normal course of event the item which could link a perpetrator of a crime with the crime would be disposed of at the earliest—Improbable that accused Vijay would have kept purse with photograph of deceased in almirah for over six days in his house, recovery of purse doubtful—Even if accepted that PW2 and PW3 had seen deceased for last time in the company of the appellants between 9-10 p.m., the previous night, it cannot be said that appellants were only responsible for the death of the deceased—Time gap of 3-4 hours sufficient to allow intervening circumstances and other persons to have entered the scene and caused death —Prosecution has to prove its case beyond reasonable

doubt and cannot derive any strength from the weakness of defence put up by the accused—A false defence may be called into aid only to lend assurance to the court and that too where various links in the chain of circumstantial evidence are in themselves complete—Weakness of defence cannot by itself form a link of the chain but can only lend support to the other links which in themselves form a complete chain of circumstantial evidence pointing un-erringly towards the guilt of the accused—Appellants given benefit of doubt —Appeal Allowed—Accused Acquitted.

Another witness to the recovery was Constable Surender Singh who came to the witness box and testified as PW-16. In his cross-examination, this witness has stated that they went to the house of Vijay Kumar @ Mandiya, but found the house to be locked and, thereafter, they came back to the police station. However, on cross-examination by the learned APP, this witness stated that the black rexine purse was recovered from the house of Vijay Kumar @ Mandiya. This flip-flop in ˇthe testimony of PW-16 also does not inspire confidence. It creates a serious doubt as to the recovery of the purse as alleged by the prosecution. **(Para 14)**

Apart from this, we would also like to point out that it would be highly unnatural on the part of Vijay Kumar @ Mandiya to have kept an empty rexine purse, which apparently had no value, with him in his almirah and, that too, with the photograph of the deceased Pawan Kumar in it. If the intention of the appellants was to rob the deceased Pawan Kumar of Rs 600/-, which he is alleged to have had in his purse, there was no reason for them to have taken the purse with them after they had taken out the Rs 600/- and had distributed it among themselves, as alleged by the prosecution. The purse was not of any value, it was an ordinary black rexine purse and, therefore, there was no reason whatsoever in the natural scheme of the things for the appellants and, particularly, the appellant Vijay Kumar @ Mandiya to have retained the purse and to have carried

the same to his house and to have kept it in his almirah, particularly, because it also carried the photograph of the deceased Pawan Kumar. In the normal course of events, any item which could link a perpetrator of a crime with the crime would be disposed of by the criminal at the earliest opportunity. This is not so in the present case and, therefore, it appears to us quite improbable that Vijay Kumar @ Mandiya would have kept the purse with the photograph of Pawan in his almirah for over six days in his house. For all these reasons, there is a serious doubt with regard to the recovery of the purse. One of the most important circumstances in this case was the recovery of the purse at the instance of Vijay Kumar @ Mandiya. That circumstance has not been established by the prosecution beyond doubt **(Para 15)**

The proposition urged by the learned counsel for the State that it was open to the appellants to have given an explanation in the course of their statements under Section 313 Cr.P.C, is clearly answered by the observations of the Supreme Court which have been quoted above in the case of **Kulvinder Singh and Another** (supra). It is well established that the prosecution is to make out its case beyond reasonable doubt and cannot derive any strength from the weakness of the defence put up by the accused. A false defence, as pointed out by the Supreme Court, may ˘be called into aid only to lend assurance to the court and, that too, where various links in the chain of circumstantial evidence are in themselves complete. The weakness of the defence cannot, by itself, form a link of the chain, but can only lend support to the other links which in themselves form a complete chain of circumstantial evidence, pointing unerringly towards the guilt of the accused. In the present case, the submission of the learned counsel for the State that the fact that the appellants have not given any explanation ought to be regarded as a link in the chain of circumstances, cannot be accepted in this backdrop. Even if it were to be regarded as a link, it would only remain as a 'link' in an

'incomplete chain'. **(Para 20)**

Important Issue Involved: A false defence may be called into aid only to lend assurance to the court and that too where various links in the chain of circumstantial evidence are in themselves complete. Weakness of defence cannot by itself form a link of the chain but can only lend support to the other links which in themselves form a complete chain of circumstantial evidence pointing un-erringly towards the guilt of the accused

[Ad Ch]

APPEARANCES:

FOR THE APPELLANT : Mr. Anupam S. Sharma along with Mr. Javed Akhtar, Advocates, Mr. R.K. Jha, Advocate.

FOR THE RESPONDENT : Mr. Sanjay Lao, APP for the State.

CASES REFERRED TO:

1. *State of Rajasthan* vs. *Kashi Ram:* (2006) 12 SCC 254.
2. *Ramreddy Rajesh Khanna Reddy* vs. *State of A.P. :* AIR 2006 SC 1656.
3. *Kulvinder Singh and Another* vs. *State of Haryana,* Criminal Appeal No.916/2005 decided on 11.04.2011.
4. *State of U.P.* vs. *Satish:* 2005 CriLJ 1428.
5. *Joseph* vs. *State of Kerala:* (2000) 5 SCC 197.

RESULT: Appeal allowed.

BADAR DURREZ AHMED, J (ORAL)

1. These appeals have been filed against the judgment passed by the learned Additional Sessions Judge, North District, Delhi, in Sessions Case No.67/2006, arising out of FIR No.421/2005, registered at Police Station Ashok Vihar, registered under Sections 394/397/302/34 IPC. By virtue of the impugned judgment, the present appellants, namely, Ram Chander @ Ganju, Vijay Kumar @ Mandiya and Sunil @ Nalia have been convicted

under Sections 394/302 IPC. The appellants are also aggrieved by the order on sentence dated 04.02.2010 whereby the appellants were sentenced to rigorous imprisonment for 7 years and a fine in the sum of Rs 1000/- each was imposed in respect of the offence under Section 394 IPC. In default of payment of fine, the convicts were also required to undergo a further period of simple imprisonment of one month each. With regard to the offence punishable under Section 302 IPC, all the appellants were sentenced to imprisonment for life as also to a fine in the sum of Rs 1000/- each and in default of payment whereof they were to undergo simple imprisonment of one month each. The sentences were directed to run concurrently.

2. We may point out, at the outset, that there were four accused in the present case, the fourth being one Sanju, who has been declared to be a proclaimed offender. According to the prosecution, the deceased ˇPawan Kumar, who was on friendly terms with the appellants, was called by them and Sanju in the night of 24.06.2005, between 9-10 pm, on the pretext of taking a stroll in the park. According to the prosecution, Pawan left with the appellants from his residence and this fact was seen or witnessed by his brothers, namely, PW-2 Parvesh Kumar and PW-3 Satish Kumar. Thus, according to the prosecution, the deceased Pawan was last seen alive in the company of the appellants between 9-10 pm on 24.06.2005. The dead body of Pawan was discovered next morning, that is, on 25.06.2005 at about 6.30 am by one Sarju (PW-5) who is the chowkidar of the park. On discovering the dead body of Pawan Kumar, which was lying in the nursery, Sarju informed Mordhwaj (PW-1), who was the supervisor of the nursery. Thereafter, the said supervisor informed J.J. Colony Police Post through his mobile phone and the information was recorded as DD No.35 (Ex.PW12/A). Thereupon, SI Mohar Singh (PW-15) and other police officials reached the spot where the dead body was lying. The crime team was also summoned to the spot and photographs were taken. In the meanwhile, the deceased Pawan's brothers, namely, PW-2 Parvesh Kumar and PW-3 Satish Kumar, also arrived at the spot and identified the body as that of their brother Pawan Kumar. SI Mohar Singh noted that there were injuries on the head of the deceased and also found some broken pieces of earthen pots lying near the body. Thereafter, inquest proceedings were conducted, ruqqa was sent and the FIR (Ex.PW8/A) was registered. All other formalities with regard to the investigation were completed and, ultimately, the appellants were charged

of having committed the offence mentioned above. The case of the prosecution rests on the following circumstances:-

i. The deceased Pawan was last seen alive in the company of the appellants by PW-2 Parvesh Kumar and PW-3 Satish Kumar around 9-10 pm on 24.06.2005;

ii. The dead body of Pawan was discovered at about 6.30 am on 25.06.2005;

iii. As per the post mortem report (Ex.PW10/A), the time of death has been indicated to be 12 hours prior to the recording of the post mortem report. The post mortem report indicates that it was recorded at 1 pm on 25.06.2005 and, therefore, the approximate time of death would be around 1 am on 25.06.2005;

iv. The recovery of a purse from the house of the appellant Vijay Kumar @ Mandiya, at his instance, from his almirah which contained a photograph of the deceased Pawan;

v. The fact that the appellants were absconding after the alleged commission of the crime.

3. The learned counsel for the appellant submitted that before the appellants could be convicted for having committed the murder after having robbed the deceased Pawan Kumar, each of the circumstances have to be established beyond reasonable doubt. It is only if the circumstances themselves are established and a complete chain emerges, that the appellants could be convicted. In this backdrop, the learned counsel for the appellants submitted that the allegation of the prosecution that the brothers of the deceased, namely, PW-2 Parvesh Kumar and PW-3 Satish Kumar had last seen the deceased in the company of the appellants, is an afterthought. He submitted that this can be easily discerned from the fact that in the ruqqa, which formed the basis of the FIR and which, in turn, was prepared on the basis of what was stated by PW-2 Parvesh Kumar, there is no mention of his deceased brother Pawan having been last seen in the company of the appellants. The ruqqa only mentions that he identified the dead body of his brother Pawan and also stated that Pawan was a smack addict. The rukka was sent at 8.45 am on 25.06.2005.

4. The learned counsel for the appellants further submitted that in the brief facts recorded in the inquest proceedings (Ex. PW15/C) also, there is no mention of any last seen evidence. It was further stated in the 'brief facts' that there was no eye-witness and that no witness of the incident was available. During the inquest proceedings, both Parvesh Kumar and Satish Kumar were present and, therefore, according to the learned counsel for the appellants, a clear inference can be made that the evidence of 'last seen' was also not available at that point of time. The inquest papers were received at the mortuary on 25.06.2005 at about 12.30 pm. Thus, according to the learned counsel for the appellants, the entire story of the last seen evidence is an afterthought.

5. The learned counsel for the appellants further submits that even if it is to be assumed that the said PWs, namely, Parvesh Kumar and Satish Kumar had, in fact, last seen the deceased Pawan in the company of appellants at about 9-10 pm, that, by itself, would not be sufficient to return a finding of guilt. He submitted that the last seen evidence, in any event, is a very weak kind of evidence and requires solid corroboration from other circumstances, which have to be clearly established. He submitted that the time gap between PWs 2 and 3 last seeing Pawan Kumar alive in the company of the appellants and the point of time when the dead body was recovered, was too wide to reach a conclusion that there was no other person or persons who could have caused death of Pawan Kumar. He submitted that the body was discovered at 6.30 am in the morning and that he was allegedly last seen alive at about 9-10 pm on the previous night. He further submitted that even if the time of death, as indicated by the post mortem Doctor (PW-10), is taken into consideration, the time of death would be around 1.00 am on 25.06.2005, which would mean that there was a time gap of 3 to 4 hours between the actual death and when the deceased Pawan Kumar was last seen alive in the company of the appellants. Even this time gap, according to the learned counsel for the appellants, was sufficiently large and could not rule out the possibility of any other intervening circumstances or other persons causing the death of deceased Pawan Kumar.

6. Apart from this, learned counsel for the appellants also submitted that the prosecution has not brought out any motive of the alleged crime. The only motive which was suggested was that of stealing the money which Pawan Kumar allegedly had with him. He, however, submitted

that this has not been established by the evidence brought on record.

7. Lastly, the learned counsel for the appellants submitted that the only other circumstance which has been alleged by the prosecution is that of the alleged recovery of a purse at the instance of the appellant Vijay Kumar @ Mandiya from an almirah in his house on 01.07.2005, that is, after six days of the date of death of Pawan Kumar. The purse is stated to have contained a photograph of the deceased Pawan Kumar. According to the learned counsel for the appellants, this recovery is not a recovery at all and it was planted by the prosecution. He submitted that, in any event, the conduct would be highly unnatural of keeping an article which would implicate him, in his own house and keeping the said article for so many days after the commission of the offence. Apart from this, he also submitted that there is no independent recovery witness and the only police witness is PW-2 Parvesh Kumar, who is the brother of the deceased Pawan Kumar. Even, as per his testimony, he has contradicted himself inasmuch as in his examination-in-chief, this witness has stated that money was recovered from the purse, subsequently, he submitted that Rs 600/- was not found in the purse. At one point of time he has stated that the purse was recovered from the accused Vijay Kumar @ Mandiya on 25.06.2005 but, subsequently, on cross-examination by the learned Additional Public Prosecutor he submitted that the purse was recovered on 01.07.2005.

8. The learned counsel for the appellants also pointed out that the recovery of the purse is not free from doubt also because of the fact that PW-2 Parvesh Kumar had stated that the purse was recovered at noon, that is, around 12.00 to 3.00 pm, whereas, the arrest memo of the appellants being Ex. PW2/G, Ex. PW2/H and Ex. PW2/J had indicated the time of arrest to be 8.00 pm (in respect of Sunil @ Nolia), 7.30 pm (in respect of Ram Chander) and 7.00 pm (in respect of Vijay Kumar @ Mandiya) respectively. Therefore, the learned counsel for the appellants submitted that it can be inferred that the purse was recovered before their arrest. This would clearly bely the prosecution's case with regard to the recovery of the purse. Moreover, the learned counsel for the appellants also submitted that even the circumstances which have been alleged by the prosecution are not established beyond doubt. Therefore, the question of their forming a complete chain does not arise.

9. On the other hand, Mr Sanjay Lao, appearing on behalf of the prosecution, submitted that insofar as the last seen evidence is concerned, that stands clearly established in the sense that both PW-2 and PW-3 have come to the witness box and have clearly stated that the deceased Pawan Kumar left in the company of the appellants and Sanju for a stroll in the park. Both of them have stated that they saw Pawan alive in the company of the appellants at around 9 to 10 pm on 24.06.2005. The learned counsel submitted that even if the appellants had parted company with the deceased Pawan, it was for them to give some explanation in their statements under Section 313 Cr.P.C. He further submitted that the fact that they have furnished no explanation would be a circumstance which could be taken against them. In support, the learned counsel for the State relied upon the following decisions of the Supreme Court:-

1. **State of Rajasthan v. Kashi Ram:** (2006) 12 SCC 254
2. **Joseph v. State of Kerala:** (2000) 5 SCC 197

10. Mr Lao also submitted that the recovery of the purse stands established as per the recovery memo Ex. PW2/B and the testimony of ˇthe recovery witnesses. He submitted that the rexine purse was recovered at the instance of the appellant Vijay Kumar @ Mandiya from an almirah in his house. While it is true that no money was recovered from the said purse, the same contained a photograph of the deceased Pawan Kumar, and, therefore, it was clearly linked with the deceased.

11. Thus, according to the learned counsel for the State, the circumstance of the deceased Pawan Kumar having been last seen in the company of the appellants as well as the fact that the death of Pawan had occurred shortly thereafter and that his death was not under natural circumstances, coupled with the factum of recovery of the purse at the instance of appellant Vijay Kumar @ Mandiya, are clear links which complete the chain of evidence against the appellants and, therefore, according to him, the trial court has rightly convicted the appellants for the offence under Section 302 and 394 IPC. He submitted that the impugned judgment and order on sentence ought not to be interfered with.

12. After having heard the counsel for the parties and having examined the evidence on record, we are of the view that the present appeal is liable to be allowed inasmuch as the appellants are entitled to the benefit

of doubt which exists. First of all, let us take the question of recovery of the purse at the instance of Vijay Kumar @ Mandiya. One of the recovery witnesses is PW-2 Parvesh Kumar, who, as pointed out above, is the brother of deceased Pawan. PW-2 in his examination-in-chief, has stated at one point that the police apprehended Vijay, who took the police to his (Vijay's) house and from there the purse of his brother containing his photograph as well as Rs 600/- were got recovered. The witness, then volunteered to state that Rs 600/- were given to Pawan Kumar in the previous evening but the same were not found in the purse which was recovered at the instance of the accused Vijay Kumar @ Mandiya. Thus, it is seen that this witness, at one point, stated that the money was recovered from the purse and immediately, thereafter, he made a voluntary statement that the money was not found in the purse. Then, later on, in the examination-in-chief, the same witness, that is, PW-2 Parvesh Kumar, stated that the accused persons, namely, Sunil, Ram Chander and Vijay were arrested on 25.06.2005 and the purse was recovered at the instance of the accused Vijay on 25.06.2005. This is in clear contradiction to the recovery memo Ex. PW2/B which indicates that the recovery was effected on 01.07.2005. Furthermore, when PW-2 was cross-examined by the APP, he stated that the recovery of the purse was not on 25.06.2005 but on 01.07.2005 and it is on that date that all the three accused persons were arrested. From the testimony of PW-2, which we have indicated above, it appears that the witness has contradicted himself at several places. He was unclear about the recovery of the alleged sum of Rs 600/- as also with regard to the date of the recovery.

13. Moreover, in the course of his cross-examination, PW-2 Parvesh Kumar had also made a statement that the purse was recovered in the noon time, that is, between 12.00-3.00 pm. But, as mentioned above, the arrest memos Ex. PW2/G, Ex. PW2/H and Ex. PW2/J had indicated the time of arrest to be 8.00 pm (in respect of Sunil @ Nolia), 7.30 pm (in respect of Ram Chander) and 7.00 pm (in respect of Vijay Kumar @ Mandiya) respectively on 01.07.2005. Thus, if PW-2 is to be believed, then the purse was recovered even before the appellants were arrested! This is certainly not the case of the prosecution. This fact also casts serious doubts on the recovery of the purse at the instance of Vijay Kumar @ Mandiya.

14. Another witness to the recovery was Constable Surender Singh who came to the witness box and testified as PW-16. In his cross-examination, this witness has stated that they went to the house of Vijay Kumar @ Mandiya, but found the house to be locked and, thereafter, they came back to the police station. However, on cross-examination by the learned APP, this witness stated that the black rexine purse was recovered from the house of Vijay Kumar @ Mandiya. This flip-flop in the testimony of PW-16 also does not inspire confidence. It creates a serious doubt as to the recovery of the purse as alleged by the prosecution.

15. Apart from this, we would also like to point out that it would be highly unnatural on the part of Vijay Kumar @ Mandiya to have kept an empty rexine purse, which apparently had no value, with him in his almirah and, that too, with the photograph of the deceased Pawan Kumar in it. If the intention of the appellants was to rob the deceased Pawan Kumar of Rs 600/-, which he is alleged to have had in his purse, there was no reason for them to have taken the purse with them after they had taken out the Rs 600/- and had distributed it among themselves, as alleged by the prosecution. The purse was not of any value, it was an ordinary black rexine purse and, therefore, there was no reason whatsoever in the natural scheme of the things for the appellants and, particularly, the appellant Vijay Kumar @ Mandiya to have retained the purse and to have carried the same to his house and to have kept it in his almirah, particularly, because it also carried the photograph of the deceased Pawan Kumar. In the normal course of events, any item which could link a perpetrator of a crime with the crime would be disposed of by the criminal at the earliest opportunity. This is not so in the present case and, therefore, it appears to us quite improbable that Vijay Kumar @ Mandiya would have kept the purse with the photograph of Pawan in his almirah for over six days in his house. For all these reasons, there is a serious doubt with regard to the recovery of the purse. One of the most important circumstances in this case was the recovery of the purse at the instance of Vijay Kumar @ Mandiya. That circumstance has not been established by the prosecution beyond doubt.

16. Coming now to the other important circumstance, that is of PW-2 and 3 having last seen Pawan alive in the company of the appellants, we find that even if we were to accept that PW-2 and PW-3 had, in fact, seen Pawan Kumar for the last time in the company of the appellants

between 9-10 pm on 24.06.2005, it cannot be said, on the basis of this fact alone, that it is the appellants only who were responsible for the death of Pawan Kumar. The time gap of three to four hours, as pointed out above, is sufficient to allow intervening circumstances and other persons to have entered into the scene and caused the death of Pawan Kumar. The mere fact that Pawan Kumar left in the company of the appellants, by itself, cannot be regarded as sufficient to enable us to arrive at a conclusion that it is the appellants who must have, inescapably, caused the death of Pawan Kumar.

17. In **State of U.P. v. Satish:** 2005 CriLJ 1428, the Supreme Court observed that the last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. The Supreme Court also observed that in the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases.

18. A similar observation was made by the Supreme Court in the case of **Ramreddy Rajesh Khanna Reddy v. State of A.P.** : AIR 2006 SC 1656. In the latter decision, it was also stated that in cases of 'last seen', the courts should look for some corroboration. The decision in the case of **State of U.P. v. Satish** (supra) was reiterated in a recent decision of the Supreme Court in the case of **Kulvinder Singh and Another v. State of Haryana,** Criminal Appeal No.916/2005 decided on 11.04.2011. In the latter case, it was also observed as under:-

> "16. It is a settled legal proposition that conviction of a person in an offence is generally based solely on evidence that is either oral or documentary, but in exceptional circumstances conviction may also be based solely on circumstantial evidence. The prosecution has to establish its case beyond reasonable doubt and cannot derive any strength from the weakness of the defense put up by the accused. However, a false defense may be called into aid only to lend assurance to the Court where various links in the chain of circumstantial evidence are in themselves complete. The circumstances from which the conclusion of guilt is to be

drawn should be fully established. The same should be of a conclusive nature and exclude all possible hypothesis except the one to be proved. Facts so established must be consistent with the hypothesis of the guilt of the accused and the chain of evidence must be so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

19. Coming back to the present case, we find that, because of the time gap and the other surrounding factors, we cannot rule out the possibility of any other person having caused the death of Pawan Kumar, particularly, because the recovery of the purse, at the instance of Vijay Kumar @ Mandiya, in our view, is highly suspect. Since there is no corroboration of the prosecution case by virtue of some other established circumstance, it would be extremely hazardous on our part to return a finding of guilt insofar as the appellants are concerned.

20. The proposition urged by the learned counsel for the State that it was open to the appellants to have given an explanation in the course of their statements under Section 313 Cr.P.C, is clearly answered by the observations of the Supreme Court which have been quoted above in the case of **Kulvinder Singh and Another** (supra). It is well established that the prosecution is to make out its case beyond reasonable doubt and cannot derive any strength from the weakness of the defence put up by the accused. A false defence, as pointed out by the Supreme Court, may be called into aid only to lend assurance to the court and, that too, where various links in the chain of circumstantial evidence are in themselves complete. The weakness of the defence cannot, by itself, form a link of the chain, but can only lend support to the other links which in themselves form a complete chain of circumstantial evidence, pointing unerringly towards the guilt of the accused. In the present case, the submission of the learned counsel for the State that the fact that the appellants have not given any explanation ought to be regarded as a link in the chain of circumstances, cannot be accepted in this backdrop. Even if it were to be regarded as a link, it would only remain as a 'link' in an 'incomplete chain'.

21. In view of the foregoing discussion, the appellants are given the benefit of doubt and their appeals are allowed and they are acquitted of

all charges against them. The appellants are in custody. They be released immediately, if not required in any other case.

22. A copy of this judgment/order be sent to the concerned Superintendent of the jail.

ILR (2011) V DELHI 690
W.P.(C)

SHRI JAGMOHAN SINGH NEGI ....PETITIONER

VERSUS

UOI & ORS. ....RESPONDENTS

(PRADEEP NANDRAJOG & SURESH KAIT, JJ.)

W.P. (C) NO. : 7613/2010 DATE OF DECISION: 18.05.2011

(A) Constitution of India, 1950—Article 226 & 227—Service Law—Fundamental Rule 56 (J)—Petition challenging the order whereby he was ordered to be prematurely retired w.e.f. Forenoon of 18.03.2010—Petitioner was appointed as Assistant Sub-Inspector (Ministerial) with Central Industrial Security Force on 22.08.1972—Earned promotion from time to time and reached the post of Commandant on 02.01.2006 at the age of 57-1/2 years; left with less than 2-1/2 years for retiremant—Screening Committee decided to put the name of the petitioner in list of such officers, whose further retention in service required to be considered in public interest or otherwise under Rule 56 (j) of the Fundamental Rules—Recommended being unfit for continuation of service, petitioner be prematurely retired w.e.f. 18.03.2010—Petitioner challenged that no opportunity was granted to respond to the below benchmark gradings i.e. 'Average' gradings for 3 years—

Opportunity to make a representation given only after the decision of the screening committee accepted—Except the last three years, service profile of the petitioner was either 'very good' or 'outstanding'—Screening Committee should not have considered the ACRs, which were not communicated—Held—The right to make a representation against a below benchmark ACR grading is the recognition of the right to be heard on a subject where some civil consequences may flow, but pertaining to uncommunicated adverse remarks being considered by the Screening Committees, the law has grown in a different direction; holding that uncommunicated adverse remarks can be considered by Screening Committees on the issue of compulsory or premature retirement and the reason thereof is that such an order is neither stigmatic nor does it take away any right of a civil servant, to whom right guaranteed is a minimum pensionable service and beyond that it is public interest which determines how long should he serve.

It is recognized that compulsory or premature retirement is not a stigma. It is not in violation of a right of a civil servant to serve till the age of superannuation for law grants, the government an assurance of a minimum service i.e. pensionable service before which the civil servant cannot be removed from service save and except by way of penalty. Crossing the said stage, it is public interest which determines whether the civil servant must continue. **(Para 12)**

The right to make a representation against a below benchmark ACR grading is the recognition of the right to be heard on a subject where some civil consequence may flow, but pertaining to uncommunicated adverse remarks being considered by the Screening Committees, the law has grown in a different direction; holding that uncommunicated adverse remarks can be considered by Screening Committees on the issue of compulsory or premature retirement and the reason thereof is that such an order is neither stigmatic nor

does it take away any right of a civil servant, to whom right guaranteed is a minimum pensionable service and beyond that it is public interest which determines how long should he serve. **(Para 13)**

(B) Constitution of India, 1950—Article 226 & 227—Service Law—Fundamental Rule 56 (1)—Petition challenging the order whereby he was ordered to be prematurely retired w.e.f. Forenoon of 18.03.2010—Petitioner was appointed as Assistant Sub-Inspector (Ministerial) with Central Industrial Security Force on 22.08.1972—Earned promotion from time to time and reached the post of Commandant on 02.012006 at the age of 57-1/2 years left with less that 2-1/2 years—Screening Committee decided to put the name of the petitioner in list of such officers, whose further retention in service required to be considered in public interest or otherwise under Rule 56 (j) of the Fundamental Rules—Recommended being unfit for continuation of service, petitioner be prematurely retired w.e.f. 18.03.2010—Petitioner challenged that no opporunity is granted to respond to the below benchmark gradings i.e. 'Average' gradings for 3 years—Except the last three years, service profile of the petitioner was either 'very good' or 'outstanding'—Petitioner contended that keeping in view overall grading, wherein he was graded 'very good' and 'outstanding', but suddenly in the last three years is graded by as Average, which is not possible and that is why, it invited judicial review—Held—On the issue of premature retirement or compulsory retirement what has to be considered is; Whether it would serve public good to continue with the services of the employee concerned or not—That is the reason why those who are found to be 'Average' would require, in public interest, to be weeded out notwithstanding an 'Average' grading not being adverse, but the same being not complementary would justify the person moving out, to be replaced by fresh

blood; this serves the public interest—For considerable period and for considerable attributes the individual columns have been filled up with the remarks 'Just Average', 'Average', 'Adequate' and 'Satisfactory'—It is true that for about 30% period and for about 30% individual attributes the petitioner has been graded as 'Good'—Suffice would it be to state that if for approximately half period, different attributes graded are 'Adequate' 'Just Average', 'Average', or 'Satisfactory' and for the remainder 50% period the person concerned is graded 'Good'; the overall grading being 'Average' would not be so arbitrary so as to invite judicial intervention—Thus, the challenge to the ACR gradings as awarded and recorded is rejected.

For the third question posed, we may only state that the law is clear. No doubt the entire service record of a person has to be considered but prominence has to be on the last few years of service, for the reason, a person may improve with passage of time or may deteriorate with the passage of time. After all, on the issue of premature retirement or compulsory retirement what has to be considered is: Whether it would serve public good to continue with the services of the employee concerned or not. That is the reason why those who are found to be 'Average' would require, in public interest, to be weeded out notwithstanding an 'Average' grading not being adverse, but the same being not complementary would justify the person moving out, to be replaced by fresh blood; this serves the public interest. We need not burden ourselves to make a catalog of various authorities which so hold and thus we rest ourselves by noting that in sub-para (iv) of Para 32 of the decision in **Baikuntanath Das's** case (supra) this principle has been so reiterated. **(Para 17)**

We do not agree, and for which we may note that for considerable period and for considerable attributes the individual columns have been filled up with the remarks: 'Just Average', 'Average', 'Adequate' and 'Satisfactory'. It is

true that for about 30% period and for about 30% individual attributes the petitioner has been graded as 'Good'. Suffice would it be to state that if for approximately half period, different attributes graded are 'Adequate', 'Just Average', 'Average' or 'Satisfactory' and for the remainder 50% period the person concerned is graded 'Good'; the overall grading being 'Average' would not be so arbitrary so as to invite judicial intervention. Thus, the challenge to the ACR gradings as awarded and recorded is rejected. **(Para 22)**

Important Issue Involved: Uncommunicated adverse remarks can be considered by Screening Committee on the issue of compulsory or premature retirement.

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Mrs. Rekha Palli, Mrs. Amrita Prakash and Mrs. Punam Singh, Advocates.

FOR THE RESPONDENTS : Mr. B.V. Niren, Advocate.

CASE REFERRED TO:

1. *Baikuntha Nath Das & Anr.* vs. *Chief Medical Officer, Baripada & Anr.* AIR 1992 (SC) 1020.

RESULT: Petition dismissed.

PRADEEP NANDRAJOG, J.

1. Having been appointed as an Assistant Sub-Inspector (Ministerial) with Central Industrial Security Force on 22.8.1972, petitioner earned promotion to the post of Sub-Inspector on 12.4.1978 and further to the post of Inspector on 24.3.1986. He earned promotion to the post of Asstt. Commandant on 2.7.1992 and further to the post of Deputy Commandant on 20.7.2000 and went further up the ladder when he earned promotion to the post of Commandant on 2.1.2006.

2. Aged 57½ years and left with less than 2½ years' service, at a Screening Committee which met on 25.5.2009, with reference to the

ACRs of the petitioner prepared up to 31.3.2008 and warnings or displeasures awarded up to 31.3.2009, the Screening Committee decided to put the name of the petitioner in a list of such officers whose further retention in service required to be considered in public interest or otherwise under Rule 56(j) of the Fundamental Rules and considering the matter further recommended that being unfit for continuance in service, petitioner be prematurely retired and this was followed by an order dated 16.3.2010 being passed by the Competent Authority intimating petitioner his being prematurely retired with effect from the forenoon of 18.3.2010.

3. The service record of the petitioner would reveal that except for a period or two when petitioner was graded 'Good', for the remainder of the career spanning 26 years, till he earned promotion to the post of Commandant on 2.1.2006, petitioner had been graded either 'Very Good' or 'Outstanding', but all of a sudden there was a drop in performance inasmuch as the grading became 'Average' with respect to the year 1.4.2006 till 31.3.2007 and onwards. In other words, for 3 successive years i.e. the year 1.4.2006 – 31.3.2007, 1.4.2007 – 31.3.2008 and 1.4.2008 – 31.3.2009 the petitioner was graded 'Average'. Not only that. Petitioner had been awarded 1 warning and 1 IG's displeasure on 13.6.2007 and 14.6.2007 and we may note that after 25.5.2009 when the Screening Committee met and made the recommendation, thereafter petitioner was awarded 2 more displeasures on 9.6.2009 and 25.11.2009 as also a warning on 26.2.2010.

4. It may be noted here that the grading awarded to the petitioner for 3 years i.e. the year 2006 – 07, 2007 – 08 and 2008 – 09 were admittedly below benchmark and were required to be communicated to the petitioner for his response and we find that after the petitioner was prematurely retired, in the month of April 2010, the below benchmark 'Average' ACR gradings for the period 1.4.2006 – 14.10.2006, 15.10.2006 – 31.3.2007, 1.4.2007 – 31.10.2007 and 1.11.2007 – 31.3.2008 were communicated to the petitioner for his response and petitioner's response dated 15.5.2010 was rejected vide order dated 15.10.2010.

5. During arguments there was considerable confusion as to whether at all the petitioner was given an opportunity to represent against the 'Average' ACR grading for the period 1.4.2008 – 31.3.2009 in respect whereof we find that admittedly no grading was done for the period 1.4.2008 – 4.9.2008 and only for the period 5.9.2008 – 31.3.2009 was

the petitioner assessed and graded 'Average'.

6. During pendency of the writ petition the petitioner was communicated the 'Average' ACR grading for the period 1.4.2009 – 30.6.2009.

7. Since the Screening Committee had met on 25.5.2009 and by which date ACR gradings up to 31.3.2008 were ready and were considered, we eschew any controversy for the subsequent ACR gradings as also the controversy relating to the warnings and displeasures issued post said date inasmuch as admittedly, the Screening Committee had considered the service record up to the period 31.3.2008 and the penalties levid up to said period.

8. 2 things strike out with prominence. Firstly, petitioner had not been granted an opportunity to respond to the below benchmark gradings i.e. 'Average' gradings for the 3 years: 1.4.2006 – 31.3.2007, 1.4.2007 – 31.3.2008 and 1.4.2008 – 31.3.2009 and in respect whereof as noted herein above, limited to 2 years, opportunity to make a representation was given after the Screening Committee had already made the fatal decision. Secondly, that the 3 year period proved fatal to the petitioner, whose service profile otherwise had been either 'Very Good' or 'Outstanding'.

9. Learned counsel for the petitioner had sought to urge personal mala-fides against Sh.H.V.Chaturvedi, IG (North). But we find no foundation thereof neither in the pleadings in the writ petition nor we find he being made a party to the writ petition. It is only in the additional affidavit filed by the petitioner, after the pleadings were completed, that it has been alleged that Sh.H.V.Chaturvedi who was the Reviewing Officer of the petitioner has acted with bias; but without any particulars of the bias being stated and thus we hold that neither is there a foundation for the plea of mala-fide and bias nor there is any basis to infer the same and hence we reject the charge of any kind of bias against Sh.H.V.Chaturvedi.

10. The question would be: Whether the Screening Committee could consider such below benchmark ACRs of the petitioner in respect whereof the petitioner required the same to be communicated to him with an opportunity to give his response and if we hold that the Screening Committee was unjustified in considering the same, the effect thereof?

A second question would arise being that, should the petitioner be entitled to the relief prayed for if the first question is answered in his favour keeping in view that the petitioner has been afforded an opportunity to respond to the below benchmark ACR gradings and the ˇrepresentation has been rejected; the question would be whether it would be an idle formality to direct a Review Screening to be done with respect to the same material? The third question which would arise would be whether 3 years' drop in performance would be sufficient material to hold that the petitioner is a dead wood?

11. At first blush, one may rush to a conclusion that the first question has to be answered against the respondents inasmuch as it strikes that if ACR recording has not attained finality, the ACR grading at the inchoate stage cannot be considered and especially when the same has a civil consequence. But everybody who has something to do with law well knows that the path of law is strewn with examples of open and shut cases and what seemed to be at first blush unanswerable charges end up completely answered or conduct which seems to be completely unexplainable at the first blush being fully explained and thus we do not jump to a conclusion.

12. It is recognized that compulsory or premature retirement is not a stigma. It is not in violation of a right of a civil servant to serve till the age of superannuation for law grants, the government an assurance of a minimum service i.e. pensionable service before which the civil servant cannot be removed from service save and except by way of penalty. Crossing the said stage, it is public interest which determines whether the civil servant must continue.

13. The right to make a representation against a below benchmark ACR grading is the recognition of the right to be heard on a subject where some civil consequence may flow, but pertaining to uncommunicated adverse remarks being considered by the Screening Committees, the law has grown in a different direction; holding that uncommunicated adverse remarks can be considered by Screening Committees on the issue of compulsory or premature retirement and the reason thereof is that such an order is neither stigmatic nor does it take away any right of a civil servant, to whom right guaranteed is a minimum pensionable service and beyond that it is public interest which determines how long should he serve.

14. There were conflicting judgments of two Judge Bench of the Supreme Court. One set of judgments took the view that adverse entries which were not communicated to the civil servant could not be considered by Screening Committees inasmuch as the right of the civil servant to make a representation there-against was violated and it would be akin to condemning a person without hearing him. Some took the view that right to be heard had no role in a matter pertaining to compulsory retirement or premature retirement even limited to the point of considering adverse remarks without giving an opportunity to be heard on the said adverse remarks.

15. The matter was referred to a three Judge Bench of the Supreme Court and we have a decision reported as AIR 1992 (SC) 1020 **Baikuntha Nath Das & Anr. vs. Chief Medical Officer, Baripada & Anr.** wherein it was held that notwithstanding law blurring the distinction between administrative and quasi-judicial decisions with respect to fair hearing, in matters pertaining to compulsory retirement or premature retirement, since said decision was not penal in nature, it was permissible to take into account uncommunicated adverse entries in the ACRs of a civil servant. Since we do not wish to make our decision lengthy, to the inquisitive reader who would want to enrich himself with the reasoning of the law, we would commend that paragraph 15, 25, 28, 29 and 32 of the opinion in **Baikuntha Nath Das's** case (supra) be read.

16. The first question posed is thus answered against the petitioner and in view thereof, we need not answer the second question.

17. For the third question posed, we may only state that the law is clear. No doubt the entire service record of a person has to be considered but prominence has to be on the last few years of service, for the reason, a person may improve with passage of time or may deteriorate with the passage of time. After all, on the issue of premature retirement or compulsory retirement what has to be considered is: Whether it would serve public good to continue with the services of the employee concerned or not. That is the reason why those who are found to be 'Average' would require, in public interest, to be weeded out notwithstanding an 'Average' grading not being adverse, but the same being not complementary would justify the person moving out, to be replaced by fresh blood; this serves the public interest. We need not burden ourselves to make a catalog of various authorities which so hold

and thus we rest ourselves by noting that in sub-para (iv) of Para 32 of the decision in **Baikuntanath Das's** case (supra) this principle has been so reiterated.

18. It is true that till the year 2005 the service profile of the petitioner was 'Very Good' or 'Outstanding', but we find that for 3 immediate years, commencing from the very first year of petitioner's promotion to the post of Commandant, the performance fell. As noted herein above the petitioner was promoted as a Commandant on 2.1.2006 and we find that the performance of the petitioner as a Deputy Commandant for the year 1.4.2005 till the year 31.3.2006 recorded till the period 31.12.2005 has been 'Very Good'. For the period 1.1.2006 till 31.3.2006 the ACR has not been recorded. Thereafter, for the period 1.4.2006 onwards for 3 successive years the performance had been 'Average'.

19. We agree with the submission of learned counsel for the respondents that it may have happened that the petitioner who earned promotion as a Commandant in the year 2006 had only 6 years to serve and he knew fully well that keeping in view his seniority he could earn no further promotion and thus he slackened or alternatively he was unable to cope up with the duties of a Commandant which qualitatively suddenly jumped vis-à-vis the duties of a Deputy Commandant.

20. We are not to speculate as to what happened as indeed any endeavour by us on the subject would be nothing but surmises and conjectures and thus we speak no more lest we are accused of being verbose and indulging in speculative reasoning. Even otherwise, we are not supposed to go into the reasoning of petitioner's performance falling steeply.

21. The petitioner has, in Annexure P-9 to the rejoinder affidavit filed, tabulated the various attributes on which the petitioner has been graded for the period 1.4.2006 onwards till 31.3.2009 and therefrom learned counsel sought to urge that it would be difficult to sustain the ACR grading being overall graded 'Average'.

22. We do not agree, and for which we may note that for considerable period and for considerable attributes the individual columns have been filled up with the remarks: 'Just Average', 'Average', 'Adequate' and

'Satisfactory'. It is true that for about 30% period and for about 30% individual attributes the petitioner has been graded as 'Good'. Suffice would it be to state that if for approximately half period, different attributes graded are 'Adequate', 'Just Average', 'Average' or 'Satisfactory' and for the remainder 50% period the person concerned is graded 'Good'; the overall grading being 'Average' would not be so arbitrary so as to invite judicial intervention. Thus, the challenge to the ACR gradings as awarded and recorded is rejected.

23. Endeavour of learned counsel for the petitioner to compare the previous ACR gradings with the current ACR gradings is neither here nor there for the reason the previous ACR gradings were for subordinate posts and the ones which are not too favourable to the petitioner pertain to the period when petitioner was promoted to the post of Commandant, which post is not only higher in hierarchy but has a qualitative jump in the onerous duties which have to be performed and we cannot sit over the decision of the Initiating, Reviewing and Accepting Authority.

24. Accordingly, we dismiss the writ petition but refrain from imposing any costs.

ILR (2011) V DELHI 700
CM(M)

SUDERSHAN SINGH ....PETITIONER

VERSUS

RAVINDER UPPAL AND ORS. ....RESPONDENTS

(REVA KHETRAPAL, J.)

CM(M) NO. : 1253/2010 DATE OF DECISION :26.05.2011

Code of Civil Procedure, 1908—Order VI, Rule 17—Order 41 Rule 27(1) (b)—Motor Vehicles Act, 1988—Section 140, 165 and 166—Motor vehicles Act, 1939—

Section 110-A (1) (c)—Respondent No. 1 suffered multiple injuries by a vehicle driven by Petitioner and filed claim petition for compensation against petitioner, respondent No. 2 and 3—Amendment application of respondent No. 1 to amend claim petition to aver claim petition is filed by petitioner through his father in a representative capacity, allowed by Tribunal—Order challenged before High Court plea taken, amendment has effect of filing of lacunae left by respondent No. 1 and that too when defence of petitioner was put to respondent No. 1 in cross examination, which is not permissible in law—Per Contra plea taken, perusal of petition would show same was filed by father of claimant as attorney—Inadvertently this fact was not mentioned in petition—Petitioner had not filed any reply opposing application and had cross examined respondent No. 1 at length after amendment was allowed—It was too late in day for petitioner to now raise objection to amendment—Held—Section 166(1) (d) of Act nowhere envisages that such authorization in favour of agent should be in writing—If legislature intended that injured person should authorize his agent in writing to institute a claim petition on his behalf, it would have stated so, but words ''in writing'' are conspicuously absent from said sub Section—Motor vehicle Act being a beneficent piece of legislation must be so construed so as to further object of Act—Strict rules of pleadings and evidence are not to be applied in motor accident claims cases—Petitioner waived his right to file a reply and it is no longer open to him to challenge amendment at appellate stage, more so, when he has thereafter cross examined claimant extensively—Injured had suffered grievous injuries in a motor accident allegedly on account of recklessness of petitioner and is undergoing treatment till date—Hyper technicalities cannot be allowed to defeat course of justice.

Important Issue Involved: (A) Section 166(1) (d) of Motor Vehicle Act, 1988 nowhere requires the victim to authorize filing of a petition for compensation on his behalf ''in writing''. The words ''in writing'', therefore, cannot be read into the Section, more so, when they would defeat the object of the Act itself, and result in non conferment of benefit on the victims of road accidents to which they would otherwise be entitled.

(B) Strict rules of pleadings and evidence are not to be applied in motor accident claims cases.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Anand Prakash, Advocate.

FOR THE RESPONDENTS : Mr. Sanjay Agnihotri, Advocate for the respondent No. 1 and Ms. Manjusha Wadhwa, Advocate for the respondent No. 3.

CASES REFERRED TO:

1. *Malini Muralidharan Nair and Ors.* vs. *Geetha Transport Company and Ors.* 2002 ACJ 92.
2. *United Bank of India* vs. *Naresh Kumar and Ors.,* 1996(6) SCC 660.
3. *Sri Binod Chandra Goswami* vs. *Dr. Anandi Ram Baruah and Anr.* 1993 ACJ 284.

RESULT: Dismissed.

REVA KHETRAPAL, J.

1. This petition is directed against the order dated 05.07.2010, passed by the Claims Tribunal, Tis Hazari Courts, Delhi, allowing the application filed by the respondent No.1 herein under Order VI Rule 17 read with Section 151 CPC for amendment of the petition.

2. The short question which arises for decision in the present petition is as to whether an application for compensation arising out of an accident of the nature specified in sub-Section (1) of Section 165 may be made by the father of the person injured without being duly authorized in writing.

3. The brief facts relevant for the decision of the petition are that a claim petition was filed on 12.07.2007 under Section 166 read with Section 140 of the Motor Vehicles Act, 1988 for grant of compensation against the petitioner and the respondents No.2 and 3 on the ground that on 17.03.2007, when the respondent No.1 was on his way to Karol Bagh from his residence, the offending vehicle being driven in a rash and negligent manner by the petitioner slammed into the respondent No.1 and ran over him, causing multiple injuries. The said petition was neither signed, nor verified, nor filed by the injured person, namely, Shri Ravinder Uppal, the respondent No.1. This necessitated the filing of an amendment application under Order VI Rule 17 read with Section 151 CPC. The Claims Tribunal in the impugned order noted as follows:

> " It is stated that during the cross examination of PW1, it was realized that though the present claim petition has been filed by the petitioner through his father in a representative capacity but the said fact of representative character was not mentioned in the petition. Therefore, there is need for correction of the title and for the verification accordingly. The other amendment relates to the subsequent events in regard to claim of further treatment expenses and compensation for continued treatment.
>
> Reply to the application has been filed by respondent No.3. Wherein it is stated that the present application has been filed merely to fill in the lacuna of the case. It would change the nature of the case and would also cause prejudice to the respondents."

4. The Claims Tribunal, after hearing the counsel for the parties, allowed the first amendment as well as the second amendment. So far as the second amendment, which relates to the incorporation of subsequent events with regard to the further medical expenses incurred by the injured as a result of future complications and treatment of the injured is concerned, there is no dispute. The petitioner, however, challenges the

first amendment allowed by the Claims Tribunal on the ground that the amendment prayed for by the injured viz., the respondent No.1 and allowed by the Claims Tribunal has the effect of filling-up the lacunae left by the respondent No.1 and that too after the defence of the petitioner had been put to the respondent No. 1 in cross-examination, which is not permissible in law.

5. Mr. Anand Prakash, the learned counsel for the petitioner (who was the respondent No.1 in the Claim Petition), contended that serious prejudice would be caused to the petitioner if the amendment prayed for by the claimant and allowed by the Claims Tribunal by the impugned order is not set aside by this Court. The counsel for the petitioner also contended that in the cause title of the petition, it was nowhere indicated that the petition was being filed through the Power of Attorney of the respondent No. 1 nor it was mentioned in the petition itself that it was signed and verified through the Power of Attorney and, as a matter of fact, there was no power conferred upon Shri Pradeep Kumar Uppal, the father of the respondent No.1-claimant, to sign, verify and institute the petition on behalf of the respondent No.1. The petition, having been filed by the father of the respondent No.1, without authorization from the respondent No. 1, was not maintainable in law and hence, liable to be dismissed.

6. Reference was made by the learned counsel for the petitioner to the provisions of Section 166 (1) (d) of the Act, which read as under:

> 166. Application for compensation. – (1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of section 165 may be made -
>
> (a)……..
>
> (b)……..
>
> (c)……...
>
> (d) *by any agent duly authorized by the person injured or all or* any of the legal representatives of the deceased, as the case may be."

7. The learned counsel for the petitioner further contended that the amendment to the petition was sought at a belated stage after PW1-Shri

Ravinder Uppal had been cross-examined on 15.05.2008, and had admitted that it was nowhere mentioned in the petition that the petition had been signed, verified and filed on his behalf through his father. Further, it was contended on behalf of the petitioner that the original Power of Attorney purportedly executed by the respondent No.1/injured in favour of his father Mr. Pradeep Kumar Uppal, on which reliance was sought to be placed by the respondent No.1, was still not on record and, in this view of the matter, the amendment sought for by the respondent No.1 could not have been allowed by the Claims Tribunal.

8. To counter the aforesaid contentions of the learned counsel for the petitioner, Mr. Sanjay Agnihotri, the learned counsel for the respondent No.1/injured contended that a bare glance at the petition was sufficient to show that though the petition was signed and verified by Shri Pradeep Kumar Uppal, in the affidavit filed in support of the petition the said Shri Pradeep Kumar Uppal clearly stated that he was the father and the Power of Attorney holder of the petitioner/claimant and was well conversant with the facts of the case and competent to swear the affidavit. He further submitted that, inadvertently, in the petition, it was not mentioned that Shri Pradeep Kumar Uppal, was filing the petition on behalf of his son and this omission was sought to be corrected by filing the amendment application. He also submitted that the application under Order VI Rule 17 read with Section 151 CPC was filed by the respondent No.1 on 12th May, 2009, but despite opportunity granted for the purpose, the petitioner did not choose to file any reply to the said application till the date of its disposal on 05.07.2010. On the other hand, after the amendment was allowed by the Claims Tribunal and the counsel for the respondent No. 1 made a prayer before the Claims Tribunal that he wanted to re-examine the respondent No. 1, that is PW1 – Ravinder Uppal with regard to the subsequent treatment undergone by him, the petitioner raised no objection thereto, and as a matter of fact chose to cross-examine the respondent No. 1 at great length on the date fixed, that is, on 30th August, 2010. The learned counsel submitted that for all the aforesaid reasons, it was too late in the day for the petitioner to now raise objection to the amendment, when he had not even chosen to file a reply to the application for amendment.

9. Having heard the learned counsel for the parties at length, this Court cannot help but observe that the General Power of Attorney relied

upon by the respondent No.1, authorizes the father of the respondent No.1 – Shri Pradeep Uppal to sign, verify, present, appear and pursue all kinds of suits, applications, affidavits, reviews, petitions, appeals, notices etc., on behalf of the respondent No.1 in all courts and concerned departments in respect of the motor cycle of the injured, but no authorization is given to Shri Pradeep Uppal thereby to institute a claim petition for compensation on account of the injuries sustained by the respondent No.1. Be that as it may, the said Power of Attorney, to my mind, is not a relevant document, pertinent to the controversy in issue, and, in any case, only a photostat copy thereof is placed on record.

10. A plain reading of sub-section 1(d) of Section 166 of the Motor Vehicles Act, 1988 shows that an application for compensation arising out of an accident may be filed by any agent duly authorized by the person injured and in the case of a fatal accident, by all or any of the legal representatives of the deceased, as the case may be, but ˇthe said section nowhere envisages that such authorization should be in writing. If the legislature intended that the person injured should authorize his agent in writing to institute a claim petition on his behalf, it would have stated so in clause (d) of Section 166 (1) itself, but the words "in writing" are conspicuously absent from the said sub-section.

11. The Motor Vehicles Act, 1988, moreover, being a beneficent piece of legislation, must be so construed so as to further the object of the Act. The object of the Act, clearly, is to provide compensation to the victims of a motor accident. If the grant of such compensation to motor accident victims is hemmed in by procedural and other technicalities, the purpose of the Act is liable to be defeated. Even otherwise, it is well-settled that strict rules of pleadings and evidence are not to be applied in motor accident claims cases. Procedural rules, even in civil cases, have been held to be hand-maidens of justice, which are not to be allowed to obstruct the course of justice. In a motor accident case, this applies with greater force. Take the example of an injured victim, who is physically and mentally unfit to file a claim petition, or is in coma, or is on the brink of collapse, can such a victim institute a claim petition of his own? The answer, quite obviously, must be an emphatic 'No'. In such circumstances, it is only a parent or a spouse or a near relative who can do so on his behalf. Sometimes, motor accident victims are known to lie in hospital for several months or to remain bed-ridden for years together. Are such

victims to be denied the expenses for their medical treatment, attendant charges and claims under other heads merely because they cannot authorize in writing a member of their family to institute a petition on their behalf? To construe the provisions of Section 166(1)(d) in such a narrow and pedantic manner would be a travesty of justice.

12. In the instant case, the petitioner is stated to have undergone 22 surgeries and is still stated to be undergoing treatment. The record bears out the fact that he was crushed by the offending truck of Tata make, which is a heavy vehicle, resulting in grave injuries on his person. In such circumstances, the petition was signed, verified and instituted by his father by prominently highlighting in Column no. 1 thereof the name of the injured as Ravinder Uppal, in which column the name of the victim and the name of the victim.s father are both set out but the name of the victim is in bold print. The affidavit filed in support of the petition further clarifies that the petition is being filed by the father of the victim. In such circumstances, the allegation that there was concealment of the true facts is entirely mis-placed, more so, as at the time of evidence, the claimant himself appeared in the witness box as PW1. It was only when he was cross-examined that he became aware of the fact that the averment that his father had been duly authorized by him to institute the petition on his behalf had not been made in the petition. He, accordingly, moved an amendment application to which the petitioner (the respondent No.1 in the claim petition) chose not to file a reply. Technically, at this point of time, the petitioner waived his right to file a reply and it is no longer open to him to challenge the amendment at the appellate stage, more so, when he has thereafter cross-examined the claimant extensively.

13. In the case of **'United Bank of India versus Naresh Kumar and Ors.'**, 1996(6) SCC 660 a suit was instituted by a person who ˇwas not duly authorized on behalf of the public corporation to file the plaint on its behalf. While holding that procedural defects which do not go to the root of the matter should not be permitted to defeat a just cause, the Supreme Court exposited that even when the trial court finds that the plaint is not duly signed and verified by a competent person, the appellate court in exercise of its power under Order 41 Rule 27 (1) (b) CPC can require a proper Power of Attorney to be produced or can order a competent person to be examined as a witness to prove the ratification. As already stated, a claim petition stands on a higher pedestal

than a civil suit, the same being a petition filed under an Act the intent of which is to confer benefit on the victims of motor accidents. What applies to the institution of a plaint will, therefore, apply with all the more force in the case of a motor accident claim case.

14. In the case of **Sri Binod Chandra Goswami versus Dr. Anandi Ram Baruah and Anr.** 1993 ACJ 284, the following apposite observations were made by a Single Bench of Gauwahati High Court:

> "I have considered the submission made on behalf of the petitioner and the opposite party and have ˇperused the impugned order and other materials on records. Technically the impugned order does not suffer from any infirmity. But the provisions of law are not to be observed as ritual. There lies the legislative intendment as well as juristic principles beneath the words of the provision of law. From a plain reading of Section 166 of the M. V. Act, it becomes apparent that legislative intendment regarding entertaining application claiming compensation by the tribunal is very liberal. Sub-section (4) of Section 166 empowers the Tribunal to treat the report filed by the police officer regarding an accident as if it were an application under the provisions of the M. V, Act. What care is to be taken by the Tribunal is to see that no person other than the person entitled to compensation manages to get away with the compensation by impersonation. In the case wherein the application is made by a person other than the person entitled to the compensation, without being authorized, only course for the learned Tribunal may not be to reject the application. The learned Tribunal may treat the application as if it was preferred by the person entitled to compensation if subsequent to the filing of such claim application, the real claimant appears before the Tribunal and endorses the action taken by the unauthorized person claiming compensation. Legislative intendment to provide immediate relief to the injured person as contemplated under Section 140 of the M. V. Act cannot be allowed to be sacrificed at the altar of technicality."

> "In the instant case, no doubt, claim application was made by the petitioner without obtaining prior authority from the injured. But if the learned tribunal is satisfied that subsequently the injured ˇhas appeared before it by his subsequent act of appointing the

petitioner as his constituted attorney, the Tribunal may treat the application as if it were, filed by the injured through a duly authorized person."

15. A division bench of the Karnataka High Court in the case of **Malini Muralidharan Nair and Ors. versus Geetha Transport Company and Ors.** 2002 ACJ 92, while considering the provisions of Section 110-A (1) (c) of the Motor Vehicles Act, 1939, which are in pari materia to the provisions of Section 166 (1) (d) of the Motor Vehicles Act, 1988 observed as follows:

> "The expression "duly authorized agent" contained in Section 110-A does not mean that authorization should always be in writing. It includes a person having an implied authority to claim compensation for the one who is injured in the accident or even for the legal representatives of a deceased person. We have to conceive the situation where the claimant is injured, suffered severe injuries resulting in his becoming physically or mentally handicapped, to apply or to execute an authority and in such a case if we take that there should be written authority, it may frustrate the whole object of creating the special Tribunals, for quick justice avoiding technicalities. The Section does not provide or require that authority must be in writing. The authority may be implied from earlier or subsequent conduct as well of the person on whose behalf the claim petition had been filed by another under implied authority."

16. In view of the aforesaid, I am of the considered opinion that in the present case, where the injured/respondent No.1 had sustained grievous injuries in a motor accident allegedly on account of the recklessness of the petitioner-driver and is undergoing treatment till date, hyper technicalities cannot be allowed to deflect the course of justice. Even otherwise, the interpretation sought to be placed on the provision of Section 166(1)(d) in the instant case is not correct, for the reason that the said section nowhere requires the victim to authorize the filing of a petition for compensation on his behalf "in writing". The words "in writing", therefore, in my view, cannot be read into the section, more so, when they would defeat the object of the Act itself, and result in non-conferment of benefit on the victims of road accidents to which they would otherwise be entitled. The petitioner, in any case, had waived his

right to challenge the impugned order by virtue of the fact that prior to the filing of the present petition he had not filed written statement to the amended petition and even cross-examined the respondent No.1 without demur or protest. The present petition is, therefore, not maintainable and is liable to be dismissed.

17. The petition is accordingly dismissed with the observation that in case the respondent No.1 succeeds in his claim petition, and in the event the Insurance Company is saddled with the liability for payment of compensation, the petitioner may be burdened with the liability to pay interest for the period the present petition remained pending in this Court.

ILR (2011) V DELHI 710
CRL. A.

DHANANJAY SINGH BHADORIA ....APPELLANT

VERSUS

STATE ....RESPONDENT

(S. RAVINDRA BHAT & G.P. MITTAL, JJ.)

CRL. A. NO. : 198/2011 DATE OF DECISION: 31.05.2011

Indian Penal Code, 1860—Section 302, 392, 397, 201, 404—Arms Act, 1959—Section 25/54/59—Explosive Substance Act, 1908—Section 4 & 5—As per prosecution, deceased and PW2 running partnership and suffered losses—Deceased and PW2 started racket of financing vehicles under fake names and used to disappear with the cash entrusted by intending car buyers—Appellant Dhananjay Singh and co-accused Shailender Kumar (since deceased) visited the deceased on motorcycle at his house—They both took PW2 and deceased out with them and on way back

Shailender Kumar placed knife on PW2s throat and asked him to hand over valuables, his purse was snatched—PW2 noticed appellant firing shot on the neck of deceased—PW2 pushed Shalinder Kumar and ran away—PW2 rang up PW6, wife of deceased on her mobile and informed her that the deceased had been abducted by the appellant and his co-accused in his Santro Car—Later, deadbody of deceased found—Cause of death was opined as Spinal Shock consequent upon cervical vertebral and spinal cord injuries as a result of blast effect of fire arm—On receipt of secret information, appellant arrested with a bag carrying two loaded country made pistols and cartridges besides six crude explosive bombs—Santro car seized by police of District Moradabad as unclaimed property—Pursuant to disclosure of appellant, one country made pistol and his blood stained clothes recovered from his rented house—On secret information, co-accused Shailinder Kumar (since dead) arrested—On inspection of car, on opening dashboard from lower side by mechanic, a bullet recovered—Trial Court convicted appellant u/s 302, 392, 397, 201, 404—Arms Act Section 25/54/59 and Explosive Substance Act Section 4 & 5—Held, Too many improbabilities in prosecution story—Improbable that appellant and co-accused allowed PW2 to escape on foot when they were in possession of Santro Car and were well aware that PW2 had witnessed commission of murder—Appellant was armed with pistol and as a natural conduct, he and co-accused would not have allowed PW2 to escape—Not even scratch injury present on neck of PW2—If appellant and co-accused had robbed PW2 of three ATM cards, they would naturally have asked PW2 the PIN nos. of the cards or else ATM cards were worthless to them—Natural course of human conduct would be that the appellant and co-accused would have taken PW2 to the nearest ATM centre to withdraw the money using the cards—No evidence collected by prosecution

showing ATM cards used to make purchases or if PW2 stopped all transations in respect of robbed ATM cards—Explanation given by PW2 for not informing police regarding incident that he apprehended harm to himself for doing business in false name, not natural conduct—Not believable that PW2 would have seen the appellant firing a shot shot at deceased and would not disclose it to PW6 (wife of deceased)—While PW2 claimed, he did not give any information to PW12 (brother-in-law of deceased), PW12 claimed that he received telephone call from PW2 on the night of the incident informing about the deceased being shot at and taken away in his Santro car—Although IO joined a chance witness, PW9 to witness the recovery, the landlord of the premises was not even questioned, if the appellant resided in premises—Defies logic that appellant would keep country made pistol which was used by him for commission of crime with two other pistols and go to Anand Vihar, ISBT from where he was arrested—Recovery of cartridge from dashboard cannot be believed because of delay of 7 days and hole caused by fire cartridge too prominent in dash board to go un-noticed by police officers—In view of improbabilities and contradictions, not established beyond reasonable doubt that deceased was shot at by appellant—Regarding recovery of Arms and Explosives from appellant, recovery witness, PW54 denied having made any statement to the police or arms and ammunitions being recovered in his presence—Conduct of various officers including IO in recording successive disclosure statements and shifting the place of recovery to the place of their choice as per their convenience, does not inspire any confidence—Omission on the part of police witnesses, to notice hole created by bullet in dashboard till dashboard was opened and used bullet retrieved makes version of recovery of arms and ammunition suspect—Appellant acquitted—Appeal allowed.

[Ad Ch]

APPEARANCES:

FOR THE APPELLANT : Mr. Manish Vashisht, Advocate with Mr. Sameer Vashisht, Advocate.

FOR THE RESPONDENT : Mr. Jaideep Malik, APP for the State.

CASES REFERRED TO:

1. *Sukhbir Singh & Anr.* vs. *State of Punjab,* 2011 (4) AD SC 69.
2. *Rakesh* vs. *State,* 2010 (2) JCC 1529.
3. *Suchand Pal* vs. *Phani Pal,* 2003 (11) SCC 527.
4. *Smt. Saroj* vs. *State,* 2003 (3) JCC 616.
5. *Alil Mollah & Anr.* vs. *State of W.B.,* (1996) 5 SCC 369.
6. *Narsinbhai Haribhai Prajapati etc.* vs. *Chhatrasinh & Ors.,* AIR 1977 SC 1753.
7. *Bhgagirath* vs. *State of M.P.* 1976 (1) SCC 20.

RESULT: Appeal allowed.

G.P. MITTAL, J.

1. The Appellant is aggrieved by the judgment dated 08.11.2010 and order on sentence dated 16.11.2010 in Sessions Case No.135/06/04 FIR No.349/2003 & Session Case No. 136/06/04 FIR No. 367/2003, which was disposed of by this common judgment whereby the Appellant was held guilty under various provisions of Indian Penal Code (IPC) and sentenced to undergo imprisonment which are extracted from Para 5 of the order on sentence hereunder:-

> "Keeping in view the facts and circumstances of the case, convict Dhananjay Singh Bhadoria is awarded sentences as under:-
>
> (i) Life imprisonment with fine of Rs. 10,000/- for offence under section 302 IPC in case FIR No.349/03. In default of payment of fine, the convict shall undergo SI for three months.
>
> (ii) Rigorous imprisonment for five years with fine of Rs. 5,000/- for offence under section 392 IPC in case FIR No.349/03. In default of payment of fine, the convict shall undergo SI for two months.
>
> (iii) Rigorous imprisonment for five years for offence under section 397 IPC in case FIR No.349/03.
>
> (iv) Rigorous imprisonment for three years with fine of Rs. 5,000/- for offence under section 201 IPC in case FIR No.349/03. In default of payment of fine, the convict shall undergo SI for two months.
>
> (v) Rigorous imprisonment for two years with fine of Rs. 5,000/- for offence under section 404 IPC in case FIR No.349/03. In default of payment of fine, the convict shall undergo SI for two months.
>
> (vi) Rigorous imprisonment for five years with fine of Rs. 10,000/- for offence under section 25/54/59 of Arms Act in case FIR No.349/03. In default of payment of fine, the convict shall undergo SI for three months.
>
> (vii) Rigorous imprisonment for seven years with fine of Rs. 10,000/- for offence under section 4/5 of Explosive Substances Act in case FIR No.367/03. In default of payment of fine, the convict shall undergo SI for three months.
>
> (viii) Rigorous imprisonment for five years with fine of Rs. 5,000/- for offence under Section 25/54/59 Arms Act in case FIR No.367/03. In default of payment of fine, the convict shall undergo SI for three months."

2. The case of the prosecution is that deceased Naresh Kumar and PW-2 Shiv Kumar @ Bobby were partners in the perfumes and deodorant supply business in Ghaziabad. They suffered losses in the said business as a result of which Naresh Kumar (deceased) ran into debts. PW-2 and Naresh Kumar hired a premises No. H-128, Shivani Apartment, New Delhi for their residence and rented an office at Madhu Vihar through a broker Sant Ram. Naresh Kumar and Shiv Kumar were residing and carrying on business in Delhi under fake names, i.e. Raj Kumar and Rohit Sharma, respectively. The intention of Shiv Kumar PW-2 and the deceased was involved in vehicle financing and thereafter to disappear with the cash entrusted by the intending car buyers.

3. PW-2 and the deceased knew the Appellant Dhananjay Singh and co-accused Shalender Kumar Singh @ Kapil (since deceased). According to the prosecution, the Appellant and Shalender Kumar Singh (co-accused) visited the deceased on a black Pulsar motorcycle, at his office (A-23, Madhu Vihar) on 06.09.1993 at 7:30 P.M. The Appellant and Shalender Kumar Singh had brought some sweets laced with intoxicating substance and offered them to PW-2 and the deceased. The deceased took a piece of sweet but PW-2 refused to do so as he was unwell.

4. According to prosecution version, the Appellant proposed to the deceased and PW-2 to go to Gurgaon to spend some time and have fun, to which the deceased agreed. In Gurgaon, all the four had whisky, beer and their dinner and by that time, the deceased Naresh Kumar got intoxicated. All the four made their way back from Gurgaon at about 1:00 A.M. on the night intervening 06-07.09.2003. After crossing ITO Yamuna Bridge at Shakarpur Check Post, the Appellant and the co-accused asked PW-2 to stop car as they wanted to urinate. The Appellant and the co-accused got down from the car whereas, PW-2 and the deceased remained seated in the car.

5. Upon returning to the vehicle, Shalender Kumar Singh @ Kapil came to PW-2's side and placed a knife on his throat demanding that he should hand over whatever he had (with him) at that time. PW-2, therefore, took out his purse from the back pocket of his trouser, which was snatched by Shalender Kumar Singh. It contained Rs. 1200/- in cash and certain ATM cards. In the meanwhile, PW-2 noticed the Appellant placing his country made pistol on the neck of the deceased (who was in an intoxicated state) and firing a shot at him. In the meanwhile, PW-2 pushed Shalender Kumar Singh away and he then ran towards Yamuna to save his life; he turned back to see if the Appellant and Shalender Kumar Singh were chasing him. He, however, noticed that they sped away from the spot in the car with the deceased.

6. According to the prosecution, PW-2 was in possession of mobile phone No. 56087690 belonging to the deceased, since Naresh Kumar was in an intoxicated state. PW-2 rang up PW-6 Madhvi, wife of the deceased Naresh Kumar at 2:00 A.M. on her mobile and informed her that the Appellant and Shalender Kumar Singh had taken away her husband Naresh Kumar with them in her husband's car. PW-2 searched for the deceased on the road but without success. On the information given by

PW-2 Shiv Kumar, Amit Kumar brother-in-law of the deceased Naresh Kumar reached Maharajpur check post. They (PW-2 and PW-12 Amit Kumar) made a frantic search for Naresh Kumar, but without any success.

7. In the meanwhile, an unidentified dead body was noticed by PW-36 Inspector Ram Raj Singh, Additional SHO, Police Station Anand Vihar at 3:02 A.M. Inspector Ram Raj Singh gave an information through wireless to HC Satish Kumar, who in turn passed it on to Duty Officer HC Madan Kumar (PW-20) who recorded DD No.5-A (Ex.PW-20/A). Inspector Satyavir Singh (PW-47) SHO, Police Station AnandVihar reached the spot of recovery of the dead body where he met ASI Jai Prakash (PW-14) and Constable Ashok Kumar (PW-21). The SHO noticed the injuries on the dead body and on search (of the dead body), cash amounting to ` 115/-, three DTC tickets and an envelope Ex.PW-30/15 containing certain documents (of ICICI Bank) were recovered. The documents bore the name of Raj Kumar Sharma along with his address.

8. The SHO (PW-47) prepared a rukka Ex.PW-47/A on his personal observation and sent the same to PS Anand Vihar where FIR No.349/2003 was recorded.

9. The IO lifted blood stained earth, earth control and blood from the spot from where the dead body was recovered. These were converted into separate pullandas and sealed with the seal of 'SVS'; other articles recovered from the dead body of Naresh Kumar were also seized. SI K.P. Rana (PW-52) was sent by the IO to 128, Shivani Apartment to make inquiries regarding identity of the dead body. On reaching flat No.128, Shivani Apartment, it was discovered that the tenancy of the premises was arranged by one Sukhbir Singh, a property dealer of the area. Sukhbir Singh reached the flat and was then taken by SI K.P. Rana to the spot, where the dead body lay.

10. PW-4 Sukhbir Singh identified the dead body to be of one Raj Kumar Sharma. PW-4 informed the IO that the deceased used to run shop No.2, A-23, Gali No.19, Madhu Vihar the tenancy of which was also arranged by him through a property dealer Sant Ram.

11. At about 8:50 A.M. the dead body was sent to the mortuary with the request to the autopsy surgeon to preserve it for 72 hours, by an application, Ex.PW-47/F. The IO along with other police personnel searched for the bullet.

12. The IO (PW-47) left for Madhu Vihar along with PW-4 Sukhbir Singh. He met one Sant Ram at Madhu Vihar, who claimed that he had arranged the shop to the deceased Raj Kumar who used to run *"Health Care Enterprises"* along with his brother Rohit.

13. According to the prosecution, at about 11:00 A.M. PW-2 Shiv Kumar reached the said shop and was identified by PW-1 Sant Ram as Rohit Kumar @ Bobby, (Shiv Kumar) brother of the deceased. Enquiries were made from Rohit Kumar, who appeared to be nervous. Shiv Kumar (PW-2) disclosed that he and his brother, i.e. the deceased were residing at the aforesaid address under a fake name and that the actual name of the deceased was Naresh Kumar and his own name was Shiv Kumar. PW-2 Shiv Kumar gave a detailed account of the incident to the IO.

14. On 08.09.2003 the dead body was identified by Jagbir Singh Sehrawat, the deceased's brother-in-law and Rajesh Kumar, his elder brother. The inquest proceedings were held by the IO and autopsy on the dead body was performed by PW-5 Dr. K.Goel.

15. Dr. K.Goel found *"an oval shape lacerated, punctured wound of size 1.75 cm x 1.25 cm with abraded collar around.* The autopsy surgeon opined the cause of death to be *spinal shock consequent upon cervical vertebral and spinal cord injuries as a result of blast effect of fire arm. The mode of death was homicidal."*

16. The IO searched for the Appellant and Shalender Kumar Singh. On 21.09.2003, at about 5:45 P.M. When SI Vinay Tyagi (PW-31) was present in industrial area, Patparganj, Anand Vihar along with SI Atul Tyagi, ASI Majid Khan, HC Nagender, Ct. Banvir, Ct. Sohanvir, Ct. Hari Om and others, he received secret information that one Dhananjay Singh, a desperate criminal involved in heinous crimes was present near the entry gate of ISBT Anand Vihar, on his black Pulsar Motorcycle bearing No.UP-16D-2299 and was in possession of illegal arms and ammunition. PW-31 SI Vinay Tyagi passed on this information to senior police officers and then proceeded to the place where Dhananjay Singh was stated to be available. He requested 4-5 passersby to join the raiding party, however, all of them refused. In the meanwhile, Sanjay Singhal a resident of Vivek Vihar, who was passing through that road in his Santro car was requested to join the raiding party, to which he agreed. At about 6:30 P.M. at the instance of a secret informer, the Appellant was apprehended. Upon

interrogation, he disclosed his name to be Dhananjay Bhadauria. The Appellant was carrying a bag; and on opening it, two loaded country made pistols, i.e. 12 bore and .32 bore, nine live cartridges of 12 bore, one live cartridge of .32 bore and one sweet box on which, *'tasty sweet'* was printed were found. The sweet box was opened, from which, six improvised crude explosive bombs were recovered, wrapped in khakhi plastic tape. Thereafter, the Appellant disclosed that the six bombs were crude explosives. The bomb disposal squad was requisitioned by flashing a message to District Control Room. At about 7:30 P.M. Inspector Banwari Lal, along with his staff and the Crime team reached the spot and took photographs of all the crude bombs and defused them. The gun powder recovered from the defused bombs was weighed and kept in a plastic jar. The iron splinter and stones were kept in a separate transparent polythene bag and then kept in separate plastic jars. All the six jars with gun powder were marked as A to F and iron splinters and stones were marked as A1 to F1. It was discovered that the country made pistol of .32 bore, on checking contained a live cartridge. These too were taken into possession (after preparing a sketch) by memo Ex.PW-19/E. The Appellant was handed over to SI K.P. Rana by SI Vinay Tyagi for further investigation of the case.

17. On 23.09.2003, the Appellant was taken to Moradabad by SI Udaiveer. He pointed out the place where the Santro car was abandoned by him and co-accused Shalender Kumar. It transpired that the Santro car had been seized by the police of PS Manjhola, District Moradabad as unclaimed property.

18. On 24.09.2003 a second disclosure statement (recorded as supplementary disclosure statement Ex.PW-30/G) was made by the Appellant stating that the *Katta* (country made pistol), his blood stained clothes, credit cards and the purse were concealed by him in his residence 13/63, Raj Nagar, Ghaziabad. Pursuant to the disclosure statement, the Appellant led the police party to his rented house, i.e. 13/63 Raj Nagar, which led to the recovery of one country made pistol (of .315 bore) from a box. The IO completed formalities regarding preparation of sketch and seizure of the country made pistol.

19. On 28.09.2003 on the basis of secret information co-accused Shalender Kumar was arrested from Karkardooma Court. (We shall not discuss the role of Shalender Kumar except where it is relevant for

appreciation of the evidence against the Appellant as he expired during the trial and the proceedings against him were ordered to have abated).

20. Meanwhile, the Santro car No. HR-61-U-3265 was seized from the police of PS Manjhola. On 01.10.2003 one electrician Aslam Ali (PW-10) was called to the Police Station for inspecting the Santro Car. On opening the dashboard, from the lower side a bullet was recovered which was kept in a bag, sealed with the seal of 'VS' and seized by memo Ex.PW-10/A and PW-10/B. The exhibits were thereafter sent to the FSL. Some live cartridge (of .315 bore) were also sent to the CFSL for the purpose of test firing. PW-37 Mr. K.C. Varshney, Senior Scientific Officer (Ballistic)-cum-Chemical Examiner to the Govt. of NCT of Delhi gave report dated 04.02.2004 Ex.PW-37/A. The result of the examination is extracted hereunder:-

> "(1) The country made pistol .315" bore marked exhibit 'F1' is designed to fire a standard 8mm/.315" cartridge. It is in working order in its present condition. Test-fire conducted successfully.
>
> (2) The 8mm/.315" cartridge case marked exhibit 'ECI' is fired empty cartridge.
>
> (3) The deformed bullet marked exhibit 'EBI' correspond to the bullet of 8mm/.315" cartridge.
>
> (4) The 8mm/.315" cartridge from the laboratory stock was test fired through the country made pistol .315" bore marked exhibit 'F1', test fired cartridge case and recovered test fired bullet were marked as 'TCI' & 'TBI' respectively.
>
> (5) The individual characteristic of firing pin marks present on evidence fired cartridge case marked exhibit 'ECI' and on test fired cartridge cases marked as 'TCI' were examined & compared under the Comparison Microscope Model Leica DMC and were found identical. Hence the exhibit 'ECI' has been fired through the country made pistol .315" bore marked exhibit 'F1' above.
>
> (6) The individual characteristic of striations on evidence fired bullet exhibit 'EBI' and on test fired bullet marked as 'TBI' were examined & compared under the Comparison Microscope Model Leica DMC and were found identical. Hence the exhibit 'EBI' has been fired through the country made pistol .315" bore marked exhibit 'F1' above.
>
> (7) The exhibits 'F1'/ 'ECI' & 'EBI' are firearm/ammunition as defined in the Arms Act 1959."

21. The two country made pistols pertaining to FIR No. 367/2003 were found to be in working condition and the cartridges recovered were found to be live cartridges. The parts of the defused crude bomb were also examined by PW-50 Dr. A.K.Dalela, Junior Scientific Officer, CFSL, Chandigarh who gave his report Ex.PW-50/A. The result of this examination is extracted below:-

> "Various laboratory tests such as colour tests and High performance thin layer chromatographic (HPTLC) analysis were carried out with exhibit – A to F and Exhibit A-1 to F-1 under reference. The results thus obtained have been analysed as given below:
>
> Potassium ions, chlorate ions, arsenic ions, sulphide ions and aluminium have been detected in exhibit –A to exhibit-F and exhibit A-1 to exhibit F-1."

22. On completion of the investigation a charge for the offence punishable under sections 392,397,302,201 read with Section 34 IPC, 404 IPC and 25,54,59 of the Arms Act in Sessions Case No.135/06/04 (FIR No. 349/2003) was framed against the Appellant. In Sessions Case No.136/06/04 (FIR No. 367/2003) a charge for the offence punishable under Section 25 Arms Act and 4/5/6 of Explosive Substances Act in Sessions Case No.135/06/04 (FIR No. 367/2003) was framed against the Appellant.

23. The Appellant pleaded not guilty to the charges.

24. The prosecution, in order to establish its case examined 55 witnesses. The witnesses produced by the prosecution can be divided into six different sets.

25. PW-2 Shiv Kumar is an eye witness of the alleged commission of the murder by the Appellant and the co-accused on the night intervening 06-07.09.2003. PW-6 Smt. Madhvi and PW-12 Amit Kumar, (PW-6's brother) are the supporting witnesses in respect of the commission of

murder of Naresh Kumar. PW-9 Rajnish Kumar, PW-30 SI Yogesh Kumar and PW-47 Insp. Satyavir Singh (IO) deposed about recovery of the pistol (Ex.P-4) alleged to have been used in the commission of murder and blood stained clothes of the Appellant. PW-29 SI Udayvir Singh, PS Majhola, Moradabad, PW-39 HC Giriraj Kishore Sharma, PS Majhola, Moradabad and PW-30 SI Yogesh Kumar are witnesses to recovery of the Santro car No. HR-61-U-3265 from PS Majhola. PW-10 Aslam Ali was engaged by the IO to remove the dashboard from the Santro car. He deposed about extraction of a bullet from the dashboard. PW-25 Constable G. Ganesh took photographs of the car, whereas PW-44 Dr. Rajender Kumar examined the car in FSL, Rohini. PW-5 Dr. K. Goel conducted autopsy on the dead body of deceased Naresh Kumar, whereas PW-19 Constable Banbir, PW-31 SI Vinay Tyagi, PW-42 SI Atul Tyagi, PW-52 Insp. K.P.Rana and PW-54, Sanjay Singhal public witness are in respect of apprehension of the Appellant on 21.09.2003 and recovery of .32 bore and .12 bore pistols, nine cartridges of .12 bore and six crude bombs. PW-52 Inspector K.P. Rana also recorded the disclosure statement Ex.PW-19/K of the Appellant.

26. On closure of the prosecution evidence, the Appellant was examined under Section 313 Cr.P.C. to enable him an opportunity to explain the incriminating evidence produced against him. The Appellant denied the prosecution's allegation and pleaded false implication. The Appellant took the plea that he was abducted by Ashwani @ Munna Pandit, Rahul Tyagi, Amit Goel, Chottey Lal Sharma, Gautam Tyagi, Gyanender Singh etc. and the accused in that case (i.e. the said persons) were arrested. Deceased Naresh Kumar was murdered by his abductors and he was handed over by them to the Special Staff SI Vinay Tyagi, who was related to the abductors. The Appellant was falsely involved in the case to demolish the case of his abduction. He deposed that PW-2 Shiv Kumar was also connected with Munna Pandit's gang.

27. The Appellant produced four witnesses in his defence.

28. DW-1 Sanjay Singh Bhadoria is the brother of the Appellant. He deposed about the abduction of the Appellant and lodging of FIR No.602/2003 at PS Kavi Nagar by him. He deposed that SI Vinay Tyagi is related to Rahul Tyagi, Jitender Tyagi and Saurabh Tyagi, who were accused in the said FIR. He deposed that the abductors murdered one person and his brother, Appellant was handed over to SI Vinay Tyagi from Kotdwar

where he was confined by the abductors to demolish the FIR got registered by him.

29. DW-2 deposed that Pulsar motorcycle UP-16-D-2299 was registered in the name of one Mr. Raju Sharma resident of Sector 27, Noida.

30. DW-3 Constable Anil Kumar Sharma from PS Kavi Nagar, Ghaziabad proved registration of FIR No.602/2003 on the complaint of DW-1.

31. DW-4 Satrunjay Singh corroborated the testimony of DW-1 regarding the abduction of the Appellant.

32. On appreciation of evidence, the Trail Court believed the prosecution version and convicted the Appellant as stated earlier.

33. We have heard Mr. Manish Vashisht, learned counsel for the Appellant, Mr. Jaideep Malik, learned APP for the State and have perused the record.

34. It is argued by the learned counsel for the Appellant that conduct of PW-2 was unnatural. PW-2 did not inform the deceased's wife that her husband had been shot by someone or for that matter by the Appellant. It is unbelievable that PWs 2 and 12 instead of lodging a police report would roam around in search of the deceased.

35. The following contradictions were pointed out in the testimony of PW-2:-

(i) PW-2 could not mention the registration number of the black Pulsar motorcycle on which the accused persons had allegedly gone to the office of the deceased, on 06.09.2003.

(ii) PW-2 did not hand over the packet of sweets to the police which the accused persons offered to the deceased and himself (PW-2). As per prosecution the sweets were laced with sedatives. The box of sweets was never recovered.

(iii) PW-2 could not tell the name of the liquor shop/local theka from where they had allegedly bought whisky on way to Gurgaon.

(iv) PW-2 could not tell the name of the restaurant situated on the ground floor of DT complex Gurgaon from where all four of them had purchased two bottles of beer and consumed food.

(v) No bill of Rs. 500/- for the alleged consumption of beer and food could be produced on his (PW-2's) statement to the police; neither could the police produce any such document.

(vi) PW-2 deposed that the co-accused Shalender Kumar had placed a knife on his throat but no injury or even a scratch was found on his person.

(vii) PW-2 alleged that he handed over his ATM/credit cards to the accused persons but did not take any steps to get the same blocked from the concerned Banks. These cards were never used nor was any attempt by the accused to swipe it for any unauthorized appropriation of money.

(viii) Moreover no deposition regarding the credit cards or ATM cards was made by PW-2 before the learned Trial Court.

(ix) PW-2 deposed that the deceased was shot with a country made pistol by the Appellant but no blood stains were found on his clothes although he was sitting next to the deceased. This fact is established by Ex.PW-3/B.

(x) The police met PW-2 during the day time at 11:00 – 11:30 A.M. and even at that particular time he did not tell them about murder of the deceased yet the police asked him about the deceased.

(xi) PW-2 and the deceased Naresh Kumar were living under assumed identities and were duping people by luring them in the pretext of their being car financers.

(xii) PW-2 failed to disclose about the disability of the deceased to drive the vehicle due to his left hand being in a plaster cast.

(xiii) PW-2 could not explain (and the Court failed to appreciate) that if he had met the Appellant for the first time on 06.09.2003, in his office how could he know about the

FIR lodged at PS Kavi Nagar, Ghaziabad, U.P. in respect of the Appellant's abduction being a false report.

(xiv) The statement of PW-2 was not trustworthy as he has deposed that he had shown the police the restaurant where they had consumed beer; however, the statement of the IO PW-47 was that he did not take PW-2 to verify his version about purchase of liquor from near the border and the DT complex at Gurgaon.

36. It is argued that the prosecution failed to prove ownership of the mobile phone number No.56087690 from which the call was allegedly made to PW-6 Madhvi wife of the deceased. The conduct of PW-2 in not informing the police, though he was fully aware that the deceased was shot by the Appellant, was also unnatural.

37. It is submitted that the prosecution version regarding nabbing of the Appellant on 21.09.2003 on the basis of secret information and recovery of two country made pistols and explosive is suspect and doubtful. PW-4 Sanjay Singhal, who is alleged to be an eye witness to the arrest and recovery of the arms and explosive, did not support the prosecution version. Since the nabbing and arrest of the Appellant on 21.09.2003 is doubtful, the basis of the case was shaky and the Appellant is entitled to be acquitted.

38. It was strenuously canvassed before us that recovery of the country made pistols alleged to have been used in commission of the murder was recovered on 25.09.2003, four days after arrest of the Appellant which gives ample scope to the police to invent the story and plant the alleged recovery. Nobody from the vicinity was cited as a witness to the recovery. Even the landlord (of the premises) was not joined in the proceedings which makes the recovery highly suspect and unbelievable. It is submitted that in the circumstances, the Appellant is entitled to acquittal.

39. On the other hand, it is urged by the learned APP that since PW-2 and the deceased were carrying on business under assumed identities, PW-2 was scared to approach the police and, therefore, his conduct was not unnatural. The evidence produced by the prosecution is credible and reliable and no interference is called for in the order of conviction passed by the Trial Court.

40. PW-2 Shiv Kumar is the star witness of the prosecution. He testified that they (he and the deceased Naresh Kumar) suffered losses in deodorant and perfumes business in Ghaziabad and ran into debt. He and the deceased started the financing business under assumed names, i.e. Raj Kumar Sharma and Rohit Sharma.

41. PW-2 deposed that on 06.09.2003 he and Naresh Kumar were in their office at about 07.30 P.M. The Appellant Dhananjay with co-accused Shalender Kumar Singh went there on a black Pulsar motorcycle; co-accused Shalender Kumar Singh offered some sweets to the deceased and PW-2 as they had purchased a new car. The Appellant proposed that the deceased and PW-2 go to Gurgaon to have fun. At about 08.30 P.M. they all left for Gurgaon in the deceased's Santro XP car. PW-2 was in the driver's seat, the deceased was in the front seat whereas Appellant and co-accused were seated in the rear seat. They all had whisky, beer and then had their dinner at the D.T. complex. They were returning from Gurgaon at about 1:00 A.M. The Appellant and co-accused got down from the car at ITO bridge near Shakarpur check post under the pretext of urinating. When they returned, co-accused Shalender Kumar placed a knife on the neck of PW-2 and asked him to hand over all his belongings; PW-2 was robbed of his ATM, credit cards and ` 1200/- in cash. PW-2 deposed that the Appellant shot the deceased with a country made pistol. PW-2 further testified that he managed to get out of the car and ran towards Yamuna. PW-2 called up the deceased's wife from the mobile phone No.56087690 of deceased Naresh Kumar (which was available with him) at 2:00 A.M and informed her that the Appellant and the co-accused took away her husband Naresh Kumar with them in her husband's car at about 2:00 A.M. on that day. The witness stated that at that time he did not inform deceased's wife that the Appellant had shot her husband. PW-2 also deposed that upon information given by him Amit Kumar (PW-12) brother-in-law of the deceased met him at Maharajpur check post. They both searched for Naresh Kumar on the roads on the assumption that the Appellant might have thrown him from the car. 42. PW-2 stated that the next day i.e. on 07.09.2003 he went to his office at Madhu Vihar where he met the police. He testified that he did not lodge any report with the police immediately after the incident on the night intervening 06-07.09.2003 since he was apprehensive of the police as he was living under a false name.

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43. To establish the offence of commission of murder by the Appellant, the prosecution relied upon :-

(a) The testimony of PW-2 as ocular evidence,

(b) The recovery of country made pistol Ex. P-4 in pursuance of the disclosure statement Ex.PW-30/G, allegedly made by the Appellant,

(c) The recovery of Santro Car bearing No. HR-61-U-3265 from Police Station Manjhola, District Moradabad in pursuance of the disclosure statement Ex.PW-47/I;

(d) The recovery of deformed cartridge from the dashboard Ex.P-7 of the car by PW-10 Aslam Ali on 01.10.2003. The deformed bullet according to PW-37 K.C. Varshney's Ballistic Expert Report Ex.PW-37/A was fired from the Pistol Ex.P-4.

44. It may be noticed that PW-2 gave a detailed account how he along with the deceased, the Appellant and co-accused Shalender Kumar travelled to Gurgaon to have fun and how on their return journey, the Santro Car was stopped at ITO bridge near the police check post Shakarpur under the pretext of the Appellant and the co-accused getting down to urinate; the co-accused keeping a knife on PW-2's neck, robbing him of his valuables and the Appellant's firing a shot at the deceased's neck.

45. The version put forth appears to be too simple and straight forward to be believed by any Court. However, we find too many holes and improbabilities to rely on the same.

46. PW-2 deposed that he and the deceased were living and doing business in Delhi under a false name and their intention was to disappear after pocketing money (of gullible persons approaching them for financing vehicles or of the financers). The explanation for not reporting the matter to the police is that of PW-2 approached the police, the cat would have been out of the bag, as PW 2's misdeeds would come out in the open and the police would have known about it, due to which they (the police) might have taken some action against him for the illegalities committed by him. The Appellant and co-accused Shalender Kumar were projected as dreaded criminals (as at the time of arrest of the Appellant on 21.09.2003

six crude bombs, two country made pistols, nine live cartridges of 12 bore and one live cartridge of .32 bore are alleged to have been recovered from him). It is improbable that the Appellant and the co-accused allowed PW-2 to escape on foot while they were in possession of a Santro Car and were well aware that he (PW-2) witnessed commission of his partner's (Naresh Kumar) murder by them. The Appellant was armed with a pistol and as a natural conduct, (as any other criminal who had fired upon the deceased to rob him) he and the co-accused would not have allowed PW-2 to escape.

47. We would not attach much importance to the non-verification of the story (by the IO) by visiting Gurgaon, of the accused, PW-2 and the deceased having whisky and food by examining the concerned shopkeepers. But, we are not inclined to believe that there would not even be a scratch on PW-2's neck when the knife was placed on his neck by co-accused Shalender Kumar and he was robbed of his belongings i.e. cash and ATM cards.

48. Furthermore, if the Appellant and co-accused had robbed PW-2 of his three ATM cards, they would naturally first have asked for the PIN number of the cards, or else the ATM cards were worthless to them. Not only this, the natural course of human conduct would be the Appellant and the co-accused would have taken PW-2 to the nearest ATM center to withdraw the money, using the cards. No evidence was collected by the prosecution showing that the ATM cards were used to make any purchases or if PW-2 stopped all the transactions in respect of the robbed ATM card by informing the concerned Banks. The DD No. 5-A Ex.PW-20/A recorded in PS Anand Vihar clearly shows that an unidentified dead body was recovered at 03:02 A.M. on 07.09.2003. Obviously, the police would have tried to get a clue about identity of the deceased at the earliest to proceed further in the matter. Thus, according to the prosecution, PW-52 SI K.P. Rana first reached Shivani Apartment on the basis of some papers (containing the address of Shivani Apartment) recovered from the dead body of Naresh Kumar and then to Madhu Vihar on the basis of local inquiries made from PW-4 Sukhbir Singh.

49. Self preservation is the basic instinct of every human being. Therefore, one may not report the incident; one may not intervene in a quarrel apprehending physical or other harm to oneself. The explanation

given by PW-2 for not informing the police regarding the incident was that he apprehended harm to himself for doing business in a false name with illegal design. But, how long PW-2 could have concealed the murder of his partner Naresh Kumar is not borne out from his testimony. It is unbelievable that he merrily walked to his office at Madhu Vihar the next morning i.e. on 07.09.2003 at 11:00 A.M. where he was confronted by PW-47 Inspector Satyavir Singh (IO) and on inquiry the whole incident was disclosed by him to the said PW-47. This defies normal human conduct and it is very difficult to believe the story invented by PW-2. We are supported in this view by **Alil Mollah & Anr. v. State of W.B.,** (1996) 5 SCC 369; **Narsinbhai Haribhai Prajapati etc. v. Chhatrasinh & Ors.,** AIR 1977 SC 1753; **Sukhbir Singh & Anr. v. State of Punjab,** 2011 (4) AD SC 69. The Supreme Court in similar circumstances declined to rely on PW-3 an eye witness testimony and held: -

> 7. On his own showing PW 3 was an employee of the deceased. He was present, according to his testimony, when the deceased was assaulted by the appellants. He admits that after committing the crime the appellants and their associates fled away. The witness, however, not only did not raise any alarm when his master was being assaulted, he did not go near his employer even after the assailants had fled away to see the condition in which the employer was after having suffered the assault. According to him he got frightened and fled away to his home. He also admitted in his cross-examination that neither at his home nor in the village did he disclose what he had seen in the evening of 4th February, 1982 to anyone. Though in the morning of the following day, the witness went to the brick-fields of the deceased-employer and many of his co-employees were also present there, he admitted that he did not disclose the occurrence to anyone of them and went on to concede that even to the Manager of the brick-fields he gave the information about the occurrence only 2-3 days after the occurrence. His statement was recorded by the police on the next day in the afternoon. This conduct of the witness that he did not tell anyone about the occurrence till the next day appears to be rather unnatural and creates an impression that he had not witnessed the occurrence. The witness however tried to take shelter on the plea that he was "frightened" and therefore till he appeared before the police, he

did not pick up courage to inform anyone either in the village or in the brick-fields regarding the occurrence. This plea does not impress us……..."

50. PW-6 Madhvi, deceased's wife was aware that her husband and PW-2 were staying and carrying on business in Delhi under assumed names. It is not believable that PW-2 would see the Appellant firing a shot at the deceased and would not disclose it to PW-6 (as is projected by PW-2). According to PW-2 he informed PW-6 that the deceased was abducted (by the Appellant and co-accused). PW-2 says he did not give any information to PW-12 Amit Kumar, brother-in-law of the deceased. However, PW-12 says that he received a telephone call from PW-2 on the night intervening 06-07.09.2003 that Dhananjay and Shalender Kumar had shot the deceased and taken away his Santro car.

51. PW-12 deposed that he asked PW-2 to reach Maharajpur check post. He (PW-12) reached there and PW-2 again narrated the entire incident to him. PW-2 testified that both of them searched for the dead body of Naresh Kumar but could not find it after which both went home. PW-12 Amit Kumar is an Advocate by profession. It defies all logic that he would not immediately take PW-2 to the police and report about the murder of his brother-in-law. On the other hand, PW-12 did not even accompany PW-2 to his office at Madhu Vihar to make further search or to inform the police. We are, therefore, not inclined to believe that the incident of a shot being fired at the deceased took place in the manner alleged by the prosecution.

52. According to the prosecution, the Appellant was arrested on 21.09.2003 at about 06:20 P.M. on the basis of secret information received by PW-31 SI Vinay Tyagi that a 'desperate criminal' involved in heinous crimes was present near the entry gate of ISBT Anand Vihar, on his Black Pulsar motorcycle bearing registration No.UP-16-D 2299 and was in possession of illegal arms and ammunition. According to PW-31 the Appellant was apprehended and on his search, a black bag slung on his shoulder, two loaded country made pistols of 12 bore and 32 bore, nine live cartridges of 12 bore and one live cartridge of .32 bore and one sweet box containing six improvised crude explosive bombs were recovered.

53. According to the prosecution, the Appellant made a disclosure statement regarding his involvement in case FIR No.349/2003 and further investigation of the case was handed over to PW-52 SI K.P.Rana.

54. It is the case of the prosecution that PW-52 further interrogated the Appellant who made a confessional statement Ex.PW-19/K regarding commission of murder of Naresh Kumar and disclosed that he could help in recovering of the country made pistol (used in the commission of deceased's murder) from the house of his friend Rakesh at Lucknow. The Appellant also disclosed to enable recovery of the Santro car from Moradabad where it was abandoned.

55. The Santro Car was not recovered from the place it was alleged to be abandoned by the Appellant. It was seized by PW-29 SI Udayvir Singh from PS Manjhola where the same was deposited as 'abandoned'. This part of the disclosure statement regarding recovery of the Santro Car is not admissible in evidence as this fact was not discovered in pursuance of the disclosure statement.

56. What is intriguing is that after recovery of the car from PS Manjhola the Appellant, according to the prosecution did not stick to his first disclosure statement and made another disclosure statement Ex.PW-30/G (informing SI Yogesh Kumar) that his first disclosure statement (where he stated that he had concealed the country made pistol in the house of his friend Rakesh at Lucknow) was false and that in fact, the country made pistol and the articles belonging to the deceased were kept by him in his tenanted house at 13/63, Raj Nagar, Ghaziabad.

57. According to the prosecution, SI Yogesh Kumar returned to Delhi on the night of 24-25.09.2003 and the Appellant was kept in the lock up of PS Vivek Vihar. On 25.09.2003 Inspector Satyavir Singh (IO), SI Yogesh Kumar (PW-30) and other police personnel reached house No.13/63, Raj Nagar, Ghaziabad in a private vehicle, where they met PW-9 Rajnish Kumar. The Appellant took out the house key from under a brick and opened the lock of house No.13/63, Raj Nagar, Ghaziabad and recovered one cream coloured shirt, a sky blue jeans apart from a leather purse with words *'Ricoh'* and five credit cards belonging to the deceased bearing the name Raj Kumar Sharma / R.K. Sharma and one country made pistol .315 bore. The IO completed the formalities of seizure of all the articles. It is strange that the IO preferred to join a

chance witness Rajnish Kumar (PW-9) yet the landlord of the premises was not even questioned if the Appellant was really a tenant or residing in House No.13/63, Raj Nagar, Ghaziabad.

58. It is interesting to note that the Appellant instead of carrying the keys of the tenanted room with him (where he had kept illegal arms like country made pistol) would prefer to hide the keys under a brick. It is logic defying that the Appellant would keep the country made pistol (which was used by him earlier for commission of deceased's murder) and would carry other two pistols with him to Anand Vihar, ISBT where he was allegedly apprehended along with other ammunition. It is unbelievable and highly improbable that the IO would not make an attempt to either join the landlord at the time of the search or would not even examine him to confirm if the Appellant was really a tenant in the premises owned by him. In a similar case, circumstances leading to the recovery of incriminating materials was disbelieved by a Division Bench of this Court in **Smt. Saroj v. State,** 2003 (3) JCC 616 and **Rakesh v. State,** 2010 (2) JCC 1529. To say the least, the recovery of the country made pistol in the circumstances stated above is not reliable. We are, therefore, not inclined to believe the same.

59. The Santro Car No. HR-61-U-3265 was recovered from PS Manjhola on 24.09.2003 and was brought to Delhi the same night. PW-47 IO and other police officers were aware that Naresh Kumar's murder was committed in that car. The IO preferred to get the car photographed by PW-25 Constable G. Ganesh only on 29.09.2003. These photographs could have been taken on 25.09.2003 or at the most on 26.09.2003 in the Police Station where the car was kept. The car could have been inspected by the IO and other police officers (at the time of recovery) on 24.09.2003 or immediately thereafter in Delhi to find out if there was any hole in the dashboard. In fact, the piercing hole by bullet in the dashboard would have been apparent to even a layman. The IO, however, summoned a mechanic PW-10 Aslam Ali only on 01.10.2003 who pulled out the dashboard and extracted a deformed cartridge alleged to have been fired from the pistol Ex.P-4. As stated earlier country made pistol Ex.P4 and one deformed bullet were sent to the Ballistic Expert PW-37 K.C. Varshney, who by his report Ex.PW-37/A after test firing gave a report that the deformed cartridge Ex.P-5 recovered from the dashboard was fired from the pistol Ex.P-4. We are not inclined to believe the

recovery of the cartridge from the dashboard by PW-10 on 01.10.2003 because of the delay of seven days. Also, the hole caused by a fired cartridge was too prominent in a dashboard to go unnoticed by the discerning eyes of several police officers including the IO.

60. The prosecution had collected evidence in the form of call records of phone number 9818524955 and 56087690 which showed that there were some communication between these two numbers six times on the night intervening 06-07.09.2003. Though, the prosecution has not produced any evidence to show who were subscribers of the said two telephone numbers; yet we are inclined to believe that some talks might have taken place between PW-2 and PW-6 Madhvi, the deceased's wife. This talk could have been regarding abduction of the deceased by Dhananjay as is sought to be proved through PW-2 and PW-6 or by any other person. In the circumstances narrated earlier, we are not inclined to believe that a shot was fired at the deceased by the Appellant on 07.09.2003 at 2:00 A.M. near the check post, Shakarpur as is the case of the prosecution. It may be true that the deceased was taken away by the Appellant. Admittedly the deceased was found dead at 3:02 A.M. vide DD No.5-A, Ex.PW-20/A. However, the Court cannot make any alternative case of the deceased being last seen alive in the company of the Appellant, as it would be only in the realm of speculation. Moreover, the Appellant did not have any opportunity to meet such a case. A reference can fruitfully be made to **Bhgagirath v. State of M.P.** 1976 (1) SCC 20 where the Supreme Court held as under:-

> "The prosecution can succeed by substantially proving the very story it alleges. It must stand on its own legs. It cannot take advantage of the weakness of the defence. Nor can the Court, on its own, make out a new case for the prosecution and convict the accused on that basis.
>
> When the substratum of the evidence given by the eyewitnesses examined by the prosecution was found to be false, the only prudent course, in the circumstances, left to the Court was to throw out the prosecution case in its entirety against all the accused."

A similar view was taken later by the Supreme Court in **Suchand Pal v. Phani Pal,** 2003 (11) SCC 527.

61. In view of the improbabilities/ contradictions pointed out coupled with the discrepancies mentioned in para 35 of this judgment it is not established beyond all reasonable doubt that the deceased was shot at by the Appellant and thus, he could not have been held guilty of murder. The impugned judgment and order on sentence, therefore, cannot be sustained.

FIR No.367/2003

62. Turning to the Appellant's arrest in case FIR No.367/2003 and recovery of one black bag containing two loaded country made pistols of 12 bore and 32 bore, nine live cartridges of 12 bore and one live cartridge of .32 bore and one sweet box containing six improvised crude explosive bombs, apart from the official witnesses, the prosecution examined PW-54 Sanjay Singhal. He deposed having joined PW-30 SI Vinay Tyagi and PW-42 SI Atul Tyagi and accompanied them to ISBT Anand Vihar. After sometime, one person identified as the Appellant reached there with a black coloured bag. On opening the bag, 3-4 sweet boxes were found. One pistol like weapon was recovered. After sometime, other officials arrived. He deposed that he could not tell what was kept in those sweet type boxes. The witness was allowed to be cross examined by the Public Prosecutor for the State. He denied having made the statement Ex.PW-54/A to the police. The witness denied that the country made pistol was recovered from the *"dub"* of the pant of the Appellant. He denied that on opening the bag nine cartridges and one loaded katta was recovered in his presence. He also denied that one sweet box contained six plastic balls which were country made bombs. The witness further denied that the bomb detection team was called in his presence or that photographs of the articles kept in the sweet boxes were taken.

63. In many cases, witnesses turn hostile for variety of reasons. Thus, if a public witness turns hostile, it is not necessary that the official witnesses are to be painted as unreliable and their testimonies are to be discarded. However, as we have stated earlier the conduct of the various police officers including the IO in recording successive disclosure statements and shifting the place of recovery to the place of their choice as per their convenience does not inspire any confidence. SI Yogesh Kumar's and Inspector Satyavir Singh (IO) omission to notice the hole created by the bullet in the dashboard of the Santro Car till the dashboard was opened and the used bullet was retrieved from the dashboard by

PW-10 etc make us skeptical about the recovery of two country made pistols, six crude bombs and nine cartridges to be suspect and incredible. The Appellant is in custody for about the last eight years and even if he had been convicted under Section 25 Arms Act, 1995 or under Section 4 and 5 of Explosive Substances Act, 1884 he would not have been sentenced to imprisonment for more than the period already undergone by him. However, in the circumstances mentioned above, it would be highly unsafe to rely upon the testimony of the witnesses with regard to the recovery of arms and explosives on 21.09.2003 at about 6:20 P.M. at ISBT Anand Vihar.

64. We are of the opinion that the Appellant is entitled to the benefit of doubt. For the above reasons, the Appeal has to succeed, we allow the same. Accordingly we set aside the judgment and order of the Trial Court and acquit the Appellant of the charge framed against him. He is hereby ordered to be set at liberty.

Crl. M. (Bail) No.236/2011

65. In view of the above, this application has become infructuous, the same is accordingly dismissed.

ILR (2011) V DELHI 734
CRL. APPEAL

SAGAR @ GYANENDER ....APPELLANT

VERSUS

STATE ....RESPONDENT

(S. RAVINDRA BHAT & G.P. MITTAL, JJ.)

CRL. APPEAL NO. : 31/2011 DATE OF DECISION: 31.05.2011

Indian Penal Code, 1860—Section 302—As per prosecution case, PW2 (informant) was residing at the place where incident occurred—His nephew, the

deceased lived in the same premises—The deceased was involved in a quarrel, a few months before the incident with co-accused Shakti (sent for trial to JJB)—Shakti had threatened deceased—On the day of incident, Shakti along with the appellant came and caught hold of deceased from the back while appellant gave a knife blow to the deceased—On the basis of appellant's disclosure statement, knife recovered—Trial Court convicted appellant u/s 302—Held, death occurred at 10 p.m. While PW2's statement was recorded at 11.40 p.m. and FIR registered at 12.10 p.m.—Thus no unreasonable delay in lodging of FIR—Merely because PW2 was related to the deceased, this fact itself was insufficient to exclude his testimony—Testimony of PW2 reliable and credible—As per autopsy surgeon, cause of death was hemorrhagic shock due to the stab injury and was sufficient to cause death in the ordinary course of nature—Proved in evidence of PW2, that it was Shakti and not the appellant who had enmity against deceased—Having regard to the weapon with which injury inflicted on the right side chest of the deceased, the palm injury of the appellant assumes some significance—Prosecution has a duty to the court to explain injuries of the accused and that absence of such explanation assumes importance about the fullness or correctness of the prosecution version—Having regard to the nature of injury, the one hour time taken to intimate the police and the two hour time to reach the hospital, there is an element of uncertainty as to whether something preceded the assault—No universal rule that infliction of single knife blow would or would not attract Section 302—Application of Section 302 would depend upon manner in which blow inflicted and the surrounding circumstances—Injured taken to hospital two hours after the incident, Shakti had been beaten by the deceased and had threatened deceased, appellant

had no motive against deceased, injuries on the appellant's palm had not been explained, read with the fact that it had been recorded in the PCR form Ex. PW9/A about a quarrel, it could be inferred that something preceded the attack—Appellant had occasion to inflicit more than one injury however, he did not do so—It cannot be said that appellant had intention of causing injuries that could have in the normal course of nature resulted in death—Conviction of appellant altered to one u/s 304 part I and sentenced substitute to 8 years imprisonment—Appeal partly allowed.

In the present case too, this Court is of the opinion that although PW-2 witnessed the event, his testimony mentioned the role of the appellants. PW-1 also corroborates it. Further PW-2 himself attributed no motive, yet, the time in rushing the injured Ashok to the hospital was about two hours from the incident. Furthermore, Shakti had been beaten by the deceased in the previous incident. The deceased had been threatened by Shakti. The Appellant admittedly had no motive against the deceased. The injuries on the Appellant's palm have not been explained. Read together with PW-9/A (which mentions about a quarrel) one can reasonably infer that something preceded the attack. **(Para 22)**

Having regard to the overall circumstances, the absence of motive and the possibility that there was a quarrel which escalated into a serious fight which finally resulted in PW-2 wielding a knife and causing the injury on the deceased, cannot be ruled-out. Here too, as in the decisions noted above, the appellant had occasion to inflict more than one injury. He did not do so. Further, the appellant himself suffered a palm injury. Taking an overview of all these facts, it cannot be said that the appellant had the intention of causing injury that would have in the normal course of nature, resulted in a death. All indications are that the intention of causing such bodily injury as was likely to cause death. **(Para 23)**

[Ad Ch]

APPEARANCES:

FOR THE APPELLANT : Ms. Sahila Lamba, Advocate.

FOR THE RESPONDENT : Mr. Lovkesh Sawhney, APP for the State.

CASES REFERRED TO:

1. *Ram Pat & Ors.* vs. *State of Haryana* 2009 (7) SCC 614.
2. *Hari* vs. *State of Maharashtra* 2009 (11) SCC 96.
3. *Ashok Kumar Chaudhary* vs. *State of Bihar* 2008 (114) Cr. LJ 3030 (SC).
4. *Chamela* vs. *GNCTD (Crl. A. No.545/2004,* decided on 13.04.2010).
5. *Dashrath Singh* vs. *State of U.P.,* 2004 (7) SCC 408.
6. *Kashi Ram* vs. *State of M.P.* 2002 (1) SCC 71.
7. *Lehna* vs. *State of Haryana,* (2002) 3 SCC 76.
8. *Kashiram* vs. *State of M.P.* 2002 (1) SCC 71.
9. *Tholan* vs. *State of Tamilnadu,* 1984 (2) SCC 133.
10. *Jagtar Singh* vs. *State of Punjab* 1983 Cri LJ 852.
11. *Hari Ram* vs. *State of Haryana* AIR 1983.
12. *Randhir Singh* vs. *State of Punjab* AIR 1982.
13. *Kulwant Rai* vs. *State of Punjab* AIR 1982.
14. *Kulwant Rai* vs. *State of Punjab* 1981 (4) SCC 245.
15. *Jagrup Singh* vs. *State of Haryana* AIR 1981.
16. *Kulwant Singh* vs. *State of Punjab,* 1981 (4) SCC 245.
17. *Lakshmi Singh & Ors.* vs. *State of Bihar* 1976 (4) SCC 394.
18. *Thulika Kali* vs. *State of Tamil Nadu,* (1972) 3 SCC 393.
19. *Dalip Singh* vs. *State of Punjab,* AIR 1953 SC 364.
20. *Ram Sunder* vs. *State of U.P.* Crl. A. No. 555/83 decided on 24-10-83.

RESULT: Appeal Partly Allowed.

S. RAVINDRA BHAT, J.

1. This judgment would dispose of an appeal directed against the judgment and order of the learned Additional Sessions Judge dated 19.04.2010 in SC No.64/2008. By the impugned judgment, the Trial Court convicted the appellant for the offences punishable under Section 302 IPC. The appellant was sentenced to undergo imprisonment for life with a fine of Rs.10,000/- in default of which he was to undergo rigorous imprisonment for three months.

2. The prosecution's case is that at about 8.40 PM on 23.12.2007, a PCR Constable-PW-9 received information regarding a stabbing incident at Gali No.8, Kanti Nagar, which was duly recorded in the form Ex.PW-9/A. The police reached the spot and gathered that the injured has been taken to the G.T.B. Hospital. The injured (Ashok Kumar "the deceased") was declared as dead in the MLC prepared at 9:40 PM. That document was exhibited in the trial as Ex.PW-25/D. The sole eye witness was deceased's uncle; his statement was recorded at 11:40 PM (Ex.PW2/A); the FIR was later registered at 12:10 AM. PW-2 stated that he used to reside at the place where the incident occurred and worked in a jeans manufacturing unit at West Kanti Nagar. His nephew, the deceased, lived in the same premises and used to work in another factory in the same street. Ashok Kumar was involved in a quarrel, a few months before the incident, with one Shakti (arrayed as co-accused in the present case, but since he was a juvenile, sent for trial under the provisions of Juvenile Justice (Care and Protection of Children) Act, 2000). Shakti used to reside in Gali No.11, West Kanti Nagar. In that (previous) incident, Shakti had sustained injuries; the matter was compromised on that occasion. PW-2 further narrated that Shakti had later threatened the deceased once or twice about wrecking revenge. PW-2 mentioned about the incident which occurred on 23.12.2007 when Shakti, along with an accomplice went to the premises. Shakti allegedly caught hold of the deceased from the back, while his companion, i.e., the present appellant gave a knife blow to the deceased, who collapsed. Thereafter, the appellant and Shakti fled the spot.

3. On the basis of the PW -2's statement, the FIR was registered and the matter was referred for investigation; PW-22 reached the spot

and prepared a site plan Ex.PW-22/A. The scene of occurrence was photographed; the photos were produced during the trial as Ex.PW-14/1 to Ex.PW-14/3. Shakti was allegedly arrested by the PW-22 with the help of SI Rajiv Kumar, PW19 and another Constable PW-17. He led the police party to a place near Shyam Lal College from where the appellant was arrested by memo Ex.PW-17/A. On the basis of the appellant's disclosure statement Ex.PW-2/D, a knife, Ex.P.1 was recovered and sealed which was recorded by memo Ex.PW-2/G. The police prepared inquest papers PW-22/B to PW-22/D and sent the body for autopsy. The autopsy surgeon was not available during the trial and the post mortem report was proved by another doctor PW-20. The accused was charged with having committed the offences; he pleaded not guilty and claimed trial. Shakti was sent to trial by the Juvenile Justice Board.

4. During the trial, the prosecution examined 25 witnesses and also produced several exhibits. On consideration of these, the Trial Court concluded that the appellant was guilty as charged and handed down the sentence noticed in the earlier part of this judgment.

5. Ms. Sahila Lamba, learned counsel for the appellant argued that the entire prosecution version which culminated in the findings of guilt against the appellant hinged on the sole eye witnesses' testimony of PW-2, the deceased's uncle. It was urged that the said eye witness's testimony could not have been relied upon since he was untrustworthy. It was submitted that if one compares the injury inflicted on the deceased, which find corroboration in the postmortem report (Ex.PW-20/A which mentioned about the incised stab wound present on the "right side lower chest placed obliquely") with the eye witnesses testimony of PW-2 who too stated about the injury being sustained by the appellant, the contradiction would become obvious. Learned counsel argued that if, in fact, the incident had been truthfully narrated, there was no reason why the appellant should have suffered an injury on his left palm, which was spoken to by the witness and also corroborated by MLC-Ex.18/A. It was further urged that the first information or intimation received by the police was at 8:40 PM -Ex.PW-17/A mentioned about a quarrel in the premises. However, the case made out by the prosecution was one of unprovoked attack upon the deceased.

6. It was urged that the prosecution had not explained why it delayed recording of the FIR. PW-2's testimony was that incident occurred

at 7:30 PM; the intimation of the incident was given to the police at 8:40 PM through phone -mentioned in Ex.PW-9/A. The testimony of PW8 was that the police reached the hospital at 9:30 PM. Even though, the MLC recorded at around 9:40 PM stated that the deceased had been brought dead, the police recorded the PW-2's statement only at 11:40 PM and finally the FIR was registered at 12:10 AM. Counsel urged that this delay of 4½ hours was inexplicable and prosecution preferred no argument on this. Contending that the recording of the delayed information report is a highly suspicious circumstances, learned counsel urged that this assume significance if one tests the credibility of PW-2's deposition which contains several gaps. It is further submitted that the matter gets compounded if one considers that PW-1 Babloo who was informed by PW-2 about the stabbing incident at 7:30 PM and in fact who allegedly intimated the police from a PCO and even accompanied PW-2 to the hospital with the deceased, did not even inform about the assailant's identity. Learned counsel submitted that there was no explanation why PW-2 delayed taking the deceased to the hospital. All indications were that the injured person was taken to the hospital and declared dead at 9:40 PM. The occurrence took place at 7:30 PM according to PW-1 & PW2. However, the prosecution version of receipt of intimation by the police is at 8:40 PM. If all these are taken into consideration, the explanation given by the police that he was trying to save the deceased from injury and, therefore, sustained a wound on his left palm is credible and reasonable.

7. It was submitted that the recovery of the knife Ex.P-1 could not be believed for the reason that it was not witnessed by any member of the public; the only witness was PW-2 who was interested in the outcome of the case, being the deceased's uncle. Furthermore, the alleged weapon of incident, a 27 cm long knife was recovered from a public place. There was no corroboration by the Forensic Science Laboratory about the blood stains on the knife matching the deceased's blood group.

8. It was argued that even if the facts were to be held as proved by the prosecution, a careful reading of the PCR intimation Ex.PW-9/A which mentioned about quarrel and beating, reported by PW-1 and the injury found on the appellant's left palm, which was established by his MLC Ex.PW-18/A, pointed to a sudden quarrel. It was submitted that only motive alleged on the part of the assailant was Shakti's desire for

revenge. So far as the appellant is concerned, the prosecution admittedly did not allege any motive. Therefore, if there indeed was a quarrel and the deceased received a knife blow on the lower part of the right side of his chest, the appellant's explanation that he was trying to save the injured was reasonable and could not be ruled out. In these circumstances, argued the learned counsel, the case fell within the four corners of the fourth exception of Section-300 which clarifies that such attacks-if they lead to death as a result of injuries caused during quarrel, would amount to culpable homicide but not murder. Learned counsel relied upon several decisions i.e. **Tholan v. State of Tamilnadu,** 1984 (2) SCC 133; **Dashrath Singh v. State of U.P.,** 2004 (7) SCC 408, **Kulwant Singh v. State of Punjab,** 1981 (4) SCC 245, **Kashi Ram v. State of M.P.** 2002 (1) SCC 71 and the judgment of the Division Bench of this Court in **Chamela v. GNCTD** (Crl. A. No.545/2004, decided on 13.04.2010).

9. Mr. Lovkesh Sawhney, learned APP urged that the eye witnesses testimony of PW-2 was credible and not challenged in material particulars. The witnesses consistently maintained that a quarrel had taken place between the Shakti and the deceased a few months prior to the incident; Shakti had even threatened harm in order to wreck vengeance. The sequence of events whereby the appellant accompanied Shakti; proceeded to give knife blow to the deceased when Shakti held or restrained him; the assailants later fleeing from the spot, and the description of the injury, found corroboration by the fact that even the injury suffered by the appellant during the course of his attack on the deceased was noticed and spoken to by PW-2.

10. It was submitted that too much cannot be made about the description of the attack given in the earliest intimation Ex.PW-9/A since concededly PW-1 who was not an eye witness called the police. It was urged that mention of the time (of the attack) as 7:30 PM cannot be pin down with exactitude since witnesses cannot be expected to note the precise time when such attack occurs. There would also be an approximation and the time could well have been about 8:00 PM. So if such was the case, the intimation to the police at 8:40 PM, the time taken to reach the hospital and the Doctor's determination that the injured was brought dead, leading to mental trauma and shock experienced by the relatives i.e. PW-2 had to be also taken into consideration. Therefore, the recording of PW-2's statement under Section-161 Cr.P.C. at 11:40 PM

and the subsequent registration of the FIR at 12:10 AM which clearly mentioned the names of Shakti and the present appellant, are not only credible but actually established the correct sequence of events.

11. Learned counsel urged that there was no question of any sudden quarrel or provocation because according to the PW-2's deposition, previous incident had ended into compromise even though Shakti had suffered a worst of the attack by the deceased. However, Shakti nurtured a grudge and even threatened the deceased once or twice. The appellant who was Shakti's friend or accomplice did not offer any explanation for his presence at the site or how the quarrel, if any, allegedly took place. His statement under Section-313 Cr. PC, established his presence. If indeed, he was trying to save the deceased from injury and had sustained a palm injury, it was necessary for him to give the explanation or lead evidence. His silence in this regard was significant and the Court correctly inferred that his intention as well as that of Shakti in meeting the deceased in the latter's premises with a knife was with the motive of killing him. The nature of weapon and the kind of injury inflicted upon the deceased was such as to rule out every possibility of applicability of Section-300 Exception 4. Learned counsel distinguished the judgments relied upon by the appellant and urged the Court to maintain the conviction recorded in the impugned judgment.

12. There is no doubt that a prosecution is under a duty to record or register the first information report at the earliest point, to avoid embellishment. In **Thulika Kali v. State of Tamil Nadu,** (1972) 3 SCC 393, the Supreme Court held that the FIR is an extremely vital and valuable piece of evidence for the purpose corroborating the oral evidence adduced at the trial. The importance of the report, stated the court

> "can hardly be overestimated from the stand point of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed the names of the actual culprits and the part played by them as well as the names of eye-witness present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought…"

It is evident from the above narration of facts that the prosecution alleged about the incident having occurred at 07.30 pm. PW-1 corroborated the version of PW-2 in this regard. PW-9/A is the earliest PCR intimation, received by the police – it was at 08.40 pm. The testimony of PW-1 would disclose that he informed the police. PW-8 deposed that the police reached hospital at 09.30 PM. The FIR records that the incident took-place at 07.30 PM; the FIR was registered at 12.10 AM, after the statement of PW-2 was recorded. The Postmortem Report (Ex. 20/A) states that the deceased was declared "Brought Dead" on 23.12.2007 at 09.40 pm. The Postmortem started at 01.05 pm; it stated that the approximate time of death was about 2/3rd of a day (i.e. about 16 hours). If all these facts are taken into consideration, it would be apparent that all indications are that the death occurred at 10.00 PM, The recording of PW-2's statement was at 11.40 PM. The registration of FIR was at 12.10 PM. In these circumstances, there is no unreasonable delay in recording the FIR so as to raise any suspicion about embellishment or introduction of coloured version.

13. Turning next to the appellant's objection about the findings being untenable, being based on the sole testimony of PW-2, while there can be no doubt that the witness was related to the deceased, that fact itself is insufficient to exclude his testimony. Consistently, in decisions from **Dalip Singh v. State of Punjab,** AIR 1953 SC 364, **Lehna vs. State of Haryana,** (2002) 3 SCC 76, and **Ashok Kumar Chaudhary v State of Bihar** 2008 (114) Cr. LJ 3030 (SC) the Supreme Court while rejecting a similar contention by the convicted accused, in respect of the deceased's relatives' testimony held that even if there was some hostility between the accused and the family members of the deceased (who had deposed against the accused during the trial) that would not be a ground to reject their deposition since it is inconceivable that they would shield the actual culprit and falsely implicate an innocent person. The people present at a crime scene are not witnesses by choice. The prosecution has to present witnesses who saw the alleged incident and can depose about it. That, in many circumstances, the witnesses turn-out to be related to the deceased or victim, someone connected to her (or him), cannot be a factor to discredit their version. The Court has a duty to their testimony by applying the same standard, i.e. of credibility and trustworthiness. PW-2 speaks about a previous fight between the accused Shakti and the deceased, in which he (Shakti) had been beaten-up. He

also speaks about Shakti threatening the deceased with dire consequences and that he would take revenge. There is no effective cross-examination by the appellant about these statements. Further, speaking about the incident, PW-2 clearly testified that at 07.30 PM, when he was sitting with the deceased, in his room, the Appellant, along with Shakti reached there. Shakti pointed at the deceased and told the appellant that he ought to be finished that day and caught hold of the deceased. The appellant stabbed him with a knife on the chest. PW-2 also added that the appellant sustained injuries on his left hand. The deceased fell down. PW-2 laid him on a cot outside the room, brought an auto-rickshaw and took the injured Ashok to GTB Hospital with Babloo, PW-1. PW-1 also corroborates this. He also stated that the police were informed about the incident. This fact finds corroboration in the PCR Form recorded as PW-9/A. As regards the previous incident, there was no effective cross-examination except to elicit that no police complaint had been made by the deceased against Ashok. He explained why he could not intervene, stating that he feared being stabbed. PW-2 further acknowledged that the appellant had no past enmity with the deceased. Having regard to the totality of these circumstances, the attempts of the appellant's counsel to impeach the credibility of PW-2, in the opinion of the Court, are insubstantial. He clearly deposed being alone with the deceased in the room when both the assailants went there and attacked. He deposed that the appellant had no history of past enmity with the deceased; equally, he mentioned that the appellant sustained injury. The latter fact finds corroboration in the MLC, Ex. PW-18/A. If the attempt of PW-2 was to falsely implicate anyone, he could easily have attributed a motive to the appellant which he did not. Having regard to these overall circumstances and the reasonable proximity of time within which the FIR was registered, the Court is of the opinion that the PW-2's testimony is credible and reliable.

14. As far as the recovery of the knife is concerned, the only independent eyewitness in this regard is PW-2. The Trial Court in para 41 of its judgment, in this regard, stated that recovery of knife, Ex. PW-1 at the instance of appellant, might be in doubt.

15. It would be relevant, at this stage, to examine the nature of the injury found by the Doctor, on the deceased. The Postmortem Report, Ex. PW-20/A, described the injury as an incised stab placed on the right-side of the lower chest, placed obliquely. The Upper medial angle of the

injury was sharp and present 4.5 cms lateral to the midline and 14 cm below a line joining both the nipples. The lower lateral angle was blunt and present 6.5 cm from the midline and 16.5 cms below level of right nipple. The dimensions of the wound were 3cms x 0.2 cm x 13 cm with upper medial end showing a tailing of 0.3 cm length. The wound went through skin cuts through the coastal margin at the level of 8th rib and entered the paretorial cavity. It perforated the liver on the anterior aspect. The doctor's opinion was that the cause of death was hemmorhagic shock due to the injury, sufficient to cause death in the ordinary cause of nature.

16. The evidence of PW-2 establishes that it was Shakti and not the appellant, who nursed a grudge against the deceased. The previous quarrel between the two of them was settled. Shakti, nevertheless, allegedly held-out threats against the deceased. If one takes into account the circumstance that both PW-1 and 2 mentioned the time of attack as 7.30 PM, and further that the deceased was inflicted with a single knife blow, after which the accused fled the spot, the time taken in informing the police – (the earliest intimation being at 08.40 PM), is not sufficiently explained. PW-2 only stated that after the attack the deceased fell-down and he lifted him and kept him on a cot. In such circumstances, the effort of the relatives of the victim of the attack would be to first rush him to the hospital. There is a delay of almost two hours in this regard. If this delay is seen along with the intimation made to the police at 08.40 PM, the possibility of the attack being the culmination of a fight cannot be ruled-out. While the homicidal nature of the injury and the attack cannot be doubted, equally, there is no explanation forthcoming why the appellant had sustained an injury on the left palm. The prosecution's case is that the knife, Ex. P1 was wielded to inflict the injury. Ex. PW-21/B is the sketch of the alleged weapon of offence; the blade of the knife is 15.9 cm long. The hilt or handle is 11.2 cm. The depth of the injury, according to the Postmortem Report is 13 cm. Having regard to such a weapon, which was wielded on the right-side chest of the deceased (the details of how the attack took place), the palm injury of the appellant assumes some significance. In the decision reported as **Ram Pat & Ors. v. State of Haryana** 2009 (7) SCC 614; **Hari v. State of Maharashtra** 2009 (11) SCC 96 and **Lakshmi Singh & Ors. v. State of Bihar** 1976 (4) SCC 394, it was held that the prosecution has a duty to the Court

to explain the injuries of an accused and that absence of such explanation assumes importance about the fullness or correctness of the version presented to the Court. Having regard to the nature of this injury, the time taken to intimate the police (1 hour) and the time taken to reach the hospital (2 hours), there is an element of uncertainty about whether the assault was entirely described by PW-2 or whether something preceded it.

17. There can be no universal rule that infliction of a single knife blow would or would not attract Section 302 IPC. It depends on the manner in which the blow is inflicted and the surrounding circumstances. In this case, the appellant has made an alternative submission that the rulings in **Tholan v. State of Tamil Nadu** 1984 (2) SCC 133; **Dashrath Singh v. State of U.P.** 2004 (7) SCC 408; **Kulwant Rai v. State of Punjab** 1981 (4) SCC 245; **Kashiram v. State of M.P.** 2002 (1) SCC 71 and **Chamela v. Govt. of NCT** (Crl. A. No. 545/2004 dated 13.04.2010) are applicable. In **Tholan** (supra), while converting the conviction for murder into one under Section 304 Part-II IPC, in a case involving one knife-blow, the Supreme Court held as follows:

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> 9. Learned Counsel for the appellant contended that having regard to the genesis of the occurrence and the surrounding circumstances and the fact that one blow with a knife was given which happened to land on the chest it cannot be said with reasonable certainty that appellant intended to commit murder of deceased Sampat or appellant intended to cause the particular injury and the injury intended to be inflicted was sufficient in the ordinary course of nature to cause death.
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> 12. It is equally not in dispute that appellant gave only one blow with a knife. Appellant had no quarrel or dispute with deceased Sampat. It is not shown that deceased Sampat had anything to do with the chit organised by K.G. Rajan. No malice has been alleged to have been entertained by the accused towards deceased Sampat. The incident occurred on the spur of the moment. It appears that the house of the deceased Sampat was somewhere near the house in which the organisers or at least one of them

was residing. Appellant had his dispute and grievance with the organisers of the chit. It is the prosecution case that accused abused organisers of the chit. Deceased Sampat is not shown to be the organiser of the chit. Probably when the deceased Sampat told the accused not to misbehave in the presence of ladies and not to use vulgar and filthy language the appellant retorted by questioning the authority of Sampat to ask him to leave the place. Presence of Sampat is wholly accidental. Altercation with Sampat was on the spur of the moment. Even the meeting was accidental. There arose a situation in which appellant probably misguided by his own egocentric nature objected as to why Sampat should ask him to leave the place and in this background he gave one blow with a knife which landed on the right side chest of the deceased, which has proved fatal. Could the appellant be said to have committed murder! In other words, whether Part I or Part III of Section 300. I.P.C. would be attracted in the facts of this case. Even Mr. Rangam learned Counsel for the State of Tamil Nadu could not very seriously contend that the appellant intended to commit murder of Sampat. His submission was that at any rate appellant when he wielded a weapon like a knife and gave a blow on the chest, a vital part of the body, must have intended to cause that particular injury and this injury is objectively found by the medical evidence to be fatal and therefore Part III of Section 300 would be attracted. On this aspect, the decisions are legion and it is not necessary to recapitulate them here merely to cover idle parade of familiar knowledge. One can profitably refer to **Jagrup Singh v. State of Haryana** AIR 1981 **Randhir Singh v. State of Punjab** AIR 1982 ; **Kulwant Rai v. State of Punjab** AIR 1982 and **Hari Ram v. State of Haryana** AIR 1983. To this list two more cases can be added **Jagtar Singh v. State of Punjab** 1983 Cri LJ 852 and **Ram Sunder v. State of U.P.** Crl. A. No. 555/83 decided on 24-10-83. Having regard to the ratio of each of these decisions, we are satisfied that even if exception I is not attracted the requisite intention cannot be attributed to the appellant. But in the circumstances herein discussed he wielded a weapon like a knife and therefore he can be attributed with the knowledge that he was likely to cause an injury which was likely to cause

death. In such a situation he would be guilty of committing an offence under Section 304 Part II of the Penal Code. Having regard to the circumstances of the case a sentence of 5 years would be quite adequate.

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18. In **Kulwant Rai** (supra), the Court observed that:

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3. When the matter was before the High Court it was strenuously urged that in the circumstances of the case part I of Section 300 would not be attracted because it cannot be said that the accused had the intention to commit the murder of the deceased. In fact, that is conceded. More often, a suggestion is made that the case would be covered by part 3 of Section 300 Penal Code in that not only the accused intended to inflict that particular injury but the injury intended to be inflicted was by objective medical test found to be sufficient in the ordinary course of nature to cause death. The question is in the circumstances in which the offence came to be committed, could it ever be said that the accused intended to inflict that injury which proved to be fatal. To repeat, there was an altercation. There was no premeditation. It was something like hit and run. In such a case, part 3 of Section 300 would not be attracted because it cannot be said that the accused intended to inflict that particular injury which was ultimately found to have been inflicted. In the circumstances herein discussed, it would appear that the accused inflicted an injury which he knew to be -likely to cause death and the case would accordingly fall under Section 304 Part II Penal Code.

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19. Likewise, in **Dashrath Singh** (supra), the Supreme Court held as follows:

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24. Firstly, it must be noted that the intention to cause the death of Pratap Singh cannot be imputed to the accused Raja Ram. Apart from the finding of both the Courts that the common

object of the unlawful assembly was not to kill Pratap Singh or any other member of his family but only to cause hurt or apply criminal force in order to desist them from asserting the rights over the disputed site, one more circumstance that rules out the intention on the part or any of the accused to kill Pratap Singh is that after the single blow inflicted on the victim with the kanta, there was no further move to attack him. PW1 made this clear in his deposition. If Raja Ram intended to kill him, he would not have stopped at injuring him once only. Still, the question remains whether the offensive act done by the appellant Raja Ram falls within clause thirdly of Section 300. That the appellant intended to cause bodily injury to the victim by striking him on his head with a sharp-edged weapon the appellant was carrying cannot be denied in view of the sequence of events deposed to by PWs 1 to 4. From the medical evidence of PWs 6 & 8 coupled with the magnitude of the injury caused on head with a dangerous weapon, it can be presumed that the injury which was inflicted and intended to be inflicted is sufficient in the ordinary course of nature to cause death. PW 8 who performed the surgery on 13.8.1977 noted the pre-operative diagnosis on Exhibit ka-9 as follows:

"Right fronto-parietal infected compound commutated fracture of skull with brain heriniates, underneath: brain abscess and cerebrates with heriniation."

25. He prescribed post-operative treatment. PW 8 stated that the death was on account of the head injury which caused brain abscess and such injury could lead to the occurrence of death in the ordinary course of nature. The evidence of PW 8 leaves no doubt that the skull and brain injury caused to the victim was sufficient in the ordinary course of nature to cause death. PW6 who attended on the victim on the day of occurrence itself noticed the incised wound of 15 cm x 5 cm x brain tissue deep found on the head of the patient. He stated that the injury was appearing to be dangerous to life and the injury must have been inflicted by a sharp-edged object thrust with sufficient force.

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20. Kashiram (supra) relied upon by the appellant was really in the context of a plea of self-defence.

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Though Section 105 of the Evidence Act enacts a rule regarding burden of proof but it does not follow therefrom that the plea of private defence should be specifically taken and if not taken shall not be available to be considered though made out from the evidence available in the case. A plea of self defence can be taken by introducing such plea in the cross-examination of prosecution witnesses or in the statement of the accused persons recorded under Section 313 Cr. P.C. or by adducing defence evidence. And, even if the plea is not introduced in any one of these three modes still it can be raised during the course of submissions by relying on the probabilities and circumstances obtaining in the case as held by this Court in **Vijayee Singh's** case (supra). It is basic criminal jurisprudence that an accused cannot be compelled to be examined as a witness and no adverse inference can be drawn against the defence merely because an accused person has chosen to abstain from the witness box.

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21. Chamela (supra), a Division Bench ruling, was a case involving infliction of a single stab wound on the chest of the deceased. The quarrel in that case between two parties had taken place 10-15 days prior to the incident. The Division Bench ruled as follows:

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9. As per the case set up by the prosecution, Ram Prasad was in jail when deceased Kunwar Pal had teased Chamela, wife of Ram Prasad. On being set free, 10-15 days prior to 28.9.2001, alleges the prosecution, Ram Prasad accompanied by Chamela, Raj Kumar and Narender Pal came to the jhuggi cluster along the railway line at Azadpur. The time was around 9:00 PM. On the exhortation of Chamela who allegedly said 'meri bezati ka badla tab hoga jab iska kaam tamam kar do', co-accused Raj Kumar and Narender caught hold of Kunwar Pal and facilitated Ram Prasad to inflict a single stab blow on the chest of Kunwar Pal,

who died.

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17. As per the site plan the distance between spot 'A' and spot 'C' is about 40 meters. The distance between spot 'C' and spot 'D' is about 15 meters.

18. It is apparent that some racing and chasing has taken place, which has not been deposed to by the eye-witnesses.

19. It is thus apparent that the eye-witness account of what actually transpired has not come out with purity.

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22. Suffice would it be to state that it is very easy to falsely implicate somebody by alleging exhortation. Since the manner in which the offence has taken place as reflected in the site plan has not been stated through the eyewitness account we are of the opinion that Chamela should be entitled to some benefit as was extended to Narender and Raj Kumar. Thus, we hold that the evidence on record, at best, makes out the commission of an offence punishable under Section 304 (II) IPC read with Section 34 as far as even Chamela is concerned.

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24. If two people had caught the deceased and Ram Prasad assaulted the deceased, had the intention been to kill the deceased, surely, given the opportunity, Ram Prasad would have inflicted more than a single stab wound.

25. Infliction of a single stab wound though opportunity available was to stab much more, evidences that Ram Prasad's intention was to cause injury upon the deceased.

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22. In the present case too, this Court is of the opinion that although PW-2 witnessed the event, his testimony mentioned the role of the appellants. PW-1 also corroborates it. Further PW-2 himself attributed no motive, yet, the time in rushing the injured Ashok to the hospital was

about two hours from the incident. Furthermore, Shakti had been beaten by the deceased in the previous incident. The deceased had been threatened by Shakti. The Appellant admittedly had no motive against the deceased. The injuries on the Appellant's palm have not been explained. Read together with PW-9/A (which mentions about a quarrel) one can reasonably infer that something preceded the attack.

23. Having regard to the overall circumstances, the absence of motive and the possibility that there was a quarrel which escalated into a serious fight which finally resulted in PW-2 wielding a knife and causing the injury on the deceased, cannot be ruled-out. Here too, as in the decisions noted above, the appellant had occasion to inflict more than one injury. He did not do so. Further, the appellant himself suffered a palm injury. Taking an overview of all these facts, it cannot be said that the appellant had the intention of causing injury that would have in the normal course of nature, resulted in a death. All indications are that the intention of causing such bodily injury as was likely to cause death.

24. In view of the above findings, the conviction of the appellant is altered to one under Section 304 Part-I and the sentence substituted to eight years' imprisonment. The appellant shall be entitled to the benefit of Section 428 Cr.PC as well as the period undergone by him post-conviction with remissions, if any.

25. The appeal is partly allowed in the above terms.

ILR (2011) V DELHI 753
CS(OS)

VEEPLAST HOUSEWARE PRIVATE LTD. ....PLAINTIFF

VERSUS

M/S BONJOUR INTERNATIONAL & ANR. ....DEFENDANT

(V.K. JAIN, J.)

CS(OS) NO. : 1181/2011 DATE OF DECISION: 02.06.2011

Code of Civil Procedure, 1908—Order 39 Rule 1 and 2 CPC—Infringement of design, registered under Design Act—Plaintiff manufacturer of Water Jugs—Design of Water Jugs registered in Class 07-01—Suit filed alleging defendant found selling Water Jugs with identical design—Claimed inter-alia by the defendant that the cap used by the defendant on its Water Jugs altogether different from cap used by plaintiff on its water jug—Certificate imputed novelty in design to the shape and configuration of water jug—Held, to ascertain whether impugned design infringes another design, the products need not be placed side by side—Matter has to be examined from the point of view of a customer with average knowledge and imperfect recollection—Comparison showed that primary design of Water Jug of the plaintiff has been copied by defendant no. 1—Application of injunction allowed.

The legal proposition is that in order to ascertain whether the impugned design infringes another design which is duly registered or not, the two products need not be placed side by side and the matter has to be examined from the point of view of a customer with average knowledge and imperfect recollection. It needs to be kept in mind that a person coming across the impugned product may not be having the

product of the plaintiff with him at the time when he finds the product of the defendant in the market. He, therefore, has no opportunity to compare the two products to compare their similarities and dissimilarities to ascertain which product originates from which source. But, even if the two products are placed side by side, it cannot be disputed that the primary design of the jug of the plaintiff has been copied by defendant No. 1. In fact, there seems to be no distinction in the primary design of the two products. The differences I can notice are in the design of handle and cap. Even the legs of the two jugs appear to be almost identical. As far as the tap is concerned, the knob of the two jugs appears to be similar though the nozzle portion is longer in the jug of the defendant. Another noteworthy feature in this regard is that the lower portion of both the jugs is bigger than the upper portion and the overall shape of the two jugs is identical. It appears to me that any person coming across the water jug being manufactured and sold by defendant No. 1 may easily take it as a product of the plaintiff-company. This is more so in the case of a customer who is illiterate or semi-illiterate and, therefore, may not bother to read the brand name, written on the two jugs. In the case of **Alert India vs. Naveen Plastics,** 1997 PTC (17), this Court, inter alia held as under:

> "Thus for determining whether two designs are identical or not, it is not necessary that the two designs should be exactly the same. The main consideration to be applied is whether the broad features of shape, configuration, pattern etc. are same or nearly the same and if they are substantially the same then it will be a case of imitation of the design of one by the other."

Prima facie, it appears to me that the design adopted by defendant No. 1 for selling its jug is more or less similar to that of the plaintiff except in respect of the lid. Also, there is a strong possibility of defendant No. 1 passing off its water

jugs as those of the plaintiff. **(Para 5)**

[Sa Ga]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Surinder Singh and Mr. Amit Verma, Advocates.

FOR THE DEFENDANTS : Mr. Shailen Bhatia and Ms. Zeba Tarannum Khan, Advocate.

CASES REFERRED TO:

1. *Harish Chhabra* vs. *Bajaj Electricals Ltd and Anr* 2005 (4) ALLMR 3.
2. *Hawkins Cookers Ltd* vs. *Zaverchand Liladhar Shah & Ors* 2005 (31) PTC 129 (Bom).
3. *Metro Plastic Industries (Regd)* vs. *M/s Galaxy Footwear New Delhi* 2000 PTC 1(FB).
4. *Alert India* vs. *Naveen Plastics,* 1997 PTC (17).
5. *Castrol India Ltd.* vs. *Tide Water Oil. Co. Ltd* 1996 PTC (16).
6. *Eastern Engineering Co.* vs. *Paul Engineering Co.,* AIR 1968 Calcutta 109.
7. *Brighto Auto Industries* vs. *B. Chawla & Sons PTC* (Suppl), (1) 851 (Del).

RESULT: Application for Injunction Allowed.

V.K. JAIN, J. (ORAL)

IA No. 7916/2011 (O. 39 R. 1&2 CPC)

1. The plaintiff is engaged in the manufacturing and trading of various plastic products, including water jugs. The products of the plaintiff are being sold under the name 'Nayasa' and the plaintiff claims PAN India presence in its field. The plaintiff-company has three manufacturing plants and employees more than 400 workers. In the year 2004, the plaintiff-company conceptualized and created a novel design to be used for water jugs. The design was registered vide Design No. 194990 in Class 07-01 and the registration is stated to be valid till 23rd July, 2014.

In the first week of May 2001, the plaintiff came to know about use of a design by the defendant on their water jugs being sold under the name Bonjour Maharaja. The case of the plaintiff company is that the design adopted by the defendant for its jug is identical to the registered design of the plaintiff. The plaintiff has accordingly sought an injunction, restraining the defendants from manufacturing, selling, offering for sale and distributing any water jug bearing a design which amounts to infringement of the registered design of the plaintiff-company. The plaintiff has also sought damages and delivery of infringing material. IA No. 7916 of 2011 has been filed by the plaintiff, seeking ad interim injunction against the use of the design adopted by the defendant for selling its water jug.

2. The suit has been contested by defendant No. 1 which claims to be manufacturing various products, including water jugs and selling them under its mark Bonjour. It is claimed that the plaintiff has no right to seek design registration in respect of water jug in entirety and the design of the defendant is neither new nor original. It is also alleged that the bucket of the defendant also has similar fold as is the fold of the water jug of the plaintiff. As regards legs of the water jugs, it is alleged that these legs are identical to the legs on the vacuum flask of defendant No. 1 which is holding a registered design to be applied by it in respect of that vacuum flask. It is also pointed out that the cap being used by the plaintiff on the water jug is different from the cap shown on its registered design. It is further stated that cap being used by the defendant on its water jugs is altogether different.

3. A perusal of the Certificate of Registration issued by Controller General of Patents, Designs and Trade Marks on 10th June, 2004 would show that the plaintiff-company has been granted registration of design in respect of a water jug. The Certificate would show that novelty in the design is imputed to the shape and configuration of the water jug as illustrated in the Registration Certificate.

4. In **Eastern Engineering Co. Vs. Paul Engineering Co.,** AIR 1968 Calcutta 109, the High Court, inter alia, observed as under:

> "Whether a design is novel is a matter of fact to be decided by the eye. As already indicated, if the same shape or pattern, or one substantially similar, has previously been thought of in

connection with any article of manufacture and the idea published, or registered, then the design will be deprived of its novelty. The previous idea or design, will act as an anticipation of the later design, and will be a bar to its protection. That the eye, and the eye alone, is to be the judge of Identity, and is to decide whether one design is or is not an anticipation of any, has been laid down time and time again in numberless cases.

The question which has to be decided is whether the two appearances are substantially the same or not. The design must be looked at as a whole, the question being whether an article made according to the design under consideration is substantially similar in appearance to an article made according to the alleged anticipation. The test is not only to look at the two designs side by side, but also apart, and a little distance away."

5. The legal proposition is that in order to ascertain whether the impugned design infringes another design which is duly registered or not, the two products need not be placed side by side and the matter has to be examined from the point of view of a customer with average knowledge and imperfect recollection. It needs to be kept in mind that a person coming across the impugned product may not be having the product of the plaintiff with him at the time when he finds the product of the defendant in the market. He, therefore, has no opportunity to compare the two products to compare their similarities and dissimilarities to ascertain which product originates from which source. But, even if the two products are placed side by side, it cannot be disputed that the primary design of the jug of the plaintiff has been copied by defendant No. 1. In fact, there seems to be no distinction in the primary design of the two products. The differences I can notice are in the design of handle and cap. Even the legs of the two jugs appear to be almost identical. As far as the tap is concerned, the knob of the two jugs appears to be similar though the nozzle portion is longer in the jug of the defendant. Another noteworthy feature in this regard is that the lower portion of both the jugs is bigger than the upper portion and the overall shape of the two jugs is identical. It appears to me that any person coming across the water jug being manufactured and sold by defendant No. 1 may easily take it as a product of the plaintiff-company. This is more so in the case of a customer who is illiterate or semi-illiterate and, therefore, may not bother

to read the brand name, written on the two jugs. In the case of **Alert India vs. Naveen Plastics,** 1997 PTC (17), this Court, inter alia held as under:

"Thus for determining whether two designs are identical or not, it is not necessary that the two designs should be exactly the same. The main consideration to be applied is whether the broad features of shape, configuration, pattern etc. are same or nearly the same and if they are substantially the same then it will be a case of imitation of the design of one by the other."

Prima facie, it appears to me that the design adopted by defendant No. 1 for selling its jug is more or less similar to that of the plaintiff except in respect of the lid. Also, there is a strong possibility of defendant No. 1 passing off its water jugs as those of the plaintiff.

6. The learned counsel for the defendant, relying upon the provisions contained in Section 22 (3) of the Designs Act read with Section 19 thereof, has contended that since design got registered by the plaintiff is not a new or original design, the registration granted to the plaintiff-company is liable to be cancelled and, therefore, this is a valid defence available to the defendant in the present suit. Prima facie, I find no merit in this contention. There is no material on record to show that the design got registered by the plaintiff was being used by any other person in India before it was got registered by the plaintiff. It is, therefore, difficult to accept that it is not a new or original design. As rightly contended by the learned counsel for the plaintiff, it is not the jug as a product in which any right is being claimed by the plaintiff. The claim of the plaintiff is confined to the shape and configuration of the product as is also made out from the Certificate, whereby the design was registered and the design used by the defendant is practically a copy of the design of the plaintiff as far as primary shape of the product is concerned.

7. The learned counsel for the defendant has relied upon **Harish Chhabra vs. Bajaj Electricals Ltd and Anr** 2005 (4) ALLMR 3, **Hawkins Cookers Ltd. vs. Zaverchand Liladhar Shah & Ors** 2005 (31) PTC 129 (Bom), **Brighto Auto Industries vs. B. Chawla & Sons PTC** (Suppl), (1) 851 (Del), **Metro Plastic Industries (Regd) vs. M/s Galaxy Footwear New Delhi** 2000 PTC 1(FB), whereas the learned counsel for the plaintiff has relied upon **Castrol India Ltd. vs. Tide**

Water Oil. Co. Ltd 1996 PTC (16).

8. In the case **Harish Chhabra** (supra), respondent No. 1, who was a manufacturer of ceiling fans and claimed to be an inventor of the design of a part of the ceiling fan decorative ring on the central part of the ceiling fan, was granted registration not in respect of any part invented by it, but in respect of the ceiling fan as a whole. Relying upon the decision of House of Lords in the case of **William J. Holdsworth and Ors. Vs. Henry C. M' crea** reported in 1987 2 ia 380, it was held that the Registration Certificate granted by respondent No. 2 in favour of respondent No. 1 was erroneous and it was not in respect of new design invented by respondent No. 1. A perusal of the judgment would show that the learned counsel for the defendant No. 1 conceded before the Court that the fan as a whole could not have been registered and the Certificate of Registration was not in respect of any part or a separate part innovated design but was in respect of the whole of the ceiling fan and the ceiling fan was not the invention nor a new design by the first respondent. However, in the case before this Court, the Registration Certificate by itself made it clear that novelty was claimed on the basis of the shape and configuration and, therefore, the registration is deemed to be limited to the shape and configuration as indicated in the design which has been registered by the Controller General of Patents, Designs and Trade Marks.

In the case of **Hawkins Cookers Ltd** (supra), registration was granted in respect of an entire Tava and not in respect of the handle which the petitioner claimed to have specially designed. Noticing that it was not the case of the petitioner that the Tava was an innovation of the petitioner, it was held that it was not permissible for a party to register the whole of the item but only that part was registered which was its own innovation. Since Tava was not an innovation of the petitioners, the Court was of the view it ought not to have been registered. It was observed that in this case that even a slight innovation or improvement in the design is a design by itself and can be registered as independently innovated design. However, the fact remains that the defendant has not got its design registered, and, therefore, no benefit of this judgment can be claimed by it. As noted earlier that in this case the right being claimed by the plaintiff and the registration granted to it is confined to the shape and configuration of the product and not to the product as a whole.

Registration of the design does not mean that no other person can manufacture a water jug and he cannot use a lid or a tap or legs on the water jug manufactured and sold by him. All these are essential components of a water jug and no one can claim any exclusive right therein. No right can be claimed in respect of the whole of the product unless the products itself is his innovation or in respect of its essential parts unless those parts are of a particular design invented by him. Therefore, what is objectionable in this case is the shape and design used by defendant No. 1. There can be no objection to defendant No. 1 manufacturing and selling any water jug so long as he does not adopt the configuration and shape which the plaintiff-company has got registered in its name. I also perused the decisions in the case of **Brighto Auto Industries and Metro Plastic Industries** (supra). I find no such proposition of law in these judgments which would warrant taking a view contrary to what I am taking. There can be no dispute with the proposition of law that if a design even it is a registered design has no newness or originality in it, it can be got cancelled, but, where a particular design has been invented by a person and there is a novelty factor attached to it, that design cannot be adopted by any other person and if it is done, it would amount to infringement of registered design.

9. In **Castrol India Ltd** (supra), the plaintiff held registration of a design in respect of a non-metallic container having a unique, novel and distinctive shape and configuration. The respondent found using the registered design of the petitioner in respect of the containers in which he was selling automotive lubricants. A suit for injunction was filed by the petitioners for restraining the respondents from infringing its registered design or using a design which was deceptively similar to its registered design. It was claimed by the respondent that there were number of differences in the design being used by it vis-à-vis the design of the plaintiff. It was claimed that there was difference in the colour packaging and shape of the ridges and it was also submitted that several other manufacturers were marketing their product in similar containers and there was nothing unique or original in the design of the petitioner. Rejecting the contention of the respondent, the Court, inter alia, observed as under:

> "The Controller of Patents and Designs registered the petitioner's design because he must have been satisfied that the design was

new and original. Under Section 51A of the Act, it was open to any concern to ask for cancellation of the petitioner's registration of the design if there were any grievance that the petitioner's design was not a new or original design. No such application has been made by concern including the respondents before the Controller.

There is no evidence even prima facie that there was any design like the petitioner's design used in the market prior to the registration of the design in question. The certificate or registration was granted to the petitioner on 13th November, 1990. The two samples of similar containers used by Bharat Petroleum and the Indian Oil Corporation and produced by the respondents bear the dates September 1993 and November, 1993 respectively."

In the case before this Court also, the design of the petitioner being a registered design, prima facie, it is entitled to protection unless it is shown that there was nothing new or original in the design. As noted earlier, there is no evidence of any design identical to the registered design of the plaintiff being used prior to registration granted to the plaintiff. Therefore, prima facie, the plaintiff is entitled to protection of its registered design.

10. For the reasons given in the preceding paragraphs, I am of the view that the defendant cannot be allowed to continue to use the impugned design. Defendant No. 1 is, therefore, restrained from manufacturing or selling any water jug with the impugned design or any other design which would constitutes infringement of the registered design of the plaintiff. However, defendant No. 1 is permitted to liquidate the stock which it has already manufactured, within four weeks from today, subject to its filing an affidavit by tomorrow, i.e., 03rd June, 2011, disclosing the quantity which it has already manufactured.

The applications stands disposed of. The observations made in this order being tentative nature and would not affect the final outcome of the suit.

CS(OS) No. 1181/2011

The parties to appear before the Joint Registrar for admission/ denial of documents on 16th August, 2011.

The matter be listed before the Court for framing of issues on 12th December, 2011.

This matter was heard partly before lunch and was scheduled to be heard further at 2.15 PM. The matter was heard again after lunch and the hearing has concluded at 4.11 PM.

Copy of this order be given dasti under the signature of Court Master.

ILR (2011) V DELHI 762
W.P.(C)

DR. MANOHER SINGH RATHORE ....PETITIONER

VERSUS

UNION OF INDIA AND ORS. ....RESPONDENTS

(KAILASH GAMBHIR, J.)

W.P.(C) NO. : 1671/2011 DATE OF DECISION: 03.06.2011

Constitution of India, 1950—Article 226 Seeking direction to the respondent no.2 hospital to quash the selection made for the single seat of DNB (secondary) in Radiodiagnosis for January 2011 session and allow the petitioner to join the course in question—The petitioner applied in the stream of Radio-diagnosist for the DNB Secondary seats for January 2011 session—Selection of the shortlisted candidates to be made on the basis of marks obtained in the post Graduate course and the admission was to be granted at the time of counseling on the appointed date—Grievance of the petitioner is that in the shorlisted candidates, the petitioner had the first rank and respondent no.4 was third in the said list and at the

time of counseling, instead of there being counseling, an interview took place—In the impugned result, respondent no.4 was declared selected for the single seat in DNB(secondary) Radio Diagnosis instead of the petitioner—The core issue to be examined is whether in the NBE guidelines the selection of the candidates for DNB (Broad Specialty) secondary seats was to be conducted based on the marks obtained by the candidates in their diploma courses followed by the aptitude test or in place of aptitude test it was to be done through the process of counseling not in dispute between the parties that as per the public notice issued by the respondents No.1 & 2 inviting applications for admission in DNB (Broad Specialty) secondary seats for the session January 2011 in the stream of Radiology, the method of selection was prescribed through counseling and not through the aptitude test—The respondent hospital has not disputed the fact that the petitioner having secured 66% marks in his P.G. course was top in the merit list amongst all the said four candidates who had participated in the said counseling/aptitude test, but since the respondent No.4 had secured more marks in the aptitude test, therefore, he surpassed the petitioner in the said selection. Held—The Court does not subscribe to the stand taken by the hospital that the aptitude test or interview is implicit in the term counseling—Had the hospital issued a proper public notice strictly in terms of the NBE guidelines, then the present imbroglio would not have arisen—Petitioner is a well qualified Doctor-not fathomable that he was so naive that he was not aware of the fact that he would be required to appear in the aptitude test/ interview—Even if the respondent hospital committed an error in using the wrong term in the public notice, the petitioner cannot be allowed to take advantage of the same—The petitioner at no stage had lodged any protest, not only with the hospital, but even with the

NBE and it is only when he came to know about his result of being unsuccessful in the said selection, he in utter desperation sought to challenge the selection process by way of filing the present writ petition before this court—It is a settled legal position that the correctness of the selection procedure cannot be challenged by an unsuccessful candidate who had fully participated in the selection process without any protest or demur not the function of the Court to sit over the decisions of the Selection Committee and to scrutinize the relative merit of the candidates unless there is illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the selection, or proved mala fides affecting the selection etc. Taking into consideration the aforesaid legal principles, this Court does not find that the respondent No.2 hospital did not adhere to the laid down criteria as prescribed by the National Board of Education for selecting the candidates for DNB (Broad Specialty) secondary seats and the petitioner cannot be put to any advantageous position simply because an error or lapse was committed by the hospital in the public notice calling the candidates for counseling instead of appearing for the aptitude test/interview—However, a cost of Rs. 50,000/- payable to the Petitioner is imposed upon the respondent hospital for the negligence committed by them in notifying to the candidates the procedure of selection as counseling instead of aptitude test/interview—The hospital shall recover the same from those officers/doctors who were responsible for committing such a lapse/mistake by insertion of the said wrong information in the public notice.

Vide order dated 16.05.2011, a direction was given to the respondent No.2-hospital to categorically name the officer who was responsible for committing such a lapse or mistake in the public notice calling for the candidates to appear in

the counseling instead of aptitude test/interview. Instead of complying with the said direction disclosing the name of the official/officer due to whose negligence or lapse the said public notice did not carry the correct procedure of calling the candidates for selection, the respondent No.2hospital in their affidavit has made an attempt to justify and explain that the term 'counseling' in the advertising must necessarily and contextually as per prevalent practice to be read with the applicable regulations as including the 'interview' for the purpose of assessment/suitability. Such an absurd explanation given by the respondent No.2-hospital deserves outright rejection. Counseling as per the prevalent system was introduced as a single window system of admission based on the merit or rank achieved by a candidate. Counseling in admission process is nowhere defined as such but is the most common and prevalent practice today in almost all educational institutions throughout the country. A day and time is allotted to the candidate according to his rank and at the time of counseling, a student is allowed to choose his choice of stream in the seats on offer on showing of the requisite documents like proof of date of birth, certificates of eligibility, etc. to establish his claim and on the spot admission is granted on deposit of money. Now interview is on the other hand is a totally contrary phenomenon; an evaluation based on questions asked and answers given by the candidate. The two terms however much diluted cannot be by any stretch of imagination be interchangeably used. In this modern age, keeping in view the rapid strides made in the sphere of Information and Technology, the process of online counseling through a centralized system is being undertaken. There are also Post Graduate Medical Courses, admission to which is done by counseling for which in case of an emergency or any exigency is allowed to be attended by any representative of the candidate. If the contention of the counsel for the respondent hospital is accepted that the aptitude test was implicit in the term counseling then how do the prevalent practice of online counseling and attending of the counseling

by a representative can take place, is a question which is beyond the comprehension of this court to answer. Had the respondent No.2-hospital issued a proper public notice strictly in terms of the NBE guidelines, then the present imbroglio would not have arisen. This Court thus does not subscribe to the stand taken by the respondent-hospital that the aptitude test or interview is implicit in the term 'counseling'.

(Para 19)

Another fact which cannot be ignored is that the petitioner at no stage had lodged any protest, not only with the hospital, but even with the NBE and it is only when he came to know about his result of being unsuccessful in the said selection, he in utter desperation sought to challenge the selection process by way of filing the present writ petition before this Court. It is a settled legal position that the correctness of the selection procedure cannot be challenged by an unsuccessful candidate who had fully participated in the selection process without any protest or demur. The Hon'ble Apex Court in the case of **Madan Lal and others vs. State of J & K and others,** AIR 1995 SC 1088,, while dealing with the similar situation, held as under:

> "9. Therefore, the result of the interview test on merits cannot be successfully challenged by a candidate who takes a chance to get selected at the said interview and who ultimately finds himself to be unsuccessful. It is also to be kept in view that in this petition we cannot sit as a Court of appeal and try to re-assess the relative merit of the concerned candidates who had been assessed at the oral interview nor can the petitioners successfully urge before us that they were given less marks though their performance was better. It is for the Interview Committee which amongst others consisted of a sitting High Court Judge to judge the relative merits of the candidates who were orally interviewed in the light of the guidelines laid down by the relevant rules governing such interviews. Therefore, the assessment on merits

as made by such an expert committee cannot be brought in challenge only on the ground that the assessment was not proper or justified as that would be the function of an appellate body and we are certainly not acting as a court of appeal over the assessment made by such an expert committee."

There is also no dispute with the legal position that it is not the function of the Court to sit over the decisions of the Selection Committee and to scrutinize the relative merit of the candidates unless there is illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the selection, or proved mala fides affecting the selection etc. In **Dalpat Abasaheb Solunke & Ors. vs. Dr. B.S.Mahajan & Ors,** AIR 1990 SC 434, it was held as under:

9. It will thus appear that apart from the fact that the High Court has rolled the cases of the two appointees in one, though ˇtheir appointments are not assailable on the same grounds, the Court has also found it necessary to sit in appeal over the decision of the Selection Committee and to embark upon deciding the relative merits of the candidates. It is needless to emphasise that it is not the function of the Court to hear appeals over the decisions of the Selection Committees and to scrutinize the relative merits of the candidates. Whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject. The Court has no such expertise. The decision of the Selection Committee can be interfered with only on limited grounds, such as illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the selection, or proved mala fides affecting the selection etc. It is not disputed that in the present case the University had constituted the Committee in due compliance with the relevant

statutes. The Committee consisted of experts and it selected the candidates after going through all the relevant material before it. In sitting in appeal over the selection so made and in setting it aside on the ground of the so called comparative merits of the candidates as assessed by the Court, the High Court went wrong and exceeded its jurisdiction."**(Para 21)**

Important Issue Involved: The correctness of the selection procedure cannot be challenged by an unsuccessful candidate who had fully participated in the selection process without any protest or demur and it is not the function of the Court to sit over the decisions of the Selection Committee and to scrutinize the relative merit of the candidates unless there is illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the selection, or proved mala fides affecting the selection etc.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Avneesh Garg, Advocate.

FOR THE RESPONDENTS : Mr. Sumeet Pushkarna for the respondents 1&2. Dr. Rakesh Gosain for respondent no.3.

CASES REFERRED TO:

1. *Madan Lal and others* vs. *State of J & K and others,* AIR 1995 SC 1088.
2. *Dalpat Abasaheb Solunke & Ors.* vs. *Dr. B.S.Mahajan & Ors,* AIR 1990 SC 434.

RESULT: Appeal dismissed.

KAILASH GAMBHIR, J.

1. By this petition filed under Article 226 of the Constitution of India, the petitioner seeks a direction to direct the respondent no.2 hospital to quash the selection made for the single seat of DNB(secondary) in

Radiodiagnosis for January 2011 session and allow the petitioner to join the course in question.

2. Facts shorn of unnecessary details relevant for deciding the present petition are that the petitioner applied in the stream of Radiodiagnosis in response to the respondent no.2 hospital's advertisement/ notification published on its website inviting applications for the DNB Secondary seats for January 2011 session where the selection of the shortlisted candidates was to be made on the basis of marks obtained in the Post Graduate course and the admission was to be granted at the time of counseling on the appointed date. The grievance of the petitioner is that in the shortlisted candidates, the petitioner had the first rank owing to his marks in the post graduation and respondent no.4 was third in the said list and at the time of counseling, instead of there ˇbeing counseling, an interview took place and in the impugned result, respondent no.4 was declared selected for the single seat in DNB(secondary) Radio Diagnosis instead of the petitioner. Being aggrieved with the aforesaid act of the respondent no.2 hospital in not following the guidelines of the respondent no.3 National Board of Examinations, the petitioner has preferred the present petition.

3. Mr. Garg, learned counsel appearing for the petitioner argued that the respondent hospital has not followed the criteria laid down by the respondent no.3 NBE whereunder for DNB (Broad Specialty) Secondary Seat, the respondents 1 and 2 could have conducted a counseling and not the aptitude test/interview. Counsel also submitted that the petitioner had scored the highest marks in Diploma in Radio Diagnosis out of the 24 candidates to secure admission in the said DNB Specialty Course. Counsel further submitted that the respondent hospital had no authority to frame their own guidelines and that too in violation of the guidelines framed by the NBE. Counsel also submitted that the report filed by the NBE pursuant to the directions given by this court is contrary to their own guidelines and unjustifiably they have gone to the extent of endorsing the said illegal conduct of the respondent hospital. Counsel also submitted that the NBE guidelines permit the respondent hospital to devise a mechanism of allocating 100 marks by allocating 75% marks to P.G. Diploma, 2.5% marks for experience, 2.5% for academic and 20% for interview. Counsel also stated that even the aptitude test was not conducted by the respondents 1 and 2 in terms of the criteria laid down under the NBE guidelines.

Counsel also submitted that even the selection committee was not constituted by the respondent in terms of clause 1 (c) of the *'Standard Procedure to be followed'* of the NBE guidelines.

4. Counsel further submitted that as per the report submitted by the NBE, the same clearly shows that there was only one expert as an external member although the requirement as per the NBE is equal ratio of experts; external as well as internal. Counsel further submitted that no waitlist was prepared by the respondent in terms of clause 1(f) of the standard procedure laid down under the NBE guidelines. Counsel invited attention of this court to such similar result declared by the Max Super Specialty Hospital wherein they have declared the waitlist of the candidates in order of merit. Counsel also submitted that the respondent hospital also failed to furnish the information to the NBE in terms of clause 2 of NBE guidelines which requires furnishing of every information right from the stage of advertisement till the completion of the process within a period of 10 days from the completion of the admission process. Counsel also submitted that some of the candidates possibly did not participate in counseling on the assumption that the candidate who has scored highest marks in the diploma course would automatically get the seat and had those candidates been aware of the fact that the interview would take place then certainly they would also have participated in that process.

5. Opposing the present petition, counsel for the respondent nos.1 and 2 submitted that the petitioner is estopped by the doctrine of estoppel and acquiescence to challenge the selection process once he had participated in the interview without protest. Counsel also submitted that the petitioner was well aware of the fact that he was to appear in the interview which is the practice prevalent in all the hospitals despite the fact that in the advertisement the term 'counseling' was used and therefore counseling must be read in terms of the prevalent practice and not independent of that. Counsel also submitted that the petitioner had appeared in similar such interviews in other hospitals as well wherein he had failed. Counsel further submitted that the process of selection was broad based and absolutely transparent and the entire record was not only placed before this court but was also placed before the NBE. Counsel also submitted that the Selection Committee duly comprised of two experts from the hospital i.e. HOD and Senior Consultant and one external medical expert who was a professor from G.B. Pant Hospital and one DDG from the

Ministry as observer. Counsel also submitted that similar process was adopted by the hospital to select the candidates for other broad Specialty courses. Counsel also placed reliance on the similar patterns adopted by the other hospitals as placed on record along with the short affidavit. Counsel also submitted that the interview is necessary to assess and rationalize the suitability of the candidates who have qualified diploma course from different institutes of the country.

6. Dr.Rakesh Gosain, learned counsel for the respondent no.3 NBE submitted that for counseling, determination of merit is essential. Counsel submitted that now the NBE has introduced CET for DNB primary and secondary seats and there will be no scope of any such controversy. Counsel also submitted that out of the seven candidates, four candidates came to participate in the counseling at random and it is not that only four top candidates in order of merit came to participate in the said counselling.

7. Counsel for the respondent no.4 submitted that if the counseling was mentioned in the advertisement, the same was meant for all the candidates and not for the petitioner alone and therefore the petitioner cannot claim that he was taken by surprise. Counsel further submitted that the petitioner cannot claim that he was treated differently than the other candidates and therefore he cannot find fault with the decision making process which was uniformly applied to all the candidates. Counsel also submitted that the respondent No.4 had already joined the said course after resigning from Chirayu Medical College, Bhopal and thus now cannot be made to suffer.

8. I have heard learned counsel for the parties and given my thoughtful considerations to the submissions made by them.

9. The principal grievance raised by the petitioner was that the respondent No.2 i.e. Safdarjung Hospital and Vardhman Mahavir Medical College had devised its own selection process, completely contrary to the procedure laid down by the respondent No.3-National Board of Examinations for selecting the candidates for DNB (Broad Specialty) secondary seats in the field of Radiodiagnosis. The petitioner has also raised a grievance that the selection procedure adopted by the respondent No.2-hospital was not transparent besides being totally arbitrary.

10. The Diplomat of National Board (DNB) courses are prestigious and highly specialized advanced courses. So far DNB (Broad Specialty) primary seats are concerned, the selection is now done through a centralized test know as the CET and therefore admission to DNB (Broad Specialty) course for the primary seats is now strictly based on the performance in the said test which is to be followed by centralized counseling conducted by the respondent No.3-NBE Board. As regards DNB (Broad Specialty) secondary seats are concerned, the same system of centralized test through CET will be in force w.e.f. June, 2011 with follow up of single window centralized counseling system for allocation of seats and, therefore, from June, 2011 the selection of candidates for ˇboth DNB primary and DNB secondary seats will be done through a centralized test followed by centralized counseling.

11. This Court in the present case is concerned with DNB (Broad Specialty) secondary seats and that too for January, 2011 session. The core issue to be examined by this Court in the present case is whether in the NBE guidelines the selection of the candidates for DNB (Broad Specialty) secondary seats was to be conducted based on the marks obtained by the candidates in their diploma courses followed by the aptitude test or in place of aptitude test it was to be done through the process of counseling.

12. It is not in dispute between the parties that as per the public notice issued by the respondents No.1 & 2 inviting applications for admission in DNB (Broad) secondary seats for the session January 2011 in the stream of Radiology, the method of selection was prescribed through counseling and not through the aptitude test. The date of counseling announced in the public notice for the said course i.e. DNB (Broad Specialty) seat in Radiology and four other courses was 18.02.2011. There was only one seat for the general category in the stream of Radio diagnosis. At the footnote of the said public notice, it was reiterated that the counseling for the Broad Specialty (secondary seat) will be held on 18.02.2011 at 11 a.m. in the Committee Room. It is also not in dispute that instead of conducting the counseling, the respondents No.1 & 2 had conducted the clinical aptitude test, which they claim was conducted by them strictly as per the NBE guidelines and not in violation of the same.

13. Because of the aforesaid contrary stands taken by the petitioner as well as the respondent No.2-Hospital, this Court vide order dated 07.04.2011 directed the respondent No.3-NBE to examine the entire issue and to report as to whether the selection/admission of the respondent No.4 is in accordance with the criteria laid down by the NBE or not. Pursuant to the said directions, the National Board of Examinations had submitted their report dated 21.04.2011 which is signed by a Committee comprising of five experts in their respective fields. As per the said report, the NBE has taken a categorical stand that in order to determine the merit of the candidate the respondent-Hospital had conducted an aptitude test in accordance with the guidelines of the National Board of Examinations and its own guidelines dated 10.12.2009. In the concluding remarks, the said Committee has clearly taken a view that no deviation was made by the hospital in the selection process from the guidelines laid down by the National Board of Examinations for selection of DNB candidate for the secondary seat.

14. As per the guidelines for admission to DNB programme as placed on record, the following procedure has been laid down to be followed by the respondent-hospital for selecting the candidates for DNB (Broad Specialty) in secondary seats course. The same is reproduced as under:

> "(a) The Aptitude Assessment shall be done in a transparent manner i.e. wide publicity shall be given by the Institution for invitation of the applications, as per the time framed defined by the Board (stated in the accreditation agreement letter).
>
> (b) The concerned Institute shall maintain a complete record of all applicant candidates along with their contact details, which shall be submitted to the Board's office at the end of a selection process (as per format enclosed).
>
> (c) The selection committee/panel of experts appointed by the concerned institutions shall comprise of at least 50% of external members i.e. faculty members not related to the Institute, the panel shall comprise only of subject experts i.e. those specialists who are associated with practice and teaching of the concerned specialty.

> (d) Consultants/Administrators/Promoters of the concerned Hospital cannot be associated with the Hospital's selection process, if any of the close relatives or known person is appearing in the said aptitude assessment test.
>
> (e) The Institute concerned shall evolve objective skills for assessing the professional aptitude of candidates (the model scale for assessment of skills is proposed along with at annexure 9).
>
> (f) The Institute concerned shall prepare a subject wise merit list based on the performance of the candidates equal to the number of seats available & an equal number of candidates in order of merit in the wait list panel.
>
> (h) All candidates shall be treated alike and on equal grounds. There shall not be any kind of preferential weightage (example Institute/state of Graduation, Domestic Candidate etc.) to be given to any kind of candidate on any reason or ground."

15. As per the respondent-hospital, the procedure was strictly adhered by them for selecting the candidates for different streams of DNB (Broad Specialty) secondary seats. The hospital has taken a stand that the same method is being adopted by the hospital for the last several years and even other hospitals accredited with the NBE are following the same process to select the candidates through the said process i.e aptitude test. The documents placed on record by the respondent-hospital clearly show that similar aptitude test/interview test to select the candidates for DNB (Broad Specialty) secondary seats was adopted by Manipal University, Manipal; Northern Railway Central Hospital, New Delhi; RML Hospital, New Delhi; L.V.Prasad Eye Institute, Hyderabad; Rajiv Gandhi Cancer Institute and Research Centre, New Delhi and Holy Spirit Hospital, Mumbai. The public notice dated 31.12.2010 issued by the NBE also clearly states that the process for selecting the candidates for DNB secondary seats will be strictly on the basis of guidelines of NBE and the accredited centres shall have to ensure complete transparency and objectivity in the process. Relevant Clause (C) of the said public notice is reproduced as under.

> "(c) **Secondary DNB seats**
>
> Since a CET for DNB secondary seats shall be conducted wef

June 2011, the NBE accredited hospitals may advertise for DNB secondary seats for Jan 2011 session, however, the selection process and joining of secondary DNB candidates shall be undertaken only after the primary candidates have joined the DNB course. This process shall be strictly on the basis of guidelines of NBE. The accredited centres shall have to ensure complete transparency and objectivity in the process."

16. As per the respondent hospital, they have constituted a Committee of DNB under the Chairmanship of Dr. K.T. Bhowmik, Medical Superintendent which consisted of seven members and 13 course coordinators and in the meeting the said Committee held on 2.12.2009 had decided that the shortlisted candidates will be interviewed by the Interview Board comprising of (i) Medical Superintendent as the Chairman (ii) HOD or the nominated person of the specialty in Safdarjung Hospital (iii) external expert of the concerned specialty from another teaching institute/hospital, preferably from a government teaching institute of Delhi and (iv) a representative from the reserved category. The said Committee further decided that the candidates could apply only for one specialty and they would be called for interview to maintain the ratio of 1:7 depending upon the number of vacancies available. The Committee further decided that the selection in the aptitude test will be comprised of 100 marks and breakup of the same was decided as under:

"4. Regarding Secondary Seats in Broad Specialities

(a) Diploma marks, == experience and achievements to be considered as for short listing and final selection.

(b) Selection will comprise of 100 marks. The break of these marks shall be as follows:

Diploma	-75 marks
Experience & Academic Achievements	-5 marks (Gold, Distinction, Publications)
Interview	– 20 marks"

The NBE guidelines also prescribe for a scale for assessment of aptitude of the candidates which is reproduced as under:

S.No.	Item	Max Marks	
A.	**Knowledge about Clinical Procedures, Surgical Skills, aptitude, Commonly Practiced protocols in the concerned specialty.**		**10**
1.	Awareness about the specialty concerned; Is the candidate aware abut the commonly practiced clinical procedures relevant/applied to the concerned specialty and the scope of specialty	5	
(a)	Not Aware – 0 Marks		
(b)	Somewhat Aware – 2 Marks		
(c)	Aware to a reasonable extent – 3 Marks		
(d)	Possesses sound knowledge – 5 Marks		
2.	Assessment of candidate for aptitude, commonly practiced protocols, knowledge of applied basic sciences, applied broad specialty to the subject.	5	
(a)	Aptitude & Knowledge – Nil		
(b)	Aptitude & Knowledge – Reasonable 2 Marks		
(c)	Aptitude & Knowledge – Above Average 3 Marks		
(d)	Sound Knowledge & Definitive Aptitude – 5 Marks		
B.	**Experience and Academic Achievement, publication and conference attended.**		**10**
(a)	Does not posses any experience – 0 Marks	5	
(b)	Possess some experience in the concerned specialty/allied specialty (has observed procedures/skills), experience less than a year – 2 Marks		
(c)	Possess experience in the concerned		

	specialty (has assisted procedures in the specialty), experience 1-2 years – 3 Marks		
(d)	Definitive experience (independently carried on procedures), possesses at least 2 years of valid experience in the specialty/allied specialty – 5 Marks		
2.	Academic achievement/publications and conference attended	5	
(a)	Does not possess any Academic Aptitude – 0 Marks		
(b)	Possess Academic Aptitude – 2 Marks (Evidence attended at least one conference /CME in sub-specialty concerned)		
(c)	Possesses academic aptitude, is aware about recent publications and has attended at least two conferences in the concerned specialty concerned specialty – 3 Marks		
(d)	Sound Academic Aptitude – attended at least 3 CME/Conference in the specialty – 5 Marks		
	TOTAL MARKS (A + B)	20	
	Marks obtained (out of 20)		
	Rank in Merit List		

17. There were in all seven candidates who were shortlisted by the respondent-hospital to participate in the counseling/aptitude test as per the said ratio of 1:7 and out of seven candidates only four candidates turned up for the said counseling/aptitude test. The respondent-hospital has not disputed the fact that the petitioner having secured 66% marks in his P.G course was top in the merit list amongst all the said four candidates who had participated in the said counseling/aptitude test, but since the respondent No.4 had secured more marks in the aptitude test, therefore, he surpassed the petitioner in the said selection.

18. Thus, the aforesaid background of facts would clearly show that the respondent-hospital has not deviated from the guidelines laid down by the NBE in selecting the candidates for DNB (Broad Specialty) secondary seats through the process of aptitude test/interview. There also cannot be any dispute that once the ultimate selection of a candidate is through an interview/ aptitude test, then the candidate who is possessing higher marks in the diploma course may not necessarily be selected and the candidate with the lower marks in the diploma course in comparison may ultimately get selected. Once the respondent-hospital has followed the procedure laid down by the NBE then the disturbing question is where did the things go wrong and who is responsible for the same. The surprising part is that once it is laid down in the NBE guidelines that the selection process will be through the aptitude test/interview then how in the public notice the respondent-hospital could have notified the criteria of selection through counseling.

19. Vide order dated 16.05.2011, a direction was given to the respondent No.2-hospital to categorically name the officer who was responsible for committing such a lapse or mistake in the public notice calling for the candidates to appear in the counseling instead of aptitude test/interview. Instead of complying with the said direction disclosing the name of the official/officer due to whose negligence or lapse the said public notice did not carry the correct procedure of calling the candidates for selection, the respondent No.2hospital in their affidavit has made an attempt to justify and explain that the term 'counseling' in the advertising must necessarily and contextually as per prevalent practice to be read with the applicable regulations as including the 'interview' for the purpose of assessment/suitability. Such an absurd explanation given by the respondent No.2-hospital deserves outright rejection. Counseling as per the prevalent system was introduced as a single window system of admission based on the merit or rank achieved by a candidate. Counseling in admission process is nowhere defined as such but is the most common and prevalent practice today in almost all educational institutions throughout the country. A day and time is allotted to the candidate according to his rank and at the time of counseling, a student is allowed to choose his choice of stream in the seats on offer on showing of the requisite documents like proof of date of birth, certificates of eligibility, etc. to establish his claim and on the spot admission is granted on deposit of money. Now interview is on the other hand is a totally contrary

phenomenon; an evaluation based on questions asked and answers given by the candidate. The two terms however much diluted cannot be by any stretch of imagination be interchangeably used. In this modern age, keeping in view the rapid strides made in the sphere of Information and Technology, the process of online counseling through a centralized system is being undertaken. There are also Post Graduate Medical Courses, admission to which is done by counseling for which in case of an emergency or any exigency is allowed to be attended by any representative of the candidate. If the contention of the counsel for the respondent hospital is accepted that the aptitude test was implicit in the term counseling then how do the prevalent practice of online counseling and attending of the counseling by a representative can take place, is a question which is beyond the comprehension of this court to answer. Had the respondent No.2-hospital issued a proper public notice strictly in terms of the NBE guidelines, then the present imbroglio would not have arisen. This Court thus does not subscribe to the stand taken by the respondent-hospital that the aptitude test or interview is implicit in the term 'counseling'.

20. It is not dispute that the petitioner is a well qualified Doctor possessing the Diploma in Medical Radiodiagnosis and was seeking admission in the specialized course of DNB (Broad Specialty) in secondary seat in the respondent hospital. It seems that the petitioner wants to take undue advantage of the said mistake committed by the respondent No.2-hospital in the said advertisement as an aspirant who wants to pursue a DNB course would apply in not one but many other hospitals accredited with the NBE and it is not fathomable that he was so naive that he was not aware of the fact that he would be required to appear in the ˇaptitude test/interview. Hence, even if the respondent hospital committed an error in using the wrong term in the public notice, the petitioner cannot be allowed to take advantage of the same.

21. Another fact which cannot be ignored is that the petitioner at no stage had lodged any protest, not only with the hospital, but even with the NBE and it is only when he came to know about his result of being unsuccessful in the said selection, he in utter desperation sought to challenge the selection process by way of filing the present writ petition before this Court. It is a settled legal position that the correctness of the selection procedure cannot be challenged by an unsuccessful candidate who had fully participated in the selection process without any protest

or demur. The Hon'ble Apex Court in the case of **Madan Lal and others vs. State of J & K and others,** AIR 1995 SC 1088,, while dealing with the similar situation, held as under:

> "9. Therefore, the result of the interview test on merits cannot be successfully challenged by a candidate who takes a chance to get selected at the said interview and who ultimately finds himself to be unsuccessful. It is also to be kept in view that in this petition we cannot sit as a Court of appeal and try to re-assess the relative merit of the concerned candidates who had been assessed at the oral interview nor can the petitioners successfully urge before us that they were given less marks though their performance was better. It is for the Interview Committee which amongst others consisted of a sitting High Court Judge to judge the relative merits of the candidates who were orally interviewed in the light of the guidelines laid down by the relevant rules governing such interviews. Therefore, the assessment on merits as made by such an expert committee cannot be brought in challenge only on the ground that the assessment was not proper or justified as that would be the function of an appellate body and we are certainly not acting as a court of appeal over the assessment made by such an expert committee."

There is also no dispute with the legal position that it is not the function of the Court to sit over the decisions of the Selection Committee and to scrutinize the relative merit of the candidates unless there is illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the selection, or proved mala fides affecting the selection etc. In **Dalpat Abasaheb Solunke & Ors. vs. Dr. B.S.Mahajan & Ors,** AIR 1990 SC 434, it was held as under:

> 9. It will thus appear that apart from the fact that the High Court has rolled the cases of the two appointees in one, though their appointments are not assailable on the same grounds, the Court has also found it necessary to sit in appeal over the decision of the Selection Committee and to embark upon deciding the relative merits of the candidates. It is needless to emphasise that it is not the function of the Court to hear appeals over the decisions of the Selection Committees and to scrutinize the relative merits of

the candidates. Whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject. The Court has no such expertise. The decision of the Selection Committee can be interfered with only on limited grounds, such as illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the selection, or proved mala fides affecting the selection etc. It is not disputed that in the present case the University had constituted the Committee in due compliance with the relevant statutes. The Committee consisted of experts and it selected the candidates after going through all the relevant material before it. In sitting in appeal over the selection so made and in setting it aside on the ground of the so called comparative merits of the candidates as assessed by the Court, the High Court went wrong and exceeded its jurisdiction."

22. Taking into consideration the aforesaid legal principles, this Court does not find that the respondent No.2hospital did not adhere to the laid down criteria as prescribed by the National Board of Education for selecting the candidates for DNB (Broad Specialty) secondary seats and the petitioner cannot be put to any advantageous position simply because an error or lapse was committed by the hospital in the public notice calling the candidates for counseling instead of appearing for the aptitude test/interview.

23. Another objection raised by the counsel for the petitioner was that the selection committee was not constituted by the respondent in terms of clause 1(c) of the Standard Procedure of the NBE guidelines. The said clause of the NBE guidelines envisages that the selection committee/panel of experts to be appointed by the concerned institute shall comprise of at least 50% of external members and such a panel shall comprise only of subject experts. In the report filed by the NBE, the stand that has been taken is that to make the admission process transparent, Vardhman Mahavir College and Safdarjung Hospital had framed the guidelines dated 10.12.2009 for conducting the aptitude test in accordance with National Board of Examinations guidelines. As per the respondent hospital, the said guidelines were framed by the hospital in its meeting held on 2.12.2009 under the chairmanship of Medical Superintendent, wherein the decision was taken that shortlisted candidates

will be interviewed by a Board comprising of (i) Medical Superintendent, Chairman (ii) H.O.D. or nominated person of the specialty in SJH (iii) An external expert of the concerned specialty from another teaching institution/ hospital preferably from a Govt. teaching institute of Delhi (iv) A representative from reserved category.

24. Counsel for the petitioner has not disputed the fact that the selection committee comprised of two external members and two experts from the hospital. Counsel for the respondent hospital has also not disputed the fact that only one external member was the expert in the concerned specialty while the other external member was in the capacity of observer. The said clause 1(c) does provide that the interview board should comprise of two external experts and two internal experts but so far the panel constituted by the respondent hospital was concerned, the same comprised of one expert and one external member as an observer. It has also come on the record that the said panel was constituted by the respondent strictly in terms of their own guidelines decided by the hospital in their meeting held on 2.12.2010. The NBE has also taken a stand that the aptitude test was conducted by the respondent hospital strictly in accordance with the guidelines of the NBE and the guidelines of the hospital dated 10.12.2009.

25. In the light of this factual position, not much can be seen gathered to say if one external member was an external expert or not. It is not the case of the petitioner that the respondent hospital had violated its own guidelines or committed any act targeting the petitioner to oust him from the selection. It cannot be lost sight of the fact that all other DNB candidates be it of primary seats or secondary seats were interviewed by the interview board constituted by the hospital in terms of the above guidelines and therefore in the absence of any specific allegation of malafides or bias, the plea raised by the counsel for the petitioner attacking the constitution of selection committee in violation of the NBE guidelines does not cut any ice.

26. There are also certain other objections raised by counsel for the petitioner castigating the selection process, but considering the fact that in the petition there are no clear allegations of malafide or arbitrariness against the members of the Selection Committee and also the fact that other candidates had also passed through the same process of selection as was undergone by the petitioner in the stream of Radiodiagnosis,

therefore, the said objections in the absence of any extraneousness, allegations of malafide or bias do not deserve any attention. Once there was a complete uniformity in the selection process and highest number of marks i.e. 75% marks were allocated to the PG diploma course, 2.5% for experience and 2.5% for academic, this Court does not find allocation of 20% marks for interview in any case on higher side when there was also a detailed scale of assessment of the aptitude as has been reproduced above. Written examination assesses the man's intellect and the interview tests the man himself and the twain shall make the selection proper and no suspiciousness can be attributed to the selection process if in the aptitude test the respondent No.4 secured higher marks than the petitioner, although in the diploma course he might have secured lesser marks.

27. Hence, In the light of the above discussion, this Court does not find any merit in the present petition and the same is hereby dismissed.

28. However, a cost of Rs.50,000/-is imposed upon the respondent-hospital for the negligence committed by them in notifying to the candidates the procedure of selection as counseling instead of aptitude test/interview. Cost shall be paid by the respondent-hospital to the petitioner within a period of two weeks from the date of this order. After payment of the said cost, the hospital shall recover the same from those officers/doctors who were responsible for committing such a lapse/mistake by insertion of the said wrong information in the public notice. Compliance affidavit shall be filed by the respondent No.2-hospital within a period of two months from the date of this order.

ILR (2011) V DELHI 784
TEST CAS.

SHRI NAGINDER SINGH SOOD ....PETITIONER

VERSUS

STATE & ORS. ....RESPONDENTS

(MANMOHAN SINGH, J.)

TEST CAS. NO. : 71/1987 DATE OF DECISION : 03.06.2011

Indian Succession Act, 1925—Section 276—Petition for grant of probate/letters of administration against the relations of testator who died on 17.11.1986 after attaining the age of 75 years—Prior to that, he had executed a Will dated 16.09.1986 as his last Will and Testament—The main objections were that the Will of testator has been forged and he never executed the alleged Will and never presented himself before the Sub-Registrar for the execution of the Will—The petitioner has procured the alleged will with fraudulent and unfair means and the same is liable to be rejected—The petitioner has denied all the allegations raised by the respondents. Held—In probate cases, the Courts have to first determine whether the propounder of the Will has discharged the burden placed on him by law under Section 68 of Indian Evidence Act and Section 63 of Indian Succession Act—This burden placed on the propounder would be discharged by proof of testamentary capacity and proof of the signatures of the testator—The burden then shifts on the contesting party to disclose prima facie existence of suspicious circumstances, after which the burden shifts back to the propounder to dispel the suspicion by leading appropriate evidence—In the present case, it was disputed by the objectors that

the Will dated 16.9.1986, was registered and last Will of the deceased. The petitioner was executor of the Will—The petitioner had also adduced the evidence of the witnesses—After this, the burden is shifted to the contesting party to prove the existence of suspicion. On the face of it, the contesting parties failed to discharge their burden of existence of suspicious circumstances averred by them in their objection—On the other hand, it was a registered Will—The original Will has been proved by the petitioner. Both the witnesses have filed their affidavits alongwith the petition and one of the witnesses who filed his affidavit as evidence was also cross examined by the contesting respondents, despite that the respondents were not able to disapprove the Will produced by the petitioner—The objections raised by the objector were not proved in evidence, rather, the deponent/objector did not appear for cross examination despite various opportunities granted to him—Thus, the respondents have totally failed to prove objections set up by them by adducing even iota of evidence—Petitioner granted probate of the Will dated 16.09.1986 subject to the petitioner filing necessary court fee on the value of the immovable property as stated in the Will.

In probate cases, the Courts have to first determine whether the propounder of the Will has discharged the burden placed on him by law under Section 68 of Indian Evidence Act and Section 63 of Indian Succession Act. This burden placed on the propounder would be discharged by proof of testamentary capacity and proof of the signatures of the testator. The burden then shifts on the contesting party to disclose prima facie existence of suspicious circumstances, after which the burden shifts back to the propounder to dispel the suspicion by leading appropriate evidence.

(Para 18)

In the present case, it was disputed by the objectors that the Will dated 16.9.1986, was registered and last Will of the

deceased. The petitioner was executor of the Will. The petitioner had also adduced the evidence of the witnesses. After this, the burden is shifted to the contesting party to prove the existence of suspicion. In the present case, the objections were filed by the respondents Sh. Naresh Sood, Sh. M.N. Sood, Sh. S.K. Sood and Sh. J.K. Sood and the matter was also contested by the legal representatives of the deceased, Sh. Ramesh Chander Sood who was impleaded as respondent No. 7, and after his death by his wife Smt. Prakash Wati Sood and respondent No. 7A Sh. Manjul Sood. **(Para 20)**

The affidavit of Manjul Sood S/o Sh. Ramesh Chander Sood was also filed. No other relatives adduced any evidence. It appears from the record that despite opportunity given to the deponent to appear for cross-examination, the witnesses were not present. Therefore, the Joint Registrar vide order dated 15.02.2011 could not find any reasonable explanation from the respondent side for non appearance of the witness and concluded the evidence. On the face of it, the contesting parties failed to discharge their burden of existence of suspicious circumstances averred by them in their objection. On the other hand, it was a registered Will. The original Will has been proved by the petitioner. Both the witnesses have filed their affidavits alongwith the petition and one of the witnesses who filed his affidavit as evidence was also cross examined by the contesting respondents, despite that the respondents were not able to disapprove the Will produced by the petitioner. The objections raised by the objector were not proved in evidence, rather, the deponent/objector did not appear for cross examination despite of various opportunities granted to him. Thus, the respondents have totally failed to prove objections set up by them by adducing even iota of evidence. Therefore, the objections are rejected.

(Para 21)

Important Issue Involved: If the propounder of the Will has discharged the burden placed on him by law under Section 68 of Indian Evidence Act and Section 63 of Indian Succession Act by proof of testamentary capacity and proof of the signatures of the testator, the burden then shifts on the contesting party to disclose prima facie existence of suspicious circumstances, after which the burden shifts back to the propounder to dispel the suspicion by leading appropriate evidence.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. S.C. Singhal, Advocate.

FOR THE RESPONDENT : None.

CASE REFERRED TO:

1. *H. Venkatachala Iyenger* vs. *B.N. Thimmajamma,* AIR 1959 SC 443.

RESULT: Petition Allowed.

MANMOHAN SINGH, J.

1. The petitioner Sh. Naginder Singh Sood has filed the present petition for grant of probate/letters of administration of the Will dated 16.09.1986 executed by late Shri Roshal Lal Sood S/o Sh. Brijlal Sood under Section 276 of the Indian Succession Act. The case of the petitioner is that late Sh. Roshal Lall Sood S/o. Sh. Brij Lall Sood, resident of R-580, New Rajinder Nagar, New Delhi died on 17.11.1986 at Delhi, while he attained the age of 75 years. He had executed a Will dated 16.09.1986 at New Delhi as his last Will and Testament. The original Will is annexed in the petition. The deceased was an ordinary resident of Delhi and he died at Delhi. the deceased owned ½ share in the immovable property (mutually divided) bearing No. R-580, New Rajinder Nagar, New Delhi, three fixed deposits and savings bank accounts and a locker in respect of which the probate/letter of administration is sought.

2. The deceased Sh. Roshal Lall Sood was issueless and his wife died in the year 1962, since then the deceased was living in house No.

R-580, New Rajinder Nagar, New Delhi in which ½ share was owned by the deceased and other half share by his brother-in-law (sala). The deceased lived all alone after the death of his wife. The deceased bequeathed his entire assets including movable and immovable property to Master Avneet Sood S/o. Sh. Naginder Singh Sood, who is grandson of Lt. Sh. Phalwant Singh his brother-in-law, solely and exclusively.

3. The property/assets in respect of which probate/letter of administration is being claimed in the present petition is described in more detail in Annexure – A to this petition. The list of all the legal heirs/near relatives is also given in Annexure-B to this petition.

4. The petitioner is the named executor of the Will, therefore, he is competent to apply for the letters of administration/probate in respect of the Will dated 16.09.1986 executed by the deceased Sh. Roshan Lall Sood.

5. The deceased had fixed place of abode at Delhi. He died at Delhi and he was having immovable property at Delhi and as such this Court has territorial jurisdiction to entertain the present petition. It is stated in the petition that no application has been made to any other court for grant of probate/letter of administration of the aforesaid Will and the estate of Lt. Sh. Roshal Lall Sood by the petitioner or anybody else.

6. The detail of the list of properties, movable and immovable, along with the value thereof left by the deceased reads as under:

	MATURITY DATE
FDR No. TB 526033 dated	14.01.1990
14.01.1985 for Rs. 46,000/- with	
State Bank of India (Main	
Branch (PBD) New Delhi.	
FDR No. U 328804 dated	02.07.1988
05.07.1983 for Rs. 30,000/- with	
State Bank of India (PBD Main	
Branch), New Delhi.	
FDR NO. TE 515038 dated	02.05.1990
02.05.1985 for Rs. 10,000/- with	

State Bank of India (PBD Main	
Branch) New Delhi.	
Saving Bank A/c No. 12940	
with the State Bank of India	
Main Branch balance as on	
29.11.1986 is Rs. 2771.26/-.	
Share in property No. R-580,	
New Rajinder Nagar, New Delhi amounting to Rs. 2,50,000/-.	

7. The present petition has been filed against the relations the details of which are mentioned in annexure B of the petition as well as in the amended memo of parties. The relation No.7 Sh. Ramesh Chander Sood, passed away during the pendency of the present petition and his wife Smt. Prakash Wati Sood, and son Sh. Manjul Sood were impleaded as respondent Nos. 7 and 7 A in place of Sh. Ramesh Chander Sood.

8. Objections were filed by the respondents Sh. Naresh Sood, Sh. M.N. Sood, Sh. S.K. Sood and Sh. J.K. Sood.

9. The main objections were that the Will of Lt. Sh. Roshal Lall Sood has been forged and he never executed the alleged Will and never presented himself before the Sub-Registrar, New Delhi for the execution of the Will. The petitioner has procured the alleged will with fraudulent and unfair means and the same is liable to be rejected. Para 3 of the alleged Will reads as under:

> "I have one sister who is married and I have absolutely no relation with her. I have not seen her for the last more than 10 years and I am not on visiting terms with her."

10. It is also alleged in the objections that the statement of the deceased was absolutely false, frivolous and shows beyond reasonable doubts that the alleged Will has not been executed by Sh. Roshal Lall Sood because of the reason that Smt. Maya Devi, sister of the deceased expired in 1929 at Hoshiarpur and the respondent Nos. 7 and 8 are the real sons of Lt. Smt. Maya Devi. The objection was also taken, that at the time of execution of the alleged Will the executant Lt. Sh. Roshal Lall Sood did not have a sound and disposing mind and the petitioner has not

disclosed the entire property of the deceased and on this ground the petition is liable to be dismissed. The alleged signatures of the Executant as shown on the alleged Will are different on each page and it shows that some dummy person with some malafide has put the signatures of Lt. Sh. Roshan Lall Sood, in fact, some other person has signed as Sh. Roshal Lall Sood and committed a fraud.

11. The annexure B is the list of relations/legal heirs of the deceased. the detail of the same are mentioned as under:

1. Shri. Naresh Sood, S/o. Late P.L. Sood, R/o. B-38, Pushpanjali Enclave, Near Saraswati Vihar Bus Stand Terminal, Pitampura, New Delhi.
2. Mr. M.N. Sood, S/o. Late Sh. P.L. Sood, R/o. 242, Desh Bandhu Apartment, Kalkaji, New Delhi.
3. Mr. S.K. Sood, S/o. Late Sh. P.L. Sood, R/o. 229, MIG Flat, Rajouri Garden, New Delhi.
4. Mrs. Saroj alias Sudershna Dosaj, R/o. 51 Ara Goan Avenue, Surrey (UK).
5. Mr. Sanjeev Sood, S/o Late Shri Santosh Sood, R/o. Ashapuri Agar Nagar, Ludhiana (PB).
6. Mr. Ramesh Chander Sood, Kailash R/o. Cottage Bazar, Vakillan, Hoshiarpur (PB).
7. Mr. J.K. Sood, C/o. Delhi Press Jhandewalan Extension, New Delhi.

12. It is also a matter of record that along with the probate petition an affidavit of Sh. Shiv Raj Singh Tyagi and Sh. Ratan Singh who were the attesting witnesses of the Will dated 16.09.1986 have been filed. In the rejoinder/replication, the petitioner has denied all the allegations raised by the respondents who have filed the reply. It is denied by the petitioner, that the Will propounded by the petitioner is a forged and fabricated one. It is also denied that it does not bear the signature of Lt. Sh. Roshal Lall Sood and that he did not appear himself before the Sub-Registrar at the time of registration of the Will. The petitioner has no concern about the family relations of the deceased. The petitioner did not know whether the deceased ever had any sister or not. The Will propounded by the petitioner is a genuine and authentic one and it was executed by Lt. Sh. Roshan

Lall Sood himself and it bears the signatures of the deceased. Till the time of death, the deceased lived with the petitioner and his family and he remained mentally alert. The petitioner has also filed an affidavit dated 29.12.1993 wherein he produced the original photographs of Lt. Sh. Roshal Lall Sood and also filed the true and correct pedigree table of Lt. Sh. Roshal Lall Sood. As per the affidavit, Sh. Roshal Lall Sood had one brother and one sister and both of them predeceased Lt. Sh. Roshal Lall Sood, who died issueless and his wife predeceased him in the year 1962.

13. The petitioner Sh. Naginder Singh Sood, who was the executor in respect of the Will dated 16.03.1986 died on 18.03.2003 at Delhi. His death certificate is placed on record as exhibit P-1 and he left behind the Avneet Sood, the present petitioner and respondent No.1 Sh. Amit Sood, his two sons as his legal heirs. Sh. Amit Sood is the brother of the present petitioner. As per petitioner, Amit Sood is living abroad and has no objection on grant of letter of Administration in favour of the petitioner. The amended memo of parties dated 29.04.2003 is also placed on record. As already mentioned, the two witnesses namely the new petitioner Avneet Sood S/o. Lt. Sh. Naginder Singh Sood, the original petitioner, and Sh. Ratan Singh adduced the evidence as PW-1 and PW-2 in support of the case of the petitioner conforming the statement made in the probate petition. As far as one of the witnesses Ratan Singh is concerned, the affidavit dated 19.02.2009 has been filed wherein he has stated as under:

> "I was working with M/s. H.S. Ahuja & Co. Chartered Accountant Connaught Place from where he has retired in the year 1985. That I had been looking the private work on various income tax asseesees. Sh. Naginder Singh Sood was known to me as he was getting his accounts work and other income tax work done through M/s. H.S. Ahuja & Co. and in these circumstances I had been dealing with him being an employee of M/s. H.S. Ahuja & Co. I had been visiting the house of Sh. Naginder Singh Sood at R-580, New Rajinder Nagar, New Delhi where he was residing as many a times I required to get certain signatures from him and sometime to collect documents or sometime to deliver the documents. His house was on the way to my house. He had been seeking my advice for investment purposes and similarly I had been meeting Shri Roshan Lall Sood his Phoofard (husband of his father's sister) who was also living

> in the same property on the ground floor. Shri Roshan Lall Sood was also developed intimacy with me during my visits. During one of my visits in the first week of the month of September, 1986 Shri Roshan Lall Sood told me that he has prepared his Will which is required to be signed by two attesting witnesses and as such requested me to sign the same as an attesting witness. On the said date my other friend Shri Shiv Raj Tyagi was also with me and as such both of us signed the same as an attesting witness. Shri Roshan Lall Sood firstly signed the Will on each page in my presence and in the presence of Shri Shiv Raj Singh Tyagi. I can identify his signatures as he signed in my presence and his signatures are at Point A on each page and also at the back of the first page at two places.
>
> Thereafter on his request I signed as an attesting witness and my signatures are at Point B and entire address is in my handwriting. Signature at Col. 2 were kept blank at that time as Shri Roshan Lall Sood that those are required to be signed by an Advocate who will get the Will registered on some later date, however, Shri Shiv Raj Singh Tyagi signed the same in his presence and my presence as one of the attesting witness who was with me. I can identify his signature as he was friendly to me and his signature are at Point C on last page and also at back of the first page. My signatures are also appearing on the back of the first page at Point B.
>
> Thereafter on 10.10.1986 I was to go in respect of determining the valuation of some property at Asaf Ali Road and as such I told Shri Roshal Lall Sood that the Will cane be get registered on the said date. Therefore, I reached at Asaf Ali Road on 10.10.1986 where Shri Roshan Lall Sood was already present and I summoned Shri Shiv Raj Singh Tyagi who was working at Delhi Stock Exchange at that time. Shri Roshan Lall Sood also requested one Advocate present there to sign the said Will who also signed the said Will at Col. 2 at the end but he demanded Rs. 2,000/- for his signature. Shri Roshan Lall Sood refused to pay him hence he scored off his signature and refused to present the Will. Thereafter Shri Roshan Lall Sood requested other lawyers but they refused to sign as an attesting witness and help him to

present in presentation of the Will. In these circumstances me, Shri Shiv Raj Singh Tyagi and Shri Roshan Lall Sood together went to the Sub-Registrar and told him none of the lawyer was ready to sign and as such Sub-Registrar entertained us and directed registration of the Will. Thereafter the said Will was registered.

Shri Roshan Lall Sood was having sound disposing mind at the time of execution and registration of the Will rather till his death."

14. The affidavit of Mr Avneet Sood is marked as exhibit PW1/A and three documents have been proved namely the death certificate of Sh. Naginder Singh Sood as exhibit P-1, the death certificate of Sh. Roshan Lall Sood as exhibit P-2 and the original Will of Lt. Sh. Roshan Lall Sood as exhibit P-3.

15. PW-1 was cross examined by the counsel for the respondent No. 7(a) & (b). In the cross examination, PW-1 deposed that the original petition does not bear his signature. His date of birth is 23.02.1972. He did not produce the birth certificate. At the time of execution of the will he was in 7th or 8th standard. He does not know when Sh. Roshan Lall Sood retired from the service. However, he was aware that he was working in the government department but he did not know the name of that department. He also did not know the name of relatives of Lt. Sh. Roshan Lall Sood. He did not know whether Roshan Lall had a sister who predeceased him. He deposed that the Will dated 16.09.1986 was executed in his presence. His father, Rattan Singh, his brother Amit Sood and Mr Tyagi were also present at the time of execution of the said Will. He was not aware as to who wrote the said Will. He deposed that the signatures of witness on the Will were almost similar, however, the signatures on the marginal of the Will were not similar as there is some variation from page to page. He denied that Sh. Roshan Lall Sood had expired at the age of 90 years. He voluntarily deposed that Sh. Roshan Lall Sood expired at the age of 65 to 75 years as he was too young to know the exact age of the deceased. He denied that Sh. Roshan Lall was very old, feeble and sick and unable even to walk just before his death. He confirmed that he accompanied the testator at the time of registration of the Will and went to the office of Sub-Registrar on 10.10.1986 between 12 to 12:30 pm. His father, brother, Mr. Tyagi and Mr Rattan Singh also accompanied him. He denied the suggestion that his father has forged the

Will with the help of other witnesses. He also denied that they had not impleaded the other relatives of Mr Roshan Lall Sood intentionally, despite knowing that they were visiting Mr. Roshan Lall Sood on regular basis. He also denied that the Will was forged in order to grab the property of the testator as he was old, sick and unable to walk properly. He further denied that the testator was 90 years old at the time of death and was not of sound mind. He also denied that the brother in law of Sh. Roshan Lall Sood pressurized him for a loan of Rs. 5 lakhs and that Mr Roshan Lall Sood died in mysterious circumstances.

16. The other witness PW-2, Mr Ratan Singh was cross examined by the relation of respondent No.7 (a) and (b). He deposed in his cross examination that prior to the execution of the Will he met Roshan Lall several times. He stated that he do not know the names of the relatives of Mr. Roshan Lall. He deposed that he had never met with any relative of Mr Roshan Lall. He do not know what was the age of Mr Roshan Lal in 1986 but by that time he had already retired from the service. In 1986, probably he was between 70 to 72 years. He deposed that he do not know from which department Mr Roshan Lall retired. The Will was executed in 1986 but he did not know the exact date. He confirmed that the Will was not written in his presence and he was not aware as to who wrote the same. He admitted that the signature on column 2 was kept blank at that time as the testator told that those are required to be signed by an advocate. He was also not aware whether the Will was got prepared from an advocate or any other person. He admitted that the name of the scribe is not mentioned on the Will. He denied the suggestion that Sh. Roshan Lall was not keeping good health in September 1986 and was sick, feeble and unable to walk. He also denied that there was any squint in one eye of Mr Roshan Lall. According to him he visited the house of Nagender Singh Sood, the petitioner on that day to take his signature on some papers, where Roshan Lall met him and requested him to witness the Will. The second witness Sh. Shiv Raj Singh Tyagi was known to him as he was working with him as a part time accountant, and on that day he accompanied him. He admitted that Lt. Sh. Roshan Lall Sood called him to witness the said Will. He further stated that Mr. Tyagi had already expired and he did not mention about the death in his affidavit. He denied the suggestion that he had prepared a false Will with the connivance of Mr Nagender Singh Sood and due to that reason Mr. Tyagi refused to appear as a witness in the matter. He stated that the Will

was not registered on the same day but was got registered in October 1986 probably between 9th to 11th October, 1986. He confirmed that at the time of execution of the Will Mr. Nagender Singh, Mr Tyagi, mother of Nagender Singh, wife of Nagender Singh, both sons of Nagender Singh were also present at the time of signing of the Will. He stated that nobody called him for the registration of the Will. He admitted that there is a cutting at portion 'A' marked now in the original Will and the name of the person is not legible. He stated that he cannot say as to whether Sh. Roshan Lall knew him or not. He deposed that Sh. Roshan Lall contacted a person, who was an advocate to present the Will for registration. He voluntarily stated that the said advocate demanded more money but testator was willing to give only Rs. 1000/- while his demand was Rs. 2,000/- therefore, his name was struck off at portion 'A'. He stated that it is correct that the factum of Rs. 1000/- is not mentioned in his affidavit of evidence. He stated that he called Mr. Shiv Raj Tyagi to sign the Will. He agreed that Shiv Raj Tyagi had not signed in the column of witnesses mentioned in the Will. On the question as to whether Shiv Raj Tyagi had signed the Will at place marked B, now in September 1986 or in October 1986 he answered that Shiv Raj Tyagi had signed at place B in October 1986 when he was called by him at Sub-Registrar.s office, Asaf Ali Road. He denied the suggestion that Lt. Sh. Roshan Lall Sood was bed ridden and old and feeble and unable to walk at the time of execution of the Will. He also denied the suggestion that Lt. Sh. Roshan Lall Sood died in mysterious circumstances.

17. The evidence by way of affidavit dated 18.08.2010 of one of the objectors namely Mr. Manjul Sood, S/o Lt. Sh. Ramesh Chander Sood (original respondent No.7) has also been adduced. No other relative/ respondent adduced the evidence. In the evidence, similar statement has been made as stated in the objection filed by the original respondent No.7. In the affidavit he deposed that the affidavit bears his signatures at Point A and B and the affidavit is marked as exhibit DW-1/A and also refers exhibit D-1 and D-2 as documents filed along with the affidavit. Objection was raised by the learned counsel for the petitioner that the said documents D-1 and D-2 could not be taken on record as these two documents were not filed on record earlier . Neither any leave was sought by the respondent to bring these documents on record. The learned counsel for the respondent sought an adjournment to take appropriate steps to bring these documents on record therefore, the

examination-in-chief was deferred to 25.11.2010. Thereafter, the application being I.A. No. 15304/2010 under Order 8 Rule 1-A CPC was filed by the respondent and the notice was issued in this regard and the said application was dismissed on merit.

18. In probate cases, the Courts have to first determine whether the propounder of the Will has discharged the burden placed on him by law under Section 68 of Indian Evidence Act and Section 63 of Indian Succession Act. This burden placed on the propounder would be discharged by proof of testamentary capacity and proof of the signatures of the testator. The burden then shifts on the contesting party to disclose prima facie existence of suspicious circumstances, after which the burden shifts back to the propounder to dispel the suspicion by leading appropriate evidence.

19. The law in this regard has been elaborated in **H. Venkatachala Iyenger -vs- B.N. Thimmajamma,** AIR 1959 SC 443, as follows:

> 18. What is the true legal position in the matter of proof of wills? It is well-known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under Section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Sections 45and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, Sections 59 and 63 of the Indian Succession Act are also relevant. Section 59provides that every

person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the

dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

20. 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'Monday, December 27, 2010s 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 suspicious circumstances 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.

22. It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. It is quite true that, as observed by **Lord Du Parcq in Harmes v. Hinkson 50 CWN 895**, "where a will is charged with suspicion, the rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is

never required to close his mind to the truth". It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect."

20. In the present case, it was disputed by the objectors that the Will dated 16.9.1986, was registered and last Will of the deceased. The petitioner was executor of the Will. The petitioner had also adduced the evidence of the witnesses. After this, the burden is shifted to the contesting party to prove the existence of suspicion. In the present case, the objections were filed by the respondents Sh. Naresh Sood, Sh. M.N. Sood, Sh. S.K. Sood and Sh. J.K. Sood and the matter was also contested by the legal representatives of the deceased, Sh. Ramesh Chander Sood who was impleaded as respondent No. 7, and after his death by his wife Smt. Prakash Wati Sood and respondent No. 7A Sh. Manjul Sood.

21. The affidavit of Manjul Sood S/o Sh. Ramesh Chander Sood was also filed. No other relatives adduced any evidence. It appears from the record that despite opportunity given to the deponent to appear for cross-examination, the witnesses were not present. Therefore, the Joint Registrar vide order dated 15.02.2011 could not find any reasonable explanation from the respondent side for non appearance of the witness and concluded the evidence. On the face of it, the contesting parties failed to discharge their burden of existence of suspicious circumstances averred by them in their objection. On the other hand, it was a registered Will. The original Will has been proved by the petitioner. Both the witnesses have filed their affidavits alongwith the petition and one of the witnesses who filed his affidavit as evidence was also cross examined by the contesting respondents, despite that the respondents were not able to disapprove the Will produced by the petitioner. The objections raised by the objector were not proved in evidence, rather, the deponent/objector did not appear for cross examination despite of various opportunities granted to him. Thus, the respondents have totally failed to prove objections set up by them by adducing even iota of evidence. Therefore, the objections are rejected.

22. Accordingly, the present petition is allowed. The petitioner is granted probate of the Will dated 16.09.1986 subject to the petitioner filing necessary court fee on the value of the immovable property as

stated in the Will. The letter of probate therefore, be issued to the petitioner on filing a surety bond and necessary court fee. The petition stands disposed of.

ILR (2011) V DELHI 801
CS (OS)

PRAKASH KHATTAR ....PLAINTIFF

VERSUS

SMT. SHANTA JINDAL & ORS. ....DEFENDANTS

(V.K. SHALI, J.)

CS(OS) NO. : 319/2008 DATE OF DECISION: 04.07.2011

(A) Code of Civil Procedure, 1908—Order XXXIX Rule 4—Vacation of ex parte ad interim stay—An agreement to sell was executed between the defendants as first party and plaintiff as second party—Defendants received part payment, property being leasehold was to be converted into freehold it was the responsibility of the plaintiff to ensure that conversion takes place within 60 days; in case the conversion did not take place, the plaintiff was to make a balance payment of Rs. 95 lacs within 60 days and the defendants would be then under an obligation to execute necessary documents and transfer possession of the property—Plaintiff filed the present suit contending that conversion could not be carried out due to default of the defendants ex-parte ad interim stay was granted defendants filed the instant application for vacation of suit-time was the essence of contract-stipulated that in case the conversion did not take place—Plaintiff was still to pay the balance consideration within 60 days which was not paid-plaintiff cannot absolve himself only because the conversion did not take place-plaintiff did not come to court with clean hands—Plaintiff admittedly a broker—Did not have sufficient funds. Held—Time was the essence of contract—Envisaged that in the event of conversion not taking place within 60 days, the plaintiff was still under an obligation to pay the balance consideration and get necessary documents executed including transfer of the property—Plaintiff therefore cannot be permitted to rely on the clause pertaining to conversion—Balance of convenience not in favour of the plaintiff—No prima facie case; interim injunction vacated.

A bare perusal of the clauses 5, 6 and 8 of the agreement, the contents of which are reproduced hereinbefore, clearly shows that it was intended between the plaintiff and the defendants that time would be the essence of the agreement. This time was only two months, i.e., 60 days from the date of the execution of the agreement which is also not in dispute. The date of execution of the agreement is 16.04.2005. Admittedly, the plaintiff has paid a sum of ˇRs. 40 lakhs which has not been disputed by the defendants but in terms of the agreement and the aforesaid clauses, the entire transaction had to be completed within a period of 60 days from the date of the signing of the agreement. The case of the plaintiff is that the defendants could not get the property converted from leasehold to freehold within the said stipulated period of 60 days. Even if it is assumed that the defendants were not able to get the suit property converted from leasehold to freehold within a period of 60 days as envisaged, time was the essence of the contract as it was envisaged in the next clause categorically that in the event of conversion not taking place within a period of 60 days, the plaintiff was still under an obligation to pay the balance sale consideration of Rs. 95 lakhs and get necessary documents executed from the defendants including the transfer of possession of the suit property. The plaintiff

cannot be permitted to rely on clause (5) of the agreement for conversion of leasehold rights into freehold and then contend as the same was not done on account of certain deficiencies, the other portion of ˇthe agreement which envisage that the transaction had to be completed within a period of 60 days from the date of signing of the agreement, does not come into operation. **(Para 26)**

The question that it is only during the course of the trial that the plaintiff will be required to show to the Court that he had sufficient means, in my opinion, has to be decided in the facts of the present case where there are specific allegations that the plaintiff being a speculator/property broker was not in possession of sufficient funds so as to go ahead with the transaction. This clearly, in my view, shows that the plaintiff does not have any prima facie case. The balance of convenience also cannot be said to be in favour of the plaintiff inasmuch as the property rates are sky-rocketing and there is no point in keeping the property of the defendants blocked under litigation on the assumption that the plaintiff will adduce evidence to prove his case as well as sufficiency of funds to make the payment. I, therefore, feel that both the question of prima facie case as well as the balance of convenience not being in favour of the plaintiff, the whole thing must be against the plaintiff for the aforesaid reasons. **(Para 29)**

(B) Transfer of Property Act, 1882—Section 52—Doctrine of lis pendens contention of plaintiff, that subject matter of the suit cannot be transacted without the permission of the court and would be subject to the outcome of the decision—Rejected as the plaintiff will not suffer irreparable loss if the injunction is vacated.

The last part which the plaintiff has to satisfy is that the plaintiff will suffer an irreparable loss. I do not feel that if the order of injunction is vacated, the plaintiff will suffer an irreparable loss. Section 52 of the Transfer of Property Act deals with the doctrine of lis pendens as has been discussed

above clearly lays down that any property which is subject matter of a suit or a litigation, cannot be permitted to be transacted without the permission of the Court and would be transacted subject to the outcome of the decision in the matter. This fact is also reiterated by the Division Bench of our own High Court in case titled **Sanjeev Narang Vs. Prism Buildcon Pvt. Ltd.** 154(2008) DLT 508 (DB), where it has been observed as under:-

> "11. We are conscious of the fact that under Section 52 of the Transfer of Property Act, 1882, ˇin case of pending suit in which right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein except under the authority of the Court and on such terms as it may impose. Therefore, in order to strike a balance between the parties, the respondent is directed to inform the purchaser about the litigation pending between the parties in case the respondent wishes to dispose of the property during the pendency of the suit so that innocent purchaser may be aware about the pending litigation of the parties.
>
> 12. In view of the above, we are left with no option but to affirm the order passed by the learned Single Judge vacating the interim injunction.
>
> 13. We make it clear that any observation made herein shall be treated as tentative in nature and shall not constitute any expression of final opinion on the issues involved in Appellant's suit and shall have no bearing on the final merit of case and submissions of the parties in the suit." **(Para 30)**

The argument of the learned senior counsel is that since the case is at the stage of recording of evidence, therefore, he

may be permitted to prove sufficiency of funds during the course of trial. No doubt, there are judgments of the Apex Court that a person need not have liquid cash available with him all the time or till the time of filing of the suit as this is a question to be decided on merits, nevertheless, the facts of the case are such which clearly show that prima facie there is no document on record to show that after having paid a sum of Rs. 40 lakhs to the defendants, the plaintiff had ever offered to pay the balance amount of Rs. 95 lakhs in terms of the Clause 6 of the agreement to complete the transaction and that he possessed sufficient liquidity to that extent. **(Para 31)**

Important Issue Involved: Ex parte ad interim stay is liable to get vacated when prima facie it is found that time was the essence of contract which envisaged that liability to pay balance consideration both in the event of conversion of land and in the event of conversion not taking place within 60 days and a party cannot be absolved of his obligation to pay in the event of non-conversion.

[Sa Gh]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Rakesh Tiku, Sr. Advocate with Mr. Prakash Gautam, Advocate.

FOR THE DEFENDANTS : Mr. Ved Prakash Sharma and Ms. Amrit Kaur, Advocate.

CASES REFERRED TO:

1. *Man Kaur (Dead) by LRs.* vs. *Hartar Singh Sangha* (2010) 10 SCC 512.
2. *Vallayati Ram Mittal Pvt. Ltd.* vs. *UOI & Anr.* (2010) 10 SCC 532.
3. *Sanjeev Narang* vs. *Prism Buildcon Pvt. Ltd.* 154(2008) DLT 508 (DB)
4. *K.L.Sethi* vs. *S.Kishan Singh* 159 (2009) DLT 464.

5. *Parwati Devi & Ors.* vs. *DDA* 159 (2009) DLT 467.
6. *Sanjeev Narang* vs. *Prism Buildcon Pvt. Ltd.* 154 (2008) DLT 508 (DB).
7. *Durga Periwal* vs. *Punjab National Bank & Ors.* 154(2008) DLT 514 (DB).
8. *Abdul Hamid & Anr.* vs. *Nur Mohammad* AIR 1976 Delhi 328.
9. *UOI* vs. *M/s Jashan Mul & Co. Fruit and Vegetable Merchanta, Subzimandi,* Delhi AIR 1976 Delhi 335.

RESULT: Application allowed.

V.K. SHALI, J.

IA No. 2156/2008 (U/O 39, Rule 1 & 2) & IA No.10200/2009

(u/O 39 Rule 4 CPC)

1. This order shall dispose of an application bearing IA No.2156/2008 under Order XXXIX Rules 1 and 2 CPC and an IA bearing no.10200/2009 u/O 39 Rule 4 CPC filed by the defendants for vacation of the ex parte ad interim stay granted on 18.2.2008.

2. Brief facts of the case are that the plaintiff has filed the present suit for specific performance against the defendant nos.1 to 5 in respect of an agreement to sell dated 16.4.2005. It is alleged in the plaint that the defendant nos. 1 to 5 are the legal heirs of one Sh.B.C.Mittal who had a perpetual sub-lease in respect of a plot of land measuring 190 sq. yds. bearing no.B-154, Shivalik Colony, Malviya Nagar, New Delhi in his favour.

3. Mr.B.C.Mittal, had expired on 31.5.99 and as a consequence of this, the defendant nos.1,2 and 5 being the daughters and the defendant nos.3 and 4 being the sons had inherited the estate of the said deceased. They had entered into an agreement to sell the aforesaid property in favour of the plaintiff vide agreement to sell dated 16.4.2005 for a total sale consideration of Rs.1,35,00,000/-, out of which an amount of Rs. 15 lacs was paid by way of 5 pay orders dated 18.4.2005 drawn in favour of each of the ˇfive defendants for which they had issued necessary receipt. It is further alleged that a sum of Rs. 25,00,000/- was

also paid to them in cash which was duly acknowledged by them. Thus, out of the total sum of Rs.1,35,00,000/-, an amount of Rs. 40 lacs is alleged to have been paid to the defendants and the balance amount of Rs.95,00,000/- was to be paid to the defendants at the time of execution of the sale deed in respect of the suit property which was to be done within 60 days from the date of conversion of the suit property from leasehold to freehold. It is also alleged that the agreement envisaged that in the event of the property being not converted into freehold for any reason, the said amount would be paid to the defendants within 60 days from the date of the execution of the receipt dated 18.4.2005 provided the defendants execute the other related documents like, General Power of Attorney, Special Power of Attorney, receipt coupled with the transfer of possession in respect of the suit property.

4. It is alleged by the plaintiff that on his asking, the defendants had applied to the L&DO for conversion of the leasehold rights in respect of the suit property into freehold which was being followed by the plaintiff. However, during this course, the plaintiff learnt that the conversion could not take place as certain deficiencies were pointed out by the L&DO. These deficiencies were that the share certificate and the NOC from the concerned society was not obtained and filed with the L&DO.

5. It has also been alleged by the plaintiff that it was learnt that actually Mr.B.C.Mittal, deceased had made only Mr.Vijay Mittal, defendant no.4 as the sole nominee of the suit property. Further, the original share certificate was not traceable, therefore, duplicate share certificate was required to be obtained by the defendants in the name of all the five defendants, who are purported to have executed the agreement to sell. It is alleged that the defendants had also lodged a report with the SHO P.S. Malviya Nagar on 29.8.2005 stating that they had lost the original share certificate. The plaintiff further states that from April, 2005 till the end of August, 2006, nothing happened and from September, 2006 for about one year, meetings took place between the plaintiff and the defendants to resolve the matter so that the transaction could be wound up but it also did not bring any fruitful result.

6. It is stated that further meetings took place in September, 2007 which did not bring any resolution as in the meantime, on account of considerable increase in the prices of real estate, the defendants turned dishonest and tried to wriggle out of the transaction compelling the

plaintiff to file the present suit for specific performance in respect of the suit property and alternatively claiming a recovery of Rs. 1,35,00,000/- against the defendants along with an interest @18% being the sale price of the suit property. Along with the suit the plaintiff had filed the abovementioned IA under Order XXXIX Rule 1 and 2 CPC for allowing an ex-parte ad interim injunction.

7. On 18.2.2008, the defendants were restrained by way of an ex parte ad interim order from parting with the possession of the suit property or in any manner creating any third party interest.

8. The defendants filed their common written statement and the reply to the application under Order 39 Rules 1 and 2 CPC and did not dispute the execution of the agreement dated 16.4.2005 by the defendant no.1 for himself and by defendant no.2 for his own self as well as defendant nos.3 to 5. However, it was the stand of the defendants that as the said document dated 16.4.2005 was neither properly stamped nor duly registered, therefore, the same was inadmissible in law and could not be relied upon. It is further contended that even if the said document is taken into consideration, it would clearly show that according to clauses 5,6 & 7 time was the essence of the contract. The first party, namely the defendants at the instance of the second party that is the plaintiff was to apply to the L&DO for conversion of the leasehold rights to freehold and the entire charges of conversion and the responsibility of getting the property converted into freehold rested with the plaintiff. It is alleged that the plaintiff failed to discharge his obligation in a reasonable and efficient manner as a consequence of which, the property could not be converted from leasehold to freehold within the stipulated period as envisaged under the agreement.

9. It has also been stated that the plea of the plaintiff that the defendants have misplaced the original share certificate and consequently, conversion of the suit property to freehold could not be done, is only a ploy to come out of the transaction by the plaintiff. It is stated that the plaintiff did not have requisite funds available with him. It is stated that the defendants had obtained a duplicate copy of the share certificate in the year 2006 that is a reasonable time given to the plaintiff. In any case, it is contended by the defendants that the agreement which was signed between the parties clearly envisaged that in the event of the property not being converted into freehold within 60 days, the plaintiff was still to

make the balance payment of Rs.95,00,000/- to the defendants and the defendants were liable to execute the documents like power of attorney, agreement to sell, Will and transfer the possession of the suit property in favour of the plaintiff. It is stated that the defendants have approached the plaintiff for making the balance payment of Rs. 95 lacs in terms of the said clause of the agreement so that the transaction could be completed but the plaintiff for the reasons best known to him neither got the said documents executed nor did he make the requisite payment of Rs.95,00,000/- in favour of the defendants. It is stated by them that time being the essence of the contract and the plaintiff having failed to make the balance payment of Rs. 95,00,000/- to the defendants, the defendants had forfeited the said amount of Rs. 40 lacs given to them as an advance at the time of signing of the agreement. It is also alleged by the defendants that the plaintiff has not come to the Court with clean hands and as a matter of fact, he is a speculator, inasmuch as they were approached by one Rajinder claiming himself to be the real estate agent operating in Malviya Nagar, Delhi sometime in December, 2007/ January, 2008 and he claimed that he has purchased the rights of the plaintiff under the agreement dated 16.04.2005 from the plaintiff, and accordingly, he wanted to complete the transaction even though it entails the payment of certain escalating charges to the defendants on account of increase in the prices of land as claimed by the defendant. It is further alleged to have been stated by the said gentleman that the plaintiff had suffered huge losses in his business of running a show room in electronic goods and therefore, was not in a position to go ahead with the transaction. Thus, the defendants have submitted that there was no prima facie case in favour of the plaintiff warranting the continuance of the ex parte ad interim stay granted to them on 18.2.2008.

10. The plaintiff filed his replication and controverted the averments made in the written statement and reiterated the averments made in the plaint.

11. From the respective pleadings of the parties, the following facts emerge:

(i) It is not in dispute that on 16.4.2005, an agreement to sell was executed between the defendants as the first party and the plaintiff as the second party.

(ii) The defendants had admittedly received a sum of Rs. 40 lacs out of which a sum of Rs. 15 lacs was received by way of five pay orders of Rs. 3 lacs each in the name of the five defendants and the balance payment of Rs. 25 lacs was received by way of cash.

(iii) The property being a leasehold property was to be converted into freehold and for this purpose, the defendants had executed the necessary documents like indemnity bonds etc. and applied to L&DO and the plaintiff was to take up the matter for conversion of the leasehold rights into freehold in favour of the defendants and pay the necessary conversion charges. It was the responsibility of the plaintiff to ensure that the conversion of the leasehold rights takes place within 60 days from the date of execution of the receipt cum agreement dated 16.4.2005. The sale deed was to be executed within that period and the balance sale consideration was to be paid.

(iv) In the event of the leasehold rights not being converted into freehold within the stipulated period of 60 days still the payment of Rs. 95 lacs was to be made by the plaintiff to the defendants within the period of 60 days and the defendants were under an obligation to execute the necessary documents like agreement to sell, receipt, Will, Power of Attorney, etc. coupled with the transfer of possession of the suit property in favour of the plaintiff.

12. It is the case of the plaintiff that the defendants have defaulted in carrying out their obligation in terms of the agreement for want of original share certificate and the nomination of defendant no.4 in the records of the society created problems as the conversion could not be carried out. It is also the case of the plaintiff that the property prices having escalated, the defendants on being approached on different dates engaged the plaintiff in futile talks which ultimately did not yield any result. This compelled the plaintiff to file the present suit for specific performance in which this Court had issued an ex parte ad interim stay on the very first date i.e. 18.2.2008.

13. As against this, the defendant has taken the plea that the plaintiff did not discharge his obligation within the stipulated period of 60 days

from the date of signing of agreement to sell. It is urged that the time was the essence of the contract and in the absence of the property being converted into freehold, the plaintiff could not absolve himself from making the balance payment of Rs. 95 lacs to the defendant as it was envisaged in the agreement itself that in the event of conversion not being carried out by the L&DO, the plaintiff had to make the balance payment of Rs. 95 lacs and perfect his title by obtaining the possession and getting all other requisite documents like agreement to sell, Power of Attorney, receipt, etc. executed in his favour.

14. In the light of the aforesaid factual matrix, the question which arises for consideration is as to whether the time was the essence of the contract or not and if the time was the essence of the contract, whether the plaintiff had defaulted in performing his part of the obligation in terms of such time frame stipulated in the agreement. For this purpose, clauses 3, 4, 5, 6 and 8 of the agreement dated 16.4.2005 become important. The said relevant clauses 3,4,5,6 and 8 read as under:-

> 3) That the second party has seen and satisfied himself with regard to title deeds existing in favour of Late Shri B.C.Mittal and has also seen and satisfied himself with regard to mutation, carried out by MCD. Affidavit, Indemnity Bond that the first party has executed for effecting mutation of the property in their favour in the office of Land and Development, New Delhi. At the request of the second party, the first party will also apply in the office of Land and Development along with the mutation, for conversion of lease hold rights into the freehold rights. The Second party has agreed to pay the conversion charges as may be applicable in terms of policy, guidelines and rules framed by Land and Development office and get mutation and conversion done at his expense from the Land and Development office. The party of the First party shall cooperate and provide any document that may be required by the Second party for the purpose of mutation in the office of Land and Development and also for the purpose of effecting conversion from lease hold to freehold."
>
> "4) That the First party has assured the Second Party that the property does not suffer from any defect of title.
>
> 5) That it is agreed that the Second party shall pay to the First party the balance sale consideration within 60 days from the execution of this receipt cum Agreement and the First party shall execute the sale deed in favour of the Second party simultaneously.
>
> **6) That the Second party has further agreed that in the event of mutation and/or conversion from leasehold to freehold for any reason not being sanctioned/carried out by the Land & Development Office within the stipulated period of 60 days as aforesaid, in that event the Second party shall pay to the First party the balance sale consideration of ` 95,00,000/- (Rupees Ninety Five Lakhs) within the said stipulated period of 60 days from the date of this agreement and the First party shall execute in favour of the Second party a registered Agreement to Sell and attendant documents such as General Power of Attorney, Receipt, Will in respect of the property and affidavit of delivery of possession and shall also deliver actual, vacant and physical possession of the property to the Second party simultaneously.**
>
> 8) That the Second party agrees that in the event of his failing to pay the balance sale consideration and complete the sale transaction, as stipulated in clause 5 and 6 above, within 60 days from the date of execution of this receipt cum agreement, the advance earnest money paid to the First party by way of this agreement shall stand forfeited. The Second party has entered this Agreement for buying the said property and if the First party fails to complete this agreement, the Second party will enforce the specific performance of this agreement."

15. I have heard Mr. Rakesh Tiku, learned senior counsel for the plaintiff and Mr. Ved Prakash Sharma, learned counsel for the defendants.

16. It was contended by Mr. Tiku, learned senior counsel on behalf of the plaintiff that at the outset, the ex parte ad interim stay was granted on 18.02.2008 in favour of the plaintiff and since the case is at the stage of recording of evidence, therefore, it will be just and proper in case the stay which is granted in favour of the plaintiff, is confirmed till the disposal of the suit as it would otherwise cause serious prejudice to the plaintiff.

17. Secondly, it was contended by the learned senior counsel that even on merits, a perusal of the agreement would show that the defendants had to apply to the L&DO for conversion of leasehold rights into freehold and the sale deed was to be executed within a period of 60 days from 16.04.2005 when the part payment amounting to Rs. 40 lakhs was made to the defendants. It is contended that no doubt under the terms and conditions of the agreement, the defendants had applied but that application could not be considered to be a valid application because it was pointed out by the L&DO that there were deficiencies as it did not have the share certificate and no objection certificate of the society. It was stated that the plaintiff in terms of the obligation deposited the necessary charges and was following up the same with the said department. It was contended by Mr. Tiku, that these deficiencies were essentially two-fold. Firstly, the original share certificate was not filed by the defendants and they had subsequently on 03.12.2005 lodged a report with the police and till the time the duplicate certificate was issued by the society, the necessary conversion could not have taken place. Secondly, it was stated that the conversion could not be carried out by the L&DO on account of the fact that the records of the society showed that late Shri B.C. Mittal, the father of the defendants had made defendant no. 4 as the sole nominee and, therefore, the record of the society had to be got corrected in this regard because the sale of the suit property was being effected by all the five defendants. It is contended that on account of these deficiencies, theplaintiff could not obtain conversion of leasehold rights to freehold and consequently the occasion for the plaintiff to pay the balance amount of sale consideration to the defendants did not arise as the time in itself ceased to be the essence of the contract.

18. So far as the second condition in clause 6 of the agreement is concerned, which envisaged that in the event of the conversion not taking place within a period of 60 days from the date of execution of the agreement, i.e., 16.04.2005, the plaintiff was still under an obligation to pay the balance sale consideration within a period of 60 days from the said date of execution of the agreement and the defendants were under an obligation to execute the necessary documents in favour of the plaintiff, this eventuality did not come into operation as the defendants did not have original share certificate and also did not get the issue of nominee sorted out. It was further contended that although originally the defendants

were willing to execute the document and transfer the possession of thesuit property but later on they backed out and consequently the plaintiff could not be blamed for not completing the transaction within a period of 60 days. It is further contended by Mr.Tiku that the defendants deliberately kept the plaintiff engaged in futile talks and in the meantime, as the prices of the immovable property had escalated beyond expectations, the defendants tried to wriggle out of the agreement.

19. On the basis of the aforesaid submissions, it was contended by the learned senior counsel that the plaintiff has got a prima facie good case and that the balance of convenience is also in favour of the plaintiff and that the plaintiff will suffer an irreparable loss in case the ex parte ad interim injunction granted on 18.02.2008 is not confirmed during the pendency of the suit.

20. As against this, Mr. Sharma, learned counsel for the defendants has contended that the plaintiff prima facie has not come to the Court with clean hands and any person who does not come to the Court with clean hands is not entitled to get the discretionary relief of specific performance much less the ad interim relief of injunction under Order 39 Rule 1 and 2 CPC. The question of the plaintiff having not come to the Court with clean hands is sought to be shown by the learned counsel for the defendants by urging that clauses 6 to 8 of the agreement which form the backbone of the entire agreement would show that the time was the essence of the contract which was fixed as 60 days from the date of the execution of the agreement, irrespective of the fact that whether the conversion of the leasehold rights into freehold has been done by the L&DO or not, the transaction ought to have been completed within a period of 60 days. As against this, the plaintiff knowing fully well that the lessor, namely, L&DO had failed to complete the process of conversion of leasehold rights into freehold within a stipulated period of 60 days, still did not pay the balance amount of Rs. 95 lakhs to the defendants and neither took the possession of the suit property. This clearly shows that the plaintiff did not have sufficient finance and he was only speculating in the property by blocking the sale/disposal of the suit property.

21. It has also been contended by the learned counsel for the defendants that the defendants have specifically stated in para 8 of the preliminary objections that they were approached by one Rajinder, a property dealer, who had purportedly purchased the rights under the

agreement dated 16.04.2005 from the plaintiff and that he was even prepared to pay a reasonable escalation in the price of the suit property to the defendants and this fact has not been disputed by the plaintiff in the replication. This clearly show that the plaintiff did not possess sufficient means or funds to complete the transaction and also defaulted in paying the balance amount of sale consideration amounting to Rs. 95 lakhs within a period of 60 days from the date of the execution of the agreement de hors as to whether the conversion was carried out by the L&DO or not.

22. So far as the conversion of the suit property from leasehold to freehold is concerned, it is contended by Mr. Sharma that conversion of the property from leasehold to freehold was essentially the responsibility of the plaintiff and the defendants had already given all necessary documents duly completed along with their affidavits to the plaintiff himself for the purpose of filing the same to the L&DO. The plaintiff has failed to complete the transaction in terms of the agreement and accordingly the defendants were constrained to forfeit the entire amount paid to them by the plaintiff on account of having not come forward to perfect his title.

23. Learned counsel for the defendants has also relied upon the following judgments :-

(i) **Abdul Hamid & Anr. Vs. Nur Mohammad** AIR 1976 Delhi 328

(ii) **UOI Vs. M/s Jashan Mul & Co. Fruit and Vegetable Merchanta, Subzimandi,** Delhi AIR 1976 Delhi 335

(iii) **K.L.Sethi Vs. S.Kishan Singh** 159 (2009) DLT 464

(iv) **Parwati Devi & Ors. Vs. DDA** 159 (2009) DLT 467

(v) **Sanjeev Narang Vs. Prism Buildcon Pvt. Ltd.** 154 (2008) DLT 508 (DB)

(vi) **Durga Periwal Vs. Punjab National Bank & Ors.** 154(2008) DLT 514 (DB)

(vii) **Man Kaur (Dead) by LRs. Vs. Hartar Singh Sangha** (2010) 10 SCC 512

(viii) **Vallayati Ram Mittal Pvt. Ltd. Vs. UOI & Anr.** (2010) 10 SCC 532

24. I have carefully on sidered the respective submissions of the parties and gone through the record.

25. The first question to be considered is as to whether the time was the essence of the contract or not, because that factor is very important and crucial so far as the execution of the documents in pursuance of the agreement in question is concerned.

26. A bare perusal of the clauses 5, 6 and 8 of the agreement, the contents of which are reproduced hereinbefore, clearly shows that it was intended between the plaintiff and the defendants that time would be the essence of the agreement. This time was only two months, i.e., 60 days from the date of the execution of the agreement which is also not in dispute. The date of execution of the agreement is 16.04.2005. Admittedly, the plaintiff has paid a sum of Rs. 40 lakhs which has not been disputed by the defendants but in terms of the agreement and the aforesaid clauses, the entire transaction had to be completed within a period of 60 days from the date of the signing of the agreement. The case of the plaintiff is that the defendants could not get the property converted from leasehold to freehold within the said stipulated period of 60 days. Even if it is assumed that the defendants were not able to get the suit property converted from leasehold to freehold within a period of 60 days as envisaged, time was the essence of the contract as it was envisaged in the next clause categorically that in the event of conversion not taking place within a period of 60 days, the plaintiff was still under an obligation to pay the balance sale consideration of Rs. 95 lakhs and get necessary documents executed from the defendants including the transfer of possession of the suit property. The plaintiff cannot be permitted to rely on clause (5) of the agreement for conversion of leasehold rights into freehold and then contend as the same was not done on account of certain deficiencies, the other portion of the agreement which envisage that the transaction had to be completed within a period of 60 days from the date of signing of the agreement, does not come into operation.

27. I feel that even if it is assumed that for reasons justified or unjustified, attributable to the defendants or not, the L&DO either intentionally or unintentionally did not complete the process of conversion of leasehold rights into freehold, still the balance payment of Rs. 95 lakhs had to be necessarily made to the defendants and the defendants were under an obligation to have transferred the possession and necessary

documents to the plaintiff. This was not done by the plaintiff. On the contrary, the plaintiff kept on sleeping over the matter for almost three years till the month of February/March 2008 when he filed the present suit for specific performance and alternatively claimed the damages to the tune of Rs. 1.30 crores. This delay of nearly three years is sought to be explained by the plaintiff by contending that he had approached the defendant in the year 2006, 2007 and even in 2008 and as the defendants were not trying to work out a solution to the problem, therefore, he was left with no other alternative but to file the suit for specific performance. The plaintiff is stated to be a property broker by the defendants in the written statement. This fact is not denied by the plaintiff. They have disputed the financial capacity of the plaintiff to be able to complete the sale transaction. The defendants have also stated in the written statement that they were approached by a gentleman by the name of Rajinder in the month of December, 2007/January, 2008 who represented to them that he had purchased the rights of the plaintiff under the agreement dated 16.04.2005 and he was prepared to go ahead with the transaction of purchase of the suit property even though it entails the payment of certain escalation charges on account of an increase in the land rates. The replication filed by the plaintiff to this averment of the defendants is curiously enough, silent which clearly makes the Court to assume prima facie that an averment which is made in the pleadings and has gone un-rebutted, is deemed to have been admitted by the plaintiff. Therefore, this clearly shows that even at the time when the agreement was entered into, the plaintiff was not in possession of sufficient means to go ahead with the transaction although this is my prima facie view but the plaintiff can always dislodge this fact by producing evidence during the course of trial. But this is certainly a factor to be taken into consideration coupled with the delay in coming to the Court at the fag end of the limitation so far as the prima facie case is concerned.

28. Mr. Tiku, learned senior counsel for the plaintiff has stated that there are judgments of the Apex Court to the effect that the financial capacity of the plaintiff for completing the transaction has to be seen during the course of trial and it is not necessary that the party who is seeking relief of specific performance must be in possession of liquid cash so as to complete the transaction. I agree with this submission of the learned senior counsel for the plaintiff but nevertheless at the same time, one cannot ignore the fact that the plaintiff kept sleeping over the

matter for a period of about three years and choose file the matter towards fag end of the three years of the limitation which clearly indicates that he did not prima facie have the funds available with him so as to make the balance payment of Rs. 95 lakhs which was being repeatedly claimed by the defendants.

29. The question that it is only during the course of the trial that the plaintiff will be required to show to the Court that he had sufficient means, in my opinion, has to be decided in the facts of the present case where there are specific allegations that the plaintiff being a speculator/ property broker was not in possession of sufficient funds so as to go ahead with the transaction. This clearly, in my view, shows that the plaintiff does not have any prima facie case. The balance of convenience also cannot be said to be in favour of the plaintiff inasmuch as the property rates are sky-rocketing and there is no point in keeping the property of the defendants blocked under litigation on the assumption that the plaintiff will adduce evidence to prove his case as well as sufficiency of funds to make the payment. I, therefore, feel that both the question of prima facie case as well as the balance of convenience not being in favour of the plaintiff, the whole thing must be against the plaintiff for the aforesaid reasons.

30. The last part which the plaintiff has to satisfy is that the plaintiff will suffer an irreparable loss. I do not feel that if the order of injunction is vacated, the plaintiff will suffer an irreparable loss. Section 52 of the Transfer of Property Act deals with the doctrine of lis pendens as has been discussed above clearly lays down that any property which is subject matter of a suit or a litigation, cannot be permitted to be transacted without the permission of the Court and would be transacted subject to the outcome of the decision in the matter. This fact is also reiterated by the Division Bench of our own High Court in case titled **Sanjeev Narang Vs. Prism Buildcon Pvt. Ltd.** 154(2008) DLT 508 (DB), where it has been observed as under:-

> "11. We are conscious of the fact that under Section 52 of the Transfer of Property Act, 1882, in case of pending suit in which right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be

made therein except under the authority of the Court and on such terms as it may impose. Therefore, in order to strike a balance between the parties, the respondent is directed to inform the purchaser about the litigation pending between the parties in case the respondent wishes to dispose of the property during the pendency of the suit so that innocent purchaser may be aware about the pending litigation of the parties.

12. In view of the above, we are left with no option but to affirm the order passed by the learned Single Judge vacating the interim injunction.

13. We make it clear that any observation made herein shall be treated as tentative in nature and shall not constitute any expression of final opinion on the issues involved in Appellant's suit and shall have no bearing on the final merit of case and submissions of the parties in the suit."

31. The argument of the learned senior counsel is that since the case is at the stage of recording of evidence, therefore, he may be permitted to prove sufficiency of funds during the course of trial. No doubt, there are judgments of the Apex Court that a person need not have liquid cash available with him all the time or till the time of filing of the suit as this is a question to be decided on merits, nevertheless, the facts of the case are such which clearly show that prima facie there is no document on record to show that after having paid a sum of Rs. 40 lakhs to the defendants, the plaintiff had ever offered to pay the balance amount of Rs. 95 lakhs in terms of the Clause 6 of the agreement to complete the transaction and that he possessed sufficient liquidity to that extent.

32. Therefore, in all the three parameters, I feel that the plaintiff has not been able to make out a prima facie case in his favour. The balance of convenience is also not in favour of the plaintiff and that the plaintiff will not suffer an irreparable loss in case the ex parte ad interim injunction granted on 18.02.2008 is vacated. I am not impressed by the argument that merely because the ex parte ad interim injunction granted on 18.02.2008 has continued for almost three years, as a matter of course and automatically the injunction deserves to be confirmed.

33. For the abovementioned reasons, I am of the considered opinion

that the injunction granted on 18.02.2008 deserves to be vacated. The application bearing IA no.2156/2008 under Order 39 Rules 1 & 2 CPC is accordingly dismissed and the corresponding application bearing IA No.10200/2009 under Order 39 Rule 4 CPC stands allowed.

34. It is hereby made clear that expression of any opinion hereinbefore shall not be deemed to be an expression on the merits of the case.

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2011 (2) AD (Delhi)	762	=	ILR (DS) 2011 (V)	488
2011 (4) AD (Delhi)	71	=	ILR (DS) 2011 (V)	534
2011 (6) AD (Delhi)	633	=	ILR (DS) 2011 (V)	659
2011 (5) AD (Delhi)	383	=	ILR (DS) 2011 (V)	676
2011 (5) AD (Delhi)	772	=	ILR (DS) 2011 (V)	784
2011 (3) Crimes	426 (SN)	=	ILR (DS) 2011 (V)	92
2011 (2) Crimes	635 (2)	=	ILR (DS) 2011 (V)	734
2010 (165) Comp Cas	229	=	ILR (DS) 2011 (V)	380
2011 (176) DLT	703	=	ILR (DS) 2011 (V)	1
2011 (178) DLT	529	=	ILR (DS) 2011 (V)	92
2011 (182) DLT	313	=	ILR (DS) 2011 (V)	167
2011 (179) DLT	440	=	ILR (DS) 2011 (V)	196
2011 (180) DLT	260	=	ILR (DS) 2011 (V)	208
2011 (180) DLT	688	=	ILR (DS) 2011 (V)	345
2011 (183) DLT	57	=	ILR (DS) 2011 (V)	365
2011 (182) DLT	20	=	ILR (DS) 2011 (V)	388

2011 (177) DLT	1	=	ILR (DS) 2011 (V)	453
2011 (179) DLT	39	=	ILR (DS) 2011 (V)	534
2011 (178) DLT	465	=	ILR (DS) 2011 (V)	585
2011 (180) DLT	93	=	ILR (DS) 2011 (V)	645
2011 (181) DLT	55	=	ILR (DS) 2011 (V)	659
2011 (180) DLT	78	=	ILR (DS) 2011 (V)	700
2011 (181) DLT	138	=	ILR (DS) 2011 (V)	801
2011 (123) DRJ	529	=	ILR (DS) 2011 (V)	107
2011 (123) DRJ	589	=	ILR (DS) 2011 (V)	128
2011 (123) DRJ	465	=	ILR (DS) 2011 (V)	147
2011 (124) DRJ	281	=	ILR (DS) 2011 (V)	345
2011 (124) DRJ	690	=	ILR (DS) 2011 (V)	380
2011 (122) DRJ	439	=	ILR (DS) 2011 (V)	488
2008 (102) DRJ	624	=	ILR (DS) 2011 (V)	529
2011 (124) DRJ	174	=	ILR (DS) 2011 (V)	645
2011 (333) ITR	146	=	ILR (DS) 2011 (V)	1
2011 (333) ITR	324	=	ILR (DS) 2011 (V)	548
2011 (2) JCC	911	=	ILR (DS) 2011 (V)	82
2011 (2) JCC	1059	=	ILR (DS) 2011 (V)	92
2011 (3) JCC	1863	=	ILR (DS) 2011 (V)	334
2011 (3) JCC	1781	=	ILR (DS) 2011 (V)	734
2011 (46) PTC	185	=	ILR (DS) 2011 (V)	208
2011 (46) PTC	343	=	ILR (DS) 2011 (V)	659
2011 (46) PTC	479	=	ILR (DS) 2011 (V)	753
2011 (3) R.A.J	588	=	ILR (DS) 2011 (V)	36
2011 (4) R.A.J	610	=	ILR (DS) 2011 (V)	208
2011 (5) RAJ	340	=	ILR (DS) 2011 (V)	388
2011 (4) RAJ	172	=	ILR (DS) 2011 (V)	563
2011 (4) RAJ	396	=	ILR (DS) 2011 (V)	659
2011 (123) RAJ	395	=	ILR (DS) 2011 (V)	659
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HIGH COURT OF DELHI : NEW DELHI

Notification

New Delhi, the 22nd September, 2011

No. 449/Rules/DHC.—Whereas the High Court of Delhi, by way of amendment, proposes to introduce a new Order XX-B after the existing Order XX-A in the First Schedule of the Code of Civil Procedure, 1908 (Central Act of 1908), which would read as under :—

''ORDER XX-B

Recognition of Electronically Signed Orders Judgments and Decrees

Rule 1: Any Order passed, Judgment pronounced or Decree prepared which is required to be signed by a Judge shall be deemed to have been singed by the Judge, if such Order, Judgment or Decree has been authenticated by means of electronic signature affixed by the Judge in such manner as may be prescribed by the High Court.

Rule 2 s: Any Order, Judgment or Decree so authenticated in the manner stipulated in Rule 1 shall also be treated as a certified copy for making a reference, for filing an application for review, revision or execution or preferring an appeal, as the case may be or for any other purpose for which filing of such a certified copy is considered necessary in the Code''

And Whereas the objections, in writing, from any person, with respect to said amendment are invited within a period of one month i.e. 30 days from the date of which this Notification is published in the Delhi Gazette, Extraordinary.

And Whereas, the objections, may be sent to the Registrar General of the High Court of Delhi at the following address/E-Mail address :—

High Court of Delhi,
Sher Shah Marg,
New Delhi-110003.
E-mail : delhihighcourt@hub.nic.in
By Order of the Court,
V.P. VAISH, Registrar General

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ADMINISTRATIVE TRIBUNAL ACT, 1985—The Petitioner, has challenged the order dated 29th January, 2010 passed by Central Administrative Tribunal, Principal Bench, New Delhi in T.A No.1317/2009 titled "Sh'Sultan Singh & Ors v. Municipal Corporation of Delhi" directing the petitioner to examine the claim of the respondents on the basis of the evidence produced before the Tribunal and thereafter process payment of difference of pay of the post held and duties discharged by the respondents on the higher post of Garden Chaudhary, if the claim of the respondents was found to be genuine and order dated 7th October, 2010 in review application No.270/2010 dismissing the review application—The respondents filed a writ petition being W.P(C) No.10158-86/2005 praying for a direction to pay difference of wages of Malies/Chowkidars and that of Garden Chaudhary from the date the respondents have been performing the duties and responsibilities of Garden Chaudhary—They are entitled for the difference in salaries between Malies/Chowkidars and Garden Chaudharies—The writ petition filed by the respondent was transferred to the Central Administrative Tribunal and was registered as T.A No.1317/2009 titled "Sultan Singh & Ors v. Municipal Corporation of Delhi"—It is contended by the petitioner that any appointment made without the recommendation of DPC is not valid and the appointment made by Deputy Director (Horticulture) was not competent—The claim of the respondents have always been that they should be paid the difference in pay of Mali/Chowkidar and the Garden Chaudhary as they were made to work on the post of Garden Chaudhary whereas the petitioner had first denied that they worked as Garden Chaudharies, then took the plea that the Assistant Director (Horticulture) was not competent to ask the respondents to work as Garden Chaudharies and that the respondents cannot be appointed to the post of Garden Chaudharies in accordance with the recruitment rules. The plea

of the respondents that they are performing the higher duties for long years for want of a regular promotion on officiating basis, and having discharged the duties of higher post by resorting to "quantum meruit rule", held that they are entitled for emoluments of the higher post.

Municipal Corporation of Delhi v. *Sh. Sultan Singh & Ors.* *128*

ARBITRATION AND CONCILIATION ACT, 1996—Execution of arbitration Award—Appeal filed to assail the order of Learned Single Judge in Execution Petition wherein he allowed release of Rs. 1,06,26,000/- to Respondents No (i) to (iii)—A family arbitration Award was passed on 1st January, 1999—The Award settled the shares and claims between five brothers forming Group-A, B, C, D, E. —The Award has since been upheld by the Hon'ble Supreme Court vide order dated 15th May, 2009 subject to the amendment of the final Award by the Division Bench of this Court vide order dated 1st August, 2008.—The possession of Okhla Property was handed over to Group C on 8th June, 2009—Therefore, the issue for which damages/rent are being claimed relates to the period beyond the period of 45 days from the date of the family settlement dated 1st January, 1999 i.e.,15th February, 1999.—The appellants claimed compensation for the illegal and unauthorized occupation of Okhla Property by Group E during all these years—The order dated 13th January, 2010 in Execution Petition itself stated that the issue of inter-se liabilities would be examined and adjudicated after all statutory dues are paid to respective banks and financial institutions.—The contention on behalf of the Appellants that the Single Judge virtually dismissed the claims of Group C qua Group E without adjudicating the same are untenable, as the final adjustments were to be made after final adjustment of statutory dues—The order made was legal—Appeal dismissed.

Y.P. Khanna & Ors. v. *P.P. Khanna & Ors.* *563*

— S.34—Arbitral Award—Non—Joinder of necessary party—An application for appointment of Arbitrator was filed on the failure of Delhi Vidyut Board (DVB) to appoint an arbitrator—

Arbitrator was appointed Arbitral award passed in favour of appellant—Award was challenged by two respondents—In appeal before the Division Bench only objectors were impleaded—An application was filed by BSES Rajdhani Power Ltd. for impleadment—Opposed by appellant—Court expressed opinion that appeal not maintainable in the absence of all parties before Arbitral Tribunal—However, appellant continued to object to impleadment application—Held—An order which may adversely affect a person should not be passed in their absence—Despite opportunity granted to appellant, appellant failed to implead all parties who may be affected by the outcome of the appeal—Appeal not maintainable—Dismissed.

Hindustan Vidyut Products LTD. v. *Delhi Power Co. Ltd.* *36*

ARMS ACT, 1959—Section 25/54/59—Explosive Substance Act, 1908—Section 4 & 5—As per prosecution, deceased and PW2 running partnership and suffered losses—Deceased and PW2 started racket of financing vehicles under fake names and used to disappear with the cash entrusted by intending car buyers—Appellant Dhananjay Singh and co-accused Shailender Kumar (since deceased) visited the deceased on motorcycle at his house—They both took PW2 and deceased out with them and on way back Shailender Kumar placed knife on PW2s throat and asked him to hand over valuables, his purse was snatched—PW2 noticed appellant firing shot on the neck of deceased—PW2 pushed Shalinder Kumar and ran away—PW2 rang up PW6, wife of deceased on her mobile and informed her that the deceased had been abducted by the appellant and his co-accused in his Santro Car—Later, deadbody of deceased found—Cause of death was opined as Spinal Shock consequent upon cervical vertebral and spinal cord injuries as a result of blast effect of fire arm—On receipt of secret information, appellant arrested with a bag carrying two loaded country made pistols and cartridges besides six crude explosive bombs—Santro car seized by police of District Moradabad as unclaimed property—Pursuant to disclosure of appellant, one country made pistol and his blood stained clothes recovered from his rented house—On secret information, co-accused Shailinder Kumar (since dead) arrested—On inspection of car,

on opening dashboard from lower side by mechanic, a bullet recovered—Trial Court convicted appellant u/s 302, 392, 397, 201, 404—Arms Act Section 25/54/59 and Explosive Substance Act Section 4 & 5—Held, Too many improbabilities in prosecution story—Improbable that appellant and co-accused allowed PW2 to escape on foot when they were in possession of Santro Car and were well aware that PW2 had witnessed commission of murder—Appellant was armed with pistol and as a natural conduct, he and co-accused would not have allowed PW2 to escape—Not even scratch injury present on neck of PW2—If appellant and co-accused had robbed PW2 of three ATM cards, they would naturally have asked PW2 the PIN nos. of the cards or else ATM cards were worthless to them—Natural course of human conduct would be that the appellant and co-accused would have taken PW2 to the nearest ATM centre to withdraw the money using the cards—No evidence collected by prosecution showing ATM cards used to make purchases or if PW2 stopped all transations in respect of robbed ATM cards—Explanation given by PW2 for not informing police regarding incident that he apprehended harm to himself for doing business in false name, not natural conduct—Not believable that PW2 would have seen the appellant firing a shot shot at deceased and would not disclose it to PW6 (wife of deceased)—While PW2 claimed, he did not give any information to PW12 (brother-in-law of deceased), PW12 claimed that he received telephone call from PW2 on the night of the incident informing about the deceased being shot at and taken away in his Santro car—Although IO joined a chance witness, PW9 to witness the recovery, the landlord of the premises was not even questioned, if the appellant resided in premises—Defies logic that appellant would keep country made pistol which was used by him for commission of crime with two other pistols and go to Anand Vihar, ISBT from where he was arrested—Recovery of cartridge from dashboard cannot be believed because of delay of 7 days and hole caused by fire cartridge too prominent in dash board to go un-noticed by police officers—In view of improbabilities and contradictions, not established beyond reasonable doubt that deceased was shot at by appellant—Regarding recovery of Arms and Explosives from appellant,

recovery witness, PW54 denied having made any statement to the police or arms and ammunitions being recovered in his presence—Conduct of various officers including IO in recording successive disclosure statements and shifting the place of recovery to the place of their choice as per their convenience, does not inspire any confidence—Omission on the part of police witnesses, to notice hole created by bullet in dashboard till dashboard was opened and used bullet retrieved makes version of recovery of arms and ammunition suspect—Appellant acquitted—Appeal allowed.

Dhananjay Singh Bhadoria v. *State* *710*

CENTRAL BOARD FOR SECONDARY EDUCATION EXAMINATION BYE-LAWS—Rule 69.2—Change/ Correction in Birth Certificate—Petitioner's request for change of date of birth in his class 10th certificate was rejected by CBSE-Date was from the previous school records—Petitioner claimed that his parents had inadvertently furnished wrong date—Correct date was mentioned in certificate issued by NDMC and passport—Respondent also contended that only typographical errors are to corrected. Held—Petitioner cannot be allowed to sleep over the mistake-repeating it throughout his academic career-period of limitation of two years provided in the bye law—Reasonable time-to take notice of a discrepancy—Getting an entry corrected in the certificates is not a vested right and is subject to limitations—Hard to believe that the parents of the petitioner and the petitioner would keep committing the mistake in furnishing the date of birth.

Chirag Jain v. *CBSE & Ors.* *267*

CENTRAL EXCISE AND SALT ACT, 1944—Section 35G CEAC No. 5/2010 is directed against the order passed by the Customs Excise and Service Tax Appellate Tribunal, disposing of the application for waiver of pre-deposit with direction to deposit two amounts of Rs. 8,71,70,993/- and Rs. 3,07,55,877/- but granted waiver from payment of penalty and interest—CEAC No. 14/2010 is directed against the order passed by the Tribunal dismissing the original appeals filed by the appellant for failure to deposit the tax amount in terms of the earlier order dated 15th February, 2010 Held: Undue hardship which entitles an

appellant to seek waiver, means something which is not warranted by the conduct of the appellant or very much disproportionate to the said conduct—Undue hardship is caused when the hardship is not warranted by the circumstances. The other aspect which has to be kept in mind is the need and requirement to safeguard the interest of Revenue. Tribunals while disposing of applications for waiver of pre deposits have to keep in mind the said two factors—Tribunals order directing payment of principal amount does not require interference—However time upto 16th May, 2011 granted to appellant to make deposit of the entire tax amount and in case the said deposit was made, the appeals filed by the appellant to be heard by the Tribunal.

Golden Tobacco Limited v. *Commissioner of Central Excise, Delhi-I* *570*

CODE OF CIVIL PROCEDURE 1908—Order 14 Rule 2—Muslim Personal Law (Shariat) Application Act, 1937—Letter of administration sought regarding Will dated 20.11.1984—Third respondent contested the petition on the ground Will forged and fabricated—Also set up another registered Will dated 5.6.1992 attested by two witnesses allegedly executed by deceased testatrix in her favour bequeathing whole of her property—Trial court accepted the Will set up by respondent as genuine although only attesting witness examined had not supported her—Trial court did not give finding on issue raised by appellant on the pretext that a Will set by third respondent was later in time and thus superseded the earlier Will propounded by the appellant—Petition dismissed However, granted probate of Will dated 5.6.1992 in favour of respondent no.3—Preferred first appeal—Contended Section 63 (c) of Indian Succession Act and Section 68 of Indian Evidence Act are applicable to Hindu Will and not to the Muslim Will—Court observed : despite the registration of said Will after six months of death of deceased the trial Court relied upon statement made by respondent no.3, propounder and beneficiary of the Will—Further observed, there were suspicious circumstances shrouding the Will—Will purported to be attested by two witnesses—Only one examined who did not prove the Will as he stated that he did not know Nawab Begam—Testatrix and

she did not sign the Will in his presence—He signed the will at his residence as he was friend of respondent no.2—Did not identify signature of other witnesses—Held: if attesting witness fails to prove the attestation or that propounder take active part in execution of Will which confers substantial benefit on him/her it would lead to suspicion which has to be explained by satisfactory evidence—Even registration of Will did not dispense with need of proving the execution and attestation—Respondent herself relied and based her case upon Section 63 (c) of Indian Succession Act and Section 68 of Indian Evidence Act which are mandatory for Will to be legally valid—Further held—The appellate court has no power to make out a new case not pleaded before the trial Court—Decision of appellate court cannot be based on grounds outside the plea taken before trial court—Trial Court pronounced judgment on only one issue; as per order 14 Rule 2 CPC a judgment which fails to pronounce on each and every issue framed suffers from material irregularity and would not be a judgment—Judgment of trial court can not be sustained—Appeal allowed—Case remanded to trial court to decide the matter afresh taking into consideration the observations.

Sheikh Anis Ahmad v. *State & Ors.* *55*

— Order XII Rule 6—The plaintiff had filed application under Order XII Rule 6 for passing of decree on the basis of admissions made by defendants—Defendants right to file the reply was closed—Defendant's had admitted vide e-mail the receipt of entire sale consideration of US $97,750/-. The defendants had further admitted vide e-mail the non-delivery of shipment of the plaintiff—The defendants had further apologized vide e-mail for the non delivery and had refunded part payment of US $ 20,000/- but had not made the balance payment. The admissions made by defendants were sufficient to pass a decree in favour of the plaintiff under Order XII Rule 6 of the Code of Civil Procedure.

AK HAB Europe BV v. *Whitefields International Private Limited Anr.* *162*

— Order 7 Rule 11—Transfer of Property Act, 1882—Section 106—Slum Areas (Improvement and Clearance) Act, 1956 (in

short 'Slums Act')—Section 19—Plaintiff/appellant bought shop in 2003—Mother of respondent nos 1-3 inducted as tenant by erstwhile owner, her tenancy terminated in January 2000, she expired in February 2000—Respondent nos 1-3 continued in possession—Sublet portion to respondent no. 4—Notice served on respondent nos 1-3 to hand over possession—Suit for possession and measne profits—Right to file written statement closed—Application u/ Order 7 Rule 11 filed by respondent nos. 1-3 on ground that no permission sought u/s 19 Slums Act—Trial court allowed application—Held, Respondent nos 1-3 inherited commercial tenancy from mother—Trial court correctly took judicial notice of fact u/s 57 Evidence Act that suit property was in slum area—A notice u/s 106 of the TPA does not convert the possession of tenant in respect of premises in Slum act areas into wrongful possession or unlawful possession since where ever there is statutory protection against dispossession by operation of law, the possession of a person inspite of termination of his lease, is deemed as lawful possession and under authority of law—Just because defence of respondents struck off does not make application u/ order 7 Rule 11 not maintainable, since application can be filed at any stage of proceedings—Appeal dismissed.

Harish Chander Malik v. *Vivek Kumar Gupta & Others* *293*

— Order XXXIX Rule 1 and 2—Injunction against invocation of bank guarantee—Plaintiff filed a suit for declaration and permanent injunction contending that it was awarded sub-contract by defendant no. 2; had furnished bank guarantee on understanding that that defendants would release the aforesaid sum which represented the retention amount—Plaintiff had completed the work within time to the satisfaction of the defendants-defect liability period was also over-entitled to recover more than 2 crores from defendant no. 2 invocation of bank guarantee—In terms of the Letter of Award(LoA) plaintiff and defendant no.2 had given joint undertaking for successful performance of contract—Plaintiff company also required to furnish bank guarantee of 2.5% of the total contract price over and above security deposit by defendant no. 2—

Also agreed that it would not be necessary for defendant no. 1 to proceed against defendant no. 2 before it proceeds against plaintiff-defendant no. 2 failed to complete the work awarded—Defendant no. 1 was constrained to encash the bank guarantee. Held—apparent from LoA that defendant no. 2 could not have participated in the bidding process without the plaintiff company—Joint undertaking furnished as associates—Liability of the plaintiff therefore not restricted only to sub-contract—Bank guarantee covered the whole of contract awarded to defendant no. 2 Case of special equity not made out—Injunction against encashment of bank guarantee denied.

ITD Cementation India LTD v. *National Thermal Power Corporation LTD. & Ors.* *345*

— Order VII Rule 11—Transfer of property Act, 1882—Section 54—Limitation Act, 1963—Article 54 of the Sechedule Specific Relief Act, Section 34—Suit for declaration, possession and injunction filed by the plaintiffs—Plot/property allotted to him for and on behalf of the President of India by the DDA by way of perpetual sub lease deed dated 18. 12.1968—Contentions of the plaintiffs—Father of the defendant sold the terrace rights of the first floor i. e. second floor and half of the terrace of the second floor that is third floor of the suit property to the plaintiffs and their mother—Received the entire Sale consideration and executed the agreement to sell, Receipt, WILL and the General Power of Attorney in favour of the plaintiffs on 11.6.1996 and got them duly registered with the Sub Registrar—Possession stated to be taken over—Father of the defendant expired on 02.04.1999—Title of the plaintiffs was perfected by operation of the registered WILL dated 11.06.1996 since the relations between the plaintiffs and the defendants were cordial, the plaintiffs allegedly continued to be in possession of the premises sold to them through their guard—A key of the terrace floor was given to the defendant in order to see their overhead water tanks—On 02.01.2009 when the plaintiff no. 1 visited the suit property he found that he was dispossessed from the terrace of the first floor—The defendants made a false statement to the DDA that they are the only legal heirs of their father without disclosing the factum of sale of the terrace of the first floor of the suit property

and without disclosing that the deceased had made a WILL in respect of the said terrace floor of the first floor in favour of the plaintiffs and applied for conversion of lease hold rights into freehold—This request of conversion by the defendants permitted by the DDA and a conveyance deed dated 03.06.2008 executed and registered in their favour—Hence the present suit—Stated in the plaint that the cause of action accrued on 29.03.1996 and 11.06.1996 when the documents were executed in their favour and in any case it also accrued on 02.04.1999 on account of the death of the father of the defendants—Further arose on 2.1.2009 till which date the plaintiffs remained in possession—Along with the suit, an application under Order 39 Rules 1 and 2 has been filed—The application filed by the defendants u/O 7 Rule 11 (d) CPC for rejection of the plaint on the ground that the present suit is barred by law on the ground that the plaintiffs are claiming a decree of declaration to the effect that they are the owners of the suit property based on unregistered agreement to sell dated 29.03.1996 and the registered GPA/SPA/WILL dated 11.06.1996—Suit is time darred as limitation is reckoned from the death i.e. 02.04.1999, it would expire on 01.04.2002 while the present suit for the declaration has been filed in the year 2009—Plaintiffs by clever drafting of the plaint purported to file the present suit for declaration and injunction merely as a camouflage while in effect they are seeking the specific performance of an agreement to sell dated 29.03.1996 and execution of the documents of title in their favour—Plaintiffs have chosen to file the present suit after 13½ Years of execution of the alleged agreement to sell knowing fully well that they cannot sue as on date by filing the suit for specific performance as the same is barred by limitation. Held—A reading of Section 54 of the Transfer of Property Act, 1882 and Section 17(1) (b) of the Registration Act, 1908 together would clearly show that no right or title or interest in any immovable property passed on to the purchaser until and unless the document is duly registered. In the instant case, the plaintiffs of their own admission have stated that they have purchased the terrace of the first floor vide agreement to sell dated 29.03.1996 which is not a registered document. First of all, the said document in question is an agreement to sell

and not a sale document as is sought to be claimed by the plaintiffs. Even if it is assumed to be a sale document, as it has been contended by the plaintiffs, even then the document being an unregistered document cannot be taken cognizance of, because the right or title or interest in the immovable property does not pass on to the plaintiffs until and unless they seek specific performance of the said agreement on the basis of the aforesaid documents.

According to Article 54 of the Schedule of the Limitation Act, the said suit for specific performance is to be filed within three years from the date of accrual of cause of action or within three years from the date of refusal by the defendants to perfect the title of the plaintiffs. While as in the instant case, the suit is filed for declaration to the effect that they should be declared owners, plaintiffs cannot be declared as owners on the basis of an inchoate title to the property. The plaintiffs are admittedly not in possession of the suit property—Even if it is assumed that the plaintiffs have not filed the suit for specific performance they ought to have claimed consequential relief under Section 34 of the Specific Relief Act wherein they were seeking declaration by claiming that the defendants be directed to perfect their title by execution of certain documents in terms of Section 54 of Transfer of Property Act pertaining to sale and mode of sale and by getting them registered under Section 17 (1) (b) of the Registration Act, 1908 but this has not been done—The plaintiffs have actually camouflaged the present suit to overcome the bar of limitation which admittedly in a suit for specific performance under Article 54 of the Limitation Act is three years. If it is taken to be a suit for declaration even then the period of limitation is three years which is to be reckoned, when the right to sue first accrues. The plaintiffs of their own admission have stated that the right to sue first accrued on 29.03.1996 and therefore, the said period of three years comes to an end in 1999. According to Section 9 of the Limitation Act, the period of limitation cannot be stopped once it starts running. Therefore, the period of limitation for seeking declaration is not to be reckoned from 2.1.2009 or 5.2.2009 as claimed by the plaintiffs. So far as the question of possession is concerned, it is only a consequential relief to the declaration or specific performance

which the plaintiffs have failed to claim within the period of limitation of three years, reckoning either from 29.3.1996 or 11.6.1996 or 2.4.1999 and hence the suit, on the meaningful reading of the entire plaint, is barred by limitation both under Article 54 or 58 of the Schedule to the Limitation Act.

Section 3 of the Government Grants Act, 1985 clearly lays down that any provision of the perpetual sub lease or lease granted under Government Grants Act will have the same force as a provision of law, therefore, the agreement to sell which is treated as a sale document by the plaintiffs, apart from other infirmities as have been stated hereinabove is also hit by Section 3 of the Government Grants Act, 1985 because Clause 6 (a) of the perpetual sub lease deed will supersede the terms and conditions of the agreement and prior permission for sale had not been obtained by the plaintiffs as envisaged in their own agreement. Order 7 Rule 11 (d) CPC lays down a contingency of rejection of the plaint if it is barred by any law.

The plaintiffs ought to have filed a suit for specific performance and not a suit for declaration as has been done by them. The plaintiffs have camouflaged the present suit by filing a suit for declaration so as to escape the period of limitation which is admittedly three years in respect of suit for specific performance in terms of Article 54 of the Limitation Act.

The question of law of limitation is a question between the Court and the party seeking to get his grievance redressed. Even if a party concedes, as suggested by the learned senior counsel, it can prevent or prohibit the Court from considering as to whether the suit is within limitation or not. Even if it is assumed that this was a concession or waiver by the defendants before the Appellate Court, it estopps the defendants from raising this plea as there is no estoppel against law.

Section 202 of the Contract Act does not apply to the facts of the present case and so far as Section 53A of the Transfer of Property Act is concerned, that can only be used as a shield not as a sword and that shield could have been used by the plaintiffs provided that they were in possession of the first floor of the suit property. The plaintiffs could have defended their possession in case they were having the same against the

defendants if they brought any action. According to the plaintiffs own admission they were not in possession of the suit property at the time of the filing of the suit.

For the foregoing reasons, the suit is rejected as being barred by limitation under Order Vll Rule 11 (d).

Sh. Ripu Daman Haryal & Anr. v. *Miss Geeta Chopra & Anr.* *406*

— Suit for declaration, permanent injunction mandatory injunction—Service Law—FCI (Staff) Regulation, 1971—Regulation 31-A—Regulation 63—Disciplinary proceedings—Probation of Offenders Act—S. 12—Plaintiff was appointed as draftsman with Food Corporation of India (FCI) on 16.04.1999—Convicted and sentenced for offence punishable u/s 325 and 149 IPC with imprisonment and fine—Sentence suspended-on 26.04.1999—Informed his employer only on 4.6.1999 of involvement and conviction—In revision against the sentence, sentence modified and was released on probation for two years vide judgment dated 12.07.2002—Respondent dismissed appellant from service vide order dated 31.07.2003—Plaintiff filed a suit against termination of service—Contended, release on probation did not carry any disqualification—Suit contested on the ground that plaintiff had not come to court with clean hands—Trial Court held: Mere release on probation does not mean that he is absolved of moral turpitude and had concealed material facts—Not informed department of his criminal proceedings pending against him —Services rightly terminated—In the first appeal, findings of court affirmed—Second appeal preferred—Held that interference with finding of fact are called for only if the same are perverse—Employee cannot claim a right to continue in the service merely on the ground that he had been given benefit of u/s 12 of Probation of Offenders Act—The act of appellant in concealing the fact of his involvement in criminal proceedings and his resultant conviction being dishonest, amounts to moral turpitude; not entitled to benefit—Appeal dismissed.

Shri Deep Chand Bharti v. *M/s Food Corporation of India* *509*

— Order XXXVIX, Rule 1 & 2—This judgment dispose of connected appeals No. FAO(OS) 107/2010 and FAO(OS) 154/2010 emanating from the common Order of the Ld. Single Judge—By means of which an interim injunction on the plaintiff's application, restrained the defendant (ESPL) from proceeding against the plaintiff (BCCI) in courts in England—Plaintiff submits that there is complete identity between the cause of action of the notified lis proposed and thereafter actually filed on 4.2.2010 in the High Court of Justice, Chancery Division, London and the dispute which is subject matter of suit—CS(OS) No. 1566/2007, filed by ESPL against the BCCI presently pending in High Court—By the subject Order, the Learned Single Judge vacated the injunction relating to the International Cricket Council (ICC) and the England & Wales Cricket Board (ECB)—The first question is whether the cause of action in both the suits is common—The Indian Suit, CS(OS) No. 1566/2007 filed on 24.8.2007, is a suit for Declaration, Permanent and Mandatory Injunction—ESPL has filed this Suit against the Union of India, Karnataka State Cricket Association and BCCI—The suit alleges that BCCI, has not only publically opposed ICL but has overtly and covertly taken all possible steps to stultify its operations. It is also alleged that a de facto monopoly in the field of cricket is sought to be created in India by BCCI which is now acting arbitrarily in its own functioning as well as in the administration of the game.

After perusing the two claims and cogitating of the contentions of the adversaries, it is opined that the cause of action in two is substantially and materially the same.

The second argument is that the UK Suit is being prosecuted under the UK Competition Act and, therefore, the action is based on a distinct statutory cause of action, thereby making the UK action a single forum case.—Argument misconceived—A statutory cause of action arises from breach of a specific duty cast or right conferred by a statue on a person.

Essel Sports Pvt. Ltd. v. *Board of Control for Cricket in India & Ors.* *585*

— Order VI, Rule 17—Order 41 Rule 27(1) (b)—Motor Vehicles Act, 1988—Section 140, 165 and 166—Motor vehicles Act, 1939—Section 110-A (1) (c)—Respondent No. 1 suffered multiple injuries by a vehicle driven by Petitioner and filed claim petition for compensation against petitioner, respondent No. 2 and 3—Amendment application of respondent No. 1 to amend claim petition to aver claim petition is filed by petitioner through his father in a representative capacity, allowed by Tribunal—Order challenged before High Court plea taken, amendment has effect of filing of lacunae left by respondent No. 1 and that too when defence of petitioner was put to respondent No. 1 in cross examination, which is not permissible in law—Per Contra plea taken, perusal of petition would show same was filed by father of claimant as attorney—Inadvertently this fact was not mentioned in petition—Petitioner had not filed any reply opposing application and had cross examined respondent No. 1 at length after amendment was allowed—It was too late in day for petitioner to now raise objection to amendment—Held—Section 166(1) (d) of Act nowhere envisages that such authorization in favour of agent should be in writing—If legislature intended that injured person should authorize his agent in writing to institute a claim petition on his behalf, it would have stated so, but words ''in writing'' are conspicuously absent from said sub Section—Motor vehicle Act being a beneficent piece of legislation must be so construed so as to further object of Act—Strict rules of pleadings and evidence are not to be applied in motor accident claims cases—Petitioner waived his right to file a reply and it is no longer open to him to challenge amendment at appellate stage, more so, when he has thereafter cross examined claimant extensively—Injured had suffered grievous injuries in a motor accident allegedly on account of recklessness of petitioner and is undergoing treatment till date—Hyper technicalities cannot be allowed to defeat course of justice.

Sudershan Singh v. *Ravinder Uppal and Ors.* *700*

— Order 39 Rule 1 and 2 CPC—Infringement of design, registered under Design Act—Plaintiff manufacturer of Water Jugs—Design of Water Jugs registered in Class 07-01—Suit filed alleging defendant found selling Water Jugs with identical

design—Claimed inter-alia by the defendant that the cap used by the defendant on its Water Jugs altogether different from cap used by plaintiff on its water jug—Certificate imputed novelty in design to the shape and configuration of water jug—Held, to ascertain whether impugned design infringes another design, the products need not be placed side by side—Matter has to be examined from the point of view of a customer with average knowledge and imperfect recollection—Comparison showed that primary design of Water Jug of the plaintiff has been copied by defendant no. 1—Application of injunction allowed.

Veeplast Houseware Private Ltd. v. *M/s Bonjour International & Anr.* *753*

— Order XXXIX Rule 4—Vacation of ex parte ad interim stay—An agreement to sell was executed between the defendants as first party and plaintiff as second party—Defendants received part payment, property being leasehold was to be converted into freehold it was the responsibility of the plaintiff to ensure that conversion takes place within 60 days; in case the conversion did not take place, the plaintiff was to make a balance payment of Rs. 95 lacs within 60 days and the defendants would be then under an obligation to execute necessary documents and transfer possession of the property—Plaintiff filed the present suit contending that conversion could not be carried out due to default of the defendants ex-parte ad interim stay was granted defendants filed the instant application for vacation of suit-time was the essence of contract-stipulated that in case the conversion did not take place—Plaintiff was still to pay the balance consideration within 60 days which was not paid-plaintiff cannot absolve himself only because the conversion did not take place-plaintiff did not come to court with clean hands—Plaintiff admittedly a broker—Did not have sufficient funds. Held—Time was the essence of contract—Envisaged that in the event of conversion not taking place within 60 days, the plaintiff was still under an obligation to pay the balance consideration and get necessary documents executed including transfer of the property—Plaintiff therefore cannot be permitted to rely on the clause pertaining to conversion—Balance of

convenience not in favour of the plaintiff—No prima facie case; interim injunction vacated.

Prakash Khattar v. *Smt. Shanta Jindal & Ors.*..... *801*

CODE OF CRIMINAL PROCEDURE, 1973—Sections 397, 251—Security and Exchange Board of India Act, 1992—Section 24 (1) and 27—Revision petition challenging the order dated 12.11.2009 framing the notice u/s 251 Cr. P.C. for the offences punishable u/s 24 (1) read with Section 27 of SEBI Act,—M/s Master Green Forests Ltd., incorporated on 03.06.1993—Company operated Collective Investment Schemes and raised huge amount from general public without complying with rules and regulations issued by SEBI—Despite repeated directions, did not comply with the said regulations—Petitioner contends that they were not the directors, promoters or In-charge of the accused company—They were only the shareholders—Had no role to play in day to day working of the company—There is no specific allegations qua the petitioners in the complaint—Held—Clear that the Petitioners are neither the Directors nor in anyway related/involved in the management or day to day affairs of the Company—They are only the shareholders and thus cannot be held liable for the offences committed by the Company—The order of learned Additional Sessions Judge framing notice against the Petitioners, set aside.

Suresh Batra & Ors. v. *Securities & Exchange Board of India* *334*

THE COMPANIES ACT, 1956—Section 433(a) read with Section 439—Petition for voluntary winding up of the company—Petitioner submitted that his company had neither done any business nor earned any income for the last ten years—No hope or prospect for the company doing any further business—A dispute in relation to business done with Prasar Bharti in 1998-1999, pending adjudication before Arbitrator—Shareholders have passed a special resolution in an extraordinary general meeting held on 9th October, 2006 resolving to wind up company by the Court—Just and equitable to wind up the company—Registrar of Companies (in short 'ROC') opposed the present petition submitting that

winding up under Section 433 of the Act is a discretionary act of the Court and while exercising discretion under Section 433(a) of the Act, the Court must consider relevant factors like company's solvency, ability to pay its debts and interest of creditors amongst other things and the Court should not exercise its discretion to wind up unless there are compelling reasons to do so—Prasar Bharti joins ROC in opposing the present petition submitting that the petitioner-company is seeking winding up only to render infructuous the arbitration award to be passed against it in a proceeding initiated by Prasar Bharti, which is pending adjudication the petitioner-company has not disclosed to the Court that that the petitioner—Company has filed a counter-claim of Rs. 11,21,63,605/- against Prasar Bharti's claim of Rs. 4,54,74,256.25. Held—The process of winding up under Section 433 is discretionary—The exercise of power under Section 433 (a), which has the effect of causing death of a company, should be exercised cautiously—Endeavour of the Court should be to revive the company though at that moment the company may be making losses—For this purpose the Legislature has conferred discretionary power on the Court—Held in various judgments that mere suspension of business by itself is not a ground to wind up a company—Financial health of a company is of paramount importance—While evaluating this, the Court has not only to just take the present financial position of the company into consideration, but also its future financial prospects—In the present case, petitioner company has filed counter claim of Rs. 11,21,63,605/- against Prasar Bharti in arbitration proceedings which is still pending adjudication and in the event, the counter-claim of the petitioner-company is allowed, possibility of revival of petitioner-company cannot be denied—The substratum of the company has not disappeared—The present petition has been filed with an intent to render the arbitration proceedings infructuous and to place the Official liquidator in the shoes of the petitioner company to contest the pending litigation—Even in the cases relied upon by the petitioner it was held that it is only when the company is not in a position to pay its debt and its substratum gone, it is entitled to resort to winding up proceeding as provided by Section 433(a) of the Act—No justified ground for winding

up is made out—The present petition and application are dismissed.

Advance Television Network Ltd. v. *The Registrar of Companies* *380*

CONSTITUTION OF INDIA, 1950—Article 226—Service Law—In the year 1996-1997, an advertisement was issued for recruitment against several posts under Railway through Railway Recruitment Board, Allahabad (in short referred to as 'the RRB'). Respondent had applied for the post of JE-II/ Signal in scale of Rs.1400-2300 (pre-revised) against employment notice dated 3/96-97. An admit card was issued to him—The examination was held on 30.1.2000 and result was published on 25.4.2000 wherein respondent was declared selected—On 9th May, 2000, a letter was issued to the respondent informing that on the basis of selection conducted by the RRB, his name had been placed on the panel and had been forwarded to Chief Administrative Officer (P) Construction office, Kashmiri Gate, Delhi—Thereafter, vide letter dated 5th April, 2002, respondent was informed that he had been declared medically unfit in A-3 category, as much, was not fit for J.E-II/Signal in the scale of Rs. 5000-8000. He was further informed that in case he wanted to opt for an alternative post, he was required to give an application within one year of receipt of said letter. Vide letter dated 5th June, 2002, respondent was informed that his case for an alternative post had been referred to the Chief Officer and was further asked to report to the office within 15 days of receipt of letter so that his medical could be done—On 4th July, 2002, respondent wrote a letter wherein he requested for an alternative post for which he was medically fit—Thereafter on 22nd October, 2002, the office of petitioner no.3 & 4 informed no.3 & 4 informed respondent that he had been declared fit for B2 and below, as such his application dated 4.7.2007 had been considered by the competent officer and in their division the post of Commercial Clerk grade 3200-4900 (R.P'S.) ST, was lying vacant and his case would be referred to the Chief Officer if he was ready for the same. The respondent requested for issuance of appointment letter for the aforesaid post. On 10th December, 2002, the Divisional Railway Manager, Ambala,

wrote a letter to the General Manager, Baroda House, New Delhi informing that the post of Commercial Clerk was lying vacant in their division and decision in that regard be informed to him—Reminders in this regard were also sent by the Divisional Railway Manager, Ambala on 9th November, 2006, 7th March, 2007 to the General Manager, Baroda House, New Delhi. Finally on 14th August, 2008, petitioners informed the respondent that as per order of the competent authority, for direct appointment against DMS-III Grade 5000-8000, there was no vacant position for S.T. and as such it was not possible to consider his case for an alternative appointment—On the other hand, the stand of respondent is that as per instructions contained in its circular bearing no. PS 13588/2009 dated 25.5.2009 are not applicable in the case of respondent as the said circular is applicable from the prospective date i.e. the date of issue. As regards instructions contained in its circular PS No.11931/99 dated 16.12.1999 is concerned, it is contended that Tribunal has considered the said circular while passing the impugned order and there is no illegality in the impugned orders which call for interference of this court in the exercise of writ jurisdiction under Article 226 of the Constitution of India—It is an admitted position that as per instructions contained in circular in PS No. 11931/99 dated 16th December, 1999 General Managers Railways had the authority to consider requests from candidates who fail in prescribed medical examination after empanelment by RRB for an appointment in the alternative category subject to fulfilment of eligibility criteria—The stand of the petitioners is that as per instructions in the aforesaid PS, if a candidate is found medically unfit, an alternative post can be provided in the equivalent grade and as there was no vacancy in the equivalent grade, alternative post was not offered to him—Held once the petitioner itself had itself chosen to deviote from the afore mentioned circular, it was not open in equity to deny the respondent the alternative post on the ground that it was in lower grade.

Union of India & Ors. v. *Jugeshwar Dhrva* *107*

— Industrial Disputes Act, 1947—Section 25F—Limitation Act, 1963—Section 5—The appellant has assailed the order dated

10th January, 2011 dismissing his writ petition impugning the award dated 11th August, 2006 passed by Labour Court VI- delay of 28 days in present intra-court appeal—CM for condonation of delay under Section 5 of the Limitation Act, 1963—Plea taken Labour Court had proceeded with great haste and hurry in closing evidence as the appellant had gone out of India—Resulted miscarriage of justice—The appellant had claimed that his Services were terminated by respondent no.1—Appellant claims that he was a workman protected under the Industrial Disputes Act, 1947 and was entitled to retrenchment compensation—Respondent no.1 disputed the claim and accordingly reference was made to the Labour Court which dismissed his case—First appeal before High Court also dismissed—Present CM filed—The facts show that for almost 5 years, the Labour Court could not proceed with the case although sufficient opportunities were granted—The defaults and lapses on the part of appellant were sufficient for dismissal and did not merit interference—Application for condonation of delay and appeal dismissed. The appellant cannot explain and wash away his default by claiming that on a few occasions the respondent was at fault—The case of the appellant has to be decided on the basis of his lapses and conduct. It will not be fair and in the interest of justice to ignore the defaults and delay on the part of the appellant as there were some lapses on the part of the management. Lapses on the part of the management is one aspect and once even costs were imposed on them—These lapses, however, do not show and have the effect on condoning the delay and latches on the part of the appellant, which have their own adverse consequences and result.

R.K. Arora v. *Air Liquide India Holding Pvt. Ltd. & Ors.* *121*

— Article 226—Border Road Organization was set up in March 1960 for the expeditious execution of Road Works for development of communication in North and North—Eastern border areas of the country—Petitioners are/were holding various group A posts in Administrative Officers cadre of BRO—Petition raised the issue (i) Whether the admimistrative officers cadre of Border Roads Organization is required to be

encadred as an organized cadre—Held—Grant of financial upgradation envisaged by Assured Career Progression Scheme is different from grant of higher scale of pay recommended by the Pay Commissions—Therefore the Assured Career Progression Scheme does provide a limited relief to the officers of the administrative officers cadre of BRO to a limited extent but is not a substitute for the benefits available to the said officers on encadrement of administrative officers cadre as an organized cadre—It is trite that the courts should not ordinarily interfere with the policy decision of the State—But at the same time it is equally settled that the courts can interfere with a policy decision of the State if such decision is shown to be patently arbitrary, discriminatory or mala fide—In view of the above discussion, we direct the department to encadre the administrative officers cadre of BRO as an organized cadre—We direct the department to decide whether the encadrement of administrative officers cadre of BRO as an organized cadre would be given a prospective or retrospective effect.

K.L. Noatay v. *UOI & Ors.* *167*

— Article 226—Border Road Organization was set up in March 1960 for the expeditious execution of Road Works for development of communication in North and North—Eastern border areas of the country—Petitioners are/were holding various group A post in Administrative Officers cadre of BRO—Petition craves for answer (ii) Whether the petitioners in W.P.(C) No. 10121/1999 are entitled to the payment of special pay/headquarters allowance—Held—This issue is no longer res integra—In LPA No. 121/1984 Union of lndia vs. K.R. Swami & Ors.' decided on 23.08.1991, a Division Bench of this Court was faced with a similar controversy—In the said case, the Ministry of Defence had issued an Office Memorandum dated 20.08.1975, which memorandum is pari material to the Office Memorandum dated 26.08.1974 involved in the present case—The Office Memorandum dated 20.08.1975 issued by Ministry of Defence envisaged the payment of special pay to the officers holding Class I posts (Group A posts) in Defence Establishments when they are posted in the headquarters of their respective organizations—

In view of the aforesaid legal position , we find no merit in the stand taken by the department that the officers working in the administrative officers cadre of BRO are not entitled to the payment of special pay/headquarters allowance on the ground that the administrative officers cadre is not an organized cadre —As a necessary corollary to the aforesaid, the department is directed to make payment of special pay/ headquarters allowance to the petitioners in W.P.(C) No. 10121/2009 from the date said petitioners were posted in headquarters of BRO.

K.L. Noatay v. *UOI & Ors.* *167*

— Petitioner was a Chemistry teacher in Delhi Public School—She attained the age of 60 years on July 31, 2010. It is not disputed that her age of retirement was 60 years—Her grievance is that a Notification dated January 29, 2007 was issued by the Government of National Capital Territory of Delhi, Directorate of Education allowing re-employment to all retiring teachers upto PGT level till they attain the age of 62 years and that despite the Notification, she had not been granted the benefit of re-employment without any cogent reason—The Managing Committee of the School has taken the stand that the Notification so relied upon by her does not apply to private unaided Schools and that as respondent No.2 is a private unaided School, it is not covered by the Notification—The Minutes of Meeting relied upon by the School, that the grant of extension is not a matter of right. In so far as the Notification of GNCTD is concerned, though it does say that the Lieutenant Governor is pleased to allow automatic re-employment of all retiring teachers upto PGT level, but it also goes on to say that such re-employment is subject to fitness and vigilance clearance—And what will constitute fitness has been clarified in the subsequent Notification of February 28, 2007—As per the said Notification, fitness does not mean physical fitness alone, but it also includes professional fitness which is required to be assessed by DDE of the concerned District after considering work and conduct report—It is true that the school did not take any disciplinary action against the petitioner on the basis of the adverse ACRs while she was in service, but if the school overlooked and ignored her such

record and yet granted her financial upgradation and other benefits, must it also grant her re-employment—The answer is in the negative—The petitioner has no right to re-employment. She only has a right to be considered and the school has a right to deny her re-employment, if after considering her over-all performance as a teacher, it finds that she is not fit for re-employment.

Shashi Kohli v. *Director of Education and Anr.*..... *196*

– Article 226 & 227—Punjab & Haryana High Court Rules & Orders V-I, Chapter 18-A—Service Law—40 Point roaster—Petition challenging the decision of not promoting the petitioners to the post of Superintendent—Selection for the post of Superintendent was held by the Departmental Promotion Committee in the year 1995—Promotions were made vide order dated 17th May 1995—Petitioners were not selected—Promotion granted to respondent no. 4 to 6—40 point Roaster applicable to the post of Superintendent was complete—Creation of vacancies thereafter on retirement of Mr. Jaswant Singh and Mr. C.D. Sidhu who were in reserved category, these posts could be filled up only from amongst the incumbent of the reserved categories—Held—There are only four posts of Superintendent in the office of District & Sessions Judge, Delhi—When the number of posts are so less in this cadre, it is difficult to say that the roster was complete on promotion of Mr. M.C. Verma and thereafter vacancies were to be filled up depending upon the category of staff who retired and caused the vacancy—Reason is simple—Even if we treat one post occupied by SC Candidate and on his retirement, that post always to be filled up by SC candidates on the application of *R.K. Sabharwal* (supra), then it would amount to reserving 25% post for SC candidates for all times together—This situation can be avoided only if the 40% roster which is in operation is allowed to continue till end as with the appointment of respondent 4 to 6, points 10, 11 and 12 in the roster only consumed and, we have no option to hold that 40 Roster which is maintained has not completed its life and is to be continued—Once this roster is operional the reserved category candidates would get due representation at the points reserved for them—There is no other course which could be

permissible on the facts of this case.

Gian Singh & Another v. *High Court of Delhi & Ors.* *280*

— Article 226, 227—Army Rule 13 (3) Item 111 (4)—Petitioner awarded 5 red ink entries between the years 1986 till 2000—Notice to show cause issued to submit response to the proposed action of being discharged from service—The competent authority passed an order that retention of petitioner in service was not warranted—Petitioner discharged from service with pension benefits—Petitioner challenged the order in writ petition—Petition dismissed—Letters Patent Appeal—Without holding the enquiry the services of the petitioner could not be discharged—Held—Relevant would it be to state that where a Rule deals with subject matter and the procedure to be followed with respect to the subject matter is also prescribed by the Rule, there is no scope to issue a policy guideline with respect to the procedure to be followed—The procedure under Rule 13 of the Army Rules simply contemplates a prior notice to the person concerned before exercising power under the Rule—Inquiries have to be held if facts are in dispute or blameworthiness of a delinquent employee has to be ascertained—We see no scope for any inquiry to be conducted where a person is being discharged from service with reference to his past service record—Noting in the instant case that before taking the action a show cause notice was served upon the petitioner and after considering the reply filed by him the action was taken, meaning thereby procedures of the law were followed, we dismiss the appeal but refrain from imposing any costs.

Pratap Singh v. *Chief of Army Staff And Ors.* *339*

— Article 226—Income Tax Act, 1961—Section 139(1), 147 and 148—Petitioner prayed for writ of Certiorari for quashing of notice u/s 148 of Act and to quash order whereby objections raised by Petitioner have been rejected—Plea taken, Assessing Officer (AO) assumed jurisdiction to initiate proceedings solely on basis of certain statements recorded by Directorate of Investigation (DIT) without forming independent opinion—Expression used in S. 147 is 'reason to believe' and not 'reason

to suspect'—There should be direct nexus or live link between materials relied upon by revenue and belief that income has escaped assessment—Per contra, plea taken AO has applied his independent mind and has not been solely guided by information given by DIT —Objections of petitioner has been appositely dealt with and order cannot be called cryptic or passed mechanically-—Sufficiency of material has to be delved at time of assessment and petitioner would be afforded adequate opportunity of hearing to explain same. Held—Scrutiny of order shows, Authority had passed order dealing with objection in a careful and studied manner—Note is taken of transaction mentioned in table constituting fresh information in respect of assessee as a beneficiary of bogus accommodation entries provided to it and represents undisclosed income—There was specific information received from office of DIT (INU-V) as regards transaction entered into by assessee company with number of concerns which had made accommodation entries and were not genuine transactions—It is neither change of opinion nor conveys a particular interpretation of a specific provision which was done in a particular manner in original assessment and sought to be done in a different manner in proceedings u/s 147 of Act—Reason to believe has been appropriately understood by AO and there is material on basis of which notice was issued—Court, in exercise of jurisdiction under Article 226 pertaining to sufficiency of reasons for information of belief, cannot interfere—Same is not to be judged at that stage—Writ dismissed.

AGR Investment LTD. v. *ADDL. Commissioner of Income Tax* *1*

— Article 227—Writ Petition—Delhi Land Reform Act, 1954—Section 55 & 33—Delhi Land Revenue Act, 1954—Section 66 Indian Contract Act, 1872—Section 23—Code of Civil Procedure, 1908—Section 9 & 89—Order 23 Rule 3—Arbitration and Conciliation Act, 1996—Legal Services Authority Act, 1995—*Boni judicis est lites dirimere, ne lis ex lite oritur, et interest reipublicae ut sit finis litium*—Petitioners no.1 and 2 and the respondents no.1 and 2 are brothers—Their father was bhumidhar of agricultural land measuring 33 bigah

3 biswas at Village in Delhi—Died leaving four male descendants—Land mutated in the name of petitioners and respondents—A family settlement arrived at on 26.12.1984 between petitioner no.1 and 2 and respondents no.1 and 2—Land agreed to be divided into four parts—Each of four brothers took possession of their respective portion—Continued till 1988—Respondent no.2 tried to grab the share of petitioners no.1 and 2—Suit for permanent injunction filed by petitioners no.1 and 2 against respondents no. 1 and 2—Suit pending—Parties called *panch* to arrive at amicable settlement—Awards signed by four brothers made by *panch*—Filed application in the pending suit for settlement—Suit dismissed as compromised—Petitioners no.1 and 2 approached for mutation—Mutation done in the name of petitioners no. 1 and 2 by *tehsildar*—Respondents no.1 and 2 preferred appeal to Additional Collector—Contending that suit dismissed as withdrawn and there was no decree by which Tehsildar was bound—No opportunity of being heard given to respondents no.1 and 2—Land partition illegal—Even if there was decree, Civil Court has no jurisdiction to pass decree for partition—Agriculture land can be partitioned under section 55 of Land Reform Act—Further, partitioned in contravention of Section 33 of the Act—Petitioners no.1 and 2 during the pendency of appeal, executed sale deed transferring the land of their exclusive share in favour of petitioners no.3 to 7—Petitioners no.3 to 7 not impleaded as party before—Additional Collector dismissed the appeal—Respondents no.1 and 2 preferred second appeal to Financial Commissioner (FC)—FC allowed the appeal setting aside the order—Petitioner no.1 and 2 did not challenge the order of FC—Petitioners no.3 to 7 filed writ petition, wherein petitioners no.1 and 2 and respondents no.1 and 2 were impleaded as respondent—Writ petition allowed with consent of the parties—Matter remanded to FC for decision afresh—FC allowed the appeal of respondents no.1 and 2—Writ petition filed—Contended, FC erred in holding notice of hearing required to be given to respondents no.1 and 2 in mutation proceedings—FC held: the order of *tehsildar* bad but failed to remand the same back—Respondents no.1 and 2 had not disputed the factum of appointment of panch, award, compromise application or separate possession not entitled to

challenge mutation—Respondents no.1 and 2 themselves enjoying the portions in the share—Respondents no.1 and 2 contended that partition was in contravention of Section 33 of Delhi Land Reform Act—The Act does not recognize family settlement—Bhumidars of joint holding not entitled to partition and were required to approach revenue assistant u/s 55 of Delhi Land Reform Act—There being no partition, there could not be question of mutation in exclusive name of petitioner—Court observed: the proposition that agriculture holdings could not be partitioned amicably and parties have to necessarily sue, is preposterous—The Land Reform Act was not intended to bring about change in the normal rights of a person or of the co-owner to effect partition amicably without being required to approach the court thereof—The attempt of the Courts must always be to minimize the litigation and not multiply it—Held: duty cast upon the court to bring litigations to an end and to ensure no further litigation arises from its decision—Amicable resolution of dispute and negotiated settlement is public policy in India—Only where settlement contrary to any statutory provisions or opposed to public policy under section 23 of Contract Act, the Court can refuse to enforce the same—No provision in Land Reform Act prohibiting amicable settlement—Section 55 provides for holding to be partible and uses expression 'may sue' enabling Bhumidar to approach the Court to revenue assistant for partition—Does not indicate a holding can be partitioned only in the manner provided therein—Further, Section 33 deals with situation where as result of transfer, transferee shall be left less than 8 standard acres of land—However, in partition there is no transfer, transferor of transferee—Each of the co-owner-owner of each and every parcel of the property—It cannot be said that any part of property transferred is from one co-owner to other—Once it is held that it is not necessary to approach Revenue Assistant for partition and parties are free to partition holding themselves, the order of FC cannot stand and set aside—Mutation effected by Tehsildar declared valid—Writ Petition Allowed.

Prem Prakash Chaudhary v. *Rajinder Mohan Rana* *22*

— Article 226—Petition challenging the preparation of seniority list on the basis of date of joining and not on merit—Petitioner was offered appointment to the post of Section Officer (Horticulture) in Central Public Works Department (CPWD) on the basis of selection in open competition through direct recruitment—Asked to report for duty latest by the forenoon of 10th August 1983—Communication did not reach him—Application requesting for extension of time to join the duty—Time extended—Petitioner joined the duty on 20.08.1983—In September 1992, petitioner came to know about the decision to prepare seniority list on the basis of date of joining—Made a representation on 29.09.1992 and he was informed that the seniority would follow the order of confirmation and not the original order of merit, which was different from the order of merit—Petitioner approached the Central Administrative Tribunal—Application dismissed—Review filed—Dismissed—Petition—Held—In view of the fact that there were instructions of 1959 with regard to the procedure for determination of inter-se seniority, there cannot be any scintilla of doubt that merit would be the governing factor for determination of seniority—In the case at hand, when the seniority list was published in the year 1995 and the petitioner had approached the Tribunal in 1997, the principle of delay and laches or limitation does not create a dent in the challenge—A seniority list had already been drawn on the basis of merit list and promotions had been conferred—The seniority list should have been fixed on the criterion of merit and if the same has been done on the basis of the merit, it cannot be found fault with.

K.P. Dubey and Others v. *Union of India and Others* *632*

— Delhi School Education Act, 1973—Rule 120—The petition impugns the judgment dated 30th April, 2009 of the Delhi School Tribunal allowing the appeal of the respondent No. 2 Mr. A.A. Vetal and setting aside the order dated 27th February, 2001 of the Managing Committee of the Dayawati Syam Sunder Gupta Saraswati Bal Mandir of removal of the respondent No. 2 from the post of the Vice Principal and of dismissal from the service of the said school and reinstating

the respondent no. 2 to his post and directing the Managing Committee of the School to decide the question of payment of salary, allowance and consequential benefits for the intervening period within two months thereof.—The respondent No. 2 was appointed in the year 1972 as Head Master of the Primary section of the School of the petitioner and was in the year 1976 promoted as a TGT and was appointed as a Vice Principal of the School in the year 1996. The school earlier filed Civil Writ No. 3754/1999 in the court and by interim order, the order dated 21st May, 1999 of the Director of Education was stayed—The charge sheet was signed by the Manager of the school on behalf of the Managing Committee of the school—The charges leveled against the respondent no. 2 had been proved to be true; that the offence committed by the respondent no. 2 being of continuing nature spread over a period of time and the inquiry having been conducted as per the provisions of the Delhi School Education Act, 1973 and Rules framed thereunder and in accordance with the principles of natural justice, the respondent no. 2 had been rightly held guilty of indulging in misbehavior towards female students and teachers; the Disciplinary Committee accordingly proposed the penalty of removal of service on the respondent no. 2 and forwarded the documents to the School Management—The Tribunal noticed that the School being an unaided recognized school, did not require prior approval of Directorate of Education before passing the order of removal of the respondent no. 2—With respect to the question of prior approval of the Directorate of Education, attention is invited to letter dated 19th April 2001 of the Directorate of Education accorded approval sought by the School on 12th December, 2000—The Directorate of Education while appointing its nominees was fully aware of the charge sheet issued.—However, immediately after the objection in this regard being taken by the respondent No. 2, steps for constitution of the Disciplinary Committee in accordance with Rule 118 were taken and Disciplinary Committee constituted which did not choose to frame a fresh charge sheet and decided to proceed on the basis of the charge sheet already issued. The same is found to be sufficient/contextual compliance of Rule 120.

— Though an act by a legally incompetent authority is invalid but

can be subsequently rectified by ratification of the competent authority. It was held that ratification by definition means the making valid of an act already done; the principle derived from the Latin maxim ratihabitio mandato aequiparatur—The Court cannot interfere with this discretion unless it is palpably arbitrary.—Impugned order of Tribunal quashed.

Samarth Shiksha Samiti (Regd.) v. *Directorate of Education & Anr.* *645*

— Article 226 & 227—Service Law—Fundamental Rule 56 (J)—Petition challenging the order whereby he was ordered to be prematurely retired w.e.f. Forenoon of 18.03.2010—Petitioner was appointed as Assistant Sub-Inspector (Ministerial) with Central Industrial Security Force on 22.08.1972—Earned promotion from time to time and reached the post of Commandant on 02.01.2006 at the age of 57-1/2 years; left with less than 2-1/2 years for retiremant—Screening Committee decided to put the name of the petitioner in list of such officers, whose further retention in service required to be considered in public interest or otherwise under Rule 56 (j) of the Fundamental Rules—Recommended being unfit for continuation of service, petitioner be prematurely retired w.e.f. 18.03.2010—Petitioner challenged that no opportunity was granted to respond to the below benchmark gradings i.e. 'Average' gradings for 3 years—Opportunity to make a representation given only after the decision of the screening committee accepted—Except the last three years, service profile of the petitioner was either 'very good' or 'outstanding'—Screening Committee should not have considered the ACRs, which were not communicated—Held—The right to make a representation against a below benchmark ACR grading is the recognition of the right to be heard on a subject where some civil consequences may flow, but pertaining to uncommunicated adverse remarks being considered by the Screening Committees, the law has grown in a different direction; holding that uncommunicated adverse remarks can be considered by Screening Committees on the issue of compulsory or premature retirement and the reason thereof is that such an order is neither stigmatic nor does it take away any right of a civil servant, to whom right

guaranteed is a minimum pensionable service and beyond that it is public interest which determines how long should he serve.

Shri Jagmohan Singh Negi v. *UOI & Ors.* *690*

— Article 226 & 227—Service Law—Fundamental Rule 56 (1)—Petition challenging the order whereby he was ordered to be prematurely retired w.e.f. Forenoon of 18.03.2010—Petitioner was appointed as Assistant Sub-Inspector (Ministerial) with Central Industrial Security Force on 22.08.1972—Earned promotion from time to time and reached the post of Commandant on 02.012006 at the age of 57-1/2 years left with less that 2-1/2 years—Screening Committee decided to put the name of the petitioner in list of such officers, whose further retention in service required to be considered in public interest or otherwise under Rule 56 (j) of the Fundamental Rules—Recommended being unfit for continuation of service, petitioner be prematurely retired w.e.f. 18.03.2010—Petitioner challenged that no opporunity is granted to respond to the below benchmark gradings i.e. 'Average' gradings for 3 years—Except the last three years, service profile of the petitioner was either 'very good' or 'outstanding'—Petitioner contended that keeping in view overall grading, wherein he was graded 'very good' and 'outstanding', but suddenly in the last three years is graded by as Average, which is not possible and that is why, it invited judicial review—Held—On the issue of premature retirement or compulsory retirement what has to be considered is; Whether it would serve public good to continue with the services of the employee concerned or not—That is the reason why those who are found to be 'Average' would require, in public interest, to be weeded out notwithstanding an 'Average' grading not being adverse, but the same being not complementary would justify the person moving out, to be replaced by fresh blood; this serves the public interest—For considerable period and for considerable attributes the individual columns have been filled up with the remarks 'Just Average', 'Average', 'Adequate' and 'Satisfactory'—It is true that for about 30% period and for about 30% individual attributes the petitioner has been graded as 'Good'—Suffice would it be to state that if for

approximately half period, different attributes graded are 'Adequate' 'Just Average', 'Average', or 'Satisfactory' and for the remainder 50% period the person concerned is graded 'Good'; the overall grading being 'Average' would not be so arbitrary so as to invite judicial intervention—Thus, the challenge to the ACR gradings as awarded and recorded is rejected.

Shri Jagmohan Singh Negi v. *UOI & Ors.* *690*

— Article 226 Seeking direction to the respondent no.2 hospital to quash the selection made for the single seat of DNB (secondary) in Radiodiagnosis for January 2011 session and allow the petitioner to join the course in question—The petitioner applied in the stream of Radio-diagnosist for the DNB Secondary seats for January 2011 session—Selection of the shortlisted candidates to be made on the basis of marks obtained in the post Graduate course and the admission was to be granted at the time of counseling on the appointed date—Grievance of the petitioner is that in the shorlisted candidates, the petitioner had the first rank and respondent no.4 was third in the said list and at the time of counseling, instead of there being counseling, an interview took place—In the impugned result, respondent no.4 was declared selected for the single seat in DNB(secondary) Radio Diagnosis instead of the petitioner—The core issue to be examined is whether in the NBE guidelines the selection of the candidates for DNB (Broad Specialty) secondary seats was to be conducted based on the marks obtained by the candidates in their diploma courses followed by the aptitude test or in place of aptitude test it was to be done through the process of counseling not in dispute between the parties that as per the public notice issued by the respondents No.1 & 2 inviting applications for admission in DNB (Broad Specialty) secondary seats for the session January 2011 in the stream of Radiology, the method of selection was prescribed through counseling and not through the aptitude test—The respondent hospital has not disputed the fact that the petitioner having secured 66% marks in his P.G. course was top in the merit list amongst all the said four candidates who had participated in the said counseling/aptitude test, but since the respondent No.4 had secured more marks in the

aptitude test, therefore, he surpassed the petitioner in the said selection. Held—The Court does not subscribe to the stand taken by the hospital that the aptitude test or interview is implicit in the term counseling—Had the hospital issued a proper public notice strictly in terms of the NBE guidelines, then the present imbroglio would not have arisen—Petitioner is a well qualified Doctor-not fathomable that he was so naive that he was not aware of the fact that he would be required to appear in the aptitude test/interview—Even if the respondent hospital committed an error in using the wrong term in the public notice, the petitioner cannot be allowed to take advantage of the same—The petitioner at no stage had lodged any protest, not only with the hospital, but even with the NBE and it is only when he came to know about his result of being unsuccessful in the said selection, he in utter desperation sought to challenge the selection process by way of filing the present writ petition before this court—It is a settled legal position that the correctness of the selection procedure cannot be challenged by an unsuccessful candidate who had fully participated in the selection process without any protest or demur not the function of the Court to sit over the decisions of the Selection Committee and to scrutinize the relative merit of the candidates unless there is illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the selection, or proved mala fides affecting the selection etc. Taking into consideration the aforesaid legal principles, this Court does not find that the respondent No.2 hospital did not adhere to the laid down criteria as prescribed by the National Board of Education for selecting the candidates for DNB (Broad Specialty) secondary seats and the petitioner cannot be put to any advantageous position simply because an error or lapse was committed by the hospital in the public notice calling the candidates for counseling instead of appearing for the aptitude test/interview—However, a cost of Rs. 50,000/- payable to the Petitioner is imposed upon the respondent hospital for the negligence committed by them in notifying to the candidates the procedure of selection as counseling instead of aptitude test/interview—The hospital shall recover the same from those officers/doctors who were responsible for committing such a lapse/mistake by insertion

of the said wrong information in the public notice.

Dr. Manoher Singh Rathore v. *Union of India and Ors.* *762*

— Article 311 (2)—Code of Civil Procedure, 1908—Suit for declaration, permanent injunction mandatory injunction—Service Law—FCI (Staff) Regulation, 1971—Regulation 31-A—Regulation 63—Disciplinary proceedings—Probation of Offenders Act—S. 12—Plaintiff was appointed as draftsman with Food Corporation of India (FCI) on 16.04.1999—Convicted and sentenced for offence punishable u/s 325 and 149 IPC with imprisonment and fine—Sentence suspended-on 26.04.1999—Informed his employer only on 4.6.1999 of involvement and conviction—In revision against the sentence, sentence modified and was released on probation for two years vide judgment dated 12.07.2002—Respondent dismissed appellant from service vide order dated 31.07.2003—Plaintiff filed a suit against termination of service—Contended, release on probation did not carry any disqualification—Suit contested on the ground that plaintiff had not come to court with clean hands—Trial Court held: Mere release on probation does not mean that he is absolved of moral turpitude and had concealed material facts—Not informed department of his criminal proceedings pending against him —Services rightly terminated—In the first appeal, findings of court affirmed—Second appeal preferred—Held that interference with finding of fact are called for only if the same are perverse—Employee cannot claim a right to continue in the service merely on the ground that he had been given benefit of u/s 12 of Probation of Offenders Act—The act of appellant in concealing the fact of his involvement in criminal proceedings and his resultant conviction being dishonest, amounts to moral turpitude; not entitled to benefit—Appeal dismissed.

Shri Deep Chand Bharti v. *M/s Food Corporation of India* *509*

DELHI LAND REFORMS ACT, 1956 ("DLRA")—Section 185 Father of the plaintiff and father of the defendants real brothers and joint owners in respect of agricultural land situated within the revenue estate of village Jhaoda Majra, Burar—During life

time of fathers of the parties, oral partition took place—After death of the father, in 1966 plaintiff being only legal heir succeeded to his share and mutation was recorded—In 1971—72 father of defendants also died and defendants succeeded to their share—Plaintiff is co-sharer of 1/2 share in total land—Defendant no. 1 had encroached upon a portion of property of the plaintiff and constructed pucca wall, two hand pumps and a chapper had also been installed—Hence suit filed by the plaintiff seeking permanent and mandatory injunction restraining the defendant from interfering in the peaceful possession of the plaintiff—Trial court decreed the suit and defendants restrained from dispossessing the plaintiff and from interfering with her peaceful possession over land and defendant No. 1 directed to remove the pucca wall constructed by him—The first Appellate Court reversed the findings on the ground that there was a cloud over the title of plaintiff, the defendant was claiming himself to be the co-owner of the suit land, this question could only be decided by the revenue court, jurisdiction of the civil court was barred, suit of the plaintiff was dismissed—Hence the instant appeal. Held : There is no perversity in the findings—The impugned judgment had noted that both the parties were claiming cultivatory possession over this portion of the suit land—Even after the oral partition effected between the parties, admittedly their shares had not been demarcated—Section 185 of DLRA stipulates that except as provided by or under this Act no court other than a court mentioned in column 7 of Schedule 1 shall take cognizance of any suit, application or proceedings mentioned in column 3 of the said Schedule—An application for declaration of bhumidari rights is maintainable under Sections 10,11,12,13,73,74,79 & 85 of the Act before the Revenue court which alone has the jurisdiction to deal with such bhumidari rights—Under Section 55 a suit for partition of a holding of a bhumidar is maintainable but the jurisdiction vests with the revenue court—Substantial question of law is accordingly answered in favour of respondent and against the appellant—There is no merit in this Appeal as also pending application are dismissed.

Smt. Hanso Devi (Deceased) Through LRS. v. *Sh. Chandru (Deceased) Through LRS.* *365*

— Section 55 & 33—Delhi Land Revenue Act, 1954—Section 66 Indian Contract Act, 1872—Section 23—Code of Civil Procedure, 1908—Section 9 & 89—Order 23 Rule 3—Arbitration and Conciliation Act, 1996—Legal Services Authority Act, 1995—*Boni judicis est lites dirimere, ne lis ex lite oritur, et interest reipublicae ut sit finis litium*—Petitioners no.1 and 2 and the respondents no.1 and 2 are brothers—Their father was bhumidhar of agricultural land measuring 33 bigah 3 biswas at Village in Delhi—Died leaving four male descendants—Land mutated in the name of petitioners and respondents—A family settlement arrived at on 26.12.1984 between petitioner no.1 and 2 and respondents no.1 and 2—Land agreed to be divided into four parts—Each of four brothers took possession of their respective portion—Continued till 1988—Respondent no.2 tried to grab the share of petitioners no.1 and 2—Suit for permanent injunction filed by petitioners no.1 and 2 against respondents no. 1 and 2—Suit pending—Parties called *panch* to arrive at amicable settlement—Awards signed by four brothers made by *panch*—Filed application in the pending suit for settlement—Suit dismissed as compromised—Petitioners no.1 and 2 approached for mutation—Mutation done in the name of petitioners no. 1 and 2 by *tehsildar*—Respondents no.1 and 2 preferred appeal to Additional Collector—Contending that suit dismissed as withdrawn and there was no decree by which Tehsildar was bound—No opportunity of being heard given to respondents no.1 and 2—Land partition illegal—Even if there was decree, Civil Court has no jurisdiction to pass decree for partition—Agriculture land can be partitioned under section 55 of Land Reform Act—Further, partitioned in contravention of Section 33 of the Act—Petitioners no.1 and 2 during the pendency of appeal, executed sale deed transferring the land of their exclusive share in favour of petitioners no.3 to 7—Petitioners no.3 to 7 not impleaded as party before—Additional Collector dismissed the appeal—Respondents no.1 and 2 preferred second appeal to Financial Commissioner (FC)—FC allowed the appeal setting aside the order—Petitioner no.1 and 2 did not challenge the order of FC—Petitioners no.3 to 7 filed writ petition, wherein petitioners no.1 and 2 and respondents no.1 and 2 were impleaded as respondent—Writ petition allowed

with consent of the parties—Matter remanded to FC for decision afresh—FC allowed the appeal of respondents no.1 and 2—Writ petition filed—Contended, FC erred in holding notice of hearing required to be given to respondents no.1 and 2 in mutation proceedings—FC held: the order of *tehsildar* bad but failed to remand the same back—Respondents no.1 and 2 had not disputed the factum of appointment of panch, award, compromise application or separate possession not entitled to challenge mutation—Respondents no.1 and 2 themselves enjoying the portions in the share—Respondents no.1 and 2 contended that partition was in contravention of Section 33 of Delhi Land Reform Act—The Act does not recognize family settlement—Bhumidars of joint holding not entitled to partition and were required to approach revenue assistant u/s 55 of Delhi Land Reform Act—There being no partition, there could not be question of mutation in exclusive name of petitioner—Court observed: the proposition that agriculture holdings could not be partitioned amicably and parties have to necessarily sue, is preposterous—The Land Reform Act was not intended to bring about change in the normal rights of a person or of the co-owner to effect partition amicably without being required to approach the court thereof—The attempt of the Courts must always be to minimize the litigation and not multiply it—Held: duty cast upon the court to bring litigations to an end and to ensure no further litigation arises from its decision—Amicable resolution of dispute and negotiated settlement is public policy in India—Only where settlement contrary to any statutory provisions or opposed to public policy under section 23 of Contract Act, the Court can refuse to enforce the same—No provision in Land Reform Act prohibiting amicable settlement—Section 55 provides for holding to be partible and uses expression 'may sue' enabling Bhumidar to approach the Court to revenue assistant for partition—Does not indicate a holding can be partitioned only in the manner provided therein—Further, Section 33 deals with situation where as result of transfer, transferee shall be left less than 8 standard acres of land—However, in partition there is no transfer, transferor of transferee—Each of the co-owner-owner of each and every parcel of the property—It cannot be said that any part of property transferred is from one co-owner to other—

Once it is held that it is not necessary to approach Revenue Assistant for partition and parties are free to partition holding themselves, the order of FC cannot stand and set aside—Mutation effected by Tehsildar declared valid—Writ Petition Allowed.

Prem Prakash Chaudhary v. *Rajinder Mohan Rana* *22*

DELHI MUNICIPAL CORPORATION ACT, 1957—Section 19(1)(C) Section 33 (5)—The appellant in LPA No. 430/2010, a candidate of the Indian National Congress (INC), had contested for the post of Councilor from ward No. 78 i.e. Majnu-Ka-Tila of the Municipal Corporation of Delhi (MCD) and was declared as elected. His election was called in question before the learned Additional District Judge (ADJ) Election Tribunal who, by order dated 4.6.2008, declared the election to be null and void and further held that in terms of Section 19(1)(c) of the Act, 1957 the respondent—Satish Kumar, the appellant in LPA No. 334/2010, of the Bharatiya Janata Party (BJP) should be declared elected as Councilor of the said ward—Writs filed by both appellants—The learned Single Judge affirmed the finding of the Tribunal to the effect that the election of the elected candidate has been correctly declared null and void, yet did not accept the conclusion arrived at by the Tribunal that the election petitioner could be declared as the elected councilor—LPA filed by both the appellants the election tribunal as well as the learned Single Judge has adverted to the oral and documentary evidence in detail to show that there was manipulation as regards the security deposit; that there was delayed submission of forms and the name of Vikas was not reflected in Form 3 which has really not been explained by the authorities. The said conclusion has been rightly arrived at and, hence, there is no warrant to interfere with the said conclusion—On a reading of the Rules, clauses of the 1996 Order and the Forms, there can be no shadow of doubt that unless somebody is sponsored for allocation of symbol as a substitute candidate in case nomination of original candidate is rejected on scrutiny or his withdrawing from the contest the substitute cannot step into the shoes of the original candidate—Further the requirement of S.33(5) of the Act is extremely important at the stage of

scrutiny and failure to produce the electoral roll must be deemed a failure to comply with a substantial provision of the statute—The requirement of S.33(5) is therefore mandatory and failure to comply with it is fatal to a candidate's claim to stand for election—Thus, the said non-reflection of the name is a substantial defect and is not curable. Also, When there are only two contesting candidates, and one of them is under a statutory disqualification, votes cast in favour of the disqualified candidate may be regarded as thrown away, irrespective of whether the voters who voted for him were aware of the disqualification—This is not to say that where there are more than two candidates in the field for a single seat, and one alone is disqualified, on proof of disqualification all the votes cast in his favour will be discarded and the candidate securing the next highest number of votes will be declared elected. In such a case, question of notice to the voters may assume significance, for the voters may not, if aware of the disqualification have voted for the disqualified candidate. Testing the present factual matrix on the anvil of the aforesaid enunciation of law, it is difficult to accept how the voting pattern would have been because there is a multi-cornered contest and it is very difficult, in the absence of any kind of pleading or evidence, to arrive at the conclusion that the election petitioner should have been declared elected—Both appeals being sans substance, dismissed.

Sh. Satish Kumar v. *Shri Vikas & Ors.* *453*

DELHI SCHOOL EDUCATION ACT, 1973—Rule 120—The petition impugns the judgment dated 30th April, 2009 of the Delhi School Tribunal allowing the appeal of the respondent No. 2 Mr. A.A. Vetal and setting aside the order dated 27th February, 2001 of the Managing Committee of the Dayawati Syam Sunder Gupta Saraswati Bal Mandir of removal of the respondent No. 2 from the post of the Vice Principal and of dismissal from the service of the said school and reinstating the respondent no. 2 to his post and directing the Managing Committee of the School to decide the question of payment of salary, allowance and consequential benefits for the intervening period within two months thereof.—The respondent No. 2 was appointed in the year 1972 as Head

Master of the Primary section of the School of the petitioner and was in the year 1976 promoted as a TGT and was appointed as a Vice Principal of the School in the year 1996. The school earlier filed Civil Writ No. 3754/1999 in the court and by interim order, the order dated 21st May, 1999 of the Director of Education was stayed—The charge sheet was signed by the Manager of the school on behalf of the Managing Committee of the school—The charges leveled against the respondent no. 2 had been proved to be true; that the offence committed by the respondent no. 2 being of continuing nature spread over a period of time and the inquiry having been conducted as per the provisions of the Delhi School Education Act, 1973 and Rules framed thereunder and in accordance with the principles of natural justice, the respondent no. 2 had been rightly held guilty of indulging in misbehavior towards female students and teachers; the Disciplinary Committee accordingly proposed the penalty of removal of service on the respondent no. 2 and forwarded the documents to the School Management—The Tribunal noticed that the School being an unaided recognized school, did not require prior approval of Directorate of Education before passing the order of removal of the respondent no. 2—With respect to the question of prior approval of the Directorate of Education, attention is invited to letter dated 19th April 2001 of the Directorate of Education accorded approval sought by the School on 12th December, 2000—The Directorate of Education while appointing its nominees was fully aware of the charge sheet issued.—However, immediately after the objection in this regard being taken by the respondent No. 2, steps for constitution of the Disciplinary Committee in accordance with Rule 118 were taken and Disciplinary Committee constituted which did not choose to frame a fresh charge sheet and decided to proceed on the basis of the charge sheet already issued. The same is found to be sufficient/contextual compliance of Rule 120.

— Though an act by a legally incompetent authority is invalid but can be subsequently rectified by ratification of the competent authority. It was held that ratification by definition means the making valid of an act already done; the principle derived from the Latin maxim ratihabitio mandato aequiparatur—The Court

cannot interfere with this discretion unless it is palpably arbitrary.—Impugned order of Tribunal quashed.

EXPLOSIVE SUBSTANCE ACT, 1908—Section 4 & 5—As per prosecution, deceased and PW2 running partnership and suffered losses—Deceased and PW2 started racket of financing vehicles under fake names and used to disappear with the cash entrusted by intending car buyers—Appellant Dhananjay Singh and co-accused Shailender Kumar (since deceased) visited the deceased on motorcycle at his house—They both took PW2 and deceased out with them and on way back Shailender Kumar placed knife on PW2s throat and asked him to hand over valuables, his purse was snatched—PW2 noticed appellant firing shot on the neck of deceased—PW2 pushed Shalinder Kumar and ran away—PW2 rang up PW6, wife of deceased on her mobile and informed her that the deceased had been abducted by the appellant and his co-accused in his Santro Car—Later, deadbody of deceased found—Cause of death was opined as Spinal Shock consequent upon cervical vertebral and spinal cord injuries as a result of blast effect of fire arm—On receipt of secret information, appellant arrested with a bag carrying two loaded country made pistols and cartridges besides six crude explosive bombs—Santro car seized by police of District Moradabad as unclaimed property—Pursuant to disclosure of appellant, one country made pistol and his blood stained clothes recovered from his rented house—On secret information, co-accused Shailinder Kumar (since dead) arrested—On inspection of car, on opening dashboard from lower side by mechanic, a bullet recovered—Trial Court convicted appellant u/s 302, 392, 397, 201, 404—Arms Act Section 25/54/59 and Explosive Substance Act Section 4 & 5—Held, Too many improbabilities in prosecution story—Improbable that appellant and co-accused allowed PW2 to escape on foot when they were in possession of Santro Car and were well aware that PW2 had witnessed commission of murder—Appellant was armed with pistol and as a natural conduct, he and co-accused would not have allowed PW2 to escape—Not even scratch injury present

on neck of PW2—If appellant and co-accused had robbed PW2 of three ATM cards, they would naturally have asked PW2 the PIN nos. of the cards or else ATM cards were worthless to them—Natural course of human conduct would be that the appellant and co-accused would have taken PW2 to the nearest ATM centre to withdraw the money using the cards—No evidence collected by prosecution showing ATM cards used to make purchases or if PW2 stopped all transations in respect of robbed ATM cards—Explanation given by PW2 for not informing police regarding incident that he apprehended harm to himself for doing business in false name, not natural conduct—Not believable that PW2 would have seen the appellant firing a shot shot at deceased and would not disclose it to PW6 (wife of deceased)—While PW2 claimed, he did not give any information to PW12 (brother-in-law of deceased), PW12 claimed that he received telephone call from PW2 on the night of the incident informing about the deceased being shot at and taken away in his Santro car—Although IO joined a chance witness, PW9 to witness the recovery, the landlord of the premises was not even questioned, if the appellant resided in premises—Defies logic that appellant would keep country made pistol which was used by him for commission of crime with two other pistols and go to Anand Vihar, ISBT from where he was arrested—Recovery of cartridge from dashboard cannot be believed because of delay of 7 days and hole caused by fire cartridge too prominent in dash board to go un-noticed by police officers—In view of improbabilities and contradictions, not established beyond reasonable doubt that deceased was shot at by appellant—Regarding recovery of Arms and Explosives from appellant, recovery witness, PW54 denied having made any statement to the police or arms and ammunitions being recovered in his presence—Conduct of various officers including IO in recording successive disclosure statements and shifting the place of recovery to the place of their choice as per their convenience, does not inspire any confidence—Omission on the part of police witnesses, to notice hole created by bullet in dashboard till dashboard was opened and used bullet retrieved makes version of recovery of arms and ammunition

suspect—Appellant acquitted—Appeal allowed.

Dhananjay Singh Bhadoria v. *State* *710*

HINDU MARRIAGE ACT, 1955—S. 13 (1) (ia) and (ib)—Cruelty—Desertion—Parties married at Delhi according to Hindu Rites and Ceremony—Problem started from the time of honeymoon which continued till they stayed together—Respondent alleged that the appellant was under the influence of her parents and would leave matrimonial home time and again—Disturbed due to cruel conduct—Appellant attempted to commit suicide—Trial court granted decree of divorce on the ground of cruelty—Preferred appeal—Contended inter-alia that respondent admitted in his cross-examination that appellant could not have inserted her finger into electric shocket due to narrow width of hole—Also admitted no power plugs in any portion of rented home where they were living together—Also failed to prove appellant made any attempt to commit suicide by laying herself in front of DTC Bus—Respondent submitted, no cross-examination of landlady with regards to the attempt made to\ commit suicide on two occasions by inserting finger in socket and threatening to come underneath the DTC bus—Court observed, the contention that the width of socket too narrow lack force as it was not the case of respondent that she literally put finger inside the socket—Held—Cruelty has not been defined—It is not possible to put concept in strait jacket formula—Cruelty can be physical or mental, intentional or unintentional—Respondent husband alleged behaviour of appellant caused him mental pain, sufferings and humiliation—Threat by wife to commit suicide would in the ambit of mental cruelty trial court judgment upheld—Appeal dismissed.

Smt. Suman Khanna v. *Shri Muneesh Khanna*..... *488*

INCOME TAX ACT, 1961—Section 148/149—Notice under Section 148 of the Act issued by the Assessing Officer (AO) whereafter the assessee appeared and participated in proceedings before the AO and thereafter AO prepared fresh assessment order—In appeal, Commissioner Income Tax (appellate) rejected the contention of the assessee that there was no valid service of notice—In further appeal the Income

Tax Appellate Tribunal held that the notice was not properly served under Section 148 of the Act and as such, assumption of jurisdiction by AO to reassess the income of the assessee was bad in law—Hence, appeal before the Hon'ble High Court—Held, service of notice as a precondition before the assessment would be a question of fact and since in the present case, no objection was raised with regard to the non-issue of notice and rather the assessee by way of letter adopted the return originally filed as return in response to the notice and it is only thereafter that AO proceeded further with reassessment, during which proceedings certain queries were raised and assessee gave detailed response, notice issued at old address available on record would constitute valid service of notice—Further held, where the assessee appear before the AO and is given a copy of the notice before assessment whereafter assessee participates in the assessment proceedings, service of copy of notice also would be service of notice under Section 148. Appeal decided in favor of Revenue and matter remanded back to Tribunal to decide the remaining grounds.

The Commissioner of Income Tax-VI v. *Three Dee Exim Pvt. Ltd.* *534*

— Section 80 1B—Industries (Development and Regulations) Act, 1951—The appellant (hereinafter referred to as 'the assessee') herein was an individual running his proprietorship concern under the name and style of M/s Ragnik Exports. This concern is engaged in business of manufacturing and exports of readymade garments—To manufacture these garments for the purpose of exports, the assessee started to manufacture articles from 01.07.1997. The assessee could avail the benefit of Section 80 1B of the Act from the date of manufacture of these articles, i.e., Assessment Year 1998-99, which was the first year of the assessee's manufacture, the assessee did not claim the deduction under the said provision in that assessment year. The assessee did not claim this benefit even in few succeeding years. Held: Section 80 1B of the Act provides that once an industrial undertaking which fulfils the condition stipulated therein gets the benefit, the same is available for 10 successive assessment years. The small scale industrial undertaking has been denied the benefit under Section 80

1B(14)(g) of the I.T. Act and having regard to the said provisions, it should have been registered as a small scale industrial unit in order to claim the status of SSI Unit. Since it was not so registered under the provision of Industries (Development and Regulations) Act, 1951 (hereinafter referred to as the 'IDR Act'), the assessee was not entitled to claim the benefit under Section 80IB of the I.T. Act—As far as second question of law is concerned, viz., whether the assessee can be denied the benefit of Section 80IB of the I.T. Act simply because of the reason that he did not avail this benefit in the initial assessment year, i.e., 1998-99—There is no reason not to give the benefit of this claim to the assessee if the conditions stipulated under Section 80IB of the I.T. Act are fulfilled.—The other question as to whether it is incumbent upon the assessee that it is registered under the IDR Act for claiming the benefit under Sub-Section (3) of Section 80 1B of the I.T. Act—Benefit was denied only on the ground that it is not registered under the provisions of I.D.R. Act. The registration under the I.D.R. Act will be of no consequence for availing the benefit under Section 80 1B of the I.T. Act—Clause (g) of sub-section (14) of Section 80IB of the I.T. Act only mandates that such an industrial undertaking should be regarded as small scale industrial undertaking under Section 11B of the I.D.R. Act—The assessee had realized his mistake in not claiming the benefit from the first Assessment Year 1998-99—At the same time, the assessee forgave the claim upto the Assessment Year 2003-04 and was making the same only for the remaining period—There is no reason not to give the benefit of this claim to the assessee since the conditions stipulated under Section 80IB of the I.T. Act are fulfilled—Appeal allowed.

Praveen Soni v. *Commissioner of Income Tax*..... *548*

— Section 139(1), 147 and 148—Petitioner prayed for writ of Certiorari for quashing of notice u/s 148 of Act and to quash order whereby objections raised by Petitioner have been rejected—Plea taken, Assessing Officer (AO) assumed jurisdiction to initiate proceedings solely on basis of certain statements recorded by Directorate of Investigation (DIT) without forming independent opinion—Expression used in S.

147 is 'reason to believe' and not 'reason to suspect'—There should be direct nexus or live link between materials relied upon by revenue and belief that income has escaped assessment—Per contra, plea taken AO has applied his independent mind and has not been solely guided by information given by DIT —Objections of petitioner has been appositely dealt with and order cannot be called cryptic or passed mechanically-—Sufficiency of material has to be delved at time of assessment and petitioner would be afforded adequate opportunity of hearing to explain same. Held—Scrutiny of order shows, Authority had passed order dealing with objection in a careful and studied manner—Note is taken of transaction mentioned in table constituting fresh information in respect of assessee as a beneficiary of bogus accommodation entries provided to it and represents undisclosed income—There was specific information received from office of DIT (INU-V) as regards transaction entered into by assessee company with number of concerns which had made accommodation entries and were not genuine transactions—It is neither change of opinion nor conveys a particular interpretation of a specific provision which was done in a particular manner in original assessment and sought to be done in a different manner in proceedings u/s 147 of Act—Reason to believe has been appropriately understood by AO and there is material on basis of which notice was issued—Court, in exercise of jurisdiction under Article 226 pertaining to sufficiency of reasons for information of belief, cannot interfere—Same is not to be judged at that stage—Writ dismissed.

AGR Investment LTD. v. *ADDL. Commissioner of Income Tax* *1*

INDIAN EVIDENCE ACT, 187—S.68—Registration of Will—Code of Civil Procedure 1908—Order 14 Rule 2—Muslim Personal Law (Shariat) Application Act, 1937—Letter of administration sought regarding Will dated 20.11.1984—Third respondent contested the petition on the ground Will forged and fabricated—Also set up another registered Will dated 5.6.1992 attested by two witnesses allegedly executed by deceased testatrix in her favour bequeathing whole of her property—Trial court accepted the Will set up by respondent

as genuine although only attesting witness examined had not supported her—Trial court did not give finding on issue raised by appellant on the pretext that a Will set by third respondent was later in time and thus superseded the earlier Will propounded by the appellant—Petition dismissed However, granted probate of Will dated 5.6.1992 in favour of respondent no.3—Preferred first appeal—Contended Section 63 (c) of Indian Succession Act and Section 68 of Indian Evidence Act are applicable to Hindu Will and not to the Muslim Will—Court observed : despite the registration of said Will after six months of death of deceased the trial Court relied upon statement made by respondent no.3, propounder and beneficiary of the Will—Further observed, there were suspicious circumstances shrouding the Will—Will purported to be attested by two witnesses—Only one examined who did not prove the Will as he stated that he did not know Nawab Begam—Testatrix and she did not sign the Will in his presence—He signed the will at his residence as he was friend of respondent no.2—Did not identify signature of other witnesses—Held: if attesting witness fails to prove the attestation or that propounder take active part in execution of Will which confers substantial benefit on him/her it would lead to suspicion which has to be explained by satisfactory evidence—Even registration of Will did not dispense with need of proving the execution and attestation—Respondent herself relied and based her case upon Section 63 (c) of Indian Succession Act and Section 68 of Indian Evidence Act which are mandatory for Will to be legally valid—Further held—The appellate court has no power to make out a new case not pleaded before the trial Court—Decision of appellate court cannot be based on grounds outside the plea taken before trial court—Trial Court pronounced judgment on only one issue; as per order 14 Rule 2 CPC a judgment which fails to pronounce on each and every issue framed suffers from material irregularity and would not be a judgment—Judgment of trial court can not be sustained—Appeal allowed—Case remanded to trial court to decide the matter afresh taking into consideration the observations.

Sheikh Anis Ahmad v. *State & Ors.* *55*

— S. 68 Appreciation of evidence—Petition seeking probate of Will dated 5.8.1989 allegedly made by deceased with respect to her property in Pant Nagar Jungpura Extension bequeathing the same in favour of appellant to the exclusion of all other legal heirs—Deceased expired on 8.1.1991 leaving behind three sons and two daughters—The sons and daughters except parents gave no objection—Respondent no. 2 gave no objection but described the Will as forged and fabricated by respondents No. 3 to 5—Also asserted Will dated 31.12.1989 in his favour—Filed separate probate petition—Appellant in order to prove Will examined himself and attesting witness, his brother Yaspal Chopra and one more attesting witness—Respondent no.4 examined himself and also examined attesting witnesses of the Will dated 31.12.1989—ADJ opined that deceased was of sound and disposing mind at the relevant time—Witnesses examined by appellant corroborated each other in their affidavit but material contradictions in cross-examination inter-alia witness specifically stated that his affidavit was typed and nothing was written in hand—Led to the inference that handwritten portion in his affidavit was written without his knowledge or witness telling lie—If the examination-in-chief ignored the entire statement of witnesses goes and cannot be considered or read in evidence—Hence not reliable—Also observed, PW-1 being son-in-law highly interested witness, had grouse against the respondent whose house he had to vacate—ADJ Held—There was suspicion regarding execution of Will dated 5.8.1989—Decided the issue against appellant—However found evidence of respondent with respect to the Will dated 31.12.1989 to be trustworthy—No effective cross-examination done on the manner of execution and attestation of Will—Granted probate in favour of fourth respondent—Court Held—Contradiction in the testimony of witnesses minor in nature since the evidence was recorded after a gap of many years and memory can fade—However, found one of the attesting witnesses i.e. son-in-law had reasons to depose against the respondent—Testimony of witnesses raises doubt about the veracity of their statements—Found the Will dated 5.8.1989 shrouded with suspicious circumstances and Will dated 31.12.1989 was duly proved in accordance with requirement of Section 63 (c) of Indian

Succession Act and Section 68 of Indian Evidence Act—Appeal Dismissed.

Satya Pal Chopra v. *State & Ors.* *518*

INDIAN PENAL CODE, 1860—Section 302, 307, 350—Trial Court convicted sentenced appellant/accused for offence u/s 302/307/350—Prosecution case that accused was passing by house of deceased when she, her son Ajay Choudhary along with Dinesh were watching television —Ajay, Dinesh and deceased were laughing, upon which accused got enraged and called Ajay outside asking him the reason for their laughter—Accused objected to their laughing at him and slapped Ajay—Accused left threatening Ajay that he would not leave him alive—After about 3-4 minutes accused came back with knife and on deceased asking him to stop, the accused stabbed her and thereafter her son Dinesh—Held, where incident leading to fatal attack is preceded by a trivial quarrel and the assault is limited to a single though fatal blow, without history of any malice or previous ill-will between the deceased and assailant, even a few minutes lapse between the quarrel, the accused leaving the scene and returning armed and attacking, may not amount to murder but would be covered u/s 304—Quarrel between appellant and deceased's son was due to trivial reason—No pre meditation or previous history of ill-will between deceased and accused family—Accused attacked deceased when he thought that she would prevent him from assaulting her son, both she and PW4 were given single blows when they tried to prevent his attacks—These facts viewed cumulatively do call for applicability of Exception 4 of Section 300 so as to amount to culpable homicide under first part of Section 304—Conviction u/s 302 altered to one u/s 304 Part 1—Conviction for other offences not disturbed—Appellant's sentence modified to 7 years RI for offence u/s 304 Part 1.

Deepak Sharma v. *State of Delhi* *40*

— Sections 201, 302, 379—Deceased running video library—Four of the five accused borrowed movies from him—In the night four accused along with deceased and PW11 and PW16 saw TV together—PW11 and PW16 left at 2.30 am leaving deceased with four accused in their rented room—Next day

boby of deceased found in gunny bag in drain—Postmortem revealed that death due to strangulation—Four accused arrested and stolen video player and cassettes recovered from them—Four accused led police to fifth accused from whose possession T.V recovered—Case of prosecution rested entirely on last seen and recoveries—Trial court acquitted two accused and convicted three accused for offence under Section 302/34 and 379/34—Held, recovery of TV at the instance of accused not established—PW16 who was also a recovery witness resiled from earlier statement in his cross examination and testified that no recovery was made in his presence, he was taken to the police station and his signatures were obtained on some papers and was made witness—Contradictions in testimony of other recovery witness PW 23 who was a police officer—Recovery of video not established beyond reasonable doubt—Last seen witness PW11 in testimony did not mention name of deceased but referred to him as servant of the shop keeper—Other last seen witness PW16 completely resiled from prosecution version —Contradictions in testimony of both last seen witnesses—Prosecution failed to prove case beyond reasonable doubt—Appeals allowed.

Mohd. Badal v. *State* *82*

— Sections 394/397/302/34—Circumstantial Evidence—As per prosecution, deceased was on friendly terms with the appellants and was called by them and one Sanju in the night of the incident on the pretext of taking a stroll in the park—Taking of the deceased witnessed by PW2 and PW3 brothers of deceased between 9 to 10 p.m. on 24.6.2005—Deadbody of deceased discovered next morning at 6.30 a.m. by chowkidar of park—Injuries found on the head of deceased—Circumstances relied upon by prosecution were that deceased last seen alive in company of appellants by PW2 and PW3 around 9 to 10 p.m. the previous night; deadbody of deceased discovered at 6.30 am next morning i.e. 25.06.2005; as per postmortem report, time of death around 1 a.m. on 25.6.2005 recovery of purse from house of appellant Vijay at his instance which contained photograph of deceased and appellants absconding after crime—Trial Court convicted appellants u/s 394/302—Held, recovery un-reliable as contradictions in

evidence of recovery witness PW2 who at one point stated that Rs. 600/- were recovered alongwith the photograph of the deceased in the purse while at other point stated that no money was recovered—PW2 claimed that purse recovered on 25.6.2005, while recovery memo mentioned date as 1.7.2005—As per version of PW2, purse recovered even before appellant's arrest—Contradictions in testimony of PW16, recovery witness—Un-natural on part of accused Vijay Kumar to have kept empty raxin purse which apparently had no value with him with photograph of deceased—In normal course of event the item which could link a perpetrator of a crime with the crime would be disposed of at the earliest—Improbable that accused Vijay would have kept purse with photograph of deceased in almirah for over six days in his house, recovery of purse doubtful—Even if accepted that PW2 and PW3 had seen deceased for last time in the company of the appellants between 9-10 p.m., the previous night, it cannot be said that appellants were only responsible for the death of the deceased—Time gap of 3-4 hours sufficient to allow intervening circumstances and other persons to have entered the scene and caused death —Prosecution has to prove its case beyond reasonable doubt and cannot derive any strength from the weakness of defence put up by the accused—A false defence may be called into aid only to lend assurance to the court and that too where various links in the chain of circumstantial evidence are in themselves complete—Weakness of defence cannot by itself form a link of the chain but can only lend support to the other links which in themselves form a complete chain of circumstantial evidence pointing unerringly towards the guilt of the accused—Appellants given benefit of doubt —Appeal Allowed—Accused Acquitted.

Ram Chander @ Ganju v. *State of Delhi*..... *676*

— Section 302, 392, 397, 201, 404—Arms Act, 1959—Section 25/54/59—Explosive Substance Act, 1908—Section 4 & 5—As per prosecution, deceased and PW2 running partnership and suffered losses—Deceased and PW2 started racket of financing vehicles under fake names and used to disappear with the cash entrusted by intending car buyers—Appellant Dhananjay Singh and co-accused Shailender Kumar (since

deceased) visited the deceased on motorcycle at his house—They both took PW2 and deceased out with them and on way back Shailender Kumar placed knife on PW2s throat and asked him to hand over valuables, his purse was snatched—PW2 noticed appellant firing shot on the neck of deceased—PW2 pushed Shalinder Kumar and ran away—PW2 rang up PW6, wife of deceased on her mobile and informed her that the deceased had been abducted by the appellant and his co-accused in his Santro Car—Later, deadbody of deceased found—Cause of death was opined as Spinal Shock consequent upon cervical vertebral and spinal cord injuries as a result of blast effect of fire arm—On receipt of secret information, appellant arrested with a bag carrying two loaded country made pistols and cartridges besides six crude explosive bombs—Santro car seized by police of District Moradabad as unclaimed property—Pursuant to disclosure of appellant, one country made pistol and his blood stained clothes recovered from his rented house—On secret information, co-accused Shailinder Kumar (since dead) arrested—On inspection of car, on opening dashboard from lower side by mechanic, a bullet recovered—Trial Court convicted appellant u/s 302, 392, 397, 201, 404—Arms Act Section 25/54/59 and Explosive Substance Act Section 4 & 5—Held, Too many improbabilities in prosecution story—Improbable that appellant and co-accused allowed PW2 to escape on foot when they were in possession of Santro Car and were well aware that PW2 had witnessed commission of murder—Appellant was armed with pistol and as a natural conduct, he and co-accused would not have allowed PW2 to escape—Not even scratch injury present on neck of PW2—If appellant and co-accused had robbed PW2 of three ATM cards, they would naturally have asked PW2 the PIN nos. of the cards or else ATM cards were worthless to them—Natural course of human conduct would be that the appellant and co-accused would have taken PW2 to the nearest ATM centre to withdraw the money using the cards—No evidence collected by prosecution showing ATM cards used to make purchases or if PW2 stopped all transations in respect of robbed ATM cards—Explanation given by PW2 for not informing police regarding incident that he apprehended harm to himself for doing business in false name, not natural

conduct—Not believable that PW2 would have seen the appellant firing a shot shot at deceased and would not disclose it to PW6 (wife of deceased)—While PW2 claimed, he did not give any information to PW12 (brother-in-law of deceased), PW12 claimed that he received telephone call from PW2 on the night of the incident informing about the deceased being shot at and taken away in his Santro car—Although IO joined a chance witness, PW9 to witness the recovery, the landlord of the premises was not even questioned, if the appellant resided in premises—Defies logic that appellant would keep country made pistol which was used by him for commission of crime with two other pistols and go to Anand Vihar, ISBT from where he was arrested—Recovery of cartridge from dashboard cannot be believed because of delay of 7 days and hole caused by fire cartridge too prominent in dash board to go un-noticed by police officers—In view of improbabilities and contradictions, not established beyond reasonable doubt that deceased was shot at by appellant—Regarding recovery of Arms and Explosives from appellant, recovery witness, PW54 denied having made any statement to the police or arms and ammunitions being recovered in his presence—Conduct of various officers including IO in recording successive disclosure statements and shifting the place of recovery to the place of their choice as per their convenience, does not inspire any confidence—Omission on the part of police witnesses, to notice hole created by bullet in dashboard till dashboard was opened and used bullet retrieved makes version of recovery of arms and ammunition suspect—Appellant acquitted—Appeal allowed.

Dhananjay Singh Bhadoria v. *State* *710*

— Section 302—As per prosecution case, PW2 (informant) was residing at the place where incident occurred—His nephew, the deceased lived in the same premises—The deceased was involved in a quarrel, a few months before the incident with co-accused Shakti (sent for trial to JJB)—Shakti had threatened deceased—On the day of incident, Shakti along with the appellant came and caught hold of deceased from the back while appellant gave a knife blow to the deceased—On the basis of appellant's disclosure statement, knife recovered—Trial

Court convicted appellant u/s 302—Held, death occurred at 10 p.m. While PW2's statement was recorded at 11.40 p.m. and FIR registered at 12.10 p.m.—Thus no unreasonable delay in lodging of FIR—Merely because PW2 was related to the deceased, this fact itself was insufficient to exclude his testimony—Testimony of PW2 reliable and credible—As per autopsy surgeon, cause of death was hemorrhagic shock due to the stab injury and was sufficient to cause death in the ordinary course of nature—Proved in evidence of PW2, that it was Shakti and not the appellant who had enmity against deceased—Having regard to the weapon with which injury inflicted on the right side chest of the deceased, the palm injury of the appellant assumes some significance—Prosecution has a duty to the court to explain injuries of the accused and that absence of such explanation assumes importance about the fullness or correctness of the prosecution version—Having regard to the nature of injury, the one hour time taken to intimate the police and the two hour time to reach the hospital, there is an element of uncertainty as to whether something preceded the assault—No universal rule that infliction of single knife blow would or would not attract Section 302—Application of Section 302 would depend upon manner in which blow inflicted and the surrounding circumstances—Injured taken to hospital two hours after the incident, Shakti had been beaten by the deceased and had threatened deceased, appellant had no motive against deceased, injuries on the appellant's palm had not been explained, read with the fact that it had been recorded in the PCR form Ex. PW9/A about a quarrel, it could be inferred that something preceded the attack—Appellant had occasion to inflicit more than one injury however, he did not do so—It cannot be said that appellant had intention of causing injuries that could have in the normal course of nature resulted in death—Conviction of appellant altered to one u/s 304 part I and sentenced substitute to 8 years imprisonment—Appeal partly allowed.

Sagar @ Gyanender v. *State* *734*

INDIAN SUCCESSION ACT, 1925—S. 63 (c)—WILL—Grant of Probate—Validity of Will—Indian Evidence Act, 187—S.68—Registration of Will—Code of Civil Procedure 1908—

Order 14 Rule 2—Muslim Personal Law (Shariat) Application Act, 1937—Letter of administration sought regarding Will dated 20.11.1984—Third respondent contested the petition on the ground Will forged and fabricated—Also set up another registered Will dated 5.6.1992 attested by two witnesses allegedly executed by deceased testatrix in her favour bequeathing whole of her property—Trial court accepted the Will set up by respondent as genuine although only attesting witness examined had not supported her—Trial court did not give finding on issue raised by appellant on the pretext that a Will set by third respondent was later in time and thus superseded the earlier Will propounded by the appellant—Petition dismissed However, granted probate of Will dated 5.6.1992 in favour of respondent no.3—Preferred first appeal—Contended Section 63 (c) of Indian Succession Act and Section 68 of Indian Evidence Act are applicable to Hindu Will and not to the Muslim Will—Court observed : despite the registration of said Will after six months of death of deceased the trial Court relied upon statement made by respondent no.3, propounder and beneficiary of the Will—Further observed, there were suspicious circumstances shrouding the Will—Will purported to be attested by two witnesses—Only one examined who did not prove the Will as he stated that he did not know Nawab Begam—Testatrix and she did not sign the Will in his presence—He signed the will at his residence as he was friend of respondent no.2—Did not identify signature of other witnesses—Held: if attesting witness fails to prove the attestation or that propounder take active part in execution of Will which confers substantial benefit on him/her it would lead to suspicion which has to be explained by satisfactory evidence—Even registration of Will did not dispense with need of proving the execution and attestation—Respondent herself relied and based her case upon Section 63 (c) of Indian Succession Act and Section 68 of Indian Evidence Act which are mandatory for Will to be legally valid—Further held—The appellate court has no power to make out a new case not pleaded before the trial Court—Decision of appellate court cannot be based on grounds outside the plea taken before trial court—Trial Court pronounced judgment on only one issue; as per order 14 Rule 2 CPC a judgment which fails to

pronounce on each and every issue framed suffers from material irregularity and would not be a judgment—Judgment of trial court can not be sustained—Appeal allowed—Case remanded to trial court to decide the matter afresh taking into consideration the observations.

Sheikh Anis Ahmad v. *State & Ors.* *55*

— Section 276—Petition for grant of probate/letters of administration against the relations of testator who died on 17.11.1986 after attaining the age of 75 years—Prior to that, he had executed a Will dated 16.09.1986 as his last Will and Testament—The main objections were that the Will of testator has been forged and he never executed the alleged Will and never presented himself before the Sub-Registrar for the execution of the Will—The petitioner has procured the alleged will with fraudulent and unfair means and the same is liable to be rejected—The petitioner has denied all the allegations raised by the respondents. Held—In probate cases, the Courts have to first determine whether the propounder of the Will has discharged the burden placed on him by law under Section 68 of Indian Evidence Act and Section 63 of Indian Succession Act—This burden placed on the propounder would be discharged by proof of testamentary capacity and proof of the signatures of the testator—The burden then shifts on the contesting party to disclose prima facie existence of suspicious circumstances, after which the burden shifts back to the propounder to dispel the suspicion by leading appropriate evidence—In the present case, it was disputed by the objectors that the Will dated 16.9.1986, was registered and last Will of the deceased. The petitioner was executor of the Will—The petitioner had also adduced the evidence of the witnesses—After this, the burden is shifted to the contesting party to prove the existence of suspicion. On the face of it, the contesting parties failed to discharge their burden of existence of suspicious circumstances averred by them in their objection—On the other hand, it was a registered Will—The original Will has been proved by the petitioner. Both the witnesses have filed their affidavits alongwith the petition and one of the witnesses who filed his affidavit as evidence was also cross examined by the contesting respondents, despite that

the respondents were not able to disapprove the Will produced by the petitioner—The objections raised by the objector were not proved in evidence, rather, the deponent/objector did not appear for cross examination despite various opportunities granted to him—Thus, the respondents have totally failed to prove objections set up by them by adducing even iota of evidence—Petitioner granted probate of the Will dated 16.09.1986 subject to the petitioner filing necessary court fee on the value of the immovable property as stated in the Will.

Shri Naginder Singh Sood v. *State & Ors.* *784*

MOTOR VEHICLES ACT, 1988—Section 2 (1O), (21), (27), 3, 4, 5, 96(2) (b), 140 and 166—Driver of offending vehicle had a driving license for driving Light Motor Vehicle (Non Transport)—At time of accident, he was driving a motorcycle—Motor Accident Claims Tribunal (MACT) held since driver had a valid driving license for driving LMV, he apparently also possessed qualification to drive a vehicle of a lower category—Tribunal refused to grant recovery right to appellant Insurance Company—Order challenged in HC—Plea taken, motorcycle comes under a different category from LMV (NT) and if a person knows how to drive a motor car, it does not mean he is qualified to drive a motor cycle as well—There was wilful breach of terms and conditions of Policy on part of insured by allowing driver to drive motor cycle without a valid license—Appellant Insurance Company ought to have been at least given recovery rights to enable it to recover awarded amount from insured/owner—Per contra plea taken, in order to bring case within mischief of ''breach'' it must be proved by Insurance Company that there was wilful default on part of insured—Where there is no evidence on record to indicate that owner of vehicle had parted with keys of vehicle, deliberately or knowingly, to a person who caused accident, it cannot be said that there was express or implied consent on part of insured/ owner so as to exonerate Insurance Company from liability to pay compensation to victim—Held—Expertise which is required to drive motorcycle is quite different from know-how required by a person for driving a light motor vehicle—It can not be assumed that every person

who is competent to drive LMV, will be skilled in driving a two wheeler as well—Insured who was owner of motor vehicle, did not examine herself to state whether there was no wilful breach of policy condition pertaining to driving license on her part—Insured Owner must be held guilty of deliberate breach of contract between him and appellant—Appellant entitled to recover amount in question from owner and driver.

Bajaj Allianz General Insurance Co. Ltd. v. *Akram Hussain & Ors.* *437*

— Section 140, 165 and 166—Motor vehicles Act, 1939—Section 110-A (1) (c)—Respondent No. 1 suffered multiple injuries by a vehicle driven by Petitioner and filed claim petition for compensation against petitioner, respondent No. 2 and 3—Amendment application of respondent No. 1 to amend claim petition to aver claim petition is filed by petitioner through his father in a representative capacity, allowed by Tribunal—Order challenged before High Court plea taken, amendment has effect of filing of lacunae left by respondent No. 1 and that too when defence of petitioner was put to respondent No. 1 in cross examination, which is not permissible in law—Per Contra plea taken, perusal of petition would show same was filed by father of claimant as attorney—Inadvertently this fact was not mentioned in petition—Petitioner had not filed any reply opposing application and had cross examined respondent No. 1 at length after amendment was allowed—It was too late in day for petitioner to now raise objection to amendment—Held—Section 166(1) (d) of Act nowhere envisages that such authorization in favour of agent should be in writing—If legislature intended that injured person should authorize his agent in writing to institute a claim petition on his behalf, it would have stated so, but words ''in writing'' are conspicuously absent from said sub Section—Motor vehicle Act being a beneficent piece of legislation must be so construed so as to further object of Act—Strict rules of pleadings and evidence are not to be applied in motor accident claims cases—Petitioner waived his right to file a reply and it is no longer open to him to challenge amendment at appellate stage, more

so, when he has thereafter cross examined claimant extensively—Injured had suffered grievous injuries in a motor accident allegedly on account of recklessness of petitioner and is undergoing treatment till date—Hyper technicalities cannot be allowed to defeat course of justice.

Sudershan Singh v. *Ravinder Uppal and Ors.* *700*

NATIONAL COUNCIL FOR TEACHER EDUCATION ACT, 1992—Section 32 read with National Council for Teacher Education (Recognition, Norms and Procedure) Regulations, 2007 (Regulations)—Regulation 8 (7)—Processing of Applications—Respondent submitted an application for recognition for B.Ed course—Chairman of the Respondent had constructed a building in his name and executed a 99 years lease in favour of the Respondent—Prerequisite under the Regulation 8(7) was that institution to own a land —Subsequently Chairman executed a gift deed in favour of the Respondent—Appellant did not inspect the institution—Did not recommend for recognition—Appeal Committee dismissed the appeal—Requirement under Regulation 8(7) were not fulfilled—Single Judge remanded the matter—Requirement was satisfied before the application was considered—Regulation 8(10) stipulates that norms of recognition to be fulfilled at the time of inspection—Instant appeal was filed—Appellant contended—condition under Regulation 8(7) mandatory and imperative—Respondent cannot take a plea that they were not aware of norm and be allowed to remove defect in the application—Also new set of regulations—National Council for Teacher Education (Recognition, Norms and Procedure) Regulations 2009 had come into force and Appellant had imposed ban of acceptance of application for recognition for Teachers Training Courses/Additional intake for academic sessions 2011-12 in various States for specified courses. Held—Substantial compliance is to be done—The realm of substantial compliance not discussed in view of the change of scenario—It will be difficult to put the clock back and direct that applications be considered in accordance with Regulations 2007—Applications brought in order after compliance of condition be processed after the ban is lifted and policy is

changed—For other courses where there is no ban, applications directed to be considered.

National Council For Teacher Education & Anr. v. *G.D. Memorial College of Education* *147*

PREVENTION OF CORRUPTION ACT, 1988—Sections 7 & 13 (1) (d)—As per prosecution, complainant/PW2 keeping three cows at residence and selling milk—Appellant/accused Milk Tax Inspector, MCD demanded bribe of Rs.1000/- with threat to challan him in case of nonpayment - PW2 agreed to pay Rs.500/- in one instalment and the balance after marriage of his brother—On basis of complaint, FIR lodged—PW6 constituted raiding party—PW2 contacted accused at his residence along with PW3—On demand PW3 gave Rs.500/- to accused—PW2 requested accused to return some money as he was in need—Accused returned Rs.200/- and kept Rs. 300/- and asked PW2 to give Rs.700/- after marriage of his brother—Trial Court convicted accused for offences u/s 7 & 13 (1) (d) and sentenced him to RI for one year for each offence besides fine of Rs.300/- on each count—Held, there were discrepancies in the testimonies of PW5 and PW3 with regard to demand and payment of amount—Post raid proceedings and recovery memo Ex. PW2/C not above suspicion since letter signed by PW2 on 24.4.1989 but by other witnesses on 26.4.89; also no explanation given with regard to discrepancy—PW5 claimed, he did not remember, who prepared recovery memo—Recovery memo Ex. PW2/C, doubtful as spacing in 3/4th part of document more than the spacing in the last few lines giving impression that document was already signed and due to shortage of space contents were subsequently squeezed in—It was put to all witness in their cross examination that no recovery memo prepared at spot but at CBI office—PW2 claimed that PW3 recovered tainted money from under cushion, however PW3 claimed that he did not remember who recovered the same and that possibly he recovered it—PW6 said that it was on his direction that PW3 recovered tainted money while PW5 stated that he did not remember who recovered the same—Discrepancies in testimoney of raid witnesses with regard to what transpired in raid—In view of discrepanies, doubt created

in prosecution case—Mere recovery of money divorced from circumstances under which it is paid is not sufficient to convict accused when substantive evidence of demand and acceptance in the case is not reliable—Appeal allowed—Accused acquitted.

Prem Singh Yadav v. *Central Bureau of Investigation* *92*

— Sections 7 & 13—Appellant aggrieved by conviction under Section 7 and 13 (1)(d) of Act preferred appeal and urged main prosecution witnesses were hostile and took complete u-turn from what they deposed in examination in chief—Thus prosecution cases became unreliable—Held:- If any witness during cross examination has taken complete u-turn from what he deposed in examination-in-chief, then chief examination part of witness cannot be thrown out—Judgment of conviction confirmed.

Shri Brij Pal Singh v. *CBI* *220*

SECURITY AND EXCHANGE BOARD OF INDIA ACT, 1992—Section 24 (1) and 27—Revision petition challenging the order dated 12.11.2009 framing the notice u/s 251 Cr. P.C. for the offences punishable u/s 24 (1) read with Section 27 of SEBI Act,—M/s Master Green Forests Ltd., incorporated on 03.06.1993—Company operated Collective Investment Schemes and raised huge amount from general public without complying with rules and regulations issued by SEBI—Despite repeated directions, did not comply with the said regulations—Petitioner contends that they were not the directors, promoters or In-charge of the accused company—They were only the shareholders—Had no role to play in day to day working of the company—There is no specific allegations qua the petitioners in the complaint—Held—Clear that the Petitioners are neither the Directors nor in anyway related/involved in the management or day to day affairs of the Company—They are only the shareholders and thus cannot be held liable for the offences committed by the Company—The order of learned Additional Sessions Judge framing notice against the Petitioners, set aside.

Suresh Batra & Ors. v. *Securities & Exchange Board of India* *334*

SERVICE LAW—In the year 1996-1997, an advertisement was issued for recruitment against several posts under Railway through Railway Recruitment Board, Allahabad (in short referred to as 'the RRB'). Respondent had applied for the post of JE-II/Signal in scale of Rs.1400-2300 (pre-revised) against employment notice dated 3/96-97. An admit card was issued to him—The examination was held on 30.1.2000 and result was published on 25.4.2000 wherein respondent was declared selected—On 9th May, 2000, a letter was issued to the respondent informing that on the basis of selection conducted by the RRB, his name had been placed on the panel and had been forwarded to Chief Administrative Officer (P) Construction office, Kashmiri Gate, Delhi—Thereafter, vide letter dated 5th April, 2002, respondent was informed that he had been declared medically unfit in A-3 category, as much, was not fit for J.E-II/Signal in the scale of Rs. 5000-8000. He was further informed that in case he wanted to opt for an alternative post, he was required to give an application within one year of receipt of said letter. Vide letter dated 5th June, 2002, respondent was informed that his case for an alternative post had been referred to the Chief Officer and was further asked to report to the office within 15 days of receipt of letter so that his medical could be done—On 4th July, 2002, respondent wrote a letter wherein he requested for an alternative post for which he was medically fit—Thereafter on 22nd October, 2002, the office of petitioner no.3 & 4 informed no.3 & 4 informed respondent that he had been declared fit for B2 and below, as such his application dated 4.7.2007 had been considered by the competent officer and in their division the post of Commercial Clerk grade 3200-4900 (R.P'S.) ST, was lying vacant and his case would be referred to the Chief Officer if he was ready for the same. The respondent requested for issuance of appointment letter for the aforesaid post. On 10th December, 2002, the Divisional Railway Manager, Ambala, wrote a letter to the General Manager, Baroda House, New Delhi informing that the post of Commercial Clerk was lying vacant in their division and decision in that regard be informed to him—Reminders in this regard were also sent by the Divisional Railway Manager, Ambala on 9th November, 2006, 7th March, 2007 to the General Manager, Baroda House, New

Delhi. Finally on 14th August, 2008, petitioners informed the respondent that as per order of the competent authority, for direct appointment against DMS-III Grade 5000-8000, there was no vacant position for S.T. and as such it was not possible to consider his case for an alternative appointment—On the other hand, the stand of respondent is that as per instructions contained in its circular bearing no. PS 13588/2009 dated 25.5.2009 are not applicable in the case of respondent as the said circular is applicable from the prospective date i.e. the date of issue. As regards instructions contained in its circular PS No.11931/99 dated 16.12.1999 is concerned, it is contended that Tribunal has considered the said circular while passing the impugned order and there is no illegality in the impugned orders which call for interference of this court in the exercise of writ jurisdiction under Article 226 of the Constitution of India—It is an admitted position that as per instructions contained in circular in PS No. 11931/99 dated 16th December, 1999 General Managers Railways had the authority to consider requests from candidates who fail in prescribed medical examination after empanelment by RRB for an appointment in the alternative category subject to fulfilment of eligibility criteria—The stand of the petitioners is that as per instructions in the aforesaid PS, if a candidate is found medically unfit, an alternative post can be provided in the equivalent grade and as there was no vacancy in the equivalent grade, alternative post was not offered to him—Held once the petitioner itself had itself chosen to deviote from the afore mentioned circular, it was not open in equity to deny the respondent the alternative post on the ground that it was in lower grade.

Union of India & Ors. v. *Jugeshwar Dhrva* *107*

— Administrative Tribunal Act, 1985—The Petitioner, has challenged the order dated 29th January, 2010 passed by Central Administrative Tribunal, Principal Bench, New Delhi in T.A No.1317/2009 titled "Sh'Sultan Singh & Ors v. Municipal Corporation of Delhi" directing the petitioner to examine the claim of the respondents on the basis of the evidence produced before the Tribunal and thereafter process payment of difference of pay of the post held and duties

discharged by the respondents on the higher post of Garden Chaudhary, if the claim of the respondents was found to be genuine and order dated 7th October, 2010 in review application No.270/2010 dismissing the review application—The respondents filed a writ petition being W.P(C) No.10158-86/2005 praying for a direction to pay difference of wages of Malies/Chowkidars and that of Garden Chaudhary from the date the respondents have been performing the duties and responsibilities of Garden Chaudhary—They are entitled for the difference in salaries between Malies/Chowkidars and Garden Chaudharies—The writ petition filed by the respondent was transferred to the Central Administrative Tribunal and was registered as T.A No.1317/2009 titled "Sultan Singh & Ors v. Municipal Corporation of Delhi"—It is contended by the petitioner that any appointment made without the recommendation of DPC is not valid and the appointment made by Deputy Director (Horticulture) was not competent—The claim of the respondents have always been that they should be paid the difference in pay of Mali/Chowkidar and the Garden Chaudhary as they were made to work on the post of Garden Chaudhary whereas the petitioner had first denied that they worked as Garden Chaudharies, then took the plea that the Assistant Director (Horticulture) was not competent to ask the respondents to work as Garden Chaudharies and that the respondents cannot be appointed to the post of Garden Chaudharies in accordance with the recruitment rules. The plea of the respondents that they are performing the higher duties for long years for want of a regular promotion on officiating basis, and having discharged the duties of higher post by resorting to "quantum meruit rule", held that they are entitled for emoluments of the higher post.

Municipal Corporation of Delhi v. *Sh. Sultan Singh & Ors.* *128*

— Fundamental Rule 56 (J)—Petition challenging the order whereby he was ordered to be prematurely retired w.e.f. Forenoon of 18.03.2010—Petitioner was appointed as Assistant Sub-Inspector (Ministerial) with Central Industrial Security Force on 22.08.1972—Earned promotion from time to time and reached the post of Commandant on 02.01.2006

at the age of 57-1/2 years; left with less than 2-1/2 years for retiremant—Screening Committee decided to put the name of the petitioner in list of such officers, whose further retention in service required to be considered in public interest or otherwise under Rule 56 (j) of the Fundamental Rules—Recommended being unfit for continuation of service, petitioner be prematurely retired w.e.f. 18.03.2010—Petitioner challenged that no opportunity was granted to respond to the below benchmark gradings i.e. 'Average' gradings for 3 years—Opportunity to make a representation given only after the decision of the screening committee accepted—Except the last three years, service profile of the petitioner was either 'very good' or 'outstanding'—Screening Committee should not have considered the ACRs, which were not communicated—Held—The right to make a representation against a below benchmark ACR grading is the recognition of the right to be heard on a subject where some civil consequences may flow, but pertaining to uncommunicated adverse remarks being considered by the Screening Committees, the law has grown in a different direction; holding that uncommunicated adverse remarks can be considered by Screening Committees on the issue of compulsory or premature retirement and the reason thereof is that such an order is neither stigmatic nor does it take away any right of a civil servant, to whom right guaranteed is a minimum pensionable service and beyond that it is public interest which determines how long should he serve.

Shri Jagmohan Singh Negi v. *UOI & Ors.* *690*

TRADE MARKS ACT, 1996—Section 28, Section 29. Suit for permanent injunction, damages and delivery of infringing material—The Plaintiff company is engaged in the business of manufacturing and selling ''Spices and condiments'' under its registered logo—Plaintiff company claims its use throughout the world.—The written statement filed by the defendant rejected for non-payment of costs.—Section 28 of the Act, gives to the registered proprietor of the trade mark the exclusive right to the use of the trade mark in relation to the goods or services in respect of which the trade mark is registered and to obtain relief in respect of infringement of the

trade mark in the manner provided by this Act.—It is thus settled proposition of law that in order to constitute infringement the impugned trademark need not necessarily be absolutely identical to the registered trademark of the plaintiff and it would be sufficient if the plaintiff is able to show that the mark being used by the defendant resembles his mark to such an extent that it is likely to deceive or cause confusion and that the user of the impugned trademark is in relation to the goods in respect of which the plaintiff has obtained registration in his favour—In fact, any intelligent person, seeking to encash upon the goodwill and reputation of a well-established trademark, would make some minor changes here and there so as to claim in the event of a suit or other proceeding, being initiated against him that the trademark being used by him, does not constitute infringement of the trademark, ownership of which vests in some other person—No person can be allowed to sell goods either using the mark of another person or its imitation, so as to cause injury to that person and thereby enrich himself at the cost of a person who has spent considerable time, effort and money in building the brand reputation, which no amount of promotion or advertising can create-even if the defendant is able to show that on account of use of other word/mark of the plaintiff, there would be no confusion in the mind of the customer—That on account of the packaging, get up and the manner of writing trademark on the packaging, it is possible for the consumer to distinguish his product from that of the plaintiff, he would be liable for infringement of the registered trademark—The person coming across the product of the defendant, bearing the impugned trademark may not necessarily be having the product of the plaintiff bearing his registered trademark with him when he comes across the product of the defendant with the mark 'MHS' logo—Who may care to notice the features which distinguish the trademark of the defendant from that of the plaintiff—Similarity of the two trademarks, may induce him to believe that the product which he has come across was, in fact, the product of the plaintiff or had some kind of an association or connection with the plaintiff—The trademark being used by the defendant is visually similar to the trademark being used by the plaintiff, though phonetically, there may not

be much similarity in the two trademarks on account of use of the letters 'S' in place of 'D' and re-arrangement of the letters—Considering the strong visual similarity, rather weak phonetic similarity, would not be of much consequence and would not permit the defendant to use the logo being presently used by him—It is also in the interest of the consumer that a well-established brand such as 'MDH' or its colourable imitation, as is made out from the manner in which the logo 'MHS' has been used by the defendant, should not be allowed to be used by another person in such a deceptive manner—Therefore, the act of the defendant constitutes not only infringement, but also the passing off. This would, amount to putting premium on dishonesty and give an unfair advantage to an unscrupulous infringer over those who have a bona fide defence to make and therefore come forward to contest the suit and place their case before the Court.

M/s Mahashian Di Hatti Ltd. v. *Mr. Raj Niwas, Proprietor of MHS Masalay*..... *659*

TRADE MARKS ACT, 1999—Section 9(1) (a), (2) (a), 11(1) and 2(a)—Order passed by Intellectual Property Appellate Board (IPAB) allowing application of Respondent No. 1 OCPL removing trade mark FORZID from Register of Trade Marks, challenged before High Court—Plea taken, similarity in respect of generic feature 'ZID' will not make UBPL's mark FORZID deceptively similar to OCPL's ORZID—IPAB erred in ignoring order of Madras High Court refusing OCPL interim injunction—Registration in favour of OCPL was in respect of label mark—Font, colour, trade dress and appearance of label used by UBPL was different in each respect from trade dress and get up of label used by OCPL—Respective prices of two drugs were markedly different, there was no scope for confusion—Per contra plea taken, Madras High Court has held trade marks were phonetically similar and OCPL was prior user—Dosage of two injections were different and if wrongly administered could result in irreversible side effect—Refusal of injunction by Madras High Court was only at interlocutory stage as such was not binding on IPAB—Entire mark of OCPL was embedded in mark of UBPL and latter's subsequent adoption was not honest—Registration in favour of OCPL was

in respect of device of which word mark formed integral and inseparable part and IPAB had rightly compared two marks as a whole—Held—Entire word mark ORZID is being used as part of work mark FORZID with only addition of a single letter 'F'—Mere prefixing letter F to mark of OCPL fails to distinguish FORZID sufficiently from ORZID so as not to cause deception or confusion in mind of average customer with imperfect recall—Addition as a prefix of Soft Consonant F to ORZID does not dilute phonetic and structural similarity of two marks—Test of deceptive similarity has to be applied ''from Point of view of men of average intelligence and imperfect recollection''—FORZID and ORZID are deceptively similar words and are likely to cause confusion in mind of average customer with imperfect recollection—Comparison of two competing marks as a whole is rule and dissection of a mark is exception which is generally not permitted—A person of average intelligence and imperfect recollection would hardly undertake any 'dissection' exercise, to discem fine distinction between marks—Unlike a consumer durable product, variations in size of font, colour, trade dress or label for a medicine would not make much of a difference—Mere fact that two drugs are priced differently is not sufficient to hold that unwary average purchaser of drugs will not be confused into thinking one is as good as other or in fact both are same drug—A prescription written for ORZID may be mistaken by dispenser at pharmacy shop to be FORZID or vice-versa—Principles of comity of jurisdiction does not mean that IPAB should be bound by the orders of High Court at stage of interim injunction as opinions expressed at that stage are at best, tentative—No ground to interfere with impugned order of IPAB.

United Biotech Pvt. Ltd. v. *Orchid Chemicals And Pharmaceuticals Ltd. And Ors.* *388*

TRADE AND MERCHANDISE MARKS ACT, 1958—Section 46 & 56—M/s United Brothers ('UB'), a partnership firm engaged in the business of manufacturing and marketing of aluminium halloware and other household utensils since 1957, under the trade mark UNITED—UB challenges an order passed by the Intellectual Property Appellate Board dismissing its

application under Section 46 and 56 of the Act, 1958 for cancellation/removal of registration of Respondent No. 1 in respect of mark "UNITED" in respect of electric flat iron, Held: When the mark like UNITED is a weak one and the registration already granted to the respective parties can be allowed to continue on account of the long number of years during which both AU and UB have used the mark for their respective goods without there being deception and confusion in the minds of the consumers as regards the origin of their respective goods i.e., electric flat irons and pressure cookers—Petition dismissed.

United Brothers v. *Aziz Ulghani & Anr.* *208*

TRANSFER OF PROPERTY ACT, 1882—Section 106—Slum Areas (Improvement and Clearance) Act, 1956 (in short 'Slums Act')—Section 19—Plaintiff/appellant bought shop in 2003—Mother of respondent nos 1-3 inducted as tenant by erstwhile owner, her tenancy terminated in January 2000, she expired in February 2000—Respondent nos 1-3 continued in possession—Sublet portion to respondent no. 4—Notice served on respondent nos 1-3 to hand over possession—Suit for possession and measne profits—Right to file written statement closed—Application u/ Order 7 Rule 11 filed by respondent nos. 1-3 on ground that no permission sought u/s 19 Slums Act—Trial court allowed application—Held, Respondent nos 1-3 inherited commercial tenancy from mother—Trial court correctly took judicial notice of fact u/s 57 Evidence Act that suit property was in slum area—A notice u/s 106 of the TPA does not convert the possession of tenant in respect of premises in Slum act areas into wrongful possession or unlawful possession since where ever there is statutory protection against dispossession by operation of law, the possession of a person inspite of termination of his lease, is deemed as lawful possession and under authority of law—Just because defence of respondents struck off does not make application u/ order 7 Rule 11 not maintainable, since application can be filed at any stage of proceedings—Appeal dismissed.

Harish Chander Malik v. *Vivek Kumar Gupta & Others* *293*

— The writ petitioners had sought various reliefs which included a direction to the respondent to provide them alternative accommodation—One of the petitioners apparently filed a previous proceeding WP(C) No. 3095/2001—That writ petition was dismissed.—Other similarly situated litigants were also writ petitioners in that proceedings—Whatever be that position the petitioners admit that their effort to have final order clarified was unsuccessful on three previous occasions. Having regard to these facts, the claim for compensation and the right to be put back into possession into alternative accommodation cannot be entertained in this manner. The petitioners have also not cared to throw light on whether the appeal against the eviction order succeeded and if at all the petitioners availed the liberty granted by the Court.

Urmila Punera & Anr. v. *UOI & Ors.*..... *529*

— The view that we are taking is consistent with the implication of CI. (b) of Section 101. When in an election petition which complies with Section 84 of the Act it is found at the hearing that some votes were obtained by the returned candidate by corrupt practices, the Court is bound to declare the petitioner or another candidate elected if, but for the votes obtained by the returned candidate by corrupt practice, such candidate would have obtained a majority of votes. In cases falling under Clause (b) of Section 101 the Act requires merely proof of corrupt practice, and obtaining votes by corrupt practice: it does not require proof that the voters whose votes are secured by corrupt practice had notice of the corrupt practice. If for the application of the rule contained in Clause (b) notice to the voters is not a condition precedent, we see no reason why it should be insisted upon in all cases under Clause (a). The votes obtained by corrupt practice by the returned candidate, proved to be guilty of corrupt practice, are expressly excluded in the computation of total votes for ascertaining whether a majority of votes had been obtained by the defeated candidate and no fresh poll is necessary. The same rule should, in our judgment, apply when at an election there are only two candidates and the returned candidate is found to be under a statutory disqualification existing at the date of the filling of the nomination paper.''

Sh. Satish Kumar v. *Shri Vikas & Ors.* *453*

— Section 52—Doctrine of lis pendens contention of plaintiff, that subject matter of the suit cannot be transacted without the permission of the court and would be subject to the outcome of the decision—Rejected as the plaintiff will not suffer irreparable loss if the injunction is vacated.

Prakash Khattar v. *Smt. Shanta Jindal & Ors.*..... *801*

WEALTH TAX ACT, 1957—The questions to adjudicate upon are as follows:- (i) Whether on the facts and circumstances of the case, the Tribunal was right in holding that the land in question has to be valued at Rs.847/- only for the purposes of Wealth Tax and not at Rs.2,77,64,000/- (ii) Whether on the facts and in circumstances of the case the Tribunal was right in holding that the value of the land situated in village Gadaipur which has been declared surplus under the Urban Land Ceiling Act, 1976 cannot be treated as the wealth of the assessee. (iii) Whether the Tribunal is correct on facts and law in affirming the order of CWT(A) and thereby deleting the addition of Rs.8,08,239/- for AY 1984-85, Rs.8,82,317/- for AY 1988-89 and Rs.9,92,910/- AY 1989-90 made in the net wealth of the assessee on account of value of construction of country club—The land in question is a leased property. A persual of the order of the Income Tax Appellate Tribunal (hereinafter referred to as the "Tribunal") seems to suggest that the Assessing Officer has taken into account an area equivalent to 17138.48 sq. metres which consists of a land equivalent to 4158 sq. metres which is 'contiguous' and 'appurtenant' to the building(s) erected thereupon and an area of 12619.98 sq. metres which was declared surplus under Urban Land (Ceiling & Regulation) Act, 1976—Though the said notification was published in the official Gazette the possession of the land was not taken over.

Commissioner of Wealth Tax v. *Chelsford Club Ltd.* *251*