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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—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*

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

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).

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.

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.

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.

— 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.

— 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.

— 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.

— 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.

— 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*

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*

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*

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*

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*

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.

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

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.

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.

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*

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*

ILR (2011) V DELHI 1
WP(C)

AGR INVESTMENT LTD. ....PETITIONER

VERSUS

ADDL. COMMISSIONER OF INCOME TAX AND ANR. ....RESPONDENTS

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

WP(C) NO. : 7517/2010 DATE OF DECISION: 07.01.2011

Constitution of India, 1950—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.

In the case at hand, as we find, the petitioner is desirous of an adjudication by the writ court with regard to the merits of the controversy. In fact, the petitioner requires this Court to adjudge the sufficiency of the material and to make a roving enquiry that the initiation of proceedings under Sections 147 and 148 of the Act is not tenable. The same does not come within the ambit and sweep of exercise of power under Article 226 of the Constitution of India. It is open to the assessee to participate in re-assessment proceedings and put forth its stand and stance in detail of satisfy the assessing officer that there was no escapement of taxable income. We may hasten to clarify that any observation made in this order shall not work to the detriment of the plea put forth by the assessee during the re-assessment proceedings.

(Para 23)

Important Issue Involved: To require the Court to adjudge the sufficiency of material and to make a roving enquiry whether the initiation of proceedings under Section 147 and 148 of the Act is not tenable, does not come within the ambit and sweep of exercise of power under Article 226 of the Constitution of India.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. S. Ganesh, Sr. Advocate with Mr. Satyen Sethi, Mr. Arta Trana, Advocates.

FOR THE RESPONDENTS : Mr. M.P. Sinha, Advocate.

CASES REFERRED TO:

1. *Sarthak Securities Co. Pvt. Ltd.* vs. *ITO,* Writ Petition No.6087/2010.
2. *CIT* vs. *SFIL Stock Broking Ltd.,* [2010] 325 ITR 285 (Del).
3. *Assistant Commissioner of Income Tax* vs. *Rajesh Jhaveri Stock Brokers P. Ltd,* [2007] 291 ITR 500 (SC).
4. *Hindustan Lever Ltd.* vs. *R.B. Wadkar,* [2004] 268 ITR 332 (Bom).
5. *GNK Driveshafts (India) Ltd.* vs. *Income Tax Officer and Others,* (2003) 179 C54 (SC) 11.
6. *GKN Driveshafts (India) Ltd.* vs. *Income Tax Officer & Ors.,* (2003) 179 CTR 11 (SC).
7. *United Electrical Co. Pvt. Ltd.* vs. *CIT,* [2002] 258 ITR 317.
8. *IPCA Laboratories Ltd.* vs. *DCIT* (2001) 251 ITR 420 (Bombay).
9. *Raymond Woolen Mills Ltd.* vs. *Income Tax Officer & Ors.,* [1999] 236 ITR 34 (SC).
10. *Praful Chunilal Patel* vs. *Assistant Commission of Income Tax,* [1999] 236 ITR 832.

11. *Bombay Pharma Products* vs. *Income Tax Officer,* [1999] 237 ITR 614 (MP).
12. *Anant Kumar Saharia* vs. *Commissioner of Income Tax & Ors.,* [1998] 232 ITR 533 (Gauhati).
13. *Birla VXL Ltd.* vs. *Assistant Commissioner of Income Tax,* [1996] 217 ITR 1 (Guj.).
14. *N.D. Bhatt, Inspecting Assistant Commissioner, Income Tax & Another.* vs. *I.B.M. World Trade Corporation,* [1995] 216 ITR 811(Bombay).
15. *Phool Chand Bajrang Lal & Anr.* vs. *Income Tax Officer & Anr.,* [1993] 203 ITR 456 (SC).
16. *Central Provinces Manganese Ore Co. Ltd.* vs. *ITO,* [1991] 191 ITR 662.
17. *Sheo Narain Jaiswal & Ors.* vs. *Income Tax Officer & Ors.,* [1989] 176 ITR 352 (Patna).
18. *Ganga Saran & Sons P. Ltd.* vs. *ITO & Ors.,* [1981] 130 ITR 1 (SC).
19. *General Mrigendra Shum Sher Jung Bahadur Rana* vs. *ITO,* [1980] 123 ITR 329.
20. *H.A. Nanji & Co.* vs. *Income Tax Officer,* [1979] 120 ITR 593 (Calcutta).
21. *Indian Oil Corporation* vs. *ITO* [1977] 106 ITR 1 (SC).
22. *ITO* vs. *Lakhmani Mewal Das,* [1976] 103 ITR 437 (SC).
23. *Siemens Engineering & Manufacturing Co. of India Ltd.* vs. *Union of India,* AIR 1976 SC 1785.
24. *Union of India* vs. *Mohan Lal Capoor,* AIR 1974 SC 87.
25. *Calcutta Discount Co. Ltd.* vs. *ITO* [1961] 41 ITR 191 (SC).
26. *Jay Bharat Maruti Ltd.* vs. *CIT,* 223 CTR 269 (Del).
27. *CIT* vs. *Batra Bhatta Company,* 174 Taxman 444 (Del).

RESULT: Writ dismissed.

DIPAK MISRA, CJ.

1. By this writ petition preferred under Article 226 of the Constitution of India, the petitioner has prayed for issue of a writ of certiorari for quashment of the notice dated 25th February, 2010 issued under Section 148 of the Income Tax Act, 1961 (for brevity 'the Act') for the assessment year 2003-04 and further to quash the order dated 28th June, 2010 whereby the objections raised by the petitioner have been rejected.

2. It is submitted by Mr. S. Ganesh, learned senior counsel along with Mr. Satyen Sethi and Mr. Arta Trana, learned counsel appearing for the petitioner, that the assessing officer has assumed jurisdiction to initiate the proceedings under Section 147 and issued notice under Section 148 of the Act solely on the basis of certain statements recorded by the Directorate of Investigation without forming an independent opinion. It is urged by him that the expression used in Section 147 of the Act is 'reason to believe' and not 'reason to suspect' and it is the settled legal position that there should be direct nexus or live link between the materials relied upon by the revenue and the belief that income has escaped assessment. It is contended that on a bare reading of the reason to believe, it is evident that the jurisdiction to reassess the income has been assumed on the basis of unspecific and vague information which cannot justify the formation of the belief or the reason to believe that income has escaped assessment. The entire foundation of the belief that the income has escaped assessment is that "certain investigations were carried out by the Directorate of Investigation, Jhandewalan" though no particulars had been given on what basis the Directorate of Investigation had come to the conclusion that accommodation entries were given to the petitioner. It is urged that no details of the persons who supposedly alleged that the transactions of the petitioner were bogus were provided and further the nature of the alleged accommodation entries have not been referred to in the reason to believe. In essence, the submission in this regard is that there is complete absence of material which can be said to have a live link with or be the basis of formation of the purported belief or reason to believe that the petitioner's income had escaped assessment. The allegation that the transactions entered into by the petitioner were bogus is totally without any substance in the absence of any materials/details provided. It is further submitted by the learned counsel for the petitioner that the reasons recorded must show application of mind by the assessing

officer to the material produced before him on the basis of which the reason to believe is formed that income has escaped assessment and in the absence of such application of mind which is evincible from the reasons recorded, the order is vulnerable in law. It is contended by him that the assessing officer has merely blindly accepted what was allegedly intimated to him by the Directorate of Investigation without even attempting to ascertain the basis of the Directorate's assertion that accommodation entries were given to the petitioner. It is his further submission that the objections raised by the petitioner have not been disposed of in conformity with the decision rendered by the Apex Court in **GKN Driveshafts (India) Ltd. v. Income Tax Officer & Ors.,** (2003) 179 CTR 11 (SC) inasmuch as there is no consideration of the basic and fundamental objections raised by the petitioner which go to the very root of the matter and would clearly reveal that no addition whatsoever could have been made to the petitioner's income. It is canvassed by him that the decision of the Apex Court in **GKN Driveshafts (India) Ltd.** (supra) requires that the assessee's objections to the reopening should be considered and disposed of in conformity with the rules of natural justice.

3. To bolster his submissions, the learned counsel for the petitioner has commended us to the decisions in **ITO v. Lakhmani Mewal Das,** [1976] 103 ITR 437 (SC), **General Mrigendra Shum Sher Jung Bahadur Rana v. ITO,** [1980] 123 ITR 329, **United Electrical Co. Pvt. Ltd. v. CIT,** [2002] 258 ITR 317, **CIT v. SFIL Stock Broking Ltd.,** [2010] 325 ITR 285 (Del), **Siemens Engineering & Manufacturing Co. of India Ltd. v. Union of India,** AIR 1976 SC 1785 and **Union of India v. Mohan Lal Capoor,** AIR 1974 SC 87.

4. Mr. M.P. Sinha, learned counsel appearing for the revenue, supported the order passed by the competent authority contending, interalia, that the assessing officer has applied his independent mind and has not been solely guided by the information given by the Directorate of Investigation. It is proponed by him that the objections raised by the petitioner has been appositely dealt with and by no stretch of imagination it can be said to be a cryptic order passed in a mechanical manner. The learned counsel for the revenue would submit that what is basically contended by the learned counsel for the assessee – petitioner pertains to sufficiency of material which should not be gone into at this stage. It is put forth by him that the same has to be delved into at the time of

assessment and the petitioner would be afforded adequate opportunity of hearing to explain the same. The learned counsel has further submitted that the decisions which have been placed reliance upon by the learned counsel for the petitioner are distinguishable on facts and, hence, the same really do not render much assistance to him.

5. To appreciate the controversy, it is appropriate to refer to the initial notice dated 25th February, 2010 which was sent by the assessing officer. On a perusal of the said notice, it is evident that there has been escapement of taxable income for the assessment year 2003-04 within the meaning of Section 147 of the Act. It is worth noting, there is a cavil between the revenue and the petitioner how the objections have been dealt with by the competent authority of the revenue. It is averred in the petition that the petitioner, on receipt of the notice, submitted that the return of income filed under Section 139(1) of the Act may be treated as filed in response to the notice under Section 148 of the Act and the reasons recorded for assuming jurisdiction to re-assess the income be furnished so that objections referring to the assumption of jurisdiction may be filed. On 15th March, 2010, the reason to believe, as recorded, was provided to the petitioner wherefrom it is reflectible that the jurisdiction was assumed on the basis of the report of the Directorate of Investigation that certain persons had given statement that the petitioner had received accommodation entries. On 20th May, 2010, the assessee requested to provide copies of the statement and the report of the DIT (Investigation) to enable him to raise objections. However, as is manifest, by letter dated 21st June, 2010, the petitioner raised the following objections:

"(i) During the year the petitioner has neither received any gift nor any share application money nor any loan.

(ii) There was no change in share capital during the year as compared to immediately preceding year. The petitioner being a public limited listed company is regulated by the rules and regulations of SEBI and cannot accept share application money or issue share capital except with the prior approval of SEBI.

(iii) Neither any loan was borrowed nor has any payment been repaid during the year. Reference was made to clause 23(a) of Tax Audit Report.

(iv) It was explained that during the year, investment in shares held by the petitioner was sold. From the audited balance sheet, it is evident that the petitioner was having shares of three limited companies, namely, Lakshmi Float Glass Limited, Bawa Float Glass Limited and KPF Finances Limited of the face value of Rs.1,40,00,000/-. It was these shares that were sold at the face value only. It is out of sale of these shares that sale to the extent of Rs.27,00,000/- has been alleged in the reasons as accommodation entry.

(v) Amount received on sale of investments was utilized to give loans and the same appear in the balance sheet under the head 'loans and advances'."

6. Upon receipt of the said objections, the same were dealt with vide Annexure P-2 dated 28th June, 2010. In paragraph 3, the authority concerned referred to its earlier decision and reproduced the same. We think it appropriate to reproduce the relevant portion of the same whereby the objections have been rejected:

"REASONS RECORDED IN WRITING FOR
REOPENING THE CASE UNDER SECTION 148
M/s AGR INVESTMENT LTD.
ASSESSMENT YEAR 2003-04

Certain investigations were carried out by the Directorate of Investigation, Jhandewalan, New Delhi in respect of the bogus/ accommodation entries provided by certain individuals/companies. The name of the assessee figures as one of the beneficiaries of these alleged bogus transactions given by the Directorate after making the necessary enquiries. In the said information, it has been inter-alia reported as under:

"Entries are broadly taken for two purposes:

1. To plough back unaccounted black money for the purpose of business or for personal needs such as purchase of assets etc., in the form of gifts, share application money, loans etc.

2. To inflate expense in the trading and profit and loss account so as to reduce the real profits and thereby pay less taxes. It has

been revealed that the following entries have been received by the assessee:

Beneficiary's Name	Beneficiary's Bank Name	Beneficiary's Bank Name	Value Entry Taken
AGR Investment Ltd.	SBI	Pahar Ganj	400000
AGR Investment Ltd.	SBI	Pahar Ganj	300000
AGR Investment Ltd.	SBI	Pahar Ganj	300000
AGR Investment Ltd.	SBI	Pahar Ganj	500000
AGR Investment Ltd.	SBI	Pahar Ganj	700000
AGR Investment Ltd.	SBI	Pahar Ganj	500000
		Total	2700000
Instrument No. by which entry taken	Date on which Entry taken	Name of Account Holder of entry giving account	
141581	23-May-02	SAAR Enterprises Pvt. Ltd.	
141852	28-May-02	SAAR Enterprises Pvt. Ltd.	
141957	28-May-02	Tulip Engg. Pvt. Ltd.	
141854	9-Jun-02	SAAR Enterprises Pvt. Ltd.	
141955	9-Jun-02	Tulip Engg. Pvt. Ltd.	
141959	20-Jun-02	Tulip Engg. Pvt. Ltd.	
Bank from which entry given	Branch of entry giving bank	A/c No. entry giving account	
Corpn. Bank	Paschim Vihar	52116	
Corpn. Bank	Paschim Vihar	52116	
Corpn. Bank	Paschim Vihar	52174	
Corpn. Bank	Paschim Vihar	52116	
Corpn. Bank	Paschim Vihar	52174	
Corpn. Bank	Paschim Vihar	52174	

The transactions involving Rs.27,00,000/-, mentioned in the

manner above, constitutes fresh information in respect of the assessee as a beneficiary of bogus accommodation entries provided to it and represents the undisclosed income/income from other sources of the assessee company, which has not been offered to tax by the assessee till its return filed.

On the basis of this new information, I have reason to believe that the income of Rs.27,00,000/- has escaped assessment as defined by section 147 of the Income Tax Act. Therefore, this is a fit case for the issuance of the notice under section 148.

xxx

xxx

i) The reasons recorded by the Assessing Officer amply "demonstrate" that income has escaped assessment, there is adequate "reason to believe" that income has escaped assessment, as the report of DIT(Inv) has specifically pointed out that the receipts are bogus; they are mere accommodation entries and this channel has been utilized by the assessee to introduce its own unaccounted money in its books of accounts. In this respect, it would be pertinent to cite here the case of **IPCA Laboratories Ltd. vs. DCIT** (2001) 251 ITR 420 (Bombay).

ii) It would be pertinent to state here as under:-

Assessee must disclose all primary facts fully and truly – The words ,,omission or failure to disclose fully and truly all material facts necessary for his assessment for that year. postulate a duty on every assessee to disclose fully and truly all material facts necessary for his assessment. What facts are material and necessary for assessment will differ from case to case. There can be no doubt that the duty of disclosing all the primary facts relevant to the decision on the question before the assessing authority lies on the assessee – **Calcutta Discount Co. Ltd. vs. ITO** [1961] 41 ITR 191 (SC); **Indian Oil Corporation v. ITO** [1977] 106 ITR 1 (SC); **ITO v. Lakhmani Mewal Das** (supra)."

7. The questions that emerge for consideration are whether there has been application of mind or change of opinion, whether the objections

have been properly dealt with and whether there is a mere suspicion or reason to believe. Regard being had to the aforesaid issues, we think it appropriate to refer to certain citations in the field.

8. In **Raymond Woolen Mills Ltd. v. Income Tax Officer & Ors.,** [1999] 236 ITR 34 (SC), while dealing with the validity of commencement of re-assessment proceedings under Section 147 of the Act, the Apex Court has held that there is prima facie some material on the basis of which the Department could re-open the case. The sufficiency or correctness of the material is not a thing to be considered at that stage.

9. The High Court of Gujarat in **Praful Chunilal Patel v. Assistant Commission of Income Tax,** [1999] 236 ITR 832 has opined that in terms of the provision contained in Section 147, the Assessing Officer should have reason to believe that any income chargeable to tax has escaped assessment. The word 'reason' in the phrase 'reason to believe' would mean cause or justification. If the assessing officer has a cause or justification to think or suppose that income has escaped assessment, he can be said to have a reason to believe that such income had escaped assessment. The words 'reason to believe' cannot mean that the assessing officer should have finally ascertained the facts by legal evidence. They only mean that he forms a belief from the examination he makes and if he likes from any information that he receives. If he discovers or finds or satisfies himself that the taxable income has escaped assessment, it would amount to saying that he had reason to believe that such income had escaped assessment. The justification for his belief is not to be judged from the standards of proof required for coming to a final decision. A belief, though justified for the purpose of initiation of the proceedings under Section 147, may ultimately stand altered after the hearing and while reaching the final conclusion on the basis of the intervening enquiry. At the stage where he finds a cause or justification to believe that such income has escaped assessment, the assessing officer is not required to base his belief on any final adjudication of the matter.

10. In **Ganga Saran & Sons P. Ltd. v. ITO & Ors.,** [1981] 130 ITR 1 (SC), it has been held thus:

> "It is well settled as a result of several decisions of this Court that two distinct conditions must be satisfied before the ITO can assume jurisdiction to issue notice under S. 147(a). First, he must have reason to believe that the income of the assessee has escaped assessment and, secondly, he must have reason to believe that such escapement is by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. If either of these conditions is not fulfilled, the notice issued by the ITO would be without jurisdiction. The important words under S.147(a) are "has reason to believe" and these words are stronger than the words "is satisfied". The belief entertained by the ITO must not be arbitrary or irrational. It must be reasonable or in other words it must be based on reasons which are relevant and material. The Court, of course, cannot investigate into the adequacy or sufficiency of the reasons which have weighed with the ITO in coming to the belief, but the Court can certainly examine whether the reasons are relevant and have a bearing on the matters in regard to which he is required to entertain the belief before he can issue notice under S.147(a). It there is no rational and intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be inescapable that the ITO could not have reason to believe that any part of the income of the assessee had escaped assessment and such escapement was by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts and the notice issued by him would be liable to be struck down as invalid."

11. In **Birla VXL Ltd. v. Assistant Commissioner of Income Tax,** [1996] 217 ITR 1 (Guj.), a Division Bench of the Gujarat High Court has opined thus:

> "Explanation 2 to Section 147 of the Act, as appended to newly substituted section 147 makes certain provisions, where in certain circumstances, the income is deemed to have escaped assessment giving jurisdiction to the Assessing Officer to act under the said provision. Another requirement which is necessary for assuming jurisdiction is that the Assessing Officer shall record his reasons for issuing notice. This requirement necessarily postulates that before the Assessing Officer is satisfied to act under the aforesaid

provisions, he must put in writing as to why in his opinion or why he holds belief that income has escaped assessment. "Why" for holding such belief must be reflected from the record of reasons made by the Assessing Officer. In a case where Assessing Officer holds the opinion that because of excessive loss or depreciation allowance income has escaped assessment, the reasons recorded by the Assessing Officer must disclose that by what process of reasoning he holds such a belief that excessive loss or depreciation allowance has been computed in the original assessment. Merely saying that excessive loss or depreciation allowance has been computed without disclosing reasons which led the assessing authority to hold such belief, in our opinion, does not confer jurisdiction on the Assessing Officer to take action under sections 147 and 148 of the Act. We are also of the opinion that, howsoever wide the scope of taking action under section 148 of the Act be, it does not confer jurisdiction on a change of opinion on the interpretation of a particular provision from that earlier adopted by the assessing authority. For coming to the conclusion whether there has been excessive loss or depreciation allowance or there has been underassessment at a lower rate or for applying the other provisions of Explanation 2, there must be material that have nexus to hold opinion contrary to what has been expressed earlier. The scope of section 147 of the Act is not for reviewing its earlier order suo motu irrespective of there being any material to come to a different conclusion apart from just having second thoughts about the inferences drawn earlier.

[Emphasis added]

12. In **Sheo Narain Jaiswal & Ors. v. Income Tax Officer & Ors.,** [1989] 176 ITR 352 (Patna), it was held that reassessment proceedings can be initiated under Section 147(a) of the Act if the Income-tax Officer has reason to believe that there has been escapement of income and that the said income escaped assessment by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment for that period or year. Both the conditions are conditions precedent for the assumption of jurisdiction under Section 148 of the Act.

13. In **Phool Chand Bajrang Lal & Anr. v. Income Tax Officer & Anr.,** [1993] 203 ITR 456 (SC), the Apex Court has held thus:

"From a combined review of the judgments of this Court, it follows that an Income-tax Officer acquires jurisdiction to reopen an assessment under Section 147(a) read with Section 148 of the Income-tax Act, 1961, only if on the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons, which he must record, to believe that, by reason of omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profits or gains chargeable to income-tax has escaped assessment. He may start reassessment proceedings either because some fresh facts had come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. Since the belief is that of the Income-tax Officer, the sufficiency of reasons for forming the belief is not for the Court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non-specific information. To that limited extent, the Court may look into the conclusion arrived at by the Income-tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income-tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief…"

[Emphasis supplied]

14. In **Anant Kumar Saharia v. Commissioner of Income Tax & Ors.,** [1998] 232 ITR 533 (Gauhati), it was held as follows:

"The belief is that of the Assessing Officer and the reliability or credibility or for that matter the weight that was attached to the

materials naturally depends on the judgment of the Assessing Officer. This court in exercise of power under Article 226 of the Constitution of India cannot go into the sufficiency or adequacy of the materials. After all the Assessing Officer alone is entrusted to administer the impugned Act and if there is prima facie material at the disposal of the Assessing Officer that the income chargeable to income-tax escaped assessment this court in exercise of power under Article 226 of the Constitution of India should refrain from exercising the power. In the instant case, the case of the petitioner was fairly considered and thereafter the above decision is taken."

[Underlining is ours]

15. In **Bombay Pharma Products v. Income Tax Officer,** [1999] 237 ITR 614 (MP), it was held as follows:

It is also established that the notice issued under Section 148 of the Act should follow the reasons recorded by the Income-tax Officer for reopening of the assessment and such reasons must have a material bearing on the question of escapement of income by the assessee from assessment because of his failure or omission to disclose fully and truly all material facts. Whether such reasons are sufficient or not, is not a matter to be decided by the court. But the existence of the belief is subject to scrutiny if the assessee shows circumstances that there was no material before the Income-tax Officer to believe that the income had escaped assessment."

[Emphasis added]

16. In **H.A. Nanji & Co. v. Income Tax Officer,** [1979] 120 ITR 593 (Calcutta), it has been held that at the time of issue of notice of reassessment, it is not incumbent on the ITO to come to a finding that income has escaped assessment by reason of the omission or failure of the assessee to disclose fully and truly all material facts necessary for assessment. It has been further held that the belief which the ITO entertains at that stage is a tentative belief on the basis of the materials before him which have to be examined and scrutinised on such evidence as may be available in the proceedings for reassessment. The Division Bench held that there must be some grounds for the reasonable belief that there has

been a non-disclosure or omission to file a true or correct return by the assessee resulting in escapement of assessment or in under-assessment. Such belief must be in good faith, and should not be a mere pretence or change of opinion on inferential facts or facts extraneous or irrelevant to the issue and the material on which the belief is based must have a rational connection or live link or relevant bearing on the formation of the belief.

17. In **N.D. Bhatt, Inspecting Assistant Commissioner, Income Tax & Another. v. I.B.M. World Trade Corporation,** [1995] 216 ITR 811(Bombay), it has been held thus:

"It is also well-settled that the reasons for reopening are required to be recorded by the assessing authority before issuing any notice under section 148 by virtue of the provisions of section 148(2) at the relevant time. Only the reason so recorded can be looked at for sustaining or setting aside a notice issued under section 148."

18. In **Hindustan Lever Ltd. v. R.B. Wadkar,** [2004] 268 ITR 332 (Bom), a Division Bench has opined thus:-

"…. the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide the link between conclusion and evidence. The reasons recorded must be

based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish the vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment."

[underlining is ours]

19. In **Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers P. Ltd,** [2007] 291 ITR 500 (SC), it has been ruled thus:-

"Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court in **Central Provinces Manganese Ore Co. Ltd. v. ITO,** [1991] 191 ITR 662, for initiation of action under Section 147(a) (as the provision stood at the relevant time) fulfillment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective

satisfaction."

[Emphasis supplied]

20. In this context, we may refer with profit to a Division Bench decision of this Court in **SFIL Stock Broking Ltd.** (supra), wherein the Bench was dealing with the validity of the proceedings under Section 147 of the Act. The Bench reproduced the initial issuance of notice and thereafter referred to the reasons for issue of notice under Section 148 which was provided to the assessee. Thereafter, the Bench referred to the decisions in **CIT v. Atul Jain,** 299 ITR 383 (Del), **Rajesh Jhaveri Stock Brokers Pvt. Ltd** (supra), **Jay Bharat Maruti Ltd. v. CIT,** 223 CTR 269 (Del) and **CIT v. Batra Bhatta Company,** 174 Taxman 444 (Del) and eventually held thus: -

"9. In the present case, we find that the first sentence of the so-called reasons recorded by the Assessing Officer is mere information received from the Deputy Director of Income Tax (Investigation). The second sentence is a direction given by the very same Deputy Director of Income Tax (Investigation) to issue a notice under Section 148 and the third sentence again comprises of a direction given by the Additional Commissioner of Income Tax to initiate proceedings under Section 148 in respect of cases pertaining to the relevant ward. These three sentence are followed by the following sentence, which is the concluding portion of the so-called reasons:-

> "Thus, I have sufficient information in my possession to issue notice u/s 148 in the case of M/s SFIL Stock Broking Ltd. on the basis of reasons recorded as above."

10. From the above, it is clear that the Assessing Officer referred to the information and the two directions as 'reasons' on the basis of which he was proceeding to issue notice under Section 148. We are afraid that these cannot be the reasons for proceeding under Section 147/148 of the said Act. The first part is only an information and the second and the third parts of the beginning paragraph of the so-called reasons are mere directions. From the so-called reasons, it is not at all discernible as to whether the Assessing Officer had applied his mind to the information and independently arrived at a belief that, on the basis of the material

which he had before him, income had escaped assessment. Consequently, we find that the Tribunal has arrived at the correct conclusion on facts. The law is well settled. There is no substantial question of law which arises for our consideration."

[Emphasis is ours]

21. At this juncture, it is profitable to refer to the authority in **GNK Driveshafts (India) Ltd. v. Income Tax Officer and Others,** (2003) 179 C54 (SC) 11 wherein their Lordships of the Apex Court have held thus:-

> "5. We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under Section 148 of the Income Tax Act is issued, the proper course of action for the notice is to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the notice is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment years."

21. In **Sarthak Securities Co. Pvt. Ltd. v. ITO,** Writ Petition No.6087/2010, decided on 18th October, 2010, a Division Bench of this Court, after reproducing Section 147 of the Act and relying on certain decisions in the field, expressed the view as follows:

> "23. `The obtaining factual matrix has to be tested on the anvil of the aforesaid pronouncement of law. In the case at hand, as is evincible, the assessing officer was aware of the existence of four companies with whom the assessee had entered into transaction. Both the orders clearly exposit that the assessing officer was made aware of the situation by the investigation wing and there is no mention that these companies are fictitious companies. Neither the reasons in the initial notice nor the communication providing reasons remotely indicate independent

application of mind. True it is, at that stage, it is not necessary to have the established fact of escapement of income but what is necessary is that there is relevant material on which a reasonable person could have formed the requisite belief. To elaborate, the conclusive proof is not germane at this stage but the formation of belief must be on the base or foundation or platform of prudence which a reasonable person is required to apply. As is manifest from the perusal of the supply of reasons and the order of rejection of objections, the names of the companies were available with the authority. Their existence is not disputed. What is mentioned is that these companies were used as conduits. In that view of the matter, the principle laid down in **Lovely Exports (P) Ltd.** (supra) gets squarely attracted. The same has not been referred to while passing the order of rejection. The assessee in his objections had clearly stated that the companies had bank accounts and payments were made to the assessee company through banking channel. The identity of the companies was not disputed. Under these circumstances, it would not be appropriate to require the assessee to go through the entire gamut of proceedings. It is totally unwarranted."

22. The present factual canvas has to be scrutinized on the touchstone of the aforesaid enunciation of law. It is worth noting that the learned counsel for the petitioner has submitted with immense vehemence that the petitioner had entered into correspondence to have the documents but the assessing officer treated them as objections and made a communication. However, on a scrutiny of the order, it is perceivable that the authority has passed the order dealing with the objections in a very careful and studied manner. He has taken note of the fact that transactions involving Rs.27 lakhs mentioned in the table in Annexure P-2 constitute fresh information in respect of the assessee as a beneficiary of bogus accommodation entries provided to it and represents the undisclosed income. The assessing officer has referred to the subsequent information and adverted to the concept of true and full disclosure of facts. It is also noticeable that there was specific information received from the office of the DIT (INV-V) as regards the transactions entered into by the assessee company with number of concerns which had made accommodation entries and they were not genuine transactions. As we

perceive, it is neither a change of opinion nor does it convey a particular interpretation of a specific provision which was done in a particular manner in the original assessment and sought to be done in a different manner in the proceeding under Section 147 of the Act. The reason to believe has been appropriately understood by the assessing officer and there is material on the basis of which the notice was issued. As has been held in **Phool Chand Bajrang Lal** (supra), **Bombay Pharma Products** (supra) and **Anant Kumar Saharia** (supra), the Court, in exercise of jurisdiction under Article 226 of the Constitution of India pertaining to sufficiency of reasons for formation of the belief, cannot interfere. The same is not to be judged at that stage. In **SFIL Stock Broking Ltd.** (supra), the bench has interfered as it was not discernible whether the assessing officer had applied his mind to the information and independently arrived at a belief on the basis of material which he had before him that the income had escaped assessment. In our considered opinion, the decision rendered therein is not applicable to the factual matrix in the case at hand. In the case of **Sarthak Securities Co. Pvt. Ltd.** (supra), the Division Bench had noted that certain companies were used as conduits but the assessee had, at the stage of original assessment, furnished the names of the companies with which it had entered into transactions and the assessing officer was made aware of the situation and further the reason recorded does not indicate application of mind. That apart, the existence of the companies was not disputed and the companies had bank accounts and payments were made to the assessee company through the banking channel. Regard being had to the aforesaid fact situation, this Court had interfered. Thus, the said decision is also distinguishable on the factual score.

23. In the case at hand, as we find, the petitioner is desirous of an adjudication by the writ court with regard to the merits of the controversy. In fact, the petitioner requires this Court to adjudge the sufficiency of the material and to make a roving enquiry that the initiation of proceedings under Sections 147 and 148 of the Act is not tenable. The same does not come within the ambit and sweep of exercise of power under Article 226 of the Constitution of India. It is open to the assessee to participate in the re-assessment proceedings and put forth its stand and stance in detail to satisfy the assessing officer that there was no escapement of taxable income. We may hasten to clarify that any observation made in this order shall not work to the detriment of the plea put forth by the assessee

during the re-assessment proceedings.

24. Consequently, the writ petition, being sans substratum, stands dismissed without any order as to costs.

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W.P. (C)

SH. PREM PRAKASH CHAUDHARY & ORS. ....PETITIONERS

VERSUS

SH. RAJINDER MOHAN RANA & ORS. ....RESPONDENTS

(RAJIV SAHAI ENDLAW, J.)

W.P. (C) NO. : 101/2008 DATE OF DECISION: 08.02.2011

Constitution of India, 1950—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.

I find the proposition that the agricultural holding cannot be partitioned amicably by the parties themselves and the parties have to necessarily sue therefor to be preposterous. The Reforms Act was not intended to bring about a change in the normal rights of a person or of the co-owners to effect partition amicably without being required to approach the Courts therefor. The attempt of the Courts must always be to minimize litigation and not multiply it. An established maxim boni judicis est lites dirimere, ne lis ex lite oritur; et interest reipublicae ut sit finis litium casts a duty upon the Court to bring litigation to an end and to ensure that no further litigation arises from its decisions. Judicial resources are valuable and scarce. The resources of the Court are not infinite especially in terms of judicial time. Therefore, administration of justice, in interest of equity and fair play, demands that a view which discourages rather than encourages litigation be taken. The procedure prescribed even when the Courts are approached with a claim for partition is distinct from that qua other cases. In a partition suit the preliminary decree decides only a part of the suit i.e. the share of the parties and thereafter gives the parties an opportunity to divide / partition mutually as per the share so adjudicated and the Court proceeds to partition by passing a final decree only if the parties are unable to themselves divide as per their shares. Amicable resolution of disputes and negotiated settlements is public policy in India. Section 89 of the Code of Civil Procedure, Arbitration & Conciliation Act, 1996 as well as Legal Services Authority Act, 1995 call upon the Courts to encourage settlements of legal disputes through negotiations between the parties. If amicable settlements are discarded and rejected on flimsy pleas, the parties would be wary of entering into negotiated settlements.

This ˇtendency has to be checked and such litigants discouraged by the Court. It would be in consonance with public policy of India (see **Double Dot Finance Ltd. Vs. Goyal MG Gases Ltd.** 117 (2005) DLT 330). **(Para 16)**

The Supreme Court recently in **Ranganayakamma Vs. K'S. Prakash** (2008) 15 SCC 673 reiterated that only where a settlement is contrary to any statutory provision or opposed to public policy as envisaged under Section 23 of the Indian Contract Act, can the Courts refuse to enforce the same. Neither of the counsels are able to show any provision in the Reforms Act prohibiting the amicable partition; nor any precedent for the same. On the contrary, the language of Section 55 providing for the holding to be partible, uses the expression "may sue", enabling the Bhumidhar to approach the Court of Revenue Assistant for partition. Section 55 does not indicate that a holding can be partitioned only in the manner provided therein. The Legislature has not opted to make the same "notwithstanding anything to the contrary contained in any other law or contract". Once it is held that the right to partition is inherent in the right to property, in the absence of the said right having been shown to have been taken away, it cannot be held that partition of property governed by the Reforms Act could only be under Section 55 and not otherwise. **(Para 17)**

Section 33 deals with a situation where as a result of transfer, the transferor shall be left with less than 8 standard acres of land. However, in partition there is no transfer or transferor or transferee. Each of the co-owners is the owner of each and every parcel of the property and it cannot be said that any part of the property is transferred by one co-owner to the other. If any precedent is needed for the said proposition, reference may be made to **Ram Charan Das Vs. Girja Nandini Devi** AIR 1966 SC 323. I therefore do not see as to how Section 33 would apply. The purport of Section 33 is to prevent fragmentation of holdings to uneconomical sizes. There is nothing preventing continuance of holdings less than minimum prescribed or transfer where

holding is in any case less than that prescribed. Practical experience shows that transfers resulting in transferor being left with less than that prescribed, are also effected by simultaneously transferring the balance to a nominee/family member of the transferor. Here, the joint holding of the parties itself was less than minimum 8 standard acres prescribed. I do not see as to how the amicable partition effected by the parties themselves would prejudice anyone.

(Para 19)

Important Issue Involved: (i) The Court can refuse to enforce only those settlements which are contrary to any statutory provision or opposed to public policy as per section 23 of Indian Contract Act (ii) There is no bar to partition an agricultural land by way of family settlement.

[Gu Si]

APPEARANCES:

FOR THE PETITIONERS : Dr. Anurag Kumar Agarwal & Mr. Vibhav Kumar Srivastava, Advocates.

FOR THE RESPONDENTS : Mr. N'S. Dalal & Mr. Devesh Pratap Singh, Advocates for R-1 & 2. Mr. Anshuman Srivastava, Advocate for Mr. V.K. Tandon, Advocate for R-3 to 5.

CASES REFERRED TO:

1. *Ranganayakamma* vs. *K'S. Prakash* (2008) 15 SCC 673.
2. *Sahib Singh* vs. *Lt. Governor of Delhi* 137 (2007) DLT 111.
3. *Hari Shankar Singhania* vs. *Gaur Hari Singhania* (2006) 4 SCC 658.
4. *Double Dot Finance Ltd.* vs. *Goyal MG Gases Ltd.* 117 (2005) DLT 330).

5. *M'S. Madhusoodhanan* vs. *Kerala Kaumudi (P) Ltd.* (2004) 9 SCC 204.
6. *K.K. Modi,* vs. *K.N. Modi* AIR 1998 SC 1297.
7. *Hatti* vs. *Sunder Singh* (1970) 2 SCC 841.
8. *Ram Charan Das* vs. *Girja Nandini Devi* AIR 1966 SC 323.

RESULT: Writ Petition Allowed.

RAJIV SAHAI ENDLAW, J.

1. The writ petition impugns the order dated 20th November, 2007 of the Financial Commissioner, Delhi allowing the second appeal preferred ˇby the respondents no.1 & 2 herein under Section 66 of the Delhi Land Revenue Act, 1954 (Revenue Act) against the order dated 20th November, 1995 of the Additional Collector, Delhi dismissing the appeal of the respondents no.1 & 2 against the order dated 9th June, 1995 of Tehsildar, Najafgarh, Delhi.

2. The factual matrix is not in dispute. The petitioners no.1 & 2 and the respondents no.1 & 2 are brothers; their father Sh. Siri Lal was Bhumidhar of agricultural land measuring 33 Bighas and 3 Biswas situated at Village Ghewra, Delhi; the said Sh. Siri Lal died on 8th October, 1984 leaving the petitioners no.1 & 2 and the respondents no.1 & 2 as his only four male descendants; the said land was on 20th March, 1985 accordingly mutated from the name of Sh. Siri Lal to the names of the petitioners no.1 & 2 and respondents no.1 & 2.

3. It is the case of the petitioners no.1 & 2 that there was in fact a family settlement on 26th December, 1984 between the petitioners no.1 & 2 and respondents no.1 & 2 under which the land aforesaid was agreed to be divided into four parts with each of the four brothers taking possession of ˇtheir respective portions of land and continuing so till the end of the year 1988 when the respondent no.2 tried to grab the share of the petitioners no.1 & 2; a suit for permanent injunction was filed in the Civil Court by the petitioners no.1 & 2 against the respondents no.1 & 2 pleading the family settlement of 26th December, 1984 and seeking to restrain the respondents no.1 & 2 from selling, dispossessing or otherwise interfering in the land which had fallen to the share of the petitioners no.1 & 2. The said suit remained pending. It is not in dispute

that the parties appointed Panchas to arrive at an amicable settlement and an award dated 14th May, 1989 signed by all the four brothers was made by the said Panchas; thereafter the four brothers filed an application under Order 23 Rule 3 of the CPC in the civil suit aforesaid in which they admitted that the agricultural land aforesaid had been divided by them between themselves. The Civil Court where the suit was pending, on 3rd August, 1989 recorded the statements of the parties in support of the compromise and dismissed the suit as compromised.

4. The petitioners no.1 & 2 thereafter approached the Tehsildar, Najafgarh for mutation of the portion of the land which had as per the compromise aforesaid fallen to their share in their exclusive names. The Tehsildar called for the report from the Patwari and thereafter vide order dated 9th June, 1995 mutated the Khasra Numbers which under the compromise application aforesaid had fallen to the share of the petitioners no.1 & 2 in the names of the petitioners no.1 & 2.

5. While doing so, the Tehsildar observed that since the Civil Court had passed a decree on the basis of the compromise, the Revenue Officer is not supposed to go into the intricacies of the order and it is the duty of the Revenue Officer to implement the judgment and decree of the Court. 6. Aggrieved therefrom the respondents no.1 & 2 preferred an appeal to the Additional Collector, Delhi. It was the contention of the respondents no.1 & 2 in the appeal that the suit was dismissed as withdrawn and as such there was no decree with which the Tehsildar could consider himself bound. It was further argued that without giving an opportunity of being heard to the respondents no.1 & 2, the land had been partitioned illegally. ˇIt was yet further contended that even if there was a decree, the Civil Court had no jurisdiction to pass a decree for partition of agricultural land. It was also argued that the agricultural land could be partitioned only under Section 55 of the Delhi Land Reforms Act, 1954 (Reforms Act) with which the land was governed and not by the parties themselves. It was yet further argued that the partition was in contravention of Section 33 of the Reforms Act.

7. The petitioners no.1 & 2 during the pendency of the appeal before the Additional Collector, by sale deeds executed between 9th August, 1995 and 1st May, 1996, transferred the land, which under the compromise had fallen to their exclusive share in favour of the petitioners

no.3 to 7. However, the petitioners no.3 to 7 were not impleaded as parties in the appeal before the Additional Collector.

8. The Additional Collector vide order dated 20th November, 1995 agreed with the order of the Tehsildar and dismissed the appeal.

9. Aggrieved therefrom the respondents no.1 & 2 preferred the second appeal to the Financial Commissioner. The Financial Commissioner vide ˇorder dated 27th August, 1996 allowed the said appeal and set aside the order of the Tehsildar and the Additional Collector.

10. The petitioners no.1 & 2 did not challenge the said order of Financial Commissioner. The petitioners no.3 to 7 however filed Civil Writ Petition No.4813/2000 in this Court and in which the petitioners no.1 & 2 as well as the respondents no.1 & 2 were impleaded as respondents. The said writ petition was, with consent of the parties, allowed on 18th October, 2001. The order dated 27th August, 1996 (supra) of the Financial Commissioner was set aside and the matter remanded to the Financial Commissioner for decision afresh after also hearing the petitioners no.3 to 7. The respondents no.1 & 2 applied for review of the said order but which application was dismissed on 16th September, 2003 for the reason of the order being a consent order.

11. It is thereafter that the order dated 20th November, 2007 impugned in this writ petition has been made by the Financial Commissioner allowing the appeal of the respondents no.1 & 2.

12. Notice of the writ petition was issued. The counsel for the petitioners and the counsel for the respondents no.1 & 2 have been heard. The counsel for the respondents no.3 to 5 has not made any submissions.

13. The counsel for the petitioners has contended that the Tehsildar has effected mutation in terms of the compromise recorded in the suit for permanent injunction aforesaid. It is contended that the Financial Commissioner has erred in holding that a notice of hearing was required to be given to the respondents no.1 & 2 in mutation proceedings. Attention is invited to Sections 22 & 23 of the Revenue Act to contend that where there is no dispute, no notice is required to be given or enquiry required to be made. Attention is specially invited to the Explanation to Section 22 where family settlement, by which the holding or part of the holding

recorded in the record of rights in the name of one or more members of that family is declared to belong to another or other members, is included in the word "transfer" under Section 22. It is also argued that though the Financial Commissioner has held the order of Tehsildar to be bad for the reason of having been made without hearing the respondents no.1 & 2 but has not ˇremanded the matter to the Tehsildar, leaving the petitioners in lurch. It is also contended that the respondents no.1 & 2 have not disputed the factum of the appointment of Panchas or the award dated 14th May, 1989 or the filing of the compromise application and/or separate possession and hence are not entitled to challenge mutation on the basis thereof. It is yet further contended that the respondents no.1 & 2 themselves have been enjoying the portion which fell to their share and are with mala fide intention coming in the way of mutation of the portion which has fallen to the share of the petitioners no.1 & 2. Reliance is placed upon **M'S. Madhusoodhanan Vs. Kerala Kaumudi (P) Ltd.** (2004) 9 SCC 204, **Hari Shankar Singhania Vs. Gaur Hari Singhania** (2006) 4 SCC 658 and **K.K. Modi, Vs. K.N. Modi** AIR 1998 SC 1297 in support of the contention that the Courts have placed the family settlement at a high pedestal and have always attempted to enforce the family settlement and not allowed technicalities to come in the way thereof. Lastly, it is argued that mutation is not adjudicatory and the title is not on the basis of mutation but on the basis of family settlement and the Tehsildar has merely given effect to the family settlement. It is argued that the Financial Commissioner has erroneously considered the proceedings before the Tehsildar to be of partition and which the Tehsildar in any case has no jurisdiction to entertain, the jurisdiction with respect thereto under the Reforms Act having been vested in the Revenue Assistant.

14. The counsel for the respondents no.1 & 2 has contended that the partition of agricultural holding is in contravention of Section 33 of the Reforms Act read with Rules 33 & 36 of the Delhi Land Reforms Rules, 1954; that the Reforms Act does not recognize family settlement and the Bhumidhars of a joint holding even though agreeable to amicable partition of their holding, are not entitled to partition the holding themselves and are necessarily required to approach the Revenue Assistant under Section 55 of the Reforms Act for the same and partition can only be effected in the manner provided in Section 57 and in no other manner; it is thus contended that there being no partition between petitioners no.1 & 2 and respondents no.1 & 2, there could be no question of mutation

in the exclusive name of the petitioners. Reference is also made to the judgment in **Hatti Vs. Sunder Singh** (1970) 2 SCC 841 that the Reforms Act is a complete Code in itself and Civil Court is incompetent to pass a decree for partition. It is also contended that the petitioners no.1 & 2 having not challenged the earlier order of the Financial Commissioner, are now not entitled to any relief on this ground also. On query, it is informed that the respondents no.1 & 2 have sold only 100 sq. yrds. of land out of the portion falling to their share in the family settlement aforesaid and which transaction has also been nullified in view of the present writ petition. It is yet further stated that out of the entire land inherited by petitioners no.1 & 2 and respondents no.1 & 2, nine Bighas of land has since been acquired and compensation with respect thereto been received by the petitioners no.1 & 2 and the respondents no.1 & 2 in equal share. In response to the argument of the petitioners no.1 & 2 of the petitioners being left in a lurch, it is stated that since the question of mutation did not arise, there was no need to remand the matter and the petitioners are free to sue the respondents for partition before the Revenue Assistant, if so desire.

15. As far as the contention of the respondents no.1 & 2 of the petitioners being not entitled to challenge the order owing to the petitioners no.1 & 2 having not challenged the same earlier is concerned, as aforesaid, the order in the earlier writ petition setting aside the earlier order of the Financial Commissioner is a consent order made in the presence not only of the petitioners no.3 to 7 and respondents no.1 & 2 but also of the petitioners no.1 & 2. Once the respondents no.1 & 2 agreed to setting aside of the order and to remand for consideration afresh by the Financial Commissioner, it does not lie in the mouth of the respondents no.1 & 2 to contend that the petitioners are bound by the earlier order which in any case has ceased to exist.

16. I find the proposition that the agricultural holding cannot be partitioned amicably by the parties themselves and the parties have to necessarily sue therefor to be preposterous. The Reforms Act was not intended to bring about a change in the normal rights of a person or of the co-owners to effect partition amicably without being required to approach the Courts therefor. The attempt of the Courts must always be to minimize litigation and not multiply it. An established maxim boni judicis est lites dirimere, ne lis ex lite oritur; et interest reipublicae ut sit

finis litium casts a duty upon the Court to bring litigation to an end and to ensure that no further litigation arises from its decisions. Judicial resources are valuable and scarce. The resources of the Court are not infinite especially in terms of judicial time. Therefore, administration of justice, in interest of equity and fair play, demands that a view which discourages rather than encourages litigation be taken. The procedure prescribed even when the Courts are approached with a claim for partition is distinct from that qua other cases. In a partition suit the preliminary decree decides only a part of the suit i.e. the share of the parties and thereafter gives the parties an opportunity to divide / partition mutually as per the share so adjudicated and the Court proceeds to partition by passing a final decree only if the parties are unable to themselves divide as per their shares. Amicable resolution of disputes and negotiated settlements is public policy in India. Section 89 of the Code of Civil Procedure, Arbitration & Conciliation Act, 1996 as well as Legal Services Authority Act, 1995 call upon the Courts to encourage settlements of legal disputes through negotiations between the parties. If amicable settlements are discarded and rejected on flimsy pleas, the parties would be wary of entering into negotiated settlements. This tendency has to be checked and such litigants discouraged by the Court. It would be in consonance with public policy of India (see **Double Dot Finance Ltd. Vs. Goyal MG Gases Ltd.** 117 (2005) DLT 330).

17. The Supreme Court recently in **Ranganayakamma Vs. K'S. Prakash** (2008) 15 SCC 673 reiterated that only where a settlement is contrary to any statutory provision or opposed to public policy as envisaged under Section 23 of the Indian Contract Act, can the Courts refuse to enforce the same. Neither of the counsels are able to show any provision in the Reforms Act prohibiting the amicable partition; nor any precedent for the same. On the contrary, the language of Section 55 providing for the holding to be partible, uses the expression "may sue", enabling the Bhumidhar to approach the Court of Revenue Assistant for partition. Section 55 does not indicate that a holding can be partitioned only in the manner provided therein. The Legislature has not opted to make the same "notwithstanding anything to the contrary contained in any other law or contract". Once it is held that the right to partition is inherent in the right to property, in the absence of the said right having been shown to have been taken away, it cannot be held that partition of property governed by the Reforms Act could only be under Section 55 and not otherwise.

18. The counsel for the respondents no.1 & 2 in an attempt to show as to what prevents the parties from so partitioning, has referred to Section 33 and to Section 57 (1)(b). Section 33 prohibits transfer where the transferor will be left with less than 8 standard acres. It is argued that since the total holding of 33 Bighas and 8 Biswas was itself less than 8 standard acres (approx equal to 40 Bighas), the same could not be divided by the petitioners no.1 & 2 and the respondents no.1 & 2 between themselves.

19. Section 33 deals with a situation where as a result of transfer, the transferor shall be left with less than 8 standard acres of land. However, in partition there is no transfer or transferor or transferee. Each of the co-owners is the owner of each and every parcel of the property and it cannot be said that any part of the property is transferred by one co-owner to the other. If any precedent is needed for the said proposition, reference may be made to **Ram Charan Das Vs. Girja Nandini Devi** AIR 1966 SC 323. I therefore do not see as to how Section 33 would apply. The purport of Section 33 is to prevent fragmentation of holdings to uneconomical sizes. There is nothing preventing continuance of holdings less than minimum prescribed or transfer where holding is in any case less than that prescribed. Practical experience shows that transfers resulting in transferor being left with less than that prescribed, are also effected by simultaneously transferring the balance to a nominee/family member of the transferor. Here, the joint holding of the parties itself was less than minimum 8 standard acres prescribed. I do not see as to how the amicable partition effected by the parties themselves would prejudice anyone.

20. As far as Section 57(1)(b) is concerned, the same provides that where the partition will result in a holding less than 8 standard acres, the Court instead of dividing the holding may either direct the sale of the same and distribution of the sale proceeds or proceed to divide the holding in accordance with such principles as may be prescribed or in the alternative dismiss the suit. It is thus not as if Section 57(1)(b) prohibits partition resulting in a holding of less than 8 standard acres. The counsel for the respondents no.1 & 2 also fairly admits that while applying the principles, the holding can be divided but contends that the same has to be done only in the presence of the Gram Sabha and by the Revenue Assistant and cannot be done amicably by the parties themselves or by

way of family settlement and with which proposition, I do not concur.

21. I find that the Division Bench of this Court in **Sahib Singh Vs. Lt. Governor of Delhi** 137 (2007) DLT 111 was faced with a similar objection, of the Consolidation Officer in the course of the consolidation proceedings being not entitled to entertain an application for separation of Khatas on the basis of a partition of pre-consolidation holding in a family settlement and that such an application could be entertained only if the holding had been partitioned under the Reforms Act. It was further contended that the Consolidation Officer by entertaining the said application had partitioned the holding and for which he had no jurisdiction in the face of the bar of Section 185 of the Reforms Act. The Division Bench did not accept the said contention and held that a family settlement dividing the holding and which family settlement was part of a judicial record and had not been denied could form the basis of not only mutation but also application for separation of Khata. The said judgment applies to the present case on all fours.

22. The counsel for the respondents no.1 & 2 has also argued that the nature of the order of the Financial Commissioner is not such requiring interference by this Court in exercise of jurisdiction under Article 226 of the Constitution of India. I am unable to agree. The Financial Commissioner has not returned any categorical finding on the pleas of the respondents under Sections 33 and Section 55, though it has been generally observed that the mode of partition and manner of joint Khata having been specifically provided for in the Reforms Act, but the same does not tantamount to holding that the parties are prohibited from partitioning the land themselves, if the same does not contravene the provision of the Reforms Act.

23. The petitioners no1. & 2 had applied to the Tehsildar for mutation on the basis of the compromise as recorded in the suit for permanent injunction. The Tehsildar felt that the Civil Court had decreed the partition. The Additional Collector affirmed the said finding. The ˇFinancial Commissioner in the order impugned has primarily disagreed with the same.

24. However, what cannot be lost sight of is that the petitioners had claimed mutation on the basis of the compromise recorded in the Civil Court and not on the basis of a decree of the Civil Court. The Civil Court did not pass a decree in accordance with the compromise. The Civil

Court by putting its imprimatur on the compromise did nothing but to ensure that the parties remained bound with the same. Nothing having been brought before this Court that the said contract is in violation of the provisions of the Reforms Act, I see no reason why the order of the Financial Commissioner should not be interfered with. Once it is held that it is not necessary to approach a Revenue Assistant for partition and the parties are free to partition the holding themselves, the order of the Financial Commissioner cannot stand.

25. The writ petition therefore succeeds, the order of the Financial Commissioner is set aside and it is declared that the mutation effected by ˇthe Tehsildar on the basis of the partition mutually effected by the parties amongst themselves is valid. The writ petition is disposed of. No order as to costs.

ILR (2011) V DELHI 36
FAO (OS)

HINDUSTAN VIDYUT PRODUCTS LTD. ....APPELLANT

VERSUS

DELHI POWER COMPANY LTD. & ANR. ....RESPONDENTS

(VIKRAMAJIT SEN & SIDDHARTH MRIDUL, JJ.)

FAO (OS) NO. : 337/2007 & CMs NO. : 1510-1513/2010
FAO (OS) 338/2007 & CM NO. : 1523/1526/2010

DATE OF DECISION: 04.03.2011

Arbitration and Conciliation Act, 1996—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.

We are not impressed by this argument. It is axiomatic that an Order which may adversely impact any person should not be passed in their absence, denying them the right of an opportunity to be heard. Audi alteram partem is a cherished principle adhered to in all civilized judicial systems. This is so even though we note that for reasons recondite the Respondents before us had not impleaded all the other parties who were before the Arbitral Tribunal. It was thus fortuitous for the non-objectors that the learned Single Judge has set aside the Award in toto. The maintainability of those Objections has not been assailed before. **(Para 5)**

Important Issue Involved: (i) Appeal is not maintainable in the absence of impleadment of necessary party who may be affected by outcome of the appeal.

[Gu Si]

APPEARANCES:

FOR THE PETITIONER: : Ms. B. Mohan Advocate.

FOR THE RESPONDENTS : Mr. Avnish Ahlawat, Advocate. for the DPCL. Manish Srivastava, Advocate for NDPL. and BSES.

RESULT: Appeal dismissed.

VIKRAMAJIT SEN, J.

1. These Appeals assail the Judgment of the learned Single Judge passed on July 25, 2007 by which OMP No.114/2006 and OMP No. 115/2006 came to be decided. Petitions under Section 34 of the Arbitration & Conciliation Act, 1996 had been filed by the Delhi Power Company Ltd. challenging the validity of the Award dated 22nd December, 2005. A perusal of the records discloses that Arbitration Application No.97/2002 had earlier been filed keeping in view the failure of the DVB (Delhi Vidyut Board) to appoint an Arbitrator. Justice D.K.Jain, as His Lordship then was, had noted that the appointment of an Arbitrator had not been made within thirty days and hence Justice R.P.Gupta, (Rtd.) was appointed as the Arbitrator. The parties before the Arbitrator were arrayed as follows:-

"Hindustan Vidyut Products Ltd. vs.

1. Delhi Transco Ltd., (Delhi Power Supply Company Ltd.)

2. BSES Rajdhani Power Ltd.

3. Delhi Power Co. Ltd. (D.P.C.L.)

4. North Delhi Power Ltd. (N.D.P.L.)

5. BSES Yamuna Power Ltd.

2. In terms of the Award dated 22.12.2005 the Arbitral Tribunal had held in favour of the Appellant that the Respondents before the Tribunal were liable to refund the sum of Rs. 10,00,000/- alongwith interest thereon aggregating a total sum of Rs. 20,26,000/-. It is also held that the liability rested jointly and severally on those Respondents.

3. It is not disputable that the Award was challenged only by the Delhi Power Company Ltd. (OMP 114/2006) and by the Delhi Transco Ltd. (OMP 115/2006) but not by BSES Rajdhani Power Ltd., North Delhi Power Limited and BSES Yamuna Power Ltd.. In the impugned Judgment dated July 25, 2007 the learned Single Judge has inter alia concluded that the claim of the Appellant was time barred and hence the Award was a patent illegality and was liable to be set aside. It was ordered accordingly.

4. We have already narrated hereinabove the parties before the Arbitrator. In the present Appeals, however, only the Objectors before

the learned Single Judge viz. Delhi Power Company Ltd. and Delhi Transco Ltd. have been impleaded. It is in these circumstances that BSES Rajdhani Power Ltd. has filed an application before us for impleadment viz. CM 1512/2010 in FAO(OS) 337/2010. Similarly, CM No.1525/2010 has been filed in FAO(OS) 338/2007. Inexplicably, the application has been strongly opposed by the Appellant even though we had earlier expressed the opinion that the Appeal ˇmay not be maintainable in the absence of all the parties before the Arbitral Tribunal being impleaded in the present Appeal. We had made this clarification in the circumstances that if the Appeals were to be allowed the natural effect would be that parties who are absent because of their non-impleadment would become liable, jointly or severally for the amount of the Award even though the Award of the learned Arbitrator has set aside in toto as against all the parties to the Arbitration and not just the Objectors before the Court. On the last date of hearing, the request of learned Counsel for the Appellant for an adjournment had been acceded. Nevertheless, learned Counsel for the Appellant continues to object to the impleadment application; he also insists that the Appeal is maintainable even in the absence of impleadment of parties who would be adversely affected if the Appeals were to be accepted. The brief argument of learned Counsel for the Appellant is that since Objections had not been filed by any of the parties other than Delhi Power Company Ltd. and Delhi Transco Ltd. the Award had become final as against them (the non-objectors).

5. We are not impressed by this argument. It is axiomatic that an Order which may adversely impact any person should not be passed in their absence, denying them the right of an opportunity to be heard. Audi alteram partem is a ˇcherished principle adhered to in all civilized judicial systems. This is so even though we note that for reasons recondite the Respondents before us had not impleaded all the other parties who were before the Arbitral Tribunal. It was thus fortuitous for the non-objectors that the learned Single Judge has set aside the Award in toto. The maintainability of those Objections has not been assailed before.

6. Despite opportunity having been granted to the Appellant, since it has resolutely failed to take steps to implead all the parties who may be affected by the outcome of the Appeal, it is our opinion that the Appeal is not maintainable. It is for the Appellant to ensure the presence of all parties likely to be affected in the proceedings, by way of their

impleadment in the Appeal. In these circumstances, we do not think it appropriate to allow the Application seeking impleadment which has been resisted by the Appellant and instead we dismiss the Appeals as being not maintainable.

ILR (2011) V DELHI 40
CRL A.

DEEPAK SHARMA ....APPELLANT

VERSUS

STATE OF DELHI ....RESPONDENT

(S. RAVINDRA BHAT AND G.P MITTAL, JJ.)

CRL. A. NO. : 45/1998 DATE OF DECISION: 09.03.2011

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.

It is apparent from the above, that the Supreme Court has held that where the incident leading to the fatal attack, is preceded by a trivial quarrel, and the assault is limited to a single, though fatal blow, without any history of malice, or previous ill well between the deceased and the assailant, even a short while, i.e. a few minutes elapse between the quarrel, the accused leaving the scene, and returning armed, the attack may not amount to murder, but would be covered by Section 304. In the present case too, the quarrel between the appellant and the deceased's sons, was due to a trivial reason. Although PW-2 and PW-4 denied having teased or laughed at the appellant, refusing his suggestion, the independent testimony of PW-5 somewhat supports his (the appellant's) version about some irritant or provocation, particularly the allusion to the two boys (PW-2 and PW-4) always quarrelling with him. The appellant is consistently shown to have used the word "Himayat" to PW-4 and the deceased. There is no reason to disbelieve PW-5. In fact, this version is closer to that of the line of questioning, on behalf of the appellant, that the boys had teased him. He, therefore, went home, and returned within about 3-4 minutes.

He tried to assault Ajaypal; the deceased tried to prevent him; he attacked her. PW-4 thereafter tried to intervene; he too was attacked. All these facts do not suggest pre-meditation, or a previous history of ill will between Deepak and the deceased's family. He launched an attack on the deceased, when he thought that she would prevent him from assaulting Ajaypal. Both she and PW-4 were given single blows, when they tried to prevent his attack. These facts, viewed cumulatively do call for the applicability of Exception 4 to Section 300, IPC, as to amount to culpable homicide, covered by the first part of Section 304. **(Para 16)**

Important Issue Involved: 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 betweem the deceased and assailant, if after a few minutes lapse after the quarrel the accused leaves the scene and returns armed and attacks, this may not necessarily amount to murder but would be covered u/s 304 Part-I IPC.

[Ad Ch]

APPEARANCES:

FOR THE APPELLANT : Mr. Sandeep Sethi, Sr. Advocate with Mr. Anurag Jain, Advocate.

FOR THE RESPONDENT : Mr. Jaideep Malik, APP.

CASES REFERRED TO:

1. *Sharad* vs. *State of Maharashtra* 2009 (14) Scale 179.
2. *Ramjit* vs. *State of U.P.* 2009 (11) SCC 373.
3. *Sandhya Jadhav* vs. *State of Maharashtra* 2006 (4) SCC 653.
4. *Jeet Singh* vs. *State of Haryana* 2005 (11) SCC 597.
5. *Balbir Singh* vs. *State of Punjab* 1995 (Suppl) 3 SCC 472.

6. *Sheetla Prasad* vs. *Baba* 1994 (SCC) (Cr.) 161.

7. *Shitla Prasad* vs. *State of U.P.,*1994 SCC (Cri) 1161.

8. *Jagtar Singh* vs. *State of Punjab* 1983 Crl.L. 852.

RESULT: Appeal partly allowed.

S. RAVINDRA BHAT, J.

1. The appellant (hereafter called "Deepak") impugns the judgment and order dated 13.01.1998 in S.C. No. 414/1995 whereby he was convicted of the offence punishable under Section 302 IPC and sentenced to undergo imprisonment for life with fine of Rs. 1000/ - and in default further R.I. for one month. The learned Addl. Sessions Judge also convicted Deepak for the offence punishable under Section 307 IPC and sentenced him to undergo R.I. for five years and to pay Rs. 500/-as fine, in default of which he was to undergo R.I. for a period of 15 days. A similar sentence was imposed, after conviction was recorded under Section 450 IPC.

2. The prosecution case was that on 19.07.1995, Deepak, in a stabbing incident, had attacked one Beermati with a knife and also stabbed Dinesh. The prosecution allegations were that Deepak was passing by the house of Beermati, (the deceased), around 04.00 pm on 19.07.1995. She, her son Ajay Choudhary along with Dinesh were watching television. Deepak was known to the deceased and her two sons as he was their neighbour, residing in the same street. It was alleged that Ajay, Dinesh and Beermati were laughing, upon which Deepak got enraged and called Ajay outside asking him the reason for their laughter. It was alleged that Deepak held Ajay by the neck, when he (Ajay) stated that the three were laughing over something that was being screened on TV. Deepak is alleged to have abused Ajay and told him that they were laughing and mocking him and that they were lying to him; it was alleged that he told Ajay "saale mujh par haste ho, mera mazak udate ho aur jhoot bolte ho". He slapped Ajay 3/4 times. At that time, Ajay's brother Dinesh came out and separated the two. Deepak allegedly left towards his house stating that he (Ajay) had been rescued but that he would not be left alive in future; the prosecution alleged that the actual words used were "ab to bach gaya hai, ise zinda nahi chodoonga". It was alleged that thereafter Ajay and Dinesh went inside their house. About 3/4 minutes later, Deepak came back with a knife in his hand. At that time Beermati was near the

entrance of her house and on seeing Deepak armed with a knife, she asked him to stop, enquiring where was he going. Deepak allegedly told Beermati that she was shielding her sons and that he would first remove her from his way – allegedly stating "tu ladkon ke bahut himayat karti hai, pehle tujhe hi raste se hataa deta hoon". Thereafter Deepak stabbed her in the lower portion of the left breast resulting in her bleeding and Beermati's falling down. It was alleged that Dinesh tried to save his mother from Deepak but that the latter said that he too used to favour his brother and would not be left alive. The alleged words used by Deepak were "tu bhi bhai ka himayati banta hai, tujhe bhi zinda nahi choroonga". With these words he attacked Dinesh with the knife in the lower left side of his abdomen. This resulted in Dinesh's bleeding.

3. It was alleged that upon seeing this, Ajay got frightened and raised an alarm. On hearing the noise, many people, including Om Bir Singh reached the spot. On seeing them, Deepak ran away along with his knife. It was alleged that Ajay took Beermati and Dinesh to G.T.B. Hospital with a neighbour and others; Beermati was declared dead. The prosecution alleged that Ajay's statement was recorded as Ex. PW-2/A by SI Yoginder Khokhar who was examined as PW-1. This was on account of his receiving DD No. 23, marked as Ex. PW-11/A. Subsequently, statements of other witnesses, including the injured Dinesh were recorded on the basis of which FIR was lodged in Bhajanpura Police Station, being FIR No. 390/1995. According to the prosecution version, Deepak was arrested on 20.07.1995 and on the basis of his interrogation, the recovery of a knife was made. It was alleged that a disclosure statement, Ex. PW-6/B was recorded. The knife was marked as Ex. PW-6/A; a blood-stained shirt was seized and marked as Ex.6/2.

4. On 02.05.1996, the court charged Deepak for offences punishable under Sections 302, 307 and 450 IPC. He entered the plea of not guilty and claimed trial. The prosecution examined 25 witnesses in support of its case; Deepak examined two defence witnesses. On the basis of the materials, depositions of witnesses and rival contentions, the Trial Court found the accused Deepak guilty as charged and sentenced him to undergo Rigorous Imprisonment for committing the concerned offences, in the manner indicated previously in the present judgment.

5. At the outset, learned counsel for the appellant submitted that having regard to the evidence, particularly the depositions of PW-2, the

deceased's younger son Ajay, as well as PW4, the elder son of the deceased, who sustained injuries, the attack by Deepak stood established and could not be denied. It was, however, submitted that Deepak got enraged due to remarks made by PW-2 Ajay Pal and other members of his family. Learned senior counsel for the appellant submitted that even as per allegations of the prosecution, there was no history of enmity or malice and that there was no motive for Deepak to have attacked Beermati and Dinesh. In this context, it was argued that according to the line of questioning adopted during the cross-examination, there was hardly any time-gap between the first incident when all members of the family were laughing and when the attack took place. Therefore, the versions of PW-2 and 4 about the reason for Deepak's anger are to be seen in the context of the deposition of other witnesses. Even though PW-2 and PW-4 deposed that there was trivial provocation for the attack, a reading of PW-5's testimony clarifies that the reason for the attack was something else. The said witness had deposed very clearly having witnessed the incident and heard Deepak stating "tere bache rozana jaghre karte hain, tu inki himayat karti hai, mere raste se hat jaa" and an altercation between Birmati and the accused had taken place."

6. It was submitted that even though PW-2 and PW-4 had stated that they were laughing due to a humorous or comic scene aired on the television, it was evident that there was some previous history of the appellant Deepak being teased or quarreled with. Learned counsel also pointed to the cross-examination of PW-4 to the following effect:

> "It is incorrect to suggest that I and my brother were standing on the door of our house when the accused Deepak had passed through the gali clad in a white trouser and shirt and that upon seeing him, we passed a taunting remark by saying "look the black crow in a white dress is coming". It is further incorrect to suggest that the accused felt bad when he heard the remark and an altercation took place between the accused and us. It is further wrong that the accused told us that we should not taunt in this way to which we replied that if we behave the same manner, what harm he could do to them. It is further wrong to suggest that thereafter an altercation took place between us which resulted in fight between the accused on one side and both of us on the other side. It is further incorrect to suggest that meanwhile,

> our mother also joined us and all of us dragged the accused inside our house and started beating him and the accused got released himself and tried to run away from there but we all three again caught hold of him. It is further incorrect to suggest that our mother picked up a thapi (wooden stick) for washing clothes and started beating the accused with that thapi and that Deepak also started beating us with fists and slapped blows and that he slapped fist blows to me also. It is further incorrect to suggest that I got angered at the beating received by me and in the fit of anger I went inside the house and brought a knife and that on seeing the knife, the accused became nervous and he tried to snatch the knife and in that process of snatching the knife, which was snatched by the accused from me, my mother received injuries and in the same process, I also received the injuries. It is further correct that after the incident the accused ran away from the spot and I cannot say he ran away towards his house."

7. It was emphasized that the evidence of PW-2 made it clear that Deepak was the son of the deceased's neighbour and that they did not have any previous history of enmity. The entire facts revealed that an altercation took place on account of a trivial provocation which evidently had some previous history. Learned senior counsel highlighted that the post mortem report of the deceased suggested that she died on account of a single blow and the Court should take this aspect into consideration and hold that this was not a case of previous deliberation or premeditated action. On the other hand, the entire evidence pointed to a sudden fight, leading to an altercation and the resultant injuries to the deceased and PW-4. In these circumstances, submitted learned senior counsel, the appellant could not have been convicted for the offence under Section 302 but instead it could have been under Section 304 IPC. In support of the submission, learned counsel relied upon the judgments reported as **Sandhya Jadhav v. State of Maharashtra** 2006 (4) SCC 653; **Balbir Singh v. State of Punjab** 1995 (Suppl) 3 SCC 472; **Sharad vs. State of Maharashtra** 2009 (14) Scale 179; **Jeet Singh vs. State of Haryana** 2005 (11) SCC 597; **Ramjit v. State of U.P.** 2009 (11) SCC 373; **Sheetla Prasad v. Baba** 1994 (SCC) (Cr.) 161 and **Jagtar Singh v. State of Punjab** 1983 Crl.L. 852.

8. The learned APP argued that the findings and conviction recorded by the Trial Court are unassailable and ought not to be disturbed by this Court. It was submitted that the conduct of the appellant betrayed prior planning and premeditation. Reliance was placed in this regard upon the testimonies of PW-2 and 4 who had deposed that Deepak even upon being told that none of the deceased's family members were making fun of him, did not believe them and swore to finish Ajaypal, PW-3. To achieve this end, he went back home, returned armed with the knife, which was recovered subsequently during the investigation. PW-1/C, a drawing of the knife revealed that its total length was 32 cms, or 1 foot of which the blade was about 15 cm. Significantly, the knife was a "button-dar" one, i.e. the blade opening upon the press of a button. This was not a household article normally kept in residences. The appellant, going back in the first instance and returning with such a dangerous weapon and proceeding to use it without hesitation betrayed his real intention which was to inflict deadly injuries upon those who he was angry with or against whom he bore a grudge. The deceased Beermati came in the way and tried to protect her sons but unfortunately was brutally attacked. Not content, Deepak attacked Dinesh and cause serious injuries to him. It was submitted that even if the testimonies of PW-2 and PW-4 cannot be entirely relied upon, the independent deposition of PW-5 about how the events took place conclusively established Deepak's real intention to launch a murderous attack. In these circumstances, submitted the learned APP, the conviction and sentence recorded by the Trial Court are unimpeachable.

9. In this case, the MLC, Ex. 7/A and the Death Summary, Ex. 7/B reveals that Beermati was taken to hospital at 5.30 pm and declared brought dead. The MLC of Dinesh, PW-4, marked as Ex. PW-18/A, reveals that he too was examined at 5.30 PM on the date of the incident. The doctors declared him fit for statement. The observations in this document revealed that he had suffered a stab wound on the left side of the abdomen in mid-auxiliar line at the line of the last ˇrib to the extent of 1 inch into 1 into 6th of an inch. The postmortem report prepared by PW-12, Dr. A.K. Tyagi indicated the following injuries and cause of death:

"XXXXXX XXXXXX XXXXXX

External Injury:-1) Incised stab wound of 3.0x0.8 cm xcavity deep was present obliquely over middle outer front of left side chest. The upper inner angle was more acute than lower outer angle & upper angle is 10.0 cms horizontly out words & to left from the nipple. The injury entered the left side chest cavity by cutting the 4th rip and then went through and through the lower part of upper lobe of left lung near its inner margin it further entered the Heart i.e. left ventricle from its left wall by making a cut of 1.7x0.2 cms and ended by making small nick over inter-ventriculor septum. The depth in the heart is 04.00 cms and total depth of the injury was 11.5 cms. The direction of injury was from left to right obliquely downwords, inwards and slightly backwards.

Left side chest cavity contains blood about 600 cc. Injuries to left lung and heart as mentioned with external injuries.

Opinion – Death in this case was due to shock as a result of haemorrage caused by injury to chest. The Injury was antemortem, caused by sharp edged cutting stabing weapon and was sufficient to cause death in ordinary course of nature Blouse showd a cut mark corresponding to external injury. The post mortem report No. 457/95 was prepared by me, i.e. in my own hand writing bears my signatures at point A. the same is exhibited PW. 12/A.

XXXXXX XXXXXX XXXXXX"

10. Since the appellant Deepak has not disputed having attacked the deceased and PW-4, it would be unnecessary to discuss the details with regard to depositions of various prosecution witnesses. In order to consider whether Deepak's conviction was correctly recorded under 302 IPC or it has to be altered as was submitted on his behalf, it is necessary to scrutinize the evidence PW-2, 4 and 5. These had claimed to be eye witnesses to the incident and were present when the attack took place.

11. PW-2 and PW-4 are consistent by and large, in stating the details and origins of the attack. It was deposed that on the day of the incident, both of them, along with the deceased were watching television around 4.00 PM. Deepak was passing by. Simultaneously, he heard them laugh. Thinking that they were laughing or mocking at him, he called out

Ajaypal, PW-2 and asked him the reason for the laughter. PW-2 informed him that the laughter was on account of some comic incident in the television programme or film. The two eyewitnesses PW-2 and PW-4 were extensively cross-examined whether the film ANDAAZ APNA APNA was screened at that time and who were the lead actors in that film. Deepak was unsatisfied with PW-3's explanation and tried to attack Ajaypal upon which PW-4 Dinesh interceded and separated the two of them from a scuffle. The latter part is spoken to by PW-4. Thereupon, according to both the witnesses, Deepak left the scene, threatening to return and finish Ajaypal. Barely three-four minutes later, he came back and tried to enter the house of PW-2, 4 and the deceased. According to the two witnesses, Beermati tried to stop him but was fatally stabbed. When Dinesh, PW-4 intervened, he too received stab injuries in the abdomen. It would thus be apparent that the cause for the attack, as made out by these two witnesses, was quite trivial.

12. PW-5, who apparently saw the later part of the occurrence and is an independent witness, had stated that when the deceased sought to intervene, Deepak remarked that she was always protecting her sons even though they were quarreling with him frequently (jhagra karte hain). The appellant Deepak in PW-4's cross-examination, suggested that he and PW-2 had remarked on that day that he was wearing a white pant and apparently looking like a black crow, which was the immediate cause of provocation. The suggestion was, however, denied. 13. It would be necessary to see if the attack was homicidal, and did not amount to murder. The appellant's counsel had urged that the present case fell under fourth exception to Section 300, IPC, which reads as follows:

> **"Exception 4 :** Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.
>
> **Explanation :** It is immaterial in such cases which party offers the provocation or commits the first assault.."

In **Sandhya Jadhav** (supra) relied on by the appellant, the Supreme Court held that:

> "9. The Fourth Exception to Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of

> prosecution not covered by the First Exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two or more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall

be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

14. In **Balbir Singh** (supra) relied on by the appellant, it was held that:

> "6. It was next contended that in any case it was not proper to convict the appellant under Section 302 IPC. The contention deserves to be accepted. This was not a case of premeditation as the accused and the deceased met by chance and the appellant had given only one blow. The evidence regarding raising of a lalkara by the other accused has not been believed by the trial court. On the basis of the evidence led in this case it is not possible to say with certainty under which circumstances the appellant gave a kirpan blow to Amrik Singh. No attempt was made by him to give another blow. The injury caused on the head of Amrik Singh does not appear to have been caused intentionally. Therefore, in view of the facts and circumstances of this case we are of the opinion that the lower court committed an error in convicting the appellant under Section 302. He should have been convicted under Section 304 Part I. Therefore, we alter the conviction of the appellant from Section 302 IPC to Section 304 Part I IPC. The sentence of RI for life is set aside and instead he is ordered to suffer RI for 10 years. This appeal is allowed to the aforesaid extent. As the appellant has been released on bail he is ordered to surrender to his bail bond, so as to serve out the sentence imposed upon him…"

The relevant observations in **Jeet Singh** (supra) relied on by the appellant, to say that the attack was not with the intention of causing death, are as follows:

> "It is pointed out that there was no previous quarrel or enmity between the appellant and the deceased and the quarrel had

suddenly taken place due to the fact that the deceased Bawa Singh drove the tractor through his field and the sudden quarrel ensued because of the conduct of the deceased. It is also pointed out that the appellant was having a weapon with him and he gave only one blow which unfortunately had resulted in the death of the deceased. It is contended by the appellant's counsel that the offence would come within the ambit of Section 304 Part I IPC. It is true that there is only one fatal injury on the head of the deceased. The appellant must have inflicted a blow on the head of the deceased because of the quarrel between the two. The appellant certainly would have knowledge that his act would result in the death of the deceased. Hence, the offence comes under the purview of Section 304 Part I of the Indian Penal Code and hence we set aside the conviction of the appellant for the offence under Section 302 IPC and hold him guilty of the offence under Section 304 Part I IPC and sentence him to undergo imprisonment for a period of 8 years. The appeal is disposed of as above."

15. Stating that merely because an assailant goes away for a short while, after the initial altercation, but soon returns, to launch an attack, there need not necessarily be an inference that the assailant intended to cause death, punishable under Section 302, the appellant in this case had relied on **Ramjit** (supra). The court had observed, in that case that:

> "12. It is submitted by learned counsel for the State that this cannot be stated to be a case of sudden quarrel because the accused persons after the quarrel went inside and came back with arms. In the instant case though the witnesses stated that after initial exchange of hot words and quarrel the accused persons went inside and came back, it is to be noted that they have fairly accepted that while the exchange of hot words, quarrel was continuing and immediately i.e. in less than two and three minutes they came back.
>
> 13. That being so, in the peculiar facts of the case we are of the considered view that appropriate conviction would be under Section 304 Part I read with Section 149 IPC. The conviction is accordingly altered. The other convictions remain unaltered. Custodial sentence of 10 years in respect of offence punishable

under Section 304 Part I IPC would suffice. The sentences in respect of other offences remain unaltered. All the sentences shall run concurrently…"

In much the same vein, as in the cases cited by the appellant, the Supreme Court, in **Shitla Prasad v. State of U.P.,**1994 SCC (Cri) 1161, held that:

> "The next question is whether the offence committed by the appellant amounts to murder? The evidence of all the four eyewitnesses shows that it was a sudden affair. PW 1 objected to the accused diverting the water and when he did not pay any heed PW 1 called the deceased in his presence to intervene in the quarrel that took place. It was also stated that the matter could be settled by the Panchayat. As a matter of fact PW 2 in the cross-examination admitted that because of the incident of diverting water, the quarrel took place and the accused inflicted the single injury. In the circumstances it cannot be held that clause 1 of Section 300 applies. Then we have to consider whether clause 3 is attracted. Having regard to the nature of the injury and to the fact that the appellant did not inflict any more injuries it is difficult to hold that he intended to inflict that particular injury which the doctor opined to be fatal. However, the fact remains that the deceased died because of this injury. The High Court however failed to note that the prosecution has to prove that the appellant intended to cause that particular injury. In this process of enquiry the question arises whether he had intention to cause that particular injury. This ingredient is not established beyond doubt. However, it must be held that the appellant had knowledge that by inflicting such injury he was likely to cause death. In the result the conviction of the appellant under Section 302 IPC and the sentence of imprisonment for life are set aside. Instead he is convicted under Section 304 II IPC. The appellant has already undergone a period of seven years. Therefore the sentence is reduced to the period already undergone.."

In Jagtar Singh the facts were that the accused had inflicted a single knife injury which proved fatal. The court held that though death ensued, the prosecution did not establish that the offence was one under Section

302, IPC:

> "The next question is what offence the appellant is shown to have committed? In a trivial quarrel the appellant wielded a weapon like a knife. The incident occurred around 1.45 noon. The quarrel was of a trivial nature and even in such a trivial quarrel the appellant wielded a weapon like a knife and landed a blow in the chest. In these circumstances, it is a permissible inference that the appellant at least could be imputed with a knowledge that he was likely to cause an injury which was likely to cause death. Therefore, the appellant is shown to have committed an offence under Section 304 Part II of the IPC and a sentence of imprisonment for five years will meet the ends of justice."

16. It is apparent from the above, that the Supreme Court has held that where the incident leading to the fatal attack, is preceded by a trivial quarrel, and the assault is limited to a single, though fatal blow, without any history of malice, or previous ill well between the deceased and the assailant, even a short while, i.e a few minutes elapse between the quarrel, the accused leaving the scene, and returning armed, the attack may not amount to murder, but would be covered by Section 304. In the present case too, the quarrel between the appellant and the deceased's sons, was due to a trivial reason. Although PW-2 and PW-4 denied having teased or laughed at the appellant, refusing his suggestion, the independent testimony of PW-5 somewhat supports his (the appellant's) version about some irritant or provocation, particularly the allusion to the two boys (PW-2 and PW-4) always quarrelling with him. The appellant is consistently shown to have used the word "Himayat" to PW-4 and the deceased. There is no reason to disbelieve PW-5. In fact, this version is closer to that of the line of questioning, on behalf of the appellant, that the boys had teased him. He, therefore, went home, and returned within about 3-4 minutes. He tried to assault Ajaypal; the deceased tried to prevent him; he attacked her. PW-4 thereafter tried to intervene; he too was attacked. All these facts do not suggest pre-meditation, or a previous history of ill will between Deepak and the deceased's family. He launched an attack on the deceased, when he thought that she would prevent him from assaulting Ajaypal. Both she and PW-4 were given single blows, when they tried to prevent his attack. These facts, viewed cumulatively do call for the applicability of Exception 4 to Section 300, IPC, as to

amount to culpable homicide, covered by the first part of Section 304.

17. In view of the above findings, the court is of the opinion that the appellant's conviction under Section 302 IPC needs to be altered to one under Section 304, first Part. The conviction for the other offences is, however, undisturbed. Having regard to the facts of this case, the appellant's sentence is modified to seven years RI, for the offence punishable under Section 304, Part I, IPC. The sentence in respect of the other offences, are however, left unaffected. All sentences shall run concurrently. Crl. Appeal No. 45 of 1998 is partly allowed to this extent.

ILR (2011) V DELHI 55
FAO

SHEIKH ANIS AHMAD ....APPELLANT

VERSUS

STATE & ORS. ....RESPONDENT

(MOOL CHAND GARG, J.)

FAO NO. : 267/2010 DATE OF DECISION: 16.03.2011

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.

It has been held by the Apex Court in the case of **Girja Datt Singh Vs Gangotri Datt Singh,** AIR 1955 SC 346 that Section 63 (c) of the Indian Succession Act requires the Will to be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark on the Will or has seen some other person sign the Will, in the presence and by the direction of the testator or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator. Similarly the requirement of Section 68 of the Evidence Act, is that at least one of the attesting witness should be called as a witness to prove the due execution and attestation of the Will. **(Para 25)**

Further, it has also been observed that if attesting witness fails to prove attestation by other attesting witness or the propounder takes active part in execution of the Will which confer substantial benefit on him would lead to suspicious circumstance which has to be explained by satisfactory evidence. Even registration of the Will does not dispense with the need of proving execution and attestation. The following judgments can be referred for this purpose:

(1) **Yumnam Ongbi Tampha Ibema Devi Vs. Yumnam Joykumar Singh & Ors.** (2009) 4 SCC 780

(2) **Janki Narayan Bhoir Vs. Narayan Namdeo Kadam** 2003 (2) SCC 91

(3) **Indu Bala Bose & Ors. Vs. Mahindra Chandra Bose & Anr.** AIR 1982 SC 133

(4) **Bhagat Ram & Anr. Vs. Suresh & Ors.** AIR 2004 SC 436 **(Para 26)**

Further the respondent herself relied, acted and based her case upon Section 63 (c) of the Indian Succession Act and Section 68 of the Evidence Act, hence the issue No 1 as decided on those wholesome provisions of law, the provisions of Section 57 of the Indian Succession Act would not be a bar and would not come in the way of deciding issue ˇNo.1 against the said respondent. More so, respondent is also now stopped from saying that the Will dated 5.06.1992 does not require attestation and the provisions of Section 63 (c) of Indian Succession Act and Section 68 of the Evidence Act are mandatory only as far as a Hindu Will is concerned as there is no bar to a Mohammedan taking recourse to those provisions for making a Will but once he has taken that recourse all the rigors of the Indian Succession Act will then be applicable. In this regard it would be appropriate to make a reference to an Allahabad High Court Judgment in the case of **Mohd. Yusuf Vs Board of Revenue, Allahabad,** AIR 2005 Allahabad 199, wherein it had been held:-

> "It would appear that the attesting witnesses were not examined to prove the Will. There is not an iota of evidence on record to show that the witnesses were dead or were not traceable on the date fixed for evidence. It is borne out from the record that the attesting witnesses were not called by issuing notices to prove Will. The Scribe in his cross-examination, it would appear, has stated that Will was not registered in his presence and he did not go to the office of Sub-Registrar at the time of Registration. No doubt, a scribe can be said to be an attesting witness, provided the two attesting witnesses are dead or incapable to give evidence even after being summoned for giving evidence if the test laid down by the Apex Court is fully satisfied to the effect that the witnesses should have put his signature animos attestandi i.e. for the purpose of attesting and he has seen executant sign and has received from him a personal acknowledgement of his signatures at the time of

registration. This clearly goes to prove that scribe in the present case does not satisfy the requirements laid down by the Apex Court and cannot be said to be an attesting witness." **(Para 27)**

It is also to be observed that the respondent had never taken this plea before the trial Court that provisions of Hindu Law relating to attestation and execution of the Will would not be applicable to Mohammedan rather she has relied her case on those provisions hence the respondent cannot change her stand in the appeal and introduce a new case. In this regard would like to quote an Apex Court Judgment, in the case of M.P. Srivastava Vs Mrs Veena, AIR 1967 SC 1193 wherein it has been held that:-

"It was never argued on behalf of the appellant in the Court of First Instance and the High Court that attempts proved to have been made by the respondent to resume conjugal relations could not in law amount to satisfaction of the decree, and we do not think we would be justified at this stage in allowing that question to be raised for the first time in this Court."

(Para 28)

It is also pertinent to mention that even the appellate court has no power to make out a new case which was not been pleaded by the respondent before the trial court and the decision of the appellate court cannot be based on the grounds outside the plea of the respondents. Hence the matter cannot be remanded back to the trial court to examine the question of applicability of the Muslim Personal Law and its effect on Will dated 5.06.1992. In this regard would like to make reference to an Apex Court judgment, in the case of Siddu Venkappa Devadiga Vs Smt. Rangu Devadiga and Others, AIR 1977 SC 890, wherein it was held that:-

"We have also examined the plaint and we find that it was clearly pleaded there that Shivanna was the

absolute owner of the Purshottam Restaurant until his death on September 8, 1938, that the defendant was "employed" by him in that business, that the defendant came to Bombay soon after the death of Shivanna passing to be a friend and well-wisher of the plaintiffs and that possession of the Purshottam Restaurant was given to him on his assurance that he would look after the interests of the plaintiffs and would carry on the business on their behalf. The plaintiffs pleaded further that when the defendant refused to render accounts and totally excluded them from the control and management of the business, it became necessary for them to take action against him. It was further stated in the plaint that the plaintiffs first filed a criminal complaint against the defendant but it was dismissed for want of appearance, & thereafter filed the present suit alleging that Shivanna was the absolute owner of the restaurant and was the tenant of the premises where it was being carried on. As has been stated, the defendant traversed that claim in his written statement and pleaded that the business always belonged to him as owner. There was thus no plea that the business was 'benami' for Shivanna. We also find that the parties did not join issue on the question that the business was 'benami'. On the other hand, the point at issue was whether Shivanna was the owner of the business and the tenancy rights of the premises where it was being carried on. It is well-settled, having been laid down by this Court in **Trejan and Co. Ltd. v. PW. N.H. Nagappa Chettiar** 1956 SCR 789 and **Baraba Singh Ms. Achal Singh** AIR 1961 SC 1097 that the decision of a case cannot be based on grounds outside the plea of the parties, and that it is the case pleaded which has to be found. The High Court therefore went wrong is ignoring this basic principle of law, and in making out an entirely new case which was not pleaded and was not the subject matter of the trial." **(Para 30)**

It is thus, clear respondent No.3 has failed to prove the Will dated 05.06.1992 as the onus to prove Issue NO.1 was not discharged by respondent No.3. It was thus incumbent upon the learned ADJ to have ˇalso gone into the evidence led on behalf of the appellant qua the Will dated 20.11.1984 and to have returned the finding on Issue No.2 also. **(Para 39)**

Important Issue Involved: (A) Registration of a Will does not dispense with the need of proving its execution and attestation.

(B) A plea not taken before trial Court cannot be raised in appeal for the first time to introduce a new case.

(C) The trial Court is required to pronounce the judgment on all issues framed in the case; the judgment not pronounced on all issues suffers from irregularity.

[Gu Si]

APPEARANCES:

FOR THE APPELLANT : Mr. V.B. Andley, Sr. Advocate with Mr. Rajinder Mathur, Mr. Priyank Sharma, Mr. Krushna B. Singh, Advocates.

FOR THE RESPONDENTS : Mr. K. Datta, Advocate for R-3.

CASES REFERRED TO:

1. *LIC Housing Finance Ltd.* vs. *Pearl Developers (P) Ltd. & Ors.* 2009 (107) DRJ 473.
2. *Yumnam Ongbi Tampha Ibema Devi* vs. *Yumnam Joykumar Singh & Ors.* (2009) 4 SCC 780.
3. *Asma Beevi & Ors.* vs. *S. M. Amneer Ali & Ors.,* 2008 (6) MLJ 92 Mad.

4. *Mohd. Yusuf* vs. *Board of Revenue, Allahabad,* AIR 2005 Allahabad 199.
5. *Bhagat Ram & Anr.* vs. *Suresh & Ors.* AIR 2004 SC 436.
6. *Janki Narayan Bhoir* vs. *Narayan Namdeo Kadam* 2003 (2) SCC 91.
7. *Smt. Satya Devi* vs. *Rati Ram & Ors.* 85 (2000) DLT 17 DB.
8. *Shanti Lal* vs. *Mohan Lal,* AIR 1986 J&K 61.
9. *Indu Bala Bose & Ors.* vs. *Mahindra Chandra Bose & Anr.* AIR 1982 SC 133.
10. *State of Gujarat* vs. *Ranji Mandir Trust, Baroda & Ors.* AIR 1979 Guj. 113.
11. *Smt. Ramawati Devi* vs. *Omkar Chand Gupta,* AIR 1978 NOC 199.
12. *Siddu Venkappa Devadiga* vs. *Smt. Rangu S. Devadiga & Ors.* AIR 1977 SC 890.
13. *M.P. Shreevastava* vs. *Mrs. Veena,* AIR 1967 SC 1193.
14. *Baruha Singh* vs. *Achal Singh & Ors.* AIR 1961 SC 1897.
15. *Trejan and Co. Ltd.* vs. *PW. N.H. Nagappa Chettiar* 1956 SCR 789.
16. *Girja Datt Singh* vs. *Gangotri Datt Singh,* AIR 1955 SC 346.
17. *Ganesh Prasad* vs. *Lala Hazari Lal & Ors.* AIR (29) 1942 All 201.
18. *Abdul Hameed* vs. *Mohammad Yoonus,* AIR 1940 Mad 153.
19. *Mangal Singh* vs. *King-Emperor,* AIR 1937 PC 179.
20. *Venkat Rao & Anr.* vs. *Namdeo & Ors.* AIR 1931 PC-285.
21. *Sarabhai Amibhai* vs. *Cussum Haji Jan Mahomed,* AIR 1919 Bombay 80.
22. *Sarabai Amibai* vs. *Mahomed Cassum Haji Jan Mahomed* MANU/MH/0158/1918 : AIR1919Bom80.

RESULT: Appeal Allowed.

MOOL CHAND GARG, J.

1. This is an appeal filed by the appellant who sought letters of administration regarding Will dated 20.11.1984 allegedly executed by Mst. Nawab Begum, the deceased testatrix. The third respondent on the other hand contested the said probate petition. While describing the will relied upon by the appellant as forged and fabricated, she also set up another Will dated 05.06.1992 alleged to have been executed by Mst. Nawab Begum, the deceased testatrix in her favor bequeathing whole of her property which is a registered document and had been also attested by two witnesses.

2. On the pleadings of the parties, learned ADJ framed the following issues:-

> 1. Whether the deceased Smt. Nawab Begum had executed any valid will dated 5.6.1992 in favour of respondent no. 3 Mst. Gohar Sultan while in sound and disposing mind and in the presence of at least two attesting witnesses? If so, its effect?
>
> 2. If issue no. 1 is not proved then whether Mst. Nawab Begum had executed any valid will dated 20.11.1984 in favour of petitioner Sheikh Anis Ahmed while in sound and disposing mind and in the presence of at least two attesting witnesses? If so, its effect?
>
> 3. Relief.

3. The trial Court vide impugned order accepted the Will set up by the respondent as genuine and valid even though the only attesting witness examined by the said respondent has not supported her. While deciding issue No.1 in favor of the respondent, the learned ADJ has not given any finding on issue no. 2 on the pretext that the will set up by the third respondent was later in time and thus superseded the earlier will propounded by the appellant and thus dismissed the petition filed by the appellant. However the Court has granted the probate of the Will dated 05.06.1992 in favor of respondent No.3.

4. Assailing the aforesaid Judgment the appellant has submitted that Mst. Nawab Begum, the deceased testatrix was the step grandmother of

the appellant who had executed the Will dated 20.11.1984 in his favour in respect of her property bearing No.4094-4095 and 4096, Urdu Bazar, Jama Masjid, Delhi. It is submitted that Will dated 05.06.1992 (Ex.OW2/1) set up by respondent No.3 is a forged and fabricated document. The said will has also not been proved to have been executed by the deceased testator nor attestation thereof has been proved. Thus the said will is neither valid nor legal.

5. It is further submitted that even though it is the case of the third respondent that the deceased testatrix signed the Will Ex.OW2/1 in presence of two attesting witnesses while only one witness i.e. Malik Mohd. Tanvir was examined as OW3, who has stated that he does not know Nawab Begum and that she did not sign the Will in his presence nor he signed in her presence. Though, he has identified his signatures on the Will but also stated that his signatures were obtained at his house by the husband of Gohar Sultan. He also stated that the other attesting witness Wahid Ali did not sign in his presence nor he signed in the presence of Wahid Ali and also failed to identify the signatures of Wahid Ali. Wahid Ali was not examined as a witness despite his availability. Thus, it is submitted by the appellant that the third respondent has not proved the 2nd will in accordance with the ˇprovisions of Section 63(c) of the Indian Succession Act, 1925 and Section 68 of the Evidence Act or even otherwise.

6. On the other hand according to the 3rd respondent, since the Will set up by her was executed by a Muslim, there was no requirement to prove such Will in accordance with Section 63(c) of the Indian Succession Act, 1925 and under Section 68 of the Evidence Act which it is stated was not applicable to Muslims. Admittedly no such plea has been raised by the said respondent in her written statement. In this regard relevant averments made in the written statement filed by her are reproduced hereunder:

> "1. That the present petition is liable to be rejected outright as the same is not maintainable in view of the fact that Smt. Nawab Begum, daughter of late Sh. Sheikh Mohammed Abdullah and wife of late Sh. Iqbal Ahmad was the owner of the property bearing No.217, situated at Gali Garhaya, Bara Bazar, Jama Masjid, Delhi-110006 and also property bearing No.4904, 4095 and 4096

situated at Urdu Bazar, Jama Masjid, Delhi-110 006 and being the absolute owner of the aforesaid properties executed a Will dated 5th day of June, 1992 in favour of her only daughter Smt. Gohar Sultan and as such the petitioner herein above has no right, lien in the properties referred to hereabove.

2. That even otherwise the will referred to hereinabove in para 1 of preliminary objection was duly executed on 5th day of June, 1992 and being the last Will and a registered Will, properties mentioned in the said Will devolved upon Smt. Gohar Sultan. The said Will was duly registered with the Registrar of documents and stands mutated in favour of the legal heir and successor by virtue of that Will i.e. Smt. Gohar Sultan, Therefore, petition deserves outright rejection.

ON MERITS

xxx

xxx

4. That the contents of para 4 of the petition are absolutely wrong and therefore denied. It is denied that Mst. Nawab Begum aforesaid executed her last valid Will dated 20th of November, 1984. However, it is stated that a copy of the said Will has not been furnished to the objector. Contents of remaining para are absolutely wrong and therefore denied as Smt. Nawab Begum never executed any Will dated 20th November, 1984.

5. That the contents of para 5 of the petition as stated are absolutely wrong and, therefore, denied. The said Will dated 20th November, 1984 was never executed by Smt. Nawab Begum and therefore question of bequeathing the properties No.4094 to 4096 in Bazar Machhli Walan, Urdu Bazar, Jama Masjid, Delhi does not arise and the claim of the petitioner is based on a false and fabricated Will, therefore, the petition is not maintainable."

7. It is also the case of the appellant that, even if for the sake of argument the submission of respondent No.3 is accepted that a will executed by a Muslim could be oral and there is no need to examine any attesting witness to prove its execution as there is no requirement that such a Will should be attested also, it is submitted that the aforementioned

submission of respondent No.3 is not the foundation of the Impugned Judgment nor such a plea has even been noticed by the Addl. District judge. Rather the written statement of the respondent as quoted above shows that the case of the respondent is that Will dated 05.06.1992 has been proved in accordance with the provisions contained in Section 63(c) of the Indian Succession Act. The Will relied upon is a registered document and has been attested by the two attesting witnesses. However, the solitary witness to prove the execution and attestation of the will has not supported the said respondent. It is, thus, stated that the case of respondent No.3 that the 2nd Will was not required to be attested by two witnesses cannot be accepted. Even if Section 63(c) is not applicable in the case of a Muslim, the dispensation of proof as required under the Evidence Act is not ousted. Moreover case is required to be proved as pleaded. A plea which has not been raised cannot be relied upon.

8. There is no dispute that Mst.Nawab Begum was step grandmother of Anis Ahmed, the appellant. She is said to have executed Will dated 20.11.1984 in favour of the appellant. Respondent No.3 filed a reply/ objections dated 10.08.1994 to the aforesaid will and inter alia pleaded that the deceased testatrix executed a Will dated 05.06.1992 in her favour bequeathing all her movable and immovable properties to her including property at Urdu Bazar. She has denied execution of the Will dated 20.11.1984, Ex.P-1 as propounded by the ˇappellant. She has also pleaded that the Will dated 20.11.1984 is a forged and fabricated document. However she has not led any evidence in this regard.

9. The objections filed by respondent No.3 were replied to by the appellant. In their reply it was specifically stated that Mst.Nawab Begum did not executed will dated 05.06.1992 as alleged. The will propounded by her in any case is forged and fabricated. It is even otherwise illegal and void inter alia because it is in respect of the entire movable and immoveable properties left by the deceased and is violative of the rule that a Mohammedan cannot by Will depose of more than a third of surplus of his assets after payment of funeral expenses and debts and bequests in excess of one third cannot take effect unless the heirs consent thereto after the death of the testatrix. In this case Nawab Begum widow of Iqbal Ahmad died leaving Sultan Ahmad only son of Iqbal Ahmad (her step son) as her heir and his consent was not obtained after the death of Nawab Begum. After the death of Iqbal Ahmad, his only son Sultan

Ahmad maintained Nawab Begum in all respects. It is also stated that the appellant and Gohar Sultan both have applied for the mutation of the suit property in their respective names in the Municipal records but the matter is still pending there before the municipal authorities. 10. After framing issues the trial Court directed respondent No.3 to lead her evidence first. She examined N.C. Bajaj, Adv. as OW1, herself as OW2 and Malik Mohd. Tanvir one of the attesting witnesses as OW3 to prove the execution and attestation of the Will Ex.OW2/1. As noticed above, the said witness has not supported the case of the respondent.

11. On the other hand, the appellant has examined Md. Yasin, PW1, Dr. Fazul Rehman, PW2 son of the other attesting witness Dr. Moinuddin Baqai who had died in the meantime, and himself as PW3 to prove the due execution of the Will dated 20.11.1984, Ex.P1. However the impugned judgment has not made any reference to the evidence of the appellant. It only proceeds on the basis of the evidence of the objector which is deficient in proving the execution of the Will propounded by her inasmuch as the only attesting witness has not supported her case. Yet the learned ADJ has accepted the execution of ˇthe Will Ex.OW2/1 on the basis of the statement of the 3rd respondent and on account of its registration.

12. Holding that the 3rd respondent has proved the execution of the 2nd will successfully the ld. ADJ decided Issue No.1 in her favour. Consequently without returning any finding on issue No.2 the ld. ADJ has also dismissed the petition filed by the appellant presuming that the Will dated 20.11.1984 Ex.P1 relied upon by the appellant stands superseded by the Will dated 05.06.1992. In view of that it has been held that the appellant was not entitled to the grant of letters of administration and thus, has dismissed the suit.

13. According to the appellant,

(i) The Will Ex.OW2/1 dated 05.06.1992 is legally not proved.

(ii) Gohar Sultan had tried to show that the deceased Nawab Begum signed the Will Ex.OW2/1 in the presence of the two attesting witnesses namely Malik Mohd. Tanvir and Wahid Ali and those attesting witness signed in her presence. In short according to Gohar Sultan, the requirement of Section 63(c) of the Succession Act was fully complied with though only attesting witness Malik

Mohd. Tanir examined as OW3 has not supported her. She has not examined the 2nd witness namely wahid Ali though he was present in Court on 17.03.2004 for being examined as a witness.

(iii) OW3 Malik Mohd Tanvir has deposed that he does notknow Nawab Begum and she did not sign the Will in his presence nor he (Mohd. Tanvir) signed in her presence. He has identified his signatures on the Will but says that his signatures were obtained at his house by the husband of Gohar Sultan. OW3 has also stated that the other attesting witness Wahid Ali did not sign in his presence nor he signed in the presence of Wahid Ali. He does not identify the signatures of Wahid Ali.

(iv) Will dated 05.06.1992 is an irrevocable Will.

(v) Will dated 05.06.1992 bequeath more than 1/3rd of the property of Nawab Begum and the consent of her relations were not obtained after her death.

(vi) The provisions of Section 63(c) of the Indian Succession Act and Section 68 of the Evidence Act have not been satisfied. The appellant relies upon the following judgments in this regard.

1. *Surinder Kumar Grover Vs. State & Ors. 177 (2011) DLT 188.*	How a Will is to be executed, attested and proved.
2. *Girja Datt Singh Vs. angotri Datt Singh AIR 1955 SC 346*	How a Will is to be executed, attested and proved.
3. *Yumnam Ongbi Tampha Ibema Devi Vs. Yumnam Joykumar Singh & Ors. (2009) 4 SCC 780*	Attesting witness failing to prove attestation by other attesting witness. Profounder taking active part in execution of the
4. *Janki Narayan Bhoir Vs. Narayan Namdeo Kadam 2003 (2) SCC 91*	Will which confer substantial benefit on him, is a suspicious circumstances which must be
5. *Indu Bala Bose & Ors. Vs.*	explained by satisfactory

Mahindra Chandra Bose & Anr. AIR 1982 SC 133	evidence.
6. *Bhagat Ram & Anr. Vs. Suresh & Ors. AIR 2004 SC 436*	Registration of the Will does not dispense with the need of proving execution and attestation. Endorsement made by Registrar are relevant for registration purpose only.

14. It has been submitted by the appellant that in view of the conduct of the respondent and her pleadings, the Will relied upon by her being not an oral Will but a registered document allegedly attested by two witnesses should have been proved in accordance with the aforementioned guidelines. However this has not been done and as such the findings on Issue No.1 is not sustainable. It is submitted that respondent No.3 is even otherwise estopped from saying that the Will dated 05.06.1992 does not require attestation or that provisions contained under Section 63(c) of the Indian Succession Act and Section 68 of the Evidence Act only applies qua the Will executed by a Hindu in view of her own deposition.

15. The appellant submits that even if one has to rely upon Section 57 of the Indian Succession Act, there is no bar for a Mohammedan to take recourse to provisions contained under Section 63(c) and Section 68 of the Evidence Act. It is submitted that the respondents cannot set ˇup a new case in appeal. Reference has been made to the following judgments in this regard:

1. *Sayeeda Shakur Khan & Ors. Vs. Sajid Phaniband & Nr. 2007 (1) HLR 71*	Will made by a Muslim married under Special Marriage Act. All rigours of Indian Succession Act applicable.
2. *Mohd. Yusuf Vs. Board of Revenue, UP, Allahabad & Ors. AIR 2005 All. 199*	Muslim Will. Attesting witnesses not examined Execution of the Will not proved.
3. *Asma Beevi & Anr. Vs. M. Ameer Ali & Ors. 2008 (6) MLJ 92*	Section 63 of the Indian Succession Act is not strictly applicable under Mohammedan

	Law to establish the execution of a Will since a Will need not be in writing under Islamic Law

16. Moreover, in the present case, the provisions of Muslim Law are not available for the benefit of respondent No.3 inasmuch as:

(i) The respondent cannot change her stand and introduce a new case completely.

(ii) Muslim Personal Law does not apply to the case in hand.

(iii) The Court cannot make out a new case for the respondent which has not been pleaded and, therefore, the case cannot be decided by this Court merely on the plea of the respondent that some of the provisions of Indian Succession Act were not applicable to her.

17. It is also the case of the appellant that Muslim Personal Law (Shariat) Application Act, 1937 which was promulgated to make provisions for the application of Muslim Personal Law to muslims enacted Sections 2 and 3 which read as under:-

"2. Application of Personal law to Muslims.- Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal properly inherited or obtained under contract or gift or any other provision of Personal Law. marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in ˇcases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

3. **Power to make a declaration.-**1) Any person who satisfies the prescribed authority--

(a) that he is a Muslim, and

(b) that, he is competent to contract within the meaning of section 11 the Indian Contract Act, 1872 (9 of 1872), and

(c) that he is a resident of [the territories to which this Act extends].

(2) xxx xxx xxx"

18. In this case neither there is any plea nor any evidence is available to show that the deceased testator filed any declaration as required under Section 3 reproduced above. Even otherwise when the Will in question is in writing and signed by the testatrix and the witnesses, the pleas put forward by the third respondent are of no consequence. Consequently, the provisions of the Indian Succession Act only will apply.

19. In the absence of any plea regarding applicability of Muslim Personal Law, the Court cannot make out a new case for the respondent and thus cannot remand the case and direct the trial Court to examine the question of applicability of Muslim Personal Law and its effect on the Will dated 05.06.1992.

20. In support of his aforesaid submission, the appellant has relied upon the following judgments:-

(i) **M.P. Shreevastava Vs. Mrs. Veena,** AIR 1967 SC 1193,

(ii) **State of Gujarat Vs. Ranji Mandir Trust, Baroda & Ors.** AIR 1979 Guj. 113,

(iii) **Siddu Venkappa Devadiga Vs. Smt. Rangu S. Devadiga & Ors.** AIR 1977 SC 890,

(iv) **Smt. Ramawati Devi Vs. Omkar Chand Gupta,** AIR 1978 NOC 199,

(v) **Baruha Singh Vs. Achal Singh & Ors.** AIR 1961 SC 1897.

21. As regards, evidence which is required to be led so as to prove oral Wills or to which Section 57 applies it has been submitted that all such cases are to be scrutinized with greatest care and strict proof regarding execution of the oral Will must be proved to the complete satisfaction of the Court. Reference has been made to the following judgments:-

1. **Venkat Rao & Anr. Vs. Namdeo & Ors.** AIR 1931 PC-285

2. **Mangal Singh Vs. King-Emperor,** AIR 1937 PC 179

3. **Ganesh Prasad Vs. Lala Hazari Lal & Ors.** AIR (29) 1942 All 201

4. **Shanti Lal Vs. Mohan Lal,** AIR 1986 J&K 61.

22. It has been submitted that even otherwise the 3rd respondent has not made out any case for the grant of probate in this case in her favor in as much as, in her statement she has herself stated that the deceased testatrix executed the Will wherein she was shown as sole beneficiary and that she and her husband played a prominent part in the execution of the Will. The Will was got registered after six months of the date of death of the testatrix and the 3rd respondent has signed the will only at that time.

23. On the other hand respondent No 3 in their written synopsis, has claimed that the testatrix is her mother and that neither Section 63(c) nor Section 68 of the Evidence Act are applicable on a Mohammedan Will and the validity of the Will is in no way affected due to non-attestation by witnesses or failure to prove attestation. The respondent No.3 has relied on the following cases:

(i) **Sarabhai Amibhai Vs. Cussum Hai Jan Mahomed,** AIR 1919 Bom. 80

(ii) **Abdul Hameed Vs. Mohammad Yoonus,** AIR 1940 Mad 153

(iii) **Asma Beevi & Ors. Vs. S. M. Amneer Ali & Ors.,** 2008 (6) MLJ 92 Mad.

24. I have heard the parties and would like to observe that though the respondent No.3 had tried to show that that the requirement of Section 63 (c) of Indian Succession Act were fully complied with, one of the witnesses examined namely the statement of OW3 Malik Mohd. Tanvir deposed that he did not know the deceased Testatrix and did not sign the Will in his presence nor he signed in her presence, therefore it ˇcannot be held that provisions of 63 (c) of Indian Succession Act and Section 68 of the Evidence Act have been satisfied.

25. It has been held by the Apex Court in the case of **Girja Datt Singh Vs Gangotri Datt Singh,** AIR 1955 SC 346 that Section 63 (c)

of the Indian Succession Act requires the Will to be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark on the Will or has seen some other person sign the Will, in the presence and by the direction of the testator or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator. Similarly the requirement of Section 68 of the Evidence Act, is that at least one of the attesting witness should be called as a witness to prove the due execution and attestation of the Will.

26. Further, it has also been observed that if attesting witness fails to prove attestation by other attesting witness or the propounder takes active part in execution of the Will which confer substantial benefit on him would lead to suspicious circumstance which has to be explained by satisfactory evidence. Even registration of the Will does not dispense with the need of proving execution and attestation. The following judgments can be referred for this purpose:

(1) **Yumnam Ongbi Tampha Ibema Devi Vs. Yumnam Joykumar Singh & Ors.** (2009) 4 SCC 780

(2) **Janki Narayan Bhoir Vs. Narayan Namdeo Kadam** 2003 (2) SCC 91

(3) **Indu Bala Bose & Ors. Vs. Mahindra Chandra Bose & Anr.** AIR 1982 SC 133

(4) **Bhagat Ram & Anr. Vs. Suresh & Ors.** AIR 2004 SC 436

27. Further the respondent herself relied, acted and based her case upon Section 63 (c) of the Indian Succession Act and Section 68 of the Evidence Act, hence the issue No 1 as decided on those wholesome provisions of law, the provisions of Section 57 of the Indian Succession Act would not be a bar and would not come in the way of deciding issue ˇNo.1 against the said respondent. More so, respondent is also now stopped from saying that the Will dated 5.06.1992 does not require attestation and the provisions of Section 63 (c) of Indian Succession Act and Section 68 of the Evidence Act are mandatory only as far as a Hindu Will is concerned as there is no bar to a Mohammedan taking recourse to those provisions for making a Will but once he has taken that recourse

all the rigors of the Indian Succession Act will then be applicable. In this regard it would be appropriate to make a reference to an Allahabad High Court Judgment in the case of **Mohd. Yusuf Vs Board of Revenue, Allahabad,** AIR 2005 Allahabad 199, wherein it had been held:-

> "It would appear that the attesting witnesses were not examined to prove the Will. There is not an iota of evidence on record to show that the witnesses were dead or were not traceable on the date fixed for evidence. It is borne out from the record that the attesting witnesses were not called by issuing notices to prove Will. The Scribe in his cross-examination, it would appear, has stated that Will was not registered in his presence and he did not go to the office of Sub-Registrar at the time of Registration. No doubt, a scribe can be said to be an attesting witness, provided the two attesting witnesses are dead or incapable to give evidence even after being summoned for giving evidence if the test laid down by the Apex Court is fully satisfied to the effect that the witnesses should have put his signature animos attestandi i.e. for the purpose of attesting and he has seen executant sign and has received from him a personal acknowledgement of his signatures at the time of registration. This clearly goes to prove that scribe in the present case does not satisfy the requirements laid down by the Apex Court and cannot be said to be an attesting witness."

28. It is also to be observed that the respondent had never taken this plea before the trial Court that provisions of Hindu Law relating to attestation and execution of the Will would not be applicable to Mohammedan rather she has relied her case on those provisions hence the respondent cannot change her stand in the appeal and introduce a new case. In this regard would like to quote an Apex Court Judgment, in the case of M.P. Srivastava Vs Mrs Veena, AIR 1967 SC 1193 wherein it has been held that:-

> "It was never argued on behalf of the appellant in the Court of First Instance and the High Court that attempts proved to have been made by the respondent to resume conjugal relations could not in law amount to satisfaction of the decree, and we do not think we would be justified at this stage in allowing that question to be raised for the first time in this Court."

29. In another case of **State of Gujarat Vs Ranji Mandir Trust Baroda and Others,** the Division Bench of Gujarat High Court has observed that:-

"1to3. xxxx

4. To grant or not to grant leave to urge this new plea of "Act of State" is the question we must resolve at the threshold in our opinion, whether or not the Municipal Court has jurisdiction, to try the suit from the standpoint of the plea of "Act of State" is a mixed question of law and facts. Such a plea must in, the first, place be raised in the written statement. An issue must be framed on this question and parties must have an opportunity to adduce evidence on this plea. It is possible that in a given case a pointed issue may not be raised and yet the parties may have understood that defence of "Act of State" was sought to be urged and parties may adduce evidence on the point. So far as the present case is concerned, apart from the fact that there was no such plea in the written statement and no such issue was raised, the parties never realized that the defence of "Act of State" was sought to be relied upon by the State in order to defeat the present suit. This position is incapable of being disputed having regard to the fact that even the learned Govt. Pleader who appeared in the trial Court did not raise any such contention and did not urge any argument in the context of this plea. Under the circumstances, we are faced with the question whether we should permit the learned Assistant Govt. Pleader to urge this plea at this juncture. At the cost of repetition it may be stated that even now the State has not come forward with an application for leave to amend the written statement. If the State had applied for the amendment of the written statement and if. the Court had granted it, the matter would have had to be remanded to the trial Court in order to enable the plaintiff to lead evidence in order to establish that there was sufficient recognition of his rights either in express terms or by implication or, by conduct."

30. It is also pertinent to mention that even the appellate court has no power to make out a new case which was not been pleaded by the respondent before the trial court and the decision of the appellate court cannot be based on the grounds outside the plea of the respondents.

Hence the matter cannot be remanded back to the trial court to examine the question of applicability of the Muslim Personal Law and its effect on Will dated 5.06.1992. In this regard would like to make reference to an Apex Court judgment, in the case of Siddu Venkappa Devadiga Vs Smt. Rangu Devadiga and Others, AIR 1977 SC 890, wherein it was held that:-

"We have also examined the plaint and we find that it was clearly pleaded there that Shivanna was the absolute owner of the Purshottam Restaurant until his death on September 8, 1938, that the defendant was "employed" by him in that business, that the defendant came to Bombay soon after the death of Shivanna passing to be a friend and well-wisher of the plaintiffs and that possession of the Purshottam Restaurant was given to him on his assurance that he would look after the interests of the plaintiffs and would carry on the business on their behalf. The plaintiffs pleaded further that when the defendant refused to render accounts and totally excluded them from the control and management of the business, it became necessary for them to take action against him. It was further stated in the plaint that the plaintiffs first filed a criminal complaint against the defendant but it was dismissed for want of appearance, & thereafter filed the present suit alleging that Shivanna was the absolute owner of the restaurant and was the tenant of the premises where it was being carried on. As has been stated, the defendant traversed that claim in his written statement and pleaded that the business always belonged to him as owner. There was thus no plea that the business was 'benami' for Shivanna. We also find that the parties did not join issue on the question that the business was 'benami'. On the other hand, the point at issue was whether Shivanna was the owner of the business and the tenancy rights of the premises where it was being carried on. It is well-settled, having been laid down by this Court in **Trejan and Co. Ltd. v. PW. N.H. Nagappa Chettiar** 1956 SCR 789 and **Baraba Singh Ms. Achal Singh** AIR 1961 SC 1097 that the decision of a case cannot be based on grounds outside the plea of the parties, and that it is the case pleaded which has to be found. The High Court therefore went wrong is ignoring this basic principle of law, and

in making out an entirely new case which was not pleaded and was not the subject matter of the trial."

31. Further, the Will, Ex.OW2/1 is not an oral Will. Admittedly, it is a written Will attested by two witnesses. This fact has also been so stated by the objector. Since the only attesting witness examined on ˇbehalf of the objector has not proved the Will, the other circumstances which can be inferred from the statement of the respondent itself are suspicious so as to bely the case of respondent No.3 inasmuch as in her cross examination she has admitted that she and her husband played a prominent part in the execution of the Will. The Will was got registered after about 6 months of the date of death of the deceased testatrix. She has also admitted that all the movable and immovable properties of Nawab Begum were bequeathed to her. She has also admitted that the relationship of Nawab Begum with Sultan Ahmad and his sons Anis Ahmad were very cordial till her death but neither Sultan Ahmad nor Anis Ahmad were called at the time of the execution of the Will.

32. There are many other suspicious circumstances surrounding the said Will. Though the Will purports to be attested by two witnesses out of whom only one was examined as a witness he too does not prove the Will. OW3 Malik Mohd. Tanvir has appeared as a witness but he has stated that he does not know Nawab Begum. She did not sign the Will in his presence. He himself signed the Will at his residence. He is a friend of the husband of Gohar Sultan. He has not identified the signatures of the other witnesses on the Will.

33. Respondent No.3 has stated that the executants and the attesting witnesses signed the Will in the office of the sub-Registrar even though the Will was produced for registration after six months of the death of the deceased testatrix. She also deposed that both the attesting witnesses were present in the office of the Sub-Registrar at the time of the registration of the Will. However, no independent witness has appeared to identify the signatures of the executants. The respondent has stated that Mr. M.N. Sharma, Advocate has taken instructions from Nawab Begum for the drafting of the Will and he brought the duly typed on 05.06.1992. Strangely Mr. M.N. Sharma, Advocate has not been produced as a witness. Mr. M.N. Sharma, Advocate has not signed the original Will as a drafter of the Will or in any other capacity. Thisstatement of respondent No.3 itself causes suspicion about her case.

34. A bare perusal of the order passed by the Addl. District Judge goes to show that the Addl. District Judge has not decided issue No.1 in favour of the appellant treating the Will dated 05.06.1992 as a Will ˇexecuted by the Muslim which does not require attestation to be proved in accordance with Section 63(c) of the Indian Succession Act. Rather the Court has presumed that the execution and attestation of the Will has been proved according to Section 63(c) of the Indian Succession Act read with Section 68 of the Evidence Act.

35. Despite registration of the aforesaid Will after six months of the death of the deceased, the Court has extensively relied upon the statement made by respondent No.3 who is the propounder and beneficiary under the Will even though the only attesting witness examined on behalf of the respondent has not supported the case of the third respondent inasmuch as the said witness not only stated that he was unable to identify the signatures of deceased testator as he was not knowing the said lady. He was also not able to identify signatures of Wahid Ali or any other witness including Gohar Sultan on the Will in question.

36. Even Dr.N.C. Bajaj who appeared as OW1 has not stated that the Will in question was executed in his presence or that it was signed by the two witnesses in his presence. He was only a witness to the execution of the Will which was produced for registration after the death of the deceased testator. According to Smt. Gohar Sultan who appeared as OW2, the Will in question was prepared by one M.N. Sharma, Advocate but the said M.N Sharma has not been examined by the third respondent as a witness to prove the Will in question.

37. It may be observed here that even if Gohar Sultan is to be presumed to be a witness to the registration of the Will she has not stated her presence at the time of execution of the Will, nor it has been so stated by OW3 or OW1. Admittedly, the registration has taken place after the death of the deceased.

38. In these circumstances, the observation made by the Addl. District Judge relying upon the statement of Shri N.C. Bajaj as a second attesting witness is of no consequence.

39. It is thus, clear respondent No.3 has failed to prove the Will dated 05.06.1992 as the onus to prove Issue NO.1 was not discharged by respondent No.3. It was thus incumbent upon the learned ADJ to

have also gone into the evidence led on behalf of the appellant qua the Will dated 20.11.1984 and to have returned the finding on Issue No.2 also.

40. In this regard reference has been made to a Division Bench judgment of this court, in the case of **Smt. Satya Devi Vs. Rati Ram & Ors.** 85 (2000) DLT 17 DB, Wherein it has been held that:

> "Rule 2 of Order 14 of the Code was substituted by the Code of Civil Procedure Amendment Act, 1976. The amended provision says that notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of Sub-rule (2), pronounce judgment on all issues. After issues have been framed it is the mandate of law that judgment must be pronounced on all issues. The only exception to this rule is in Sub-rule (2), which provides that an issue of law may be tried as a preliminary issue but the same must relate to jurisdiction of the Court or to a bar to the suit created by any law for the time being in force. Only in these two eventualities issues of law may be tried as preliminary issues and not in any other eventuality. The Trial Court thus acted with material irregularity in exercise of its jurisdiction in proceeding to dispose of the suit merely on recording findings on only one issue. The issue so decided was not an issue of law but a mixed issue of law and fact. Such practice on the part of the Court to dispose of suits at the very threshold without further trial on other issues must be deprecated."

41. In another judgment delivered by the Single Bench of this court, in the case of **LIC Housing Finance Ltd. Vs. Pearl Developers (P) Ltd. & Ors.** 2009 (107) DRJ 473, it was held that:-

> "Order 14 Rule 2 of the CPC provides that notwithstanding that a case may be disposed of on a preliminary issue, the court shall pronounce judgment on all issues. In view of the said mandatory provision of law and the judgments aforesaid cited by the senior counsel for the PDPL, there can be no dispute with the proposition that a judgment which fails to pronounce on each and every issue framed would suffer from material irregularity and would be no judgment."

42. Now coming to the judgments referred by respondent No 3 reliance has been placed upon a Bombay High Court judgment, in the case of **Sarabhai Amibhai Vs Cussum Haji Jan Mahomed,** AIR 1919 Bombay 80, wherein it was held:-

> The testator was a Cutchi Memon and in some respects Cutchi Memons are governed by Hindu law. Further, the document in question is not attested. But I think it is quite clear, and at any rate there is an express authority of this Court precisely in point, that Cutchi Memons are governed by Mahomedan law as regards the execution of their wills, and that under Mahomedan law no attestation is necessary. The case I refer is In re Aba, Satar (1905) 7 Bom. L.R. 558 and is a decision of Mr. Justice Tyabji. So far, therefore, as that point is concerned, I think no difficulty arises

43. In another Judgment delivered by Madras High Court, in the case of **Abdul Hameed Vs Mohammad Yoonus** 'AIR 1940 Mad' 153, wherein it has been held that:-

> The testator being a Cutchi Memon the provisions of the Mahomedan law with regard to wills apply. That a Cutchi Memon is governed by the Mahomedan law in this respect was held in **Sarabai Amibai v. Mahomed Cassum Haji Jan Mahomed** MANU/MH/0158/1918 : AIR1919Bom80 and the contesting respondents have not disputed the correctness of the decision. It is also accepted, as it must be, having been accepted by the Judicial Committee, that by the Mahomedan law no writing is required to make a will valid and no particular form even of verbal declaration is necessary as long as the intention of the testator is sufficiently ascertained.

44. In another Judgment delivered by Madras High Court, in the case of **Asma Beevi Vs M. Aeer Ali,** 2008(6) MLJ 92, Wherein it has been held that:-

> The Village administration officer, D.W.3 has been the scribe of the Will, who has deposed that the deceased Mohammed Ismail signed in the Will in his presence and attestors Lateef and Ganesa Iyer have also signed as witnesses to the Will in his presence.

However, no motive has been attributed against D.W.3 and D.W.4 to disbelieve the evidence of the scribe and the other witness. On the facts and circumstances, I am of the view that there is no error on the part of the trial Court holding that the Will, Exhibit B-38 has been established as a genuine document. I am of view that Section 63 of the Indian Succession Act is not strictly applicable under the Mohammedan Law to establish the execution of a Will, since a Will need not be in writing, under the Islamic Law and accordingly, the Will, Exhibit B-38 has been established as a genuine document executed by Mohammed Ismail , father of the appellants and respondents 1,2 and 4.

45. All the aforesaid judgments are not of any help to the case of the third respondent inasmuch as in the absence of any plea taken by the third respondent that the Will in question had been executed by a ˇmuslim or that provisions of Section 63(c) of the Indian Succession Act was not strictly applicable to his case or that the Will was an oral will or that it was not required to be attested, the judgments cannot be of any help to the case of the third respondent.

46. In view of that the Judgment/order passed by the ADJ in respect of issue No.1 cannot be sustained. Consequently, the appeal is allowed. However, as the ADJ has not given any finding on issue No.2 despite availability of evidence, the case is remanded back to the ADJ to decide Issue No.2 on the basis of the evidence led on behalf of the appellant and to return a fresh finding on issue No.3. Parties to appear before the Addl. District Judge on 28.03.2011. The Addl. District Judge will decide the matter afresh taking into consideration the observation made by this Court above within a period of one year from the date of appearance of the parties.

47. With these observations, the appeal is disposed of with no orders as to costs.

48. TCR be sent back along with a copy of this order.

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MOHD. BADAL **....APPELLANT**

VERSUS

STATE **....RESPONDENT**

(BADAR DURREZ AHMED AND MANMOHAN SINGH, JJ.)

CRL.A. NO. : 202/1997 **DATE OF DECISION: 22.03.2011**

Indian Penal Code, 1860—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.

[Ad Ch]

APPEARANCES:

FOR THE APPELLANTS : Mr. Sumeet Verma & Mr. Sumer Kumar Sethi.

FOR THE RESPONDENT : Ms. Richa Kapoor.

CASE REFERRED TO:

1. *Surinder Singh* vs. *State of Punjab:* 1989 SCC (Crl) 649.

RESULT: Appeals Allowed.

BADAR DURREZ AHMED, J (ORAL)

1. These appeals are being decided by a common judgment inasmuch as they arise out of the common judgment and order on sentence dated 31.03.1997 delivered in Sessions Case No. 30/1990 arising out of FIR No. 77/1989 registered under Section 302/201/34 IPC at Police Station Saraswati Vihar.

2. Initially there were five accused, namely, Mohd. Akhtar, Mohd. Badal, Mohd. Rumal, Mohd. Sabir and Mohd. Zuber. Charges were framed against all the five accused under Section 302/34 IPC and Section 406/34 IPC. Additionally, Mohd. Zuber was also charged with the offence under Section 411 IPC. Initially the charges were framed on 02.03.1990. However, subsequently, at the time of recording the statement under Section 313 Cr. P.C, the learned Additional Sessions Judge noted that the charge framed gave the wrong place of occurrence and consequently charges were re-framed on 08.10.1996. Consequently, the accused desired that some of the witnesses, namely, PWs 1, 2, 11, 13, 15 and 16 be recalled for further cross-examination. This request was allowed and the said witnesses were recalled for further cross-examination. Thereafter, the statements under Section 313 Cr. P.C were recorded and the impugned

judgment and order on sentence was delivered / passed.

3. By virtue of the impugned judgment, Mohd. Sabir and Mohd. Zuber have been acquitted of all charges. Mohd. Akhtar, Mohd. Badal, Mohd. Rumal were convicted under Section 302/34 IPC and in place of the offence as charged under Section 406/34 IPC, the said three accused were convicted under Section 379/34 IPC. Insofar as the offence under Section 302/34 is concerned, the three convicts were imposed a sentence of life imprisonment along with a fine of ` 1,000/- each and in default, they were to serve a sentence of six months rigorous imprisonment each. Insofar as the offence under Section 379/34 IPC is concerned, each of the three convicts was required to undergo rigorous imprisonment for one year.

4. The three convicts, that is, Mohd. Akhtar, Mohd. Badal and Mohd. Rumal, filed separate appeals being Crl. A. Nos. 278/1997, 202/1997 and 256/1997, respectively. Insofar as Mohd. Rumal is concerned, his appeal (Crl. A. 256/1997) was disposed of by another Bench of this Court on 19.04.2010 inasmuch as the appellant was not present and nobody was appearing on his behalf. The Court noted that the appellant was perhaps not interested in pursuing the appeal inasmuch as he had been prematurely released after having spent over fourteen years in custody upon the recommendation of the Lieutenant Governor. In those circumstances Mohd. Rumal's appeal was disposed of on 19.04.1010. We are, therefore, left with the present appeals which have been filed by the convicts Mohd. Akhtar and Mohd. Badal.

5. The prosecution case, as noted by the learned Additional Sessions Judge, is as under:-

> "(i) Deceased Raj Kumar was running a video-library at his house No. 505/292, Sri Nagar, Delhi, and he used to lend T.V. and Video on hire.
>
> (ii) On 20. 2.1989 at about 9.30 p.m. accused Akhtar, Badal, Rumal and Sabir went to the house of Raj Kumar to hire T.V, Video and cassettes of two films, namely, Wardi and Surya.
>
> (ii) Raj Kumar left with the equipment and cassettes in a rickshaw and installed the same in a room on the second floor of house No. A-519, J. J. Colony, Shakurpur.

(iv) The room had been taken on rent a month earlier by the accused from PW 13 Angoori Devi.

(v) The accused invited Meer Singh (PW 11) and Pappu (PW16), husband and son of the landlady, to see the films in their room.

(vi) After installation of TV and video in the room of the accused, Raj Kumar came to his house for dinner and after dinner he returned again to the room of the accused.

(vii) Meer Singh and Pappu watched TV till 2.30. a.m and then they retired to sleep leaving the deceased and the four accused in their room.

(viii) On Waking up next morning, Meer Singh and Pappu found that the tenanted room was empty and four accused had disappeared.

(ix) When Raj Kumar did not return home, his brother Subhash and Ramesh (PW1) searched for him and when they could not trace him, they lodged missing report at 7.15 p.m on 21.2.89 at P'S. Saraswati Vihar.

(x) On 22.2.89 at 7. 36 a.m. an information was received at P'S. Saraswati Vihar that a gunny bag was lying near DDA Office at Road No. 43, Britannia Chowk. This information was entered at DD No. 2-A and assigned to ASI Sultan Singh.

(xi) ASI Sultan Singh reached the spot and found a gunny bag lying in the naala (drain). The gunny bag was checked and the dead body of Raj Kumar was found in it. The body was identified by brother of the deceased.

(xii) The postmortem was conducted by Dr. L.K. Baruah (PW 5) at 4.30 p.m. on 22.2.89 and then it revealed that the death had occurred due to strangulation 36-40 hours earlier.

(xiii) On 4.4.89 accused Akhtar, Badal, Rumal and Sabir were nabbed in their jhuggi at Jamuna Pushta and the stolen video machine and cassettes were recovered from them.

(xiv) The four accused were interrogated and they led to C-43, Nathu Colony, Shahdara where accused Zuber was living as

tenant. The stolen T.V. was produced by Zuber."

6. The learned counsel appearing on behalf of the appellants submitted that the aforesaid prosecution version is sought to be established on the basis of the testimonies of PW11– Meer Singh and PW16 – Pappu, who are said to be witnesses who last saw the deceased Raj Kumar alive in the company of the appellants at about 2:30 am in the early hours of 21.02.1989. The learned counsel for the appellants further submitted that the prosecution story also seeks confirmation from the alleged recoveries made at the instance of the appellants. It is alleged by the prosecution that a VCR, which belonged to the deceased Raj Kumar, was recovered from the appellant Akhtar and that two video cassettes of the Hindi films 'Vardi' and 'Surya', which belonged to the deceased Raj Kumar, were recovered at the instance of Mohd. Rumal. Insofar as the appellant Mohd. Badal is concerned, it is alleged that the TV of Crown make was recovered from the residence of the co-accused Mohd. Zuber at the instance of the appellant Mohd. Badal. The prosecution also sought corroboration from the testimonies of PWs 1 and 2, who are the brother and brother-in-law of the deceased Raj Kumar insofar as the hiring of the TV, VCR and video cassettes and the deceased Raj Kumar leaving with three of the accused persons, are concerned. The prosecution has also relied on the fact that the appellants had refused to undergo the Test Identification Parade in which they were to be identified by PWs 1 and 2.

7. According to the learned counsel appearing on behalf of the appellants the prosecution has not, at all, been able to establish the fact that PW11 and PW16 last saw the deceased Raj Kumar in the company of the appellants. They also contended that the recoveries are not free from doubt. Insofar as the appellant Mohd. Badal is concerned, the recovery stands disproved in view of the fact that the trial court itself did not accept the recovery of the TV set from the residence of Mohd. Zuber. Therefore, the allegation that Mohd. Badal led the police party to Zuber's residence, who produced the TV, also does not get established. Insofar as the appellant Mohd. Akhtar is concerned, the learned counsel for the said appellant submitted that the recovery of the VCR, which was allegedly at the instance of the said appellant, is not free from doubt. As such, the learned counsel for the appellants ˇcontended that the circumstances of last seen evidence and the recoveries were themselves

on very shaky grounds and, therefore, there is no way that the appellants could have been convicted for the offences for which they were convicted by the learned Additional Sessions Judge.

8. The learned counsel for the State supported the trial court decision on all fours. She submitted that PWs 1 and 2 had clearly stated in their depositions that they had seen the three persons which included the appellants, who had come to the residence of the deceased Raj Kumar for the purposes of hiring the TV set, VCR and the two video cassettes and that they had seen Raj Kumar leaving with them in a rickshaw for the purposes of installing the same at their residence. According to the said witnesses, this was around 9:30 pm on 20.02.1989. The learned counsel for the State also submitted that the trial court has correctly accepted the testimonies of PW11 and PW16 as the last seen evidence. She further submitted that the recoveries also stood established both from the appellant Mohd. Akhtar as well as the appellant Mohd. Badal and that the trial court arrived at the correct conclusion, on the basis of the last seen evidence as well as on the basis of the recoveries, that the appellants were guilty of the offence under Section 302/34 as well as the offence under Section 379/34 IPC. She contended that no interference is called for and that the decision of the ˇlearned Additional Sessions Judge, both on conviction as well as on sentence, ought to be confirmed by this Court.

9. It is clear from the above resume that the case against the appellants rests entirely on the last seen evidence and the recoveries. If one of these elements is missing and does not stand established, then the case against the appellants cannot be said to have been proved beyond reasonable doubt. Let us first take the case of Mohd. Badal. Insofar as he is concerned, it is stated that he led the police party to the residence of Mohd. Zuber and it is at the instance of Zuber that the TV set is said to have been recovered. We find from the impugned judgment itself that the learned Additional Sessions Judge has disbelieved the prosecution version insofar as the recovery of the TV set from Mohd. Zuber is concerned. When this is the case, we fail to see as to how the learned Additional Sessions Judge could have foisted the recovery of the TV set on the appellant Mohd. Badal. The consequence of this discussion is that the alleged recovery of the TV set at the instance of the appellant Mohd. Badal has not, at all, been established and, therefore, insofar as the

appellant Mohd. Badal is concerned, there is no recovery at his instance. In the context of recoveries, we may also point out that it is PW16 Pappu, who is said to have accompanied the police party at the time of alleged recoveries. Initially, PW16 Pappu tended to support the prosecution version. ˇHowever, after his recall, in his cross-examination he resiled from his statement with regard to the recoveries and he was also cross-examined by the learned Additional Public Prosecutor as he had resiled from his earlier statement. In his cross-examination he categorically stated that he was taken to the police station and his signatures were taken on some papers and he was made a witness by the police. He further stated that he did not go anywhere in the police van and that no article was recovered by the police in his presence. He further stated that police did not recover any VCR or TV or cassette in his presence. Ultimately, he stated that he did not know anything about the case. As pointed out above, he was cross-examined by the Additional Public Prosecutor and he stated that he knew that one should make a true statement in Court and that the statement being made on that day was true while the statement made by him earlier was made under the influence of the police. He denied the suggestion that he had been won over by the accused. It is noteworthy that this witness had come to depose from jail as he was implicated in some other murder case.

10. PW23 ASI Mahinder Singh is supposed to be a recovery witness. According to him, in his examination-in-chief, the accused Zuber produced a TV of Sonyo make and a VCR from his house. The seizure memo of the TV was marked as Exhibit PW16/G and the seizure memo in respect of the VCR was Exhibit PW16/F. Since this ˇstatement was not in accord with the seizure memo, the Additional Public Prosecutor had sought permission to cross-examine the witness and upon such cross-examination, this witness stated that he did not remember if the VCR was produced by Mohd. Akhtar from below a bed-sheet in his jhuggi at Yamuna Pusta. But that, after reading the contents of PW16/F, he recollected that the VCR was recovered from the jhuggi of Mohd. Akhtar. This witness has importantly stated that the video cassettes of the films were easily available in the market and that the number of the TV was not mentioned in the recovery memo and that TVs of the same make are also available in the market.

11. From the above, it is clear that there were two witnesses to the

recovery. One was PW16 – Pappu and the other was PW23 – ASI Mahinder Singh. Insofar as PW16 Pappu is concerned, he has completely resiled from his earlier statement and has stated that no recoveries were made in his presence. PW23 ASI Mahinder Singh is also ambivalent about the recovery of the VCR from Mohd. Akhtar. This aspect has already been mentioned above. Therefore, we are of the view that the recovery of the VCR at the instance of Mohd. Akhtar has also not been established beyond reasonable doubt.

12. We now come to the last limb of the case and that is with regard to the last seen evidence. On going through the testimony of ˇPW11 Meer Singh, we find that he has not mentioned the name of the deceased anywhere, either in his examination-in-chief or during his cross-examination. On the contrary, he has referred to the person who allegedly brought the TV, VCR and cassettes as "a servant" of the shop keeper. He has also not identified the deceased as being that person whom he had referred to as the servant of the shop keeper. Therefore, PW11's testimony cannot be regarded as a part of the last seen evidence because he has not identified the person whom he last saw in the company of the accused. Apart from this, PW11 has also contradicted himself by saying that after he took his meal at about 9:30 pm on 20.02.1989, he went to sleep and woke up only after 11 am the next morning. This completely contradicts the prosecution version of PW11 having seen the deceased Raj Kumar in the company of the accused persons including the appellants at about 2:30 am. We may point out that this witness has stated that he had informed the police on the day the dead body of the deceased Raj Kumar was discovered, that is, on 22.02.1989 but we find from the evidence on record that there is no such information available with the police on that date. In fact, PW11 made his statement only on 05.03.1989, that is, after 12 days of the incident.

13. Insofar as the PW16 is concerned, we have already stated that he completely resiled from all his statements to the extent that he ˇstated that he did not know anything about the case and that the earlier statements made by him, which tended to support the prosecution, were made under the influence of the police. Apart from this, we find that PW16 Pappu has contradicted his father PW11 Meer Singh on several counts. One of the counts being that Meer Singh stated that his wife had gone to Rajasthan whereas PW16 Pappu states that his mother was present on that date.

PW16 Pappu also stated that he did not tell police anything because of fear, but he does not explain as to why after several days he made the statement before the police. In fact, the learned counsel for the appellants had placed reliance on a Supreme Court decision in the case of **Surinder Singh v. State of Punjab**: 1989 SCC (Crl) 649, where the Supreme Court, in a similar situation, rejected the testimony of one of the witnesses who did not inform the police in the first instance on the ground that he had been threatened by the accused and subsequently after a few hours, he informed the police. The Supreme Court questioned the veracity of the testimony of the said witness in the following manner:-

> "If he was so frightened at that time to go and tell others about the occurrence, it is not known how he was able to get over his fears a few hours later and go and inform PW3 and others about what had happened."

Similarly, in the present case, there is no explanation as to what made PW16 Pappu overcome his so-called fears and to make the statement before the police. In any event, this witness has completely resiled ˇfrom his statements and, therefore, cannot be relied upon for the purposes of convicting the appellants.

14. We also note that the trial court took note of DD No. 13-A, which is a document which has been marked 'A' and which is the first statement made by PW2 Subhash reporting the fact that his brother Raj Kumar was missing. In that statement, we find that PW2 Subhash has not made any mention about the accused or about any persons coming to the residence of Raj Kumar for the purposes of hiring of the TV set, VCR and video cassettes. It is only stated that Raj Kumar had gone somewhere to install the VCR and TV and that he suspected nobody.

15. The trial court has noted these facts in paragraph 7 of the impugned judgment as under:-

> "7. My attention has been drawn to Mark-A , which is the copy of DD No. 13-A dt. 21.2.89. This DD entry was made at 7.15 p.m. on the report of PW 2 Subhash Chander. The story of three boys having come on the previous night does not find mention in DD No. 13-A. It simply states that on 20.2.89 at 9. 30 p.m. Raj Kumar had gone to install VCR and Colour TV somewhere. It does not say that three boys had themselves come to hire TV

and VCR. Rather the information i.e. Subhash says that he does not have suspicion on anyone. Even in the FIR Ex. PW 6/A which was registered on the statement of Subhash, the description of the boys is not given. The omission, according to ld. counsel for the accused, indicates that the accused were framed in the case. I see no substance in the argument. The story that was given by Subhash at the first opportunity on 21.2.89, was not in any manner inconsistent with the version developed later. It is another thing that the Duty Officer did ˇnot care to record all the details. As a matter of fact, PW 2 Subhash may not have even imagined on 21.2.89 that his brother had been murdered. He had gone to the police station to lodge a missing report and that appears to be the reason why he confined himself to making a missing report. No fault can be found with the prosecution case, if Subhash did not elaborate at the earliest stage."

However, we do not find ourselves in agreement with the conclusions arrived at by the learned Additional Sessions Judge. When PW2 Subhash's brother had gone missing, it was all the more reason to give all details so that his brother could be located. We do not agree with the manner in which the learned Additional Sessions Judge has brushed aside the fact that DD No. 13-A does not contain any of the details which had subsequently come in at a later stage in the statement Exhibit PW2/A, which forms the basis of the ruqqa, after the dead body was discovered. We may point out that the ruqqa was sent at 9:10 am on 22.02.1989. It is for this reason also that the refusal of the Test Identification Parade by the appellants at the instance of PWs 1 and 2, would be of no consequence.

16. In view of the foregoing discussion, we are of the view that the prosecution has not been able to establish its case against the appellants beyond reasonable doubt. The appellants are acquitted of all charges. The impugned judgment and order on sentence are set aside. Consequently, the appellant Mohd. Akhtar, who is in custody, is directed to be released forthwith. Insofar as the appellant Mohd. Badal ˇis concerned, he is on bail. Therefore, his bail bonds are cancelled and the sureties stand discharged. The appeals are allowed as above.

ILR (2011) V DELHI 92
CRL. APPEAL

PREM SINGH YADAV ....APPELLANT

VERSUS

CENTRAL BUREAU OF INVESTIGATION ....RESPONDENT

(M.L. MEHTA, J.)

CRL. APPEAL NO. : 206/2002 DATE OF DECISION: 25.03.2011

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.

In view of the above, it may not be safe to rely upon the testimonies of PW2, PW3, PW5 and PW6 regarding demand and acceptance of money by the accused. The recovery of ˇtainted money alone is not sufficient to record the conviction. In the case of **Suraj Mal v. State (Delhi Administration)** (1979) 4 SCC 725 it was held that mere recovery of money, divorced from the circumstances under which it is paid, is not sufficient to convict the accused when the substantive evidence in the case is not reliable. Mere recovery of money cannot prove the case of the prosecution against the accused in the absence of any instance to prove the payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe. In the case of **C.M. Girish Babu** (supra). The Supreme Court held that mere recovery of money from the accused by itself is not enough in the absence of substantive evidence of demand and acceptance. In this case the reliance was placed on a

three-Judge Bench judgment in **M. Narsinga Rao v. State of A.P.** wherein it was held as under:-

"**20.** A three-Judge Bench in **M. Narsinga Rao v. State of A.P.** while dealing with the contention that it is not enough that some currency notes were handed over to the public servant to make it acceptance of gratification and prosecution has a further duty to prove that what was paid amounted to gratification, observed: (SCC p.700, para 24)

24. ...we think it is not necessary to deal with the matter in detail because in a recent decision rendered by us the said aspect has been dealt with at length. (Vide **Madhukar Bhaskarrao Joshi v. State of Maharashtra**) The following statement made by us in the said decision would be the ˇanswer to the aforesaid contention raised by the learned Counsel: (SCC p.577, para 12)

'12. The premise to be established on the facts for drawing the presumption is that there was payment or acceptance of gratification. Once the said premise is established the inference to be drawn is that the said gratification was accepted `as motive or reward' for doing or forbearing to do any official act. So the word `gratification' need not be stretched to mean reward because reward is the outcome of the presumption which the court has to draw on the factual premise that there was payment of gratification. This will again be fortified by looking at the collocation of two expressions adjacent to each other like `gratification or any valuable thing'. If acceptance of any valuable thing can help to draw the presumption that it was accepted as motive or reward for doing or forbearing to do an official act, the word `gratification' must be treated in the context to mean any payment for giving satisfaction to the public servant who received it.

22. It is equally well settled that the burden of proof placed upon the accused person against whom the presumption is made under Section 20 of the Act is not akin to that of burden placed on the prosecution to prove the case beyond a reasonable doubt.

"4. …It is well established that where the burden of an issue lies upon the accused he is not required to discharge that burden by leading evidence of proof his case beyond a reasonable doubt. That is, of course, the test prescribed in deciding whether the prosecution has discharged its onus to prove the guilt of the accused; but the same test cannot be applied to an accused person who seeks to discharge the burden placed upon him under Section 4 under the Prevention of Corruption Act. It is sufficient if the accused person succeeds in proving a preponderance of probability in favour of his case. It is not necessary for the accused person to prove his case beyond a reasonable doubt or in default to incur verdict of guilt. The onus of proof lying upon the accused person is to prove his case by a preponderance of probability. As soon as he succeeds in doing so, the burden shifts to prosecution which still has to discharge its original onus that never shifts, i.e.; that of establishing on the whole case the guilt of the accused beyond a reasonable doubt." (See **V.D.Jhangan v. State of U.P.** at AIR p. 1764, para 4). (Emphasis supplied)"

(Para 14)

Important Issue Involved: Mere recovery of money divorced from circumstances under which it is paid is not sufficient to convict accused under Sections 7 & 13 (1) (d) Prevention of Corruption Act 1988 when substantive evidence of demand and acceptance in the case is not reliable.

[Ad Ch]

APPEARANCES:

FOR THE APPELLANT : Mr. Arun Bhandari and Mr. Varun Bhandari, Advocates.

FOR THE RESPONDENT : Mr. Narinder Mann, Advocate.

CASES REFERRED TO:

1. *State of Maharashtra* vs. *Dnyaneshwar Laxman Rao Wankhede* (2009) 15 SCC 200.
2. *C.M. Girish Babu* vs. *CBI, Cochin, High Court of Kerala* (2009) 3 SCC 779.
3. *Dilip* vs. *State of M.P.* [2009] 1 SCC 450.
4. *Gagan Kanejia* vs. *State of Punjab* [2006] 13 SCC 516).
5. *Zamir Ahmed* vs. *The State,* 1996 Crl. Law Journal 2354.
6. *Suraj Mal* vs. *State (Delhi Administration)* (1979) 4 SCC 725.
7. *V.D.Jhangan* vs. *State of U.P.* at AIR p. 1764.

RESULT: Appeal allowed.

M.L. MEHTA, J.

1. This appeal is directed against the Judgment dated 27th February, 2002 and Order dated 28th February, 2002, were by, the appellant/accused was convicted by learned˘ Special Judge under Sections 7 and 13(1)(d) of the Prevention of Corruption Act, 1988 (hereinafter, referred to as 'the Act') and was sentenced to undergo rigorous imprisonment of one year for each offence. He was also ordered to pay fine of Rs.300/- on each count. In case of default of payment of fines, he was to undergo further simple imprisonment of one month each. Both the sentences were ordered to run concurrently.

2. The prosecution's case, as unfolded at the trial, is that PW2/complainant Ajaib Singh lodged a complaint Ex. PW2/A with CBI, Anti Corruption Branch on 25th April, 1989 alleging that he was keeping three cows at his residence and was making his livelihood by selling the milk. Appellant/accused Prem Singh Yadav, posted as a Milk Tax Inspector, MCD, Green Park used to harass him on one pretext or the other and had also challaned him twice before. On 24th April, 1989, the accused

came to the complainant with a demand of Rs.1,000/- as bribe, failing which, he threatened to challan him and detain his cows. The complainant agreed to pay Rs.500/- on 26th April, 1989 at 10:00 am near his house at Green Park and the balance was agreed to be paid after the marriage of his brother.

3. On the basis of his complaint, FIR Ex. PW6/A was registered. The said case was entrusted to Sh. Mehar Singh Inspector, CBI (PW6). On the same day, he constituted a raiding party consisting of complainant and two independent witnesses, namely, PW3/Sh.P.K. Jain and PW5/ Sh.T.M. Kumar. The complainant produced four Government Currency notes in the denomination of Rs.100/- each and two Government Currency notes of Rs.50/- each to the raiding officer. The numbers of the notes were noted down in the handing over memo Ex.PW2/B. Pre-raid proceedings involving spraying of phenolphthalein powder on the currency notes and explaining the witnesses about the characteristics of the powder by giving practical demonstration about the procedure were conducted. The tainted money was handed over to the complainant with the directions to hand it over to the accused on specific demand. PW3/P.K.Jain was to remain as shadow witness and was directed to remain close to the complainant. Both, complainant and PW3 together reached near the house of the accused. The other members of the raiding party also arrived there. Complainant/PW2 contacted the accused at his residence at the second floor and told the accused that P.K.Jain/PW3 was his close relative. Thereafter, Mr. Jain/PW3 ˇalso came upstairs. The accused allegedly asked the complainant to give the money which he had asked for. The complainant told him about having brought Rs.500/-. At this the accused asked him to give Rs.500/- and the balance of Rs.500/-, after the marriage of his brother. The money was given to the accused, who accepted the same with his right hand and counted the same with his left hand. Then, the complainant requested him to return some money as he was in need of the same for the marriage of his brother. At his request, the accused returned him Rs.200/- and kept Rs.300/- with him and asked PW2 to give him Rs.700/- after the marriage of his brother. The tainted money was kept by the accused under the sofa cushion. PW3/Mr. Jain gave a signal to the raiding party, which arrived at the spot. The accused became mum and perplexed. After some time, the accused told the raiding party about the money kept under the sofa cushion. The tainted Government Currency notes were recovered by PW3, from under the

sofa cushion, at the instance of Investigation Officer (PW6). The numbers tallied with the handing over memo. The washes of both hands of the accused and that of the sofa cushion were taken separately which turned the solutions pink. After the completion of the formalities, the ˇaccused was arrested. On the completion of investigation he was challaned under Section 7 read with Section 13(1)(d) of the Act. The accused denied the charges and pleaded not guilty. At the trial, the prosecution examined as many as six witnesses. The accused was also examined under Section 313 Cr.P.C, wherein he denied all incriminating evidence. He alleged false implication and claimed innocence. He did not lead any evidence in defence.

4. The learned defence counsel Mr. Arjun Bhandari has assailed the impugned judgment and order. He submitted that the accused was falsely implicated since he had challaned the complainant many times for unauthorisedly keeping cows. He also submitted that the version as presented by the complainant regarding alleged demand of Rs.1000/- by the accused, but his giving of Rs.500/- to the accused and then taking back Rs.200/- from him, was concocted and unbelievable. He also submitted that it was unbelievable that the accused would keep the money under the sofa cushion. He contended that the complainant under the pretext of giving invitation card of marriage of his brother came and cleverly kept the tainted money along with the card. He pointed to a few ˇdiscrepancies in the statements of witnesses and submitted that there were also contradictions about the preparation of recovery memo Ex.PW2/ C as the complainant Ajaib Singh was seen to have signed it on 24th April, 1989 whereas all others on 26th April, 1989. He submitted that in view of various material discrepancies the burden of proof laid on the accused was satisfactorily discharged. He also submitted that when there are two possible views coming out of the evidence of the witnesses, the one favouring the accused was to be accepted. He relied upon the judgments titled as **State of Maharashtra v. Dnyaneshwar Laxman Rao Wankhede** (2009) 15 SCC 200 and **C.M. Girish Babu v. CBI, Cochin, High Court of Kerala** (2009) 3 SCC 779.

5. Mr. Narender Mann, learned counsel appearing for the CBI submitted that the discrepancies in the statements of witnesses are insignificant and otherwise natural due to long time gap. He submitted that the accused demanded Rs.1000/- from the complainant and on his informing him about the marriage of his brother, he agreed to take

Rs.500/- from the complainant after his brother's marriage. Further, on the complainant expressing need, the accused returned Rs.200/- on the understanding that he will be given Rs.700/- after the marriage. He further submitted that there could not be any reason for the accused keeping the money under the cushion instead of keeping it in his pocket.

6. Though, the learned Special Judge has analyzed the evidence of the witnesses PW2, PW3 and PW5, I have also chosen myself to re-appreciate the testimony of these witnesses. The testimony of PW2 is to be seen in the background of the fact that accused had admittedly challaned him twice and may be, as alleged by the accused, the complainant was carrying some grudge against him. However, that alone cannot be the reason to discard the testimony of the complainant, though, it will make one cautious to scrutinize his testimony. He stated that the accused had demanded Rs.1000/- otherwise he would be challaned again. The accused told him to make payment on 26th April, 1989 near Jain School, Green Park at 10 am, which was at a distance of about five minutes from the accused's house. When the complainant told the accused that he was not in a position to make payment since the marriage of his brother is to take place, the accused directed him to make payment of Rs.500/- and the balance to be paid afterwards. The complainant stated that he along with PW3/Mr. Jain went to the house of the accused. He went on the second floor while PW3 kept standing downstairs at the ground floor. He told the accused that PW3 was his relative. The accused asked him whether he had brought the agreed amount of Rs.500/-? When he said that he has brought the money, accused asked him to hurry up. The complainant gave the money to the accused and while accepting the same with the right hand, he told him that after the marriage of his brother, he should pay the balance of Rs.500/-. PW2 requested the accused to return him some money, since the marriage of his brother was to be solemnized. The accused at this request, returned Rs.200/- and said that he should pay balance Rs.700/- after the marriage. After counting the money, the accused kept the same under the cushion of sofa. Mr. Jain gave signal to the members of the raiding party, which arrived at the spot and after challenging him apprehended the accused and recovered the tainted money of Rs.300/- from below the cushion of the sofa.

7. Before proceeding to see the veracity of the testimony of this witness, in the light of the testimonies of other witnesses, namely PW3,

PW5 and PW6 and to see as to whether the discrepancies as pointed out by learned counsel were material as alleged by him or insignificant as submitted by learned counsel for the prosecution, it may be appropriate to refer to the judgment in the case of **Zamir Ahmed v. The State,** 1996 Crl. Law Journal 2354. With regard to the discrepancies, it was observed by the Division Bench of this court that:-

> "It would be a hard not to crack to find out a case which is bereft of embellishment, exaggeration, contradictions and inconsistencies. The said things are natural. Such contradictions and inconsistencies are bound to creep in with the passage of time. If the witnesses are not tutored they would come out with a natural and spontaneous version on their own. The two persons on being asked to reproduce a particular incident which they have witnessed with their own eyes would be unable to do so in like manner. Each one of them will narrate the same in his own words, according to his own perception and in proportion to his intelligence power of observation."

8. In the present case, the testimony of the complainant and also that of the other material witnesses viz PW3, PW5 and PW6 have been analyzed in the background of the fact that the complainant was earlier challaned by the accused. The accused in his statement under Section 313 Cr.P.C. stated that the complainant and other gawalas used to supply milk to the CBI officials free of cost and they were in the habit of getting MCD officials trapped. In the cross-examination of the complainant also, various instances were put to him regarding traps laid on number of other MCD Inspectors, who had challaned other gawalas.

9. Some of the discrepancies which have been noted seem to be material. It is noted that with regard to the payment of Rs.1000/-, PW5 said that he had heard from CBI officials that accused was demanding Rs.1000/- from the complainant, but the complainant was unable to bring the same. Even learned Special Judge has termed this discrepancy in the statement of complainant and PW3 as the material one by noting as under:-

> "…The version of the conversation between the accused and the complainant given by PW2 and PW3 is discrepant to the extent that complainant PW2 did not state that accused demanded

Rs.1000/- whereas PW3 shadow witness has not stated so but he stated that the accused demanded Rs.1000/-. Complainant has not stated that he demanded Rs.1000/- and the accused asked him whether he brought the settled amount but PW3 stated that the accused asked the complainant whether he had brought Rs.1000/-. He has himself not told that he had brought Rs.500/-. PW3 has not stated in his previous statement that the accused demanded Rs.1000/- at the time of talks..."

10. Another discrepancy which has been taken note of by learned Special Judge as material is with regard to the time of return of Rs.200/- by the accused to the complainant in the following manner:-

"…Besides this, there is another discrepancy in this statement that as per complainant, the accused returned Rs.200/- when he was counting the money to the complainant PW2 prior to keeping the money beneath the cushion of sofa and not after he kept the same. But according to PW3, after receipt of the tainted money from PW2, the accused kept the same under the cushion of the sofa and then PW2 asked the accused to return the money and thereafter he returned the money to the complainant after taking from sofa. The above discrepancies in their testimonies regarding demand of money and return of Rs.200/- to PW2 complainant go to show that the testimonies of these PWs have not received corroboration from each other on the point of demand of bribe..."

11. In addition to above, it may be noted that regarding post raid proceedings and recovery memo Ex.PW2/C, there arises suspicion, inasmuch as, this is signed by complainant on 24th April, 1989 whereas by all other witnesses on 26th April, 1989. No explanation has been put forward with regard to the discrepancy regarding this date. PW5 has stated that he does not remember as to who prepared the post raid proceedings i.e. recovery memo. It is also observed that in about 3/4th part of this document Ex.PW2/C the spacing is much more than the spacing in the last few lines. This gives an impression that the said document was already signed and due to shortage of space, the content was subsequently squeezed to fit the space available. It was also put to all witnesses in their cross-examinations that no post raid proceedings Ex. PW2/C was prepared at the spot but was prepared in the office of CBI.

12. With regard to the recovery of the tainted money from under the cushion, it was said by PW2, that the same was recovered by PW3, whereas PW3 said that he did not remember as to who recovered the same. Then he said may be possibly he recovered. PW6 said that it was on his direction that PW3 recovered money from under the cushion. PW5 stated that he did not remember as to who recovered the same.

12.1 PW2 said that he along with PW3 went to the house of the accused and that PW3 remained sitting on the scooter at ground floor. PW2 said he went upstairs to the house of the accused on second floor and after 5-10 minutes he came down to bring PW3 to the room of the accused. As against this, PW3 said that after few minutes he also went to the second floor house of the accused, while PW2 remained standing upstairs.

12.2 There is also a doubt with regard to the position of the accused at the time of trap and apprehension. PW2 said that he and the accused were sitting on the sofa when the raiding party came and apprehended the accused. He stated that the accused was apprehended from inside the room and not from outside. PW6, on the other hand said that the accused was apprehended when he was talking with the complainant/PW2 outside the room.

12.3 PW2 had also said that the accused was alone in the room when he went there. PW3 said that he did not remember if he had stated in his statement Ex.PW3/DA that when he went to the house of the accused he was sitting with his wife. He was confronted with his statement Ex.PW3/DA where it was so recorded.

12.4 With regard to the pre raid proceedings also there was some doubt inasmuch as PW2 said that the pre raid proceedings Ex.PW2/B were recorded in Hindi which he had read and signed. He, however, admitted that Ex. PW2/B was in English. On this, PW3 also said that he did not remember in whose hand writing it was. It was suggested to him in his cross-examination that no pre raid proceedings was held in his presence and that his signatures were obtained subsequently on plain papers.

12.5 With regard to hand wash also there were discrepancies inasmuch as PW2 did not know as to who had taken hand washes of the accused or that of the cushion. PW5 also did not remember as to who had taken hand wash of the accused or of the cushion. PW6, who was the IO, also did not remember as to who had taken hand wash. Later on he said that he might have taken the hand wash of the accused, but he had not mentioned it either in his statement or in the recovery memo that he had taken hand wash of the accused or that of the cushion. It was suggested to him that no washes were taken by him at the spot.

12.6 Though, not very glaring it is also noticed that PW3 said that he along with PW2 had taken tea with the accused while they were talking. However, he did not remember if tea was taken before or after the talks, but he confirmed having taken tea when they were transacting. As against this, the complainant/PW2 did not remember having taken any tea or water at any point of time. It is also seen that the complainant has also nowhere said in his examination in chief about having given marriage invitation card to the accused. However, in his cross-examination he said that he had given the invitation card along with envelope Mark "A" and Mark "B" to the accused. PW3 did not say anything with regard to the marriage/invitation card or the envelope having been given by the complainant to the accused. PW5 also does not recollect if any card was lying under the sofa cushion. PW6, on the other hand, said that there was no card or envelope in the room at that time.

13. In the light of the abovementioned discrepancies, the defence has created some doubt in the prosecution case. It is more so in view of specific suggestion to the complainant in cross-examination that he had placed the invitation card along with the tainted money cleverly under the cushion of the sofa where he was sitting and that the accused did not demand or accept any money from him.

14. In view of the above, it may not be safe to rely upon the

testimonies of PW2, PW3, PW5 and PW6 regarding demand and acceptance of money by the accused. The recovery of tainted money alone is not sufficient to record the conviction. In the case of **Suraj Mal v. State (Delhi Administration)** (1979) 4 SCC 725 it was held that mere recovery of money, divorced from the circumstances under which it is paid, is not sufficient to convict the accused when the substantive evidence in the case is not reliable. Mere recovery of money cannot prove the case of the prosecution against the accused in the absence of any instance to prove the payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe. In the case of **C.M. Girish Babu** (supra). The Supreme Court held that mere recovery of money from the accused by itself is not enough in the absence of substantive evidence of demand and acceptance. In this case the reliance was placed on a three-Judge Bench judgment in **M. Narsinga Rao v. State of A.P.** wherein it was held as under:-

"**20.** A three-Judge Bench in **M. Narsinga Rao v. State of A.P.** while dealing with the contention that it is not enough that some currency notes were handed over to the public servant to make it acceptance of gratification and prosecution has a further duty to prove that what was paid amounted to gratification, observed: (SCC p.700, para 24)

> 24. ...we think it is not necessary to deal with the matter in detail because in a recent decision rendered by us the said aspect has been dealt with at length. (Vide **Madhukar Bhaskarrao Joshi v. State of Maharashtra**) The following statement made by us in the said decision would be the answer to the aforesaid contention raised by the learned Counsel: (SCC p.577, para 12)
>
> > '12. The premise to be established on the facts for drawing the presumption is that there was payment or acceptance of gratification. Once the said premise is established the inference to be drawn is that the said gratification was accepted `as motive or reward' for doing or forbearing to do any official act. So the word `gratification' need not be stretched to mean reward because reward is the outcome of the presumption which the court has to draw on the

> factual premise that there was payment of gratification. This will again be fortified by looking at the collocation of two expressions adjacent to each other like `gratification or any valuable thing'. If acceptance of any valuable thing can help to draw the presumption that it was accepted as motive or reward for doing or forbearing to do an official act, the word `gratification' must be treated in the context to mean any payment for giving satisfaction to the public servant who received it.

22. It is equally well settled that the burden of proof placed upon the accused person against whom the presumption is made under Section 20 of the Act is not akin to that of burden placed on the prosecution to prove the case beyond a reasonable doubt.

> "4. …It is well established that where the burden of an issue lies upon the accused he is not required to discharge that burden by leading evidence of proof his case beyond a reasonable doubt. That is, of course, the test prescribed in deciding whether the prosecution has discharged its onus to prove the guilt of the accused; but the same test cannot be applied to an accused person who seeks to discharge the burden placed upon him under Section 4 under the Prevention of Corruption Act. It is sufficient if the accused person succeeds in proving a preponderance of probability in favour of his case. It is not necessary for the accused person to prove his case beyond a reasonable doubt or in default to incur verdict of guilt. The onus of proof lying upon the accused person is to prove his case by a preponderance of probability. As soon as he succeeds in doing so, the burden shifts to prosecution which still has to discharge its original onus that never shifts, i.e.; that of establishing on the whole case the guilt of the accused beyond a reasonable doubt." (See **V.D.Jhangan v. State of U.P.** at AIR p. 1764, para 4). (Emphasis supplied)"

15. In the case of **Dnyaneshwar Laxman** (supra) also the Supreme Court held as under:-

> "**16.** Indisputably, the demand of illegal gratification is a sine qua non for constitution of an offence under the provisions of the Act. For arriving at the conclusion as to whether all the ingredients of an offence, viz., demand, acceptance and recovery of the amount of illegal gratification have been satisfied or not, the court must take into consideration the facts and circumstances brought on the record in their entirety. For the said purpose, indisputably, the presumptive evidence, as is laid down in Section 20 of the Act, must also be taken into consideration but then in respect thereof, it is trite, the standard of burden of proof on the accused vis-a-vis the standard of burden of proof on the prosecution would differ. Before, however, the accused is called upon to explain as to how the amount in question was found in his possession, the foundational facts must be established by the prosecution. Even while invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt."

16. Though, the accused has led no evidence in defence, but from the cross-examinations of prosecution witnesses he has satisfactorily discharged the onus laid upon him. By preponderance of probability the accused has been able to create doubt in the prosecution case. From the evidence as noticed above, a suspicion arises against the prosecution case, more so, in view of the fact that the complainant might be having a grudge against the accused for challaning him on previous occasions. Even otherwise, in view of all this it is difficult to hold that prosecution has proved its case beyond reasonable doubt. It is also well settled principle of law that where it is possible to have both the views, one in favour of the prosecution and the other in favour of the accused, the latter should prevail (see **Dilip v. State of M.P.** [2009] 1 SCC 450 and **Gagan Kanejia v. State of Punjab** [2006] 13 SCC 516).

17. In view of the aforementioned reasons, the impugned judgment and order, are set aside, the appeal is allowed. The accused stands acquitted. His surety bonds are discharged.

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UNION OF INDIA & ORS. ....PETITIONER

VERSUS

JUGESHWAR DHRVA ....RESPONDENTS

(ANIL KUMAR & VEENA BIRBAL, JJ.)

W.P.(C) NO. : 7888/2010 DATE OF DECISION: 25.03.2011

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.

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.

Perusal of record shows that vide letter dated 9th May, 2000, respondent was informed that his name has been placed in the panel of selected candidates and thereafter on 5th April, 2002, respondent was informed that he was unfit for A-3 post, as such he was not fit for JE-II/Signal, Scale 5000-8000. He was further asked vide aforesaid letter that if he wanted to opt for an alternative post then he should inform the office. It is also an admitted position that petitioner applied for an alternative appointment. Thereafter on 22nd

October, 2002, respondent was informed that his application has been considered by the competent officer and the post of Commercial Clerk grade Rs. 3200-4900 was lying vacant and if he was ready, his case could be referred to the Chief Officer. The letter dated 22nd October, 2002 reads as under:-

"S.No. 729E/1400/S&B/P.B/UMB

Dated: 22.10.2002

Divisional Officer

N.R. Ambala Cantt.

Sh. Jugeshwar Dhrva

Sh. Nityananda Dhrva

Village/P.O. Meghdaga,

Rangodhama

P'S. Sundargarh, Orissa-770002.

Sub:- In reference to appointment to alternative post other than

A.P.P. J.E.T.T./Sig.

Ref:- Your application dated 04.07.02

After been declared unfit for A-3 grade by medical memo No. 231541, dated 4.7.02; and been declared fit for B2 and below; you by you said letter, have made request for suitable job. Your application has been considered by competent officer and it has been decide that in this division, the post of commercial clerk grade – 3200-4900 (R.P'S.), S.T., is lying vacant for this post, your case can be referred to Chief Officer, if in case you are ready for it. It you are not ready, then send your application to this office. Please send your application within 15 days of this letter, so that appropriate action may be taken.

Sd/-

DRM

N.R., Ambala"

Thereafter vide letter dated 10th December, 2002, Divisional Railway Manager, Ambala informed office of General Manager, Baroda House, New Delhi that the post of Commercial Clerk, Grade 3200-4900 ST was lying vacant and requested for his decision as per memo no. 11931/99. The said letter reads as under:-

Divisional Office

Ambala Cantt.

S.No. 729 E/1400/S& T/P.O. Ambala

Dated: 10.12.2002

Office of General Manager,
Baroda House
New Delhi.

Sub: In reference to appointment of Sh. Jugeshwar/ Nityananda to post of alternative to Upper J.E. 11/sig. grade 5000-8000; through Memo no.11931/99.

The above stated person was selected by virtue of R.R.B. for post of Upper J.E./sig.

However, he by medical examination done by DMO/ UMB/Ambala through medical memo no. 23541, dated 4.7.02 was declared unfit for post of J.E. 11/sig. Grade and by medical memo no. 231541, dated 4.7.02, was declared fit for B2 post.

In this division at present the post of commercial clerk, Grade 3200-4900, S.T. is lying vacant. The applicant has made application for appointment to alternative post. Thus, by memo no.11931/99, the matter has been referred to General Manager for his decision it. Please inform the office with your decision on this matter, so that applicant may be given answer.

Sd/-

(Trilok Chawdhary)
Divisional Railway Manager/
Acting, Ambala"

Again vide letter dated 7th March, 2007, General Manager, Head Office, Baroda House was informed by the office of Divisional Railway Manager, Ambala that the post of Commercial Clerk was still lying vacant and appropriate directions were sought from the Head Office. If appointment in the equivalent grade was not permissible then why option was given to the respondent for an alternative appointment for the post of 'Commercial Clerk' in the scale of Rs. 3200-4900. **(Para 12)**

[Ch Sh]

APPEARANCES:

FOR THE PETITIONER : Mr. Kumar Rajesh Singh, Advocate.

FOR THE RESPONDENTS : None.

RESULT: Writ Petition Dismissed.

VEENA BIRBAL, J.

1. By way of this petition under Article 226 of the Constitution of India, petitioners have challenged the impugned order dated 16th March, 2010 passed in O.A No.653/2010 as well as the order dated 26th August, 2010 passed in R.A.No.212/2009 by the Central Administrative Tribunal, Principal Bench, New Delhi (hereinafter referred to as `the Tribunal.).

2. Briefly the facts relevant for disposal of the present petition are as under:-

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 such, 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 alterative 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 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.

3. Aggrieved with the same, respondent filed an O.A. before the Tribunal challenging the rejection order dated 14th August, 2008 issued by petitioner nos.3 & 4.

4. The stand of the respondent before the Tribunal was that as per Railway Board circulars dated 24.9.1999, 7.8.2000 and 29.12.2000 there are instructions for an alternative employment to the medically unfit

candidates against the below category post for which a candidate was medically fit. Respondent also cited precedents contending that in the past also, many such candidates who were medically unfit for B1 have been appointed in the alternative posts with medical fitness C1, C2 and below category in different divisions of Railways and also referred to various orders issued by petitioners in this regard (Annexure A-15 (colly). Respondent also contended before the Tribunal that through out he opted for an alternative post in the year 2002 and the same has been rejected after a lapse of 6 years which has caused serious prejudice to him in as much as he has become overage.

5. The stand of petitioners before the Tribunal was that as per instructions contained in its circular P'S.No.13588 dated 25th May, 2009, no alternative appointment was permissible to the medically unfit empanelled candidates and all the previous policies in this regard have been discontinued. It was also contended that as per instructions contained in its circular PS No.11931 dated 16.12.1999 which has been relied upon by respondent, alternative appointment could be considered only in the equivalent grade and as no vacancy for ST in the grade of Rs. 5000-8000 was available for which he was provisionally selected, no alternative appointment could be given to him. It was also contended that in the past the candidates who were provided alternative post were of Group 'D' and were in initial grade of appointment.

6. After considering the rival contentions of the parties, the Tribunal has held that the post of 'Commercial Clerk' as well as the post for which respondent was found provisionally selected are Group C posts though in a different pay scale and if there was a policy laid down by the Railway Board that a person who is selected for a post by the RRB but is found medically unfit for the said post, could be considered for an alternative appointment in the same grade only, then why the petitioners have taken six years to decide the issue. The Tribunal further held that as far as the Railway Board's circular/letter dated 25th May, 2009 by which it has been decided to discontinue the policy of alternate appointment to the medically unfit empanelled candidates, the said circular is prospective in nature as it is specially mentioned therein that it will take effect from the date of issue, as such the same will not come in the way of respondent. Further the case of respondent has already been taken up for alternative appointment in the year 2002. Accordingly, the Tribunal vide impugned

order dated 16th March, 2010 has directed the petitioners to reconsider the claim of the respondent for any other alternative post against ST category in case the respondent fulfills the eligibility conditions and the medical category is B-2 and below for the said post or even against the post of Commercial Clerk in Ambala Cantt in case that vacancy is still available and communicate the decision to respondent.

7. Aggrieved with the aforesaid impugned order of the Tribunal, petitioners had filed a review application i.e R.A.No. 212/2009 before the Tribunal and contended that as per instructions contained in PS NO.11931/ 99 dated 16th December, 1999, respondent cannot be given an alternative appointment in lower grade and the said aspect of matter was not considered by the Tribunal, as such review of impugned order dated 16th March, 2010 was sought.

8. The review application was dismissed by the Tribunal vide ˇimpugned order dated 26th August, 2010 holding that the petitioners were trying to re-argue the matter which was not permissible and all the points raised had already been considered and the Tribunal cannot sit in appeal over its own decision.

9. Aggrieved with the aforesaid orders dated 16th March, 2010 and 26th August, 2010 of the Tribunal, present writ petition is filed.

10. Learned counsel for the petitioners has contended that the Competent Authority has rightly rejected the claim of the respondent for an alternative appointment. It is contended that as per instructions contained in PS No.11931/99 dated 16.12.1999 an alternative appointment can be provided only in the equivalent grade whereas post of `Commercial Clerk. was falling in the lower grade and there was no vacancy against the ST quota in the equivalent grade and same was informed to the respondent vide letter dated 14th August, 2008 by the Divisional Office, Ambala Cantt. It is further contended that as per instructions contained in circular PS 13588/2009 dated 25.5.2009 the policy of providing alternative appointments to the medically unfit empanelled candidates selected through RRBs/RRCs for any Group 'C' or Group 'D' post has been discontinued. In these circumstances, Tribunal ought not to have issued directions to the petitioners for considering the case of the respondent for an alternative appointment.

11. 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.

12. 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.

Perusal of record shows that vide letter dated 9th May, 2000, respondent was informed that his name has been placed in the panel of selected candidates and thereafter on 5th April, 2002, respondent was informed that he was unfit for A-3 post, as such he was not fit for JE-II/Signal, Scale 5000-8000. He was further asked vide aforesaid letter that if he wanted to opt for an alternative post then he should inform the office. It is also an admitted position that petitioner applied for an ˇalternative appointment. Thereafter on 22nd October, 2002, respondent was informed that his application has been considered by the competent officer and the post of Commercial Clerk grade Rs. 3200-4900 was lying vacant and if he was ready, his case could be referred to the Chief Officer. The letter dated 22nd October, 2002 reads as under:-

"S.No. 729E/1400/S&B/P.B/UMB

Dated: 22.10.2002

Divisional Officer

N.R. Ambala Cantt.

Sh. Jugeshwar Dhrva
Sh. Nityananda Dhrva

Village/P.O. Meghdaga,
Rangodhama
P'S. Sundargarh, Orissa-770002.

Sub:- In reference to appointment to alternative post other than A.P.P. J.E.T.T./Sig.

Ref:- Your application dated 04.07.02

After been declared unfit for A-3 grade by medical memo No. 231541, dated 4.7.02; and been declared fit for B2 and below; you by you said letter, have made request for suitable job. Your application has been considered by competent officer and it has been decide that in this division, the post of commercial clerk grade – 3200-4900 (R.P'S.), S.T., is lying vacant for this post, your case can be referred to Chief Officer, if in case you are ready for it. It you are not ready, then send your application to this office. Please send your application within 15 days of this letter, so that appropriate action may be taken.

Sd/-

DRM

N.R., Ambala"

Thereafter vide letter dated 10th December, 2002, Divisional Railway Manager, Ambala informed office of General Manager, Baroda House, New Delhi that the post of Commercial Clerk, Grade 3200-4900 ST was lying vacant and requested for his decision as per memo no. 11931/99. The said letter reads as under:-

Divisional Office

Ambala Cantt.

S.No. 729 E/1400/S& T/P.O. Ambala

Dated: 10.12.2002
Office of General Manager,
Baroda House

New Delhi.

Sub: In reference to appointment of Sh. Jugeshwar/ Nityananda

to post of alternative to Upper J.E. 11/sig. grade 5000-8000; through Memo no.11931/99.

The abovestated person was selected by virtue of R.R.B. for post of Upper J.E./sig.

However, he by medical examination done by DMO/UMB/ Ambala through medical memo no. 23541, dated 4.7.02 was declared unfit for post of J.E. 11/sig. Grade and by medical memo no. 231541, dated 4.7.02, was declared fit for B2 post.

In this division at present the post of commercial clerk, Grade 3200-4900, S.T. is lying vacant. The applicant has made application for appointment to alternative post. Thus, by memo no.11931/99, the matter has been referred to General Manager for his decision it. Please inform the office with your decision on this matter, so that applicant may be given answer.

Sd/-

(Trilok Chawdhary)
Divisional Railway Manager/
Acting, Ambala"

Again vide letter dated 7th March, 2007, General Manager, Head Office, Baroda House was informed by the office of Divisional Railway Manager, Ambala that the post of Commercial Clerk was still lying vacant and appropriate directions were sought from the Head Office. If appointment in the equivalent grade was not permissible then why option was given to the respondent for an alternative appointment for the post of 'Commercial Clerk' in the scale of Rs. 3200-4900.

13. Considering the above back ground of the case, the Tribunal has held as under:-

"It is thus clear that as late as in March, 2007 also the Divisional Office had maintained that one post of Commercial Clerk in ST category was lying vacant with them. At this stage applicant again requested the authorities to allow him to join on the post of Commercial Clerk which is evident from page 50. However, all of a sudden vide letter dated 20.6.2008, applicant was informed that his case has been rejected for alternative appointment on the post of Commercial Clerk as it is in the lower grade. In the same

letter applicant was informed that his case is under examination in the office of General Manager (P), NDLS. At this stage, applicant again gave a representation to the authorities but vide letter dated 14.8.2008 applicant was informed that there is no vacant post for direct appointment against DMS-III Grade Rs.5000-8000 against ST category, therefore, his case cannot be considered for alternative appointment meaning thereby that till March, 2007 applicant was given the impression that his case is still under consideration in the office of GM (P), Head Quarters, Baroda House, New Delhi. It is a specific case set up by the applicant that in the meanwhile he has become overaged and had not applied for any other post as his request was sub-judiced. If there was no provision for considering a person against a lower grade then applicant should have been informed as back as in 2002 itself that he cannot be considered for alternative appointment in the lower grade. The request made by the Divisional Office, Ambala Cantt. to the General Manager (P) in 2002 clearly stated that the post of Commercial Clerk in the grade of Rs. 3200-4900 was available in ST category. Respondents have not explained why it took them more than 6 years in deciding this issue. After all, there was a policy laid down by the Railway Board itself that a person, who is selected for a post by the RRB but is found medically unfit, could be considered for alternative appointment in the same grade, therefore, these facts would be known to the office of the General Manager. Keeping a person under a hope that he would be considered for the alternative appointment and ultimately rejecting the claim on the ground that it is in the lower grade after 6 years, cannot be sustained in law. In case he met the requirement of Commercial Clerk and the post was lying vacant in the ST category and there was no other claimant, respondents could always have considered the applicant for the said post. Simply because it was in the lower pay scale, the request of the applicant could not have been rejected because the post of Commercial Clerk is also a Group 'C' post and the post for which applicant was found selected was also a Group 'C' post though in a different pay scale."

The PS 11931 dated 16.12.1999 on which the petitioners are relying contain the administrative guidelines having no legal force. Despite the

existence of aforesaid guidelines/instructions, the petitioners had asked the respondent for his option for an alternative post in the lower grade vide letter dated 5.4.2002 and the respondent had opted for the said post and thereafter the office of petitioners no. 3 and 4 had been corresponding with the respondent for the alternative post on a lower grade for the past 6 years. The correspondence on record shows that respondent has been informed categorically by the office of petitioners no. 3 and 4 that his application has been considered by the competent officer and it has been decided in their division that post of commercial clerk grade 3200-4900 (R.P'S.) ST was lying vacant and if he was ready his case can be considered for that. The respondent's request for issuance of appointment letter is kept pending for 6 years. There is no explanation for the same. It is not denied that when the case of the petitioner was under consideration, there was a policy in existence for an alternative post. It is not the case of the petitioner that post of commercial clerk in S.T. category is not lying vacant. Respondent has also set up a case for the Tribunal that he had become over age and had not applied for any other job. Taking into consideration all the facts and circumstances, it is not open for the petitioner either in equity or in the facts of the present case to deny the respondent an alternative post on the ground that the same is in lower grade. The petitioner itself had chosen to deviate from the aforesaid circular and had been continuously stating that post of commercial clerk is lying vacant and respondent can be considered for that. Under these circumstances, it is not open for them to now contend that an alternative post can be given only in the equivalent grade and not in the lower grade.

As regards PS No. 13588/2009 dated 25.5.2009 by which it is contended that policy to consider for alternative post has been discontinued, the same is not applicable to the facts and circumstances of the present case and the Tribunal has rightly held so. It is categorically stated in the aforesaid circular that the same will take effect from the date of issue. The date of issue of said circular is 25.5.2009 whereas the case of the petitioner relates to the year 2002 when there was no such circular in existence.

In view of above discussion as well as on equity, we do not find any illegality or perversity in the impugned orders of the Tribunal.

The writ petition stands dismissed. The interim stay of the impugned orders of the Tribunal granted by this court vide orders dated 25th November, 2010 stands vacated.

Considering the facts and circumstances, the petitioners shall also pay a cost of Rs.15,000/- to the respondent.

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LPA

R.K. ARORA **....APPELLANT**

VERSUS

AIR LIQUIDE INDIA HOLDING PVT. LTD. & ORS. **....RESPONDENTS**

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

LPA NO. : 233/2011 **DATE OF DECISION: 30.3.2011**

Constitution of India, 1950—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.

The aforesaid facts show that for almost 5 years, the Labour Court could not have proceeded with the case although sufficient opportunities were granted. The above defaults and lapses on the part of the appellant are sufficient and establish that the appeal does not merit interference. 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 of condoning the delay and latches on the part of the appellant, which have their own adverse consequences and result.

(Para 10)

[Ch Sh]

APPEARANCES:

FOR THE APPELLANT : Mr. S.P. Sharma, Advocate.

FOR THE RESPONDENT : None.

RESULT: Dismissed.

SANJIV KHANNA, J.

CM No. 5203/2011 (for exemption)

Allowed, subject to all just exceptions.

LPA No. 233/2011 & CM No. 5202/2011 (delay)

1. The appellant R.K. Arora has assailed the order dated 10th January, 2011, dismissing his writ petition impugning the award dated 11th August, 2006, passed by the Labour Court VI. As there is a delay of ˇ28 days in filing of the present intra-court appeal, CM No. 5202/2011 has been filed for condonation of delay under Section 5 of the Limitation Act, 1963. Learned counsel for the appellant has submitted that the Labour Court had proceeded with great haste and hurry in closing the evidence as the appellant had gone out of India in the course of his employment. It is submitted that this has resulted in miscarriage of justice.

2. As per the case made out by the appellant, his services were terminated by the respondent No. 1 herein M/s Air Liquide Holding India Pvt. Ltd. on 11th January, 2005. The appellant claims that he was a workman protected under the Industrial Disputes Act, 1947 (Act, for short) and that the terms and conditions of employment were governed by the standing orders under Model standing orders, he was entitled to retrenchment compensation and the respondent No. 1 had failed to comply with Section 25F of the Act. Respondent No. 1, disputed the claim and accordingly reference was made to the Labour Court.

3. On 31st October, 2005, Labour Court framed two issues namely (1) Whether the appellant was not a workman within the meaning of Section 2(s) of the Act as claimed by the Management; and (2) whether the termination of services of the appellant by the Management on 11th January, 2005 was illegal and unjustified and if so, what was the effect thereof?

4. The case was fixed for recording of appellant's evidence on 31st January, 2006. On the said date, no witness was present on behalf of the appellant. Adjournment was requested for and accordingly granted subject to final opportunity, as it was not opposed. On the next date of hearing, again the evidence of the appellant could not be recorded as he had filed an application that certified copies of the standing orders had not been placed on record and the management should be directed to place them on record. The request for adjournment was allowed and the case was fixed for the appellant's evidence on 20th May, 2006. On the said date, evidence could not be recorded as the appellant protested that the management had not placed certified copy of the standing orders on record. The Labour Court, however, recorded that the management did not have certified copy of the standing orders allegedly applicable to the appellant. Final opportunity was granted to the appellant to lead evidence on 7th August, 2006. Again on 7th August, 2006, the appellant did not lead evidence and an application was filed that the management should first lead the evidence on issue No. 1. The application was dismissed and final opportunity was granted to the appellant to lead evidence on 5th October, 2006. On the said date, the appellant had sought an adjournment as he had moved an application for transfer of the case from the said Presiding Officer to another Presiding Officer. At the request of the appellant, the case was adjourned. On 11th December, 2006, no witness of the appellant was present and in the interest of justice, the matter was once again adjourned. On the next date of hearing i.e. 1st February, 2007, the order sheet records that the appellant had filed two affidavits by way of evidence but the copies of the said affidavits were served on the management on the same date. Two applications were filed by the appellant along with documents, 136 in number. Thereafter, the management took adjournment to file reply to the applications and ˇvide order dated 28th March, 2007, costs of Rs.500/- was imposed on the management. By order dated 11th May, 2007, the application on behalf of the workman for placing on record additional documents was allowed, subject to the management questioning the relevancy of the documents. Application for framing of additional issues was dismissed. The matter was fixed for cross-examination of the workman on 13th July, 2007.

5. On 13th July, 2007 and 10th August, 2007, the workman was not cross-examined as an application was filed by the management. The said application was heard on 29th September, 2007 and was disposed

of on 6th October, 2007. On 6th October, 2007, the appellant again filed an application which was dismissed on 31st October, 2007. On 14th December, 2007, the matter was adjourned to 18th January, 2008 as the authorized representative of the management was sick. The right to cross-examination by the management was closed on 18th January, 2008. This order was recalled on 27th February, 2008, subject to payment of costs of Rs.2,000/- which was subsequently reduced to Rs.500/- on 2nd April, 2008.

6. On 17th May, 2008, finally one of the witnesses, Mr. H'S. Mokha was cross-examined by the management.

7. The appellant moved another application for summoning of original documents which was allowed, so that the appellant could be cross-examined comprehensively on 30th July, 2008. On the said date, the cross-examination was not carried out as the authorized representative of the management had fractured his leg. On 18th December, 2008, again, the matter was adjourned to enable the management to cross- examine the appellant. On 6th April, 2009, the representative of the appellant took time to segregate documents and the request was allowed and the case was adjourned to 26th August, 2009. In between on 11th August, 2009 the matter was taken up as the appellant filed an application on 25th July, 2009 seeking permission to exhibit the computer generated documents on record. On 26th August, 2009, the matter was adjourned to 5th November, 2009 for reply and arguments on the application. On the said date, the matter was adjourned to 13th November, 2009. The arguments were finally heard on 9th December, 2009, but the case was again adjourned to 2nd January, 2010. On the said date, by a detailed order, the application was dismissed and it was noticed that the appellant had been adopting delaying tactics. It was noticed that the matter had been fixed several times for recording of evidence of the workman and the case was adjourned to 7th July, 2010.

8. On 7th July, 2010, the appellant was not present in person for cross-examination. The Labour Court noticed that the issues were framed way back on 31st October, 2005 and sufficient opportunities have been granted. It was further recorded that no justified reasons could be canvassed for non-appearance of the appellant. Accordingly, the evidence of the appellant workman was closed and the case was fixed for evidence

of the management on 19th August, 2010. On 19th August, 2010, the appellant filed an application for recall/setting aside the order dated 7th July, 2010. It was stated in the application that "due to unavoidable circumstances, evidence of the appellant could not be produced on 7th July, 2010". On the said date, as no witness of the management was present, the entire proceedings were closed and the Labour Court, thereafter, proceeded and has adjudicated the claim on ˇmerits on the basis of the available material. In paragraph 11 of the order dated 11th August, 2006, the Labour Court observed as under:-

> "11. The respondent/management at the very outset has raised an objection that the claimant does not fall within the category of workman as is defined under Section 2(s) of the Industrial Disputes Act, 1947 and therefore, the provisions of Industrial Disputes Act, 1947 are not applicable in the case of claimant. There appears to be a considerable substance and force in the contention of the management, in as much as, claimant admittedly was appointed as Deputy Management (Administration) by the management, and during the relevant period i.e. w.e.f. 1.4.2000, he admittedly was working against the post of Manager (Administration). Further, the salary drawn by the claimant, admittedly was to the tune of Rs.27,060/- per month, besides being other benefits. It is also not disputed as is evident from the pleadings of the parties on record, that the claimant possessed high qualifications like M.A. in Public Administration, Diploma in office Organization and LL.B. degree. All these qualifications were mentioned by the claimant at the time of his entry into the service of the management. The appointment letter which has been placed on record by the claimant himself, nowhere indicate that he was to work merely as a clerk. In any case, by any stretch of imagination it cannot be made to appear that the claimant was working as a workman with the management."

9. Learned counsel for the appellant has submitted that some adjournments were taken by the management and twice costs of Rs. 500 were imposed on them. This is no doubt true as is apparent from the facts detailed above. However this is one part of the story. What is also apparent is the repeated and large number of adjournments which have been taken by the appellant or on his behalf. The issues, as noticed

above, were framed on 31st October, 2005. Thereafter, on 6 dates, the appellant took adjournments i.e. 31st January, 2006, 13th March, 2006, 20th May, 2006, 7th August, 2006, 19th October, 2006 and 11th December, 2006. On the next date of hearing i.e. 1st February, 2007, appellant filed two applications which were disposed of on 11th May, 2007, one of the applications was dismissed. One of the witnesses of the appellant was cross-examined on 17th May, 2008. The appellant again moved another application for summoning of original documents. On 6th April, 2009, the appellant again prayed for some time to segregate the documents and on his request the case was adjourned to 26th August, 2009. In between on 25th July, 2009, the appellant moved an application which was dismissed on 2nd January, 2010 and the case was adjourned to 7th July, 2010 for cross-examination of the appellant. On the said date again, the appellant was not present. Accordingly, the evidence of the appellant was closed.

10. The aforesaid facts show that for almost 5 years, the Labour Court could not have proceeded with the case although sufficient opportunities were granted. The above defaults and lapses on the part of the appellant are sufficient and establish that the appeal does not merit interference. 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 of condoning the delay and latches on the part of the appellant, which have their own adverse consequences and result.

11. Accordingly, as we do not find any merit in the appeal, we are not inclined to issue notice on the application for condonation of delay. The application and consequently the appeal are dismissed.

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W.P. (C)

MUNICIPAL CORPORATION OF DELHI ....PETITIONER

VERSUS

SH. SULTAN SINGH & ORS. ....RESPONDENTS

(ANIL KUMAR & SUDERSHAN KUMAR MISRA, JJ.)

W.P. (C) NO. : 7947/2010 DATE OF DECISION: 20.04.2011

Service Law—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.

Apparently the petitioner misconstrued the claim of the respondents who were not seeking promotion to the post of Garden Chaudharies but are only claiming difference in pay of Mali/Chowkidar and Garden Chaudharies as they had been performing the work of Garden Chaudharies after the Deputy Director Horticulture directed them to perform the said work which was also intimated to headquarter Horticulture without any objection either from the Horticulture department or any other competent authority at any time. This is also ˇnot the plea of the petitioner that Headquarter of Horticulture Department and alleged competent authority was not aware of work of Garden Chaudharies being taken from Malies/ Chowkidars as sufficient number of posts of Garden Chaudharies were not filled and all the posts according to accepted norms were not created. **(Para 22)**

The petitioner has relied on (1997) 6 SCC 200, **Mohd'Swaleh v. Union of India & Ors** and W.P(C) No.4231/2002 decided on 17th March, 2011 titled **MCD v.**

Sh.Bhanwar Singh & Anr. In **Bhanwar Singh & Anr** (Supra) the Single Judge of the High Court had set aside an award passed against the Municipal Corporation of Delhi holding that the workman was entitled in future to wages as of a Garden Chaudhary. The workman in the said case had filed a complaint under Section 33 of Industrial Disputes Act, 1947 regarding the terms of his employment having been changed during the tenure of general dispute between the employer MCD and the Chowkidar, Beldar, Bullockmen, Bhishties, Coolies, Machinemen, Hedgemen, Garden Chaudhary etc. employed with it. It was asserted by the workman that term of his employment had been changed by his transfer from Shahdara zone where he was working to the Headquarters (Horticulture Department). In these circumstances the reference was made 'Whether the workman was entitled to wage of Garden Chaudhary for the period 3rd December, 1988.. The Tribunal had held that the workman though was not entitled ˇto the relief of regularization on the post of mali with effect from 1st March, 1978, however, he was held entitled to wages equal to regular malies with effect from 1st March, 1978 till the date of his regularization up to 31st March, 1998 without any increment. It was also held that the workman shall be entitled to receive wages of regular Garden Chaudharies in proper pay scale. The learned Single Judge relying on W.P(C) No.4023/1997 titled **Municipal Corporation of Delhi v. Jagdish Chander** where it was held that proper procedure has to be followed for promotion to the post of Garden Chaudhary had set aside the award holding that the workman was entitled for emoluments as of mali only as he was asked to work as Garden Chaudhary by the Assistant Director who was not authorized to do so. Apparently the case relied on by the petitioner is distinguishable as the respondents are not claiming regular appointment to the post of Garden Chaudhary. The respondents are claiming difference in wages as they were directed to perform the work of Garden Chaudharies by the Deputy Director (Horticulture) and the details of respondents who had been

directed to work as Garden Chaudharies and the tenure during which they worked as Garden Chaudharies, were sent to the Horticulture headquarter and Municipal Corporation of Delhi without any objection or action on the part of petitioner. In the case of respondents it is also apparent that the work of Garden Chaudharies was available. In the circumstances, on the basis of ratio of **Sh.Bhanwan Singh & Anr** (Supra) it cannot be held that the respondents are not entitled for difference in wages. **(Para 26)**

[Ch Sh]

APPEARANCES:

FOR THE PETITIONER : Mr. Gaurang Kanth, Advocate.

FOR THE RESPONDENTS : Mr. Rajinder Nischal, Advocate.

CASES REFERRED TO:

1. *GNCT of Delhi* vs. *B'S.Jarial and Anr.* W.P(C) No.5742/2010.
2. *Sultan Singh & Ors* vs. *Municipal Corporation of Delhi* T.A No.1317/2009.
3. *State of West Bengal & Ors* vs. *Kamal Sen Gupta & Anr,* (2008) 2 SCC (L&S) 735.
4. *MCD* vs. *Sh.Bhanwar Singh & Anr.* W.P(C) No.4231/2002.
5. *Secretary-cum-Chief Engineer, Chandigarh* vs. *Hari Om Sharma and Ors,* 1999 (1) SLJ 23 (SC).
6. *Secy.-cum-Chief Engineer* vs. *Hari Om Sharma,* (1998) 5 SCC 87.
7. *Selvaraj* vs. *Lt.Governor of Island , Port Blair and Ors,* (1998) 4 SCC 291.
8. *Municipal Corporation of Delhi* vs. *Jagdish Chander* W.P(C) No.4023/1997.
9. *Mohd'Swaleh* vs. *Union of India & Ors* (1997) 6 SCC 200.
10. *Sh.Bhagwan Dass and Ors.* vs. *State of Haryana & ors.,* 1987 (3) SLJ 93.

RESULT: Dismissed.

ANIL KUMAR, J.

1. The petitioner, Municipal Corporation of Delhi 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 the 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 is found to be genuine and order dated 7th October, 2010 in review application No.270/2010 dismissing the review application.

2. Brief facts to comprehend the disputes are that 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.

3. The respondents had contended that they had joined as Malies/Chowkidars and were regularized with effect from different dates which were detailed by the respondents in their petition. The respondents also disclosed the dates and particulars since when they had been performing the duties and responsibilities of Garden Chaudhary pursuant to directions by their superior officers. The respondents contended that the petitioners admitted that the respondents were performing the duties and responsibilities of Garden Chaudhary in the lists sent by the petitioner to its horticulture department dated 23rd January, 2003 by the central zone. The respondents also relied on a list dated 10th August, 2004 disclosing the particulars of the Malies/Chowkidars who had been working as Garden Chaudhary in south zone and another list dated 6th January, 2004 of west zone.

4. The respondents categorically asserted that the petitioner is taking the work of Garden Chaudhary from them but paying the salary of Mali/Chowkidar. According to the respondents the pay scale of Mali is Rs.2550-3200/- and that of Garden Chaudhary is Rs.3050-4590/-.

5. The respondents also relied on an award given by an Industrial Tribunal in I.D No.122/1995 in case of Sh.Jai Chand, Mali in which the petitioner was directed to pay the difference of emoluments to said Sh.Jai Chand from the date he had been performing the duties of Garden Chaudhary. The writ petition being W.P(C) No.4799/2000 filed against the award in favour of Sh.Jai Chand, Mali was dismissed on 24th September, 2004 and the award was upheld.

6. The respondents contended that they had sent a legal notice dated 22nd February, 2005 to the petitioner Corporation seeking difference in wages of Malies/Chowkidars and that of Garden Chaudharies and on failure of petitioner to pay the difference filed the writ petition contending inter-alia that since the respondents had been performing the duties and responsibilities of Garden Chaudhary at the instance of the petitioner with effect from various dates disclosed in the writ petition, they are entitled for the difference in salaries between Malies/Chowkidars and Garden Chaudharies. According to them they were asked to do the work of Garden Chaudharies by the concerned persons of the department of horticulture and various lists duly prepared and signed by different officials of MCD indicating the dates since when they are working as Garden Chaudhary were sent to the Municipal Corporation of Delhi/petitioner.

7. In the circumstances the respondents sought that a writ of mandamus or any other writ or order be issued directing the petitioner to pay the difference of wages of Malies/Chowkidars and that of Garden Chaudhary from the date the respondents had been performing the duties and responsibilities of Garden Chaudharies. The writ petition filed by the respondents was contested by the petitioner and a counter affidavit dated 13th August, 2008 and a supplementary affidavit dated 25th September, 2008 was filed. The petitioner denied that the respondents were performing the duties and responsibilities of Garden Chaudhary with effect from the dates mentioned in the writ petition. According to the petitioner no order appointing respondents as Garden Chaudhary was given to them. The petitioner also denied that the petitioner had been taking the work of Garden Chaudhary from the respondents. The petitioner contended that the respondents were never assigned the duties of Garden Chaudhary. According to the petitioner the post of Garden Chaudhary is a selection post and an employee after qualifying the trade test and on fulfilling other conditions of the recruitment rules framed for the post could be appointed.

The respondents, according to the petitioner are not having requisite qualifications as per the recruitment rules. Regarding the case of Sh.Jai Chand it was contended that the ratio of said case is not applicable in case of the respondents.

8. Though the respondents had filed different lists as detailed hereinabove where it was admitted that the respondents had been working as Garden Chaudharies in different zones which fact was, however, denied by the petitioner in its affidavit dated 18th April, 2006, therefore, the Court passed an order dated 21st April, 2006 directing the petitioner to file a supplementary affidavit clearly indicating whether the documents relied on and filed by the respondents are genuine or not.

9. Consequent to the order dated 21st April, 2006 the petitioner filed the supplementary affidavit in the writ petition being W.P(C) No.10158-86/2005 dated 13th August, 2008 categorically stating that the lists which were filed by the respondents were issued by the zonal horticulture departments i.e Central zone, south zone and west zone respectively and were received by Horticulture headquarter. Out of the three lists, it was contended that original of one of the list was available and original of two lists were not traceable, however, photocopy of one of the two lists were not traceable on the record. The petitioner also pleaded that the three lists were issued by concerned zonal head of the department of horticulture without any inspection and order from any competent authority. It was contended that the additional work as Garden Chaudhary at zonal level was assigned without the existence of any vacant post in violation of the recruitment rules.

10. Yet another supplementary affidavit dated 25th September, 2008 was filed on behalf of the petitioner disclosing that as per CPWD yardstick one Garden Chaudhary is required for 18 malies and at present the sanctioned strength of malies/chowkidars is 6000 and thus 333 Garden Chaudharies are required. The petitioner also disclosed that only 169 Garden Chaudharies and 39 Technical Supervisors were working with the horticulture department who had been promoted from the feeder cadre. It was also contended that as per the existing recruitment rules, malies with 8 years of regular service with qualification of matric with agriculture as one of the subject and subject to qualifying trade test are eligible for promotion to the post of Garden Chaudhary.

11. 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"**.

12. The Tribunal heard the pleas and contentions of the parties and directed the petitioner to examine the claim of the respondents on the basis of the evidence that is the three lists issued by different zones in respect of respondents working as Garden Chaudharies and other functions and process the payment of difference of pay of the post held and the duties discharged by the respondents relying on **Selvaraj v. Lt.Governor of Island , Port Blair and Ors,** (1998) 4 SCC 291 and **Secretary-cum-Chief Engineer, Chandigarh v. Hari Om Sharma and Ors,** 1999 (1) SLJ 23 (SC). The respondent has also relied on W.P(C) No.5742/2010, **GNCT of Delhi v. B'S.Jarial and Anr** where the Division Bench had held that when a person is told to discharge the function and duties of a higher post till the same is filled up and he works for years together as in that case the Deputy Superintendent was made to work as Superintendent for more than 7 years, it would be unjust to deny him wages in the said post. The Tribunal categorically noted 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 what is referred by the Tribunal as the 'quantum of proportion rule', held that they are entitled for emoluments of the higher post. The mention of 'quantum of proportion rule' appears to be a typing error. What the Tribunal intended to say was 'quantum meruit rule'.

13. The Tribunal has also noted that no assistance on the part of the petitioner, Municipal Corporation of Delhi was rendered despite the notice to the petitioner and the counsel for the petitioner rather even on the second call had not appeared on behalf of Municipal Corporation of Delhi. The Tribunal did not keep the case pending being an old case and had decided the same in accordance with Rule 60 of Central Administrative Tribunal (Procedure) Rules, 1987.

14. The petitioner, thereafter, had filed an application for review of order dated 29th January, 2010 being review petition No.270/2010 which was, however, dismissed by the Tribunal by order dated 7th October, 2010 holding that the Deputy Director (Horticulture) is the ˇcompetent authority for entrustment of duties and repelled the plea of the petitioner

that Deputy Director (Horticulture) was not competent to entrust the responsibility for higher post on Malies/Chowkidars. Aggrieved by the order of the Tribunal dated 29th January, 2010 directing the petitioner to consider the claim of the respondents on the basis of the evidence adduced by them and the order dated 7th October, 2010 dismissing their review application and holding that Deputy Director (Horticulture) was the competent authority to entrust the responsibilities of higher post, the petitioner Municipal Corporation of Delhi has filed the present writ petition inter-alia on the grounds that the appointments of the respondents was contrary to the recruitment rules as the appointment was to be made by the competent authority as per directions of DPC and category 'C' DPC is required to have DOH (Chairman), DDH (Member), ADH (Member), ADH/S.C (Member) and A.O (H) Convener. It is contended that any appointment made without the recommendation of above mentioned DPC is not valid and the appointments made by Deputy Director (Horticulture) was not competent. The petitioner reiterated that the respondents were not having requisite qualification and no lists have been produced by them that they were appointed to the post of Garden Chaudharies. Regarding the lists issued by different zones, the petitioner asserted that they were issued without permission of the competent authority and contrary to the provisions of the recruitment rules. The petitioner further disclosed that a Garden Chaudhary is in charge of 10-20 Malies and as per CPWD yardstick, one Garden Chaudhary is required for 18 malies and at present considering the strength of malies/chowkidars of 8000, approximately 444 Garden Chaudharies are required. The petitioner also disclosed that there are only 187 Garden Chaudharies working with the horticulture department. The petitioner, however, in the writ petition admitted that due to the exigencies of the work, the concerned head of the department asked some of the malies/chowkidars to do the work of Garden Chaudharies also. The admission made by the petitioner in its writ petition in paragraph 4 is as under:-

> "4. That it is most respectfully submitted that the Garden Chaudhary is a supervisory post and in addition to the work of Mali's the Garden Chaudhary is supposed to be the in charge for a group of Mali's, i.e., say 10-20 Mali's. As per CPWD yardstick, one garden Chaudhary is required for 18 Mali's and at present the sanctioned strength of Malies/Chawkidars is approximately 8000. Therefore, the total Garden Chaudhary required would be

approximately 444. However at present there are only 187 posts Garden Chaudhary working with the Horticulture Department who have been promoted from the feeder cadre (Earlier there were 169 sanctioned post of Garden Chaudhary and 39 Technical supervisors, however later both of them merged and there were total 208 posts of Garden Chaudharies. Later the Petitioner Department converted 21 posts as Horticulture Inspectors. Therefore at present there are only 181 posts of Garden Chaudharies). **Hence due to the exigencies of work, the concerned head of the Department asked some of the Mali's/ Chawkidar's to do the work of Garden Chaudhary also. It is pertinent to mention here that the said work was assigned in addition to their own duty at the zonal level without the existence of any vacant posts and also without obtaining any permission from the competent authority.** Further, the said charge was given in violation of the conditions of the Recruitment Rules. It is also to be noted that no appointment letter/office order was ever issued to the Respondents w.r.t. their additional work."

The respondents opposed the pleas and contentions of the petitioner taking the same pleas and contentions which were taken on their behalf before the Central Administrative Tribunal.

15. This Court has heard the learned counsel for the parties in detail and has perused the documents produced along with the writ petition. In the counter affidavit which was filed in the original petition, the plea of the petitioner was that the respondents are not performing the duties and responsibilities of Garden Chaudharies and they are performing the duties of Malies/Chowkidars. Para 2 of the counter affidavit dated 18th April, 2006 filed on behalf of the petitioner by Sh.Kiran Dabral, Additional Deputy Commissioner (Horticulture), Horticulture Department (HQ) is as under:-

"2. That the contents of para No.2 of the petition are denied for want of knowledge, however, it is submitted that they have been performing duties of Mali/Chowkidar not Garden Chaudhary under the answering respondent-MCD."

However, after the Tribunal passed the order dated 29th January,

2010 directing the petitioner to examine the claim of the respondents afresh on the basis of evidence produced before the Tribunal which could not be negated by the petitioner, the petitioner in the present writ petition has changed its plea and has contended that due to exigencies of work, concerned head of the department asked some of the Malies/ Chowkidars to do the work of Garden Chaudhary also. In para 4 of the present petition it was rather contended that the work of Garden Chaudhary was assigned to Mali/Chowkidar in addition to their own duty at the zonal level without the existence of any vacant post.

16. It is apparent that the petitioners have taken different stands and have filed affidavits of its officers without disclosing the correct facts. The Tribunal while passing the order dated 29th January, 2010 directed the petitioner to examine the claim of the respondents afresh on the basis of evidence produced before the Tribunal. The Tribunal had taken into consideration the lists prepared by the Horticulture department, Central Zone of those Malies/Chowkidars who have been looking after the charge of Chaudharies. The said list dated 23rd January, 2003 was prepared by the Assistant Director Central Zone and Deputy Director Central Zone and bear the endorsement of Horticulture Officer (Headquarter). The list dated 10th August, 2004 also details the particulars of the Malies who are looking after the work of Chaudharies in South Zone, Horticulture Department which list is also endorsed by the Deputy Director, South Zone besides SO (H) and other officials. Another list on which reliance has been placed is the list dated 5th January, 2004 giving details of officiating Chaudharies in the West Zone which is also endorsed by Deputy Director (Horticulture) besides other officials. The Court in the earlier writ petition which was later on transferred to the Tribunal had to direct the petitioner to file a supplementary affidavit about the lists of officiating Chaudharies by its order dated 21st April, 2006. The petitioner in response changed its stand and admitted that the lists were received in the Horticulture Headquarter from Zonal Horticulture Department i.e Central Zone, South Zone and West Zone, however, contended that they are by the officials who were not competent. It was also admitted that though the original list issued by West Zone was available in the record of the Headquarter, however, the lists issued by Central Zone and South Zone were not available and only copies were available.

17. Pursuant to the lists issued by zonal department by Deputy

Directors who were taking the work of Garden Chaudharies from the Malies/Chowkidars, no action was taken against any of the officials or the Assistant Directors or any other person as to why they are taking the work of Garden Chaudharies from Mali and Chowkidar, as this was allegedly contrary to the recruitment rules and they were not allegedly authorized to do so. The petitioner has also tried to contend that there were no vacancies of Garden Chaudharies and, therefore, the Malies/ Chowkidars, respondents could not be asked to discharge the work of Garden Chaudharies.

18. This plea of the petitioner that the posts of Garden Chaudharies was not available is contrary to its own admission that considering the strength of Malies/Chowkidars total Garden Chaudharies required are approximately 444 and only 187 Garden Chaudharies are working with the Horticulture department. This has also been contended that earlier there were 169 Garden Chaudharies and 39 technical supervisors which posts were merged and there were total 208 Garden Chaudharies. If the petitioner require 444 Garden Chaudharies and have only 208 Garden Chaudharies, it cannot be inferred that the work of Garden Chaudharies was not available with the Municipal Corporation of Delhi/petitioner. If the work of Garden Chaudharies has been available and the petitioner has not appointed Garden Chaudharies and in the circumstances Deputy Director Horticulture has taken the work of Garden Chaudharies from some of the Malies/Chowkidars and has also kept a detailed record which was sent to the Headquarter of the Horticulture department of the petitioner and despite receiving such record, no action was taken against any of the officials for taking the work of Garden Chaudharies or objected that they were not authorized to appoint Garden Chaudharies , would reflect that the horticulture department or the alleged competent authority consented to the appointment of the respondents as Chaudharies not on the regular basis but only to take the work from them.

19. The learned counsel for the petitioner has argued the matter on the premise that the respondents are claiming to be appointed to the post of Garden Chaudharies without having qualifications as contemplated under the recruitment rules. No doubt on account of having worked as Garden Chaudharies on ad hoc basis for a number of years, the respondents may not be entitled to be appointed to the post of Garden Chaudharies contrary to the recruitment rules, however, perusal of their petition which

was filed in the High Court which was later on transferred to the Central Administrative Tribunal whose order is impugned by the petitioner, reveals that what the respondents are demanding is only that the petitioner should pay the 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 Chaudharies.

20. After the order dated 29th January, 2010 was passed by the Tribunal directing the petitioner to consider the claim of the respondents on the basis of the evidence produced before the Tribunal, the petitioner had filed an application for review on the ground that DOPT guidelines do not prescribe for any relaxation for promotion of Malies to Garden Chaudharies and thus as per recruitment rules and DOPT guidelines, promotion could not be granted to the Malies for the simple reason that they had been officiating on the said post of Garden Chaudharies for several years.

21. Para 4(v) to 4(viii) and para 5 of the review petition filed by the petitioner are as under:-

"4.

(v) That as per the existing RR's malies with 8 years of regular service with qualification Matric with agriculture, as one of the subject and subject to qualifying the Trade Test, are eligible for promotion to the post of Garden Chaudhary.

(vi) That the DOPT guidelines do not prescribe for any relaxation for promotion of Malies to Garden Chaudhary and thus as per RR's and DOPT guidelines, promotion cannot be granted to Malies for the simple reason that they have been officiating on the said post for several years. The rules prescribe that unless they fall within the zone of consideration, they cannot be considered.

(vii) That at present there are 169 Garden Chaudhary and 39 Technical Supervisors working with the Horticulture Department who have been promoted from the feeder cadre.

(viii) That thus it is crystal clear that there are no promotional posts available on which the respondents could be considered at

this stage. However, the petitioner corporation states that the respondents would be considered for appointment of Garden Chaudhary in accordance with the RR's and DOPT guidelines, in the order of their seniority subject to their meeting the eligibility criteria.

5. That thus while deciding the T.A No.1317/09, inadvertently it could not be brought to the notice of this Hon'ble Court, that the question "Whether the workmen are entitled to pay of higher post of Garden Chowdhary on the basis of their officiation on the said post while they were holding the substantive post of Mali" came up for consideration before the Hon'ble High Court of Delhi and while deciding C.W.P No.7869/02; 8679/05; 13288-91/05; 12025/06; the Hon'ble High Court Held: " Since the directions were given by the workmen to look after the responsibilities of higher post of Garden Chaudhary by the Assistant Director (Horticulture) who was not the competent authority under the recruitment rules, the workmen are not entitled to pay of higher post of Garden Chowdhary."

Accordingly two awards given by the Tribunal which are in favour of the workmen and against the management of the Municipal Corporation of Delhi are hereby set aside. The two awards which are against the workmen and in favour of the management of the Municipal Corporation of Delhi are maintained as this Court does not find any perversity in the said awards for the reasons given hereinabove. The copy of the order dt.15.12.09 is annexed as Annexure."

22. Apparently the petitioner misconstrued the claim of the respondents who were not seeking promotion to the post of Garden Chaudharies but are only claiming difference in pay of Mali/Chowkidar and Garden Chaudharies as they had been performing the work of Garden Chaudharies after the Deputy Director Horticulture directed them to perform the said work which was also intimated to headquarter Horticulture without any objection either from the Horticulture department or any other competent authority at any time. This is also ˇnot the plea of the petitioner that Headquarter of Horticulture Department and alleged competent authority was not aware of work of Garden Chaudharies

being taken from Malies/Chowkidars as sufficient number of posts of Garden Chaudharies were not filled and all the posts according to accepted norms were not created.

23. While seeking the review of order dated 29th January, 2010 it was rather pleaded that the Mali/Chowkidars are not entitled for difference in pay for performing the duties of Garden Chaudharies pursuant to the directions of the Assistant Director (Horticulture) as it was adjudicated in Civil writ petition Nos.7869/2002, 8679/2005, 13288-91/2005 and 12025/2006. Before this Court the copies of these orders have not been produced by the learned counsel for the petitioner. This is, however, clear that the facts and circumstances in those writ petitions were different as apparently in those cases Assistant Director (Horticulture) had asked the malies/chowkidars to perform the duties of Garden Chaudharies in contradiction to the present case where the Deputy Director (Horticulture) has asked the respondents to perform the duties of Garden Chaudharies and the details of these persons and the dates from which they have been performing was duly intimated to the Horticulture headquarter without any objection of any type either by the Horticulture headquarter or from the petitioner in any manner. If the Deputy Director and other officials had been asking the malies/chowkidars to perform the duties of Garden Chaudharies contrary to any directions or rules, action should have been proposed or taken by the petitioner against them. This is also apparent that the work of Garden Chaudhary has been available as the post of Garden Chaudharies based on the number of posts of Malies/Chowkidars have not been filled.

24. The Tribunal while dismissing the application for review of the petitioner by order dated 7th October, 2010 has held that the Deputy Director (Horticulture) is the competent authority relying on the decision of the Apex Court in **State of West Bengal & Ors v. Kamal Sen Gupta & Anr,** (2008) 2 SCC (L&S) 735.

25. The learned counsel for the petitioner has not produced any guidelines, circulars to show that if the work is available and the Garden Chaudharies are not appointed, then who is competent to appoint Malies/ Chowkidars on ad hoc basis as Garden Chaudharies and to take from them the work of Garden Chaudharies. If on account of exigencies of the work the head of the department asks Malies/Chowkidars to do the

work of Garden Chaudharies which is now admitted by the petitioner in the present writ petition impugning the order of the Tribunal then why the difference of pay of Mali/chowkidar and Garden Chaudhary be not be paid to them, has not been satisfactorily explained by the petitioner. Applying the principle of quantum meruit as was held by the Supreme Court in case of **Selvaraj** (Supra) the petitioner has to pay to the respondents emoluments available in the higher pay scale during the time they actually worked on the post of Garden Chaudhary in the facts and circumstances. In **Selvaraj vs. Lt. Government of Island, Port Blair,** (1998) 4 SCC 291, the employee was not regularly promoted to the post of Secretary (scouts) but he was regularly asked to look after the duties of Secretary (scouts). Applying the principle of quantum meruit it was held by the Supreme Court that the authorities should have paid to the employee the emoluments available in the higher pay scale during the time he actually worked on the said post of Secretary (Scouts) though in an officiating capacity and not as a regular promote. In **Secy.-cum-Chief Engineer v. Hari Om Sharma,** (1998) 5 SCC 87 the employee was promoted as a stop-gap arrangement as Junior Engineer I and he had given an undertaking that on the basis of stop-gap arrangement, he would not claim any benefit pertaining to that post. It was held that the Government in its capacity as a model employer cannot be permitted to raise such an argument, and the undertaking which is said to constitute an agreement between the parties cannot be enforced at law. An agreement that if a person is promoted to the higher post or put to officiate on that post or, as in the instant case, a stop-gap arrangement is made to place him on the higher post, he would not claim higher salary or other attendant benefits would be contrary to law and also against public policy. It would, therefore, be unenforceable in view of Section 23 of the Contract Act, 1872. In W.P(C) No.5742/2010, decided on 25th August, 2010, **GNCT of Delhi v. B'S. Jarial and Anr.** another Division Bench had held that when a person is told to discharge the function and duties of a higher post till the same is filled up and he works for years together as in that case the Deputy Superintendent was made to work as Superintendent for more than 7 years, it would be unjust to deny him wages for the said post. The Division Bench had held that if an employee is directed to work on a higher post he has no option but to work at higher post at the dictate of the employer, as for his not so doing would attract penalty proceedings against him. In **Sh.Bhagwan Dass and Ors.**

Vs State of Haryana & Ors., 1987 (3) SLJ 93 it was observed by the Supreme Court that whether the appointment was for temporary period or the scheme was temporary in nature is not relevant and what is to be seen is that once it is established that the nature of duties and functions discharged and the work done in similar, the doctrine of equal pay for equal work would be attracted. The employee in this case had been posted to officiate as Sub Post Master in HSG-I at the post office and he shouldered the higher responsibilities of the department and, therefore, he became entitled for emoluments of the post of HSG-I for those periods and he could not be denied those emoluments.

26. The petitioner has relied on (1997) 6 SCC 200, **Mohd'Swaleh v. Union of India & Ors** and W.P(C) No.4231/2002 decided on 17th March, 2011 titled **MCD v. Sh.Bhanwar Singh & Anr.** In **Bhanwar Singh & Anr** (Supra) the Single Judge of the High Court had set aside an award passed against the Municipal Corporation of Delhi holding that the workman was entitled in future to wages as of a Garden Chaudhary. The workman in the said case had filed a complaint under Section 33 of Industrial Disputes Act, 1947 regarding the terms of his employment having been changed during the tenure of general dispute between the employer MCD and the Chowkidar, Beldar, Bullockmen, Bhishties, Coolies, Machinemen, Hedgemen, Garden Chaudhary etc. employed with it. It was asserted by the workman that term of his employment had been changed by his transfer from Shahdara zone where he was working to the Headquarters (Horticulture Department). In these circumstances the reference was made 'Whether the workman was entitled to wage of Garden Chaudhary for the period 3rd December, 1988.. The Tribunal had held that the workman though was not entitled ˇto the relief of regularization on the post of mali with effect from 1st March, 1978, however, he was held entitled to wages equal to regular malies with effect from 1st March, 1978 till the date of his regularization up to 31st March, 1998 without any increment. It was also held that the workman shall be entitled to receive wages of regular Garden Chaudharies in proper pay scale. The learned Single Judge relying on W.P(C) No.4023/1997 titled **Municipal Corporation of Delhi v. Jagdish Chander** where it was held that proper procedure has to be followed for promotion to the post of Garden Chaudhary had set aside the award holding that the workman was entitled for emoluments as of mali only as he was asked to work as Garden Chaudhary by the Assistant Director who was not

authorized to do so. Apparently the case relied on by the petitioner is distinguishable as the respondents are not claiming regular appointment to the post of Garden Chaudhary. The respondents are claiming difference in wages as they were directed to perform the work of Garden Chaudharies by the Deputy Director (Horticulture) and the details of respondents who had been directed to work as Garden Chaudharies and the tenure during which they worked as Garden Chaudharies, were sent to the Horticulture headquarter and Municipal Corporation of Delhi without any objection or action on the part of petitioner. In the case of respondents it is also apparent that the work of Garden Chaudharies was available. In the circumstances, on the basis of ratio of **Sh.Bhanwan Singh & Anr** (Supra) it cannot be held that the respondents are not entitled for difference in wages.

27. In **Mohd'Swaleh** (Supra) it was held by the Supreme Court that a Deputy Registrar of Central Administrative Tribunal who was ordered by the Vice Chairman to discharge the function of the Registrar would not be entitled for emoluments of the Registrar as the Vice Chairman did not have the power to appoint another Government servant, permanently to the said post, as the appointing authority was the President of India. It was held that in absence of any delegation of power in respect of Group 'A' post, Vice Chairman was not empowered to make the appointment of the Registrar. In contradistinction in case of respondents it has been held that the Deputy Director could take the work of Garden Chaudharies from the malies/chowkidars which is Group "D" post workman and this fact was not objected to either by the petitioner at any time nor by the Horticulture headquarter. If the action of the Deputy Director or the headquarter Horticulture was illegal then the petitioner should have taken some action against some of the officials or at least should have objected about taking the work of Garden Chaudharies from malies and chowkidars for years together. In the circumstances, apparently the ratio of the cases relied on by the petitioner would not entitle it for any relief to decline the difference in wages to the respondent during the period they worked as Garden Chaudharies which is left for determination by the petitioner after consideration of evidence produced by the respondents.

28. Considering the entire facts and circumstances it is apparent that 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. There is no doubt that respondents are not claiming appointment to the post of Garden Chaudharies on account of having worked on ad-hoc basis on the post of Garden Chaudhary contrary to rules or that some of them not having the requisite qualifications are entitled for relaxation.

29. In the entirety of facts and circumstances therefore, the learned counsel for the petitioner has failed to make out any such grounds which will impel this Court to exercise its jurisdiction under Article 226 of the Constitution to set aside the orders of the Tribunal dated 29th ˇJanuary, 2010 and 7th October, 2010 as no illegality or un-sustainability or perversity in the orders of the Tribunal has been made out.

30. The writ petition is, therefore, dismissed. Parties are left to bear their own cost.

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LPA

NATIONAL COUNCIL FOR TEACHER EDUCATION & ANR. ....APPELLANTS

VERSUS

G.D. MEMORIAL COLLEGE OF EDUCATION ....RESPONDENT

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

LPA NO. : 743/2010, 830/2010 & 833/2010 DATE OF DECISION: 20.04.2011

National Council for Teacher Education Act, 1992 (Act)—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.

From the aforesaid enunciation of law, it is manifest that substantial compliance has to be done. We are not inclined to enter into the realm of substantial compliance as there has been a change of scenario. The NCTE has framed 2009 Regulations. Regulation 8(7) of 2009 Regulations reads as follows:

> "(i) No institution shall be granted recognition under these Regulations unless the institution or society sponsoring the institution is in possession of required land on the date of application. The land free from all encumbrances could be either on ownership basis or on lease from Government or Government institutions for a period of not less than 30 year. In cases where under relevant State or Union Territory laws the maximum permissible lease period is less than 30 years, the State Government or Union Territory Administration law shall prevail. However, no building shall be taken on lease for running and teacher training course.
>
> (ii) The society sponsoring the institution shall have to ensure that proposed teacher education institution

has a well demarcated land area as specified by the norms. The teacher education institution shall not be allowed to have any other institution within its demarcated area or building and shall not have any other course(s) in its building.

(iii) The physical education institution shall similarly be required to have a separate demarcated area or building and shall not house any other course including other teacher education courses.

(iv) The society sponsoring the institution shall be required to transfer and vest the title of the land and building in the name of the institution within a period of six months from the date of issue of formal recognition order under sub-regulation (11) of Regulation 7. However, in case, the society fails to do so due to local laws or rules or bye-laws, it shall intimate in writing with documentary evidence, of its inability to do so. The Regional Office shall keep this information on record and place it before the Regional Committee for its approval." **(Para 16)**

A stand has also been taken that there has been a ban regarding acceptance of application for recognition of teacher training courses for the academic session 2011-12 in various States for specific courses and so far as State of Haryana is concerned, there is a ban on D.El.Ed, B.Ed., D.P. Ed. and B.P.Ed. Even if the submission of the learned counsel for the respondent is accepted, it is difficult to put the clock back and say that the application should be considered in accordance with 2007 Regulations and application should be processed. The application can alone be processed after the ban is lifted or for that matter for 2012-13, depending upon the change of policy. **(Para 17)**

In view of the aforesaid, there is no necessity to address with regard to the nature and character of the Regulations and the compliance thereof. Therefore, we are only inclined

to direct that the application which has been brought in order after compliance of the condition provided under Regulation 8(7) the same shall be processed in accordance with law for grant of recognition as stipulated under Section 14 of the Act after the ban is lifted and there is a change in the policy decision. As far as other courses are ˇconcerned where ban is not there the application shall be considered for the academic session 2011-12. **(Para 18)**

Important Issue Involved: Applications for recognition of teacher training courses cannot be directed to be processed on the basis of old regulations as that would amount to turning the clock back once new Regulation came into force in 2009

[Sa Gh]

APPEARANCES:

FOR THE APPELLANTS : Mr. Parag Tripathi, ASG wigh Mr. Amitesh Kumar & Mr. Ravi Kant, Advocates.

FOR THE RESPONDENT : Mr. Sanjay Sherawat with Mr. Sunder Rao K.P. & Ms. Sangeeta Batra, Advocates.

CASE REFERRED TO:

1. *National Council for Teachers Education and Another* vs. *Committee of Management,* 2006 III AD (S.C.) 65.

RESULT: Appeal allowed.

DIPAK MISRA, CJ.

1. The controversy raised in these appeals fundamentally pertain to the interpretation of the Regulation 8(7) of National Council for Teacher Education (Recognition, Norms & Procedure) Regulations, 2007 (for brevity '2007 Regulations') framed under Section 32 of the National Council for Teacher Education Act, 1993 (for short 'the NCTE Act'). They were heard together and are being disposed of by this common

order. In LPA No.833/2010 as the factual matrix is slightly different, the relief clause therein shall be adverted to separately. For the sake of clarity and convenience, we shall advert to the facts in LPA No.743/2010 where the assail is to the order dated 13th July, 2010 passed by the learned Single Judge in WP (C) No. 4094/2010.

2. The facts, which are required to be unfurled, are that the respondent, G.D. Memorial College of Education, submitted an application to the Northern Regional Committee of NCTE (NRC) on 9th June, 2008 seeking recognition for B.Ed. course. It was pleaded in the writ petition that the respondent-institution is managed and run by Shri Krishna Shiksha Samiti, a society registered under the Societies Registration Act, 1860. After submitting the application, it came to the knowledge of the respondent that as per the 2007 Regulations the society or the institution was required to be ˇthe owner of the land. It was contended that Shri Baldev Krishna, the Chairman of the Society had constructed the building in his name and had executed a 99 years lease in respect of the said land in the name of the society. After coming to know about the amendment, Shri Baldev Krishna executed a deed of gift in favour of the society. The copy of the gift deed was filed before the NRC. Despite filing of the said document, when the application of the respondent-writ petitioner was not processed, he filed WP (C) No. 8749/2008 and the said writ petition was disposed of on 10th December, 2008 by recording the statement of the NRC that the application of the respondent for recognition shall be processed and decided within 90 days. After the said order was passed, NRC did not inspect the institution but communicated by letter dated 12th March, 2009 that the application did not deserve consideration as the State Government by recommendation, as required under Clause 7(3) of the 2007 Regulations, did not recommend for recognition and had provided reasons/grounds and statistics for not granting recognition; that the institution has not submitted permission letter from the competent authority to use the land for educational purpose, as required under Clause 8(8) of the 2007 Regulations; and that the land is not in the name of the institution as required under Clause 8(7) of the 2007 Regulations.

3. Being dissatisfied with the said decision, the respondent preferred an appeal before the Appeal Committee of NCTE and the Committee by order dated 12th April, 2010 dismissed the appeal on the ground that the institution ˇdid not fulfill the mandatory requirements under Regulation

8(7) of the 2007 Regulations.

4. Being grieved by the aforesaid order, the respondent preferred the writ petition. It was contended that the NRC as well as the Appeal Committee had fallen into error by not granting recognition though subsequently the land was gifted and further it was incumbent on the part of the NRC to grant time to the applicant to remove the defects and, therefore, when the defect was made good, recognition should have been granted. The said stand was controverted by the appellant-NCTE contending, inter alia, that as per the regulation in force, at that time it was obligatory on the part of the college or society governing the same to be the owner of the land on which the building of the college was situated and since admittedly on that date, the college/society governing it did not have the ownership and was merely the lessee for 99 years, the application was not in order and had been rightly rejected. The learned Single Judge took note of the fact that on the date of application, the writ petitioner did not satisfy the requirement of ownership but it satisfied the requirement before the application was considered. The learned Single Judge considering the regulations came to hold that the applicant seeking recognition is required to be given an opportunity for making up the deficiency, if any, in the application. The prohibition under Regulation 8(7) of the 2007 Regulations was only for such applicants. institutions, which were not even in possession of the land on the date of the application. The writ petitioner was in possession of the land having a lease for 99 years and subsequently it became the owner of the property though such a deficiency was not pointed out. The learned Single Judge also referred to Regulation 8(10) of the 2007 Regulations, which stipulates that the institution is required to fulfill all the norms for recognition at the time of inspection. The learned Single Judge further observed that the Appeal Committee did not deal with the contentions but passed a routine order concurring with the view taken by the NRC under these circumstances, the learned Single Judge found merit in the writ petition and remitted the matter to the NRC for decision on the application of the applicant in accordance with law.

5. We have heard Mr.Parag Tripathi, learned Additional Solicitor General along with Mr.Amitesh Kumar and Mr.Ravi Kant, learned counsel for the appellants and Mr'Sanjay Sherawat along with Mr'Sundar Rao K.P. and Ms'Sangeeta Batra, learned counsel for the respondent.

6. The gravamen of controversy as has been unfolded is whether the NCTE was under legal obligation to entertain the application for grant of recognition despite the fact that the applicant – institution had not complied with Regulation 8(7) of 2007 Regulations. Submission of Mr.Parag Tripathi, learned Additional Solicitor General is that the said Regulation is mandatory in nature and imperative in character. It is also urged by him that the respondent could not have advanced a mercurial plea that he was not aware of the Regulations and, therefore, he could not transfer the land and, further, the NCTE should have granted the institution an opportunity to remove the defect or to make the defect good. Learned Additional Solicitor General would further submit that in the meantime a new set of Regulations, namely, NCTE (Recognition Norms and Procedure) Regulations, 2009 (for short '2009 Regulations') has come into force with effect from 31.8.2009 and further the NCTE has imposed a ban regarding acceptance of application for recognition of Teacher Training Courses / Additional intake for the academic session 2011-2012 in various states for specified courses.

7. Learned counsel for the respondent, per-contra, would submit that subsequent event should be taken into consideration and on such technical plea the inspection could not have been denied. That apart, it is further canvassed that the order of the learned Single Judge is absolutely impeccable and the recognition of the institution has to be decided as per the 2007 Regulations.

8. Regard being had to the submissions canvassed, it is apposite to refer to Section 14 of the Act which deals with grant of recognition:

> "14. **Recognition of institutions offering course or training in teacher education.-**
>
> (1) Every institution offering or intending to offer a course or training in teacher education on or after the appointed day, may, for grant of recognition under this Act, make an application to the Regional Committee concerned in such form and in such manner as may be determined by regulations :
>
> Provided that an institution offering a course or training in teacher education immediately before the appointed day, shall be entitled to continue such course or training for a period of six months,

> if it has made an application for recognition within the said period and until the disposal of the application by the Regional Committee.
>
> (2) The fee to be paid along with the application under Sub-section (1) shall be such as may be prescribed.
>
> (3) On receipt of an application by the Regional Committee from any institution under Sub-section (1), and after obtaining from the institution concerned such other particulars as it may consider necessary, it shall-
>
> (a) if it is satisfied that such institution has adequate financial resources, accommodation, library, qualified staff, laboratory and that it fulfils such other conditions required for proper functioning of the institution for a course or training in teacher education, as may be determined by regulations, pass an order granting recognition to such institution, subject to such conditions as may be determined by regulations; or
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> (b) if it is of the opinion that such institution does not fulfil the requirements laid down in Sub-clause (a), pass an order refusing recognition to such institution for reasons to be recorded in writing :
>
> Provided that before passing an order under Sub-clause (b), the Regional Committee shall provide a reasonable opportunity to the concerned institution for making a written representation.
>
> (4) Every order granting or refusing recognition to an institution for a course or training in teacher education under Sub-section (3) shall be published in the Official Gazette and communicated in writing for appropriate action to such institution and to the concerned examining body, the local authority or the State Government and the Central Government.
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> (5) Every institution, in respect of which recognition has been refused shall discontinue the course or training in teacher education from the end of the academic session next following the date of receipt of the order refusing recognition passed under Clause (b) of Sub-section (3).

(6) Every examining body shall, on receipt of the order under Sub-section (4),-

(a) grant affiliation to the institution, where recognition has been granted; or

(b) cancel the affiliation of the institution, where recognition has been refused."

9. On a perusal of the said provision, it is luminescent that an application has to be submitted in such a manner as may be prescribed by the Regulations and the application is to be considered by the Regional Committee which shall record its satisfaction that such an institution has adequate financial resources, accommodation, laboratory, qualified staff, library and it fulfills other such conditions required for the proper functioning of the institution to offer a course or training in teacher education as may be determined by the Regulations and thereafter pass an order granting recognition to such institution subject to such condition as may be determined by the Regulations.

10. Section 32 of the Act empowers the National Council for Teacher Education (National Council) to frame Regulations. The NCTE has framed Regulations from time to time and the 2007 Regulation came into force w.e.f. 10.12.2007. Regulation 5 deals with manner of making an application and the time limit. It reads as follows:

"5. **Manner of making application and Time Limit**

(1) An institution eligible under Regulation 4, desirous of running a teacher education programme may apply to the concerned Regional Committee of NCTE for recognition in the prescribed form in triplicate along with processing fee and requisite documents.

(2) The form can be downloaded from the Council's website www.ncte-in.org, free of cost. The said form can also be obtained from the office of the Regional Committee concerned by payment of Rs.1000 (Rs. One thousand only) by way of a demand draft of a Nationalized Bank drawn in favour of the Member Secretary, NCTE payable at the city where the office of the Regional Committee is located.

(3) An application can be submitted conventionally or electronically online. In the latter case, the requisite documents in triplicate along with the processing fee shall be submitted separately to the office of the Regional Committee concerned. Those who apply on-line shall have the benefit of not to pay for the form.

(4) The cut-off date for submission of application to the Regional Committee concerned shall be 31st October of the preceding year to the academic session for which recognition has been sought.

(5) All complete applications received on or before 31st October of the year shall be processed for the next academic session and final decision, either recognition granted or refused, shall be communicated by 15th May of the succeeding year."

11. Regulation 7 provides for "Processing of Applications". Clauses (1) to (3) being relevant for the present purpose are reproduced below:

"(1) The applicant institutions shall ensure submission of applications complete in all respects. However, in order to cover the inadvertent omissions or deficiencies in documents the office of the Regional Committee shall point out the deficiencies within 30 days of receipt of the applications, which the applicants shall remove within 90 days. No application shall be processed if the processing fees of Rs.40,000/- is not submitted and such applications would be returned to the applicant institutions.

(2) Simultaneously, on receipt of application, a written communication alongwith a copy of the application form submitted by the institution(s) shall be sent by the office of Regional Committees to the State Government / U.T. Administration concerned.

(3) On receipt of the communication, the State Government/UT Administration concerned shall furnish its recommendations on the applications to the office of the Regional Committee concerned of the National Council for Teacher Education within 60 days from receipt. If the recommendation is negative, the State Government / UT Administration shall provide detailed reasons / grounds thereof with necessary statistics, which shall be taken

into consideration by the Regional Committee concerned while deciding the application. If no communication is received from the State Government / UT Administration within the stipulated 60 days, it shall be presumed that the State Government / UT Administration concerned has no recommendation to make."

12. Regulation 8 deals with the conditions for grant of recognition. Clauses (1) and (7) being pertinent are reproduced below:

"(1) An institution must fulfill all the prescribed conditions related to norms and standards as prescribed by the NCTE for conducting the course or training in teacher education. These norms, inter alia, cover conditions relating to financial resources, accommodation, library, laboratory, other physical infrastructure, qualified staff including teaching and non-teaching personnel, etc.

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(7) No institution shall be granted recognition under these regulations unless it is in possession of required land on the date of application. The land free from all encumbrances could be either on ownership basis or on lease from Government / Govt. institutions for a period of not less than 30 years. In cases where under relevant State / UT laws the maximum permissible lease period is less than 30 years, the State Government / UT Administration law shall prevail. However, no building could be taken on lease for running any teacher training course."

13. As the factual matrix would reveal the respondent institute submitted the application for seeking recognition for B.Ed programme on 9.6.2008. The institute did not satisfy the requirement of ownership of land on the date of making of the application for recognition. The Regulation 5(1) clearly provides that an eligible institution desirous of running a teacher education programme may apply to the concerned Regional Committee of NCTE for recognition in the prescribed form with processing fee and requisite documents. Regulation 8(1) stipulates in a categorical manner that an institution must fulfill all the prescribed conditions related to norms and standards as prescribed by the NCTE for conducting the course or training in teacher education. Regulation 8(7) lays the

postulate that no institution shall be granted recognition under these Regulations unless it is in possession of required land on the date of application. The land has to be free from all encumbrances either on ownership basis or on lease from Government / Govt. institutions for a period of not less than 30 years. It is not in dispute that both the conditions were not satisfied on the date when the application was submitted.

14. Learned counsel for the appellants has drawn our attention to a Division Bench decision of the Punjab and Haryana High Court in LPA No.794/2009. In the said case the Division Bench has held thus:

"6. Learned counsel for the NCTE submits that rejection of the application of the appellant was justified in view of scheme of regulations which require that on the date of application, the applicant should have ownership or lease from the Government, which eligibility was not fulfilled by the appellant. He further submits that if any fresh application is made, the same will be considered in accordance with law.

7. We are unable to hold that the appellant had a right to be considered for recognition, irrespective of its eligibility on the date of application. Thus, acquisition of ownership after making of application was not enough. Contention that requirement of opportunity to make up deficiency of documents entitled the appellant to consideration on the basis of subsequent eligibility, cannot be accepted. However, there is no bar to making of a fresh application, as stated by learned counsel for the NCTE."

15. In this context our attention has also been drawn to the decision in **National Council for Teachers Education and Another v. Committee of Management,** 2006 III AD (S.C.) 65. In the said case the Apex Court was dealing with non-filing of essential documents by the institution and the rejection of recognition by the NCTE. Their Lordships referred to Section 14, Section 32 and the Regulations framed under Section 32 as regard being had to the duty cast on the NCTE and the requisite infrastructural facilities for imparting education to the teachers. Their Lordships have held thus:

"15. Regulations could be framed by the appellant under

Sub-section (1) of Section 32 read with Section 14 thereof. Section 14, as noticed hereinbefore, itself provides that the applications are required to be filed in such form and in such a manner as was determined by the Regulations. The Regulations could have thus also been framed in terms of Sub-section (1) of Section 14 of the Act. We have, however, noticed hereinbefore that Clause (e) of Sub-section (2) of Section 32 specifically refers to Section 14 of the Act for the purpose of laying down the form and manner in which the applications for recognition are required to be submitted. The High Court was, therefore, entirely wrong in arriving at the ˇconclusion that the Council had no such power. The Regulations, having been validly framed, indisputably, were required to be complied with. The Council has a statutory duty to perform. It is an autonomous body. Its jurisdiction extend to the entire territory of India except the State of Jammu and Kashmir and in that view of the matter, it is indisputably required to process a large number of applications received by it from various institutions situate throughout the country. Six month's time, in view of the statutory scheme, is necessary for processing the papers, inspection of the institution and to take a decision on the basis of report submitted pursuant thereto as to whether the institution in question, having regard to Entry 66 of List II of the Seventh Schedule of the Constitution of India, has the requisite infrastructural facilities for imparting education to the teachers.

16. For the afore-mentioned purpose, it is not necessary for us to determine the question as to whether the provisions of the Regulations are imperative in character or not. There cannot, however, be any doubt or dispute that even if they are directory in nature, substantial compliance thereof was necessary. It is no ground that such an application could not be filed by the first respondent before 31st December, 2004 as it received the NOC issued by the State Government. In view of the provisions of the Act and the Regulations, it was obligatory on the part of the first respondent to file an

application, which was complete in all respects. It does not lie in the mouth of the applicant to state that despite requirements of law it would not comply with the same. It is not a case where the requirements were not capable of being complied with. The first respondent was required to show that it has a legal and valid title in respect of the land on which the building in question was required to be constructed. It was also required to furnish the copy of the building plan approved by the competent authority. We have noticed hereinbefore that the application form itself provides for as to what infrastructural facilities are necessary for running the institution. The infrastructural facilities required to be provided must be commensurate with the requirements stated in the said form itself. One of them is to state the number of different rooms and their respective sizes thereof available in the proposed institution. So far as the title over the land in question is concerned, it was stated by the respondent that the land is available in the name of institution on a long-term basis. It is not disputed that copy of the registered Deed of Lease was furnished for the first time by the first respondent on 9.6.2005. Similarly, complete information as to whether the building plan had been sanctioned or not was furnished only on the said date. We are, therefore, of the opinion that the impugned judgment cannot be sustained."

16. From the aforesaid enunciation of law, it is manifest that substantial compliance has to be done. We are not inclined to enter into the realm of substantial compliance as there has been a change of scenario. The NCTE has framed 2009 Regulations. Regulation 8(7) of 2009 Regulations reads as follows:

> "(i) No institution shall be granted recognition under these Regulations unless the institution or society sponsoring the institution is in possession of required land on the date of application. The land free from all encumbrances could be either on ownership basis or on lease from Government or Government institutions for a period of not less than 30 year. In cases where under relevant State or Union Territory laws the maximum

permissible lease period is less than 30 years, the State Government or Union Territory Administration law shall prevail. However, no building shall be taken on lease for running and teacher training course.

(ii) The society sponsoring the institution shall have to ensure that proposed teacher education institution has a well demarcated land area as specified by the norms. The teacher education institution shall not be allowed to have any other institution within its demarcated area or building and shall not have any other course(s) in its building.

(iii) The physical education institution shall similarly be required to have a separate demarcated area or building and shall not house any other course including other teacher education courses.

(iv) The society sponsoring the institution shall be required to transfer and vest the title of the land and building in the name of the institution within a period of six months from the date of issue of formal recognition order under sub-regulation (11) of Regulation 7. However, in case, the society fails to do so due to local laws or rules or bye-laws, it shall intimate in writing with documentary evidence, of its inability to do so. The Regional Office shall keep this information on record and place it before the Regional Committee for its approval."

17. A stand has also been taken that there has been a ban regarding acceptance of application for recognition of teacher training courses for the academic session 2011-12 in various States for specific courses and so far as State of Haryana is concerned, there is a ban on D.El.Ed, B.Ed., D.P. Ed. and B.P.Ed. Even if the submission of the learned counsel for the respondent is accepted, it is difficult to put the clock back and say that the application should be considered in accordance with 2007 Regulations and application should be processed. The application can alone be processed after the ban is lifted or for that matter for 2012-13, depending upon the change of policy.

18. In view of the aforesaid, there is no necessity to address with regard to the nature and character of the Regulations and the compliance thereof. Therefore, we are only inclined to direct that the application which has been brought in order after compliance of the condition provided

under Regulation 8(7) the same shall be processed in accordance with law for grant of recognition as stipulated under Section 14 of the Act after the ban is lifted and there is a change in the policy decision. As far as other courses are concerned where ban is not there the application shall be considered for the academic session 2011-12.

19. In LPA No.833/2010 the prayer has been for grant of recognition for imparting education in M.Ed course. As we perceive, there is no ban on consideration for the 2011-12 in the State of Punjab and Haryana. Therefore, the application filed may be considered in accordance with 2009 Regulations for the academic session 2011-12.

20. In the result, the appeals are allowed and the order passed by the learned Single Judge is set aside with the aforesaid modifications. There shall be no order as to costs.

ILR (2011) V DELHI 162
CS (OS)

AK HAB EUROPE BV ....PLAINTIFF

VERSUS

WHITEFIELDS INTERNATIONAL PRIVATE LIMITED ANR. ....DEFENDANTS

(J.R. MIDHA, J.)

CS (OS) NO. : 1724/2009 DATE OF DECISION: 25.04.2011

Code of Civil Procedure, 1908—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.

Learned counsel for the plaintiff submits that the defendants have admitted the receipt of the entire sale consideration of US$ 97,750/-. The defendants have further admitted the non-delivery of the shipment to the plaintiff. The defendants have further apologized for the non delivery and have refunded part payment of US$ 20,000/- but have not made the balance payment. **(Para 5)**

The admissions by the defendants are sufficient to pass a decree in favour of the plaintiff under Order XII Rule 6 of the Code of Civil Procedure. The plaintiff is thus entitled to US$ 77,750/- (US$ 97,750 less US$ 20,000). Learned counsel for the plaintiff submits that the conversion rate of US dollar was Rs.49/- per US dollar on the date of filing of the suit and accordingly the plaintiff is entitled to principal amount of Rs.38,09,750/- (US$ 77,750 x 49). The plaintiff is claiming interest @18% per annum for the pre-suit ˇperiod as well as pendente lite and future interest. **(Para 6)**

[Ch Sh]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Ankur Mittal, Advocate.

FOR THE DEFENDANTS : None.

RESULT: Allowed.

JUDGMENT (ORAL)

CS(OS) 1724/2009 and I.A.No.10371/2010

1. The plaintiff has filed this application under Order XII Rule 6 of the Code of Civil Procedure for passing of decree on the basis of the admissions of the defendants.

2. No reply has been filed to the application despite the number of opportunities granted. Vide order dated 10th January, 2011, last opportunity was granted to the defendants to file the reply within two weeks subject to cost of `20,000/-. However, the defendants neither filed the reply nor paid the cost whereupon the defendants right to file the reply was closed on 11th March, 2011.

3. The relevant facts in brief are as under:-

3.1 The plaintiff is a company based in Netherlands and is engaged in business of trading.

3.2 In January, 2009, the defendants agreed to sell 115 MT of rice to the plaintiff for a total consideration of US$ 97,750/- @ US$ 850 per MT.

3.3 The plaintiff accordingly placed the purchase order No.44315-0250 dated 6th February, 2009 upon the defendants and remitted the entire consideration in advance to the defendants by transferring the funds to defendant No.1's account No.2000193003679 with Bank of Rajasthan. The plaintiff has filed the statement of account along with the plaint to prove the transfer of funds. As per the purchase order, the ordered rice was to be delivered by 10th February, 2009.

3.4 Vide e-mail dated 10th February, 2009, the defendant admitted the receipt of the aforesaid payment.

3.5 Despite the remittance of the total consideration in advance, the defendants failed to supply the rice to the plaintiff whereupon the plaintiff issued reminders dated 27th January, 2009, 25th February, 2009 and 4th March, 2009.

3.6 Vide e-mail dated 7th April, 2009, the defendant refused to send the shipment on the ground of increase in prices. In the alternative, the defendant offered to deduct the cost of the empty bags and to refund the balance payment.

3.7 Vide e-mail dated 8th April, 2009, the defendant againagreed to ship the rice in terms of the agreement but despite the same, no shipment

was made whereupon the plaintiff issued reminders dated 9th April, 2009, 18th April, 2009, 20th April, 2009, 7th May, 2009, 9th May, 2009, 11th May, 2009, 13th May, 2009 and 14th May, 2009.

3.8 Vide e-mail dated 24th March, 2009, the plaintiff called upon the defendant to refund the payment in reply to which the defendant vide e-mail dated 24th May, 2009 agreed to refund the payment received.

3.9 Vide e-mail dated 19th June, 2009, the plaintiff again demanded refund of the payment from the defendants.

3.10 The plaintiff instituted this suit for recovery of US$ 1,07,536/- (`52,69,264/-) on 27th August, 2009.

4. The learned counsel for the plaintiff submits that the defendants have made the following admissions which entitle the plaintiff to obtain the decree under Order XII Rule 6 of the Code of Civil Procedure:-

4.1 The plaintiff has admitted the entire correspondence exchanged between the parties as matter of record in the written statement.

4.2 Vide e-mail dated 25th September, 2009 of defendant No.1 to the plaintiff, the defendants have refunded the part payment of US$ 20,000/- to the plaintiff.

4.3 In reply to the plaintiff's e-mail dated 26th September, 2009, defendant No.1 admitted the payment of US$ 20,000/- to be a meager amount but mentioned their intention not to keep the plaintiff's money.

4.4 Vide e-mail dated 30th September, 2009, defendant No.2 expressed his apology for delay in shipment.

4.5 Vide e-mail dated 26th September, 2009, defendants admitted the receipt of full payment of the consignment of 115 MT of rice.

5. Learned counsel for the plaintiff submits that the defendants have admitted the receipt of the entire sale consideration of US$ 97,750/-. The defendants have further admitted the non-delivery of the shipment to the plaintiff. The defendants have further apologized for the non delivery and have refunded part payment of US$ 20,000/- but have not made the balance payment.

6. The admissions by the defendants are sufficient to pass a decree

in favour of the plaintiff under Order XII Rule 6 of the Code of Civil Procedure. The plaintiff is thus entitled to US$ 77,750/- (US$ 97,750 less US$ 20,000). Learned counsel for the plaintiff submits that the conversion rate of US dollar was Rs.49/- per US dollar on the date of filing of the suit and accordingly the plaintiff is entitled to principal amount of Rs.38,09,750/- (US$ 77,750 x 49). The plaintiff is claiming interest @18% per annum for the pre-suit period as well as pendente lite and future interest.

7. In the facts and circumstances of this case, the plaintiff's application under Order XII Rule 6 of the Code of Civil Procedure is allowed and the suit is decreed in favour of the plaintiff and against the defendants on the following terms:-

7.1 The suit is decreed for Rs. 38,09,750/- in favour of the plaintiff and against the defendants.

7.2 The plaintiff shall be entitled to interest @9% per annum on the total principal amount of Rs.47,89,750/- from the date of transfer of funds, i.e., 6th February, 2009 up to 25th September, 2009 when the defendants made part payment of US$ 20000 to the plaintiff. The plaintiff shall be entitled to pendente lite and future interest @9% per annum on the balance amount of Rs.38,09,750/- from 25th September, 2009 till realization.

7.3 The plaintiff is also awarded costs of the suit including the Court fees paid as well as the counsel's fees.

8. All pending applications are disposed of.

ILR (2011) V DELHI 167
W.P. (C)

K.L. NOATAY ....PETITIONER

VERSUS

UOI & ORS. ....RESPONDENTS

(PRADEEP NANDRAJOG & SURESH KAIT, JJ.)

W.P.(C) NO. : 4377/2003 & 10121/2009 DATE OF DECISION: 26.04.2011

(A) Constitution of India, 1950—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.

As regards the application of the Modified Assured Career Progression Scheme (MACPS) to the officers working in the administrative officers grade is concerned, relevant would it be to note that in order to remove stagnation, the Fifth Central Pay Commission recommended Assured Career Progression Scheme (ACPS) to all the general employees in the Central Government. The scheme of ACP recommended by the Fifth Central Pay Commission envisaged three time-bound promotions for Group A posts after 4, 8 and 13 years of service. For posts in Groups B, C and D, two time-bound promotions were to be provided on completion of 8 and 16 years of service for Group B, 10 and 20 years for Group C and 12 and 24 years for Group D. The Government accepted the said scheme in a modified manner and introduced the ACPS for Groups B, C and D and isolated posts in Group A where two financial upgradations were to be provided on 12 and 24 years of service. The financial upgradations were to be in the next higher grade in the existing hierarchy. The Sixth Central Pay Commission recommended certain modifications in the Assured Career Progression Scheme implemented by the Government. One of the recommendations made by the Sixth Central Pay Commission was that save and except organized Group A services, the benefit of ACPS be available to all posts belonging to Group A, whether isolated or not, which recommendation has been accepted by the Central Government. 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. **(Para 18)**

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. **(Para 19)**

In view of the above discussion, we direct the department to encadre the administrative officers cadre of BRO as an organized cadre. **(Para 20)**

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. The decision would be taken within 16 weeks of the receipt of this judgment. In taking the said decision, the department shall take into account all the facts germane to the issue, particularly the fact that the officers working in the administrative officers cadre have been stagnating since a long time. **(Para 22)**

(B) Constitution of India, 1950—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 India 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.

This issue is no longer res integra. In LPA No.121/1984 '**Union of India 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 materia 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. The petitioner therein was working as Senior Administrative Officer in Military Engineering Service. A similar stand that the officers therein did not belong to an organized Group A service was taken by Military Engineering Service to deny the payment of special pay/headquarters allowance to the officers therein, which stand was repelled by this Court in following terms:-

"We have reproduced above the relevant resolution

of the Central Government accepting the recommendation of the Pay Commission regarding special pay. This resolution refers paras 34 and 35 of Chapter 8 and para 27(i) of Chapter 14 of the Pay Commission Report. Only para 34 is relevant for our purpose as other paras deal with the quantum of the special pay. Para 34 is as under:-

"34. We are of the view that the device of special pay should be used as sparingly as possible. Thus our approach generally has been to suggest a higher scale of pay for posts which are held on a non-tenure basis and where the special pay has been granted at present in lieu of a higher scale for the post itself. However, we feel that the device of granting special pay cannot be discarded in the case of posts where persons have to attracted for a fixed tenure from other cadres and departments. The grant of special pay for compensating genuine and discernible, but not substantial, difference of duties is to be preferred to the fragmentation of cadres, with attendant complication. Once a higher scale of pay as such is sanctioned for a post of category of posts in a cadre, and a person is appointed to such a post, it may be difficult to shift him to a posts carrying even a slightly lower scale of pay, as it may be construed as a reduction in rank, attracting the provisions of Article 311 of the Constitution. No such disadvantage attaches to posts carrying special pay which leads to enormous flexibility. This criterion would apply to posts in the Secretariat and at the Headquarters of the departments. In the case of posts at 'headquarters' held on a tenure basis, the officer brought on deputation has to encounter many problems due to the disturbance involved, and some compensation on this account has to be provided also if suitable persons are to be attracted to these posts."

Special Pay, under F.R. 9(25), means an addition, of

the nature of pay, to the emoluments of a post or of a Government servant, granted in consideration of – (a) the specifically arduous nature of the duties; or (b) a specific addition to the work or responsibility. Cadre under F.R.9(4) means the strength of a service or a part of service sanctioned as a separate unit. Para 34 of the Pay Commission Report reproduced above does not talk of any organized service or established service. In this para it is recommended that special pay be granted "in the case of posts where persons have to be attracted for a fixed tenure from other cadres or departments." The Commission opined that the grant of special pay for compensating genuine and discernible, but not substantial, difference of duties was to be preferred to the fragmentation of cadres, with attendant complication. This criterion, it said, would apply to posts in the Secretariat and at the Headquarters of the departments and in the case of posts at Headquarters held on tenure basis, the officer brought on deputation had to encounter many problems due to the disturbance involved, and some compensation on this account had to be provided also if suitable persons were to be attracted on those posts. The resolution of the Government for grant of special pay merely says that it would be given to the officers of Central Class I Services posted at the Headquarters organizations of the various non-technical, scientific and engineering departments. The resolution says nothing more. In the office memorandum dated August 20, 1975, it was stated that on the recommendation of the Third Pay Commission contained in paragraphs 35 and 37 of Chapter 8 and para 27(i) of Chapter 14 of the Report regarding grant of special pay, the President was pleased to decide that special pay shall be paid officers of Class I non-technical, technical and engineering services in defence establishmenst viz. ML&C, IOFS and MES when they were posted to their

Headquarters Organizations, i.e., to the highest office administratively in charge of the Defence Establishments, viz., (i) Director of Military Lands and Cantonments; (2) the office of the Director General of Ordinance Factories, Calcutta; and (3) E-in-C's Branch, Army Headquarters. On the basis of this office memorandum, Senior Barrack Stores Officers or Principal Barrack Stores Officers or Senior Administrative Officers started getting special pay. A clarification to this scheme was issued on June 9, 1982 when another office memorandum was issued, and under this it was stated that a doubt had arisen whether the benefit of special pay as contained in office memorandum dated August 20, 1975, could be extended to officers of non-organized services on their posting to the Headquarters Organizations of their respective departments. It was clarified by the office memorandum that benefit of special pay would be admissible to Class I Officers (Group 'A' Officers) of the respective Organized Services only when they were posted to the Headquarters Organization of their respective departments. The petitioners have, therefore, been denied special pay on this account.

We have seen above, the decision of the Government accepting the recommendation of the Pay Commission means that the posts held by senior scale officers (officers of Central Class I Services) in the Headquarters Organ in various non-technical, scientific and engineering departments should carry a special pay of Rs.200/- per month, etc. The argument that special pay is to be admissible to Class I Officers of respective organized services is based on para ˇ29 of the Report which is not relevant for our purposes inasmuch paragraphs 25 to 29 deal with pay fixation on promotion. Special pay is discussed in paras 30 to 39 of the Report. Moreover, resolution of the Government does not talk of any tenure posting to be

eligible for special pay. There is no ambiguity in the resolution of the Government for us to go back to the Pay Commission Report on the grant of special pay. Special Pay cannot mean other than what F.R. 9(25) says…." **(Para 28)**

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. **(Para 29)**

(C) Constitution of India, 1950—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—The issue raised in the petition (i) Whether the initial pay of the petitioner in W.P. (C) No. 4377/ 2003 in the post of Civilian Officer Grade-I (SG) was required to be fixed in terms of the provisions of F.R. 22 (1) (a) (1)—Held—The sine qua non for the application of F.R.22(1) (a) (1) in a given case is appointment or promotion to a new post—Both, the petitioner as also the department have proceeded on the premise that the post of Civilian Officer Grade-I (Selection Grade) is distinct from the post of Civilian Officer Grade-I Whereas the petitioner has contended that the post of Civilian Officer Grade-I (Selection Grade) is a functional post i.e. it carries greater duties and responsibilities than the feeder post of Civilian Officer Grade-I the department has contended that the said post is non functional—The stands taken by

both the petitioner and department are incorrect as they are based on an incorrect understanding of the concept of selection grade—That being the position, the post of Civilian Officer Grade-I (Selection Grade) is not distinct from the post of Civilian Officer Grade-1 When the post of Civilian Officer-1 (Selection Grade) is not distinct from the post of Civilian Officer Grade—I, F.R. 22 (1) (a) (1) has no application in the present case.

As evident from the aforesaid, the sine qua non for the application of F.R. 22(1)(a)(I) in a given case is appointment or promotion to a new post. Both, the petitioner as also the department have proceeded on the premise that the post of Civilian Officer Grade-I (Selection Grade) is distinct from the post of Civilian Officer Grade-I. Whereas the petitioner has contended that the post of Civilian Officer Grade-I (Selection Grade) is a functional post i.e. it carries greater duties and responsibilities than the feeder post of Civilian Officer Grade-I the department has contended that the said post is non-functional. The stands taken by both the petitioner and department are incorrect as they are based on an incorrect understanding of the concept of selection grade.**(Para 35)**

That being the position, the post of Civilian Officer Grade-I (Selection Grade) is not distinct from the post of Civilian Officer Grade-I. When the post of Civilian Officer Grade-I (Selection Grade) is not distinct from the post of Civilian Officer Grade-I F.R.22(I)(a)(1) has no application in the present case. **(Para 38)**

Important Issue Involved: Officers working in the administrative officers cadre of BRO are entitled to the payment of special pay/headquarters allowance.

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. K.N. Madhusoodhanan, Advocate Ms. Rekha Palli, Ms. Punam Singh and Ms. Amrita Prakash, Advocates.

FOR THE RESPONDENTS : Mr. K.P'S. Kohli, Advocate. Mr. R.V. Singh and Mr. A'S. Singh, Advocates.

CASES REFERRED TO:

1. *Union of India* vs. *S'S. Ranade* (1995) 4 SCC 462.
2. *Union of India* vs. *K.R. Swami & Ors.* LPA No.121/1984.
3. *Lalit Mohan Deb* vs. *Union of India* (1973) 3 SCC 862.

RESULT: Petition dismissed.

PRADEEP NANDRAJOG, J.

1. The above captioned writ petitions under Article 226 of Constitution of India raise three issues; namely: (i) whether the administrative officers cadre of Border Roads Organization is required to be encadred as an organized cadre; (ii) whether the petitioners in W.P.(C) No.10121/1999 are entitled to the payment of special pay/headquarters allowance; and (iii) whether the initial pay of the petitioner in W.P.(C)No.4377/2003 in the post of Civilian Officer Grade-I (SG) was required to be fixed in terms of the provisions of F.R. 22(I)(a)(1).

2. Whereas issue No.(i) arises for consideration in both the writ petitions, issues Nos.(ii) and (iii) arise in W.P.(C) Nos.10121/1999 and 4377/2003 respectively.

3. Since one of the issues which arise for consideration in the two captioned petitions is common, arguments were heard in both the matters on 07.04.2011 and decision was reserved. The present judgment decides both the petitions.

4. We shall be dealing with each of the issues separately.

Issue No. (I)

5. Border Roads Organization (hereinafter referred to as the "BRO") 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. BRO is a civil engineering institution responsible to provide civil (construction) engineering cover to the Armed Forces of India and under the administrative control of Ministry of Road Transport and Highways, Government of India. BRO is staffed with a combination of Border Roads Engineering Services (BRES) officers from General Reserve Engineering Force (GREF) and officers from Corps of Engineering of Indian Army. Broadly, there are four cadres in BRO; namely: (i) Civil Engineering Cadre; (ii) Electrical and Mechanical Engineering Cadre; (iii) Administrative Officers (Non-Technical) Cadre and (iv) Medical Cadre. Out of the said four cadres, two cadres namely, civil engineering cadre and electrical and mechanical engineering cadre have been encadred as organized cadres. The petitioners in the two captioned writ petitions are/were the officers who are/were holding various Group A posts in the administrative officers cadre of BRO.

6. In the year 1991 the petitioner of W.P.(C) No.4377/2003, K.L.Noatay who was working on the post of Civilian Officer, Grade-I in the administrative officers cadre of BRO filed a petition bearing No.3210/1991 under Article 226 of Constitution of India before the Gauhati High Court, inter-alia praying for the relief(s) that :- (i) a direction be issued to the department to undertake a cadre review of the posts in the administrative officers cadre of BRO; and (ii) petitioner K.L.Noatay be promoted to a post higher than that of Civilian Officer, Grade-I, with effect from the date his counterpart working in engineering cadres was promoted to a higher post and to grant him incidental benefits of such promotion.

7. Noting that there are no promotional prospects for the persons working as Civilian Officers in BRO, vide judgment and order dated 14.07.1995 the Gauhati High Court directed the department to undertake a review of the cadre of Civilian Officers i.e. administrative officers cadre to improve promotional prospects of the post of Civilian Officer in BRO. The relevant portion of the judgment of the High Court reads as under:-

> "9. <u>There is thus an immediate need to provide promotional prospects for persons working as Civilian Officers in the Border Roads Organization.</u> The respondents have stated in their affidavit-in-opposition that it has been decided to carry out the cadre review of the Civilian Officer and grant relief to them, but the matter has been dragged for too long time. Since such cadre review of the Civilian Officers of Border Roads Organization is long over-due and the petitioner is about to retire from service within a year, I direct that the respondents shall within a period of 3 months from the receipt of a certified copy of this order from the petitioner review the cadre of Civilian Officers in the Border Roads Organization for the purpose of creating promotional posts for Civilian Officers and within two months thereafter consider the petitioner along with others for promotion to such promotional posts which may be created by the respondents. I further direct that while making such cadre review and granting promotional benefits, the respondents shall also decide as to whether, considering the fact that the Civilian Officers have stagnated in their respective posts for almost two decades, such promotional benefits should be given with retrospective effect. With these directions, the writ petition is disposed of, but there shall be no order as to costs." (Emphasis Supplied)

8. Pursuant to the afore-noted directions issued by Gauhati High Court, on 08.11.1995 the department carried out a review of the posts in the administrative officers cadre of BRO.

9. All this while, the officers working in the administrative officers cadre of BRO were making representations to the department that in view of the lack of promotional prospects in the administrative officers cadre which has a sizeable strength inasmuch as it consists of 130 Group A officers and plays an important role in the working of BRO the same be encadred as an organized cadre.

10. In view of the representations made by the officers of the administrative officers cadre, on 30.09.2009 DDG (Pers), BRO forwarded a note to the Border Roads Development Board wherein he mooted a proposal for the encadrement of the administrative officers cadre of the BRO as an organized cadre. The said note reads as under:-

> "1. Ref Sectt BRDB ID Note No. PC-6 to BRDB/03/191/2007/GE-I dated 13 May 2009.

2. GO – 1349W Dir (Admn) RS Ghera of this Dte has submitted a representation requesting for making Administrative Officers Cadre as an organized cadre so that the benefits of Organized Cadre can also be extended to Administrative Officers Cadre, as in the case of Civil/E & M cadre.

3. The case has been examined in the light of the following aspects:-

(a) Instruction from Deptt of Pers & Trng vide No. AB-14017/38/90-Estt (RR) dated 23 May 1990(F/B) which stipulates that all isolated posts should be encadred into Organized Cadre.

(b) 130 Group A Officers are on the strength of the Administrative officers cadre in the Organization. Organized services like Indian Supply Service, Indian Inspection Service, P & T Building Works Service, etc have less strength that that of Administrative Officer Cadre.

(c) In BRO, the Group A E&M Cadre who were having less strength (i.e. 117 Nos) had been made an Organized Service, during 1997.

(d) A model Organized cadre Cadre should have the following level of posts.

Ideal	**Holding**
SAG (Jt Secy or equivalent)	Director (JAG)
JAG (Dy Secy or equivalent)	Jt Dir (JAG)
STS (US or equivalent)	SAO(STS)
JTS (Admn Offr or equivalent)	AO(JTS)

50% of JTS should be through direct recruitment.

(e) Presently in the Administrative officers cadre, the lower three levels are available as against the SAG level, two posts of Director are available which are lower than SAG level.

(f) In BRO there are broadly four arms/cadre of Officers:-

(i) Civil Engineers

(ii) Mech Engineers

(iii) Medical Officers

(iv) Administrative Officers

(g) The cadres mentioned at (i) and (ii) of Para 3 (f) are organized cadre. The Medical Cadre which is small in strength, though not Organized, is covered by Dynamic Assured career progression and an Officer joined as MO-II(JTS) will get SAG Scale after completion of 20 years of Service.

(j) The Administrative officers cadre, in fact, is large in strength and meets the requirements of an Organized Service and is presently deprived of benefits of both Organized Cadre as well as DACP.

4. Representation of Director (Admn) RS Ghera was also referred to the Cadre Review Committee constituted at this Dte for the purposes of cadre review of all categories of GREF officers. The Committee has opined that if Admn Officers Cadre is to be constituted as an organized cadre, then all the attributes of an organized service has to be satisfied, viz post at the level of JS equivalent has to be created, lateral entry to be stopped, Dir (Admn) post to be declared Non-Functional, entry at JTS level has to be from Civil Service Examination conducted by UPSC and the Gazette Notification of the Ministry will be required making Admn Officers of BRO as an organized service.

6. All organized cadres do not have posts strictly as per the model Organized Service and even Indian Legal Services do not have any post of JTS level. Therefore, the cadres which do not fit as per the model can also be declared as Organized cadre. In view of all the points elaborated above, it is recommended that the case for declaring Administrative Officers Cadre as an organized cadre be considered even if it involves excluding the SAG level post at present." (Emphasis Supplied)

11. Vide office order dated 05.11.2009 the Border Roads Development Board rejected the afore-noted proposal mooted by DDG (Pers) for the encadrement of the administrative officers cadre of the

BRO as an organized cadre, which office order reads as under:-

"Subject: To encadre Administrative Officer of BRO as an Organized Group A Cadre

Reference Dte.GBR's Note No.13822/SCR/Adm Cadre/DGBR/93/E1A dated 30.09.2009 on the above subject.

2. The proposal has been examined and the same has not been accepted due to the reasons given below:-

(a) Border Roads Organization is a construction agency and engineers are the backbone of the organization and the main cadre for the execution of construction works, hence comparison of AOs with engineers is not tenable.

(b) The Assistant Executive Engineers (entry level) are recruited through UPSC on the basis of Engineering Service Examination whereas Administrative Officers are recruited through interview basis only. Thus mode of selection for these two posts is not similar.

(c) After implementation of recommendation of 6th Central Pay Commission, the Govt. has introduced Modified ACP Scheme for Group A officers also. Under this scheme, there will be three financial upgradation at intervals of 10, 20 and 30 years of continuous regular service and the same is also applicable to the officers of Administrative officers cadre.

3. This issues with the approval of secretary BRDB."

12. Aggrieved by the decision of the department not to encadre the administrative officers cadre as an organized cadre the petitioners in both the petitions have filed the present petition(s) under Article 226 of Constitution of India inter-alia contending that in view of the lack of promotional prospects in the administrative officers cadre which has a sizeable strength inasmuch as it consists of 130 Group A officers and plays an important role in the working of BRO, the department be directed to encadre the said cadre as an organized cadre. In order to highlight the lack of promotional prospects in the administrative officers cadre, the petitioners laid emphasis on the fact there exists a wide disparity between the promotional prospects in the administrative officers cadre and the

two cadres of BRO which have been encadred as organized cadre namely, civil engineering cadre and electrical and mechanical engineering cadre. To demonstrate the said disparity, following table(s) were pressed into service by the petitioners:-

Comparison of Cadres in BRO

Civil Engineering Cadre

S. No	Name of Official	Date of Joining	Senior Time Scale	Junior Admn. Grade (Jt Dir/Dir)	Senior Admn. Grade	Higher Admn Grade
1.	V.K. Yadav	09.05.1978	15.06.1992	13.12.1997 (Dir)	12.12.2002	17.11.2009
2.	Anil Kumar	10.05.1983	23.07.1993	18.08.1999 (Dir)	01.12.2004	-
3.	Vinod Kumar	05.04.1983	July 1993	14.06.1999 (Dir)	05.10.2005	-

Electrical and Mechanical Engineering Cadre

S. No	Name of Official	Date of Joining	Senior Time Scale	Junior Admn. Grade (Jt Dir/Dir)	Senior Admn. Grade	Higher Admn Grade
1.	S. Sen	01.05.1982	22.03.1992	07.06.2001 (Dir)	31.05.2006	-
2.	V.N. Singh	06.08.1985	09.11.1993	07.10.2003 (Dir)	-	-
3.	Rajesh Kumar	08.09.1990	20.08.2000	28.11.2009 (Dir)	-	-

Administrative Officers Cadre

S. No	Name of Official	Date of Joining	Senior Time Scale	Junior Admn. Grade (Jt Dir/Dir)	Senior Admn. Grade	Higher Admn Grade
1.	R'S. Ghera	18.03.1978	05.03.1993	20.02.2002 (Jt Dir); 30.11.2007 (Dir)	-	-
2.	A.K. Chattop-adhyay	14.03.1983	29.06.1995	06.09.2004 (Jt Dir)	-	-
3.	R.P. Singh	04.03.1983	12.04.1996	01.12.2006 (Jt Dir)	-	-
4.	Rohtash Kumar	17.10.1979	08.06.1996	22.08.2007 (Jt Dir)	-	-
5.	Alok Das	15.06.1982	09.09.1997	01.09.2007 (Jt Dir)	-	-

13. Per contra, the department contended that it is settled legal position that the courts should be very slow in interfering with the policy decisions of the State as it is a decision taken by the administrators on an examination of various facets before them and the inputs they receive from various sources. It was contended that in view of the said legal position, this Court should not interfere with the policy decision of the department not to encadre administrative officers cadre as an organized cadre.

14. Broadly speaking, there are two categories of posts in Group A services in the Central Government viz., those encadred in the organized cadres and those which do not form part of any organized cadre. In an organized cadre the posts belonging therein are arranged in a hierarchical and pyramidical manner representing different level of responsibilities or grades and the level of responsibilities increases with each senior level. There are six grades in an organized cadre viz., Junior Time Scale (JTS), Senior Time Scale (STS), Junior Administrative Grade (JAG), Non-Functional Selection Grade (NFSG), Senior Administrative Grade (SAG), Higher Administrative Grade (HAG) and Higher Administrative Grade-I (HAG-I). While the Junior Time Scale (JTS) is the lowest grade, Higher Administrative Grade-I (HAG-I) is the highest grade. The Pay

Commissions recommend scales of pay (now known as pay bands) for different grades/levels of posts keeping in view the nature of responsibilities attached to the posts and the cadre structure i.e. the promotional avenues. As opposed to this, the posts belonging to an unorganized cadre are not arranged according to the level of the responsibilities attached to the posts. Since the posts belonging to the unorganized cadres are not arranged according to the level of the responsibilities/grades the recommendations made by the Pay Commissions do not apply to the unorganized cadres as a result whereof acute stagnation is caused in the said cadres. The instant case is a perfect example of the same. The tables noted in para 12 above depicting the career progressions of the officers working in the administrative officers cadre vis-à-vis their counterparts working in the two engineering cadres, the organized cadres of BRO. The afore-noted judgment dated 14.07.1995 passed by the Gauhati High Court also notices the stagnation of the officers of the administrative officers cadre.

15. In view of the acute stagnation in the administrative officers cadre of BRO due to non-encadrement of the said cadre as an organized cadre, is the decision of the department of refusing to encadre the administrative officers cadre as an organized cadre legally valid is the question which needs to be answered by us?

16. As already noted herein above, three reasons have been given by the department in refusing to encadre the administrative officers cadre as an organized cadre; namely: (i) the two engineering cadres play a pivotal role in the working of BRO, which is not the case with administrative officers cadre; (ii) the mode of selection for the entry level posts in the administrative officers cadre and the two engineering cadres are different; and (iii) the implementation of the recommendations of Sixth Central Pay Commission the Modified Assured Career Progression Scheme (MACPS) applies to all the Group A central government employees including the officers working in the administrative officers cadre of BRO and the same solves the problem of the lack of promotional prospects in the administrative officers cadre.

17. The first two reasons given by the department to refuse to encadre the administrative officers cadre as an organized cadre are wholly fallacious. The department has not correctly appreciated the tenor of the grievance raised by the officers working in administrative officers cadre in respect of non-encadrement of their cadre as an organized cadre. The

grievance raised was that due to non-encadrement of the administrative officers cadre as an organized cadre there is lack of promotional prospects in the said cadre. It was not the grievance of the officers working in administrative officers cadre that they are being discriminated against their counterparts in the two engineering cadres and thus their cadre should also be encadred as an organized cadre like the two engineering cadres. The career progression of the officers working in the said two engineering cadres has only been referred to by the officers working in administrative officers cadre to demonstrate the lack of promotional prospects in their cadre. Thus, the approach of the department in drawing a comparison between administrative officers cadre and the two engineering cadres and thereby refusing encadrement to administrative officers cadre is totally non-focused. In any case, it is not correct to say that the administrative officers cadre does not play an important role in the working of BRO. BRO has a task force of approximately 42,000 personnel. The administrative officers cadre is responsible for assisting, advising and operating matters of discipline, administration and other matters relating to human behavior and motivation in personnel of BRO. The administrative officers cadre is also responsible for the general safety of unit lines, maintenance of regimental institutions, general administration matters, preservation of resources and liaison with other units on matters connected with execution of tasks assigned to them.

18. As regards the application of the Modified Assured Career Progression Scheme (MACPS) to the officers working in the administrative officers grade is concerned, relevant would it be to note that in order to remove stagnation, the Fifth Central Pay Commission recommended Assured Career Progression Scheme (ACPS) to all the general employees in the Central Government. The scheme of ACP recommended by the Fifth Central Pay Commission envisaged three time-bound promotions for Group A posts after 4, 8 and 13 years of service. For posts in Groups B, C and D, two time-bound promotions were to be provided on completion of 8 and 16 years of service for Group B, 10 and 20 years for Group C and 12 and 24 years for Group D. The Government accepted the said scheme in a modified manner and introduced the ACPS for Groups B, C and D and isolated posts in Group A where two financial upgradations were to be provided on 12 and 24 years of service. The financial upgradations were to be in the next higher grade in the existing

hierarchy. The Sixth Central Pay Commission recommended certain modifications in the Assured Career Progression Scheme implemented by the Government. One of the recommendations made by the Sixth Central Pay Commission was that save and except organized Group A services, the benefit of ACPS be available to all posts belonging to Group A, whether isolated or not, which recommendation has been accepted by the Central Government. 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.

19. 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.

20. In view of the above discussion, we direct the department to encadre the administrative officers cadre of BRO as an organized cadre.

21. However the matter does not rest here. The further question which arises is whether the said encadrement would take effect from a prospective or retrospective date and if retrospective, then from which date.

22. 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. The decision would be taken within 16 weeks of the receipt of this judgment. In taking the said decision, the department shall take into account all the facts germane to the issue, particularly the fact that the officers working in the administrative officers cadre have been stagnating since a long time.

Issue No. II

23. The petitioners in W.P.(C) No.10121/2009 who are holding various Group A posts in the administrative officers cadre in BRO have been posted at the headquarters of BRO in Delhi.

24. On 26.08.1974 Department of Expenditure, Ministry of Finance, Government of India issued following office memorandum to all the Ministries/Departments of Government of India:-

> "Subject: - Grant of special pay to class I senior scale (Rs.1100-1600)/junior Administrative Grade/inter Administrative Grade officers posted in headquarters organization of the various Departments-Recommendations of the Third Pay Commission.
>
> The undersigned is directed to invite a reference to the recommendations of the Third Pay Commission contained in paragraph 34 and 35 of Chapter 8 and paragraph 27(1) of Chapter 14 of its Report regarding grant of special pay to officers in the senior scale and the Junior/inter administrative grades of Central Class I Services while holding posts in their respective Headquarters organization. These recommendations have been accepted by the Government vide item No.8 of the Annexure to the Ministry of Finance to the Ministry Resolution No.F.11/35/74-IC dated 1.5.1974. The President is accordingly pleased to decide that special pay at the following rates to officers of Class I Non-technical, Technical, Scientific and Engineering Services when they are posted to the Headquarters Organizations of those Departments, i.e. to the highest office administratively in charge of the Department like the office of the C & A.G., office of the Controller General of Defence Accounts, P & T Board, Central Board of Direct Taxes, Central Board of Customs and Excise, etc.
>
> Rates of Special Pay
>
> Officers in the senior scale Rs.200/- per month (Revised scale Rs.1100-1600)
>
> Officers in the Junior Rs.300/- per month Administrative/ Intermediate Administrative grade
>
> (Revised scales Rs.1500-1800/1800-2000/1500-2000)
>
> The grant of special pay at the rates indicated above will be subject to the condition that the pay plus special pay does not exceed Rs.1700/- in case of senior scale officers and Rs.2250/- in case of Junior/Intermediate administrative grades."

25. On 20.02.1979 the Director General Border Roads sanctioned the payment of special pay/headquarters allowance only with respect to the officers working in the "organized cadres" of BRO.

26. Aggrieved by the action of the department of denying the payment of special pay/headquarters allowance to the officers working in the administrative officers cadre, the petitioners have filed the present petition under Article 226 of Constitution of India.

27. Whether the action of the department in denying special pay/ headquarters allowance to the officers working in administrative officers cadre on the ground that the administrative officers cadre is not an organized cadre is legally valid?

28. This issue is no longer res integra. In LPA No.121/1984 **'Union of India 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 materia 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. The petitioner therein was working as Senior Administrative Officer in Military Engineering Service. A similar stand that the officers therein did not belong to an organized Group A service was taken by Military Engineering Service to deny the payment of special pay/headquarters allowance to the officers therein, which stand was repelled by this Court in following terms:-

> "We have reproduced above the relevant resolution of the Central Government accepting the recommendation of the Pay Commission regarding special pay. This resolution refers paras 34 and 35 of Chapter 8 and para 27(i) of Chapter 14 of the Pay Commission Report. Only para 34 is relevant for our purpose as other paras deal with the quantum of the special pay. Para 34 is as under:-
>
> "34. We are of the view that the device of special pay

should be used as sparingly as possible. Thus our approach generally has been to suggest a higher scale of pay for posts which are held on a non-tenure basis and where the special pay has been granted at present in lieu of a higher scale for the post itself. However, we feel that the device of granting special pay cannot be discarded in the case of posts where persons have to attracted for a fixed tenure from other cadres and departments. The grant of special pay for compensating genuine and discernible, but not substantial, difference of duties is to be preferred to the fragmentation of cadres, with attendant complication. Once a higher scale of pay as such is sanctioned for a post of category of posts in a cadre, and a person is appointed to such a post, it may be difficult to shift him to a posts carrying even a slightly lower scale of pay, as it may be construed as a reduction in rank, attracting the provisions of Article 311 of the Constitution. No such disadvantage attaches to posts carrying special pay which leads to enormous flexibility. This criterion would apply to posts in the Secretariat and at the Headquarters of the departments. In the case of posts at 'headquarters' held on a tenure basis, the officer brought on deputation has to encounter many problems due to the disturbance involved, and some compensation on this account has to be provided also if suitable persons are to be attracted to these posts."

Special Pay, under F.R. 9(25), means an addition, of the nature of pay, to the emoluments of a post or of a Government servant, granted in consideration of – (a) the specifically arduous nature of the duties; or (b) a specific addition to the work or responsibility. Cadre under F.R.9(4) means the strength of a service or a part of service sanctioned as a separate unit. Para 34 of the Pay Commission Report reproduced above does not talk of any organized service or established service. In this para it is recommended that special pay be granted "in the case of posts where persons have to be attracted for a fixed tenure from other cadres or departments." The Commission opined that the grant of special pay for compensating genuine and discernible,

but not substantial, difference of duties was to be preferred to the fragmentation of cadres, with attendant complication. This criterion, it said, would apply to posts in the Secretariat and at the Headquarters of the departments and in the case of posts at Headquarters held on tenure basis, the officer brought on deputation had to encounter many problems due to the disturbance involved, and some compensation on this account had to be provided also if suitable persons were to be attracted on those posts. The resolution of the Government for grant of special pay merely says that it would be given to the officers of Central Class I Services posted at the Headquarters organizations of the various non-technical, scientific and engineering departments. The resolution says nothing more. In the office memorandum dated August 20, 1975, it was stated that on the recommendation of the Third Pay Commission contained in paragraphs 35 and 37 of Chapter 8 and para 27(i) of Chapter 14 of the Report regarding grant of special pay, the President was pleased to decide that special pay shall be paid officers of Class I non-technical, technical and engineering services in defence establishmenst viz. ML&C, IOFS and MES when they were posted to their Headquarters Organizations, i.e., to the highest office administratively in charge of the Defence Establishments, viz., (i) Director of Military Lands and Cantonments; (2) the office of the Director General of Ordinance Factories, Calcutta; and (3) E-in-C's Branch, Army Headquarters. On the basis of this office memorandum, Senior Barrack Stores Officers or Principal Barrack Stores Officers or Senior Administrative Officers started getting special pay. A clarification to this scheme was issued on June 9, 1982 when another office memorandum was issued, and under this it was stated that a doubt had arisen whether the benefit of special pay as contained in office memorandum dated August 20, 1975, could be extended to officers of non-organized services on their posting to the Headquarters Organizations of their respective departments. It was clarified by the office memorandum that benefit of special pay would be admissible to Class I Officers (Group 'A' Officers) of the respective Organized Services only when they were posted to the Headquarters Organization of their respective departments. The petitioners have, therefore, been

denied special pay on this account.

We have seen above, the decision of the Government accepting the recommendation of the Pay Commission means that the posts held by senior scale officers (officers of Central Class I Services) in the Headquarters Organ in various non-technical, scientific and engineering departments should carry a special pay of Rs.200/- per month, etc. The argument that special pay is to be admissible to Class I Officers of respective organized services is based on para 29 of the Report which is not relevant for our purposes inasmuch paragraphs 25 to 29 deal with pay fixation on promotion. Special pay is discussed in paras 30 to 39 of the Report. Moreover, resolution of the Government does not talk of any tenure posting to be eligible for special pay. There is no ambiguity in the resolution of the Government for us to go back to the Pay Commission Report on the grant of special pay. Special Pay cannot mean other than what F.R. 9(25) says…."

29. 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.

Issue No. (III)

30. On 28.10.1972 the petitioner in W.P.(C)No.4377/2003 was recruited in the administrative officers cadre of BRO on the post of Civilian Officer Grade-I in the pay scale of Rs. 3700-4500/-. On 01.12.1991 the petitioner was granted selection grade in the pay scale of Rs. 3700-125-4700-150-5000 and his pay was fixed at Rs. 4,575/- per month. Pursuant thereto, the petitioner made a representation to the department inter-alia stating therein that his initial pay in the post of Civilian Officer Grade-I (Selection Grade) be fixed in terms of the provisions of FR 22(I)(a)(1) for the reason the post of Civilian Officer Grade-I (Selection Grade) carries greater duties and responsibilities than the post previously held by him i.e. the post of Civilian Officer Grade-I. The department

accepted the aforesaid representation of the petitioner and fixed the pay of the petitioner as Rs. 4,700/- per month in terms of the provisions of FR 22(I)(a)(1).

31. All was well in the world of the petitioner till about 11.03.1996, on which date the Controller of Defence Accounts issued a letter to the department inter-alia stating therein that the department has wrongly fixed the initial pay of the petitioner in the post of Civilian Officer Grade-I (Selection Grade) in terms of the provisions of FR 22(I)(a)(1) for the post of Civilian Officer Grade-I (Selection Grade) is a non-functional post and thus the initial pay of the petitioner ought to have been fixed in terms of the provisions of FR 22(2). On the receipt of the afore-noted letter issued by Controller of Defence Accounts, the department re-fixed the initial pay of the petitioner in the post of Civilian Officer Grade-I (SG) as Rs. 4,575/- per month in terms of the provisions of FR 22(2).

32. Aggrieved by the aforesaid action of the department the petitioner has filed the present petition under Article 226 of Constitution of India.

33. As evident from the afore-noted conspectus of facts, the controversy involved in the present matter centers around FR 22, the relevant portion whereof reads as under:-

"F.R. 22. (I) The initial pay of a Government servant who is appointed to a post on a time-scale of pay is regulated as follows:-

(a)(1) Where a Government servant holding a post, other than a tenure post, in a substantive or temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity, as the case may be, subject to the fulfillment of the eligibility conditions as prescribed in the relevant Recruitment Rules, to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him, his initial pay in the time-scale of the higher post shall be fixed at the stage next above the notional pay arrived at by increasing his pay in respect of the lower post held by him regularly by an increment at the stage which such pay has accrued or rupees one hundred only, whichever is more.

Save in cases of appointment on deputation to an ex cadre

post, or to a post on ad hoc basis or on direct recruitment basis, the Government servant shall have the option, to be exercised within one month from the date of promotion or appointment, as the case may be, to have the pay fixed under this rule from the date of such promotion or appointment or to have the pay fixed initially at the stage of the time-scale of the new post above the pay in the lower grade or post from which he is promoted on regular basis, which may be refixed in accordance with this rule on the date of accrual of next increment in the scale of the pay of the lower grade or post. In cases where an ad hoc promotion is followed by regular appointment without break, the option is admissible as from the date of initial appointment/promotion, to be exercised within one month from the date of such regular appointment:

Provided that where a Government servant is, immediately before his promotion or appointment on regular basis to a higher post, drawing pay at the maximum of the time-scale of the lower post, his initial pay in the time-scale of the higher post shall be fixed at the stage above the pay notionally arrived at by increasing his pay in respect of the lower post held by him on regular basis by an amount equal to the last increment in the time-scale of the lower post or rupees one hundred, whichever is more.

(2) When the appointment to the new post does not involve such assumption of duties and responsibilities of greater importance, he shall draw as initial pay, the stage of time-scale which is equal to his pay in respect of the old post held by him on regular basis, or, if there is no such stage, the stage next above his pay in respect of the old post held by him on regular basis:

…."

34. A plain reading of the above Rule shows that two distinct situations are envisaged when a government servant is promoted or appointed in a substantive, temporary or officiating capacity to another post. Where such appointment involves higher duties and responsibilities, the initial pay of such Government servant in higher post shall be fixed at the stage *"next above the notional pay arrived at by increasing his pay in respect of the lower post held by him regularly by an increment at the*

stage at which such pay has accrued or rupees one hundred only, whichever is more.". This is otherwise called stepping up of the pay at the initial stage. However, where the appointment to the new post does not involve duties and responsibilities of greater importance there would be no stepping up of the pay at the initial stage and the initial pay would be *"equal to his pay in respect of the lower post held by him on regular basis."* Therefore, in each case, it would be a question of fact whether the appointment to the new post is one which has higher duties and responsibilities than the old post.

35. As evident from the aforesaid, the sine qua non for the application of F.R. 22(1)(a)(I) in a given case is appointment or promotion to a new post. Both, the petitioner as also the department have proceeded on the premise that the post of Civilian Officer Grade-I (Selection Grade) is distinct from the post of Civilian Officer Grade-I. Whereas the petitioner has contended that the post of Civilian Officer Grade-I (Selection Grade) is a functional post i.e. it carries greater duties and responsibilities than the feeder post of Civilian Officer Grade-I the department has contended that the said post is non-functional. The stands taken by both the petitioner and department are incorrect as they are based on an incorrect understanding of the concept of selection grade.

36. The concept of 'Selection Grade' was explained by the Supreme Court in the decision reported as **Lalit Mohan Deb v Union of India** (1973) 3 SCC 862 in the following terms:-

> "It is well recognised that a promotion post is a higher post with a higher pay. A selection grade has higher pay but in the same post. A selection grade is intended to ensure that capable employees who may not get a chance of promotion on account of limited outlets of promotions should at least be placed in the selection grade to prevent stagnation on the maximum of the scale. Selection grades are, therefore, created in the interest of greater efficiency." (Emphasis Supplied)

37. In the decision reported as **Union of India v S'S. Ranade** (1995) 4 SCC 462 the question which had arisen for consideration was whether the post of Commandant (Selection Grade) is distinct from the post of Commandant. Answering the aforesaid question in negative, the Supreme Court observed as under:-

"This submission is based on a misunderstanding of what is meant by Selection Grade. Undoubtedly, a Commandant who becomes a Commandant (Selection Grade) secures a promotion to a higher pay scale. But it is a higher pay scale in the same post. The use of the word 'promotion' in Rule 6 and the constitution of a Departmental Promotion Committee for selection of Commandant (Selection Grade) in Rule 7, do not necessarily lead to the conclusion that the promotion which is contemplated there is necessarily a promotion to a higher post. Promotion can be either to a higher pay scale or to a higher post. These two rules and the use of the word 'promotion' there do not conclude the issue.

The High Court in its impugned judgment has referred to Article 311(2) of the Constitution. It has considered how different posts in the Civil Service of the Union or the States or all-India services are compared or ranked with reference to one another in order to ascertain whether, in a given case, there is reduction in rank under Article 311(2) by transfer from one post to another post. In this connection the High Court has emphasised that posts carrying different designations and different duties may be considered equivalent in rank if they are in the same pay scale. In this context pay scale may be a good yardstick for measuring rank. But this has no application to selection grade posts. Because the creation of a selection grade in the same post stands on a very different footing. By its very nature a selection grade provides a higher pay or a higher pay scale in the same post. The beneficiary of a selection grade does not thereby occupy a post which is higher in rank than the post earlier occupied by him." (Emphasis Supplied)

38. That being the position, the post of Civilian Officer Grade-I (Selection Grade) is not distinct from the post of Civilian Officer Grade-I. When the post of Civilian Officer Grade-I (Selection Grade) is not distinct from the post of Civilian Officer Grade-I F.R.22(I)(a)(1) has no application in the present case.

Conclusion

39. In view of above discussion, we conclude as under:- I The

department is directed to encadre the administrative officers cadre of BRO as an organized cadre. The department shall further decide whether the encadrement of administrative officers cadre of BRO as an organized cadre would take effect from a prospective or retrospective date within eight weeks of the receipt of this judgment. II 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 the headquarters of BRO.

40. With these directions, the above captioned petitions are disposed of. There shall be no order as to costs.

ILR (2011) V DELHI 196
WP (C)

SHASHI KOHLI ....PETITIONER

VERSUS

DIRECTOR OF EDUCATION AND ANR. ....RESPONDENTS

(REKHA SHARMA, J.)

WP (C) NO. : 4330/2010 DATE OF DECISION: 29.04.2011

Constitution of India, 1950—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.

It is well settled that every adverse entry in a confidential report of an employee has to be communicated to him, for it is likely to mar his chances of promotion or other benefits. Here, in the present case, it is the petitioner's own case that inspite of adverse entries which were not communicated to her, she was given the benefit of financial upgradation under the ACP Scheme and was not put to any disadvantage while she was in service. The question is, whether once she

has ceased to be in the service of the respondent on attaining the age of 60 years, those ACRs even though not communicated to her could be looked into for determining, whether she deserved to be re-employed up to the age of 62 years. I feel that for the purpose of re-employment, the Committee was required to take an over-all view of conduct of the petitioner as a teacher in terms of fitness and, therefore, the ACRs, whether adverse or favourable, could be looked into. In any case, the Committee not only examined the ACRs of the last 5 years of the petitioner, but also her other record which, as noticed above, was far from commendatory. 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? I feel, the answer is in the negative. At the cost of repetition, it may be stated that 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. **(Para 17)**

[Ch Sh]

APPEARANCES:

FOR THE PETITIONER : Ms. Tamali Wad, Advocate with Ms. Indrani Ghosh, Advocate.

FOR THE RESPONDENTS : Mr. Anjum Javed, Advocate with Mr. Nirbhay Sharma, Advocate for respondent No. 1. Mr. Puneet Mittal, Advocate with Mr. Nitin Sharma, Mr. Ankur Aggarwal, Ms. Suman Rani & Mr. Sagar, Advocates for respondent No. 2.

CASES REFERRED TO:

1. *Dr. V.K.Agrawal* vs. *University of Delhi and others,* reported in (2005) Delhi Law Times 468 (DB).
2. *Prof. P'S.Verma* vs. *Jamia Millia Islamia University & others,* reported in 1996 III AD (Delhi) 33.
3. *Rattan Lal Sharma* vs. *Managing Committee, Dr. Hari Ram (Co-Education) Higher Secondary School and others,* reported in (1993) 4 Supreme Court Cases 10.

RESULT: Dismissed.

REKHA SHARMA, J.

1. The 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 (in short, referred to as "GNCTD") allowing re-employment to all retiring teachers upto PGT level till they attain the age of 62 years and that despite the Notification, she has not been granted the benefit of re-employment without any cogent reason.

2. Before I proceed further, let me reproduce the Notification. It runs as under:-

"GOVERNMENT OF NATIONAL CAPITAL TERRITORY OF DELHI, DIRECTORATE OF EDUCATION, OLD SECRETARIAT, DELHI.

No.F.30-3(28)/Co-Ord/2006/686-753

Dated: 29th January, 2007

NOTIFICATION

In pursuance to Cabinet Decision No.113, dt. 4.9.2006 conveyed vide letter No.F.3/3/2004-GAD/CN/ 20491-502, dt. 8.9.2006, the Lieutenant Governor, Government of National Capital Territory of Delhi is pleased to allow automatic re-employment of all retiring teachers upto PGT level, subject to fitness and vigilance clearance, till they attain the age of 62 years or till clearance from

Government of India for extending retirement age is received, whichever is earlier. The terms and conditions of re-employment are being notified separately.

By order and in the name of

The Lt. Governor of the National Capital

Territory of Delhi

Sd/-

(MADHUP VYAS)

Joint Secretary (Education)"

3. In furtherance to the Notification dated January 29, 2007, the GNCTD issued another Notification dated February 28, 2007 laying down instructions/guidelines for re-employment. The following paragraph of this Notification is relevant.

"x x x x x

1. The retiring teachers of the Directorate of Education, GNCT of Delhi, shall be eligible for consideration for re-employment against clear vacancy upto his/her attaining the age of 62 years. The re-employment will be subject to fitness and vigilance clearance of the retiring teachers, i.e. the pensioner. For physical fitness of retiring teacher, a certificate from authorized medical practitioner is required to be submitted to the Head of School, where the retiring teacher has last served. The professional fitness is required to be assessed by DDE of the concerned District after considering work and conduct report, vigilance clearance and medical certificate submitted by the pensioner. The DDE concerned will ensure that the teachers, who are free from vigilance angle, are only re-employed and individual teacher should not be made to run around to get the vigilance clearance..."

4. While the petitioner has relied upon the aforesaid Notification of January 29, 2007, respondent No.2, namely, 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 also a private unaided School, it is not covered by the Notification. It

may be noted that respondent No.1, namely, Director of Education in its counter-affidavit to the writ-petition has endorsed the said stand of respondent No.2. It says that the Notification dated January 29, 2007 regarding re-employment is meant for teachers upto PGT level in Government and Government aided Schools and is not applicable to unaided Public Schools. It further says that the re-employment is subject to conditions as specified in the Notification, like, medical fitness and performance before the retirement and that the competent authority in the case of Public Schools is the Managing Committee which has to take final decision in the matter of re-employment. It is not that respondent No.2 did not consider the case of the petitioner for re-employment up to the age of 62 years, but it was done not on the basis of the Notification dated January 29, 2007 but on the basis of a decision of the Working Committee of the Delhi Public School Society taken in its meeting held on January 15, 2007 whereby it was decided that all teachers will remain in employment upto the age of 62 years unless found unsuitable on any ground by a Committee consisting of Chairman, Vice Chairman and Principal of the School. The extracts of the Minutes of the meeting of the Working Committee relevant for our purpose are as under:-

> "x x x x x x
>
> (i) All teachers will remain in employment upto the age of 62 years unless found unsuitable on any ground by a committee consisting of Chairman, Vice Chairman and Principal of the School.
>
> (ii) In case of Principals, Vice Principals, Headmistresses/ Headmasters the committee consisting of Chairman DPSS and Chairman of the concerned School shall take a decision.
>
> (iii) Principal of the School would put up all the cases of said employees about to attain the age of 60 years, well in time, for decision by the appropriate committee.
>
> (iv) Provisions of the Delhi Education Act and Rules would be kept in view while deciding whether the 2 years beyond 60 years of age are to be by way of extension or reemployment and whether it can be done without seeking any approval."

6. It is not disputed that a Committee comprising of Mr. Ashok Chandra, Chairman, DPSS, Mr. V.R.Vaish, Chairman, M.C., Mr. Pramod

Grover, Vice-Chairman and Mr. M.I.Hussain, Principal-cum-Manager was constituted and the said Committee examined the relevant records of service including the Annual Confidential Reports (ACRs) of last 5 years of all eligible candidates including the petitioner but found the petitioner unfit for re-employment.

7. Undoubtedly, and I say so, because it appears to be so apparent from the Notification of GNCTD dated January 29, 2007 read along with the Notification dated February 28, 2007 on the one hand, and the Minutes of the meeting relied upon by the School on the other, 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. As regards the decision of the Working Committee of the School that its teachers will remain in employment upto the age of 62 years, the same will also come into effect if the teachers are not found unsuitable on any ground by the Committee. Hence, irrespective of whether it is the Notification of the GNCTD, or the decision of the Working Committee of the School, in either case, what needs to be examined is whether a teacher is fit, or to put it differently, not suitable for re-employment on any ground. The only right that the petitioner can claim is the right to be considered for extension. Nothing less, nothing more. And as borne out from the record, she was considered and found to be not fit for grant of extension.

8. It will not be out of place to refer to two judgments of the Division Bench of this Court relied upon by the learned counsel for respondent No.2 wherein it has been held that the only right that an employee has in the matter of re-employment is the right to be considered and the Courts ordinarily will not interfere in the decision of the authority empowered to take such a decision.

9. In the first judgment titled **Prof. P'S.Verma versus Jamia**

Millia Islamia University & others, reported in 1996 III AD (Delhi) 33, the petitioner was a Professor in Jamia Millia Islamia University. He retired at the age of 60 on attaining the age of superannuation. Upon his retirement, he sought re-employment relying upon Regulation XXXVII of the University which provided that the Executive Council, on recommendation of Vice Chancellor, may in the interest of University, re-employ a teacher for such period as it may deem fit but not beyond the age of 65 years. The petitioner's request for re-employment was forwarded by the Head of the Department, namely, the Dean to the Vice Chancellor without making any comments of his own. However, subsequently the comments of the Dean were called for and in his comments, he stated that the petitioner's bio-data did not show any substantial contribution in respect of the research work, which is expected from a person of his status and as such, he did not recommend his case for re-employment. His case was also referred to the Advisory Committee, but the Advisory Committee also in its recommendation to the Executive Committee felt that it was not in the larger interest of the institution to grant him re-employment. The petitioner challenged the non-grant of extension to him, amongst others, on the ground, that two teachers after superannuation were re-employed without any recommendation of the Head of the Department, on the mere forwarding of their applications. The Division Bench of this Court dismissed the writ-petition and held as under:-

> "5. Having considered the respective stand of the parties, their submissions and the relevant Ordinance XXXVII-A, we are of the view that there is no legal right vested in a teacher of the respondent-University for being re-employed beyond the age of superannuation. The only right, if any, which can be said to be available to a teacher on superannuation would be of being considered for re-employment and in case recommendation is made for re-employment, he may be re-employed by the Executive Council. In a case where no recommendation for re-employment is made, the matter has to be referred to the Advisory Committee. In the case of the petitioner there was no positive recommendation for re-employment and no fault can be found in respondents action in forwarding his case to the Advisory Committee, which also has now given its advice for not re-employing the petitioner. The mere fact that in the past two teachers, after superannuation were re-employed, assuming, without any recommendation of

> the Head of the Department, on the mere forwarding of their applications, the same cannot amount to conferring a right in petitioner's favour and this act cannot be taken as an act of discrimination thereby giving right in petitioner's favour for being re-employed as a matter of course when petitioner's case was duly considered and not recommended and approved by the Advisory Committee."

10. The second case titled **Dr. V.K.Agrawal versus University of Delhi and others,** reported in (2005) Delhi Law Times 468 (DB) was an appeal from a decision of a learned Single Judge dismissing the plea of the appellant who was a Lecturer in Moti Lal Nehru College for re-employment after he had attained the age of superannuation. His case for re-employment was recommended by the Principal of the college and was also recommended by the Governing Body of the college. However, the Vice Chancellor on receiving the recommendation sent it to the Advisory Committee which consisted of experts and the Advisory Committee after examining the same on various aspects declined to recommend the appellant for re-employment. The appellant contended before the Division Bench that once the Governing Body had recommended its case, the Vice Chancellor was only required to give his formal assent. Dismissing the plea of the appellant, the Division Bench held that, "it is not for this Court to say whether a teacher is a distinguished teacher or not. This Court does not consist of experts in the subject concerned, and the Court must ordinarily defer to the opinion of the experts. The advisory committee consists of experts, who considered the case of the appellant and did not recommend grant of re-employment to him. We cannot sit in appeal over the decision of the advisory committee, which was accepted by the Vice-Chancellor."

11. Coming back to the case of the petitioner, I find, that she does not say that the Committee was not validly constituted. Of-course, she does say that she was a party to complaints made against the Principal of the School, namely, Shri M.I.Hussain to the National Commission for Women for harassing the teachers of the school and on those complaints, the Principal was indicted by the Commission. It is, thus, contended that the Principal was inimically disposed towards the petitioner and because of his animus against her, he might have misrepresented the facts before the Screening Committee resulting in her unfair assessment. I feel, that

the mere fact that she along with some others had made complaints against the Principal, would not be sufficient to discard the finding of the Committee. The Principal was not the sole member of the Committee. It also comprised of the Chairman and the Vice Chairman and no bias is alleged against them. The Committee records that it examined the relevant records of service including the Annual Confidential Reports of last 5 years of all eligible candidates including the petitioner. It is not the case of the petitioner that such record was not looked into. She does say that some ACRs were taken into consideration, which did not paint her in rosy colours and which were also not communicated to her, but that is another argument which I shall deal with a little later. The report of the Committee cannot be rubbished on the sole ground that the petitioner had filed a complaint against the Principal. However, in fairness to the learned counsel for the petitioner, let me refer to a judgment of the Supreme Court relied upon by her rendered in the case of **Rattan Lal Sharma versus Managing Committee, Dr. Hari Ram (Co-Education) Higher Secondary School and others,** reported in (1993) 4 Supreme Court Cases 10.

12. In the aforesaid case, the Principal of a Higher Secondary School was suspended and a charge-sheet was issued to him. One of the charges was that a sum of Rs. 129.37 on account of amalgamated fund given to the appellant by the teacher incharge of the amalgamated fund, was reported to have been used by him and was unaccounted for. The school authorities appointed an inquiry committee of three members including the teacher incharge of the amalgamated fund. The said teacher not only acted as a member of the Inquiry Committee but also appeared as a witness in support of the charge. A learned Single Judge of the High Court held that the inquiry proceeding was vitiated by bias and hence not sustainable. The Division Bench in appeal reversed the decision of the Single Judge. The Apex Court agreed with the Single Bench and held that in the facts of the case, there was not only a reasonable apprehension in the mind of the appellant about the bias of one of the members of the inquiry committee but such apprehension became real when the member appeared as a witness against the employee to prove the charge and thereafter proceeded with the inquiry proceedings as a member of the inquiry committee to uphold the correctness of his deposition as a judge. The Apex Court further held that the said member of the inquiry committee

was interested in establishing the charge and from the charge itself, it was apparent that he had a pre-disposition to decide against the appellant.

13. The aforementioned case cited by the learned counsel for the petitioner is clearly distinguishable. In the said case, the bias of the member of the Committee was very pronounced. He not only acted as a member of the inquiry committee but also deposed against the employee in support of the very charge on which, the inquiry committee was required to give its finding of "proved" or "not proved". The facts of the present case are entirely different. Here there was a mere apprehension in the mind of the petitioner that the Principal on account of her having made complaints against him was biased against her. There was no further allegation against him. Hence, the petitioner can derive no assistance from the aforementioned case.

14. This brings me to the question, whether the Committee could take into consideration such ACRs of the petitioner which were adverse and were not communicated to her while she was in service?

15. The petitioner contends that notwithstanding the adverse ACRs which were never communicated to her, she was granted financial upgradation under the ACP Scheme dated August 09, 1999. She further contends that the denial of the benefit of re-employment to her on the basis of the very same ACRs is arbitrary, malafide, biased and hence illegal. On the other hand, respondent No.2 in paragraph-5 of its counter-affidavit has reproduced the entries made in the ACRs of the petitioner between the years 2002-03 to 2008-09. Those entries certainly do not project the petitioner in good hues. The very first entry of 2002-03 shows that her increment was stopped for a period of one year w.e.f. July 01, 2003. The ACR of 2003-04 reflects that she was adjudged to be a teacher with very poor communication skill and poor knowledge of chemistry and that she could not satisfy the students of 10+2 level. Hence it was recommended that she should not be given Class-XI to teach. The ACRs of the years 2004-05 till 2008-09 indicate that she was not following the norms of teaching; she was not dynamic; she was not keeping herself updated with the development of the subject; and, there were complaints received against her from the students/teachers and parents.

16. Besides the ACRs, respondent No.2 by way of Annexure-B to

the writ-petition filed a bunch of communications addressed to the petitioner by the Principal or on his behalf which ranged from as distant a time as January 05, 1979 and were as recent as July 14, 2009. I do not propose to refer to the contents of each of such communication. However, the fact remains that some of them pertain to the conduct of the petitioner with regard to her improper style of teaching, her not reporting for Monday Test Duty at times, her refusal to accept the ACRs under her signatures and her not attending to morning assembly sessions, etc.

17. It is well settled that every adverse entry in a confidential report of an employee has to be communicated to him, for it is likely to mar his chances of promotion or other benefits. Here, in the present case, it is the petitioner's own case that inspite of adverse entries which were not communicated to her, she was given the benefit of financial upgradation under the ACP Scheme and was not put to any disadvantage while she was in service. The question is, whether once she has ceased to be in the service of the respondent on attaining the age of 60 years, those ACRs even though not communicated to her could be looked into for determining, whether she deserved to be re-employed up to the age of 62 years. I feel that for the purpose of re-employment, the Committee was required to take an over-all view of conduct of the petitioner as a teacher in terms of fitness and, therefore, the ACRs, whether adverse or favourable, could be looked into. In any case, the Committee not only examined the ACRs of the last 5 years of the petitioner, but also her other record which, as noticed above, was far from commendatory. 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? I feel, the answer is in the negative. At the cost of repetition, it may be stated that 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.

18. For the reasons delineated above, I find myself one with respondent No.2, and hold, that the action taken by it in not granting re-employment to the petitioner suffers from no illegality.

19. The writ-petition has no merit. The same is dismissed.

ILR (2011) V DELHI 208
W.P. (C)

UNITED BROTHERS ....PETITIONER

VERSUS

AZIZ ULGHANI & ANR. ....RESPONDENTS

(S. MURALIDHAR, J.)

W.P. (C) NO. : 5220/2005 & WP (C) NO. : 2007/2010
CM APPLS NO. : 4027/, 4078/2010
CM APPLS NO. : 19889/10 (FOR DELAY), 19888/2010 (FOR RESTORATION)

DATE OF DECISION: 03.05.2011

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.

This Court also holds that there is no legal infirmity in the order of the IPAB which dismissed the cancellation petition of UB for the grant of registration in favour of AU for electrical flat iron in Class 9. The cancellation petition is barred both by laches and acquiescence. The mark 'UNITED' is a weak one and the registrations 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. **(Para 21)**

[Ch Sh]

APPEARANCES:

FOR THE PETITIONER : Mr. Sushant Singh with Mr. P.C. Arya, Mr. Gautam Panjwani, Mr. Tejinder Singh, Mr. V.K. Sinha and Ms. Parveen, Advocates.

FOR THE RESPONDENTS : Mr. Hemant Singh with Mr. Animesh Rastogi, Advocates.

CASES REFERRED TO:

1. *Pramod Kumar Garg* vs. *Punjab Tractors Limited* 2010 (42) PTC 633 (Del).
2. *Beiersdorf A.G.* vs. *Ajay Sukhwani* 2009 (39) PTC 38 (Del).
3. *Khoday Distilleries Ltd.* vs. *Scotch Whisky Association* AIR 2008 SC 2737.
4. *United Brothers* vs. *Navin Kumar* 2006 (32) PTC 661 (Del).
5. *United Brothers* vs. *United Traders* 1997 (17) PTC 603 (Del).
6. *Vishnudas Trading* vs. *Vazir Sultan Tobacco Co. Ltd.* 1996 (16) PTC 512 (SC).
7. *Eagle Potteries Private Limited* vs. *Eagle Flask Industries Pvt Ltd.* AIR 1993 Bom 185.
8. *Hindustan Pencils Limited* vs. *India Stationary Products Co.* 1989 (9) PTC 61 (Del).
9. *Bajaj Electricals Limited* vs. *Metal & Allied Products,* Bombay 1988 PTC 133 (Bom).
10. *Shri Dalip Chand Aggarwal* vs. *M/s. Escorts Limited,* AIR 1981 Del 150.
11. *Electric & Radio Co.* vs. *Telerad Private Ltd.* 13 (1977) DLT 315.
12. *L.D. Malhotra Industries* vs. *Ropi Industries* ILR 1976 Delhi 278.
13. *Corn Products Refining Co.* vs. *Shangrila Food Products Limited* AIR 1960 SC 142.
14. *Ciba Limited* vs. *M. Ramalingam* AIR 1958 Bom 56.
15. *Punjab Tractors Limited* vs. *Pramod Kumar Garg* 200 PTC 260.

RESULT: Both petitions dismissed.

S. MURALIDHAR, J.

CM APPLs 19889/10 (for delay), 19888/2010 (for restoration) in W.P.(C) No. 5220 of 2005

For the reasons stated therein both applications are allowed and W.P.(C) No. 5220 of 2005 is restored to file.

W.P. (C) No. 5220 of 2005 and W.P.(C) No. 2007 of 2010 with CM Nos. 4027-28 of 2010

1. W.P. (C) No. 5220 of 2005 is by 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 dated 3rd December,

2004 passed by the Intellectual Property Appellate Board ('IPAB') dismissing its application No. TRA No. 92/2004/TM/DEL (C.O. No. 6/96) under Sections 46 and 56 of the Trade and Merchandise Marks Act, 1958 ('TM Act 1958') for cancellation/removal of registration No. 388765 in Class 9 in respect of electric flat iron, granted for the mark 'UNITED' in favour of Respondent No. 1 Mr. Aziz Ulghani ('AU'), the sole proprietor of M/s. United Electric Co. ('UEC').

2. W.P. (C) No. 2007 of 2010 is by AU the sole proprietor of UEC. The said petition challenges an order dated 28th January, 2010 passed by the IPAB dismissing an appeal TRA/177/2003/TM/DEL filed by AU against the order dated 7th December, 2000 of the Registrar of Trade Marks allowing the opposition of UB to the Application No. 518071 filed by AU for registration of the trade mark 'UNITED', the word, per se, in Class 7 in respect of mixer grinder, hair dryer (machine) and washing machine.

3. UB claims that it has been using the trade mark 'UNITED' for manufacturing and marketing of aluminium halloware and other household utensils since 1957. It is stated that on account of extensive user, large scale advertising and immense popularity, the products under the trade mark 'UNITED' are associated by the purchasing public and the trade with the goods and business of UB exclusively. It is stated that the trade m ark 'UNITED' was adopted by UB from its firm's name, and that UB had a unique goodwill and reputation in respect of pressure cookers. It has enclosed with W.P. (C) No. 5220 of 2005 a statement of sale figures as well as the advertisement expenses from 1971-72 to 2003-04. UB claims to have regularly exported pressure cookers under the trade mark 'UNITED'. It is stated that UB holds registration under No. 274649 for the trade mark 'UNITED' claiming user since 15th October, 1957 in respect of aluminium halloware, utensils for household use in Class 21. It also holds registration No. 369826 claiming user since 1st April, 1957 associated with the other registered trade mark 274649 for the trade mark 'UNITED' in respect of household, domestic utensils and containers (not of precious metal or coats therewith), pressure cookers (non-electrical), milk cans and soap cases (boxes), all being goods included in Class 21. It is stated that the above trademarks have been renewed from time to time and are still valid and subsisting on the Register of Trade Marks.

4. It is stated that UB came to know that AU got the trade mark 'UNITED' registered under registration No. 388765 as of 14th April, 1982 in relation to electric flat iron in Class 9. UB opposed the registration of AU bearing No. 518071 in Class 7 under opposition No. DEL-8511. UB also opposed another application of AU bearing No. 5488524 advertised in the Trade Marks Journal No. 1190 in Class 11 dated 16th November, 1984 at page 1190. The main objection was that while obtaining the registration No. 388765 in Class 9 in relation to electric flat iron AU made false statements and concealed certain material facts. The other ground was that the trade mark offended provisions of Sections 9, 11 and 18 of the TM Act 1958.

5. The findings of the IPAB in the impugned order dated 3rd December, 2004 while dismissing the application of UB for rectification of trade mark under registration No. 388765 in favour of AU were as under:

> (i) The date of registration of the impugned mark under registration No. 388765 was dated 14th April 1982 and UB's application for rectification was made on 14th February 1996. A period of more than seven years had elapsed since the registration was granted.
>
> (ii) The onus in terms of Section 32 of the TM Act, 1958 was on UB to show that the registration was obtained by committing fraud, or that it contravened any provision of Section 11 and suffered from non-distinctiveness of the mark at the commencement of the proceedings. UB failed to bring any evidence to substantiate any of the above grounds.

6. In W.P. (C) No. 2007 of 2010 the facts are that UEC, of which AU is the sole proprietor, filed an application on 6th October, 1989 for registration of a trade mark 'UNITED' in Class 7 in respect of mixer, grinder, hair dryer (machine) and washing machine. The said application was ordered to be advertised by the Trade Mark Registry and accepted for registration in Trade Mark Journal No. 1067 dated 16th November, 1993 at page 885. On 11th March, 1994 UB gave a notice of opposition to AU on several grounds. The principal one was that the mark applied for was likely to cause confusion and deception in the course of trade and therefore offended Section 11 (a) of the TM Act, 1958. Affidavits were filed in respect of applications as well as opposition by the respective

parties.

7. The findings of the Assistant Registrar in the order dated 7th December, 2000 allowing the opposition No. DEL-8511 of UB and refusing registration to AU (UEC) under Application No. 518071 in Class 7 were as under:

(i) The rival marks were identical to each other and therefore, the condition under Section 12 (1) of the TM Act was attracted.

(ii) Items like mixer grinders of the applicants are used in the kitchen being household goods and these goods are sold on the same counter and in the same shops where goods like aluminium halloware, utensils for household use, including domestic utensils etc. are sold. The purchasers also belong to the same class. Therefore, in view of the nature of the goods and class of purchasers, the second requirement of Section 12 (1) of the TM Act, 1958 also stood attracted.

(iii) The likelihood of confusion or deception was inherent in the trade mark 'UNITED' itself. The consumers of the products of UB while coming across the applicant's (AU's) trade mark under the same trade mark 'UNITED' would be led to the impression that the goods sold by the latter are in fact those of UB. There was likelihood of confusion or deception. Consequently, Section 11 (a) of the TM Act, 1958 was also attracted.

(iv) The mark applied for by UEC was identical to the registered trade mark of UB. It was likely to deceive or cause confusion. In the circumstances, UEC would not be permitted to claim to be the proprietors of the trade mark 'UNITED' in terms of Section 18 (1) of the TM Act, 1958.

8. In dismissing the appeal filed by UEC by the impugned order dated 28th January, 2010, the IPAB held as under:

(i) By long and continuous use of the trade mark since 1957 UB have acquired reputation and goodwill among the public. If UEC was granted registration for the mark 'UNITED' the consumers would definitely associate the goods of UEC as those of UB. There was therefore every possibility of confusion and deception.

(ii) When the marks are identical and the goods are of same description, the marks could not be registered since that would lead to dilution of the reputation of UB.

(iii) The IPAB concurred with the findings of the Assistant Registrar that the goods of UEC and the goods of UB are householdgoods which are sold to the same class of purchasers. Since the rival marks are identical and the goods are of the same description, the application of UEC for registration could not be accepted.

(iv) UEC which has been using the mark 'UNITED' since 1977 cannot claim to be the proprietor of the said trade mark and does not qualify for registration in terms of Section 18 (1) of the TM Act, 1958.

9. Mr. Sushant Singh, learned counsel appearing for UB first submitted that by the impugned order dated 3rd December, 2004 the IPAB dismissed the rectification application of UB only on the ground that no evidence had been placed on record to substantiate the contention that the mark 'UNITED' was likely to cause confusion and deception. Relying on the decisions in **Ciba Limited v. M. Ramalingam** AIR 1958 Bom 56 and **L.D. Malhotra Industries v. Ropi Industries** ILR 1976 Delhi 278, it is submitted that the IPAB had itself to decide, looking at the two trademarks, whether there was likelihood of deception. That function could not be discharged by a person in the witness box. While it was true that the absence of any evidence of deception may be a material fact which the Court may take into consideration, if the resemblance between the two marks was clear and obvious, then it was the duty of the Court to remove from the register a mark which was likely to cause deception.

10. Mr. Sushant Singh further submitted that if the normal and fair user of the mark upon a good gives rise to a likelihood of confusion and deception then the rectification application ought to be straightaway allowed. It is submitted that goods like pressure cookers ought to be considered as goods sold under the same trade channel as mixers and grinders. Relying on the decisions in **Corn Products Refining Co. v. Shangrila Food Products Limited** AIR 1960 SC 142, **Punjab Tractors Limited v. Pramod Kumar Garg** 200 PTC 260 which was affirmed by the

Division Bench of this Court in **Pramod Kumar Garg v. Punjab Tractors Limited** 2010 (42) PTC 633 (Del), it is submitted that in particular the goods are purchased by the same class of consumers i.e. home makers. Both the products are invariably sold in the same shop. It is submitted that the Supreme Court in **Vishnudas Trading v. Vazir Sultan Tobacco Co. Ltd.** 1996 (16) PTC 512 (SC), entered a caveat that the said judgment would not prejudice cases of infringement and passing off where there was a likelihood of confusion and deception on the basis of commonality of trade channel. Relying on the decision in **Bajaj Electricals Limited v. Metal & Allied Products, Bombay** 1988 PTC 133 (Bom) it is submitted that the mixer grinder and pressure cookers are the goods of the same description and are sold in the same shop and therefore, there is likelihood of confusion and deception. It is denied that the rectification application filed by UB is barred by delay or laches. Further it is submitted that the impugned order of the IPAB does not discuss the ground of delay and acquiescence. This was raised for the first time by UEC in W.P. (C) No. 2007 of 2010. Referring to the decision in **Hindustan Pencils Limited v. India Stationary Products Co.** 1989 (9) PTC 61 (Del), it is submitted that adoption of the mark 'UNITED' by UEC knowing that UB is using the said trade mark was tainted from the very inception. In the circumstances, the fact of subsequent user cannot operate in favour of UEC. Further a perusal of the document appearing at page 198 of the paper book which is produced by UEC itself shows that it has been using the trademark to sell the pressure cookers to the distributors of UB. The mark adopted is also the same.

11. Mr. Sushant Singh submitted that there was a difference between the onuses of proof in opposition proceedings and rectification applications. A reference is made to certain passages in his favour in Kerly's Law of Trade Marks and Trade Names (14th Ed., Thomson & Sweet & Maxwell, pp. 271-272). Reference is made to the decision in **Amritdhara Pharmacy v. Satyadeo Gupta** AIR 1963 SC 449. Lastly, it is submitted that the trade mark 'UNITED' has been adopted by UB for more than 50 years and it has earned immense reputation and goodwill. A reference is made to the decision in **United Brothers v. Navin Kumar** 2006 (32) PTC 661 (Del) which impliedly departed from the earlier view of the learned Single Judge of this Court in **United Brothers v. United Traders** 1997 (17) PTC 603 (Del). It is submitted that the question of whether the opponent

is manufacturing mixer grinder or related goods for which the protection is sought becomes immaterial in the context of likelihood or probability of confusion and deception. A reference is made to the decision in **Shri Dalip Chand Aggarwal v. M/s. Escorts Limited,** AIR 1981 Del 150.

12. Appearing on behalf of AU, Mr. Hemant Singh, learned counsel submitted at the outset that AU is the brother-in-law of Mr. M. Nawshah, the partner of UB. AU has been trading under the name of UEC since 1974 to the knowledge of Mr. Nawshah. He referred to the affidavit by way of evidence dated 3rd September, 2004 of AU in the cancellation petition TRA No. 92 of 2004. He also referred to the fact that AU produced 29 original bill books of sale invoices for the period 1974-75 in the proceedings in CO. No. 6 of 1996 in this Court. This was unfortunately misplaced by the Registry of this Court and could not be looked at by the IPAB. He also referred to the sales tax registration certificate and challans since 1975 that had been placed on record.

13. Mr. Hemant Singh next submitted that the IPAB had negatived the challenge of UB to the registration granted to AU in Class 9 for electric flat iron whereas it allowed the opposition filed by UB to the grant of registration to AU in Class 7 for mixer grinder, hair dryer, washing machine etc. It is submitted that UB's cancellation petition filed in 1996 was barred by laches and acquiescence. Reliance is placed on the decision in **Khoday Distilleries Ltd. v. Scotch Whisky Association** AIR 2008 SC 2737. The registration had been granted since 1982. UB had been aware of use of the trade mark 'UNITED' by AU, the brother-in-law of Mr. Nawshah since 1974. The cancellation petition was filed in 1996 since the relationship between the two brothers-in-law turned sour.

14. Mr. Hemant Singh submitted that no evidence was produced by UB either in the opposition proceedings or in the cancellation proceedings to show that the trade channel of the competing goods was the same. It was settled in various judicial pronouncements that the goods could be considered to be of the same description only if following parameters were fulfilled:

(i) If the nature and composition of competing goods are same;

(ii) If the competing goods are used for common purpose;

and

(iii) If the competing goods are sold through common trading channels.

15. Relying on the decision in **Vishnudas v. Vazir Sultan Tobacco Co. Ltd.** It is submitted that smoking cigarettes and chewing tobacco were not goods of same description, though it is common knowledge that they are sold at the same shop. Reliance is placed on the decision in **Eagle Potteries Private Limited v. Eagle Flask Industries Pvt Ltd.** AIR 1993 Bom 185. The more distinctive and reputed the trade mark, the broader is the protection that it enjoys. It is submitted that 'UNITED' was one of the most commonly used marks as was evidenced by the telephone directory of Delhi for the year 1994. It showed that innumerable traders used UNITED as part of their trading name. 'UNITED' was therefore, a weak mark commonly used by the trade, and therefore enjoyed narrow protection which must be limited to the goods for which UB have used it i.e. pressure cookers and aluminium halloware utensils.

16. Relying on the decision in Jugmug **Electric & Radio Co. v. Telerad Private Ltd.** 13 (1977) DLT 315 it is submitted by Mr. Hemant Singh that a common trade channel must be established by evidence. A common trade channel means a channel, at one end of which are common manufacturers manufacturing competing goods and on the other end are common distributors and dealers dealing in competing goods. Reliance is placed on the decision in **Beiersdorf A.G. v. Ajay Sukhwani** 2009 (39) PTC 38 (Del) and Raleigh International Trade Mark (2001) RPC 11. The judgments in **Corn Products Refining Co. v. Shangrila Food Products Ltd.** and **Bajaj Electricals Limited v. Metal & Allied Products, Bombay** are sought to be distinguished on facts. It is, accordingly, prayed that AU is entitled to retain his registration of the trade mark 'UNITED' under application No. 388765 in Class 9 for electrical flat iron and that his application of trade mark 'UNITED' under application No. 518071 in Class 7 for other electrical appliances such as mixer grinder, hair dryer, washing machine ought to proceed for registration.

17. The issues that arise for consideration in the present petitions are:

(a) Whether AU is entitled to registration of the trade mark 'UNITED' for mixer, grinder, hair dryer, washing machine etc.

which, according to him, has no commonality of trade with pressure cookers and aluminium halloware in respect of which UB holds registration for the identical mark 'UNITED'?

(b) Whether the trade mark 'UNITED' registered in favour of AU in Class 9 for electrical flat iron is liable to be cancelled on the grounds urged by UB?

18. The trade mark 'UNITED' is a word mark which by its very nature is descriptive. 'UNITED' is undoubtedly a weak mark commonly used by the trade and therefore enjoys narrow protection. Learned counsel for AU (UEC) is right in his contention that the mark 'UNITED' is extensively used either as a prefix or suffix or by itself by numerous traders. In other words, there is absolutely nothing distinctive in the mark 'UNITED' whether by itself or in association with goods which are sold under that trade mark. The mark 'UNITED' cannot enable customers to recall any particular goods with which such mark is associated as it is extensively used over a range of goods and services.

19. The analysis of the orders passed by the Assistant Registrar and the IPAB in these cases reveals that

(i) The parties are related to each other. In other words the sole proprietor of UEC (AU) is the brother-in-law of the partner of M/s. United Brothers. Therefore, each of them is definitely aware of the use of the trade mark 'UNITED' by UB since 1957. Likewise, UB was aware of the use by AU, proprietor of UEC of the mark 'UNITED' since 1974.

(ii) Both parties have been able to co-exist with their respective marks in their respective trades.

(iii) The fact is that UB applied for and was granted the registered mark 'UNITED' for pressure cookers with effect from 17th December, 1980 and was, therefore, prior user of the trade mark for pressure cookers. Till 1996 UB did not oppose the registration granted in favour of UEC for the mark 'UNITED' for electrical flat iron which was granted with effect from 14th April 1982. There is merit in the submission of learned counsel for UEC that the cancellation petition filed by UB more than 14 years after 1996 was barred by the principles of laches and acquiescence.

The observations in **Khoday Distillery v. Scotch Whisky Association** are sufficient to negative the challenge of UB to the grant of registration of trade mark 'UNITED' in favour of AU (UEC) in Class 9 for electrical flat iron.

(iv) The application by AU for registration of the mark 'UNITED' mixer, grinder, hair dryer, washing machine etc. was rightly rejected by the Assistant Registrar by an order dated 7th December 2000 on the ground that there was likelihood of confusion, deception and commonality of trade. It rightly held that the pressure cookers and mixer grinders and even washing machines are sold in the same shops dealing with household appliances. Going on the observations of the Bombay High Court in **Bajaj Electricals v. Metal & Allied Products, Bombay,** it is not difficult to imagine that these goods are sold in the same shop. There is absolutely nothing distinguishing the mark used by UEC from use of the same mark by UB. The mark is not even used along with prefix or suffix which could distinguish one from the other.

20. For the above reasons, this Court is not inclined to interfere with the order of either the Assistant Registrar or the IPAB holding that there is likelihood of confusion or deception in granting registration of the trade mark 'UNITED' in respect of mixer, grinder, hair dryer, washing machine in favour of AU. This Court concurs with the view that the opposition by UB to the grant of registration of the mark 'UNITED' in favour of AU for the goods in Class 7 ought to be allowed.

21. This Court also holds that there is no legal infirmity in the order of the IPAB which dismissed the cancellation petition of UB for the grant of registration in favour of AU for electrical flat iron in Class 9. The cancellation petition is barred both by laches and acquiescence. The mark 'UNITED' is a weak one and the registrations 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.

22. In the circumstances, neither the order dated 3rd December, 2004 passed by the IPAB dismissing UB's application No. TRA No. 92/

2004/TM/DEL (CO. No. 6/96) nor the order dated 28th January, 2010 of the IPAB dismissing the appeal filed by AU TRA/177/2003/TM/DEL calls for interference.

23. Both the petitions are dismissed but in the circumstances with no orders as to costs. The pending applications are disposed of.

ILR (2011) V DELHI 220
CRL. APPEAL

SHRI BRIJ PAL SINGH ....APPELLANT

VERSUS

CBI ....RESPONDENT

(SURESH KAIT, J)

CRL. APPEAL NO. : 995/2002 DATE OF DECISION: 06.05.2011

Prevention of Corruption Act, 1988—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.

In the case of **Khuji Vs. State of M.P.** AIR 1991, SC 1853 wherein the Supreme Court had held that statement of witness identifying all accused in examination-in-chief but contradicted in cross-examination, is nothing but an attempt to wriggle out of the first statement and that his evidence is

reliable with regard to the facts as made earlier in his examination-in-chief. **(Para 54)**

Important Issue Involved: If any witness has taken complete U turn from what he deposed in examination-in-chief, then chief examination part of witness cannot be thrown out.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Pradeep Kumar Arya with Mr. Narindra Choudhary and Mr. V.K. Chopra, Mr. Anuj Chopra, Mr. Anuj Tomar, Ms. Esha Singh, Mr. Shobhit Mittal and Mr. Kunal Rana, Advocates.

FOR THE RESPONDENT : Dr. A.K. Gautam, Standing Counsel for CBI with Mr. Neeraj Kapoor, Advocate.

CASES REFERRED TO:

1. *Roshan Lal Saini* vs. *Central Bureau of Investigation* 2011(1) JCC 102.
2. *O.P.Chhabra* vs. *State* 2010(175) DLT 374.
3. *Sunil Kumar Mishra* vs. *State (CBI),* 2007 (139) DLT 407.
4. *State* vs. *P.K.Jain and Anr.* 2007 Crl.L.J4137.
5. *Prem Singh Yadav* vs. *Central Bureau* Crl.A.No.206/2002.
6. *Tirath Prakash* vs. *State* 1992 (2001) DLT 613.
7. *Koli Lakhmanbhai Chanabhai* vs. *State of Gujarat* JT 1999 (9) SC 133.
8. *Periyasamy* vs. *Inspector, Vigilance & anti-Corruption Department* 1994 Crl. L.J. 753.
9. *Khuji* vs. *State of M.P.* AIR 1991, SC 1853.

10. *M'S.Kuppuswami & Etc.* vs. *State* 1990 INDLAW MAD 83.
11. *State of U.P.* vs. *M.K.Anthony* AIR 1985 SC 48.
12. *R'S.Nayak* vs. *A.R. Antulay* 1984 2 SCC 183.
13. *Bharuda Broginbhai Harji* vs. *State of Gujarat* AIR 1983 SC 753.
14. *Mohd. Iqbal Ahmad* vs. *State of Andhra Pradesh* AIR 1979 SC 677.
15. *Bhagwan Singh* vs. *State of Haryana* (1976) 1 SCC 389.
16. *Sat Paul* vs. *Delhi Aministration* (1976) 1 SCC 727).

RESULT: Appeal dismissed.

SURESH KAIT, J.

1. The accused was charged, while functioning as a public servant, in the capacity of Sub-Inspector, Delhi Police, posted at Police Station: Jahangir Puri, on 12.07.1995 at about 7:00 pm at PS, Jahangir Puri, Delhi, for demanding and accepting an illegal gratification of Rs. 5,000/- from the complainant Ashok Kumar as a motive or reward for showing him official favour in the matter of a complaint of bank fraud submitted by one Samey Singh and thereby committed an offence punishable under Section 7 of Prevention of Corruption Act (hereinafter referred to as "P.C. Act" for short). Second charge against the accused is that as a public servant while working in the aforesaid capacity at the aforesaid time and place by corrupt or illegal means and by abusing his official position obtained for himself a pecuniary advantage of Rs. 5,000/- without any public interest, thereby, committed an offence punishable under Section 13(2) read with Section 13 (1) (d) of P.C. Act.

2. The accused pleaded not guilty and tried by the Special Judge, Delhi. Vide judgment dated 11th December 2002, the accused was convicted and vide order dated 16.12.2002 for offence punishable under Section 7 of the P.C. Act, 1988, the accused was sentenced to undergo Simple Imprisonment (SI) for a period of 2 years and a fine of Rs. 2,000/- and in default of payment of fine to undergo SI for a further period of two months. For the offence punishable under Section 13(2) read with Section 13(1)(d) of P.C. Act, 1988, the accused was sentenced

to undergo SI for a period of 3 years with a fine of Rs. 3,000/- and in default of payment of fine, he shall have to undergo SI for 3 months. Both the substantive sentences were directed to run concurrently and period of detention already undergone during the investigation/trial of the case was set of.

3. The facts of the case in brief are that the accused had demanded a bribe of Rs.10,000/- from Shri Ashok Kumar, complainant PW-1. On the complaint of aforesaid PW-1, a trap party was constituted by Shri S.K. Peshin PW-9, DSP of CBI consisting of Shri A.G.L. Kaul and Ved Prakash, Inspectors (Both witnesses not examined). Two eye witnesses, namely, Swaminath PW-3 from the Ministry of Health, Man Mohan Kumar PW-8 from the DGS & D and other staff of CBI(Anti Corruption Branch). After completing the requisite pre-trap formalities, the trap party left the CBI office at about 3:10 pm and reached the police station Jahangir Puri at about 4:50 pm. Accordnigly, the members of the trap party took up suitable position.

4. The Complainant PW-1, shadow witnesses PW-3 and public witness PW-8 went inside the police station. Since the accused was not present, they came out. Again, as directed by the TLO (Trap Laying Officer) went inside at about 6:00 pm. The appellant was found busy and told the complainant PW-1 to meet him at 7:00 pm. Accordingly, they met him again and handed over Rs. 5000/- to appellant. On receipt of pre-appointed signal from the shadow witness at 7.55 pm, the trap rushed in and accused was apprehended by his left wrist by Sh. Ved Prakash, Inspector. The appellant while trying to free himself, came out of the room and reached the passage outside. He took out some currency notes from the right hand side pocket of his pant and threw the same on the asbestos sheets adjoining the passage. The Government currency notes were photographed while they were lying on the Asbestos Sheets. The currency notes were found tallied with the numbers of the notes recorded in the annexure of the handing over memo prepared in the CBI office.

5. Inspector Ram Sewak PW-7, SHO of P'S. Jahangir Puri and A.C.P. were called. In their presence hand wash of the right hand of the accused was taken in a colourless solution of sodium carbonate which turned pink in colour and similarly, the wash of the inner-linings of the right pocket of the pant worn by appellant was taken which also gave

positive result in the colourless solution of sodium carbonate. Both the pink solutions obtained were transferred to separate glass bottles which were duly sealed with CBI seal wrapped and got signed by the independent witnesses.

6. Thereafter the table drawer of accused was searched. Original complaint of Sh. Samey Singh PW-5, which was under verification was recovered. Pass-book and driving license of the complainant PW-1 and other documents were also recovered which were seized by the trap team of CBI.

7. During investigation, it was found that the appellant was verifying the complaint given by Sh'Samey Singh PW-5 and in connection with that complaint, the appellant had been calling the complainant Ashok Kumar, PW-1 to the police station repeatedly.

8. The prosecution examined 10 witnesses in all. Ashok Kumar PW-1 had deposed on 02.03.1998 that on 28.06.1995, accused Brij Pal Singh, SI called him to police station Jahangir Puri. He told him that by practicing fraud upon the bank a sum of Rs.36,000/- had been withdrawn from the account of one Samey Singh PW-5. He was also told that in the aforesaid transaction of withdrawal of money, his (PW-1) bank account number as witness was written. The complainant told the accused that he had not given any witness for the bank account and the aforesaid withdrawal. The accused also threatened him that he would implicate him in the case if he failed to pay him Rs. 10,000/- as bribe.

9. Thereafter, the accused called him to the police station in that connection several times. On 12.07.1995 the accused further told him to pay first installment of Rs. 5,000/- on the same day at the police station. He (PW-1) came back to his residence. He wrote a complaint and went to CBI office and met S.P., Anti Corruption.

10. At about 1:30 pm, two public witnesses, namely Somi Nath (Swami Nath) PW-3 and Man Mohan Kumar PW-8 arrived in the room of PW-9 S.K.Peshin, DSP. The complainant produced Rs. 5,000/- comprising 50 GC notes of Rs. 100/- denomination each and gave to Shri S.K.Peshin PW-9. He noted down several numbers of those currency notes on paper Ex.PW-1/B. One chemical powder was applied to those GC notes. Thereafter, demonstration of chemical reaction of aforesaid

powder was given by making one witness to touch the treated notes and dip his fingers in the plain water, but the colour of water did not change. Thereafter, one other chemical powder was dissolved in a clean glass of water to prepare a colourless solution. Same witness was directed to touch the treated notes with other hand and dipped his fingers in the said colourless solution. On this solution fingers turned pink. Aforesaid demonstration solution was thrown away. His search was conducted and he was not permitted to carry money. Thereafter, the aforesaid treated currency notes of Rs. 5,000/- were kept in the left pocket of his shirt, and was directed to give tainted money to the accused only on the event of specific demand. PW-3 Somi (Swami Nath) was directed to act as a shadow witness and watch the proceedings as well as hear the conversation between him and the accused. He was further directed to scratch his head in the event of acceptance of money by the accused. All the other members of the raiding party were searched by each other and no body was permitted to keep money on his person. One yellow bag was taken which contained empty bottle and chemical powder for making solution, sealing material, glass tumbler and CBI seal etc. All members of raiding party washed their hands before leaving for the raid. Pre-raid proceedings were prepared vide memo Ex. PW-1/C.

11. PW-1 further deposed that on seeing the accused in his room along with 3-4 persons sitting in the said room, the accused told PW-1 that he will talk with him after some time. Thereafter, they came downstairs and waited till 7:00 pm. Again, he along with Somi (Swami) PW-3 went to the room of accused at first floor at 7 pm. The conversation with the accused was as under:

Brij Pal Singh - Kaya Haal Hai

Complainant - Thik Hain

Brij Pal Singh - Hoon; yeh kaun hain

Complainant - Mere Mamaji ka ladka hai

Brij Pal Singh - Kitne Paise Laye Ho

Complainant - Paanch Hazar Rupaye

12. Thereafter, he took out Rs. 5000/- tainted money and gave to the accused Brij Pal Singh. He accepted the money in his right hand and

kept the same in the right side pocket of his pant. Thereafter, complainant asked "MERE SAATH KOI AISI BAAT TO NAHI HOGI", and accused told him that he would close the file and nobody would harass him. Then, accused asked him "DOOSRI KISHT KAB DEGA", and complainant replied, "KAL DE DENGE". Thereafter, accused Brij Pal Singh came out of the room. Meanwhile, PW-3 Somi (Swami) Nath gave signal by scratching his head and members of raiding party reached at the spot. Two CBI officials Mr.Kaul and Mr.Javed caught hold of the accused from his respective wrists. Accused started shouting. CBI officials, thereafter, gave the introduction to the accused. He managed to get free from his right hand. He took out tainted money from the right pocket of the pant and threw it on the asbestos sheet of the roof of the room of the reader of SHO. ACP and SHO of the police station were summoned at the spot and were asked to join further proceedings. Somi Nath PW-3 detailed the transaction as well as the conversation took place between him and the accused. Photographer was summoned, who took photographs of the Govt.Currency notes lying on the roof. Manmohan PW-8 picked up GC notes from the roof of the room of the reader and his photographs were taken while he was picking the GC notes. Numbers of those GC notes were also compared by PW-8, with the numbers already noted down on the list Ex.PW-1/B and he confirmed that GC notes were same.

13. Thereafter, a glass of water was brought and accused Brij Pal Singh was made to dip his right hand fingers in aforesaid plain water, on this water turned pink. Aforesaid right hand wash was transferred into a clean empty bottle, its mouth was covered with a piece of cloth. It was sealed with the seal of CBI and identification lable was prepared and pasted on the bottle. Bottle was marked as 'RHW'. The accused was made to remove his pant. Fresh water in a clean glass of water was fetched and inner lining of the pocket of the pant of the accused was dipped, on this water turned pink. Thereafter, pocket wash was transferred into a clean and empty bottle, its mouth was closed and covered with a piece of cloth. The bottle was sealed with the seal of CBI and identification lable was prepared and pasted on the bottle. Recovered currency notes, bottles of washes and the pant of the accused etc., were seized vide recovery memo Ex.PW-1/D.

14. Thereafter, room of the accused was searched from where his (PW-1) "Bank Pass Book" and 'Driving Licence' were recovered.

15. The cross-examination of the complainant was deferred at the request of the accused, as his counsel was not available on that day. However, this could take place only on 24.07.1998 when PW-1 made a summersault and proved a complete turn-coat to the prosecution. He deposed in cross-examination as under:-

"I do not know anyone with the name of Harish Aggarwal. I visited CBI office for lodging the complaint with one Mahender Kumar. It is correct that I took Mahender Kumar alongwith me because he knew some CBI officers. He reached at CBI office at around 11 a.m. In the CBI office, first of all, we went to the office of SP Sh. Dutta. It is correct that Mahender Kumar knew Mr. Dutta, SP, Anti Corruption, CBI. Thereafter, Mr. Dutta, called DSp Sh. S.K. Peshin. He sent me along with Shri S.K. Peshin to his room. It is correct that Mr. Dutta directed Sh. S.K. Peshin to get my complaint recorded from me. It is correct that Mr. Peshin interrogated me regarding the facts and on his dictation I wrote down my complaint. **It is correct that accused beat me at the instance of SHO. It is also correct that SHO Jahangirpuri had demanded a bribe of Rs. 30,000/- from me.** I had told Sh. Peshin about this fact. **It is correct that my complaint was drafted several times and after tearing few drafts of complaint, finally complaint Ex.PW-1/A was written.** Witnesses Manmohan and Swaminath were already sitting in the room of Sh. Peshin, when I arrived along with him.

I produced Rs. 5,000/- for trap money. **Aforesaid amount comprised of few Rs.100/- GC notes and few Rs. 50/- GC notes.** We left CBI office for raid at about 2 p.m. **It is correct that I did not wash my hands with soap and water before leaving for the raid.** I cannot admit or deny if the other members of the raiding party washed their hands.

I had visited CBI office on 10.7.95 also. On the said day, I orally narrated the factum of bribe demanded by the accused to Shri S.K. Peshin. I also told him about the bribe demanded by the SHO. **It is correct that on 10.7.95 also, a trap was organized by Shri S.K. Peshin and trap party went to P'S. Jahangirpuri to trap the accused. It is correct that on 10.7.95, accused did not meet me at the police station.** Trap Party did

not go to the police station on 11.7.95. I had handed over my complaint Ex. PW-1/A to Sh'S.K. Peshin. **Witness Swaminath and Manmohan accompanied the trap party to P'S. Jahangirpuri on 10.7.95 also.** On 12.7.95, we reached at P'S. Jahangirpuri at around 3.20 pm. At the time of trap, **Manmohan accompanied me as shadow witness.** My statement was not recorded by CBI at any stage during the investigation. On 12.7.95, at about 3.30 pm, when we reached at police station **accused Brij Pal Singh was available in the police station. I met him in his room. I along with Manmohan had gone to the room of accused upstairs** but remaining members of the raiding party remained downstairs. At that time, Sh'S.K.Peshin was sitting with SHO in his room. It is correct that remaining members of the raiding party took position in the room of duty officer. **When I reached in the room of the accused, ¾ public persons including one Narender Singh were already sitting there.** Manmohan did not accompany into the room of the accused and he stayed outside. He stayed at a distance of 5-7 feet from the room of the accused in the gallery. **After we reached the room of the accused, he left the room for sometime. It is correct that in the absence of accused, aforesaid Narinder demanded money from me and I handed over aforesaid tainted Rs. 5000/- to Narender in absence of accused.** It is correct that this happened in the presence of public persons who were already present there. **It is correct that at the time of trap I had no conversation with the accused, But I had conversation with said Narender.** It is correct that after I passed on the money to Narinder, trap party entered said room and at the same moment, accused also entered his office. It is also correct that I told Shri Peshin that I had given trap money to Nainder on his demand. It is also correct that on this S.K. Peshin got annoyed and told me that I should have given tainted money to the accused. **When I entered the room, I shook hand with the accused. On seeing the trap party, Narinder Singh got up and pushed the money towards the accused and on this accused Brij Pal Singh came out of the room. He refused to accept that money from Narinder saying "what is this?"** It is correct that accused was apprehended by CBI team and **Narinder managed**

to run away. It is correct that thereafter, S.K. Peshin along with the raiding party, accused as well as SHO straightway came to CBI office. It is also correct that entire proceedings of the raid were recorded in the CBI office. I have seen handing over memo Ex. PW-1/C. It was prepared in the CBI office after the raid. It is correct that I do not know English. It is also correct that before obtaining my signatures on handing over memo, it was not read over to me. Numbers of the GC notes were not recorded during pre-raid proceedings.

It is correct that Ex.PW-1/B was prepared in the CBI office after the raid. I have seen Ex. PW-1/D. It bears my signatures on all the four pages. I appended these signatures in the CBI office. When I signed aforesaid recovery memo, it was already written. It is correct that recovery memo PW-1/D was not read over to me nor its contents were explained to me before obtaining my signatures. Contents of these documents were not explained to me even thereafter. I signed the recovery memo presuming that CBI officers must have narrated the correct facts in the memo.

We reached CBI office at 6 pm. It would be incorrect to say that we reached back to CBI office at about 11 pm in the night. It would be incorrect to say that accused demanded bribe from me at around 7.30 pm or that he was arrested at that time. ACP Sanjiv Kumar did not arrive at the spot during raid proceedings. I remained at CBI office for about 15 minutes after our arrival back from the raid.

"It is correct that at the time of raid, Sh.Peshin, DSP directed the public persons sitting in the room of the accused to leave the room. **He did not search the room of the accused in my presence. Nothing was recovered from the said room** in my presence. When I left CBI office, after the proceedings, above said independent witnesses also left CBI office along with me. Inspector D.M. Sharma, was also a member of the trap party.

I was examined by the Ld. PP in this court on 02.3.98. **My said version is incorrect and version given today is correct. I gave statement dated. 2.3.98 under the pressure of 2 or 3 CBI officers.** It is correct that they threatened me that if I failed

to support the prosecution case, I can suffer dire consequence. The version given by me today was told by me to Inspector D.N. Sharma.

Q. You have stated that when the trap party entered the room of the accused Narinder Kumar pushed tainted money towards the accused and accused came out of the room saying "what is this?". Please tell at that time where Narinder Kumar and Brij Pal Singh were present.

A. At that time, Narinder Singh was sitting on a chair and accused was standing by the side of his table.

It is correct that Narinder Kumar pushed the money towards the accused on the directions of S.K.Peshin. It is also correct that because accused was not ready to accept the money and Sh. S.K.Peshin wanted the money to be forced upon him, in the process money fell down on the ground. Rough side plan was not prepared in my presence on the day of trap.

It is correct that my complaint was got written on 10.7.95. It is also correct that on 12.7.95, Sh. Peshin made me to copy said complaint dated 10.7.95 and thereafter the complaint dated 10.7.95 was torn off because trap did not succeed on 10.7.95. No document was prepared in the CBI office on 10.7.95. On 12.7.95, when I left CBI office for my residence, SHO Jahangirpuri was still in the CBI office. I do not know whether he was arrested. It is correct that accused Brij Pal Singh never demanded bribe from me nor he accepted this ame. It is correct that because accused used to beat me at the instance of SHO, therefore, I was annoyed to (with) him. **It would be incorrect to say that Swaminath accompanied me as a shadow witness. It was only Manmohan who accompanied me as a shadow witness.** It is correct that I did not have conversation described at portion "A" to "A" of my examination in chief dated 2.3.98 with the accused. **It is correct that this conversation took place with Narinder but I substituted his name with the accused under the pressure of CBI.** Narinder was also a policeman. I had seen him on several occasions with SHO."

16. Considering the conduct of complainant in making two entirely contradictory statements, the public prosecutor CBI then cross-examined him, but failed to bring him around to his case. While in his re-cross-examination by defence counsel, he reiterated what he had stated on 24.07.1998, **adding further that a trap was laid on 10.07.1995 and he changed the date to 12.07.1995 at the behest of Sh'S.K.Peshin PW-9,** who was T.L.O. of this case.

17. Interestingly, not only the complainant PW-1 has turned hostile, both the two public witnesses joined in the raiding party, namely, Swami Nath. PW-3 and Manmohan PW-8, who acted according to the prosecution as a shadow witness and recovery witnesses respectively. Both public witnesses PW-3 and PW-8 completely had turned hostile and did not support prosecution case. Public prosecutor cross-examined them at length and confronted with them the statements purported to had been recorded under Section 161 Cr.P.C., however, he could not elicit anything favourable to the prosecution from them. Their testimonies did not land any corroboration to the complainant PW-1, who as discussed above, earlier deposed in favour of the prosecution but later on retracted from his deposition in chief examination recorded on oath on 02.03.1998.

18. The trial Judge has relied upon the testimony of S.K.Peshin DSP, PW-9 TLO of the case and circumstantial evidence of K'S.Chhabra, Sr. Scientific Officer PW-4, Sh'Samey Singh PW-5, P.D.Vasandhani PW-6, and Inspector Ram Sewek PW-7.

19. To this effect it is relevant to discuss all the aforesaid witnesses in brief how they had put light in the case while deposing in the Court.

20. PW-4 Sh.K'S.Chhabra, Sr'Scientific Officer Grade-I cum Assistant Chemical Examiner, Govt. of India CFSL Delhi deposed that on 18.07.1995, two sealed bottles were received in the laboratory; their seals were intact and tallied with official specimen enclosed; both bottles contained pink colour liquid with sediments and were marked as "RHW" and "RPPW", which gave positive tests for phenolphthalein and sodium carbonate. He proved his report as Ex.PW-4/A. This witness had not been cross-examined.

21. PW-5, Samey Singh, was having a bank account with State Bank of India, at Jahangirpuri Branch, in the year 1995. Regarding

embezzlement of Rs. 36,000/- from his account, he lodged a complaint Ex.PW-5/A on 29.06.1995 at police station Jahangirpuri. This witness was also not cross-examined.

22. PW-6 P.D.Vasandhani, was the Deputy Manager in State Bank of India, Jahangirpuri Branch, during the year 1995. He had deposed that account No.8477 in the name of one Sh'Samey Singh, was maintained in the branch during his tenure. Duplicate pass book was issued on 27.06.1995. Further, he deposed that on 24.06.1995, there was a deposit of Rs. 20,000/- as per the ledger Ex.PW-6/A and on 27.06.1995 a sum of Rs. 36,300/- was shown as withdrawn from that account. This witness was cross-examined, however, nothing material came out to discredit his evidence.

23. PW-7 Inspector Ram Sewek, he was posted as SHO at police station Jahangir Puri in June/July, 1995 and the accused was working under him as Sub-Inspector. He had confirmed that complaint Ex.PW-5/A was made by Sh'Samey Singh PW-5, which was marked by his reader to the accused on his behalf.

24. On perusal of the above discussed evidence of PW-5, PW-6 and PW-7, it is clearly established that on the day of trap, i.e. 12.07.1995, appellant was investigating a complaint of PW-5 of embezzlement in his account. Thus, the appellant had motive to ask for bribe for favouring the complainant PW-1. Further, testimony of PW-7, lands more credence to the case of prosecution regarding recovery of the tainted money as under:-

> "On 12.7.95, at about 8.00 pm, I was present in P'S. Jahangirpuri in my office room. At that time Sh. R.A. Sanjeev, ACP had also come to our police station. While I was having discussion with the ACP, I heard noise that some raid has (had) taken place. Thereafter, I along with Shri S.K. Peshin, Dy. S.P. of CBI went upstair, i.e., on first floor. There I saw that accused had been apprehended by the CBI officials. I saw that some currency notes were lying on the tine-shed (Asbestos-sheet) out of that room CBI officials got photographs of those currency notes. Thereafter, CBI officials prepared a recovery memo and number of GC notes were compared and the said tallied. Thereafter hand wash of both the hands of the accused were taken. I have seen

the recovery memo Ex. PW-1/D which bears my signatures at page No. 2,3, and 4 at point "D". I had signed on this recovery memo after reading the same. In my presence, right-side pant pocket wash was also taken and some papers were recovered from the table drawer from the accused as well as from the box."

25. PW-9 S.K.Peshin, DSP, CBI had laid trap on 12.07.1995, thereafter who investigated the case of R.C.No.56/1995 Ex.PW-9/A. He deposed that this case was registered against the accused on the complaint of Ashok Kumar PW-1 alleging demand of bribe by Sh.Brij Pal Singh, Sub-Inspector posted at P'S. Jahangir Puri. Complainant PW-1 was called by him to his room, interrogated him regarding the allegation made by him. He was satisfied about the genuineness of the allegations. A trap party was constituted, arranged two independent witnesses i.e. Sh'Swami Nath PW-3 from Ministry of Health and Sh.Manmohan Kumar Pw-8 from DGS&D and by about 3 PM all the members of the raiding party, including witnesses and complainant were present in his room.

26. Further, he had deposed that complaint of Ashok Kumar PW-1 was shown to both the witness (Pw-3 and PW-8) and they also questioned the complainant regarding the allegations to satisfy themselves. The complainant produced a sum of Rs.5000/- consisting of 50 GC notes of Rs. 100 denomination, whose, numbers were noted down in the annexure Ex.PW-1/B. Ensuring that these numbers had been correctly recorded. Thereafter, a practical demonstration was given after treating the GC notes with phenolphthalein powder, directing Sh'S.R'Singh, Inspector,(not examined) to explain the reaction that takes place between said phenolphthalein powder and colourless solution of sodium carbonate. For that purpose witness Manmohan Kumar PW-8 was asked to touch these powder treated notes with his right hand finger and to wash in a colourless solution of sodium carbonate. On doing so by him the said colorless solution turned pink. It was thrown away after explaining the significance of the reaction. Personal search of the complainant was taken and he was not allowed to carry anything. The tainted amount of Rs. 5000/- was kept in his shirt's pocket and was directed to hand over the bribe amount to the accused on his specific demand of bribe. Swami Nath PW-3 was asked to accompany the complainant and remained with him so as to see the transaction and hear the conversation and also to

give signal by scratching hair on his head with both hands. The left over phenolphthalein powder had been returned to malkhana. All other formalities were also conducted during these pre-trapped proceedings which were mentioned in handing over memo Ex.PW-1/C.

27. Thereafter, they all left CBI office for police station Jahangir Puri. They reached near the police station premises at about 5:30 PM. Complainant PW-1 and shadow witness PW-3 were directed by him to go inside the police station to contact the accused. However, both of them came out and informed that accused was expected shortly on which he (PW-9) directed them (PW-1 and PW-3) to wait for the accused. The other members took suitable position around the police station premises which was housed in DDA Flats. At about 6 PM the complainant PW-1 and shadow witness PW-3 went inside the police station and came after meeting the accused who had told them to come around 7 PM.

28. It was observed that there was a rush of people who had come from adjoining areas to the police station and the accused was trying to remove the crowd from the premises of the police station. The trap team then mingled amongst the crowd. At about 7 PM when the crowd thinned and most of people had left. Complainant PW-1 and shadow witness PW-3 again went to the room of accused at the first floor. They were seen coming out of the room, to wait near the passage leading to the room on the first floor. After some time they both entered the room again, while some people already sitting had left the room. At about 7:50 PM the pre-appointed signal was received from Sh'Swami Nath PW-3, the shadow witness. On signal, he along with other staff rushed to first floor. Entered in the room, Inspector Ved Prakash caught hold of accused Brij Pal Singh by the wrist of his left hand. Accused tried to loosen the grip on his left hand wrist and somehow he succeeded and inserted his right hand in the right side pocket of his pant and took away the bribe amount and started throwing towards passage. The accused threw the notes which fell on the asbestos roof of the room situated in the ground floor of rider to the SHO. Then, Inspector Sh.A.G.L.Kaul caught hold of accused by his right hand wrist. After disclosing his identity (PW-9), challenged Sh. Brij Pal Singh as to whether he had demanded and accepted the bribe.

29. PW-9 S.K.Peshin confirmed from shadow witness PW-3 Swami Nath that bribe was demanded and accepted by the accused. PW-9

aranged at spot presence of SHO and ACP who also had come to the first floor. They were apprised about the happening in the first floor. The ACP left after directing the SHO to cooperate with CBI. PW-9 further deposed that in the meantime he also arranged for the presence of the photographer from the market. The independent witness PW-8 was asked to pick up the notes from the asbestos roof with the help of the shadow witness. Their photographs in process of picking-up notes were also taken. He identified Sh'Swami Nath PW-3 and Manmohan Kumar PW-8 in photograph Ex.PW-9/B. This witness also identified Sh.Manmohan Kumar PW-8 in Ex.PW-9/C and PW-9/C and deposed that they were visible as collecting the currency notes from the asbestos roof and that those photographs were taken by one person sent by J.K. studio. Three other photographs which were Ex.PW-9/E-1 to Ex. PW-9/E3 also show the scattered currency notes on the asbestos roof. Those photographs were also taken by under his direction by J.K'Studio and also bear the stamp of J.K'Studio along with signatures at point "A" on the reverse of the photos.

30. Further, he deposed that after collecting the notes both the witnesses PW-3 and PW-8 compared the same annexure prepared in CBI office earlier and confirmed that the numbers on these recovered notes collected from asbestos roof, were same. Colourless solution of sodium carbonate was prepared and accsused was asked to wash his right hand finger in it. The solution turned pink in colour and was transferred into a neat and clean glass bottle which was sealed with the seal of CBI. The accused was asked to remove his pant and inner lining of right side pocket, the same was dipped in a freshly prepared colourless solution of sodium carbonate which also turned into pink colour and was transferred into another glass bottle, thereafter, was also sealed with CBI seal. Those bottles were marked as "RHW" and RPPW". The site plan Ex. PW-3/B was also prepared, search of the drawer of the table of accused was conducted and documents consisting of bank accounts were seized vide Ex.PW-3/D. The recovery memo pertains to post-raid proceedings Ex.PW-1/D was prepared at the spot.

31. It is amply clear that the prosecution had to rely mainly upon the testimony of the complainant PW-1 as made by him in his examination-in-chief on 02.03.1998, the testimony of S.K. Peshin, DSP (TLO) PW-9 and other material witnesses i.e. PW-4 Sh. K'S. Chhabra, who gave

positive reports Ex. PW-4/A of Tests for phenolphthalein and sodium carbonate, PW-5 Samey Singh whose complaint was under inquiry with the appellant, PW-6 P.D. Vasandhani, Deputy Manager, S.B.I. who proved ledger Ex. PW-6/A and PW-7 Inspector Ram Sewak, SHO, P'S. Jahangirpuri who confirmed the complaint Ex. PW-5/A made by Samey Singh.

32. The learned defence counsel Sh.Pradeep Kumar Arya has argued that the PW-2 Karnal Singh DCP had not applied his mind while granting sanction for the prosecution under Section 19 of P.C. Act. PW-2 had accorded sanction Ex. PW-2/A verbatim of charge sheet. The sanctioning authority was duty bound to apply independent mind which he failed to do.

33. The learned counsel Sh. A.K. Gautam has argued that Karnal Singh PW-2 had deposed that he was posted as DCP (North-west district), Delhi and in that capacity he was appointing-cum-disciplinary authority in relation to the Sub-Inspectors of police and could remove them from the service. On 23.08.1995, he accorded sanction for prosecution of accused Brij Pal Singh, the then Sub-Inspector of police vide his detailed order Ex.PW-2/A. Further, he had deposed that he perused the SPs (CBI) report as well as the investigation record including statement of witnesses produced by the investigating officer of the case.

34. He further argued that the object for providing prior sanction under the Act is to safeguard a public servant against vicious and malicious prosecution to obtain well considered opinion of the superior authority. No doubt, on the one hand, this provision is intended to safeguard the public servant from any harassment of any fictitious proceedings, and to protect the interest of the State, on the other hand. When the moral of public services or when the integrity of one of his member is questioned, sanction provides for impartial scrutiny of the allegations by a competent authority, to satisfy itself that there is prima facie case against the person charged with an offence under the Act. He argued that PW-2 had rightly sanctioned the prosecution after going through the entire record. He was of the opinion that the prima facie case is made against the accused.

35. Learned counsel for the appellant argued that the contents of sanction are verbatim to the contents of charge-sheet filed by the CBI against the appellant.

36. The learned counsel for the respondents (CBI) has relied upon the judgment of **M'S.Kuppuswami & Etc. Vs. State** 1990 INDLAW MAD 83 in para 21, wherein, observed that petitioner certainly has no opportunity during trial to disapprove the allegations made by the prosecution. The sanction to prosecute does contain repetition of the acts, found in the charge-sheet. Merely because the narration of the facts has been borrowed from the charge-sheet, it cannot automatically be concluded that there was non-application of mind before sanction was accorded. It would certainly be better if, after going through the facts, the Sanctioning Authority himself, on his understanding of the case gives a resume of facts in the order of sanction, without adopting to follow the very phraseology used by the investigating agency. A mere reproduction of words, as far as the facts of the case are concerned, cannot in all cases indicate lacks upon mind. Sanction is not an empty formality but intended to be a protection to a public servant when prosecuted for an offence which challenges his honesty and integrity. However, in the instant case on the perusal of order of sanction, it is prima facie apparent that the Sanctioning Authority had carefully examined the investigation report, other document, i.e. allegation and statements of witness before allowing the prosecution to be instituted.

37. The Courts have to see that the mind of sanctioning authority should not be under pressure from any quarter nor should any external force be acted upon it to take a decision one way or the other. Since, the discretion to grant or not to grant a sanction vests absolutely in the sanctioning authority, its discretion should be shown to have not been affecting by any extraneous authority.

38. If the sanction granting authority failed to apply its mind to ascertain correct amount of illegal gratification to decide question of sanction is material fact and is not mere error or irregularity but serious omission on its part tantamount to illegality affecting the validity of the order which cannot be cured by the aid of Section 465 of the Cr.P.C. In the case of **Tirath Prakash Vs. State** 1992 (2001) DLT 613 as was held that if competent authority had granted the sanction mechanically without application of mind, the sanction order would be rendered vide ab initio and the cognizance taken by the special Judge and subsequent trial in the case would be illegal.

39. The learned counsel for the appellant has relied upon the case

of **R'S.Nayak Vs. A.R. Antulay** 1984 2 SCC 183 while dealing with this case the Supreme Court has referred a case of **Mohd. Iqbal Ahmad Vs'State of Andhra Pradesh** AIR 1979 SC 677 wherein it was held that a grant of sanction is not an ideal formality but a solemn sacrosanct act which removes the umbrella of protection of government servant against the frivolous prosecution and the aforesaid requirements must, therefore, be directly complied with before any prosecution could be lodged against public servants.

40. This judgment is not relevant in the present situation, herein the sanctioning authority Mr.Karnal Singh PW-2 Deputy Commissioner had gone through the facts and material placed before him in regard to the said allegations, and having applied his mind to the facts and circumstances of the case, he was fully satisfied that prima facie a case under Section 7 and Section 13 (2) read with Section 13(1)(d) of the P.C. Act was made out against the accused, Sub-Inspector of Delhi Police.

41. In another case referred as **Periyasamy Vs. Inspector, Vigilance & anti-Corruption Department** 1994 Crl. L.J. 753 (Madras High Court) where in para 14 it was observed as under:-

> "On a perusal of Ex.P13 sanction order, the sanction order does not confirm to the ratio decided by the Supreme Court and other High Courts. The sanction order does not reveal that the Sanctioning Authority had perused any records in support of this case. The sanction order does not also show as to how the Sanctioning Authority got himself satisfied with regard to the allegations against the accused. The Sanctioning Authority has not even given any reasons for his satisfaction in the Sanction Order. Therefore, I find that the Sanction Order is not valid and it is not in accordance with law."

42. On perusal of the para above, the facts of the instant case are totally different. In the present case, the Sanctioning Authority has gone through the entire records produced before him, and after complete application of mind he accorded the Sanction, therefore, above cited case has no bearing in the circumstances of the present case.

43. In my view as the law discussed above, I find no force in the arguments advance on behalf of the appellant against order of sanction.

Additionally, I note that the appellant has not even challenged the validity of sanction in his statement under Section 313 Cr.P.C. and no suggestion was put to PW-2 while his cross-examination. Even, the appellant had not raised any issue on the first available opportunity i.e. at the time of framing of charge as per the requirement of Section 19 of P.C. Act. Therefore, there is no infirmity or irregularity in issuing the sanction order Ex.PW-2/A.

44. On merit the learned counsel for the appellant submits that filling of complaint with CBI by the complainant can not be taken as a substitute for the evidence of proof of allegations. The prosecution was required to prove the allegation by convincing evidence, which is lacking in the instant case. The learned counsel for appellant has relied upon the case of **Roshan Lal Saini Vs. Central Bureau** of Investigation 2011(1) JCC 102 in para 12 observed as under:-

> "There is no merit in the submission of the learned Prosecutor. Filing of complaint with CBI by the complainant cannot be taken as a substitute for the evidence of proof of allegations contained therein. The complaint Ex.PW-6/A is a document containing allegation of demand of illegal gratification made by the appellant M.N'Sharma. Prosecution was required to prove the allegations made in the complaint by convincing evidence, which the prosecution has failed to do. Therefore, I find it difficult to accept that the prosecution has been able to establish the initial demand."

45. But, the facts of the case authority Roshan Lal (Supra) are totally also different from the present one. In the present case the case has been fully proved from the statement of PW-1, PW-6, PW-7 and PW-9. Therefore, the case cited by the learned counsel has no relevance.

46. In the case, as referred by the learned counsel for appellant, of **Sunil Kumar Mishra Vs'State** (CBI), 2007 (139) DLT 407, (Delhi High Court), relied on para 12 of this case wherein it was observed as under:-

> "All cases of corruption have two important aspects and they are (i) demand and (ii) acceptance. Unless demand and acceptance of illegal gratification by the public servant charged with under the Prevention of Corruption Act are proved by the prosecution

beyond doubt, the presumption provided for in Section 20 of the Act cannot be drawn. Three cardinal principles of criminal jurisprudence are well settled and they are as follows:-

(i) that the onus lied affirmatively on the prosecution to prove its case beyond reasonable doubt and it cannot derive any benefit from weakness of falsity of the defence version while proving its case;

(ii) that in a criminal trial the accused must be presumed to be innocent unless he is proved to be guilty; and

(iii) that the onus of the prosecution shifts."

47. Whereas, in the instant case there is a demand made by the appellant while dealing with the complaint of PW-5 and further demand in conversation at the time of conducting the raid. The appellant in the instant case has accepted the money which was proved by PW-7 and PW9 and examination-in-chief of PW-1. Therefore, the case of **Sunil Kumar Mishra** (supra) does not apply in the instant case.

48. In the case of **Prem Singh Yadav Vs. Central Bureau** of Investigation which was decided on 25.03.2011 in Crl.A.No.206/2002 referred para 14, reads as under:-

> "In view of the above, it may not be safe to rely upon the testimonies of PW2, PW3, PW5 and PW6 regarding demand and acceptance of money by the accused. The recovery of tainted money alone is not sufficient to record the conviction. In the case of **Suraj Mal v. State (Delhi Adminstration)** (1979) 4 SCC 725 it was held that mere recovery of money, divorced from the circumstances under which it is paid, is not sufficient to convict the accused when the substantive evidence in the case is not reliable. Mere recovery of money cannot prove the case of the prosecution against the accused in the absence of any instance to prove the payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe.
>
> The Supreme Court held that mere recovery of money from the accused by itself is not enough in the absence of substantive evidence of demand and acceptance. In this case the reliance

was placed on a three-judge Bench judgment in M.Narsinga Rao v. State of A.P. wherein it was held as under:-

"20. A three-Judge Bench in **M. Narsinga Rao v. State of A.P.** while dealing with the contention that it is not enough that some currency notes were handed over to the public servant to make it acceptance of gratification and prosecution has a further duty to prove that what was paid amounted to gratification.

24. ...we think it is not necessary to deal with the matter in detail because in a recent decision rendered by us the said aspect has been dealt with at length. (Vide **Madhukar Bhaskarrao Joshi v. State of Maharashtra**) The following statement made by us in the said decision would be the answer to the aforesaid contention raised by the learned Counsel: (SCC p.577, para 12) '12' The premise to be established on the facts for drawing the presumption is that there was payment or acceptance of gratification. Once the said premise is established the inference to be drawn is that the said gratification was accepted `as motive or reward' for doing or forbearing to do any official act. So the word `gratification' need not be stretched to mean reward because reward is the outcome of the presumption which the court has to draw on the factual premise that there was payment of gratification. This will again be fortified by looking at the collocation of two expressions adjacent to each other like `gratification or any valuable thing'. If acceptance of any valuable thing can help to draw the presumption that it was accepted as motive or reward for doing or forbearing to do an official act, the word `gratification' must be treated in the context to mean any payment for giving satisfaction to the public servant who received it.

49. Whereas in the present case the prosecution has certainly proved recovery of money from the accused and fully corroborated by the other substantive evidence of the demand and acceptance, therefore, this judgment does not fit to the circumstances of the instant case.

50. In the case referred as **O.P.Chhabra Vs. State** 2010(175) DLT 374, he has referred in para as under:-

"7. A perusal of Sections 7 & 13 makes it clear that Sections do

not talk of demand of bribe. They only talk of acceptance of bribe. There can be no acceptance unless there is demand that is why the Courts have always considered demand and acceptance together. There is no such requirement of law that this demand and acceptance of bribe has to be at the same time or demand must be made by spoken words at the time of trap laid by CBI or any investigating agency. It need not be emphasized that laying trap is in furtherance of investigation. Trap is laid only when demand is already there. If no demand for bribe has been made, no trap can be laid. When any person approaches CBI, he approaches CBI with a specific complaint about a public servant having demanded bribe and it is in that context ˇa trap is laid so that at the time of accepting bribe the person can be caught red handed. In this case the complainant PW-2 had categorically testified that he received notice from MTNL Exh. PW-2/A asking deposit of additional amount. This notice was received by him after expiry of the due date and in that context he met accused Om Prakash Chabra. It is quite reasonable to expect that when a customer meets an official, the official guides him as to what is the course of action. If the extension of time for deposit could have been done on just filing an application, Mr. Chabra/appellant when was approached by the complainant on 13.10.1998, would have handed him over a piece of paper and asked him to right a few lines application seeking extension of time and he would have passed an order for extension of time right there. And if it was not a case of extension of time, he would have told that he need not be contacted for extension of time as he could not extend the time and the money had to be deposited right away. The complainant categorically testified that he met the appellant on 13.10.1998. It is not the case of the appellant that the appellant had not met him on 13.10.1998. The plea taken that by the appellant is that complainant was not willing to deposit Rs.15,000/- the addition demand made by MTNL. If the complainant had not to deposit this amount, his telephone connection would have been disconnected because of non fulfillment of the demand notice. The complainant was running an STD booth and the amount demanded by demand notice was legitimate demand, payable by the complainant. Thus, there was

no question of complainant saying that he would not deposit the money. In his written explanation under Section 313 Cr.P.C. the appellant had not taken this stand that the complainant was not willing to deposit the additional amount as demanded by MTNL. The complainant only wanted that he should be given some more time and it for this reason that the appellant asked complainant to pay Rs.500/- so that he may extend the time beyond due date. This has been proved by PW-2 in his testimony. There is no reason to disbelieve the testimony of PW-2. The complainant was not willing to pay this bribe money and approached CBI and lodged a complaint. Lodging of complaint does not make the complainant an untrustworthy witness or an accomplice so as to need corroboration of his testimony. No person, who approaches CBI making complaint against a corrupt official about demand of his bribe, can be branded as accomplice."

51. This Court had considered as to whether a person making complaint regarding corruption can be considered as an accomplice or not in **State v. P.K. Jain and Anr.** 2007 Crl.L.J4137 and observed as under:

"10. I consider that observations of learned A'S.J brandishing the complainant in a trap case as accomplice amounts to discrediting the criminal justice system itself and portrays that the criminal justice system cannot respect the witnesses. This country is facing unprecedented rise in corruption. Situation has come to a stage that MCD officials, due to the corrupt practices, have turned the whole city into a slum by allowing all types of unauthorized construction, encroachment, squatting over public land. Engineers of local body who were supposed to check the unauthorized construction and encroachment of the public land, encroachment of roads, encroachment of pavements, turn a blind eye to all this, since their pockets are warmed and palms are greased. Similarly the observation of the trial Court that complainant and his son are interested witnesses and not trust worthy, is unfortunate. In case of a legitimate trap, the persons and police officials taking part in trap, in no sense can be said to be accomplice or un-credit worthy witnesses so that their evidence would require, under law to be corroborated by

independent witness. The rule of corroboration is not a rule of law. It is only a rule of prudence and the sole purpose of this rule is to see that innocent persons are not unnecessarily made victim. The rule cannot be allowed to be a shield for corrupt. Moreover, the corroboration need not be by direct oral evidence and can be gathered from circumstantial evidence. The sole evidence of a complainant is sufficient to convict a person, if it is reliable, acceptable and trust worthy."

52. On merits, the learned counsel for appellant Mr.Pradeep Kumar Arya has mainly relied upon PW-1, PW-3 and PW-8 as they were declared hostile. The PW-1 complainant has completely taken u-turn from what he had deposed in the examination-in-chief, however, the learned counsel could not find out any lacuna in the deposition of PW-1 in examination-in-chief. Therefore, the trial Judge has not relied upon what he had deposed in cross-examination. It is a settled law that if any witness has taken complete u-turn from what he had deposed in examination-in-chief, then the chief-examination part of the witness cannot be thrown out. It is very pertinent to mention here that the learned trial Judge was compelled to proceed against the PW-1 under Section 344 Cr.P.C. separately on this issue.

53. Here, I appreciate the application of mind of the trial Judge, who had very rightly proceeded against complainant PW-1 while issuing notice under Section 344 Cr.P.C., therefore, the view taken by the trial Judge was correct, I find no infirmity on this issue. Therefore, I also concur the same.

54. In the case of **Khuji Vs. State of M.P.** AIR 1991, SC 1853 wherein the Supreme Court had held that statement of witness identifying all accused in examination-in-chief but contradicted in cross-examination, is nothing but an attempt to wriggle out of the first statement and that his evidence is reliable with regard to the facts as made earlier in his examination-in-chief. Observation made in para 7 squarely apply to the facts of the present case which reads as under:-

"The High Court came to the conclusion and, in our opinion rightly, that during the one month period that elapsed since the recording of his examination-in-chief, something transpired which made him shift his evidence on the question of identity to help

the appellant. We are satisfied on a reading of his entire evidence that his statement in cross-examination on the question of identify of the appellant and his companion is a clear attempt to wriggle out of what he had stated earlier in his examination-in-chief.

The Supreme Court further observed in this case,

Since the incident occurred at a public place, it is reasonable to infer that the street lights illuminated the place sufficiently to enable this witness to identify the assailants. We have, therefore, no hesitation in concluding that he had ample opportunity to identify the assailants of Gulab, his presence at the scene of occurrence is not unnatural nor in his statement that he had come to purchase vegetables unacceptable. We do not find any material contradictions in his evidence to doubt his testimony. He is a totally independent witness who had no cause to give false evidence against the appellant and his companions.

We are, therefore, not impressed by the reasons which weighed with the trial Court for rejecting his evidence. We agree with the High Court that his evidence is acceptable regarding the time, place and manner of the incident as well as the identity of the assailants."

55. The law is settled that even in a criminal prosecution, when a witness is cross-examined and contradicted with the leave of the court by the party calling, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case, whether as a result of such cross-examination, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be credit-worthy and act upon it.

56. In **Koli Lakhmanbhai Chanabhai Vs. State of Gujarat** JT 1999 (9) SC 133, in para 5 where it was observed as under:-

"From the aforesaid evidence on record, in our view, it cannot

be said that the High Court erred in relying upon some portion of the evidence of PW-7 who was cross-examined by the prosecution. It is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witnesses cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence. (Re: **Bhagwan Singh vs'State of Haryana** (1976) 1 SCC 389 and **Sat Paul v. Delhi Administration** (1976) 1 SCC 727). In the present case, apart from the evidence of PW7 the prosecution version that he saw that appellant was having knife in his hand and was quarrelling with the deceased gets corroboration from the evidence of PWs 11 and 12 to whom he disclosed the incident immediately. On the basis of the said information, within one hour, FIR was lodged disclosing the name of the appellant as the person who has inflicted the knife blow. Number of incised wounds are found as per the Post-mortem report. The prosecution version gets further corroboration from discovery of Muddamal knife containing human blood Group 'A'. Further the bush-shirt and baniyan which were put on by the accused at the time of incident were having extensive blood stains which were also found containing human blood group 'A'. Learned counsel for the appellant, however, contended that accused is also having blood Group 'A' and that he was having injury on the thigh as per the evidence of the Doctor. In our view, there is no substance in his contention because as per the medical evidence, the injuries caused to the accused were minor and that because of such injuries, there would not because of such injuries, there would not be extensive bloodstains on the bush-shirt and baniyan put on by the accused. In his 313 statement also, accused has not explained how he got bloodstains on his bus-shirt and baniyan. He has also not denied the recovery of the said bush-shirt and baniyan from his person at the time of his arrest."

57. It is settled law that the evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed of a record. It

remains admissible in the trial and there is not legal bar to pass his conviction upon his testimony if corroborated by other reliable evidence.

58. The learned counsel for the appellant has drawn the attention of this Court to the complaint dated 12.07.1995 Ex.PW-1/A towards the cutting of the date at point B. I have perused the complaint, and note that on the top the date is 12.07.1995. However, at the bottom, there are two dates, one is 12.07.1995 another has been cut (not readable), but the contents inside the complaint clearly reflect that **'to close the file of the case the Sub-Inspector Brij Pal Singh, appellant had demanded Rs. 12,000/- as bribe but at his request he reduced to Rs. 10,000/- and the appellant directed today 12.07.1995 to bring the money accordingly he is going to give Rs. 5000/- as installment'.** Since the contents of the complaint inside of dated 12.07.1995, there are chances that while writing date 12, the pen might have slipped, otherwise, it was very easy to make from digit 10 to digit 12, even without any cutting. Therefore, I found no force in this argument also.

59. The learned counsel for appellant has further pointed out from the statement of PW-5 Samey Singh as he had deposed that he made a complaint in PS Jahangir Puri on 29.06.1995, in respect of an embezzlement of Rs.36,000/- from his account, whereas, PW-1 had deposed in his examination-in-chief that on 28.06.1995 accused Brij Pal SI called him to police station Jahangir Puri. He further argued that if the complainant PW-1 was called on 28.06.1995 then question does not arise the appellant would demand a money in the complaint dated 29.06.1995 which came day after he was called at police station. I feel this dated 28.06.1995 seems to be a typographical error, otherwise, the learned counsel for the appellant would have asked question on these two dates and would have clarified this date from PW-5 Samey Singh. This date had gone un-noticed, in my opinion this date written wrongly has no relevance, when, other witnesses corroborated the incident, otherwise.

60. In defence, the appellant stated under Section 313 Cr.P.C against the question No.37 he replied as under:-

> **"Q.37 Why this case against you?**
>
> **A. I have been falsely implicated in the instant case as the complainant was enemical to me and I have beaten at the instance of SHO, PS Jahangir Puri, once or twice."**

61. This statement of the appellant itself proves that the complainant PW-1 was harassed by the appellant and demanded bribe to favour the complainant in the complaint made by PW-5 Samey Singh. The complainant succumbed to his demand and had agreed to pay the bribe money on 12.07.1995 itself.

62. If I accept the testimony of PW-1 as made by him on 02.03.1998, in chief, then, the entire prosecution case as was deposed by the TLO, S.K.Peshin PW-9 finds full corroboration from related circumstances, i.e., hand wash and pant pocket wash of the appellant turning pink, solution whereof preserved for CFSL analysis, giving positive test of phenolphthalein and sodium carbonate, doubtlessly indicating the fact the accused who was dealing the case of embezzlement against PW-1, the appellant, did accept the tainted money, kept in his pant pocket but later on becoming suspicious of the movement taking place throwing the same by taking out of the pocket which scattered at the asbestos sheet of the roof of the room of PA to SHO PW-7, who has deposed to the effect that as remained unshaken in the cross-examination. In this regard, the settled law in the case of **State of U.P. Vs. M.K.Anthony** AIR 1985 SC 48, wherein it was held that despite discrepancies in the statement made in the court by the material witnesses if their testimonies fully inculpate the accused, conviction can be based on such evidence. The observations were made by the Apex Court as under:-

> "While appreciating the evidence of a witness the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities, pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matter not touching the core of the case, hyper technical approach by taking sentence torn out of context here and there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter, would not ordinarily permit rejection of evidence as a whole."

Their Lordships further observed,

"Unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witness may differ in some details unrelated to the main incident because power of observation, retention, and reproduction differ with individuals. Cross-examination is an unequal dual between the rustic (witness) and refined lawyer."

63. In another case of **Bharuda Broginbhai Harji Vs. State of Gujarat** AIR 1983 SC 753 that discrepancies which do not go to the root of the matter and shake the basic version of the prosecution should not be attached undue importance. The reasons given in that judgment for arriving at this conclusion as under:-

"(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) Ordinarily, it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. Thus, mental faculties, therefore, cannot be expected to be attuned to absorb the details.

(3) The powers of observance differ from person to person, what one may notice, another may not. An object or movement might emboss image of one person's mind, whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

(5) In regard to exact time of an incident or the time duration of an occurrence, usually, people make their estimates by guess work on spur of moment at the time of interrogation and one cannot expect people make very precise or reliable estimates in such matters. Again, it depends upon the time-sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details of imagination on the spur of moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved, though the witness is giving a truthful and honest account of the occurrence witnessed by him perhaps it is a sort of psychological moment."

64. Putting the curtain down, admittedly the appellant was a public servant at the time of the occurrence. There was a demand since the appellant was dealing the complaint of PW-5 Samey Singh and the accused suspecting complainant Ashok Kumar PW-1 in that complaint. Again money was demanded at the time of trap as admitted by PW-1 and the money was accepted and thereafter recovered from the appellant. Since the appellant was dealing with the complaint of PW-5 Samey Singh and the complainant PW-1 was suspect, therefore, the appellant demanded money from the complainant PW-1 to favour him and to close the issue against him. This factor establishes the motive for demanding the bribe from the complainant.

65. Keeping the above evidence and discussion into view the bribe was demanded by the appellant from PW-1, again bribe was demanded and accepted at the time of trap. Bribe money was recovered from the appellant. Hand wash and pant was also proved. Motive for demanding bribe was proved beyond doubt.

66. Therefore, I find no discrepancies in the order/judgment passed by trial Judge, therefore, I confirm the same. The bail bonds and surety bonds are cancelled. The appellant is directed to surrender before the Jail authority forthwith for remaining sentence.

67. The appeal is dismissed.

68. No costs.

ILR (2011) V DELHI 251
WTR

COMMISSIONER OF WEALTH TAX ....APPELLANT

VERSUS

CHELSFORD CLUB LTD. ....RESPONDENT

(SANJAY KISHAN KAUL & RAJIV SHAKDHER, JJ.)

WTR NOS. : 30/1992, 31A/1992 DATE OF DECISION: 06.05.2011
WTA NO. : 1/2000 & 3/2000

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.

Important Issue Involved: What would be the effect of the repeal and the date from which it would operate. The general principle is that with the passing of the Repeal Act the existing statute stands effacted, revoked or abrogated. The instant case is one of express repeal. The effect of repeal would be that all those rights and actions which are inchoate or all those causes of action which may have arisen under the repealed statute would stand obliterated. The only exception to this would be past and closed transaction. The Repeal Act quite clearly intended that the State Government would stand divested of its right in land in issue from the date of the Repeal Act coming into force. It cannot also be doubted that the assessment for the relevant assessment years are still at large. Therefore, if one were to take the circumstance of the State Government being divested of its ownership with the passing of the Repeal Act then, automatically the land in issue, would have to be included in assessment of the wealth of the assessee.

[Ch Sh]

APPEARANCES:

FOR THE APPELLANT : Ms. Prem Lata Bansal and Mr. M.P. Sharma, Sr. Advocate with Mr. Deepak Anand, Jr. Standing Counsel.

FOR THE RESPONDENT : Mr. M'S. Syali, Sr. Advocate with Ms. Husnal Syali & Mr. Rahul Sateeja.

CASES REFERRED TO:

1. *Commissioner of Wealth Tax* vs. *Sri Srikantadatta Narasimharaja Wadiyar* (2005) 279 ITR 226.

2. *Keshavan* vs. *State of Bombay* AIR 1951 SC 128 at page 131 and 132).

RESULT: Dispposed of.

RAJIV SHAKDHER, J

1. At the outset, we may point out that we have been informed by the learned counsel for both the parties that the captioned matters, which include both references as well as appeals involve a set of questions of law which are common and hence could be disposed of by a common judgment.

2. This brings us to the common questions of law which we are called upon to adjudicate in the remaining matters.

2.1 Before we do that, it be noted that the Tribunal has made out a common "statement of case" as questions of law were raised both by the assessee as well as the revenue. The questions raised at the behest of the assessee have also been referred to in the statement of ˇcase have been dealt with by us in WTR 28/1992 and WTR 29/1992. The said references were disposed of by us by orders of even date, i.e., 01.04.2011.

2.2 There is another aspect of the matter which we would also refer to at this juncture itself. This is with respect to the fact that even though the questions of law which we are presently required to adjudicate upon, at the behest of the revenue, the revenue for reasons best known, has not filed a paper book in support of its references/appeal(s) to place on record documents, which according to it would be necessary for adjudication. Why this aspect is important, would become evident shortly, as we proceed to adjudicate upon the questions culled out below.

3. The questions which we need 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 situate 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/- for AY 1989-90 made in the net wealth of the assessee on account of value of construction of country club.

Question No. (i).

4. The brief facts which are relevant for adjudicating upon the said question of law are as follows :-

4.1 The land in question is a leased property. A perusal 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 (hereinafter, referred to as 'ULCRA').

4.2 In so far as this question of law is concerned, we are required to deal with the land admeasuring 12619.98 sq. metres (hereinafter referred to as the land in issue). The said parcel of land in issue has been valued by the Assessing Officer at the rate of Rs.2200 per sq. metre, which was, the rate prescribed at the relevant point in time, by the Ministry of Works and Housing for calculation of Government's share in unearned increase.

4.3 The remaining area equivalent to 4518.5 sq. metre has been included by the Assessing Officer in valuation of the buildings constructed thereon as, this portion of land is 'contiguous' and 'appurtenant' to the building(s). While there is a certain amount of ambiguity (since the records filed before the authorities below have not been placed before us) as to whether a notification under section 10(3) of the ULCRA was issued in respect of the land in issue, there is unanimity as between the counsels who appeared for the parties that, in respect of the said land in issue, the assessee has been allowed to retain it based on the approval

of the Lieutenant Governor received under section 19(1)(vi) of ULCRA.

4.4 In this background, the assessee had contended before the authorities below that the land in issue should be valued, at the premium paid by the it, which was a sum of Rs.847/-. As indicated above, the Assessing Officer disagreed and applied the Government rate of Rs.2200/- per sq. metres.

5. Before us, arguments were advanced on behalf of the revenue by Mrs. Bansal, Sr. Advocate assisted by Mr. Deepak Anand, Junior Standing Counsel whereas Mr'Syali, Sr. Advocate assisted by Ms. Husnal Syali and Mr. Rahul Sateeja, Advocates argued on behalf of the respondent.

5.1 Mrs. Bansal submitted that the land in issue, even though a leased property, was a valuable piece of property which was located at Raisina Road, New Delhi. The land in issue was transferrable albeit with the permission of the lessor. The Tribunal by virtue of the impugned judgment had given unnecessary weightage to the clauses in the lease, which ˇaccording to her, had been erroneously read as creating an impediment in the transfer of rights in the land in issue. Mrs. Bansal thus contended that the land in issue had to be valued at least at the official rates prevalent in the area, if not the actual market rates.

6. As against this, Mr. Syali drew our attention to the impugned judgment of the Tribunal wherein reference has been made not only to the clauses of the lease which created an impediment in the transfer of the rights of the land in issue but also to the observations made in the impugned judgment with regard to the permission given by the Lieutenant Governor evidently under section 19(1)(vi) of ULCRA to the following effect:

> "….A further restriction has been placed by the order of the Lieutenant Governor by which the assessee has been permitted to possess the land as long as it is used for the bonafide purposes of the club. Naturally, the permission is to be the assessee club and not to any other club."

6.1. In view of the aforesaid observations, Mr. Syali contended that these being findings of fact; the view taken by the Tribunal had to be sustained.

7. Having heard the learned counsels for the parties, we are of the

view that it may be relevant to briefly advert to the clauses contained in the lease as well as certain important facts which emerge from the record :-

(i). First and foremost, the assessee has acquired leasehold interest in the land in issue by virtue of a perpetual lease deed.

(ii). A certain portion of the land had already buildings erected thereon.

(iii). Under clause 4 of the lease, the assessee was required to maintain the building erected on the land in issue, in good state and, in case the assessee decided to demolish the said buildings, it had to credit the sale proceeds in favour of the lessor.

(iv). As per clause 6, the assessee could use the land in issue only for the purposes of running a club and could make no additions thereon without the approval of the lessor and that too only to make the premises "habitable" as a club.

(v). Under clause 7, on determination of the lease, the assessee is required to surrender to the lessor the premises and the buildings erected thereon including the land appurtenant.

(vi). Importantly, under clause 8, the assessee cannot transfer or assign the land in issue or any part thereof without the prior sanction of the lessor in writing.

(vii). Under clause (IV) (2) it has been, inter alia, provided that if it is proved to the satisfaction of the lessor or the Chief Commissioner of Delhi (whose decision is final in that regard), that the land in issue, was not being used for the purposes of club or that the club was being improperly or inefficiently managed then, in such a case, it would be lawful for the lessor to re-enter the land in issue and, cease and determine the lease;

(viii). Similarly, under clause (IV) (3), if the land in issue or any part thereof was required for public purpose, the lessor, inter alia, could re-enter it.

7.1 Based on the aforesaid covenants, the Tribunal agreed with the assessee that the premium charged had to be the basis for valuing the

rights in the land in issue. In coming to this conclusion, the Tribunal has not only given weight to the covenants which have been referred to hereinabove, by us, but also to the permission granted by the Lieutenant Governor under section 19(1)(vi) of the ULCRA.

7.2. It would be important to note at this juncture, that it was argued by Mrs. Bansal based on the following observations of the Tribunal that it was not as if the assessee was prohibited from transferring interest in the land in issue, so long as, it is used as a club. The observations of the Tribunal in this regard, on which reliance was placed, are contained in paragraph 10 of the impugned judgment, which read as follows :-

> "The concerned permission to retain the excess land is at page 75 of the paper book and the permission to hold the excess land is so long as it is used for the bonafide purposes of the club.".

7.3. The aforesaid observation according to Mrs. Bansal was contrary to what had been observed in another part of the judgment of Tribunal, which was, to the effect that the permission was granted by the Lt. Governor only, vis-à-vis the assessee.

7.4 It is important to note that we had put to Mrs. Bansal that we were handicapped in appreciating this part of her submission, in as much, the full import of the permission granted by the Lieutenant Governor could only be fathomed if the document had been placed on record. We therefore put to her squarely that in these circumstances, we would necessarily have to go by the findings returned by the Tribunal on this aspect, which was, essentially a question of fact. Mrs. Bansal, on the other hand, sought to convey that the finding was perverse.

7.5 This line of argument, according to us, is not available to the revenue as no such question has been framed. In any event in the absence of document, we would go by the findings returned by the Tribunal while seeking to appreciate the scope, import and extent of the permission granted by the Lieutenant Governor.

7.6 To be noted a part of those relevant observations have already been extracted by us in paragraph 7.2 above. We, however, consider it appropriate to extract the remaining observations of the Tribunal completely and in continuum so that the reasoning put forth by the Tribunal is easily understood.

> "…The learned Departmental Representative also did not dispute that the land in question is subject to the various restrictive clauses under lease deed and a further restriction has been placed by the order of the Lieutenant Governor by which the assessee has been permitted to possess the land as long as it is used for the bonafide purposes of the club. Naturally, the permission is to the assessee club and not to any other club. Therefore, as soon as the assessee transfers the land in question to another person there would be a violation of the condition imposed by the Lieutenant Governor even though the transferee may continue to use the land for a club. Therefore, in our view, there are serious clogs on transfer and with the aforesaid restrictive clauses neither the assessee can think of transferring the land to another person nor can such another person think of buying the same. In our view, therefore, it would be reasonable to value the assessee's rights in the said land only at Rs.847/-, which is the premium paid by the assessee therefor. We, therefore, direct that the land in question will be valued at Rs.847/- only and not at Rs.2,77,64,000/-"

7.7 In our opinion, what emerges is that the assessee could use the land in issue and the buildings constructed thereon only for the purposes of a club. The permission that was granted was only qua the assessee. The permission of the Lieutenant Governor obviously could not have been one in rem since the applicant was the assessee. The provisions of ˇsection 19(1) (vi) of ULCRA as prevalent at the relevant point in time, make it clear that while, exemption from other provisions of ULCRA was available in respect of vacantland held by certain kinds of entities including a club, the exemption was not automatic. The exemption was required to be granted by the concerned State Government having regard to: the nature and scope of activities of the entity, and the extent of vacant land required bonafide for the purposes of the club and, any other relevant factors. Thus, the Tribunal was right in holding that the permission was available only to the assessee. In other words there was no automatic transfer of the permission assuming the land in issue was transferred to another even if it was a club.

7.8 The Tribunal, therefore, after taking into account the impediments on transfer of the land in issue, caused by clauses 4, 6, 7, 8 (iv)(2) and

(iv)(3) of the lease came to the conclusion that the assessee's rights in the land in issue had to be valued at Rs.847/-. In our view, this involves an appreciation of the evidence on record and is not a case of no evidence. In these circumstances, we find that the view taken by the Tribunal is a possible view.

7.9 There is another aspect of the matter. Clause 8 of the agreement specifically prohibits transfer of the land in issue except with the prior sanction of the lessor. The official rate which the Assessing Officer has applied in order to determine the value of the asset for the purposes of Wealth Tax, is based on a presumption that such a permission would be granted. Fair market value of an asset can be assessed by hypothetically assuming that there is a willing buyer and seller is available for an asset. The hypothesis must however end here. It could not have been further assumed that the lessor would grant permission for transfer. Therefore, in the in the circumstances which obtained in the instant case, it cannot be held that the Tribunal's view that the assessee's right in the land in issue should be valued at Rs.847/- is erroneous. The question of law is accordingly answered in favour of the assessee and against the revenue.

Question No.(ii)

8. The brief facts which are relevant for the adjudication of the said question are as follows :-

8.1 The assessee at the relevant point in time was the owner of another piece of land situate in Village Gadaipur near Mehrauli. The said land had been purchased for the purposes of carving out one acre plots for each of its members. For this purpose the assessee had collected a sum of Rs.27,67,085/- from its members. The total land purchased admeasured 286 bighas. Out of the said 286 bighas, land admeasuring 36 bighas 4 biswas, it appears, had been taken over under the Delhi Land Holdings (Ceiling) Act, 1966 vide notification dated 04.09.1976. It appears that even out of the remaining area, the competent authority had categorized a portion of land admeasuring 3 bighas 2 biswas as agricultural land, while the other portion measuring 4 bighas was shown as being used for the purposes of running a tubewell. Both these parcels of land which were equivalent to approximately 3200.68 sq. metres were excluded from Wealth Tax under the provisions of section 40(3)(v) of the Finance Act, 1983; being agricultural land.

8.2 Pursuant to the aforementioned adjustment, the assessee was left with only 246 bighas (i.e., 2,07,332.26 sq. metres) of land. By a notification dated 22.03.1979, issued under ULCRA, this piece of land was declared as surplus. The assessee filed an appeal against the said action, which was dismissed. Consequently, a notification under section 10(3) of ULCRA was issued on 15.10.1980. Though the said notification was published in the official Gazette the possession of the land was not taken over for reasons best known to the concerned authorities.

8.3 The Assessing Officer, in these circumstances, took the view that since the possession of the land in issue had not been taken, the assessee continued to be its owner and hence, after calculating its value for the purpose of Wealth Tax, brought it to tax.

8.4 In appeal, the Commissioner of Income Tax (Appeals) [in short, 'CIT(A)'] sustained the order of the Assessing Officer.

8.5 The assessee carried the issue to the Tribunal. The Tribunal reversed the decisions of the authorities below by taking the view that once a notification under section 10(3) had been issued by the concerned State Government, then the land in issue is deemed as having been acquired. The Tribunal went on to say that from the date specified in the notification, the land would vest "absolutely" in the concerned State Government free from all encumbrances. The Tribunal held; the fact that the Delhi Administration had not taken possession of the land was of little significance, since by operation of law the assessee stood divested of its ownership. A mere continuation of possession did not inhere any right, in the land in issue, in the assessee and hence, the value of land could not be included in the net wealth of the assessee. According to the Tribunal on acquisition, the only right which would accrue, in favour of the assessee, would be to seek compensation under ULCRA; though according to it even the said compensation could not be brought to tax as it was not an asset specified in section 40(3) of the Finance Act, 1983. Accordingly, the Tribunal directed the exclusion of the land valued in the sum of Rs.48,42,398/- from the net wealth of the assessee.

8.6 Before us, Mrs. Bansal submitted that this court would have to take into account a subsequent event which occurred after the Tribunal had passed the impugned judgment dated 21.10.1991. The event being: the repeal of ULCRA by Urban Land (Ceiling & Regulation) Repeal Act,

1999 (in short, 'Repeal Act'). The Repeal Act was passed on 22.03.1999 w.e.f. 11.01.1999. It was contended that on account of the provisions of the Repeal Act, which did not save expressly or by implication a "vacant land" such as that of the assessee, in respect of which, only a notification under section 10(3) of ULCRA had been issued; the decision of the Tribunal would have to be reversed. Mrs. Bansal's submission was that since the proceedings in respect of the same were still at large, the intervening event, that is, the passing of the Repeal Act would have to be taken into account by this court.

8.7 As against this, Mr. Syali, in the first instance, submitted that the circumstance in which the assessee was put had been specifically excepted by the Repeal Act by virtue of provisions contained in section 3(2)(a) of the Repeal Act. This submission was however given up by Mr. Syali realizing the folly of his approach. The learned counsel conceded ˘that the assessee's case did not fall within the ambit of the saving clause of the Repeal Act i.e., Section 3(2)(a) of the Repeal Act.

8.8 Mr. Syali, however, contended that this court was required to consider the situation as it obtained in the relevant assessment years spanning from 1984-1985 to 1989-1990 and in the assessment years 1991-1992 to 1992-1993. According to Mr. Syali, in each of the assessment years, what the court would have to take into consideration was, the state of the law on the valuation date. The valuation date being the last day of the previous year of the assessment year in which the wealth tax had to be assessed. Based on this, it was submitted by Mr Syali that the Repeal Act would not be applicable as it was brought into force much later; the relevant date being the valuation date obtaining in each of the assessment years. Mr. Syali contended that if the revenue's contentions were to be accepted the Repeal Act would operate retrospectively. This, according to Mr. Syali, would render nugatory the acts and transactions which stood closed in the relevant assessment years. In support of his submissions Mr Syali vehemently relied upon the observations made by the Karnataka High Court in the case of **Commissioner of Wealth Tax vs Sri Srikantadatta Narasimharaja Wadiyar** (2005) 279 ITR 226. Specific reference was made to the following observations made in paragraph 49 of the judgment:

> "in view of the repeal of the Urban Land Ceiling Act, as of now, no proceedings are pending against the assessee and other

> members of the family under the Ceiling Act. This decision, in our view, has no bearing for disposal of these references proceedings, since the events which have taken place subsequent to the valuation date are not required to be taken note of by this court, while considering the orders passed by the wealth tax officer, while computing the net wealth of the assessee as on the valuation date."

9. In order to appreciate the submissions made by counsel for both parties it would be helpful if the provisions of the Repeal Act are adverted to hereinbelow: The Repeal Act was passed on 22.03.1999 w.e.f. 11.01.1999.

9.1 Sub-section 1(2) of the Repeal Act stipulates that, in the first instance, the provisions of the Act would apply to the whole of the states of Haryana and Punjab and to all Union Territories. The Act is also mandated to apply all other states which adopt the Act by resolutions passed in that behalf under clause (2) of Article 252 of the Constitution of India. It is not disputed before us that the provisions of the Repeal Act did not apply to Delhi at the relevant point in time.

9.2 Continuing with the narrative, Section 2 of the Repeal Act repeals ULCRA. The transactions which are saved are referred to in section 3 of the Repeal Act. 9.3 Section 3 opens with the words that the repeal of the principal act shall not affect (a) where vesting of any vacant land pursuant to a notification issued under Section 10(3) of the ULCRA and its possession has been taken over by the State Government or any other person duly authorized in that behalf by the State Government or by the competent authority; (b) the Repeal Act would not affect the validity of any order passed under Section 20(1) of the ULCRA or any action taken thereunder granting exemption notwithstanding judgment of any court to the contrary; and (c) the Repeal Act would not affect payment made to the State Government pursuant to exemption granted under Section 20(1) of the SICA.

9.4 Sub-Section (2) of Section 3 envisages a slightly different set of circumstances. The provision even though it appears under the title "saving" encompasses a slightly different situation. A reading of the provision seems to suggest that, it mandates that, even where notification has been issued under Section 10(3) of the Act but possession has not

been taken over by the State Government (or by any other person duly authorized by the State Government in that behalf or even by the competent authority) and that despite this circumstance, the State Government has paid money in respect of such land, then the said land shall not be restored unless amount paid by the State Government is refunded. The provision, therefore, seems to suggest that where a notification under Section 10(3) of the ULCRA had been issued but the possession had not been taken over, the Repeal Act would get attracted. However, where the State had paid a whole or part of the amount even though no possession of the land was taken, the restoration of the ownership of the land to the erstwhile owner shall be subject to refund of money to the State Government. This would necessarily mean that the two provisions can only be reconciled if the expression 'such land shall not be restored' is read to mean restoration of the ownership and not possession as obviously a sub-clause (a) and (b) of the sub-Section (2) of Section 3 pertain to a situation where a notification under Section 10(3) has been issued but possession of the land has not been taken over. Therefore, if regard is had to the provisions of Sections 3(1)(a) and 3(2)(a) and (b) of the Repeal Act then the State Government shall stand divested of its ownership in the vacant land on the Repeal Act coming into force where, only a notification under Section 10(3) has been issued but possession has not been taken over.

9.5 Section 4 of the Repeal Act speaks of abatement of proceedings relating to any order made or purported to be made under ULCRA before the commencement of the Repeal Act which are pending before any court or Tribunal or authority. The proviso to Section 4 however makes it clear that the main provision of Section 4 qua abatement of proceedings, shall not apply to proceedings relating to Sections 11, 12, 13 and 14 of ULCRA with regard to land of which possession has already been taken.

9.6 Section 5 pertains to repeal and saving of the Urban Land (Ceiling & Regulation) Repeal Ordinance, 1999. This is a provision which repeals the ordinance which was a precursor to the Repeal Act, and thereby, saves the anything done or any action taken under the said ordinance, as if it had been done or action had been taken under the provisions of the Repeal Act. At this stage for the sake of convenience we wish to extract the provisions of Section 3 of the Repeal Act since it provides a clue as to what the Repeal Act intended to save.

"3. (1) The repeal of the principal Act shall not affect

(a) The vesting of any vacant land under sub-section (3) of section 10, possession of which has been taken over by the State Government or any person duly authorized by the State Government in this behalf or by the competent authority.

(b) The validity of any order granting exemption under sub-section (1) of section 20 or any action taken thereunder, notwithstanding any judgment of any court to the contrary.

(c) Any payment made to the State Government as a condition for granting exemption under sub-section (1) of section 20.

(2) Where

(a) any land is deemed to have vested in the State Government under sub-section (3) of section 10 of the principal Act but possession of which has not been taken over by the State Government or any person duly authorized by the State Government in this behalf or by the competent authority; and

(b) any amount has been paid by the State Government with respect to such land, Then, such land shall not be restored unless the amount paid, if any, has been refunded to the State Government."

9.7 As indicated by us hereinabove in our view, as correctly conceded by Mr Syali the land in issue would not fall within the four corners of Section 3 of the Repeal Act. In the instant case it is not disputed that even though a notification under Section 10(3) of the ULCRA had been issued, the concerned State had neither taken over the possession nor paid any money to the assessee – though as discussed hereinabove if money had been paid it would have only delayed the restoration of the ownership of land from the State Government to the erstwhile owner till the money received by the erstwhile owner was refunded to the State Government. The issue really is what would be the effect of the repeal and the date from which it would operate. The general principle is that with the passing of the Repeal Act the existing statute stands effaced, revoked or abrogated. The instant case is one of express repeal. The

effect of repeal would be that all those rights and actions which are inchoate or all those causes of action which may have arisen under the repealed statute would stand obliterated (See **Keshavan vs State of Bombay** AIR 1951 SC 128 at page 131 and 132). The only exception to this would be past and closed transactions. In the instant case it is obvious that on the date of repeal, the assessment of wealth tax for the assessment years in issue, is still at large. Mr Syali's submission that with the close of the assessment year the transactions for those relevant years stood completed, cannot be accepted. The captioned appeals and references exemplify this fact.

9.8 The other submission of Mr Syali which is that if, one were to accept the contention of the revenue then it would amount to the Repeal Act operating retrospectively, is, in our view, flawed. The reason being that; it is not as if the Act operates retrospectively, it only obliterates all such inchoate rights and/or actions from the date of the Repeal Act coming into force except whose which are saved or transactions which are closed. In the view we have taken, it is quite clear that the Repeal Act did not save the transaction of the kind which involved the land in issue, i.e., in respect of land where only a notification under Section 10(3) had been issued.

9.9 Therefore, the Repeal Act quite clearly intended that the State Government would stand divested of its right in land in issue from the date of the Repeal Act coming into force. It cannot also be doubted that the assessment for the relevant assessment years are still at large. Therefore, if one were to take the circumstance of the State Government being divested of its ownership with the passing of the Repeal Act then, automatically the land in issue, would have to be included in assessment of the wealth of the assessee. The only reason the Tribunal had concluded that the land in issue was not amenable to tax was that with the passing of the notification under Section 10(3) of the ULCRA it ceased to be the assessee's asset. That situation having been reversed, in our view the logical sequitur would be that Tribunal's judgment on this aspect would have to be set aside. Accordingly, the question raised before us has to be answered in favour of the revenue and against the assessee.

10. We may only observe at this juncture that the judgment of the Karnataka High Court in the case of **Sri Srikantadatta** (supra) is not pari materia as it did not deal with the facts in issue, in the instant case.

In that case, the Division bench of the Karnataka High Court had been called upon to adjudicate upon the following question of law:

> "Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the value of the vacant land, in Bangalore Palace, belonging to the assessee should be taken at Rs 2,00,000/- for the purpose of the wealth-tax assessment for the years in question?"

10.1 The Court after referring to several Supreme Court and High Court judgments observed that under Section 7(1) of the Wealth Tax Act, 1957 to arrive at the fair market value of an asset, on the date of valuation, it would not only have to be assumed notionally that there was a willing seller and a willing buyer but also that the prohibitions contained in the Ceiling Act would require to be factored in. It is pertinent to note that, in the said case, notifications under Section 10(1) and 10(3) had not been issued. The court was only called upon to adjudicate as to whether the Tribunal had applied correct principles in valuing the land in question. In the ultimate analysis, the court came to the conclusion that the Tribunal had erred and, therefore, proceeded to answer the question against the assessee. As indicated above, the said case, in our view, has no application to the facts obtaining in the instant case.

Question No. (iii)

11. This brings us to question no. (iii). In so far as this question is concerned Mr Syali has fairly conceded before us that the answer to this question would depend upon the view the court takes qua question no. (ii). In other words if the court were to answer question no. (ii) in favour of the revenue then the building constructed on the land would have to be valued and brought to tax. Since we have answered question no. (ii) in favour of the revenue, question no. (iii) will have to be answered accordingly. Thus question no. (iii) is answered in favour of the revenue and against the assessee.

12. The captioned references and appeals are disposed of accordingly.

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CHIRAG JAIN **....PETITIONER**

VERSUS

CBSE & ORS. **....RESPONDENTS**

(KAILASH GAMBHIR, J.)

W.P.(C) NO. : 12595/2009 **DATE OF DECISION: 10.05.2011**

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.

Now as per the examination bye law 69.2 of the respondent CBSE, no change in the date of birth as recorded in the Board's records can be made unless the correction is to correct a typographical error to make the certificate consistent with the school records. For better appreciation, bye-law 69.2 is reproduced as under:

"69.2 Change/Correction in Date of Birth

(i) No change in the date of birth once recorded in the Board's records shall be made. However, corrections to correct typographical and other errors to make the certificate consistent with the school records can be made provided that corrections in the school records should not have been made after the submission of application form for admission to Examination to the Board.

(ii) Such correction in Date of Birth of a candidate in case of genuine clerical errors will be made under orders of the Chairman where it is established to the satisfaction of the Chairman that the wrong entry was made erroneously in the list of candidates/application form of the candidate for the examination.

(iii) Request for correction in Date of Birth shall be forwarded by the Head of the School alongwith attested Photostat copies of :

(a) application for admission of the candidate to the School;

(b) portion of the page of admission and withdrawal register where entry in date of birth has been made; and

(c) the School Leaving Certificate of the previous school submitted at the time of admission.

(iv) The application for correction in date of birth duly forwarded by the Head of School alongwith documents mentioned in bye-laws 69.2(iii) shall be entertained by the Board only within two years of the date of declaration of result of Class X examination. No correction whatsoever shall be made on application submitted after the said period of two years."

It would be thus seen that under bye-law 69.2 only

typographical error can be rectified and that too where such an error crept in the Board's records does not tally with the school records. The Hon'ble Division Bench in **Bhagwant Dayal**(supra) was also confronted with a similar situation where also the petitioner had relied upon the birth certificate issued by the municipal authority but without commenting upon the same, the Hon'ble Division Bench held as under:

"5. The decisions of the learned Single Judge in case of **Km. Meenu and Kumari Para** (supra) cannot be relied upon in the present case. It may be noted here that this Court is not correcting or commenting upon the certificate issued by the Registrar of Births & Deaths under the Registration of Births & Deaths Act, 1969. Single judges in the said cases were dealing with the prior bye-laws, which did not have any specific bar or prohibition or fixed time limit. We are concerned with the Byelaws 69.1 and 69.2 of the CBSE Bye-laws. Bye-law 69.1 of the CBSE Bye-laws has been quoted above. There is a bar/prohibition and a time limit has been fixed in the bye-laws. Bye-law 69.2 which deals with the change or correction of date of birth, reads as under

.....

8. In the present case, class 10 certificate is dated 3rd June, 2000. Thereafter, the appellant had appeared in the All India Secondary School Certificate Examination in the year 2003. At that time also, the appellant did not challenge or ask for change of the date of birth or the name of his father. The plea taken by the appellant that he could not observe the aforesaid mistake till January, 2010 when the appellant was appearing in Civil Services Examination has been rightly not accepted. The appellant had obtained a certificate from Health Department of Government of

Haryana on 2nd February, 2010 and then had approached CBSE and his school. Learned single judge has further observed that notices were issued to three schools where the appellant had studied. One school had stated that records were not available; another school had stated that no student by the appellant's name was enrolled with them and the third school where the appellant was studying when he had appeared in 10th class examination, had enclosed copy of admission form dated 21st April, 1999, extract of the admission withdrawal register and the transfer certificate dated 31st March, 1999 issued by his previous school. In these documents, the date of birth was recorded as 18th March, 1984 and not 18th March, 1985. The appellant's father's name was mentioned as Bhim Singh and not Bhim Sain. 9. For the reasons stated hereinabove, we do not find any merit in the appeal and the same is dismissed with no order as to costs."

Thus it would be manifest from above that the petitioner cannot be allowed to sleep over the mistake committed by him once and then repeating it throughout his academic career, till the time it becomes an immutable damage. The period of limitation of two years provided in the said bye law is a reasonable time for a student to take notice of a discrepancy that has crept in and make amends. It cannot be lost sight of the fact that getting an entry corrected in the certificates is not a vested right and is subject to limitations as stipulated by the respondents. Delay defeats justice and loss of limitation destroys the remedy. Directing to frequently correct the entries of date of birth in the certificates issued by the respondents without any time frame would be casting a shadow of doubt on the credibility of the certificates itself. **(Para 9)**

The 10th certificate issued by the CBSE goes with the life of

a student as this certificate is the authenticated proof of the date of birth of a student. Such certificate is invariably accepted as a valuable piece of evidence in proof of date of birth and age of the applicant throughout his career ahead and even the courts attach a high degree of probative value to the certificate and the date of birth as entered in the certificate is accepted as almost binding. A student and his/her parents have to be very careful, alert and vigilant while disclosing the date of birth at the time of submission of forms for the examination of 10th class as any error at that stage certainly can prove fatal. In the present case, the parents of the petitioner had throughout been disclosing the date of birth of the petitioner as 18.3.1991 and this would be evident from the transfer certificate issued by Maharaja Sawai Man Singh Vidyalaya, Jaipur on 1.4.2002 and the said date of birth remained consistent in various subsequent forms filled in and signed by the petitioner and his parents. In the face of all these documents, it is hard to believe that the parents of the petitioner and the petitioner himself would keep committing the mistake in furnishing the said date of birth. The particulars in the certificates, especially the date of birth carry with them a prima facie guarantee of correctness as they are furnished by the parents or the applicant himself and hence it is difficult to assume that they are false or incorrect. Date of birth is something that no parent or child can forget or mistake and while receiving the certificate if there is a mistake then the student would make out within no time the mistake in the certificate and take steps for immediate rectification. The contention of the counsel for the petitioner that in the passport the date of birth disclosed by the petitioner was 18.5.1991, does not find any merit in the eyes of law as the said information also must have been furnished by the petitioner or his parents and the said information could also be erroneous. **(Para 10)**

Important Issue InvoIved: Getting an entry corrected in the certificates is not a vested right and is subject to limitations stipulated in the statute.

[Sa Gh]

APPEARANCES;

FOR THE PETITIONERS : Mr. Rahul Chaudhary and Mr. Akshay Chandra, Advocate.

FOR THE RESPONDENT : Mr. Atul Kumar, Advocate.

CASES REFERRED TO:

1. *Ms. Jigya Yadav* vs. *Central Board of Secondary Education & Ors.* W.P.(C) No. 3774/2010 decided on 20.12.2010.
2. *Bhagwat Dayal* vs. *CBSE & Ors.* LPA No.783/2010 decided on 24.1.2011.
3. *Km. Para* vs. *Director, Central Board of Secondary Education* AIR 2004 Delhi 310.

RESULT: Writ Petition dismissed.

KAILASH GAMBHIR, J. Oral

1. By this petition filed under Article 226 of the Constitution of India, the petitioner seeks directions to direct respondent to revoke the impugned entry pertaining to his date of birth in the Class 10th pass certificate and Class 10th Mark Sheet.

2. The brief facts of the case which have led to the filing of the present petition are that the petitioner was born on 18th May, 1991 in Ram Manohar Lohia Hospital and his date of birth was duly registered with the NDMC on 17th June, 1991 as 18th May, 1991. The petitioner also stated that he holds an Indian passport which was issued in his favour on 23rd May, 1997 for a period of 10 years and there also his date of birth was recorded as 18th May, 1991. It is also stated that the petitioner had joined Delhi Public School, R.K.Puram in the year 2004 after he migrated from Ramjas School, Pusa Road, New Delhi. While studying in DPS he had appeared for 10th class examination under Roll No.6172168 and in the same school he had appeared for class 12th examination in the year 2008 under Roll No.6267327. He also stated that his class 10th result was declared on 20th May, 2006 but his date of birth in the class 10th pass certificate as well as in mark sheet issued by the CBSE was wrongly shown as 18th March, 1991. It is also the case

of the petitioner that after passing class 12th examination from the DPS on 23rd May, 2008 he has tried in various colleges for further studies and he had filled the same date of birth in all the admission forms as was shown in the class 10th pass certificate and mark sheet. It is also stated that some time in 2009 the petitioner realized that inconsistency in his date of birth would create problem in near future for higher studies for which he took steps and applied to the Principal of the Delhi Public School requesting the change of his date of birth in the said certificates. It is also stated that the said request of the petitioner was forwarded by the DPS to the CBSE and was rejected by the CBSE vide letter dated 7th July, 2009 taking a stand that no change/correction in the date of birth which is the date from previous school records is permissible under rule 69.2 of the CBSE Examination Bye-Laws. Feeling aggrieved with the said decision taken by the CBSE, the petitioner has preferred the present petition.

3. Mr.Rahul Chaudhary, learned counsel appearing for the petitioner submits that the parents of the petitioner had been inadvertently furnishing the wrong date of birth just due to mistake as the actual date of birth based on the municipal records of the petitioner is 18th May, 1991. Counsel further submits that the same date of birth was also disclosed by the petitioner in his passport and accordingly the passport of the petitioner carries the correct date of his birth. Counsel, thus, urges that the said two documents, that is, date of birth certificate issued by the NDMC and the passport cannot be doubted and therefore based on the same, directions be given to the respondent CBSE to correctly record his date of birth as 18th May, 1991 instead of 18th March, 1991 on the secondary certificate as well on the mark sheet. In support of his arguments, learned counsel for the petitioner has placed reliance on the judgment of this Court in **Km. Para vs. Director, Central Board of Secondary Education** AIR 2004 Delhi 310.

4. Opposing the present petition, Mr.Atul Kumar, learned counsel for the respondent CBSE submits that the respondent has placed on record various documents pertaining to the petitioner right from the transfer certificate issued by Maharaja Sawai Man Singh Vidyalaya, Jaipur where the petitioner has studied upto class 6th which clearly records 18th his date of birth as March, 1991. Counsel further submits that even in the admission forms duly filled in by the parents of the petitioner for

class VII in Ramjas School and in the school leaving certificate of the said school, the date of birth of the petitioner has been disclosed as 18th March, 1991 and similarly in the admission form issued by the Delhi Public 10th School and also the examination form of class examination which was signed by the petitioner himself, the same date of birth, that is 18th March, 1991 has been filled in by the petitioner. Counsel however submits that firstly there is no scope of any mistake in the date of birth of the petitioner because the said date was either filled in by the petitioner himself or by the parents of the petitioner and secondly the said date of birth was also filled in words as well. Counsel further placed reliance on Bye-law 69.2 of the Examination Bye-laws of CBSE to contend that as per the said Bye-laws, the date of birth once recorded in the Board's record cannot be changed and it is only the correction which is permissible to correct typographical errors so as to make the certificate consistent with the school records and that too where request is made for such corrections before the submission of an application for admission for the Board examination. Counsel further submits that the request made by the petitioner is not to carry out the correction in his date of birth in the school records rather the case of the petitioner herein is that his date of birth was wrongly recorded in the school records itself and, therefore, the request of the petitioner was rightly rejected by the respondent vide letter dated 7th July, 2009. In support of his arguments counsel has placed reliance on the judgment of the Division Bench of this court in the case of **Bhagwat Dayal vs. CBSE & Ors.** LPA No.783/2010 decided on 24.1.2011.

5. I have heard learned counsel for the parties and given my anxious consideration to the arguments advanced by them.

6. The petitioner herein seeks rectification in his date of birth in his class 10th certificate and mark sheet from '18.3.1991' to '18.5.1991' at the threshold of his career as recently he has noticed the incorrect recording of his date of birth in his 10th class certificate and the mark sheet while his correct date of birth has been recorded in his passport. The petitioner has taken a stand that the only authentic document to ascertain the correct date of birth would be the birth certificate which has been issued by the NDMC and there can be no reason to disbelieve the same. As per the petitioner he was born in Ram Manohar Lohia Hospital on 18.5.1991 and through the administrative office of the hospital

the said date of birth was sent to the NDMC wherefrom the birth certificate recording the date of birth as 18.5.91 was issued in favour of the petitioner. The petitioner has also taken a stand that the records maintained by the public authorities must be given due weightage and credence instead of admission form and other school forms where due to human error sometimes wrong information can be recorded.

7. The counsel for the respondent CBSE on the other hand submits that the respondent Board is bound by its rules and under Rule 69.2 of the CBSE Examination Bye-laws, the date of birth once recorded in the record of the Board cannot be changed. Counsel has further argued that under the said bye laws only if any typographical error has crept in, the records can be rectified but to the limited extent of making the said certificate consistent with the school records, provided no correction is made in the school records after the submission of the application form by the student for admission to the examination of the Board. Counsel has also placed reliance on the judgment of the Hon'ble Division Bench in **Ms. Jigya Yadav Vs. Central Board of Secondary Education & Ors.** W.P.(C) No. 3774/2010 decided on 20.12.2010. Counsel for the respondent has also taken a stand that the petitioner was a student of Maharaja Sawai Man Singh Vidyalaya, Jaipur and in the transfer certificate issued by the said school on 1.4.2002 his date of birth has been recorded as 18.3.1991 both in figures and in words. Counsel further argued that the petitioner had joined Ramjas School, Pusa Road, New Delhi in class VII where the father of the petitioner had filled the admission form on 2.4.2002 in his own hand writing and there also the date of birth of the petitioner was recorded as 18.3.1991 again both in figures and in words. The respondent further submits that in the school leaving certificate issued by the Ramjas School on 7.8.2003, again the date of birth of the petitioner was recorded as 18.3.91 and similarly when the petitioner was admitted in class 8th in Delhi Public School, R.K. Puram, the father of the petitioner had filled the same date of birth in his own hand writing and the said form was signed by both the parents of the petitioner on 1.8.03 and even in the admission register of Delhi Public School, the same date of birth has been duly recorded. The counsel has also contended that the father of the petitioner had also filled the declaration form dated 1.8.2003 and the same was also signed by both the parents of the petitioner and there also the date of birth of the petitioner was recorded

as 18.3.1991 both in figures and in words. Counsel has further submitted that in the list of students submitted by the school for the All India Secondary School Examination 2006, the date of birth of the petitioner was recorded as 18.3.1991 both in words and in figures. Counsel has further submitted that the petitioner passed the said examination and on having passed the said examination a certificate was issued to the petitioner recording the same date of birth i.e. 18.3.1991.

8. On a bare perusal of various admission forms and the school leaving certificates, enrolment forms and extracts of the admission records pertaining to the petitioner, there is no room to doubt that throughout the parents of the petitioner and even the petitioner himself has furnished his date of birth as 18.3.1991. The date of birth was not only filled in figures but in words as well in various admission and other forms, therefore it cannot be said there was a possibility of any error being committed in recording the said date of birth by the school authorities. The date of birth in the school record is recorded at the instance of the parents of the petitioner as who else would know the correct date of birth of the petitioner except his own parents. It is not the case of the petitioner that his parents are illiterate or they belong to any rural background or somebody else had filled the said forms. Every such form either had been filled by the father of the petitioner or the petitioner himself and most of these forms were signed by the father of the petitioner and some of the forms were signed by both the parents of the petitioner. In the teeth of all these school records, it cannot be believed that there was any error committed by the parents of the petitioner in recording the date of birth of the petitioner.

9. Now as per the examination bye law 69.2 of the respondent CBSE, no change in the date of birth as recorded in the Board's records can be made unless the correction is to correct a typographical error to make the certificate consistent with the school records. For better appreciation, bye-law 69.2 is reproduced as under:

"69.2 Change/Correction in Date of Birth

(i) No change in the date of birth once recorded in the Board's records shall be made. However, corrections to correct typographical and other errors to make the certificate consistent with the school records can be made provided that corrections

in the school records should not have been made after the submission of application form for admission to Examination to the Board.

(ii) Such correction in Date of Birth of a candidate in case of genuine clerical errors will be made under orders of the Chairman where it is established to the satisfaction of the Chairman that the wrong entry was made erroneously in the list of candidates/ application form of the candidate for the examination.

(iii) Request for correction in Date of Birth shall be forwarded by the Head of the School alongwith attested Photostat copies of :

(a) application for admission of the candidate to the School;

(b) portion of the page of admission and withdrawal register where entry in date of birth has been made; and

(c) the School Leaving Certificate of the previous school submitted at the time of admission.

(iv) The application for correction in date of birth duly forwarded by the Head of School alongwith documents mentioned in byelaws 69.2(iii) shall be entertained by the Board only within two years of the date of declaration of result of Class X examination. No correction whatsoever shall be made on application submitted after the said period of two years."

It would be thus seen that under bye-law 69.2 only typographical error can be rectified and that too where such an error crept in the Board's records does not tally with the school records. The Hon'ble Division Bench in **Bhagwant Dayal**(supra) was also confronted with a similar situation where also the petitioner had relied upon the birth certificate issued by the municipal authority but without commenting upon the same, the Hon'ble Division Bench held as under:

"5. The decisions of the learned Single Judge in case of **Km. Meenu and Kumari Para** (supra) cannot be relied upon in the present case. It may be noted here that this Court is not correcting or commenting upon the certificate issued by the Registrar of Births & Deaths under the Registration of Births & Deaths Act, 1969. Single judges in the said cases were dealing with the prior

bye-laws, which did not have any specific bar or prohibition or fixed time limit. We are concerned with the Byelaws 69.1 and 69.2 of the CBSE Bye-laws. Bye-law 69.1 of the CBSE Bye-laws has been quoted above. There is a bar/prohibition and a time limit has been fixed in the bye-laws. Bye-law 69.2 which deals with the change or correction of date of birth, reads as under

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8. In the present case, class 10 certificate is dated 3rd June, 2000. Thereafter, the appellant had appeared in the All India Secondary School Certificate Examination in the year 2003. At that time also, the appellant did not challenge or ask for change of the date of birth or the name of his father. The plea taken by the appellant that he could not observe the aforesaid mistake till January, 2010 when the appellant was appearing in Civil Services Examination has been rightly not accepted. The appellant had obtained a certificate from Health Department of Government of Haryana on 2nd February, 2010 and then had approached CBSE and his school. Learned single judge has further observed that notices were issued to three schools where the appellant had studied. One school had stated that records were not available; another school had stated that no student by the appellant's name was enrolled with them and the third school where the appellant was studying when he had appeared in 10th class examination, had enclosed copy of admission form dated 21st April, 1999, extract of the admission withdrawal register and the transfer certificate dated 31st March, 1999 issued by his previous school. In these documents, the date of birth was recorded as 18th March, 1984 and not 18th March, 1985. The appellant's father's name was mentioned as Bhim Singh and not Bhim Sain.

9. For the reasons stated hereinabove, we do not find any merit in the appeal and the same is dismissed with no order as to costs."

Thus it would be manifest from above that the petitioner cannot be allowed to sleep over the mistake committed by him once and then repeating it throughout his academic career, till the time it becomes an immutable damage. The period of limitation of two years provided in the

said bye law is a reasonable time for a student to take notice of a discrepancy that has crept in and make amends. It cannot be lost sight of the fact that getting an entry corrected in the certificates is not a vested right and is subject to limitations as stipulated by the respondents. Delay defeats justice and loss of limitation destroys the remedy. Directing to frequently correct the entries of date of birth in the certificates issued by the respondents without any time frame would be casting a shadow of doubt on the credibility of the certificates itself.

10. The 10th certificate issued by the CBSE goes with the life of a student as this certificate is the authenticated proof of the date of birth of a student. Such certificate is invariably accepted as a valuable piece of evidence in proof of date of birth and age of the applicant throughout his career ahead and even the courts attach a high degree of probative value to the certificate and the date of birth as entered in the certificate is accepted as almost binding. A student and his/her parents have to be very careful, alert and vigilant while disclosing the date of birth at the time of submission of forms for the examination of 10th class as any error at that stage certainly can prove fatal. In the present case, the parents of the petitioner had throughout been disclosing the date of birth of the petitioner as 18.3.1991 and this would be evident from the transfer certificate issued by Maharaja Sawai Man Singh Vidyalaya, Jaipur on 1.4.2002 and the said date of birth remained consistent in various ˇsubsequent forms filled in and signed by the petitioner and his parents. In the face of all these documents, it is hard to believe that the parents of the petitioner and the petitioner himself would keep committing the mistake in furnishing the said date of birth. The particulars in the certificates, especially the date of birth carry with them a prima facie guarantee of correctness as they are furnished by the parents or the applicant himself and hence it is difficult to assume that they are false or incorrect. Date of birth is something that no parent or child can forget or mistake and while receiving the certificate if there is a mistake then the student would make out within no time the mistake in the certificate and take steps for immediate rectification. The contention of the counsel for the petitioner that in the passport the date of birth disclosed by the petitioner was 18.5.1991, does not find any merit in the eyes of law as the said information also must have been furnished by the petitioner or his parents and the said information could also be erroneous.

11. Hence, in the light of the aforesaid discussion, this court does not find any merit in the present petition and the same is accordingly dismissed.

ILR (2011) V DELHI 280
W.P. (C)

GIAN SINGH & ANOTHER ....PETITIONERS

VERSUS

HIGH COURT OF DELHI & ORS. ....RESPONDENTS

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

W.P. (C) NO. : 2157/1995 DATE OF DECISION: 11.05.2011

Constitution of India, 1950–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.

We have considered the submissions of both the parties. There is one peculiar feature in the instant case which in fact is not pointed out by counsel for either party. There are only four ˇposts 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. Such a situation cannot be allowed to prevail nor was contemplated in the decision rendered in **R.K. Sabharwal** (supra). The main purpose for prescribing post-based roster was to ensure that on the one hand that the backward classes get their due representation and on the other hand, it was equally strong reason that does not

result therefrom. It is stated at the cost of repetition that if we accept the contention of the learned counsel for the petitioner then, at all times, there would be 25% post reserved for the SC candidates as against 15% permitted by Rules. 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 operated, 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.**(Para 20)**

Important Issue Involved: 40 point roaster can not be operated to reserve 25% vacancies for all times to come against the original 15% reservation permitted under Rules.

[Vi Ba]

APPEARANCES:

FOR THE PETITIONERS : Mr. Pawanjeet Singh Bindra Advocate.

FOR THE RESPONDENTS : Mr. V.R. Datar, Advocate with Mr. Chetan Lokur, Advocate for DHC. Ms. Urvashi Malhotra, Advocate for Ms. Avnish Ahlawat, Advocate for the respondent No. 2.

CASE REFERRED TO:

1. *R.K'Sabharwal* vs. *State of Punjab & Ors.* (JT 1995 (2) SC 351).

RESULT: Petition dismissed.

A.K. SIKRI, J.

1. This petition is filed by the two petitioners who were the employees

in the office of District & Sessions Judge, Delhi. They have since retired. However, at the time of filing of this petition, they were in service and were holding the post of Senior Stenographers. The next promotion is to be the post of Superintendent for which selection was held by the Departmental Promotion Committee (DPC) in the year 1995 and promotions were made vide orders dated 17th May, 1995 pursuant to the recommendations of the DPC. The petitioners were not selected for promotion to the said post and instead promotion was given to respondent no. 4 to 6 which is the cause of their grievance. In this writ petition the petitioners are seeking the following relief:-

> "I) Pass a writ/direction/order in the nature of certiorari quashing the order No. 8438/Estt/E-3/DHC dated May 17, 1995 of the respondent no.1 thereby appointing respondents no. 4 to 6 as Superintendents in the office of District & Sessions Judge, Delhi
>
> II) Pass a writ/direction/order in the nature of mandamus directing the respondent no.1 to appoint the petitioners as Superintendents in the office of District & Sessions Judge with effect from May 17, 1995 with all consequential benefits resulting therefrom.
>
> III) Pass such other order(s) as this Hon'ble Court may deem fit and proper in the circumstances of the case."

2. As mentioned above, the petitioners belonged to the category of Senior Stenographers and in the seniority list of Sr. Stenographers, they were placed at sl. No. 1 and 2. Respondents no. 4 to 6, on the other hand, were working as Reader, SAS Accountant and Reader respectively. The employees belonging to all these cadres including Sr. Stenographers are eligible for consideration to the post of Superintendent. Admittedly, at that point of time, there were no service rules for promotion to the post of Superintendent in the District Courts, Delhi framed by this Court and the service conditions of lower court staff were governed by Rules and Orders of Punjab & Haryana High Court V-I, Chapter 18-A and the rules made therein by the Punjab & Haryana High Court:-

> "Rules of Punjab High Court relating to appointment of Clerks (now Superintendents) of the Court of District & Sessions Judge as amended upto June, 1947:-
>
> (1) Mode of appointment:-

> "Posts of Clerks of Courts to District and Sessions Judge shall be classified as selection post and shall be in a provincial cadre"
>
> (2) Authority competent to appoint.
>
> Appointment to the post of Clerk of Court of District and Sessions Judge whether permanent or officiating shall be made by the Hon'ble Judges of the High Court. Provided that the District and Sessions Judge concerned may make an officiating appointment to the post of C.O.C. in a leave vacancy for a period of not exceeding three months, subject to confirmation by the Hon'ble Judges of the High Court."

3. Three things emerged from the narration of the facts disclosed above up to this stage which are:-

(a) For the post of Superintendent, the Readers, SAS Accountant, Sr. Stenographers etc. are eligible to be considered. Therefore, while considering their candidature for promotion to the post of Superintendent, a combined seniority list needs to be prepared.

(b) The appointment to this post of Superintendent is by way of selection.

(c) The competent authority to make the promotion is the High Court.

4. A request dated 22nd July, 1992 was received from the District & Sessions Judge, Delhi for filling up of three posts of ˇSuperintendent which were going to fall vacant on the ensuing retirement of three incumbents namely Mr.Jaswant Singh, Mr. C.D. Sidhu and Mr. M.C. Verma on 28.2.1993, 31.5.1993 and 30.6.1993 respectively.

5. In response to this request of the learned District & Sessions Judge, Delhi this Court asked him to sent the names of such Class-III employees of his office, office of the Administrative Civil Judge and of the Judge, Small Cause Court who were completing 20 years of service in Class-III post as on 1.1.1993 alongwith their ACR folders, service books and their service particulars. In compliance, the District & Sessions Judge responded by sending the requisite information and the records alongwith the summary of ACRs. The matter was thereafter placed before the Full Court on 21.5.1994 which decided to constitute a Committee of

three Hon'ble Judges of this Court to consider the candidature of the eligible persons and to make its recommendations. The Committee of three Hon'ble Judges was constituted for this purpose held its meeting from time to time. In its third meeting it iron out certain freezes so that things can put in place and the deliberations of those meetings are not mentioned for the simple reasons that they are not relevant for us. In the third meeting which took place on 21.4.1995, the Selection Committee had deliberations about the promotions to be made.

6. After going through the meeting, entire records and the representations of the officials and also taking into consideration the comments of the District & Sessions Judge, Delhi sent vide letter dated 17th April, 1995. The Committee accepted the presentation of Mr. Jagat Singh only and held him senior to Mr. M.R. Agnihotri, who was at serial no.1 in the seniority list of general line candidates on the basis of length of service. On the similar analogy i.e. length of service Mr. Ajit Singh Dhari, Reader (who was to retire the next year) was selected by the Selection Committee. Therefore, the Committee recommended in order of merit for appointment to three posts of Superintendents in the office of District & Sessions Judge, Delhi as under, subject to the decision of CWP No. 1152/88- Sh. V.K. Garg Vs. Administration of Delhi, pending in the High Court of Delhi:-

1. Mr. Jagat Singh
2. Mr. M.R. Agnihotri
3. Mr. Ajit Singh Dhari

7. The recommendations of the Selection Committee were placed before the Full Court. The Full Court in its meeting held on 6th May, 1995 approved the recommendations of the Selection ˇCommittee. Accordingly, this Court sent letter No. 8438/Estt./E-3/DHC dated 17th May, 1995 to the District and Sessions Judge, Delhi to the effect that Hon'ble the Chief Justice and Judges of this Court have been pleased to appoint S/Sh. Jagat Singh, Reader, M R Agnihotri, SAS Accountant and Ajit Singh Dhari, Reader as Superintendents w.e.f. the date they assumed charge of the post.

8. Challenge of the petitioners to the aforesaid process and their exclusion is two folded namely, as per the petitioners, it is an established

practice that while considering the incumbent for the post of Superintendent, inter se seniority amongst Stenographers, Readers, SAS Accountant is determined on the basis of date on which these incumbents attained the higher scale of pay in their respective posts. Though, the respondents no. 4 to 6 had longer length of service when counted from the date of entry in the service, according to the petitioners since these two petitioners were put in higher scale before respondent no. 4 to 6, they stole march over the longer service of respondent no.4 to 6 and were treated senior to them. The service records of petitioners and respondent no. 4 to 6 is as under:-

Name of official (S/Sh.	Date of Appointment in the Scale of Rs. 2000-3200/-	Date of appointment in the Scale of Rs. 550-900/-	Date of Appointment in the scale of Rs. 425-700/-	Date of Entry in Service
Gian Singh	01.01.1986	01.03.1982	01.01.1973	20.11.1967
Som Kumar Khullar	01.01.1986	07.02.1987	01.01.1973	25.08.1960
Jagat Singh	Still not granted	01.05.1991	01.04.1981	19.10.1956
M.R. Agnihotri	-do-	04.091985 (500-900 & not 550-900)	01.03.1982	20.12.1958
Ajit Singh Dhari	-do-	Still not granted	01.03.1982	02.12.1957

9. They have stated that petitioner no.1 was put in higher scale w.e.f. 1.3.1982 and petitioner no.2 put in the senior scale on 7.2.1987. In comparison, respondent no. 4 and 5 entered the senior scale only from 1.5.1991 and 4.9.1995 respectively, whereas respondent no.6 had not got the senior scale till his promotion as Superintendent. On this basis, they were senior to respondent nos. 4 to 6 and they could not have been ignored for the promotion. Petitioner no.1 has made his claim to the post of Superintendent on an additional ground. He states that he is a Scheduled

available on that day, he could not be ignored for promotion given to general category candidates. In this behalf he has stated that one post of Superintendent in the office of District & Sessions Judge fell vacant upon retirement of Sh. Jaswant Singh on February 28, 1993. Another post fell vacant with the retirement of Sh. C.D. Sidhu with effect from May 31, 1993. Yet another post fell vacant upon the retirement of Shri Man Chand Verma with effect from June 30, 1993. It is significant to state that the said Shri Jaswant Singh and Shri Sidhu were candidates from the reserved category, whose posts could be filled up only by SC/ ST candidates. His submissions is that his non-appointment is contrary to law laid down by the Supreme Court in the case of **R.K'Sabharwal, Vs. State of Punjab & Ors.** (JT 1995 (2) SC 351).

10. Insofar as, first contention is concerned, we do not find any merit therein. The petitioners admit that they were junior to the respondents if the inter se seniority is to be counted from the date of entry in to the service. They have made their claim of seniority above them only on the ground that they were given the senior scale of ` 2000-3200 earlier to the respondents no. 4 to 6. Admittedly, there is no such rule of preparing seniority on this basis. It is for this reason their claim is predicated on the so called established practice. However, we do not find that there was any practice of fixing the inter se seniority on the basis of entry into the senior scale. The petitioners have given instance of Mr. M.C. Verma who was appointed as Superintendent w.e.f. 5.1.1990. Attempt is to show that it was because of the reason that he got the senior scale prior to others though his date of entry into the service was late. This solitary instance cannot be treated as "established practice". One need not forget that the promotion to the post of Superintendent is by way of selection and, therefore, a person who is junior but is found more meritorious than a senior can be given the promotion to the post of superintendent. The respondent in the counter affidavit has specifically refuted and denied any such practice. It is specifically asserted that seniority is counted only on the basis of total length of service i.e. entry into the service. There is no reason to disbelieve the same more so, when the petitioners have not been able to fortify their claim on the basis of any cogent reason.

11. In so far as second contention is concerned, we may note that there were four posts of Superintendent at the relevant time in the office of District & Sessions Judge, Delhi. Before the exercise in question was

undertaken, these posts were manned by the following persons:-

(i) Mr. Jaswant Singh,

(ii) Mr. C.D. Sidhu

(iii) Mr. Mam Chand Verma

12. Mr. Jaswant Singh and Mr. Sidhu were from the reserved category who retired w.e.f. 28.2.1993 and 31.5.1993 respectively. Exercise was undertaken to fill up these two posts as well.

13. As per 40 Point Roster applicable to the post of Superintendent, with the appointment of Sh. M.C. Verma roster was complete. It is contended that thereafter with the creation of vacancies on the 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 as per the judgment of the Supreme Court in the case of **R.K. Sabharwal** (supra).

14. One of the contention raised in the aforesaid case before the Constitution Bench of the Supreme Court was that once the post earmarked for SC/ST and backward classes and the roster are filled, the reservation is complete. The roster cannot operate and should be stopped. Any post falling vacant in the cadre thereafter is to be filled up from the category - reserved or general – due to retirement etc. This contention was accepted by the Constitution Bench in the following manner:-

> "We see considerable force in the second contention raised by the learned Counsel for the petitioners. The reservations provided under the ˇimpugned Government instructions are to be operated in accordance with the roster to be maintained in each Department. The roster is implemented in the form of running account from year to year. The purpose of "running account" is to make sure that the Scheduled Castes/Schedule Tribes and Backward Classes get their percentage of reserved posts. The concept of "running account" in the impugned instructions has to be so interpreted that it does not result in excessive reservation. "16% of the posts..." are reserved for members of the Scheduled Caste and Backward Classes. In a lot of 100 posts those falling at serial numbers 1, 7, 15, 22, 30, 37, 44, 51, 58, 65, 72, 80, 87 and 91 have been reserved and earmarked in the roster for the Scheduled

Castes. Roster points 26 and 76 are reserved for the members of Backward Classes. It is thus obvious that when recruitment to a cadre starts then 14 posts earmarked in the roster are to be filled from amongst the members of the Scheduled Caste. To illustrate, first post in a cadre must go to the Scheduled Caste and thereafter the said class is entitled to 7th, 15th, 22nd and onwards upto 91st post. **When the total number of posts in a cadre are filled by the operation of the roster then the result envisaged by the impugned instructions is achieved. In other words, in a cadre of 100 posts when the posts ˇearmarked in the roster for the Scheduled Castes and the Backward Classes are filled the percentage of reservation provided for the reserved categories is achieved.** We see no justification to operate the roster thereafter. The "running account" is to operate only till the quota provided under the impugned instructions is reached and not thereafter. **Once the prescribed percentage of posts is filled the numerical test of adequacy is satisfied and thereafter the roster does not survive.** The percentage of reservation is the desired representation of the Backward Classes in the State services and is consistent with the demographic estimate based on the proportion worked out in relation to their population. The numerical quota of posts is not a shifting boundary but represents a figure with due application of mind. **Therefore, the only way to assure equality of opportunity to the Backward Classes and the general category is to permit the roster to operate till the time the respective appointees/promotes occupy the posts meant for them in the roster.** The operation of the roster and the "running account" must come to an end thereafter. **The vacancies arising in the cadre, after the initial posts are filled, will pose no difficulty. As and when there is a vacancy whether ˇpermanent or temporary in a particular post the same has to be filled from amongst the category to which the post belonged in the roster.** For example the Scheduled Caste persons holding the posts at Roster-points 1, 7, 15 retire then these slots are to be filled from amongst the persons belonging to the Scheduled Castes. Similarly, if the persons holding the post at points 8 to 14 or 23 to 29 retire then these slots are to be filled from among

the general category. By following this procedure there shall neither be short-fall nor excess in the percentage of reservation."

15. The Court also pointed out the anomalous result that would follow if the roster is permitted to operate even after the total posts in the cadre In this direction, the Court explained

> "We may examine the likely result if the roster is permitted to operate in respect of the vacancies arising after the total posts in a cadre are filled. In a 100 point roster, 14 posts at various roster-points are filled from amongst the Scheduled Castes/ Scheduled Tribes candidates, 2 posts are filled from amongst the Backward Classes and the remaining 84 posts are filled from amongst the general category. Suppose all the posts in a cadre consisting of 100 posts are filled in ˇaccordance with the roster by December 31,1994. Thereafter in the year 1995, 25 general category persons (out of the 84) retire. Again in the year 1996, 25 more persons belonging to the general category retire. The position which would emerge would be that the Scheduled Castes and Backward Classes would claim 16% share out of the 50 vacancies. If 8 vacancies are given to them then in the cadre of 100 posts the reserve Categories would be holding 24 posts thereby increasing the reservation from 16% to 24%. On the contrary if the roster is permitted to operate till the total posts in a cadre are filled and thereafter the vacancies falling in the cadre are to be filled by the same category of persons whose retirement etc. caused the vacancies then the balance between the reserve category and the general category shall always be maintained. We make it clear that in the even of non- availability of a reserve candidate at the roster-point it would be open to the State Government to carry forward the point in a just and fair manner."

16. In the end of the judgment, the Bench clarified that the interpretation given by the Court to the working of the roster and findings on this point shall operate prospective. This judgment ˇwas rendered in February 10, 1995 and, therefore, would govern the present case as the promotions are made in May, 1995.

17. We have applied the ratio in **R.K. Sabharwal judgment** (supra)

to the present case. The first aspect to be examined is as to whether the roster was complete on the promotion of Sh. M.C. Verma and thereafter the vacancy was to be filled up depending upon the category of persons who retired and caused the vacancy. This is what is claimed by the petitioners.

18. On the other hand, in the counter affidavit filed by the respondent no.1, it is denied that with the appointment of Mr. M.C.Verma the roster was complete. As per the High Court he was appointed as point no.9 in the 40 Point Roster. As per the chain of appointment given to respondent no. 4 to 6 were appointment as point 10,11 and 12 in roster maintained. This is demonstrated in the following manner:-

Recrui -tment yr.	Point in the roster	Whether reserved or unreserved	Name of the officer/ official appointed	Whether SC/ST or from Genl. Line	Remarks
1981	1.	Scheduled caste	Sh. Nand Kishore (16.3.81	Scheduled Caste	-
1983	2.	Unreserved	Sh. R.P. Malik (25.2.83	Neither	-
	3.	-do- Manchanda (25.2.93	Sh. N.M.	-do-	
	4.	Scheduled Tribe	Sh. Jaswant Singh (25.2.830	Scheduled Caste	Since no S/T candidate was available, this vacancy was given to S/C officer being exchang-eable
	5.	Unreserved	Sh. K.C. Jain (13.5.83)	Neither	-

1986	6.	-do	Sh. Laxmi Narain (Nov. 86	-do-	
	7.	-do	Sh. Daljit Singh (19.12.86) -do	-do-	
1988	8.	Scheduled Caste	Sh.C.D'Sidhu (Dec.88)	Scheduled Caste	
	9.	Unreserved	Sh.M.C. Verma	Neither	-
1995	10.	-do-	Sh. Jagat Singh		Filled
1995	11.	-do-	Sh. M.R. Agnihotri		-do-
1995	12.	-do-	Sh. Ajit Singh Dhari		-do-
	13.	-do-			

9. It is thus claimed that ratio of the judgment in **R.K'Sabharwal** (Supra) does not apply in the present circumstances as 40 point roster had not been exhausted.

20. We have considered the submissions of both the parties. There is one peculiar feature in the instant case which in fact is not pointed out by counsel for either party. 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. Such a situation cannot be allowed to prevail nor was contemplated in the decision rendered in **R.K. Sabharwal** (supra). The main purpose for prescribing post-based roster was to ensure that on the

one hand that the backward classes get their due representation and on the other hand, it was equally strong reason that does not result therefrom. It is stated at the cost of repetition that if we accept the contention of the learned counsel for the petitioner then, at all times, there would be 25% post reserved for the SC candidates as against 15% permitted by Rules. 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 ˇthis roster is operated, 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.

21. Because of the aforesaid reasons, we do not find any merit in this writ petition which is accordingly dismissed.

ILR (2011) V DELHI 293
RFA

HARISH CHANDER MALIK **....PETITIONER**

VERSUS

VIVEK KUMAR GUPTA & OTHERS **....RESPONDENT**

(G.S. SISTANI, J.)

RFA NO. : 480/2008 **DATE OF DECISION: 23.05.2011**

Code of Civil Procedure, 1908—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.

Important Issue Involved: A notice u/s 106 of the Transfer of Property Act does not convert the possession of tenant in respect of premises covered under the Slum Areas (Improvement and Clearance) Act, 1956 into wrongful possession or unlawful possession since when ever there is a statutory protection against dispossession by the operation of law the possession of a person even inspite of termination of his lease is deemed as a lawful possession and under authority of law

[Ad Ch]

APPEARANCES:

FOR THE PETITIONER : Mr. Anil Sapra, Sr. Advocate with Mr. Jayant K. Mehta, Mr. Sukant

Vikram, Ms. Urvi Kuthiala, Advocates.

FOR THE RESPONDENT : Mr. Sanjeev Sindhwani, Mr. Sanjay Dua, Ms. Ektaa Kalra, Advocate.

CASES REFERRED TO:

1. *C. Natrajan* vs. *Ashim Bai* reported at (2007) 14 SCC 183.
2. *Mayar (H.K.) Ltd.* vs. *Owners & Parties, Vessel M.V. Fortune Express* reported in (2006) 3 SCC 100.
3. *Popat and Kotecha Property* vs. *State Bank of India Staff Assn.* reported at (2005) 7 SCC 510.
4. *Sopan Sukhdeo Sable* vs. *Asst. Charity Commissioner* reported at (2004)3 SCC 517.
5. *Saleem Bhai* vs. *State of Maharashtra* reported at (2003)1 SCC 557.
6. *Shyam Kishore & Anthr* vs. *M/s Roop Saree Kendra & Others* reported at 105 (2003) DLT 422.
7. *Sh. Krishan Kant & Others* vs. *M/s Tulsi Bahi Gordhan Bhai Patel* reported at ILR 1987 I Delhi 478.
8. *Smt. Gian Devi* vs. *Jeevan Kumar & Others* reported at AIR 1985 SC 796.
9. *Ram Singh* vs. *Nathi Lal & Others* reported in ILR 1983 I Delhi 460.
10. *Punnu Ram and others* vs. *Chiranji Lal Gupta and others,* reported at AIR 1982 Delhi 431.
11. *Mohal Lal Goela and Others* vs. *Siri Krishan and Others,* reported at AIR 1978 Delhi 92.
12. *Lal Chand (dead) by LRs and Others* vs. *Radha Kishan,* AIR 1977 SC 789.
13. *Firm Dewan Kirpa Ram Radha Kishan and Others* vs. *Hari Kishan Dass,* AIR 1977ALL. 22.
14. *Gauri Shankar Gupta* vs. *the Financial Commissioner & Anthr* reported at 1975 RLR 413.

15. *Nathu Khan and Others* vs. *Mohd. Ismail,* reported at AIR 1973 Delhi 213 (V 60 C 60).
16. *Sham Lal* vs. *Joint Hindu Family Firm a Ram Chand Sri Ram and Ors.,* reported at ILR 1972 (2) Delhi 841.
17. *Bardu Ram Dhanna Ram* vs. *Ram Chander Khirbu,* AIR 1972 Delhi 34 (FB).
18. *Bardu Ram Dhanna Ram* vs. *Ram Chander Khibree* reported at AIR 1972 Delhi 34 (V 59 C 11).
19. *Bardu Ram* vs. *Ram Chander,* 1970 R.C.R. 982.
20. *C.R. Abrol* vs. *Administrator under the Slum Areas and Others,* 1970 R.C.R. 519 (1).
21. *Calcutta Credit Corporation Ltd. and Another* vs. *Happy Homes Private Ltd.,* A.I.R. 1968 Supreme Court 471, 477.
22. *Anand Niwas Pvt. Ltd.* vs. *Anandji Kalyanji Podhi & Ors.,* AIR 1965 SC 414 (2).
23. *Jyoti Pershad* vs. *Union Territory of Delhi,* [1962]2 SCR 125).

RESULT: Appeal dismissed

G.S. SISTANI, J.

1. The present appeal is directed against the judgment and decree dated 01.09.2008 passed by the learned trial court rejecting the plaint of the appellant under order VII Rule 11 CPC as being barred by law.

2. The facts necessary to be noticed for disposal of the present appeal are that plaintiff (appellant herein) claims himself to be the owner of shop bearing no.12, Esplanade Road, Chandni Chowk, Delhi, measuring 30 sq. yards (hereinafter referred to as "the shop"), having purchased the same from its erstwhile owner, Sh. Preet Kumar Gupta, on 15.9.2003 by means of a Registered Sale Deed. Smt. Bimla Kumari Gupta, the mother of respondents no. 1-3, was inducted as a tenant in the said shop. The tenancy of the mother of respondents no. 1-3 was terminated by the erstwhile owner Sh. Preet Kumar Gupta in the month of January, 2000. The mother of respondents no.1-3 died in the month of February, 2000, and thereafter respondents no.1-3 continued to remain in possession of

the said shop. As per the plaint, after the death of the mother of respondents no.1-3, respondents no.1-3 sublet a portion of the shop to one Sh. Raj Kumar Singh (respondent no. 4 herein), who was carrying on the business of sale of readymade garments from the said shop at a monthly rent of Rs. 15000/-, per month. The sub-tenant was, however, forcibly evicted by respondents no.1-3 on 15.07.2003. On 17.07.2003, appellant received a notice from respondents no.1-3, stating themselves to be the lawful tenants of the shop, enclosed with a cheque in the sum of Rs. 2500/ towards rent for the period from March, 2003, to July, 2003, @ Rs. 500/-, per month. The appellant replied to the aforesaid notice disputing all the contentions raised by respondents no.1-3. It was also stated in the reply that the mother of respondents no.1-3 was in an unauthorized occupation of the shop at the time of her death and therefore, no better title can be derived by the respondents no. 1 to 3 therefrom. Subsequently, vide notice dated 8.8.2003 the respondents no. 1-3 were called upon to hand over vacant physical possession of the said shop before 30.8.2003. The cheque in the sum of Rs. 2500/-, which was enclosed with the legal notice, was also returned vide letter dated 9.8.2003. Since the respondents no.1-3 failed to hand over vacant physical possession of the said shop, the appellant filed a suit for possession and mesne profits.

3. As the respondents had not filed the written statement within the time allowed, the right to file written statement of respondents no. 1-3 was closed by the learned Additional District Judge vide order dated 25.07.2005 against which the respondents no. 1-3 preferred Civil Misc (Main) Petition which was dismissed by this court. A Special Leave petition was also filed by respondents no. 1 -3 which was also dismissed vide order dated 25.08.2006 and the order of the trial court by which right to file written statement was closed attained finality.

4. The respondents no. 1 – 3 thereafter filed an application under Order VII Rule 11 CPC praying for rejection of plaint on the ground that the suit property is situated in a notified slum area within the meaning of Slum Areas (Improvement and Clearance) Act, 1956 (herein referred to as "Slums Act") and no permission has been sought by the appellant from the concerned authority to initiate proceedings under section 19 of the Slums Act. The learned trial court while allowing the application under Order VII Rule 11 CPC rejected the plaint of the appellant being barred by law. This has led to the filing of the present appeal.

5. Learned Senior counsel for appellant submits that the impugned judgment is bad in law as the learned trial court has failed to appreciate the fact that the present case is not covered by Delhi Rent Control Act since respondents no. 1 to 3 had sublet the premises to respondent no. 4 at a monthly rent of Rs. 15,000/-per month and therefore the parties would be governed by the provisions of the Transfer of Property Act simpliciter and thus the provision of the Slums would not be applicable. The counsel submits that the tenancy of the mother of respondents no. 1 to 3 was validly terminated vide legal notice in January 2000, therefore, no landlord-tenant relationship exists between the parties and the respondents no. 1 to 3 are not tenants but are unauthorised occupants of the said shop and in view thereof Section 19 of the Slums Act is not applicable, and thus the respondents are only trying to delay the proceedings.

6. It is next submitted by learned senior counsel for appellant that the conduct of the respondents would be evident from the fact that despite service of summons, no written statement was filed by respondents no.1-3 and the right to file written statement was closed vide order dated 25.7.2005 and CM(M)No.2098-21/2005 filed in Delhi High Court, assailing the order dated 25.07.2005, by which the right to file written statement was closed, was also dismissed on 30.3.2006. The Special Leave Petition filed by respondents no.1-3 was also dismissed on 25.8.2006. It is pointed out by learned senior counsel for appellant that during the pendency of the Special Leave Petition an application was filed by one Smt. Poonam Jain under Order I Rule 10 CPC stating herself to be the daughter of late Sh. Ram Kumar Gupta and Smt. Bimla Kumari Gupta. In the said application, it was stated that the tenancy in respect of the said shop devolved upon Smt. Bimla Kumari Gupta and the respondents no. 1-3. The said application was dismissed on 12.2.2008. Respondents no.1-3 thereafter filed an application under Order VII Rule 11 CPC for rejection of the plaint stating that the shop is situated in a notified slum area within the meaning of Slums Act and no proceedings can be continued in view of Section 19 of the Slums Act and prayed that the plaint of the plaintiff/ appellant be rejected. In reply to this application, the appellant stated that the application was barred under Section 21 of the CPC and further no document, including any notification, was placed on record to suggest that the shop was within the purview of the Slums Act. In the written synopsis filed by the appellant, it was stated that the application under

Order 7 Rule 11 CPC was filed after four years of service and the suit was not covered by Section 19 of the said Act, which is limited to proceedings for recovery of possession from the tenants while the present suit has been filed against the respondents, who are unauthorized occupants and there was no landlord-tenant relationship between the appellant and respondents no.1-3.

7. An argument was also sought to be raised by Mr. Sapra that as per the settled law while dealing with an application under Order VII Rule 11 CPC only the contents of the plaint have to be looked into and on perusal of the plaint would show that respondents no.1-3 had been sued as unauthorized occupants only. It is further contended that under the provision of Order VII Rule 11 since only the contents of the plaint have to be seen without any demurrer and since the provisions of Slums Act were nowhere mentioned in the plaint, same could have only constituted a defence of Respondents no. 1-3 which cannot be looked into for the purposes of Order VII Rule 11 CPC. The counsel has placed reliance on **Saleem Bhai v. State of Maharashtra** reported at (2003)1 SCC 557 and more particularly at para 9 which reads as under:

> "**9.** A perusal of Order 7 Rule 11 CPC makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order 7 Rule 11 CPC at any stage of the suit — before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order 7 CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order 7 Rule 11 CPC cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court. The order, therefore, suffers from non-exercising of the jurisdiction vested in the court as well as procedural irregularity. The High Court, however, did not advert to these aspects."

8. Elaborating his arguments further learned senior counsel for the appellant submits that what respondents no.1-3 could not achieve directly cannot be permitted to be achieved indirectly. The right to file written

statement of respondents no.1-3 was closed as far back as four years prior to the filing of an application under Order VII Rule 11 CPC. This order was upheld by the Supreme Court by dismissing the Special Leave Petition filed by the respondents no. 1-3 and has attained finality. The learned senior counsel contends that the respondents no. 1-3 cannot be allowed to urge the same ground through their application under VII Rule 11 when the defence has been struck off.

9. Learned senior counsel for the appellant strongly urged before this court that Section 19 of the said Act is applicable only with regard to tenants and it was the mother of respondents no.1-3 who was the tenant of the shop. During her life time the tenancy stood terminated. Thereafter in February, 2000, the mother of respondents no.1-3 died and once the tenancy of the mother was terminated during her life time, respondents no.1-3 cannot derive a better title and thus they are merely unauthorized occupants and not tenants and thus Section 19 of the Slums Act is not applicable. It is vehemently argued by the learned senior counsel for appellant that the plaint proceeds on the premise that the tenancy of original tenant, Smt. Bimla Kumari was terminated and that respondents no. 1-3 are unauthorised occupants of the suit property. The said issue that whether the respondents no. 1-3 are .tenants. itself requires evidence and trial and the learned trial court has erred in rejecting the plaint under Order VII Rule 11 CPC.

10. In the alternate, learned senior counsel for the appellant submits that in view of the fact that the premises were sublet by respondents no. 1-3 where the rent/amount received after subletting exceeded Rs. 3500/ -the tenancy itself between the appellant and respondents no.1-3 seized to fall within the purview and jurisdiction of Delhi Rent Control Act and would be governed by the Transfer of Property Act simpliciter. In view of this the tenancy could be terminated by issuance of a notice under Section 106 of Transfer of Property Act and subsequent to the receipt of notice of termination of the tenancy, respondents no.1-3 continue to occupy the said shop not in their capacity as tenants but as unauthorized occupants and an unauthorized occupant cannot take benefit of the protection under Section 19 of the Act, which fact has not been considered by the learned trial court.

11. It is submitted by learned senior counsel for the appellant that

explicit averment has been made in para 18 of the plaint .as defendants 1-3 had sublet the premises to the defendant no.4 at a monthly rent of Rs.15,000/-, per month, hence the provisions of the Delhi Rent Control Act, 1958, are not applicable to the present proceedings.. It is further submitted by learned counsel for the appellant that the trial court has failed to consider that once the tenancy of the tenant under the Transfer of Property Act had come to an end, the tenant is liable to hand over possession to the landlord and no relationship of landlord and tenant survives between the two. Respondents no.1-3 are, thus, mere trespassers in occupation.

12. Learned senior counsel for the appellant has further sought to contend that learned trial court has erred in not considering that it has been categorically held by a Full Bench of this Court that protection under Section 19 of the Act is available only to a tenant and not to any trespasser or any unauthorized occupant. Counsel for appellant strongly urged before this court that legal heirs of a tenant whose tenancy has been terminated cannot claim the benefit of Section 19 of the Slums Act and has placed reliance on **Sh. Krishan Kant & Others v. M/s Tulsi Bahi Gordhan Bhai Patel** reported at ILR 1987 I Delhi 478, more particularly at para 5 which reads as under:

> "5. The first point to be seen is whether the respondents are liable to obtain any permission from the Competent Authority under the Slum Areas (Improvement and Clearance) Act before executing their eviction decree. This point has already been settled by this Court in a number of judgments to which I may refer. In 1971 (RLR (Notes) 1, Ram Chand Siri Ram & Anr. V. Mangol Kumar (dead) & L. Rs. (2), it is held that the legal representatives of the tenant against whom eviction order had already been passed are not covered by the definition of =tenant' as given in the Slum Areas (Improvement & Clearance) Act and thus, no permission was required to be obtained from a Competent Authority under Slum Areas Act before executing a decree for eviction. This judgment has discussed the implications of the judgment of the Full Bench given in case of Bardu Ram (supra) also. 1972 RCR 428 Raj Rani v. Moolan Bai & Ors. (3); 1973 RCR 63 Nathu Khan & Ors. v. Mohd. Ismail (4) 1973 RCR 516 Jagatri Lal v. Charanji Lal (5); 1974 RCR 276 Chhotey Lal v.

> M'S. Shammi & Ors. (6); also lay down the same proposition of law that protection of the provisions of Slum Areas Act is not available to the legal heirs of the tenant against whom eviction order stands passed. The legal position is simple one. Afterall a person against whom a valid order of eviction stands passed in law is no longer a tenant, but in view of the provisions of the Slum Areas Act he is entitled to retain the possession unless and until a permission is obtained from the Competent Authority for executing the decree against such a tenant. However, such a right to retain possession by a tenant against whom eviction order stands passed is a personal right which cannot be inherited by his heirs. Under the general law such a tenant ceases to be a tenant on passing of the eviction order or even on termination of his contractual tenancy. It is only the statutory protections which enable such a tenant to continue in the premises till the requirement of statutes are met. So, Moti Sarup did not possess any estate which could be inherited by legal heirs on his death in the shape of any tenancy rights in the premises in question. I have no reason to defer with the ratio laid down by different brother Judges of this court in the aforesaid cases. Hence, I hold that the petitioners were not entitled to have any protection of the Slum Areas Act and the respondent could execute the eviction order against the petitioners without obtaining any permission from the Competent Authority under the Slum Areas Act."

13. Further reliance is placed on **Sham Lal Vs. Joint Hindu Family Firm a Ram Chand Sri Ram and Ors.,** reported at ILR 1972 (2) Delhi 841, relevant portion of which reads as under:

> "The question in the present case is whether the protection against eviction provided in clause (b) is available only to a tenant or whether, in case the tenant dies, the protection is also available to the legal representatives of the tenant. In **C.R. Abrol v. Administrator under the Slum Areas and Others,** 1970 R.C.R. 519 (1), it has been held by a Division Bench of this Court (Hardayal Hardy and V'S. Deshpandey JJ.) that the proceedings under section 19 can only be between a landlord and a tenant, that the exercise of his jurisdiction by the Competent Authority under section 19 depends on the fulfillment of the jurisdictional

condition that the application under the section is made by a landlord for permission to evict a tenant, and that the Competent Authority is bound to make a preliminary inquiry into the existence of the relationship of landlord and tenant between the parties under section 19(1) with a view to be able to decide on the basis of such a preliminary inquiry whether the permission should be given to the landlord or not. In **Bardu Ram v. Ram Chander,** 1970 R.C.R. 982 a Full Bench of this Court (H.R.Khanna, C.J., S.N. Andley, S.N. Sharkar, V'S.Deshpande and V.D. Misra JJ.), held that the word .tenant. in section 19 of the Slum Areas Act includes a person in occupation of a tenanted premises even though a decree or order for eviction has been obtained against him. The question, however, arises as to whether, if the tenant against whom such a decree was obtained dies, his legal representatives, who are in occupation of the tenanted premises, would be included in the expression .tenant. as contemplated by the Slum Areas Act. The term .tenant. has not been defined in the Slum Areas Act. A tenancy may be either contractual or statutory. In case of contractual tenancy, the estates of the lessor and lessee (landlord and tenant) are estates of inheritance. If the tenant dies before the tenancy is terminated, his estate or interest in the property which is the subject matter of the tenancy, in the absence of anything to the contrary in the terms of the contract of tenancy, passes to his legal representatives vide Maharaja Tej Chund Behadur and Shri Kanth Ghose and Others (1841-46) 3 M.T.A. 216, Gobind Lal Roy and Hamendra Narain Roy Chowdary, (1890) I.L.R. 17 Calcutta 686 (P.C.); and Mulla's Transfer of Property Act (Fifth Edition) page 641). But, in the case of statutory tenancy, i.e., where the tenancy has been terminated and the tenant, however, continues to be in occupation of the property by virtue of the provisions of a statute which prohibits his eviction vide abdul Ghafoor v. Asa Ram, 1971 R.C.R. 561), the statutory tenant has merely a personal right to protect his possession, and has no estate or interest in the premises or property occupied by him, as pointed out by the Supreme Court in **Calcutta Credit Corporation Ltd. and Another v. Happy Homes Private Ltd., A.I.R.** 1968 Supreme Court 471, 477 (paragraph 15). Therefore, on the death of a statutory tenant,

no estate or interest in the property passes to his legal representatives. Clause (b) of sub-section (1) of section 19 of the Slum Areas Amendment Act deals with a suit or proceeding instituted before February 28, 1965, for the eviction of a tenant. Such a tenant is no doubt a tenant for the purposes of the Slum Areas Act as held by the Bench in **Bardu Ram's** case (supra), but he is only a statutory tenant as he, notwithstanding the decree or order of eviction, continues to be in possession of the property by virtue of the Delhi Rent Control Act, 1958, and the Slum Areas Act. Consequently, after the death of such a tenant, his legal representatives cannot claim any estate or interest in the property which was the subject matter of the tenancy. It follows that they cannot claim the protection provided in clause (b) of sub-section (1) of section 19 of the Slum Areas Amendment Act.

We may also point out that sub-section (4) of section 19 prescribes the factors which the Competent Authority has to take into account when granting or refusing to grant the permission under sub-section (3) of the section. Clause (a) of sub-section (4) of section 19 provides that in granting or refusing to grant permission under sub-section (3) of the section, the Competent Authority shall take into account the factor whether alternative accommodation within the means of the .tenant. would be available to him if he were evicted. The use of the word .tenant. in the said provision shows that it is the extent of the means of the tenant to acquire alternative accommodation that has to be considered by the Competent Authority under sub-section (4) of section 19 and not the means of a person who is not a tenant. Therefore, if clause (b) of sub-section (1) of section 19 were to be interpreted as applicable to persons other than the tenant, viz. his legal representatives, there would be no provision in the section providing any guide-lines to the Competent Authority to consider the means of the said legal representatives of the tenant, as sub-section (4) does not provide for any such consideration of the means of persons other than the tenant. Thus, the provision in sub-section (4) supports the view that the protection against eviction provided in clause (b) of subsection

(1) of section 19 of the Slum Areas Act is available only to the tenant and not to his legal representatives."

14. Reliance is also sought upon **Ram Singh v. Nathi Lal & Others** reported in ILR 1983 I Delhi 460 at paras 7,8,9 which read as under:

"7. The next question is: What are the rights of the heirs and legal representatives of a tenant whose tenancy had been determined during his life time? In **Anand Niwas Pvt. Ltd. v. Anandji Kalyanji Podhi & Ors.,** AIR 1965 SC 414 (2), it has been observed as under:

> "A person remaining in occupation of the premises let to him after the determination of or expiry of the period of tenancy is commonly though in law not accurately, called .a statutory tenant". Such a person is not a tenant at all, he has no estate or interest in the premises occupied by him. He has merely the protection of the statute in that he cannot be turned out so long as he pays the standard rent and permitted increases, if any, and performs the other conditions of tenancy. His right to remain in possession after the determination of contractual tenancy is personal: it is not capable of being transferred or assigned, and devolves on his death only in the manner provided by the statute (emphasis added).

In J.C. Chatterjee & Ors. v. Shri Kishan Tandon & Anr., AIR 1972 SC 2526 (3) following the judgment in Anand Niwas Pvt. Ltd. (supra) it has been held that on the death of the statutory tenant pending eviction suit or appeal, his heirs and legal representatives brought on record cannot claim the status of tenant, that they could urge all contentions which the deceased could have urged except only those which are personal to the deceased. Thus it must be held that after determination of tenancy by passing of a decree or order of eviction, the right of the tenant to remain in possession thereafter is personal to him, and not heritable by his heirs and legal representatives. Such right will devolve upon the heirs in the manner provided by the statue. In other words, the heirs and legal representatives of the statutory

tenant remain in occupation of the tenancy premises without any right, title or interest and they may be called trespassers, unless the statute confers any right upon such heirs and legal representatives.

8. Under the Act of 1952, Section 2 (j) defines 'tenant' as follows.....

9. According to the definition there is no provision for devolution of tenancy rights upon any of the heirs and legal representatives of the deceased tenant. Under the Delhi Rent Control Act, 1958, the definition of 'tenant' does not include a person against whom an order or decree for eviction has been made. In the instant case a decree for eviction was passed against Sita Ram on 14 January, 1958 and as such he was not a tenant within the meaning Section 2 (l) of the Act of 1958. His heirs and legal representatives also therefore did not inherit any right. Thus respondents No.2 to 6 though heirs and legal representatives of Sita Ram deceased a statutory tenant do not inherit any right with respect to the suit premises and therefore they are held to be trespassers in possession of the suit premises. Respondent No.1, son in law of the deceased is also a trespasser as he has failed to prove his right to remain in possession of the premises."

15. Learned senior counsel for the appellant has also relied upon **Punnu Ram and others v. Chiranji Lal Gupta and others,** reported at AIR 1982 Delhi 431, more particularly para 27, which reads as under:

> "27. …… The question that arises for consideration is what the meaning of the term .tenant. is. As noticed earlier, this term is not defined by the Act. Mr. Narula submits that tenant contemplated by Section 19 is a person in occupation or a person likely to be evicted, if permission is granted to institute eviction proceedings or execute an order of eviction. We do not agree. The protection contemplated is for a tenant as recognized by law. A mere occupier cannot be equated to a tenant. An occupier may be a trespasser or a licensee or a tenant. The concept of welfare State cannot extent to giving protection to the trespassers or persons who have no right of occupation. Therefore, when the Legislature used the term 'tenant' in Section 19 as well as

in the Preamble of the Act it means tenant-in-law..

16. Learned senior counsel for the appellant has also relied upon **Nathu Khan and Others v. Mohd. Ismail,** reported at AIR 1973 Delhi 213 (V 60 C 60) more particularly para 6, which reads as under:

> 6.The word 'tenant' in Section 19 of the Slum Areas (Improvement and Clearance) Act, 1956 certainly includes a tenant against whom an order for eviction has been passed. Even though the definition of a 'tenant' in section 2(1) of the Delhi Rent Control Act, 1958 expressly states that it 'shall not include any person against whom any order or decree for eviction has been made., this definition is restricted to the construction of the said Act. It cannot be extended to the construction of section 19 of the Slum Areas (Improvement and Clearance) Act, 1956. The latter provision was enacted partly to protect the possession of a person against whom an order for eviction was passed. As held in Bardu Ram's case, 1970 Ren CJ 1078: (AIR 1972 Delhi 34) (FB) therefore, a tenant whom an order for eviction is passed is also a .tenant. for the purpose of Section 19 of the Slum Areas (Improvement and Clearance) Act, 1956. The reason is that a tenant whose contractual tenancy has been terminated either by a notice to quit under Section 106 of the Transfer of Property Act or according to the principle underlying that provision or by an order for eviction having been passed against him still continues to be a statutory tenant. The Delhi Rent Control Act, 1958 is expressly enacted to protect the possession of tenants whose contractual tenancy has been so terminated. It is the protection of the said Act which makes such a tenant a statutory tenant after the termination of the contractual tenancy. But as held by the Supreme Court in Anand Niwas v. Anandji Kalyanji's Pedhi, AIR 1965 SC 414, the statutory protection is confined personally to the tenant himself. It is not an interest in property. It is not, therefore, heritable by the legal representatives of the statutory tenant. On the death of the statutory tenant, therefore, the legal representatives of the statutory tenant are not entitled to the statutory protection afforded by the Delhi Rent Control Act, 1958. The protection ended with the death of the statutory tenant."

17. Learned senior counsel next relied upon **Mohal Lal Goela and**

Others v. Siri Krishan and Others, reported at AIR 1978 Delhi 92, more particularly para 104, which is as under:

> "104. Issue No.9
>
> Assuming that the property is situated in a slum area, no permission of the competent authority under the Slum Areas (Improvement and Clearance) Act, 1956, is required. Under S. 19 of that Act permission of the competent authority is required for .any suit or proceedings for obtaining any decree or order for the eviction of a tenant from any building or land in a slum area.. But this suit is not a suit for the eviction of a tenant. It is a suit based on independent title against the defendants whose possession is said to be unauthorized and unlawful. Section 19 of the Slum Act has no application to such a suit. This issue is therefore, decided against the defendants."

18. Ld. Senior counsel for appellant next submits that the learned trial court has erred in taking judicial notice of the fact that Chandni Chowk is a notified slum area under the Slums Act. It is further submitted by the senior counsel that the question whether the suit property is situated in a notified slum area is a mixed question of law and fact which can be decided only on the basis of evidence to be led by the parties.

19. At the outset, the counsel for respondents submits that there is no infirmity in the judgment of the learned trial court as Chandni Chowk is a notified slum area and the suit was filed without obtaining the requisite permission under section 19 of the Slums Act which strikes at the very root of the matter.

20. Counsel for respondent has strongly urged before this court that the court can take judicial notice of notorious facts and a notification issued by the government is 'law' within the meaning of Article 13 of the Constitution and the courts are empowered to take judicial notice of the law of the land. The counsel has cited various judgments to show how and when the courts have taken judicial notice of day to day notorious facts.

21. The counsel for respondent further submits that admittedly. the suit premise is a shop and the tenancy in question is a commercial tenancy. It is further contended that as per the settled law, commercial

tenancy is heritable and since respondents no. 1-3 are legal heirs of the original tenant, Smt. Bimla Kumari, the tenancy devolves upon them by the ordinary law of succession and therefore, they are lawful tenants of the said shop entitled to the benefit of section 19 of the Slums Act. It is further the contention of counsel for respondents that since commercial tenancy is heritable; notice of termination of tenancy is of no consequence. Reliance has been placed upon **Smt. Gian Devi v. ,Jeevan Kumar & Others** reported at AIR 1985 SC 796 wherein it has been categorically held that commercial tenancy is heritable. The relevant para of the judgment read as under:

> "34. It may be noticed that the Legislature itself treats commercial tenancy differently from residential tenancy in the matter of eviction of the tenant in the Delhi Rent Act and also in various other Rent Acts. All the grounds for eviction of a tenant of residential premises are not made grounds for eviction of a tenant in respect of commercial premises. Section 14(l)(d) of the Delhi Rent Act provides that non-user of the residential premises by the tenant for a period of six months immediately before the filing of the application for the recovery of possession of the premises will be a good ground for eviction, though in case of a commercial premises no such provision is made. Similarly, Section 14(l)(e) which makes bona fide requirement of the landlord of the premises let out to the tenant for residential purposes a ground for eviction of the tenant, is not made applicable to commercial premises. A tenant of any commercial premises has necessarily to use the premises for business purposes. Business carried on by a tenant of any commercial premises may be and often is, his only occupation and the source of livelihood of the tenant and his family. Out of the income earned by the tenant from his business in the commercial premises, the tenant maintains himself and his family; and the tenant, if he is residing in a tenanted house, may also be paying his rent out of the said income. Even if a tenant is evicted from his residential premises, he may with the earnings out of the business be in a position to arrange for some other accommodation for his residence with his family. When, however, a tenant is thrown out of the commercial premises, his business which enables him to maintain himself and his family comes to a standstill. It is common

knowledge that it is much more difficult to find suitable business premises than to find suitable premises for residence. It is no secret that for securing commercial accommodation, large sums of money by way of salami, even though not legally payable, may have to be paid and rents of commercial premises are usually very high. Besides, a business which has been carried on for years at a particular place has its own goodwill and other distinct advantages. The death of the person who happens to be the tenant of the commercial premises and who was running the business out of the income of which the family used to be maintained, is itself a great loss to the members of the family to whom the death, naturally, comes as a great blow. Usually, on the death of the person who runs the business and maintains his family out of the income of the business, the other members of the family who suffer the bereavement have necessarily to carry on the business for the maintenance and support of the family. A running business is indeed a very valuable asset and often a great source of comfort to the family as the business keeps the family going. So long as the contractual tenancy of a tenant who carries on the business continues, there can be no question of the heirs of the deceased tenant not only inheriting the tenancy but also inheriting the business and they are entitled to run and enjoy the same. We have earlier held that mere termination of the contractual tenancy does not bring about any change in the status of the tenant and the tenant by virtue of the definition of the "tenant" in the Act and the other Rent Acts continues to enjoy the same status and position, unless there be any provisions in the Rent Acts which indicate to the contrary. The mere fact that in the Act no provision has been made with regard to the heirs of tenants in respect of commercial tenancies on the death of the tenant after termination of the tenancy, as has been done in the case of heirs of the tenants of residential premises, does not indicate that the Legislature intended that the heirs of the tenants of commercial premises will cease to enjoy the protection afforded to the tenant under the Act. The Legislature could never have possibly intended that with the death of a tenant of the commercial premises, the business carried on by the tenant, however flourishing it may be and even if the same constituted

the source of livelihood of the members of the family, must necessarily come to an end on the death of the tenant, only because the tenant died after the contractual tenancy had been terminated. It could never have been the intention of the Legislature that the entire family of a tenant depending upon the business carried on by the tenant will be completely stranded and the business carried on for years in the premises which had been let out to the tenant must stop functioning at the premises which the heirs of the deceased tenant must necessarily vacate, as they are afforded no protection under the Act. We are of the opinion that in case of commercial premises governed by the Delhi Act, the Legislature has not thought it fit in the light of the situation at Delhi to place any kind of restriction on the ordinary law of inheritance with regard to succession. It may also be borne in mind that in case of commercial premises the heirs of the deceased tenant not only succeed to the tenancy rights in the premises but they succeed to the business as a whole. It might have been open to the Legislature to limit or restrict the right of inheritance with regard to the tenancy as the Legislature had done in the case of the tenancies with regard to the residential houses but it would not have been open to the Legislature to alter under the Rent Act, the law of succession regarding the business which is a valuable heritable right and which must necessarily devolve on all the heirs in accordance with law. The absence of any provision restricting the heritability of the tenancy in respect of the commercial premises only establishes that commercial tenancies notwithstanding the determination of the contractual tenancies will devolve on the heirs in accordance with law and the heirs who step into the position of the deceased tenant will continue to enjoy the protection afforded by the Act and they can only be evicted in accordance with the provisions of the Act. There is another significant consideration which, in our opinion, lends support to the view that we are taking. Commercial premises are let out not only to individuals but also to Companies, Corporations and other statutory bodies having a juristic personality. In fact, tenancies in respect of commercial premises are usually taken by Companies and Corporations. When the tenant is a Company or a Corporation or anybody with juristic

personality, question of the death of the tenant will not arise. Despite the termination of the tenancy, the Company or the Corporation or such juristic personalities, however, will go on enjoying the protection afforded to the tenant under the Act. It can hardly be conceived that the Legislature would intend to deny to one class of tenants, namely, individuals the protection which will be enjoyed by the other class, namely, the Corporations and Companies and other bodies with juristic personality under the Act. If it be held that commercial tenancies after the termination of the contractual tenancy of the tenant are not heritable on the death of the tenant and the heirs of the tenant are not entitled to enjoy the protection under the Act, an irreparable mischief which the Legislature could never have intended is likely to be caused. Any time after the creation of the contractual tenancy, the landlord may determine the contractual tenancy, allowing the tenant to continue to remain in possession of the premises, hoping for an early death of the tenant, so that on the death of a tenant he can immediately proceed to institute the proceeding for recovery and recover possession of the premises as a matter of course, because the heirs would not have any right to remain in occupation and would not enjoy the protection of the Act. This could never have been intended by the Legislature while framing the Rent Acts for affording protection to the tenant against eviction that the landlord would be entitled to recover possession, even if no grounds for eviction as prescribed in the Rent Acts are made out."

22. Further, the counsel pointed out that no averment has been made in the appeal that the suit property is not situated in a notified slum area and that even during the pendency of appeal, the appellant, by moving an application seeking permission of this court for obtaining consent of the concerned authority under the Slums Act, has himself admitted the fact that the permission was necessary and that the suit property is situated in a notified slum area.

23. Mr. Sindhwani next contends that from a reading of the plaint, it becomes clear that the appellant has filed the suit against respondents no. 1-3 in their capacity as tenants. The counsel points out that it is appellant's own case that he served a legal notice to the respondents no. 1-3 terminating their tenancy. The cause of action of the said suit is also

the act of sub-letting which clearly shows that respondents no. 1-3 are tenants. Further, the counsel submits that the appellant had claimed mesne profits neither from the date on which the tenancy of Smt. Bimla Kumari was terminated nor from the date of her death; but has claimed mesne profits from 30.08.2008 which is the date of termination of tenancy of respondents 1-3. Thus the appellant has recognized the respondents as tenants of the suit property and in view thereof the mandatory permission under Section 19 of the Slums Act was required.

24. Refuting the contention of the counsel for appellant that respondents no. 1 to 3 are merely unauthorized occupants not entitled to benefit under section 19 of the Slums Act, the counsel for respondents no. 1 to 3 contends that in view of the object of enactment of the Slums Act, the definition of 'tenant' is wider under the Slums Act and a mere service of notice to quit does not change the status of tenant to that of an unauthorized occupant. It is contended that merely because a notice under section 106 of the Transfer of Property Act has been served upon the respondents no. 1 to 3, they do not cease to be tenants and do not become unauthorized occupants. Reliance has been placed upon **Lal Chand (dead) by his legal representatives & others v. Radha Kishen** reported at (1977)2 SCC 88 at pars 13 to 17 which read as under:

> "**13.** The word "tenant" has not been defined in the Slum Clearance Act but Section 2(1) of the Delhi Rent Control Act, 59 of 1958, defines it thus:
>
> > "2. (1) "tenant" means any person by whom or on whose account or behalf the rent of any premises is, or but for a special contract would be, payable and includes a subtenant and also any person continuing in possession after the termination of his tenancy but shall not include any person against whom any order or decree for eviction has been made;."
>
> This definition has been amended by Act 18 of 1976 but the amended definition also provides by Section 2(1)(A) that the word "tenant" shall not include any person against whom an order or decree for eviction has been made, except where such decree or order for eviction is liable to be reopened under the proviso to Section 3 of the amending Act of 1976. It is thus

clear that insofar as the Delhi Rent Control Act is concerned, a person against whom an order or a decree for eviction has been passed cannot, generally, be regarded as a tenant. The question which requires consideration is whether the definition of "tenant" contained in the Delhi Rent Control Act can be extended to proceedings under the Slum Clearance Act, or, in other words, whether the word "tenant" which occurs in clause (a) of Section 19(1) of the Slum Clearance Act bears the same meaning which it has under the Delhi Rent Control Act.

14. Section 19 of the Slum Clearance Act furnishes intrinsic evidence to show that the definition of the word "tenant" as contained in the Delhi Rent Control Act cannot be extended for construing its provisions. By clause (b) of Section 19(1) no person can, except with the previous permission in writing of the competent authority, execute any decree or order obtained in any suit or proceeding instituted before the amending Act of 1964 for the eviction of a "tenant" from any building or land in a slum area. Sub-section (2) of Section 19 provides that a person desiring to obtain permission of the competent authority shall make an application in the prescribed form. By sub-section (4), the competent authority is required to take into account certain factors while granting or refusing to grant the permission asked for. The first of such factors which is mentioned in clause (a) of sub-section (4) is "whether alternative accommodation within the means of the tenant would be available to him if he were evicted". It is evident that the word "tenant" is used in Section 19(4)(a) to include a person against whom a decree or order for eviction has already been passed because, that provision applies as much to the permission sought for executing a decree or order of eviction referred to in Section 19(1)(b) as to the institution of a suit or proceeding for obtaining a decree or order for eviction referred to in Section 19(1)(a). If a person against whom a decree or order of eviction has been passed is not to be included within the meaning of the word "tenant", Section 19(4)(a) could not have used the language which it uses, namely, whether alternative accommodation within the means of the "tenant" would be available to him if he were evicted. In the absence of compelling circumstances and in order to better

effectuate the object of the Slum Clearance Act, we see no reason why the word "tenant" should not bear the same meaning in Section 19(1)(a) as in Section 19(4)(a). The Rule is well settled that where the same expression is used in the same statute at different places the same meaning ought to be given to that expression, as far as possible. In the instant case the word "tenant" has been used at more than one place in Section 19 itself and it is only reasonable to construe it in the same sense throughout.

15. The Slum Clearance Act was passed, inter alia, for the protection of tenants in slum areas from eviction. As observed by this Court in **Jyoti Pershad v. Administrator for Union Territory of Delhi**[1] the Slum Clearance Act looks at the problem of eviction of tenants from slum areas not from the point of view of the landlord and his needs but from the point of view of tenants who have no alternative accommodation and who would be stranded in the open if they were evicted. The policy of the Slum Clearance Act being that the slum dweller should not be evicted unless alternative accommodation is available to him, we are of the view that the word "tenant" which occurs in Section 19(1)(a) must for the purpose of advancing the remedy provided by the statute be construed to include a person against whom a decree or order for eviction has been passed. We might mention that a Full Bench of the Delhi High Court in **Bardu Ram Dhanna Ram v. Ram Chander Khibru**[2] has taken the same view, namely, that the word "tenant" in Section 19 of the Slum Clearance Act includes a person against whom a decree or order of eviction has been passed.

16. Learned counsel for the respondent relied very strongly on a decision of this Court in **Lakhmi Chand Khemani v. Kauran Devi**[3] in support of his submission that the word "tenant" must bear the same meaning in the Slum Clearance Act as in the Delhi Rent Control Act. We are unable to appreciate how the judgment in that case supports the contention of the respondent. All that

1. AIR 1961 SC 1602 : (1962) SCR 125
2. AIR 1972 Delhi 34
3. (1966) 2 SCR 544 : AIR 1966 SC 1003

was decided therein was that a person against whom an order for eviction is passed cannot be a tenant within the meaning of the Delhi Rent Control Act and that the definition of the word "tenant" as contained in that Act would not be affected by anything contained in Section 19 of the Slum Clearance Act. The question which arose in that case was whether Section 50 of the Delhi Rent Control Act barred the jurisdiction of the civil court to entertain a suit in relation to any premises to which that Act applied, for eviction of a "tenant" therefrom. Not only that no question arose in that case as to whether the definition of "tenant" as contained in the Delhi Rent Control Act should be extended to the Slum Clearance Act, but the Court observed expressly that:

> "No question as to what the rights of a tenant against whom a decree in ejectment has been passed in view of Section 19 of the Slum Areas Act are, arises in this appeal"

and that the Court was not concerned in the appeal before it with any question as to the protection given by the Slum Areas Act to tenants .... The question before us is not whether a person against whom a decree for eviction is passed is a tenant for the purposes of the Delhi Rent Control Act but whether he is a tenant for the purposes of Section 19 of the Slum Clearance Act. Lakhmi Chand case does not deal with this problem at all.

17. Since the respondent had not obtained permission of the competent authority for instituting the present suit for obtaining a decree for eviction of Lal Chand from a building situated in the slum area and since Lal Chand must be held to be a tenant for the purposes of Section 19(1)(a) it must follow that the suit is incompetent and cannot be entertained."

25. A further reliance is place upon a Full Bench decision of this court in **Bardu Ram Dhanna Ram v. Ram Chander Khibree** reported at AIR 1972 Delhi 34 (V 59 C 11) at paras 12 to 14 which read as under:

> "12. Coming to the argument advanced on behalf of the landlord that the word "tenant" in Section 19 of the Slum Areas Act Should have the same meaning as is given in Section 2(1) of the Delhi Rent Control Act and that it should not include a person

against whom an order or decree for eviction has been made, we find that there is something inherent in the language of Section 19 which militates against the acceptance of the above argument. According to clause (b) of sub-section (1) of Section 19, where any decree or order is obtained in any suit or proceeding instituted before the commencement of the Slum Areas (Improvement and Clearance) Amendment Act, 1964, for the eviction of a tenant from any building or land in a slum area, no person shall execute such decree or order, except with the previous permission in writing of the competent authority. According to sub-section (2) of that section, a person desiring to obtain permission shall have to apply in writing to the competent authority on the prescribed from, sub-section (3) provides for the procedure to be allowed by the competent authority while granting the permission. Sub-section (4) lays down the criteria which have to be kept in view by the competent authority granting or refusing to grant the permission. A criterion given in clause (a) of that sub-section is whether alternative accommodation within the means of the tenant would be available to him if he were evicted. The use of the word "tenant" in that clause, which also covers cases mentioned in clause (b) of sub-section (1) makes it manifest that the intention of the legislature was that the 'tenant' would include a person against whom a decree or order for eviction has been obtained if the word "tenant" were not to include a person against whom a decree or order for eviction had been obtained, the use of the word "tenant" in clause (a) of sub-section (4) would be inexplicable when applying that clause to cases covered by clause (b) of subsection (1) of Section 19. It also cannot be said that the word "tenant" as used in sub-section (1) has a connotation different from that of the word "tenant" used in sub-section (4) of Section 19. It is a well-settled rule of construction, that where the legislature uses the same expression in the same statue at two places or more than the same interpretation should be given to that expression unless the context requires otherwise. (See in this connection Raghubans Narain Singh v. Uttar Pradesh Govt. Air 1967 Sc 465. There is nothing in the context of Section 19 that the word "tenant" as used in sub-sections (1) and (4) of Section 19 was intended to have different meanings.

13. The matter can also be looked at from another angle. The object of the Delhi Rent Control Act inter alias is to control evictions. The preamble of the Slum Areas Act shows that it was intended to afford further protection to the tenants living in slum areas from eviction. An essential object of the Slum Areas Act is to enable the poor, who have no other place to go to and who, if they were evicted, to remain in their dwellings until provision is made from a better life for them elsewhere. (See in this connection **Jyoti Pershad v. Union Territory of Delhi,** [1962]2 SCR 125). It was observed in that case:

> "The Act, no doubt, looks at the problem not from the point of view of the landlord, his needs, the money he has sunk in the house and the possible profit that he might make if the house were either let to other tenants or was reconstructed and let out, but rather from the point of view of the tenants who have no alternative accommodation and who would be stranded in the open if an order for eviction were passed. The Act itself contemplates eviction in cases where on the ground of the house being unfit for human habitation it has to be demolished either singly under Section 7 or as one of a block of buildings under Chapter IV. So long Therefore as a building can, without great detriment to health or safety, permit accommodation, the policy of the enactment would seem to suggest that the slum dweller should not be evicted unless alternative accommodation could be obtained for him."

To accept the contention advanced on behalf of the landlords and to construe the word "tenant" so as not to include a person against whom a decree or order for eviction has been obtained would have the effect of setting at naught the protection afforded to such persons by clause (b) of sub-section (1) of Section 19 of the Act. The inevitable consequence of the acceptance of that contention would be that though a landlord cannot evict his tenant in execution of a decree or order for eviction without the permission of the competent authority, he may circumvent the above protection afforded to the tenant by filing a separate suit for possession after obtaining the eviction order or decree. The

protection to the tenant would thus become illusory and the provision of law containing such protection would be rendered nugatory. Such a construction, which would necessarily defeat an essential object of the statue, in our opinion, should be avoided. When a question arises about the construction of a word or expression in a statue, the Court should lean in favor of the construction which subserves and effectuate the dominant purpose of the legislation rather than that which has the effect of frustrating and thwarting that purpose. The office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro private comodo, and to add force and life to the cure and remedy, according to the true intent of makers of the Act. Pro bono publico. (See in this connection Maxwell on the Interpretation of Statutes, Twelfth Edition page 40). It has been observed on page 45 of that book:

> "If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result."

It is well settled that in construing the provisions of a statue courts should be slow to adopt a construction which tends to make any part of the status meaningless or ineffective; an attempt must always be made so to reconcile the relevant provisions as to advance the remedy intended by the status (See in this connection Siraj-ul-Haq v. S. C. Board of Waqf, U. P.,:[1959] 1 SCR 1287). In the cause of Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale, [1960] 1 SCR 890 , the Supreme Court while dealing with legislation conferring further protection on the tenants, observed:

> "In interpreting provisions of such beneficial legislation the Courts always lean in favor of that interpretation which will further than beneficial purpose of that legislation."

14. Keeping in view the object and the scheme of section 19 of

the Slum Areas Act, as made manifest by its provisions, we are of the opinion that the word "tenant" in that section includes a person in occupation of the tenanted premises even though a decree or order for eviction has been obtained against him."

26. Reliance is also placed upon **Shyam Kishore & Anr. v. M/s Roop Saree Kendra & Others** reported at 105 (2003) DLT 422 wherein a Single Judge of this Court held that possession of premises by a tenant for purposes of Section 19 of the Act cannot be turned as unlawful by incident of termination of tenancy under section 106 of the Transfer of Property Act. The relevant portion of the judgment reads as under:

> "16. The definition of 'tenant' in respect of premises governed by Slum Clearance Act came up for consideration before the Full Bench of this Court in **Bardu Ram Dhanna Ram v. Ram Chander Khirbu,** AIR 1972 Delhi 34 as the word 'tenant' was not defined in the Slum Areas Act whereas the provisions of Delhi Rent Control Act defined the 'tenant' as above and view of the Delhi High Court that a 'tenant' of a premises situated in slum area also includes even a person against whom decree or order of eviction has been passed was accepted with approval by the Supreme Court in **Lal Chand (dead) by LRs and Others v. Radha Kishan,** AIR 1977 SC 789. Observations of the Supreme Court are like this:
>
> > "Slum Clearance Act looks at the problem of eviction of tenants from slum areas not from the point of view of the landlord and his needs but from the point of view of tenants who have no alternative accommodation and who would be stranded in the open if they were evicted. The policy of the Slum Clearance Act being that the slum dweller should not be evicted unless alternative accommodation is available to him. We are of the view that the word `tenant' which occurs in Section 19(1)(1) must for the purpose of advancing the remedy provided by the statute be construed to include a person against whom a decree or order for eviction has been passed. We might mention that a Full Bench of the Delhi High Court in **Bardu Ram Dhanna Ram v. Ram Chander Khirbu,**

AIR 1972 Delhi 34 (FB) has taken the same view namely, that the word `tenant' in Section 19 of the Slum Clearance Act includes a person against whom decree or order of eviction has been passed."

17. At the same time the Supreme Court also held that the definition of the word tenant as contained in Delhi Rent Control Act which does not include a person against whom decree or order of eviction has been passed would not be affected by anything contained in Section 19 of the Slum Clearance Act.

18. As is apparent from the aforesaid decisions, the definition of a tenant for the purposes of Delhi Rent Control Act is less wider than the definition of a tenant for the purposes of Slum Clearance Act. For the purpose of Delhi Rent Control Act the tenant does not include a person against whom decree of eviction has been passed whereas for the purpose of Slum Clearance Act tenant is inclusive of a person against whom ejectment decree has been passed. It is rightly so as the object of Slum Clearance Act was not to evict the tenant from the premises without the permission from the Competent Authority.

19. There is no gainsaying the fact that suit for mesne profits or for that purposes for damages emanates from the wrongful possession of a tenant. Section 2(12) of the CPC defines the 'mesne profits' as under:

"Mesne profits. of the property means those profits which the person in wrongful possession of such property actually receives or might with ordinary diligence have received therefrom.....by the person in wrongful possession."

20. Thus unless and until the possession of a tenant is wrongful or unlawful the suit for mesne profits does not lie. Termination of a tenancy of a tenant by way of notice under Section 106 of the TP Act does not render the possession of a tenant either unlawful or wrongful for the purpose of the Slum Clearance Act as it affords additional protection to the tenant that unless and until the permission is obtained under Section 19 of the Act suit or petition for eviction would not lie.

21. A tenant cannot have two split personalities, one for the purpose of suit for recovery of possession and other for the purpose of recovery of mesne profits. That is for the purpose of recovery of possession he will continue to be a 'tenant' and not termed as an unauthorised or unlawful occupant but for the purpose of recovery of mesne profits he is unauthorised or unlawful occupant by virtue of termination of his tenancy under Section 106 TP Act. Had the termination of tenancy of a tenant by way of a notice under Section 106 of the TP Act had the effect of the rendering the possession as unlawful or wrongful, remedy by way of suit for possession would have been readily available as is available in respect of tenants who are not governed by the Slum Clearance Act. Once a protection is afforded by a statute to a tenant the only effect of termination of tenancy by virtue of notice under Section 106 of the TP Act would be that his tenancy would be treated as a statutory tenancy, if not a regular tenancy.

22. This is even otherwise manifestly clear from the provisions of Section 19 of the Slum Clearance Act itself which is in the form of non-obstante clause i.e. notwithstanding anything contained in any other law for the time being in force no person shall except with the previous permission in writing of the Competent Authority institute any suit or proceeding for obtaining any time or order for the eviction of a tenant from the building or land in a slum area. It was in view of this statutory protection that the Supreme Court as well as the Delhi High Court and other Courts in cases after cases held that for the purpose of Section 19 of the Slum Clearance Act the definition of 'tenant' would include even a person against whom an order of eviction has been passed.

23. Once a person carries the status of a tenant even after the eviction order is passed his possession can by no stretch of imagination be held to be unlawful or wrongful. Since the wrongful possession of the tenant of a property is the sine qua non for claim for mesne profits, the suit for mesne profits or for that purpose damages at the market rate and not at the agreed rent would be maintainable only if the possession of that tenant

is held to be wrongful or unlawful. The fact that the permission under Section 19 is a condition precedent to the suit for possession or eviction does not mean that a landlord is entitled to file a suit for mesne profits because the permission under Section 19 of the Act is not a condition precedent for the suit for recovery of arrears of rent. One cannot be unmindful of the fact that prior permission is not necessary for recovery of rent only and 'rent' does not include 'mesne profits'. Remedy to recovery of mesne profits is available against those persons whose possession is wrongful or unlawful and possession of a premises by a tenant for the purposes of Section 19 of the Act cannot be termed as unlawful by incidence of termination of tenancy under Section 106 TP Act.

24. The object of Slum Clearance Act was to provide a protection to those persons who are occupying premises in slum area. If a person cannot be evicted solely on the basis of the notice under Section 106 of the TP Act he cannot be sued for mesne profits also. A tenant will continue to be a tenant both for the purposes of eviction proceedings as well as recovery of rent. Had the possession of a tenant whose tenancy is terminated under Section 106 of the TP Act be deemed as wrongful or unlawful it was meaningless to extend the definition of tenant to a person for the purpose of Slum Clearance Act against whom even an order of eviction is passed.

25. Without tarrying further on this aspect I hold that the notice under Section 106 of the TP Act does not convert the possession of tenant in respect of premises situated in slum area into a wrongful or unlawful possession entitling the landlord to a claim for mesne profits. The reason for such a conclusion is simple and short. Wherever there is a statutory protection against dispossession by any operation of law the possession of a person even in spite of termination of his lease is deemed as a lawful possession and under the authority of law. Almost similar view was taken by the Supreme Court in **Firm Dewan Kirpa Ram Radha Kishan and Others v. Hari Kishan Dass,** AIR 1977ALL. 22 by holding that when the statute protected the possession of the defendants conferring immunity on them from being

dispossessed by operation of law, they would be deemed to be in possession in the authority of law and even after the lease had expired or the tenancy has been terminated and the legal disability of the landlord to evict or dispossess a tenant continuing the continuous possession of a tenant in such conditions will be termed as conferring upon him a right as a statutory tenant."

27. I have heard the counsel for the parties and given my thoughtful consideration to the matter have also perused the entire material on record. The arguments of counsel for appellant may be summarized as under:

- Since the defence of the respondents no. 1-3 has been struck off, application filed by them under Order VII Rule 11 is not maintainable.
- While dealing with an application under Order VII Rule 11 CPC, only the averments in the plaint are to be considered and considering the notification would amount to leading of evidence
- Respondents no. 1 to 3 are unauthorized occupants and not tenants of the said shop and therefore cannot avail the protection under section 19 of the Slums Act
- The question whether Chandni Chowk is a notified slum area or not is a question of fact that requires evidence and that the trial court erred in taking judicial notice of the above disputed fact.
- Question whether respondents are .tenants. or =unauthorized occupants' require evidence and trial and the trial court has erred in rejecting the plaint.

28. The arguments of counsel for respondent may be summarized as under:

- There is no infirmity in the judgment of the trial court as the suit is barred by law as per section 19 of the Slums Act
- The said shop lies in a notified slum area and the court has rightly taken judicial notice of the said fact.

- Appellant has not argued that the shop is not situated in a slum area.
- The tenancy in question is a commercial tenancy and commercial tenancy being heritable in law, respondents no. 13 are lawful tenants and notice of termination of tenancy is of no consequence.
- Notice relied upon by appellant describes the respondents as tenants.
- A bare reading of the plaint makes it evident that the suit has been filed by the appellant against the respondents in their capacity as tenants and not unauthorized occupants.
- Court is fully competent to take judicial notice of notorious facts.

29. The law with regard to Order VII Rule 11 CPC is well settled. While dealing with an application for rejection of plaint under Order VII Rule 11 CPC, the court has to consider only the averment in the plaint and not the defence of the defendant or the contents of the application under Order VII Rule 11 CPC. In **C. Natrajan v. Ashim Bai** reported at (2007) 14 SCC 183, the Apex Court has observed:

> **"8.** An application for rejection of the plaint can be filed if the allegations made in the plaint even if given face value and taken to be correct in their entirety appear to be barred by any law. The question as to whether a suit is barred by limitation or not would, therefore, depend upon the facts and circumstances of each case. For the said purpose, only the averments made in the plaint are relevant. At this stage, the court would not be entitled to consider the case of the defence. (See **Popat and Kotecha Property v. SBI Staff Assn.**[4])"

30. A similar view was expressed in **Mayar (H.K.) Ltd. v. Owners & Parties, Vessel M.V. Fortune Express** reported in (2006) 3 SCC 100 wherein the Apex Court observed as under:

> **"11.** Under Order 7 Rule 11 of the Code, the court has jurisdiction to reject the plaint where it does not disclose a cause of action, where the relief claimed is undervalued and the valuation is not

4. (2005) 7 SCC 510

corrected within the time as fixed by the court, where insufficient court fee is paid and the additional court fee is not supplied within the period given by the court, and where the suit appears from the statement in the plaint to be barred by any law. Rejection of the plaint in exercise of the powers under Order 7 Rule 11 of the Code would be on consideration of the principles laid down by this Court. In **T. Arivandandam v. T.V. Satyapal**[5] this Court has held that if on a meaningful, not formal reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, the court should exercise its power under Order 7 Rule 11 of the Code taking care to see that the ground mentioned therein is fulfilled. In **Roop Lal Sathi v. Nachhattar Singh Gill**[6] this Court has held that where the plaint discloses no cause of action, it is obligatory upon the court to reject the plaint as a whole under Order 7 Rule 11 of the Code, but the rule does not justify the rejection of any particular portion of a plaint. Therefore, the High Court therein could not act under Order 7 Rule 11(a) of the Code for striking down certain paragraphs nor the High Court could act under Order 6 Rule 16 to strike out the paragraphs in the absence of anything to show that the averments in those paragraphs are either unnecessary, frivolous or vexatious, or that they are such as may tend to prejudice, embarrass or delay the fair trial of the case, or constitute an abuse of the process of the court. In **ITC Ltd. v. Debts Recovery Appellate Tribunal**[7] it was held that the basic question to be decided while dealing with an application filed by the defendant under Order 7 Rule 11 of the Code is to find out whether the real cause of action has been set out in the plaint or something illusory has been projected in the plaint with a view to get out of the said provision. In **Saleem Bhai v. State of Maharashtra**[8] this Court has held that the trial court can exercise its powers under Order 7 Rule 11 of the Code at any stage of the suit before registering the plaint or after issuing summons to

5. (1977) 4 SCC 467
6. (1982) 3 SCC 487
7. (1998) 2 SCC 70
8. (2003) 1 SCC 557

the defendant at any time before the conclusion of the trial and for the said purpose the averments in the plaint are germane and the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage. In **Popat and Kotecha Property v. State Bank of India Staff Assn**[9] this Court has culled out the legal ambit of Rule 11 of Order 7 of the Code in these words: (SCC p.516, para 19)

> "19. There cannot be any compartmentalisation, dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time it should be borne in mind that no pedantic approach should be adopted to defeat justice on hairs plitting technicalities..

12. From the aforesaid, it is apparent that the plaint cannot be rejected on the basis of the allegations made by the defendant in his written statement or in an application for rejection of the plaint. The court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the court exercising the powers under Order 7 Rule 11 of the Code. Essentially, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence except in certain cases

9. (2005) 7 SCC 510

where the pleadings relied on are in regard to misrepresentation, fraud, wilful default, undue influence or of the same nature. So long as the plaint discloses some cause of action which requires determination by the court, the mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint. In the present case, the averments made in the plaint, as has been noticed by us, do disclose the cause of action and, therefore, the High Court has rightly said that the powers under Order 7 Rule 11 of the Code cannot be exercised for rejection of the suit filed by the plaintiffappellants."

31. Further in **Popat and Kotecha Property v. State Bank of India Staff Assn.** reported at (2005) 7 SCC 510, the Apex Court elaborately dealt with the law under Order VII Rule 11. The relevant portion of the judgment is extracted as under:

> **"12.** In the present case the respondent has relied upon clause (d) of Rule 11.
>
> **13.** Before dealing with the factual scenario, the spectrum of Order 7 Rule 11 in the legal ambit needs to be noted.
>
> **14.** In **Saleem Bhai v. State of Maharashtra**[10] it was held with reference to Order 7 Rule 11 of the Code that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power at any stage of the suit — before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Order 7 Rule 11 of the Code, the averments in the plaint are the germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage.
>
> **15.** In **I.T.C. Ltd. v. Debts Recovery Appellate Tribunal**[11] it was held that the basic question to be decided while dealing with an application filed under Order 7 Rule 11 of the Code is whether a real cause of action has been set out in the plaint or something

10. (2003) 1 SCC 557

11. (1998) 2 SCC 70

purely illusory has been stated with a view to get out of Order 7 Rule 11 of the Code.

16. The trial court must remember that if on a meaningful and not formal reading of the plaint it is manifestly vexatious and meritless in the sense of not disclosing a clear right to sue, it should exercise the power under Order 7 Rule 11 of the Code taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a cause of action, it has to be nipped in the bud at the first hearing by examining the party searchingly under Order 10 of the Code. (See **T. Arivandandam v. T.V. Satyapal**[12].)

17. It is trite law that not any particular plea has to be considered, and the whole plaint has to be read. As was observed by this Court in **Roop Lal Sathi v. Nachhattar Singh Gill**[13] only a part of the plaint cannot be rejected and if no cause of action is disclosed, the plaint as a whole must be rejected.

18. In **Raptakos Brett & Co. Ltd. v. Ganesh Property**[14] it was observed that the averments in the plaint as a whole have to be seen to find out whether clause (d) of Rule 11 of Order 7 was applicable.

19. There cannot be any compartmentalization, dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time it should be borne in mind that no pedantic approach

12. (1977) 4 SCC 467
13. (1982) 3 SCC 487
14. (1998) 7 SCC 184

should be adopted to defeat justice on hairsplitting technicalities."

32. I have carefully gone through the plaint filed by the appellant before the trial court. It is the case of the appellant that the notice was sent to the respondents 1-3 only as a matter of abundant caution, though the original tenant was the mother of respondents no.1-3 and her tenancy was terminated during her life time vide a legal notice in January, 2000. It is further contended by learned counsel for the appellant that after a notice had been served upon mother of respondents no.1-3, the mother had seized to be a tenant and was occupying the premises only as an unauthorized occupant and, consequently, respondents no.1-3 are unauthorized occupants over the suit premises and, thus, are not entitled to protection under Section 19 of the Slums Act. It is further contended by learned counsel for the appellant that since the shop has been sublet by respondents no.1-3 at a monthly rent of Rs.15000/-, the provisions of Delhi Rent Control Act have seized to apply and, therefore, the Slums Act is also not applicable to the facts of the present case.

33. I find no force in the submission of the counsel for the appellant that merely because a notice under Section 106 of the Transfer of Property Act has been served upon the tenant, he seizes to be a tenant and occupies the premises only as an unauthorized occupant. Various judgments have been cited by counsel for respondents no.1-3 before this court to the effect that a service of notice under Section 106 of Transfer of Property Act does not change the status of tenant to that of an unauthorized occupant. In **Lal Chand** (supra) and **Bardu Ram** (supra), the Supreme Court and the High Court of Delhi have construed the term "tenant" in the light of the object of the enactment of the Slums Act and held that even after a decree for eviction is passed against a tenant, he continues to be termed as a "tenant" for the purposes of the Slums Act. Following, the law laid down by the Apex Court and reiterated by a Full Bench of this Court, a Single Judge of this Court in **Shyam Kishore** (supra) held that a notice under section 106 of the Transfer of Property Act does not convert the possession of tenant in respect of premises in slum area into a wrongful possession or unlawful possession for the reason that wherever there is a statutory protection against dispossession by operation of law, the possession of a person even inspite of termination of his lease is deemed as a lawful possession and under authority of law. I concur with the view of the Single Judge as it lays down the correct

position of law. It is a well known principle of interpretation that the courts should lean in favour of construction which subserves and effectuates the dominant purpose of the legislature. The Preamble to the Slums Act states that the purpose of the Act is to provide for the improvement and clearance of slum areas in certain Union Territories and for the protection of tenants in such areas from eviction. Looking at the scheme of the Act read with the Preamble, the Slums Act provides for additional protection to tenants in slum areas from eviction. If the argument of the counsel for appellant that after service of notice under section 106 of the Transfer of Property Act, the respondents no. 1 to 3 have ceased to be tenants and are merely unauthorized occupants not entitled to the benefit of section 19 of the Slums Act is accepted, it would defeat the object and spirit of the Act and would render section 19 nugatory and void. The above judgments clearly uphold the spirit of the Slums Act and have gone to the extent of protecting the possession of a tenant against whom an eviction decree has been obtained by the landlord from a competent court. Accordingly, the submission of the counsel for appellant is without any force.

34. In **Gauri Shankar Gupta v. the Financial Commissioner & Anthr** reported at 1975 RLR 413, a Full bench of this Court has very categorically held that section 19 of the Slums Act is applicable to residential as well as commercial premises. It was held as under:

> "5. It is in the context of these provisions of the Act that we have to read section 19 of the Act. Clauses (a) and (b) of section 19(1) expressly apply to a building or land may be put to use. A building or land may be used for a residential or for a non-residential purpose. The absence of a mention of the purpose indicates that section 19 does not exclude non-residential purpose. Section 19(4)(a) uses the neutral word „accommodation" which may include residential as well as non-residential buildings. Section 19(4)(b) refers to improvement as well as clearance of the slum areas. We have already seen that while improvement under Chapter III of the Act is confined to premises unfit for human habitation, slum clearance under Chapter IV can include buildings used for residentials well as non-residential purposes".

35. A careful reading of the plaint makes it evident that though the appellant contends that respondents no.1-3 are unauthorized occupants

of the said shop and the tenancy of the original tenant, Smt. Bimla Kumari, (mother of respondents no.1-3) vide notice dated January, 2000 was terminated, yet the appellant has based his plaint upon the second notice dated 08.08.2003 sent by the appellant to respondents no.1-3, terminating their tenancy over the said shop. The above finding is further corroborated by the fact that the appellant has not filed a copy of the first notice sent by the appellant to Smt. Bimla Kumari in January, 2000. Further it has been pointed out by learned counsel for respondents and also taken note of by the trial court that the appellant has claimed mesne profits neither form the date of termination of tenancy of Smt. Bimla Kumari nor from the date of her death but has claimed mesne profits from the date of termination of tenancy of respondents no.1-3. It is also not disputed that the suit premises is a commercial premises being a shop and applying the law laid down in **Gian Devi** (Supra), the respondent nos. 1 to 3 have inherited the tenancy from their mother, Smt. Bimla Kumari and a mere service of notice under section 106 of the TP Act does not change their status to unauthorized occupants. In view of the law laid down in **Gauri Shankar** (supra), I find no force in the submission of the counsel for appellant that the respondents no. 1 to 3 are not entitled to protection under section 19 of the Slums Act.

36. An objection has also been raised by counsel for appellant that the respondents no. 1 to 3 have failed to file their written statement despite various opportunities being granted to them and that trial court was pleased to close their right to file written statement which order has been upheld uptil the Supreme court wherein the SLP filed by respondents no. 1 to 3 was dismissed and the order has attained finality. The counsel for appellant has sought to contend that since the defence of respondents no. 1 to 3 was struck off and application under order VII Rule 11 CPC was at a belated stage of four years after the initiation of the suit, the said application is not maintainable. The aforesaid submission of the counsel for appellant is without any merit since it is well settled that an application under order VII Rule 11 CPC can be made at any stage of the proceedings and also in view of the fact that plea raised by respondent landlord is a legal plea which can be raised at any stage. In **Saleem Bhai v. State of Maharashtra** reported in (2003)1 SCC 557 wherein the Apex Court has held that "the trial court can exercise the power under Order 7 Rule 11 CPC at any stage of the suit — before registering the plaint or after issuing summons to the defendant at any time before the

conclusion of the trial."

37. Further in **Sopan Sukhdeo Sable v. Asst. Charity Commissioner** reported at (2004)3 SCC 517, the Apex Court held as under:

> "20..... Rule 11 of Order 7 lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of a written statement. Instead, the word "shall" is used, clearly implying thereby that it casts a duty on the court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant. In any event, rejection of the plaint under Rule 11 does not preclude the plaintiffs from presenting a fresh plaint in terms of Rule 13."

38. A faint argument has also been made by learned counsel for the appellant that since the rent of the premises is above Rs.3500/-, the provisions of Delhi Rent Control Act are not applicable and consequently the Slums Act would also not apply to the said shop. I find no merit in the aforesaid contention of learned counsel for the appellant since the Slums Act makes no distinction between the premises fetching rent above Rs.3500/-and those fetching rent below Rs.3500/-. Had it been the intention of the legislature to make any such distinction, the legislature would have in its wisdom made an amendment to the Slums Act to that effect. The absence of any such distinction in the Slums Act makes it clear that the Slums Act does not exclude premises fetching a rent of Rs 3500/-and above from within its purview.

39. Lastly it is contended by counsel for the appellant that trial court has erred in taking judicial notice of the fact that the said shop lies in a notified slums area and that the question whether the shop lies in a notified slum area or not is a question of fact, which requires leading of evidence. There is no force in the aforesaid contention of the counsel for the appellant in view of the fact that under Section 57 of the Evidence Act, the Courts are empowered to take judicial notice of certain notorious facts and various judgment have been cited before this Court by the

counsel for respondent. It is contended by counsel for respondent that looking upon the notification declaring Chandni Chowk to be a noted slum area would amount to considering evidence. I find the aforesaid contention to be without any merit since taking judicial notice means that the Court is itself duty bound to hunt up the fact and apply it even though the parties or their counsel fail to produce it. Further while taking judicial notice of a fact, a judge may resort to any such means of reference as may be at hand and are deemed to be worthy of confidence. I further find that during the course of arguments of the appeal, the appellant has till date not denied the fact that the said shop is situated in a notified slum area and, thus, I am fortified with the view of the trial court that the trial court has correctly taken judicial notice of the fact that Chandni Chowk is a notified slum area.

40. In view of the observations made above, I find that there is no infirmity in the judgment passed by the learned trial court. Accordingly, appeal is dismissed.

ILR (2011) V DELHI 334
CRL. REV. P.

SURESH BATRA & ORS. ....PETITIONERS

VERSUS

SECURITIES & EXCHANGE BOARD OF INDIA ....RESPONDENT

(MUKTA GUPTA, J.)

CRL. REV. P. NO. : 88/2010 DATE OF DECISION: 30.05.2011

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.

A perusal of the Memorandum of Association of the accused Company shows that the Petitioners herein are only the shareholders in the Company and were neither the promoters nor Directors nor in-charge and responsible for the Company's day to day working. There is no specific role attributed to the Petitioners in the complaint dated 15th December, 2003 filed against the Petitioners and the accused Company. Hon'ble Supreme Court in **K.K. Ahuja vs. V.K. Vora & Anr.,** 2009 (10) SCC 48 has held that a mere averment that person is in-charge of the Company i.e. in-charge of the day to day management of the Company cannot make him vicariously liable. Their Lordships further clarified the position of directors who would be held responsible for the offences committed by the Company. In the case at hand, it is 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. **(Para 5)**

In view of the facts and circumstances of the case, the order

of learned Additional Sessions Judge dated 12th November, 2009 framing notice against the Petitioners is set aside. **(Para 6)**

Important Issue Involved: Share holders cannot be held liable for the offence committed by company.

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Anil Hooda, Advocate.

FOR THE RESPONDENT : Mr. Sanjay Mann, Advocate.

CASE REFERRED TO:

1. *K.K. Ahuja* vs. *V.K. Vora & Anr.,* 2009 (10) SCC 48.

RESULT: Petition disposed of.

MUKTA GUPTA, J.

1. By the present revision petition, the Petitioners seek setting aside of the order dated 12th November, 2009 passed by the learned Addl. Sessions Judge framing notice under Section 251 Cr.P.C. against them for offences punishable under Section 24(1) read with Section 27 of the Security and Exchange Board of India Act, 1992(in short "SEBI Act").

2. Brief facts leading to the filing of the present petition are that M/s Master Green Forests Ltd. was incorporated on 3rd June, 1992 with three Directors Dayaram Verma, Santosh Verma and Amrit Lal Verma. Memorandum of Association was submitted to the Registrar of Companies Act, Punjab having its office at Jalandhar City. Thereafter, on 15th December, 2003 SEBI filed a complaint under Section 200 Cr.P.C. against the Company, Petitioners and the three other Directors of the Company. In the said complaint it is alleged that the said Company operated Collective Investment Schemes and raised huge amount from general public without complying with rules and regulations issued by SEBI in regard to the Collective Investment Schemes. Pursuant to the press release dated 26th November, 1997 and a public notice dated 18th December, 1997 notified by the SEBI the accused Company filed details with SEBI in regard to its Collective Investment Scheme. Thereafter, SEBI in the year 1999 vide

its public notice dated 10th December, 1999 & letters dated 15th December, 1999 and 29th December, 1999 had intimated the Petitioners that they are required to send the information such as memorandum to all the investors detailing the statement of affairs of the C.I'S., the amount repayable to each investor and the manner in which such amount is determined latest by 28th February, 2000 which date was then extended upto 31st March, 2000 vide a press release. However, the accused Company neither applied for the registration under the ˇsaid regulation nor took any steps for winding up of the scheme nor repayment to the investors as provided under the regulations and as such had violated the provisions of Section 12(1B) of SEBI Act, 1992 and Regulation 5(1) read with Regulations 68(2), 73 and 74. On 7th December, 2000 SEBI directed the accused Company to refund the money collected under the C.I'S. to the persons who had invested the money within a period of one month from the date of said directions and a notice was served in this regard. However, despite repeated directions and reminders sent by SEBI, the accused Company did not comply with the said Regulations and thus has committed the violation of Sections 11(B), 12(B) r/w regulation 68(1), 68(2), 73 & 74 of SEBI(CIS) Regulation 1999 punishable under Section 24(1)8 SEBI Act. It is alleged that the accused Company and its promoters, Directors in-charge responsible for the conduct of its business are liable under Section 27 of SEBI Act, 1992.

3. Learned counsel for the Petitioners contends that the Petitioners herein are not the Directors, promoters or in-charge of the accused Company. They are only the shareholders and have no role to play in the day to day working of the Company. Their names appear in the Memorandum in the capacity of shareholders and not under the head of Directors, promoters or persons in-charge of the Company. It is also stated that there is no specific allegation qua the Petitioners in the complaint dated 15th December, 2003. In the year 2009 an application being Crl. M.C. 1367/2007 was filed by one of the shareholders Sanjeev Kumar wherein this Court vide its order dated 20th October, 2009 had observed that there was no averment regarding the Petitioner therein and no specific role had been assigned to him by SEBI in their complaint and hence his petition was allowed. This Court held that the complaint qua the Petitioner therein was not maintainable and the trial Court was directed to proceed with the complaint case minus Sanjeev Kumar. It is contended that the case of the Petitioners herein is similar to that of Sanjeev Kumar and on

parity the Petitioners be granted the relief prayed for.

4. A brief narration of facts relevant to the case is that the Government of India in order to regulate the excessive fund raising by the private entrepreneur and floating of multiple schemes throughout the country vide its press release dated 18th November, 1997 conveyed that such schemes should be treated as Collective Investment Schemes under the SEBI Act, 1992 and SEBI was asked to frame regulations in this regard. The Respondent SEBI in the year 1999, notified Securities and Exchange Board of India [Collective Investment Scheme] Regulations, 1999 to regulate the floating of Collective Investment Scheme (in short "C.I'S.") by the Companies. The accused company is a registered company under the provisions of Companies Act. It operated a Collective Investment Scheme and raised huge amounts from general public. Pursuant to the press release dated 26th November, 1997 and public notice dated 18th December, 1997, the company filed information with ˇthe respondent SEBI regarding its C.I'S. The accused company was then required to follow the provisions under Chapter IX of the Regulations which required any person who had been operating a C.I'S. at the time of commencement of the said Regulations to be an existing C.I'S. Also any person who immediately prior to commencement of the Regulations operating such scheme was required to make an application to the SEBI for grant of registration within a period of 2 months, from the date of notification of the said Regulations. As per the Regulation 73(1) if a company failed to make an application for the registration, it ought to have wound up the existing C.I'S. and repay the amount to the investors. Despite repeated directions and reminders sent by the SEBI, to the accused Company i.e. M/s Master Green Forest Limited, the said company failed to comply with the regulations and winding up the scheme. In the year 2003 complaint case No. 11/2009 was filed against the Company and the Petitioners. Taking cognizance of the said complaint learned Addl. Sessions Judge on 12th November, 2009 framed notice against the Petitioners along with the Directors of the said Company. This order of learned Addl. Sessions Judge is impugned in the present petition.

5. A perusal of the Memorandum of Association of the accused Company shows that the Petitioners herein are only the shareholders in the Company and were neither the promoters nor Directors nor in-charge and responsible ˇfor the Company's day to day working. There is no specific role attributed to the Petitioners in the complaint dated 15th

December, 2003 filed against the Petitioners and the accused Company. Hon'ble Supreme Court in **K.K. Ahuja vs. V.K. Vora & Anr.,** 2009 (10) SCC 48 has held that a mere averment that person is in-charge of the Company i.e. in-charge of the day to day management of the Company cannot make him vicariously liable. Their Lordships further clarified the position of directors who would be held responsible for the offences committed by the Company. In the case at hand, it is 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.

6. In view of the facts and circumstances of the case, the order of learned Additional Sessions Judge dated 12th November, 2009 framing notice against the Petitioners is set aside.

7. Petition is disposed of.

ILR (2011) V DELHI 339
LPA

PRATAP SINGH ....PETITIONER

VERSUS

CHIEF OF ARMY STAFF AND ORS. ....RESPONDENTS

(PRADEEP NANDRAJOG & SURESH KAIT, JJ.)

LPA NO. : 136/2003 DATE OF DECISION: 03.06.2011

Constitution of India, 1950—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.

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. **(Para 18)**

The procedure under Rule 13 of the Army Rule simply contemplates a prior notice to the person concerned before exercising power under the Rule. **(Para 19)**

Inquiries have to be held if facts are in dispute or blameworthiness of a delinquent employee has to be ascertained.] **(Para 21)**

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. **(Para 22)**

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. **(Para 24)**

Important Issue Involved: Rule 13 of the Army Rules simply contemplates a prior notice to the person concerned before exercising power under the Rule.

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. S.M. Dalal, Advocate.

FOR THE RESPONDENT : Ms. Jyoti Singh, Sr. Advocate with Mr. Dinesh Yadav, Advocate.

CASES REFERRED TO:

1. *UOI & Ors.* vs. *Deepak Kumar Santra,* reported as 2009 (7) SCC 370.
2. *Surender Singh Sihag* vs. *UOI & Ors.,* reported as 100 (2002) DLT 705.

RESULT: Petition dismissed.

PRADEEP NANDRAJOG, J.

1. Having been awarded 5 red ink entries between the years 1986 till 2000 and after issuing a notice to show cause and enabling the petitioner to submit his response to the proposed action of his being discharged from service, the competent authority passed an order that retention of petitioner in service was not warranted, resulting in the petitioner being discharged from service with pension benefits.

2. Petitioner questions his name being struck off from the strength

of the Indian Army with effect from 7.8.2000. Challenge was by and under W.P.(C) No.5346/2000 which has been dismissed vide order dated 8.4.2002. Said order is under challenge in the instant appeal.

3. It may be noted that in August 1997 a show cause notice was issued to the petitioner requiring him to respond to the proposed action of his being discharged from service under Army Rule 13(3) Item III (4). The action was proposed on the fact that till 1997, 4 red ink entries pertaining to 4 misdemeanours for which petitioner was severely reprimanded were inflicted upon him in the month of May 1986, May 1987 as also in the month of June 1996 and April 1997.

4. Petitioner submitted a response on 5.9.1997 and considering the same, action proposed was dropped. While dropping the action it was noted that keeping in view the gravity of the offences committed by the petitioner for which punishment was awarded, it did not warrant the proposed action.

5. In June 2000 another penalty of severe reprimand was inflicted upon the petitioner and taking into account the same and the fact that with the levy of said penalty a 5th red ink entry was made in the record of the petitioner, on 5.7.2000, a show cause notice was issued calling upon the petitioner to respond as to why he be not discharged from service under Army Rule 13(3) Item III (4).

6. Petitioner filed a reply highlighting that on 8.7.1997, pertaining to 4 red ink entries earned, it was proposed to discharge him from service and considering his reply as also forming an opinion that the misdemeanours committed by the petitioner were not of a very serious nature, action was dropped. Thus, petitioner highlighted that past misconduct was considered and that for a wrong committed for which he was severely reprimanded on 6.6.2000, his discharge from service was not warranted.

7. Rejecting the defence the order was passed directing petitioner to be discharged from service.

8. Questioning the action taken against him, 4 contentions were urged. It was firstly urged that the Commandant of the Central Ordnance Depot who had passed the order was not competent to do so. Second

contention urged was that no reasons were given by him while passing the impugned order. The third contention was that by dropping proposed action pursuant to the show cause notice dated 8.8.1997 the respondents waived, for all times, a right to predicate further action on the 4 red ink entries awarded to the petitioner in the months of May 1986 and 1987, as also the month of June 1996 and April 1997. Lastly it was urged that in view of the law laid down by a Division Bench of this Court in the decision reported as 100 (2002) DLT 705 **Surender Singh Sihag Vs. UOI & Ors.,** without conducting an inquiry the services of the petitioner could not be discharged.

9. Pertaining to the first contention urged, we find that notwithstanding the same being pleaded in the writ petition it not being dealt with by the learned Single Judge in the order impugned. It is possible that the plea was given up. But, we need not rest our opinion on the technicalities of the law inasmuch as we note that vide SRO No.161 dated 11.6.1979, in exercise of the power conferred by Section 8 of the Army Act 1950 the Central Government prescribed the officers listed in the SRO with the powers under the Army Act with respect to persons under their command. The Commandant Central Ordnance Depot Delhi finds a mention in the notification in question.

10. The order directing petitioner's discharge from service has been passed by the Commandant of the Central Ordnance Depot Delhi.

11. With respect to the second plea we not that the Commandant has accorded approval to a note dated 7.8.2000 penned by Major Ravinder Singh and which note gives reasons as to why petitioner should be discharged from service. Suffice would it be to state that where a proposal contains the reasons and the same is approved by the Competent Authority, the reasons in the proposal have to be treated as the reasons of the authority concerned. Thus, it cannot be said that the Commandant of the Unit has not given adequate reasons in support of the decision.

12. Pertaining to the third submission suffice would it be to state that it is settled law that while taking any action against a person pertaining to a subsequent wrong, past conduct can be considered, and that when a wrong or wrongs are overlooked at a given point of time, their negative effect revives when a further wrong is committed.

13. The last plea urged is premised on the law laid down by a

Division Bench of this Court in **Surender Singh Sihag's** case.

14. The decision deals with the right of the competent authority to discharge a force personnel who has earned 5 red ink entries, a power under Rule 13 of the Army Rules. The Division Bench noted that the army authorities had issued an administrative instruction by way of a letter circular dated 28.12.1988 which contemplated an inquiry before discharging or dismissing a person concerned.

15. The Division Bench took the view that no action could be taken under Rule 13 without an inquiry and since no inquiry ˇwas held against Surender Singh Sihag when his services were dispensed with by way of discharge pursuant to a show cause notice alleging against him that he had earned 5 red ink entries, the order was quashed.

16. But we find that the Supreme Court, in the decision reported as 2009 (7) SCC 370 **UOI & Ors. Vs. Deepak Kumar Santra,** has taken a view contrary to the one taken by the Division Bench of this Court.

17. Pertaining to a discharge of an Army Officer exercising power under Rule 13 of the Army Rules, the Supreme Court held that once statutory Rules occupy the field, there is no place for a policy guideline and as long as the procedure prescribed by the statutory Rule is followed, it hardly matters whether a policy guideline is not followed.

18. 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.

19. The procedure under Rule 13 of the Army Rule simply contemplates a prior notice to the person concerned before exercising power under the Rule.

20. That apart, it escaped the notice of the Division Bench of this Court as to what was the scope of the inquiry to be conducted if the power to discharge a force personnel was being exercised with respect to the service profile which shows that the person concerned had earned 5 red ink entries and the requirement of the rule was to consider whether such a person is required to be discharged from service.

21. Inquiries have to be held if facts are in dispute or blameworthiness of a delinquent employee has to be ascertained.

22. 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.

23. We note that under Rule 13(3) Item III (4) the Commanding Officer has to exercise the power upon being satisfied that the desirability to retain the person concerned on the strength of the Unit is not longer there. The objective material obviously has to be the service record. It is a power akin to the power exercised in civil service under Rule 56(j) of the fundamental rules.

24. 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.

ILR (2011) V DELHI 345
CS(OS)

ITD CEMENTATION INDIA LTD ....PLAINTIFF

VERSUS

NATIONAL THERMAL POWER CORPORATION LTD. & ORS. ....DEFENDANTS

(V.K. JAIN, J.)

CS(OS) NO. : 1878/2010 DATE OF DECISION: 03.06.2011

Code of Civil Procedure, 1908—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.

It would thus, be seen that defendant No.2 which did not meet the requirements of clause 3.2.0 and at least one of the two requirements laid down in clause 3.1.0 of the Special Conditions of the Contract, could not have participated in the bidding process without associating the plaintiff company, since it was the plaintiff company which met that requirement of clause 3.1.0 which defendant No.2 did not meet. In view of the requirement laid down in clause 3.3.0 above, it was also necessary for defendant No.2 as well as plaintiff company, which defendant No.2 had associated with it, to furnish joint undertaking for successful performance of the contract and the plaintiff company being an

associate of defendant No.2 was also required to furnish an on-demand bank guarantee of 2.5% of the total contract price. This bank guarantee was to be over and above the security deposit required to be furnished by defendant No.2. Had the plaintiff company and defendant No. 2 not furnished the joint undertaking in terms of clause 3.3.0 and/or had the plaintiff company not furnished on-demand bank guarantee for 2.5% of the total contract price, the bid given by defendant No.2 would not have even been considered eligible by defendant No.1. There is no dispute that the predecessor of the plaintiff company, ITD Cementation India Ltd. had furnished the bank guarantee in terms of Clause 3.3.0 of the Special Conditions of Contract and this bank guarantee was in addition to the performance guarantee which defendant No.2 had furnished to defendant No.1. **(Para 10)**

In view of Clause 3.3.0 of the Special Conditions of the Contract, Clause 9.5.0 of the LoA dated 3.2.2004 and the above referred terms of the Joint Deed of Undertaking submitted by plaintiff company and defendant No.2, to defendant No.1; both, defendant No.2 as well as the plaintiff company became jointly and severally responsible to defendant No.1 for successful execution of the whole of the contracted work, to the satisfaction of defendant No.1 NTPC. The liability of the plaintiff company therefore was not restricted only to sub-contract or to that part of the work which was sub-contracted to it by defendant No.2. Both of them were liable to defendant No.1 in case of any loss or damage being suffered by it on account of breach of the contract by defendant No.2. It was not necessary for defendant No.1 to first proceed against defendant No.2 before it proceeds against the plaintiff company. The performance bank guarantee submitted by plaintiff company therefore covered the whole of the contract awarded to defendant No.2. **(Para 11)**

It is by now settled proposition of law with respect to invocation of bank guarantees that its invocation is not in any manner dependent on any dispute between the person at whose instance the bank guarantee is given and the person, who is its beneficiary. The only grounds on which invocation of bank guarantee can be disputed are a) fraud and b) special equities in favour of the

person at whose instance the bank guarantee has been given. As observed ˇby Supreme Court in **Vinitec Electronics Private Ltd. vs. HCL Infosystems Ltd.** (2008) 1 SCC 544, the bank guarantee which provides that it is payable by the guarantors is considered to be unconditional bank guarantee and the bank guarantee is an independent contract between the bank and the beneficiary. It is a contractual obligation of the bank to honour the unconditional and irrevocable bank guarantee irrespective of any dispute between the beneficiary and the person at whose instance the bank guarantee is given. **(Para 12)**

In the present case, no fraud has been pleaded or made out. The contentions of the learned Sr. Counsel for the plaintiff company is that since the plaintiff company performed that part of the work which was sub-contracted to it by defendant No.2, there can be no justification for invoking the bank guarantee submitted by it. It was also contended by him, that NTPC being State within the meaning of Article 12 of the Constitution of India, it needs to act fairly and reasonably and therefore invocation of bank guarantee furnished by the plaintiff company without there being any breach of the contract on the part of the plaintiff company can neither be just nor reasonable. I, however, find no merit in these contentions. As noted earlier, it was ˇone of the conditions of the bid document that if the bidder was not fully eligible in terms of Clause 3.1.0 and Clause 3.2.0 of the Special Conditions of Contract, it could have associated another person with it provided, the other person was able to meet the requirement which the bidder itself did not meet. Not only a joint performance undertaking making the bidder as well as the associate jointly as well as severally liable in case of breach of the contract on the part of the bidder but also furnish the on-demand bank guarantee for 2.5% of the total contract price was furnished by the plaintiff. Had the plaintiff company not submitted the joint undertaking and bank guarantee in terms of the tender document, the work would not have been awarded to defendant No.2 and consequently, there would have been no sub contract awarded to the plaintiff company by defendant No.2. Having furnished the joint undertaking coupled with the unconditional and payable on demand bank guarantee extending to the whole of the contract, the plaintiff

company cannot say that the bank guarantee furnished by it should not be encashed unless there is default in performance of that part of the contract which was sub contracted to it. The plaintiff company has become liable in law not only in ˇrespect of that part of the contract which it had to execute in terms of the work between it and defendant No.2 but also to the parts which were not to be executed by it. **(Para 15)**

In my view the plaintiff company has not been able to make out a case of special equity in its favour nor it can be said that there will be irreparable injury to it if the encashment of bank guarantee is not injuncted. The case of defendant No.1 is that there has been breach of contract on the part of defendant No.2. In fact the breach is alleged even on the part of the plaintiff company. It has been pointed out that the plaintiff company did not carry out breaking and integrity test in respect of the piling work done by it. Vide letter dated 24.3.2006 the plaintiff company informed defendant No.2 that it had not been able to finish Pile Breaking and Integrity Test due to non-exposure of piles and other reasons beyond its control and not attributable to it. Vide its letter dated 9.8.2006 written to defendant No.2, defendant No.1 brought to its notice that nothing had been done towards the Pile Integrity Test of piling of various foundations in Unit 7. Defendant No.1 again requested to take immediate action for remaining PIT of piling as per specifications. There is no material on record to indicate that even thereafter the plaintiff company had carried out Pile Integrity Test in respect of piling of various foundations in Unit 7. However, even if it is assumed that the plaintiff company had successfully completed the work sub contracted to it by defendant No.2, it would still be liable even if there was breach of any part of the contract on the part of defendant No.2 and defendant No.1 is entitled in law to invoke the bank guarantee furnished by the plaintiff company. I fail to appreciate, how the plaintiff company can claim any special equity in its favour when it is a contractual obligation to compensate defendant No.1 in case of breach of contract on the part of defendant No.2 and it has chosen to become jointly as well as severally liable to defendant No.1 in this regard. **(Para 21)**

Important Issue Involved: Having furnished the joint undertaking coupled with the unconditional and payable on demand bank guarantee extending to the whole of the contract, the plaintiff company cannot say that the bank guarantee furnished by it should not be encashed unless there is default in performance of that part of the contract which was sub contracted to it.

[Sa Gh]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Niraj Kishan Kaul, Sr. Advocate with Mr. R. Sudhinder and Mr. Shivram, Advocates.

FOR THE DEFENDANTS : Mr. Bharat Sangal, Advocate for D-1 Mr. Rakesh Sinha & Ms. Srishti Sharma, Advocate for D-2.

CASES REFERRED TO:

1. *Vinitec Electronics Private Ltd.* vs. *HCL Infosystems Ltd.* (2008) 1 SCC 544.
2. *Hindustan Construction Co. Ltd. and Anr.* vs. *Satluj Jal Vidyut Nigam Ltd.,* AIR 2006 Delhi 169.
3. *Dwarikesh Sugar Industries Ltd.* vs. *Prem Heavy Engineering Works (P) Ltd. & Anr.* (1997) 6 SCC 450.
4. *U.P. State Sugar Corporation* vs. *Sumac International Ltd.* (1997) 1 SCC 568.
5. *Hindustan Steelworks Construction Ltd.* vs. *Tarapore and Co.* (1996) 5 SCC 34.
6. *Ansal Engineering Project Ltd.* vs. *Tehri Hydro Development Corporation Ltd. and Anr.* (1996) 5 SCC 450.
7. *ITEK Corporation* vs. *The First National Bank of Boston* 566 F. Supp 1210.

RESULT: Application disposed of.

V.K. JAIN, J.

IA No. 12229/2010 (Order 39 Rule 1&2 CPC)

1. This is a suit for declaration and permanent injunction. Both the defendants are Government of India undertakings. Defendant No.1 awarded a contract to defendant No.2 for construction of main plant civil works, stage-II, phase-II for its thermal power plant at Kahalgaon, for an aggregate value of Rs. 49,21,27,837/-. As per a pre tender arrangement between the plaintiff and defendant No.2, the sub-contract for piling work was to be awarded by defendant No.2 which did not have requisite experience/ manpower for this purpose, to the plaintiff company. Defendant No.2 accordingly awarded the aforesaid sub-contract to the plaintiff company for an aggregate sum of Rs. 14,05,98,920.37. The plaintiff company, pursuant to the award of the aforesaid work furnished a performance bank guarantee of Rs. 1,23,03,196/-.

2. The case of the plaintiff is that the sub-contracted work was completed by it by 29.6.2005 and completion of the work was also acknowledged by defendant No.2. The defect liability period in respect of the work carried out by the plaintiff company also expired in June, 2006, thereby entitling the plaintiff company to return of the performance bank guarantee submitted by it. Since, the cost of the plaintiff company increased on account of reduction of work during the course of construction activities and the plaintiff company had to deploy additional staff and equipment, it called upon defendant No.2 to reimburse it to the extent of Rs. 1,53,23,456/-. Defendant No.2, however, did not pay the aforesaid amount to the plaintiff company. It is alleged that in order to prevent further erosion in its balance sheet, the plaintiff company at the instance of the defendants submitted a bank guarantee of Rs.70,30,000/ - on the specific understanding that the defendants would release the aforesaid sum which represented the retention amount. However, the aforesaid amount was not released despite bank guarantee having been accepted. The performance bank guarantee which the plaintiff company had furnished was extended by it till 31.5.2011, at the instance of defendant No.1. Defendant No.1 sought to invoke the performance guarantee which the plaintiff company had submitted and sent a letter to defendant No.3 bank which had issued the aforesaid bank guarantee, in this regard on 6.9.2010, though defendant No.2 had requested it to keep the encashment of bank guarantee in abeyance.

3. Thus, in nutshell, the case of the plaintiff company is that it was awarded only sub-contract for 14,05,98,920.37; it has already completed its work within the stipulated time to the satisfaction of the defendants and even the defect liability period is over and it is entitled to recover more than Rs.2 crores from defendant No.2. The plaintiff company has sought a declaration that invocation of performance bank guarantee by defendant No.1 is void and illegal. It has also sought an injunction against invocation/encashment of performance bank guarantee which it had submitted in favour of defendant No.1.

4. In its Written Statement, defendant No.1 NTPC Limited has stated that in terms of Clause 9.5.0 of Letter of Award (in short LoA) dated 3.2.2004 , Clause 3.3.0 of the Special Conditions of Contract and Clause 5 of the Joint Deed of Undertaking submitted jointly by the plaintiff company and defendant No.2; the plaintiff company, being an associate of defendant No.2 was required to furnish an on-demand bank guarantee for 2.5% of the total contract price and this was to be over and above the security deposited by defendant No.2. The bank guarantee of ˇRs.1,23,03,196/- according to defendant No.1, was a performance guarantee in relation to the whole of the work awarded to defendant No.1 and was not confined to the sub-contract awarded by defendant No.2 to the plaintiff company. It is also stated that the plaintiff company as well as defendant No.2 had jointly undertaken and declared that they shall be fully responsible for the successful performance of the contract. It was also agreed that it would not be necessary for defendant No.1 to proceed against defendant No.2 before it proceeds against the plaintiff company. It is claimed that the plaintiff company failed to fulfill its joint and several obligations under the LoA dated 3.2.2004 read with Joint Deed of Undertaking dated 5.9.2003. It is also alleged that since defendant No.1 is not a party to the alleged pre tender understanding between plaintiff company and defendant No.2, it is not bound by the terms and conditions of the aforesaid understanding. Defendant No.1 has denied that the work was completed within the stipulated time or to its satisfaction. It has been stated that defendant No.1 had protested in writing against delay in the work of piling and the plaintiff company had failed to conduct Piling Integrity Test which was the most crucial test to be carried out by it. It is further stated that since defendant No.2 failed to complete the work awarded to it, in terms of the LoA dated 3.2.2004, defendant No.1 was

constrained to issue notice to cancel the LoA and encash the performance bank guarantee. It is also alleged that as far as defendant No.1 is concerned, it has not kept any retention amount of the plaintiff company with it. The case of defendant No.1 is that since defendant No.2 failed to complete the work, it had to offload the work and get it completed by the other contractors at the sole risk and cost of defendant No.2 and it had rejected the request for return of the security deposit.

5. Defendant No.2 in its Written Statement has alleged that the bank guarantee has been wrongly invoked by defendant No.1 and though the plaintiff company had completed the piling work, defendant No.1 had failed to release payment to it in terms of the contract.

6. Clauses 3.1.0, 3.2.0 & 3.3.0 of the Special Conditions of the Contract read as under:

> 3.1.0 The bidder should have achieved in the preceding seven (7) years reckoned as on date of bid opening, in the construction of industrial/infrastructure projects, at least the following progress:
>
> (i) Concreting of 25,000 cu.m. in any one (1) year in one (1) or cumulative of two (2) concurrently running contracts and
>
> (ii) Fabrication of 6,000 MT of Structural Steel in any one (1) year in one (1) or cumulative of two (2) concurrently running contracts and
>
> (iii) Erection of 6,000 MT of Structural Steel in any one (1) year in one (1) of cumulative of two (2) concurrently running contracts and,
>
> (iv) Installation of 25,000 running meters of cast-in-situ bored piles of minimum 600mm dia in any one (1) year in one or more contracts, using rotary hydraulic rigs. Alternatively, installation of 3,500 running metres of cast-in-situ bored piles of minimum 1000 mm dia in any one (1) year in one or more contracts, using rotary hydraulic rigs.
>
> 3.2.0 The average annual turnover of the bidder, in the preceding three (3) financial years as on the date of bid opening shall not be less than Rs.30 crores.
>
> 3.3.0 Bidder, who meets the requirements at clause 3.2.0 above and at least any two requirements of clause 3.1.0 above, can also participate, provided he associate with not more than two agencies of repute, who should individually fully meet requirements of the relevant part under clause 3.1.0 above for which he is being associated and which the bidder himself is not able to meet. In such a case, bidder shall along with the bid furnish an undertaking jointly executed by him and his associate(s), for successful performance of the contract, as per format enclosed in the bid documents. In case, of award, each associate shall be required to furnish an On Demand Bank Guarantee for 2.5% of total Contract Price over and above the Security Deposit to be furnished by the Contractor.

7. Clause 9.5.0 of LoA reads as under:

> In terms of Clause No. 3.3.0 of Special Conditions of Contract, in case of association, the Associate shall be required to furnish an 'On Demand Bank Guarantee' for 2.5% of Total Contract Price over and above the Security Deposit to be furnished by the Contractor. You have associated with M/s Skanska Cementation India Ltd., Mumbai for Piling Works included in this Contract. Accordingly, you have confirmed that in addition to the security deposit to be provided by you, your Associate M/s Skanska Cementation India Ltd., Mumbai shall submit a Performance Bank Guarantee to NTPC for 2.5% of the total Contract Price i.e. for Rs.1,23,03,196/-, within two weeks of issue of LoA in line with the provisions of bidding documents.

8. Some of the Clauses of the Joint Deed of Undertaking submitted by plaintiff company and defendant No.2 to defendant No.1 read as under:

> 1. That in consideration of the Signing of Contract Agreement between the Owner and the Contractor, we the Associate and the Contractor, do hereby declare and undertake that we shall be jointly and severally responsible to the Owner for the execution and successful performance of the

Contract to the satisfaction of the Owner.

2. In case of any breach of the Contract committed by the Contractor, we the Associate do hereby undertake, declare and confirm that we shall be fully responsible for the successful performance of the contract and undertake to carry out all the obligations and responsibilities under this Deed of Joint Undertaking in order to discharge the Contractor's obligations and responsibilities stipulated in the contract. Further, if the Owner sustains any loss or damage on account of any breach of the Contract, we the Associate/Contractor jointly and severally undertake to promptly indemnify, and pay such loss/damages caused to the Owner on its written demand without any demur, reservation, contest or protest in any manner whatsoever. This is without prejudice to any rights of the owner against the contractor under the contract and all guarantees. It shall not be necessary or obligatory for the owner to first proceed against the contractor before proceeding against the associate, nor any extension of time or any relaxation given by the owner to the contractor shall prejudice any rights of the owner under this deed of Joint Undertaking to proceed against the Associate and Contractor.

3. x x x

4. The Contractor and the Associate will be fully responsible for the quality of all the Works and their repair or replacement if necessary and timely execution thereof to meet the completion schedule under the contract.

5. Apart from the Contractor's Performance Bank Guarantee/ Security Deposits, the Associate shall, furnish "as Security" the Performance Bank Guarantee, from any reputed Bank as per list enclosed at Annexure-XIII to SCC in favour of the Owner in a form acceptable to Owner. The value of such Bank Guarantee (BG) shall be equal to two and a half percent (2 ½ %) of total Contract Price and it shall be towards guaranteeing the faithful performance/ compliance of this Deed of Undertaking in accordance with the terms and conditions specified herein. The Bank

Guarantees shall be unconditional, irrevocable and valid for the entire period of the contract, i.e. till ninety (90) days beyond the end of the Defect Liability Period of the Works under the contract. The guarantee amount shall be promptly paid to the Owner on demand without any demur, reservation, protest or contest.

6. x x x

7. We, the Associate, and the Contractor agree that this Undertaking shall be irrevocable and shall form an integral part of the Contract. We further agree that this Undertaking shall continue to be enforceable till the successful completion of Contract and till the Owner discharges it.

9. The relevant Clause of the bank guarantee furnished to defendant No.1 reads as under:

We, Union Bank of India having our Registered Office at Union Bank Bhavan, 239, Widhan Bhavan Marg, Nariman Point, Mumbai 400 021 and one of its branch offices at Veer Nariman Road Branch, 84, Raj Mahal, Churchgate, Mumbai-400 020 (hereinafter referred to as the 'Bank' which expression shall, unless repugnant to the context or meaning thereof, include its successors, administrators, executors and assigns) do hereby guarantee and undertake to pay to NTPC on demand any and all monies to the extent of Rs.1,23,03,196/- (Rupees One Crore Twenty Three Lakh Three Thousand One Hundred Ninety Six Only) as aforesaid at any time upto 31/05/2010 @ 5 PM without any demur, reservation, contest, recourse or protest and/or without any reference to "Associate" or "Contractor". Any such demand made by NTPC on the Bank shall be conclusive and binding, notwithstanding any ˇdifference between NTPC and Contractor and/or between NTPC and Associate pending before any Court, Tribunal, Arbitrator or any Authority.

x x x

The Bank also agrees that NTPC at its options shall be entitled to enforce this Guarantee against the Bank as a principal debtor, in the first instance, without proceeding against Contractor or

Associate and notwithstanding any security or other guarantee that NTPC may have in relation to Contractor's or Associates. liabilities.

10. It would thus, be seen that defendant No.2 which did not meet the requirements of clause 3.2.0 and at least one of the two requirements laid down in clause 3.1.0 of the Special Conditions of the Contract, could not have participated in the bidding process without associating the plaintiff company, since it was the plaintiff company which met that requirement of clause 3.1.0 which defendant No.2 did not meet. In view of the requirement laid down in clause 3.3.0 above, it was also necessary for defendant No.2 as well as plaintiff company, which defendant No.2 had associated with it, to furnish joint undertaking for successful performance of the contract and the plaintiff company being an associate of defendant No.2 was also ˇrequired to furnish an on-demand bank guarantee of 2.5% of the total contract price. This bank guarantee was to be over and above the security deposit required to be furnished by defendant No.2. Had the plaintiff company and defendant No. 2 not furnished the joint undertaking in terms of clause 3.3.0 and/or had the plaintiff company not furnished on-demand bank guarantee for 2.5% of the total contract price, the bid given by defendant No.2 would not have even been considered eligible by defendant No.1. There is no dispute that the predecessor of the plaintiff company, ITD Cementation India Ltd. had furnished the bank guarantee in terms of Clause 3.3.0 of the Special Conditions of Contract and this bank guarantee was in addition to the performance guarantee which defendant No.2 had furnished to defendant No.1.

11. In view of Clause 3.3.0 of the Special Conditions of the Contract, Clause 9.5.0 of the LoA dated 3.2.2004 and the above referred terms of the Joint Deed of Undertaking submitted by plaintiff company and defendant No.2, to defendant No.1; both, defendant No.2 as well as the plaintiff company became jointly and severally responsible to defendant No.1 for successful execution of the whole of the contracted work, to the satisfaction of defendant No.1 NTPC. The liability of the plaintiff company therefore was not restricted only to sub-contract or to that part of the work which was sub-contracted to it by defendant No.2. Both of them were liable to defendant No.1 in case of any loss or damage being suffered by it on account of breach of the contract by defendant No.2. It was not necessary for defendant No.1 to first proceed against defendant

No.2 before it proceeds against the plaintiff company. The performance bank guarantee submitted by plaintiff company therefore covered the whole of the contract awarded to defendant No.2.

12. It is by now settled proposition of law with respect to invocation of bank guarantees that its invocation is not in any manner dependent on any dispute between the person at whose instance the bank guarantee is given and the person, who is its beneficiary. The only grounds on which invocation of bank guarantee can be disputed are a) fraud and b) special equities in favour of the person at whose instance the bank guarantee has been given. As observed ˇby Supreme Court in **Vinitec Electronics Private Ltd. vs. HCL Infosystems Ltd.** (2008) 1 SCC 544, the bank guarantee which provides that it is payable by the guarantors is considered to be unconditional bank guarantee and the bank guarantee is an independent contract between the bank and the beneficiary. It is a contractual obligation of the bank to honour the unconditional and irrevocable bank guarantee irrespective of any dispute between the beneficiary and the person at whose instance the bank guarantee is given.

13. Recently, I had an occasion to examine this issue while deciding IA No. 8635/2011 in CS(OS) No 1295/2011 on 31.5.2011. During the course of the judgment the following decisions were noted by this Court:

In **Hindustan Steelworks Construction Ltd. vs. Tarapore and Co.** (1996) 5 SCC 34, Supreme Court held that in case of an unconditional bank guarantee, the nature of obligation of the bank is absolute and not dependent upon any dispute or proceeding between the party at whose instance the bank guarantee is given and the beneficiary, there being only two exceptions – fraud and special equities. In that case Special equities were claimed on the basis as to who had committed breach of the contract. Determination of disputes was held not to be a factor, which would be sufficient to make the case as exceptional case justifying interference by the court restraining invocation of the bank guarantee.

In **Ansal Engineering Project Ltd. vs. Tehri Hydro Development Corporation Ltd. and Anr.** (1996) 5 SCC 450, Supreme Court inter alia held as under:-

"4. It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prima facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the Bank, had arisen in performance of the contract or execution of the works undertaken in furtherance thereof.

x x x

5. …….The court exercising its power cannot interfere with enforcement of bank guarantee/letters of credit except only in cases where fraud or special equity is prima facie made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the parties. The trading operation would not be jettisoned and faith of the people in the efficacy of banking transactions would not be eroded or brought to disbelief."

In **U.P. State Sugar Corporation Vs. Sumac International Ltd.** (1997) 1 SCC 568, the Supreme Court held as under:- "The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take the advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in

irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country."

14. If the bank guarantee furnished by the plaintiff company is read without reference to other documents, the obligation of the bank to pay to defendant No.2 is absolute and unqualified and the bank must necessarily remit the amount of the bank guarantee to defendant No.2 without demur or protest merely on demand from it. It is not open to the bank to go into the question as to whether there was breach of the contract on the part of plaintiff company/defendant No.2 or not. The bank is duty bound to honour the bank guarantee unless a case of fraud or special equity is made out.

15. In the present case, no fraud has been pleaded or made out. The contentions of the learned Sr. Counsel for the plaintiff company is that since the plaintiff company performed that part of the work which was sub-contracted to it by defendant No.2, there can be no justification for invoking the bank guarantee submitted by it. It was also contended by him, that NTPC being State within the meaning of Article 12 of the Constitution of India, it needs to act fairly and reasonably and therefore invocation of bank guarantee furnished by the plaintiff company without there being any breach of the contract on the part of the plaintiff company can neither be just nor reasonable. I, however, find no merit in these contentions. As noted earlier, it was one of the conditions of the bid document that if the bidder was not fully eligible in terms of Clause 3.1.0 and Clause 3.2.0 of the Special Conditions of Contract, it could have associated another person with it provided, the other person was able to meet the requirement which the bidder itself did not meet. Not only a joint performance undertaking making the bidder as well as the associate jointly as well as severally liable in case of breach of the contract on the part of the bidder but also furnish the on-demand bank guarantee for 2.5% of the total contract price was furnished by the plaintiff. Had the plaintiff company not submitted the joint undertaking and bank guarantee

in terms of the tender document, the work would not have been awarded to defendant No.2 and consequently, there would have been no sub contract awarded to the plaintiff company by defendant No.2. Having furnished the joint undertaking coupled with the unconditional and payable on demand bank guarantee extending to the whole of the contract, the plaintiff company cannot say that the bank guarantee furnished by it should not be encashed unless there is default in performance of that part of the contract which was sub contracted to it. The plaintiff company has become liable in law not only in respect of that part of the contract which it had to execute in terms of the work between it and defendant No.2 but also to the parts which were not to be executed by it.

16. The legal proposition with respect to irretrievable injury was summarized by this Court in the case of **Dwarikesh Sugar Industries Ltd. vs. Prem Heavy Engineering Works (P) Ltd. and Anr.,** (1997) 6 SCC 450, as under:-

> "The second exception to the rule of granting injunction, i.e., the resulting of irretrievable injury, has to be such a circumstance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. This will have to be decisively established and it must be proved to the satisfaction of the court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary, by way of restitution."

17. In **Hindustan Construction Co. Ltd. and Anr. Vs. Satluj Jal Vidyut Nigam Ltd.,** AIR 2006 Delhi 169, this Court held that the exceptional case pleaded against encashment of bank guarantee needs to fall within any of the following limited categories:

(i) If there is a fraud in connection with the bank guarantee which would vitiate the very foundation of such guarantee and the beneficiary seeks to take advantage of such fraud.

(ii) The applicant, in the facts and circumstance of the case, clearly establishes a case of irretrievable injustice or irreparable damage.

(iii) The applicant is able to establish exceptional or special equities of the kind which would prick the judicial conscience of the court.

(iv) When the bank guarantee is not invoked strictly in its terms and by the person empowered to invoke under the terms of the guarantee. In other words, the letter of invocation is in apparent violation to the specific terms of the bank guarantee.

18. In **ITEK Corporation vs. The First National Bank of Boston** 566 F. Supp 1210, which is a judgment referred by Supreme Court quite often in the matters relating to bank guarantee, an exporter in USA entered into an agreement with the Imperial Government of Iran and sought an order terminating its liability on standby letters of credit issued by an American Bank in favour of an Iranian Bank as part of the contract. The relief was sought on account of the situation created after the Iranian revolution when the American Government cancelled the export licences in ˇrelation to Iran and the Iranian Government had forcibly taken 52 American citizens as hostages. The US Government had blocked all Iranian assets under the jurisdiction of United States and had cancelled the export contract. The Court upheld the contention of the exporter that any claim for damages against the purchaser if decreed by the American Courts would not be executable in Iran under these circumstances and realization of the bank guarantee/letters of credit would cause irreparable harm to the plaintiff company.

19. In the case before this Court, no such circumstance is shown as existing and therefore, it is difficult to say that an exceptional circumstance justifying grant of injunction against encashment of the bank guarantee is made out.

20. As held by Supreme Court in the case of **Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd. & Anr.** (1997) 6 SCC 450, the resulting of irretrievable injury has to be such a circumstance which would make it impossible for the guarantor to reimburse himself if he ultimately succeeds and it must be proved to the satisfaction of the Court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary by way of restitution. No such circumstance exists in this case since the defendant No.1 happens to be an Undertaking of Government of India.

21. In my view the plaintiff company has not been able to make out a case of special equity in its favour nor it can be said that there will be

irreparable injury to it if the encashment of bank guarantee is not injuncted. The case of defendant No.1 is that there has been breach of contract on the part of defendant No.2. In fact the breach is alleged even on the part of the plaintiff company. It has been pointed out that the plaintiff company did not carry out breaking and integrity test in respect of the piling work done by it. Vide letter dated 24.3.2006 the plaintiff company informed defendant No.2 that it had not been able to finish Pile Breaking and Integrity Test due to non-exposure of piles and other reasons beyond its control and not attributable to it. Vide its letter dated 9.8.2006 written to defendant No.2, defendant No.1 brought to its notice that nothing had been done towards the Pile Integrity Test of piling of various ˇfoundations in Unit 7. Defendant No.1 again requested to take immediate action for remaining PIT of piling as per specifications. There is no material on record to indicate that even thereafter the plaintiff company had carried out Pile Integrity Test in respect of piling of various foundations in Unit 7. However, even if it is assumed that the plaintiff company had successfully completed the work sub contracted to it by defendant No.2, it would still be liable even if there was breach of any part of the contract on the part of defendant No.2 and defendant No.1 is entitled in law to invoke the bank guarantee furnished by the plaintiff company. I fail to appreciate, how the plaintiff company can claim any special equity in its favour when it is a contractual obligation to compensate defendant No.1 in case of breach of contract on the part of defendant No.2 and it has chosen to become jointly as well as severally liable to defendant No.1 in this regard.

22. Defendant No.1 NTPC is a large Public Sector Undertaking. It cannot be said that in the event of bank guarantee being encahsed, it would be impossible or even difficult for the plaintiff company to reimburse itself in case ˇit sues the defendant No.1 for recovery of amount of the bank guarantee. Considering the contractual obligation undertaken by the plaintiff company, I find no exceptional circumstances warranting issue of an injunction against encashment of the bank guarantee.

23. It was pointed out by the learned Counsel for the plaintiff that plaintiff company submitted a bank guarantee of Rs.70,30,000/- in order to get that much amount released from defendant No.2 but since NTPC did not agree for release of retention money/security deposit, neither the aforesaid amount has been released nor the bank guarantee of

Rs.70,30,000/- has been returned to it. Admittedly, the aforesaid bank guarantee of Rs.70,30,000/-was submitted by the plaintiff company to defendant No.2 and not to defendant No.1. Therefore, defendant No.1 does not come into the picture as far as the aforesaid bank guarantee is concerned and the matter rests solely between the plaintiff company and defendant No.2. If the plaintiff company is aggrieved on account of failure of defendant No.2 to release the amount of Rs.70,30,000/- despite receiving the bank guarantee for the aforesaid amount, it can initiate such ˇproceedings against defendant No.2 as are open to it in law but, the plaintiff company is not entitled to injunction against encashment of the bank guarantee submitted by it to defendant No.1 merely because defendant No.2 has neither paid the amount of Rs.70,30,000/- to it nor returned the bank guarantee of the aforesaid amount.

24. For the reasons given in the preceding paragraphs, I am of the view that the plaintiff has no prima facie case for grant of injunction against encashment of bank guarantee. The application therefore is dismissed. The interim order passed by this Court on 17.9.2010 is hereby vacated.

The IA stands disposed of.

CS(OS) No. 1878/2010

The matter be listed before Joint Registrar on24th August, 2011 for admission/denial of the documents and before this Court on 16th December, 2010.

ILR (2011) V DELHI 365
R.S.A.

SMT. HANSO DEVI (DECEASED) THROUGH LRS. ....APPELLANT

VERSUS

SH. CHANDRU (DECEASED) THROUGH LRS. ....RESPONDENT

(INDERMEET KAUR, J.)

R.S.A. NO. : 89/2008 & CM 12718/2010 **DATE OF DECISION: 03.06.2011**

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.

This Section 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 DLRA; revenue court 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; jurisdiction vests with the revenue court. **(Para 13)**

The averments in the plaint as also the prayer clause have ˇbeen perused. The plaintiff is claiming dispossession from the red portion B C D E in the site plan; defence of

defendant No. 1that he has title and possession over the said land; this question as to who has title of this co-owned land can only be decided by the revenue court. There is a clear cloud over this title. The contention of the appellant that a co-owner cannot seek a partition of his holding is answered by Section 55 of the DLRA which stipulates that holding of bhumidari is partitionable and a bhumidar may sue for a partition of his holding. This contention is squarely covered by Schedule I; revenue courts alone have the jurisdiction to deal with this matter. Since the red portion is claimed by both the owners i.e. the plaintiff and defendant No. 1, proper remedy would be a relief of partition against the other co-owner under Section 55 of the DLRA which jurisdiction vests with the revenue court. **(Para 14)**

Important Issue Involved: An application for declaration of bhumidari rights is maintainable under Sections 10,11,12,13,73,74,79 & 85 of the DLRA before the revenue court which alone has the jurisdiction to deal with such bhumidari rights.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr/. N'S. Vashisht, Mr. B.B. Bhatia, Mr. Rajendra Sahu, Mr. Navjot Kumar & Arpan Sharma, Advocates.

FOR THE RESPONDENT : Mr. S'S. Chhillar, Advocate for respondent No. 1. Mr. Karan Khanna, Advocate respondent No. 2.

CASES REFERRED TO:

1. *Vinod Kumar Sharma* vs. *Smt. Seema Sethi* 2009 II AD (Delhi) 782.
2. *Tara Chand & Another* vs. *Kumari Rajni Jain & Ors.* 150 (2008) DLT 101.
3. *Kirpa Ram* vs. *Surendra Deo Gaur & Others* 153 (2008) DLT 52.
4. *Rajender Singh* vs. *Vijay Pal @ Jai Pal & Others* 148 (2008) DLT 596.
5. *Om Prakash Agarwal & Ors.* vs. *Batara Behera & Ors.* Reported in 1999 (SC) 1093.
6. *Ram Karan & Others* vs. *Jagdeep Rai* reported in 79(1999) DLT 305.
7. *Cdr. Bhupinder Singh Rekhi* vs. *C'S. Rekhi & Others,* 76 (1998) DLT 257.
8. *Mam Raj* vs. *Ram Chander* DLT 1974(Vol.X) 227.

RESULT: Appeal Dismissed.

INDERMEET KAUR, J. (Oral)

1. This appeal has impugned the judgment and decree dated 15.12.2007 which has reversed the finding of the trial judge dated 27.1.2005. Vide judgment and decree dated 27.1.2005 the suit filed by the plaintiff Hanso Devi seeking permanent and mandatory injunction to the effect that that the defendant be directed to remove the pucca wall constructed upon the suit property (as described at point BCDE in Khasra No.11/8/2 (2-4), 7/2 (3-4) as shown in red colour in the site plan situated within the revenue estate of Jharoda Majra Burari, Delhi); as also a decree of permanent injunction restraining the defendant from interfering in the peaceful possession of the plaintiff had been decreed. The impugned judgment had reversed this finding; suit of the plaintiff stood dismissed.

2. Shri Khem Chand father of the plaintiff and Shri Gokal father of the defendants were real brothers and joint owners in respect of agricultural land bearing khasra no. 2/22/2(0-16), 2/22/2(3-6), 24(4-16), 11/2(4-16), 3(4-16), 4(4-16), 7/2(3-4), 8/2(3-4) and 9/2(2-4) total measuring area of 32 bighas and 18 biswas within the revenue estate of village Jhaoda Majra, Burari. During life time of fathers of the parties, oral partition took place. After death of Shri Khem Chand 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 his share. Now plaintiff is co-sharer of ½ share in total land as depicted (in yellow and red colour) in the site plan. Land of the defendants is shown in green

and blue colour in the site plan. Land of the plaintiff was surrounded by barbed wire from side of

defendant no. 1. The said wire was removed from points B to C by the defendants and they tried to fix the same from point B to E with a view to obstruct the entry of plaintiff on his land shown in red colour. On 13.03.1990 Local Commissioner inspected the property; defendant no. 1 had encroached upon a portion of property of the plaintiff and constructed pucca wall between points C and F; two handpumps and a chapper had also been installed. Hence the present suit.

3. In the Written Statement of defendant No. 1 it was admitted that the land had since been partitioned orally; the site plan filed by the plaintiff had been disputed. A separate site plan depicting share of the defendants have been filed on record; other averments were denied; it was stated that share of the plaintiff has already been sold by the plaintiff.

4. On the pleadings of the parties following four issues were framed:

(i) Whether the defendant no. 1 is in cultivating possession of property in dispute as alleged? OPD

(ii) Whether plaintiff is entitled to the relief of permanent injunction as prayed for? OPP

(iii) Whether the plaintiff is entitled to the relief of mandatory injunction as prayed for? OPP

(iv) Relief.

5. Oral and documentary evidence were led by the parties. Four witnesses on behalf of the plaintiff and three witnesses on behalf of the defendants were examined. On this oral and documentary evidence, the suit of the plaintiff had been decreed; defendants had been restrained from dispossessing the plaintiff and from interfering with her peaceful possession over land as depicted B C D E in DW-4/P1; defendant No. 1 had been directed to remove the pucca wall constructed by him at point C to D in Ex.DW-4/P-1 and to remove hand pump and chapper therein.

6. The impugned judgment had reversed this finding. The suit of the plaintiff had been dismissed. The impugned judgment was of the

view that there was a cloud over the title of the 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.

7. This is a second appeal. It has been admitted and on 06.01.2011, the following substantial question of law was formulated:-

> "Whether the finding in the impugned judgment dated 15.12.2007 dismissing the suit of the plaintiff holding that a suit for injunction in the present form simpliciter is not maintainable, is perverse? If so, its effect?"

8. On behalf of the appellant, it has been urged that the impugned judgment suffers from a perversity; it had wrongly recorded that the bar of Section 185 of the DLRA is operational; attention has been drawn to the averments made in the plaint as also the prayer clause; it is pointed out that the relief claimed by the plaintiff was simplicitor a relief of injunction; there was no bar to such a suit. Learned counsel for the appellant has placed reliance upon a judgment of this Court reported in DLT 1974(Vol.X) 227 **Mam Raj Vs. Ram Chander** as also another judgment of this Court in 150 (2008) DLT 101 **Tara Chand & Another Vs. Kumari Rajni Jain & Ors..** Reliance has also been placed upon 76 (1998) DLT 257 **Cdr. Bhupinder Singh Rekhi Vs. C'S. Rekhi & Others,** 153 (2008) DLT 526 **Kirpa Ram VS. Surendra Deo Gaur & Others** as also 2009 II AD (Delhi) 782 **Vinod Kumar Sharma Vs. Smt. Seema Sethi** to support this submission. It is pointed out that in 148 (2008) DLT 596 **Rajender Singh Vs. Vijay Pal @ Jai Pal & Others** the Apex Court had also held the same view qua a suit for injunction. It is pointed that under Section 185 of the DLRA only such suits are not maintainable before the civil court where the remedy is available before the revenue court. Present suit was wrongly held to be barred.

9. Arguments have been rebutted. It is pointed out that the disputed land i.e. portion shown in B C D E is in possession of the defendant. The impugned judgment had rightly held that question of title cannot be gone into by a civil court.

10. Record has been perused. The parties i.e. the plaintiff and defendant are admittedly cousins. The suit property was initially owned

by their respective fathers. After the death of their respective fathers one half share belonged to the family of the plaintiff and other half had to be equally divided by the family of defendants No. 1 & 2; defendants No. 1 & 2 were to get one half share. Both the parties have admitted that an oral partition had been effected between the parties. However shares of the parties had not been delineated; it was not clear which portion of the property has fallen to the share of the plaintiff and which portion had fallen to the share of the defendants. The site plan placed on record by the plaintiff has been proved as Ex. PW-4/D-1. Portion shown in yellow colour is admittedly in the possession of the plaintiff; admittedly the portion shown in blue colour is in possession of defendant No. 1 and the portion shown in green colour is in possession of defendant No. 2. There is however a cloud over the title in the red portion which is B C D E. The claim of the plaintiff is that he is in possession of red portion; this was refuted by the defendant No. 1 who has categorically in his written statement stated that the red portion is in his cultivatory possession. It was this factor which had weighed in the mind of the first appellate court to hold that there was a cloud over the title of this red portion. The finding returned in the impugned judgment qua this proposition is returned as under:-

> "14. In these circumstances, the case which stands proved on record is that both the parties are joint owners of various parcels of khasra number which was jointly owned by Shri Khem Chand and Gokal Chand.
>
> 15. Admittedly, the suit property is part of village located in village Jhaoda Majra, Burari, Delhi which is an agricultural property and is therefore governed by the provisions of Delhi Land Reforms Act.
>
> 16. Under the scheme of Delhi Land Reforms Act a person to be the owner of a land which is part of agricultural land has to be a recorded Bhumidar. Once there are more than one person recorded as Bhumidar, both of them are the joint owners and they cannot exclude each other from the possession of the suit property. Under the Act a partition can take place by way of demarcation of the respective portions. The concept of oral partition is not recognized under the Act. Testimony of PW2, the

Local Commissioner and of all other witnesses goes to show that the appellants also put up a hand pump and chappars in the suit property besides constructing a wall around it. Thus, the stand of the respondent, that she is in exclusive possession thereof is not established.

17. Certain modes for determination of rights in such circumstances regarding the ownership of the land has been provided for in the Delhi Land Reforms Act. Whenever there is a cloud on nobody's title in respect of his/her Bhumidari rights, they are required to obtain a declaration from the Revenue Estates of such rights. Similarly, if somebody occupies a portion of the property unauthorizedly then there is right of ejectment available under the Delhi Land Reforms Act by filing an ejectment suit through the Gaon Sabha. In case, there is a interse dispute between the joint owners then they can seek partition ˇamongst them by approaching the Revenue Authorities. When all these remedies are available under the scheme of Delhi Land Reforms Act, parties cannot approach to Civil Court for those reliefs.

18. The facts of this case goes to show that there was a cloud over title of the appellant to be a Bhumidar in respect of the property of which she claimed to be in exclusive possession. The appellants who were sought to be injuncted were threatening to occupy the suit property which the respondent claimed to be in her exclusive possession. In such circumstances, it has been held by the Hon'ble High Court of Delhi that the person whose title is put under cloud is required to obtain a fresh declaration to be a Bhumidar of the property for which she/he seeks injunction. Reference can be made to judgment delivered by our own High Court in the case of **Ram Karan & Others Vs. Jagdeep Rai** reported in 79(1999) DLT 305 held as under:-

> "I am of the considered opinion that the present suit is barred under the provisions of Section 185 of the Delhi Land Reforms Act as the issues raised in the present suit could be effectively decided by the Revenue Court and the jurisdiction of this Court is barred under the provisions of Section 185 of Delhi Land Reforms Act. The plaintiffs in the present suit claim a right to the suit property as a

Bhumidar which right is denied on the ground that the plaintiffs have sold out their rights in the suit land. The rights, if any, of the plaintiffs in respect of the suit land are under cloud, and therefore, for all practical purposes the plaintiffs are seeking for a declaration of their right as a Bhumidar and also seeking for a declaration of their possession in respect of the suit land. There is apparently a dispute as to possess of the agricultural land and therefore, such dispute as to possession of agricultural land could be effectively adjudicated upon and decided under the provisions of Delhi Land Reforms Act, remedy being under Section 84 read with Item No.19 of the First Schedule. All the reliefs claimed by the plaintiffs, therefore in the present suit are within the competent jurisdiction of the Revenue Assistant where a suit is pending and ˇthis Court has no jurisdiction to entertain this suit in view of the provisions of Section 185 of Delhi Land Reforms Act.

19. At this juncture it would also be relevant to take note of a judgment reported in 1986 RLR 432 which has dealt with the effect of urbanization on rural area and applicabiity of the Delhi Land Reforms Act. Some observations made in the aforesaid judgment are reproduced for the sake of reference:-

"11. On its plain language it is manifest "that any land before it can be termed land" for the purpose of the Act must be held or occupied for purposes connected with agriculture, horticulture or animal husbandry etc. Admittedly the land in question has not been used for any of the purposes contemplated therein since 1960 or even earlier when the layout plan was submitted to the Corporation for necessary sanction. It is so stated not only in the sale deeds executed by Raghbir Singh, respondent no.2, in favour of the petitioner as well as respondent no.4 but is also manifest from the Khasra girdavari for the year 1965-66, a copy of which is to be found at page 271 of the trial court record. Its perusal would show that while Raghbir Singh was recorded as Bhumidar under column 4 thereof the whole of the land

has been described as "Gair Mumkin Plot Wa Makan," i.e. Uncultivable land under plots and buildings. It thus ceased to be land for the purposes of the Act. If that be so, the provisions thereof will not longer apply and the remedy of the aggrieved party, if any, would be under the general law of the land.

As stated in the preamble to the Act itself, the Act was designed to provide for modification of Zamindari system so as to create a uniform body of peasant proprietors without intermediaries, for the unification of the Punjab and Agra systems of tenancy laws in force in the State of Delhi Land to make provision for other matters connected therewith. Consequently, the erstwhile ˇproprietors of agricultural land in the Union Territory of Delhi ceased to exist after the Act came into force and if any land was part of a holding of a proprietor he became a Bhumidar of it. If it was part of a holding of some other reason such as tenant or sub-tenant etc. he became either a Bhumidar or an asami, whereupon the rights of the proprietor in that land ceased.

12. So, under the provisions of the Act, a person could either be a Bhumidar of Agricultural land or he could be an asami (See Section 4(1) of the Act). Section 22 of the Act provides that:

"A Bhumidar or Asami shall, subject to the provisions of this Act, have the right to the exclusive possession of all land comprised in his respective holding and to use land for any purpose connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming and to make any improvement."

13. Evidently user of the land for any purpose other than that connected with agriculture, horticulture or animal husbandry etc. by a Bhumidar is prohibited by this Section. However, Section 23 allows a Bhumidar or an asami to use his holding or part thereof for industrial purposes other than those immediately connected with any of the purposes referred to in Section 22 if the same is situated within the belt declared for the purpose by the Chief Commissioner by notification in the official gazette. He

may also do so after obtaining sanction of the chief Commissioner in the prescribed manner even though the land does not lie within such a belt. It is thus essential for a Bhumidar to retain possession of its holding at all material times and to use the same for the purpose specified in Section 22 only if he is not continue to be a Bhumidar. Section 33(1) debars a Bhumidar from transferring by sale or gift or otherwise any land to any person other than a religious or charitable institution if as a result of the transfer, the transferor shall be left with less than eight standard acres of land in the Union Territory of Delhi. Of course, he can transfer the whole of his land as envisaged in Sub-section (2) of Section 33 if his entire holding is less than eight standard acres.

14. Section 34 debars a Bhmidar from letting, for any period whatsoever, any land comprised in his holding except in the cases provided for in Section 36. Section 36 enumerates the categories of Bhumidars who are permitted to let the whole or any part of his holding. These include widows, minors, lunatics and persons incapable of cultivating themselves by reason of blindness or physical infirmity etc. Under Section 43 of the Act, transfer of holding or part thereof accompanied with possession is deemed to be a sale. Section 44 lays down the consequences which flow from a Bhumidar letting his holding or part of it in contravention of the provisions contained in Section 35 and 36 of the Act and the lessee shall then be deemed to be purchaser within the meanings of Section 33 and 42. The latter Section provides that on transfer of any holding or a part thereof by a Bhumidar in contravention of the provisions of the Act, the transferee and every other person who may have obtained possession of such holding shall notwithstanding anything in any law be liable to ejectment from such holding or part thereof on the suit of the Gaon Sabha. Even the revenue assistant on receipt of information about the same can take action on his own motion to eject the transferee and every person who may have obtained possession, as stated above. Section 47 provides for the consequences of ejectment Under Section 42 and lays down that all the rights and interests of Bhumidar in the holding shall stand extinguished.

15. Section 81 o the Act too provides for penalty which a Bhumidar may entail if he uses the land for any purpose other than a purpose connected with agriculture, horticulture or animal husbandry, the penalty being that he is liable to ejectment on the suit of Gaon Sabha and he is also liable to pay damages. Thus, on a bare perusal of the foregoing provisions of the Act it is manifest that the Bhumidar is bound not only to retain possession of his land but also use it for specified purposes at all material times if he is to continue to be a Bhumidar. A perusal of Section 84to 87 would further countenance this conclusion."

20. Thus, it is apparent, that a Bhumidar to claim himself/herself to be the owners of the property forming part of the village land has to be in actual physical possession thereof that is to say under cultivator possession if it is agricultural land. In anybody claims to be a joint owner of such property, then parties cannot claim exclusive possession unless partition is effected in accordance with the provisions of the Act. Any threat by either of the parties oust a joint owner from the said property tantamount to causing cloud over the others title. Thus, unless and until, a declaration is sought as stated above, one cannot claim to be in exclusive possession of such property.

21. In this regard the matter was also examined by the Hon'ble Supreme Court in the case of **Om Prakash Agarwal & Ors. Vs. Batara Behera & Ors.** Reported in 1999 (SC) 1093. The relevan portion is reproduced hereunder:-

> "2. Mr. G.L. Sanghi, the learned senior counsel appearing for the appellants contended that the very purpose of the Orissa Land Reforms Act being a progressive legislation relating to agrarian and land tenures, the said Act cannot have any application to the land which is a part of the master plan of a City and, therefore, the High Court committed error in applying the provisions of the Land Reform Act to the case in hand. Mr. Sanghi further contended that in the absence of any materials to indicate that the ˇvendors of the sale deeds belong to the Schedule Castes the embargo contained under Section 22 of the Act will not apply and, therefore, application under Section

23 of the Act was not tenable. Mr. Sanghi also submitted that in view of Section 73(c) of the Land Reforms Act and in view of the fact that the area comes within a master plan thereby necessarily reserved as an urban area the Act cannot have any application. The learned senior counsel for the respondents on the other hand contended, that the definition of "Land" in Section 2(14) is wide enough to include the lands within the municipal area provided the same is used for agricultural purposes or is capable of being for agricultural purposes and in that view of the matter the High Court rightly remitted the matter to the Sub-Divisional Officer for re-consideration.

3. In view of the rival submissions at the Bar the first question that arises for consideration is whether the land as defined in Section 2(14) of the Act and which is either being used or capable of being user for agricultural purposes within the municipal area do come under the purview of Orissa Land Reforms Act. The Act, no doubt is a measure relating to agrarian reforms and land tenures and abolition of intermediary interest but there is no provision in the Act which excludes such agricultural lands merely because they are situated in an Urban Agglomerations. The Act applies to all land which is either used or capable of being used for agricultural purposes irrespective of whether it is situated within a municipal area or in villages. The very object of the legislation being an agrarian reform, the object will be frustrated if agricultural lands within the municipal area are excluded from the purview of the Act. In this view of the matter we have no hesitation to come to the conclusion that the Act applies to all lands which is used or capable of being used for agricultural purposes irrespective of the fact wherever the said land is situated and the conclusion of the High Court on this score is unassailable."

22. Even otherwise the law with regard to the grant of injunction is also well settled, a person who claims injunction must have a legal right in respect of the agricultural land recognized only

when there is a revenue entry i.e. of khasra Godari and Khatuni in the name of the person in respect of the specific portion of the land and not otherwise. The only legal right established on record by the evidence brought on record by both the parties is, that both the parties are joint owners of the suit property being the co-owners even through, they have stated that there was an oral partition but they have not proved as to which portion came in possession of each other. Thus, the case of the respondent, that she was in exclusive possession of the suit property cannot be accepted. Consequently, she is no entitled to the declaration or injunction as prayed for."

11. There is no perversity in this finding. The impugned judgment had noted that both the parties were claiming right over the portion shown red in the site plan; the plaintiff as also defendant No. 1 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.

12. Section 185 of the DLRA reads as under:-

"185. Cognizance of suits, etc, under this Act. - (1) Except as provided by or under this Act no court other than a court mentioned in column 7 of Schedule I shall , notwithstanding anything contained in the Code of Civil Procedure, 1908, take cognizance of any suit, application, or proceedings mentioned in column 3 thereof.

(2) Except as hereinafter provided no appeal shall lie form an order passed under any of the proceedings mentioned in column 3 of the Schedule aforesaid.

(3) An appeal shall lie from the final order passed by a court mentioned in column 3 to the court or authority mentioned in column 8 thereof.

(4) A second appeal shall lie from the final order passed in an appeal under sub section (3) to the authority, if any, mentioned against it in column 9 of the Schedule aforesaid.."

13. This Section 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 DLRA; revenue court 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; jurisdiction vests with the revenue court.

14. The averments in the plaint as also the prayer clause have been perused. The plaintiff is claiming dispossession from the red portion B C D E in the site plan; defence of defendant No. 1 that he has title and possession over the said land; this question as to who has title of this co-owned land can only be decided by the revenue court. There is a clear cloud over this title. The contention of the appellant that a co-owner cannot seek a partition of his holding is answered by Section 55 of the DLRA which stipulates that holding of bhumidari is partitionable and a bhumidar may sue for a partition of his holding. This contention is squarely covered by Schedule I; revenue courts alone have the jurisdiction to deal with this matter. Since the red portion is claimed by both the owners i.e. the plaintiff and defendant No. 1, proper remedy would be a relief of partition against the other co-owner under Section 55 of the DLRA which jurisdiction vests with the revenue court.

15. The impugned judgment in no manner calls for any interference. The judgments relied upon by learned counsel for the appellants are all distinguishable. In the case of **Ram Chander** (Supra) there was no dispute about the title to the land; permanent injunction had been claimed on the basis of succession to bhumidari rights by virtue of a Will. The judgments of **Tara Chand** (Supra),**Cdr. Bhupinder Singh Rekhi** (Supra), **Kirpa Ram** (Supra) **Vinod Kumar Sharma** (Supra) all proceeded on the assumption that what had been claimed by the plaintiff was only an injunction; there was no dispute about the title over the suit land; this was after a meaningful reading of the plaint; in this context it was noted that where there is no dispute about the title of the land; suit simplicitor being a suit for injunction is maintainable and such a suit is not barred under Section 185 of the DRCA. So also was the proposition reiterated by the Apex Court in the Rejender Singh; averments in the plaint have necessarily to be gone into to decide this question. As aforenoted in the instant case both the parties are contesting their right over the disputed

red portion; plaintiff and defendant No. 1 are both claiming title to the suit land; the impugned had correctly and rightly noted that this has created a cloud over the title of the red portion; such a cloud can be cleared only by the revenue court.

16. Substantial question of law is accordingly answered in favour of the respondent and against the appellant. There is no merit in this appeal. Appeal as also pending application are dismissed.

ILR (2011) V DELHI 380
CO. PET.

ADVANCE TELEVISION NETWORK LTD. ....PETITIONER

VERSUS

THE REGISTRAR OF COMPANIES ....RESPONDENT

(MANMOHAN, J.)

CO. PET. NO. : 316/2006 & CO. APPL. NO. : 1478/2006 **DATE OF DECISION: 04.07.2011**

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.

In the opinion of this Court, the exercise of power under Section 433 (a), which has the effect of causing death of a company, should be exercised cautiously. It should be the endeavour of the Court to attempt to revive the company though at that moment the company may be making losses. It is the duty of the Court to welcome revival rather than affirm death of a company and it is for this purpose the Legislature has conferred discretionary power on the Court. It has been 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 and 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 fact, in **New Swadeshi Mills of Ahmedabad Ltd. Vs. Dye-Chem Corporation** (1986) 59 Com Cases 183 (DB-Guj), the Court held, *"It may be that despite the inability to pay its debts, a company has still prospects of coming back to life and if the court is told of any specific proposal, which in the opinion of the court is likely to materialize, the court will be inclined to give a chance to resurrect the company. It should be the policy of the court to attempt to revive though at the moment the company may not be solvent and may not be able to meet its obligations to its creditors. But this should be only if it is shown that there is reasonable prospect for resurrection and survival. It may be easy for a court when once it is shown that the company is unable to pay its debts*

to bury it deep and distribute whatever is available as distributable surplus. But it is the duty of the court to welcome revival rather than affirm the death of a company and for that purpose the court is called upon to make a discreet exercise." **(Para 10)**

Even in the cases relied upon by the petitioner in particular the case of **Bombay Metropolitan Transport Corporation Ltd. Vs. Employees of Bombay Metropolitan Transport Corporation Ltd. (CIDCO) and Ors.** (supra), the High Courts have held that it is only when the company is not in a position to pay its debt and finds its substratum gone, it is entitled to resort to winding up proceeding as provided by Section 433(a) of the Act. **(Para 12)**

Important Issue Involved: Mere suspension of business by itself is not a ground to wind up a company. The process of winding up of the Company under Section 433 of the Companies Act, 1956 is discretionary which should be exercised cautiously by the Court.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. R.C. Beri, Advocate with Mr. S.K. Beri, Advocate.

FOR THE RESPONDENT : Mr. Darpan Wadhwa, Advocate with Ms. Sheena Iype, Advocate for ROC. Mr. Chandan Sharma, Advocate for Mr. Rajeev Sharma, Advocate for Prasar Bharti.

CASES REFERRED TO:

1. *A. Sreedharan Nair* vs. *Union Hardwares (Private) Ltd.,* (1997) 89 CC 37 (Kerala).
2. *Surendra Kumar Pareek* vs. *Shree Guru Nanak Oils Pvt. Ltd.,* (1995) 82 CC 642 (Raj.).

3. *Bombay Metropolitan Transport Corporation Ltd.* vs. *Employees of Bombay Metropolitan Transport Corporation Ltd. (CIDCO) and Ors.,* (1991) 71 CC 473 (Bom.).
4. *New Swadeshi Mills of Ahmedabad Ltd.* vs. *Dye-Chem Corporation* (1986) 59 Com Cases 183 (DB-Guj).
5. *Registrar of Companies, Bihar* vs. *Shreepalpur Cold Storage Private Ltd.,* (1974) 44 CC 479 (Patna).

RESULT: Petition dismissed.

MANMOHAN, J.

1. Present petition has been filed under Section 433(a) read with Section 439 of the Companies Act, 1956 (for short 'Act') for voluntary winding up of the petitioner company.

2. Mr. Beri submits that the petitioner-company has not done any business since 2001-2002 and thus, it has not earned any income for the last ten years. He states there is no hope or prospect of the petitioner-company doing any further business as stated in its Memorandum of Association. He submits that keeping in view the long duration in which the petitioner company had not done any business, it would be just and equitable to wind up the petitioner company. In this context, he relies upon judgments in **Surendra Kumar Pareek Vs. Shree Guru Nanak Oils Pvt. Ltd.,** (1995) 82 CC 642 (Raj.), **A. Sreedharan Nair Vs. Union Hardwares (Private) Ltd.,** (1997) 89 CC 37 (Kerala) and **Registrar of Companies, Bihar Vs. Shreepalpur Cold Storage Private Ltd.,** (1974) 44 CC 479 (Patna).

3. Mr. Beri candidly admits that a dispute in relation to business done with Prasar Bharti in 1998-1999, is pending adjudication before learned Arbitrator, Mr. Justice (Retd.) V.N. Khare.

4. Mr. Beri submits that in view of the abovestated facts, theshareholders of petitioner-company have passed a special resolution in an extraordinary general meeting held on 9th October, 2006 resolving to wind up the petitioner-company by the Court. In this context, he relies upon a Division Bench judgment of Bombay High Court in **Bombay Metropolitan Transport Corporation Ltd. Vs. Employees of Bombay Metropolitan Transport Corporation Ltd. (CIDCO) and Ors.,** (1991) 71 CC 473 (Bom.) wherein the Court has held,"That the company is

unable to pay its debts is not, as it cannot be, disputed. It is not relevant that the company got into its present straitened financial position due to its own misdoings or mismanagement, nor is the motive behind the filing of the winding-up petition relevant. This Court said in Bachharaj Factories Ltd. v. Hirjee Mills Ltd. (1995) 25 Comp. Cas 227, 251: "If the petitioners have made out a case for the winding up of the company, if they have placed materials before the Court which satisfy the Court that the company is insolvent, if they have placed materials before the Court which satisfy the court that the substratum of the company is gone, it is difficult to understand what the motive of the petitioners has got to do with the question whether an order of winding up should be made or not." Where the company is not in a position to pay its debts and finds that its substratum has gone it is entitled to resort to winding up proceedings after a resolution as provided by Section 433(1)(a) and it is difficult to see how such proceedings can be an abuse of process of Court. Where the company is unable to pay its debts, winding up ought generally to follow in public interest, so that the public do not unwarily deal with the company and jeopardise its interests……..The company has satisfied us that it has passed a special resolution that it be wound up by the Court, that it unable to pay its debts and that its substratum has gone so that it is just and equitable that it should be wound up….."

5. On the other hand, Mr. Darpan Wadhwa, learned counsel for Registrar of Companies (in short 'ROC') opposes the present petition. He submits 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.

6. Mr. Chandan Sharma, learned counsel for Prasar Bharti joins the counsel for ROC in opposing the present petition. He submits 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. He also states that 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.

7. Having heard the learned counsel for parties and having perused the papers, I am of the opinion that it would be appropriate to first enunciate the settled principle of law with regard to winding up.

8. While Chapter II of the Act deals with 'Winding up by Court', Chapter III deals with 'Voluntary Winding up'. Any Company, which wishes to wind itself up, has either option. However, it may be noted that Chapter III, winding up which is without reference to the Court, requires that the Company has the ability to discharge its liability in full within one year—which ability the petitioner admittedly does not possess.

9. The petitioner in its petition has not specifically averred which particular sub-sections it has invoked. However, during the course of arguments, the petitioner has relied upon sub-sections (a) and (c) of Section 433. But the process of winding up under Section 433 is discretionary. The language of Section 433 itself states that a "company may be wound up by the Court" in the circumstances listed in (a) and (f).

10. In the opinion of this Court, the exercise of power under Section 433 (a), which has the effect of causing death of a company, should be exercised cautiously. It should be the endeavour of the Court to attempt to revive the company though at that moment the company may be making losses. It is the duty of the Court to welcome revival rather than affirm death of a company and it is for this purpose the Legislature has conferred discretionary power on the Court. It has been 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 and 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 fact, in **New Swadeshi Mills of Ahmedabad Ltd. Vs. Dye-Chem Corporation** (1986) 59 Com Cases 183 (DB-Guj), the Court held, *"It may be that despite the inability to pay its debts, a company has still prospects of coming back to life and if the court is told of any specific proposal, which in the opinion of the court is likely to materialize, the court will be inclined to give a chance to resurrect the company. It should be the policy of the court to attempt to revive though at the moment the company may not be solvent and may not be able to meet its obligations to its creditors. But this should be only if it is shown that there is reasonable prospect*

for resurrection and survival. It may be easy for a court when once it is shown that the company is unable to pay its debts to bury it deep and distribute whatever is available as distributable surplus. But it is the duty of the court to welcome revival rather than affirm the death of a company and for that purpose the court is called upon to make a discreet exercise."

11. In the present case, this Court finds that the petitioner company has filed counter claim of Rs.11,21,63,605/-against Prasar Bharti in arbitration proceedings which is still pending adjudication. In the event, the counter-claim of the petitioner-company is allowed, the possibility of revival of petitioner-company cannot be denied. Accordingly this Court in view of the pendency of petitioner company's counter-claim against Prasar Bharti cannot reach the conclusion that the substratum of the company has disappeared and there is no possibility of resumption of business by the petitioner company. Also, keeping in view the background of the arbitration proceedings between the petitioner company and Prasar Bharti, it seems to this Court that 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 -which in the opinion of this Court cannot be permitted.

12. Even in the cases relied upon by the petitioner in particular the case of **Bombay Metropolitan Transport Corporation Ltd. Vs. Employees of Bombay Metropolitan Transport Corporation Ltd. (CIDCO) and Ors.** (supra), the High Courts have held that it is only when the company is not in a position to pay its debt and finds its substratum gone, it is entitled to resort to winding up proceeding as provided by Section 433(a) of the Act.

13. In view of the aforesaid, I am of the opinion that in the present case, no justifiable ground for winding up is made out.

14. Accordingly, the present petition and application are dismissed, but with no order as to costs.

ILR (2011) V DELHI 388
W.P.(C)

UNITED BIOTECH PVT. LTD. ....PETITIONER

VERSUS

ORCHID CHEMICALS AND PHARMACEUTICALS LTD. AND ORS. ....RESPONDENTS

(S. MURALIDHAR, J.)

W.P.(C) NO. 8198/2008 & CM NO. : 15758/2008 DATE OF DECISION: 04.07.2011

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.

While the principles of comity of jurisdiction ought to be respected, it does not mean that the IPAB should be bound

by the orders of the High Court at the stage of interim injunction as the opinions expressed at that stage are at best tentative. After the enactment of the TM Act, 1999 the disputes regarding registration of marks and their rectification were left to be decided by the IPAB in the first place. Earlier this adjudicative function was with the High Court. The IPAB is therefore expected, as a special Tribunal, to form an independent view while at the same time respecting any final determination of the issue by a High Court on the question of deceptive similarity involving the same mark. The converse would not necessarily follow. Any view expressed by the IPAB on the issue in respect of a trade mark would at best have a persuasive effect on the High Court deciding a passing off or infringement action. In the instant case, the IPAB's impugned order cannot be held to be invalid only because it did not advert to, much less follow, the decision of the High Court at the stage of interim injunction. **(Para 30)**

Important Issue Involved: (A) The test of deceptive similarity has to be applied ''from the point of view of men of average intelligence and imperfect recollection.''

(B) Comparing the two competing marks as a whole is the rule and the dissection of a mark is an exception which is generally not permitted.

(C) Unlike a consumer durable product, the variations in the size of font, colour scheme, trade dress of the label for a medicine would not make much of a difference.

(D) Mere fact that drugs are priced differently is not sufficient to hold that the unwary average purchaser of the drugs will not be confused into thinking one is as good as the other or in fact both are the same drug.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Hemant Singh with Ms. Mamta Singh and Mr. Sumit Rajput, Advocates.

FOR THE RESPONDENTS : Ms. Gladys Daniel with Mr. S. Santanam Swaminadhan, Advocates.

CASES REFERRED TO:

1. *Astrazeneca UK Ltd.* vs. *Orchid Chemicals and Pharmaceuticals Ltd.* 2006 (32) PTC 33.
2. *Ramdev Food Products Ltd.* vs. *Arvindbhai Rambhai Patel* AIR 2006 SC 3304.
3. *Cadila Health Care Ltd.* vs. *Cadila Pharmaceutical Ltd.* AIR 2001 SC 1952.
4. *Durga Dutt Sharma* vs. *N.P. Laboratories* AIR 1965 SC 980.
5. *Corn Products Refining Co.* vs. *Shangrila Food Products Ltd.* AIR 1963 SC 142.
6. *Amritdhara Pharmacy* vs. *Satyadeo Gupta* AIR 1963 SC 449.
7. *Trade Marks* vs. *Ashok Chandra Rakhit* AIR 1955 SC 558.

RESULT: Dismissed.

S. MURALIDHAR, J.

1. The challenge in this petition by United Biotech Pvt. Ltd. ('UBPL') is to an order dated 14th October 2008 passed by the Intellectual Property Appellate Board ('IPAB') allowing an application filed by Respondent No. 1 Orchid Chemicals and Pharmaceuticals Ltd. ('OCPL') seeking removal of the trade mark FORZID registered under No. 1144258 as of 18th October 2002 in Class 5 from the Register of Trade Marks.

Background facts

2. The Petitioner UBPL states that it is, inter alia, engaged in the

manufacturing and selling of pharmaceutical preparations including injections bearing the trade mark FORZID. UBPL claims that since 2002 it took steps to launch CEFTAZIDIME injections in the market under the trade mark FORZID. It entered into a licence agreement with M/s. Oscar Remedies Pvt. Ltd. („ORPL.), Haryana for manufacturing FORZID injections. UBPL made an application for registration of the said trade mark under No. 1144258 dated 18th October 2002 in Class 5. The said mark was advertised in Journal Mega dated 25th November 2003. The registration was granted unopposed. The sales figures of UBPL's products under the trade mark FORZID for the years 2002-03 till 2006-07 have been set out in the writ petition.

3. According to UBPL the mark FORZID is adopted from the words "FOR" and "ZID" the latter being derived from the generic drug CEFTAZIDIME. UBPL claims that there are several manufacturers of CEFTAZIDIME injections using trade marks with the suffix "ZID" which is stated to be common to trade. UBPL states that FORZID is an invented word coined by it. The mark is unique and identifies exclusively with the products manufactured by UBPL. FORZID injection is a Schedule H drug and can be sold only on the written prescription of a registered medical practitioner.

4. Respondent No. 1 OCPL also manufactures CEFTAZIDIME injections. It does so under the trade mark ORZID. ORPL, the licencee of UBPL, purchases the bulk drug CEFTAZIDIME from OCPL to manufacture FORZID injections for UBPL. It is stated that CEFTAZIDIME sterile powder is the basic bulk drug for manufacture of UBPL's FORZID injection and OCPL's ORZID injection. UBPL claims that OCPL was aware, at least from 2003, that UBPL was marketing CEFTAZIDIME injections using the trade mark FORZID. UBPL further states that its FORZID product and OCPL's ORZID product were listed on the same page of the annual pharmaceutical book "Drug Today" continuously in 2005, 2006 and 2007.

5. UBPL claims that the colour scheme, getup and layout of the UBPL's FORZID labels are completely different from those of OCPL's ORZID labels. Further, it is claimed that UBPL's FORZID injections are sold to various hospitals and central government organisations and there is no single instance of actual or potential confusion being reported anywhere.

6. OCPL claims that in the course of its business in 1999 OCPL coined and adopted the unique trade mark ORZID with respect to a pharmaceutical preparation containing the active pharmaceutical ingredient CEFTAZIDIME. OCPL obtained manufacturing licence for the product marketed under the trade mark ORZID on 18th December 1998 and on 8th January 1999 with respect to export sale and domestic sale respectively. OCPL states that it commenced manufacture and sale of CEFTAZIDIME formulation under the trade mark ORZID in May 1999. On 6th September 1999 OCPL applied for and obtained registration of the trade mark ORZID under No. 874808 in Class 5 in respect of medicinal and pharmaceutical preparations claiming use of the mark since May 1999. The application was advertised in the Trade Mark Journal No. 1291 (S) dated 13th March 2003. There was no opposition to this application.

7. OCPL states that when it became aware of the use of the deceptively similar trade mark FORZID by UBPL in the month of September 2007, it filed CS No. 1027 of 2007 in the High Court of Madras to seek a permanent injunction to restrain UBPL from infringing OCPL's registered trade mark ORZID. OCPL also filed O.A. No. 1275 of 2007 seeking interim injunction to restrain UBPL from infringing the registered trade mark ORZID by using the impugned trade mark FORZID. On 22nd November 2007, OCPL obtained an ex-parte interim injunction in the aforementioned O.A. No. 1275 of 2007.

8. OCPL claims that only when UBPL filed a counter affidavit to OCPL's application for interim injunction that OCPL became aware that the registration for the trade mark FORZID has been granted in favour of UBPL. Taking note of this fact, the High Court of Madras by an order dated 15th February 2008 dismissed OCPL's application for interim injunction as far as infringement of the trade mark ORZID was concerned. The High Court noted that "as on date, there is no application taken out by the plaintiff (OCPL) for an interim order of injunction restraining the defendant (UBPL) from passing off." In the said order, the High Court also noted that in view of the statement made by UBPL, OCPL intended to initiate proceedings for rectification of the mark FORZID.

The order of the Madras High Court refusing OCPL interim injunction

9. OCPL then filed OA No. 187 of 2008 seeking to restrain UBPL from passing off its pharmaceutical preparation using the trade mark FORZID. By a detailed order dated 30th April 2008, learned Single Judge of the High Court of Madras dismissed OA No. 187 of 2008 and held that OCPL would not be entitled to an injunction as prayed for "despite the fact that the plaintiff (OCPL) is admittedly the prior user of the trade mark and despite the fact that both the marks "ORZID" and "FORZID" per se have phonetic similarity." The reasons given by the learned Single Judge were as under:

(a) UBPL has been using the trade mark FORZID for the past six years. Though this would not constitute acquiescence under Section 33 especially since the plaintiff (OCPL) claims no knowledge till 2007, it would be a pointer to where the balance of convenience lies.

(b) While the OCPL's product was available only in vials of 250 mg for a price of Rs. 75/-, UBPL's product was available in vials of 1 gm (1000 mg) and 2 gm (2000 mg) for a price of Rs. 310/- and Rs. 575/- respectively. This fact, coupled with the fact that "there is only phonetic similarity and also the fact that it is a Schedule "H" drug would disentitle the plaintiff (OCPL) to an order of injunction."

(c) The judgment of the Supreme Court in **Cadila Health Care Ltd. v. Cadila Pharmaceutical Ltd.** AIR 2001 SC 1952 mandating a higher standard in case of medicinal products may "not hold good in the present case" since "a more rigorous test" was prescribed only where the two competitive drugs "had a marked difference in the compositions with complete different side effects."

(d) OCPL had not initiated any action against ORPL which was by itself independently marketing CEFTAZIDIME injections under a deceptively similar mark ORZID.

(e) OCPL had successfully defended an application for injunction in respect of another medicinal product 'Meromer' before the Delhi High Court in **Astrazeneca UK Ltd. v. Orchid Chemicals and Pharmaceuticals Ltd.** 2006 (32) PTC 33. There the High Court had negatived the plea that OCPL's 'Meromer' was

deceptively similar to the Petitioner Astrazeneca's trade mark 'Meronem' since 'Mero' which was common to both marks was a generic word having its root in the active pharmaceutical ingredient and had to be ignored while making a comparison of the two marks.

(f) The word 'ZID' was generic. The Drug Today Yearbook for 2005 showed that there were more than sixty companies manufacturing the same product and the names adopted by all of them had been derived from the active ingredient CEFTAZIDIME: they had taken 'CEF' or 'CEFTA' or 'ZID' or 'DIME' as part of the trade mark.

10. At the time when OCPL's application for rectification was taken up for hearing by the IPAB, the appeal, OSA No. 290 of 2008, filed by OCPL was pending before the Division Bench of the Madras High Court. It was argued before the IPAB on behalf of UBPL that in view of the rejection by the learned Single Judge of the Madras High Court of OCPL's prayer for interim injunction, OCPL's application for rectification of UBPL's trade mark FORZID should also be rejected. The IPAB in its impugned order, appears to have erroneously noted that OA No. 187 of 2008 filed by OCPL seeking interim injunction in the Madras High Court was "pending" when in fact it was the appeal against the order dated 30th April 2008 of the learned Single Judge dismissing the aforementioned OA No. 187 of 2008 which was pending before the Division Bench of that High Court.

The impugned order of the IPAB

11. The IPAB in its impugned order dated 14th October 2008 first held that OCPL had the locus standi to maintain the rectification application. The IPAB allowed the rectification application and directed the removal of the impugned trade mark FORZID under No. 1144258 in Class 5 from the Register of Trade Marks. The findings of the IPAB may be summarised thus:

(a) FORZID cannot be said to be phonetically altogether dissimilar to ORZID. When pronounced, both marks give "only a slightly different ˇsound but structurally and visually the marks ORZID and FORZID have close resemblance to each other."

(b) When comparing the competing marks as a whole without dissecting, it is seen that "apart from the letter 'F' in the mark of Respondent No.1 (UBPL) the two marks are identical". The letter 'F' was not such as would enable the buyers to distinguish the one mark from the other. "Due to overall close structural and visual similarity the unwary purchaser will be deceived or confused."

(c) There was no material placed on record to show that UBPL had widely advertised its marks since 2002. The mere fact that OCPL has been selling bulk drugs to various companies would not enable it to know what products were being manufactured from the said bulk drug and under what trade mark.

(d) The fact that OCPL did not oppose the application for registration of FORZID showed that it was not aware of the filing of such application. Merely because FORZID and ORZID appeared on the same page of Drugs Today 2005 did not by itself prove that OCPL was aware of the use of FORZID by UBPL prior to 2007.

(e) FORZID was not only a slavish copy of OCPL's ORZID but UBPL had "submerged the trade mark" of OCPL "in its entirety in the impugned trade mark 'FORZID'." OCPL had been using ORZID since 1999 and had also obtained prior registration. Therefore, the adoption of trade mark 'FORZID' by UBPL subsequent thereto gave rise to serious doubts about the bona fide adoption of the impugned trade mark by UBPL. The registration obtained by UBPL was hit by Section 9 (1)(a) and (2)(a) and Section 11 (1) and 2(a) of the Trade Marks Act, 1999 ('TM Act, 1999').

(f) The submission of UBPL that 'ZID' was common to trade "was not sustainable in the absence of any proof that the names/ marks occurring in the Drugs Today 2005 are at all in use or if in use, the extent of their use."

(g) UBPL had obtained registration on a false claim that it had been using mark FORZID since 1st January 2001. There was no material placed on record by UBPL to substantiate this claim.

12. Aggrieved by the said order, UBPL filed the present petition. On 1st December 2008, this Court stayed the operation of the impugned order dated 14th October 2008 of the IPAB. The said interim order has continued.

Submissions of counsel

13. Mr. Hemant Singh, learned counsel appearing for the Petitioner first contended that the similarity in respect of the generic feature "ZID" will not make UBPL's mark FORZID deceptively similar to OCPL's ORZID. Further, OCPL held a registration for the label mark of which the word ORZID formed part. Mr. Singh urged that ZID was not the essential feature of the trade mark ORZID and that for the purposes of the test of deception similarity must exist in respect of a feature other than the generic part. In particular, he submitted that if the word ZID was replaced by some other word like 'TIS' or 'BES' and then the two marks were compared as a whole they would not be deceptively similar.

14. It was next urged by Mr. Singh that the IPAB erred in ignoring the order dated 30th April 2008 of the learned Single Judge of the Madras High Court refusing OCPL interim injunction. The said judgment has since been affirmed by the Division Bench of the Madras High Court on 25th November 2008. He submitted that the impugned order of the IPAB, therefore, be set aside and the case remanded to the IPAB for a fresh hearing.

15. Thirdly, it is submitted that the IPAB not only discarded the test of deceptive similarity by comparing the marks as a whole without ignoring the generic part but also failed to notice that the registration in favour of OCPL was in respect of a label mark. The font, the colour, the trade dress and appearance of the label used by UBPL was different in each respect from the trade dress and get up of the label used by the OCPL. Referring to the judgment in **Cadila Health Care,** Mr. Singh submitted that the ˇcomposition of the two products may be similar but their respective prices were markedly different. Therefore, there was no scope for confusion.

16. Ms. Gladys Daniel, learned counsel appearing for OCPL first submitted that the learned Single Judge of the Madras High Court had also held that the trade marks were phonetically similar. The learned

Single Judge had also found that OCPL was the registered prior user. These findings were not disturbed by the Division Bench. Considering that ORZID was a Schedule H drug, there was a real danger of the injection FORZID being supplied to a customer asking for ORZID and vice-a-versa. The dosages of the two injections were different and if wrongly administered could result in serious irreversible side effects. Even the bad handwriting of a doctor on a prescription could lead to confusion and deception. She urged that the higher threshold for drugs as explained in **Cadila Health Care** should apply.

17. As regards the refusal of injunction by the learned Single Judge, which was affirmed by the Division Bench of the Madras High Court, Ms. Daniel submitted that this was only at the interlocutory stage and as such was not binding on the IPAB. She pointed out that the entire mark of OCPL was embedded in the mark of UBPL and therefore the latter's subsequent adoption of FORZID was not honest. She pointed out that the registration in favour of OCPL was in respect of the device of which the word mark formed an integral and inseparable part. She submitted that the IPAB had rightly compared the two marks as a whole.

Deceptive similarity

18. Under Section 9 (2) (a) TM Act 1999, a mark shall not be registered as a trade mark if "it is of such nature as to deceive the public or cause confusion." Under Section 11 (1) (b) TM Act 1999 a trade mark shall not be registered if because of "its similarity to an earlier trade mark and the identity or similarity of the goods or services covered by the trade mark, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark." The exception to this is in Section 12 TM Act 1999 which requires the applicant to show "honest concurrent use or other special circumstances" to enable the Registrar to ˇpermit the registration by more than one proprietor of the trade marks which are identical or similar in respect of the same or similar goods.

19. In the above background, the issues that require to be considered are whether the two competing marks FORZID and ORZID are deceptively similar; whether registration could have been validly granted of the mark FORZID when admittedly OCPL held a prior registration in respect of identical goods for a label mark of which the word ORZID forms an

integral part and further when admittedly OCPL is the prior user. A further issue that arises is whether the defences of acquiescence and honest and concurrent user are available to UBPL?

20. The word ZID which is common to both ORZID and FORZID is undoubtedly derived from the active pharmaceutical ingredient CEFTAZIDIME. However, this is not the only part of ORZID which is used by UBPL as part of its mark FORZID. It is obvious that FORZID is nothing but ORZID prefixed by a soft consonant F. Although it was repeatedly urged by Mr. Hemant Singh, learned counsel for UBPL that the generic part of FORZID and ORZID, viz., ZID had to be ignored while making comparison of the two competing marks, the fact remains that the entire word mark ORZID is being used as part of the word mark FORZID with only an addition of a single letter „F.. In the considered view of this Court, the mere prefixing of the letter F to the mark of OCPL fails to distinguish FORZID sufficiently from ORZID so as not to cause deception or confusion in the mind of an average customer with imperfect recall. The addition as a prefix of the soft consonant F to ORZID does not dilute the phonetic and structural similarity of the two marks. In the context of similar marks the 'essential feature' test as evolved in **Durga Dutt Sharma v. N.P. Laboratories** AIR 1965 SC 980 for determining deceptive similarity requires examination "whether the essential features of the plaintiff's trade mark are to be found in that used by the defendant." In the instant case the entire word mark ORZID, and not merely its essential feature, is subsumed in UBPL's mark FORZID.

21. In **Amritdhara Pharmacy v. Satyadeo Gupta** AIR 1963 SC 449, Supreme Court reiterated the tests of deceptive similarity it had formulated in **Corn Products Refining Co. v. Shangrila Food Products Ltd.** AIR 1963 SC 142. In para 8 of the judgment in Amritdhara Pharmacy, the Supreme Court held:

> "8. Let us apply these tests to the facts of the case under our consideration. It is not disputed before us that the two names 'Amritdhara' and 'Lakshmandhara' are in use in respect of the same description of goods, namely, a medicinal preparation for the alleviation of various ailments. Such medicinal preparation will be purchased mostly by people who instead of going to a doctor wish to purchase a medicine for the quick alleviation of their suffering, both villagers and townsfolk, literate as well as

> illiterate. As we said in Corn Products Refining Co. v. Shangrila food Products Ltd. the question has to be approached from the point of view of a man of average intelligence and imperfect recollection. To such a man the overall structural and phonetic similarity of the two names 'Amritdhara' and 'Lakshmandhara' is, in our opinion, likely to deceive or cause confusion. We must consider the overall similarity of two composite words Amritdhara' and 'Lakshmandhara'. We do not think that the learned Judges of the High Court were right in saying that no Indian would mistake one for the other. An unwary purchaser of average intelligence and imperfect recollection would not, as the High Court supposed, spilt the name into its component parts and consider the etymological meaning thereof or even consider the meaning of the composite words as 'current of nectar" or 'current of Lakshman'. He would go more by the overall structural and phonetic similarity and the nature of the medicine he has previously purchased, or has been told about, or about which has otherwise learnt and which he wants to purchase."

22. There is no need to multiply precedents since the law explained in the above passage has been consistently followed in several subsequent cases. The test of deceptive similarity has to be applied "from the point of view of men of average intelligence and imperfect recollection". Thus viewed, there can be no difficulty in concluding that FORZID and ORZID are deceptively similar marks and are likely to cause confusion in the mind of an average customer with imperfect recollection.

Anti-dissection rule

23. No fault can also be found with the approach of the IPAB in comparing the two competing marks as a whole. That is in fact the rule and the dissection of a mark is an exception which is generally not permitted. The anti-dissection rule is based upon a common sense observation of customer behaviour as explained in **McCarthy on Trade Marks and Unfair Competition** [J Thomas McCarthy, IV Ed., Clark Boardman Callaghan 2007] under the sub-heading „Comparing Marks: Differnces and Similarities.. The treatise further states:

> "23.15 .... The typical shopper does not retain all of the individual details of a composite mark in his or her mind, but retains only

an overall, general impression created by the composite as a whole. It is the overall impression created by the mark from the ordinary shopper's cursory observation in the marketplace that will or will not lead to a likelihood of confusion, not the impression created from a meticulous comparison as expressed in carefully weighed analysis in legal briefs."

"In litigation over the alleged similarity of marks, the owner will emphasize the similarities and the alleged infringer will emphasize the differences. The point is that the two marks should not be examined with a microscope to find the differences, for this is not the way the average purchaser views the marks. To the average buyer, the points of similarity are the more important that minor points of difference. A court should not engage "technical gymnastics" in an attempt to find some minor differences between conflicting marks. However, where there are both similarities and differences in the marks, there must be weighed against one another to see which predominate."

24. The dissection of the marks as suggested by learned counsel for UBPL is an artificial one. He wanted 'ZID' which was the generic part of the marks to be substituted by some other word like 'TIS' or 'BES' and then the two marks to be compared. This submission is based on the decision in **Astrazeneca UK Limited** where 'Mero' was identified as the generic part of the mark derived from the active pharmaceutical ingredient. In the first place, no such submission appears to have been made before the IPAB. Secondly, the type of dissection suggested, i.e. separating 'FOR' and 'ZID' and then replacing 'ZID' with another word 'TIS' before comparing the marks does not appear to be permissible in law. As already noticed it is not just the generic part 'ZID' that is common to both marks. The further prefix 'OR' too is common. In other words, 'ORZID' is common to both marks. No parallel can therefore be drawn with the facts in **Astrazeneca UK Limited**. A person of average intelligence and imperfect recollection seeking to buy CEFTAZIDIME injection would hardly undertake any 'dissection' exercise, much less in the manner suggested by learned counsel for UBPL, to discern the fine distinction between the marks. Also, unlike a consumer durable product, the variations in the size of font, colour scheme, trade dress of the label for a medicine would not make much of a difference.

In the considered view of the Court, the IPAB has applied the correct test in coming to the conclusion that FORZID is deceptively similar to ORZID.

The Cadila Health Care test

25.1 That these marks are used in respect of Schedule H drugs raises the threshold for comparison. The "more rigorous test" as explained in Cadila Health Care would come into play. There the Supreme Court referred to foreign precedents including American Cynamid Corporation v. Connaught Laboratories Inc. 231 USPQ 128 (2nd Cir 1986) in which it was held:"Exacting judicial scrutiny is required if there is a possibility of marks on medicinal products because the potential harm may be far more dire than that in confusion over ordinary consumer products." The Court also referred to Blansett Pharmaceuticals v. Carmick Laboratories 25 USPQ 2nd 1473 (TTAB 1993)in which it was observed: "Confusion and mistake is likely, even for prescription drugs prescribed by doctors and dispensed by pharmacists, where these similar goods are marketed under marks which look alike and sound alike."

25.2 On the facts of the case in **Cadila Health Care Ltd.**, the Supreme Court held as under: (SCC, p. 91)

"25. The drugs have a marked difference in the compositions with completely different side effects, the test should be applied strictly as the possibility of harm resulting from any kind of confusion by the consumer can have unpleasant if not disastrous results. The Courts need to be particular vigilant where the defendant's drug, of which passing of is alleged, is meant for curing the same ailment as the plaintiff's medicine but the compositions are different. The confusion is more likely in such cases and the incorrect intake of medicine may even result in loss of life or other serious health problems."

25.3 Further in para 28 it was observed as under: (SCC, pp 91-92)

"The defendant concedes that physicians and pharmacists are not infallible but urges that the members of these professions are carefully trained to detect differences in the characteristics of pharmaceutical products. While this is doubtless true to dos not open the door to the adoption by manufacturers of medicines of

trade marks or names which would be confusingly similar to anyone not exercising such great care. For physicians and pharmacists are human and in common with the rest of mankind are subject to human frailties. In the field of medicinal remedies the Courts may not speculate as to whether there is a probability of confusion between similar names. If there is any possibility of such confusion in the case of medicines public policy requires that the use of the confusingly similar name be enjoined."

25.4 In conclusion, it was held in para 33 as under: (SCC, p. 94)

"While examining such cases in India, what has to be kept in mind is the purchaser of such goods in India who may have absolutely no knowledge of English language or of the language in which the trade mark is written and to whom different words with slight difference in spellings may sound phonetically the same. While dealing with cases relating to passing off, one of the important tests which has to be applied in each case is whether the misrepresentation made by the defendant is of such a nature as is likely to cause an ordinary consumer to confuse one product for another due to similarity of marks and other surrounding factors. What is likely to cause confusion would vary from case to case. However, the appellants are right in contending that where medicinal products are involved, the test to be applied for adjudging the violation of trade mark law may not be at par with cases involving non-medicinal products. A stricter approach should be adopted while applying the test to Judge the possibility of confusion of one medicinal product for another by the consumer. While confusion in the case of non-medicinal products may only cause economic loss to the plaintiff, confusion between the two medicinal products may have disastrous effects on health and in some cases life itself. Stringent measures should be adopted specially where medicines are the medicines of least resort as any confusion in such medicines may be fatal or could have disastrous effects. The confusion as to the identity of product itself could have dire effect on the public health."

26. Viewed in light of the decision in **Cadila Health Care Ltd.** admittedly both FORZID and ORZID are prescription drugs. The dosages of FORZID and ORZID are not the same. It would pose a grave risk to

health if a person who has been prescribed a dosage of 250 mg CEFTAZIDIME injection (ORZID) is administered a 1000 mg dosage (FORZID). These are injections administered intravenously and can have a direct and immediate impact. In the circumstances, the mere fact that they are priced differently is not sufficient to hold that the unwary average purchaser of the drugs will not be confused into thinking one is as good as the other or in fact both are the same ˇdrug. Then there is the other real danger that a prescription written for ORZID may be mistaken by the dispenser at the pharmacy shop to be FORZID or vice versa. If it is asked for verbally the phonetic similarity is likely to cause confusion. The health of a person for whom the medicine is prescribed cannot possibly be put to such great risk. In the considered view of this Court on the question of deceptive similarity, the reasoning and conclusion of the IPAB does not call for interference.

Label mark and word mark

27. On whether the OCPL could successfully ask for rectification for UBPL's word mark FORZID notwithstanding that OCPL held registration only for a label mark, the judgment of the Supreme Court in **Ramdev Food Products Ltd. v. Arvindbhai Rambhai Patel** AIR 2006 SC 3304 is a complete answer. The Court there referred to an earlier decision in Registrar of **Trade Marks v. Ashok Chandra Rakhit** AIR 1955 SC 558, which concerned the proprietory mark 'Shree' which formed part of the device as a whole and was an important feature of the device. The Supreme Court observed that registration of a trade mark as a whole would give the proprietor "a right to the exclusive use of word 'Shree' as if separately and by itself." Therefore it would not be correct for UBPL to contend that the registration held by OCPL does not cover the word mark ORZID.

IPAB not bound to follow order of the High Court refusing interim injunction

28. It was urged by learned counsel for UBPL that on the principles of comity of jurisdiction the IPAB should have at least discussed the judgment of the learned Single Judge of the Madras High Court which was affirmed by a Division Bench. It was submitted that the IPAB further ought to have taken note of one more distinction drawn by the learned Single Judge between the two products, viz., their pricing.

29. In forming an opinion whether an interim injunction should be granted in a suit for passing off or infringement, the High Court invariably arrives at a prima facie conclusion on the basis of the materials placed on record at that stage. It is by no means a final determination which would have to await the completion of evidence. In fact Courts have emphasised that their conclusions at the stage of interim injunction are tentative and would not bind the Court at the stage of final determination of the suit. What is significant is that the two findings of the learned Single Judge - that the ˇtwo competing marks were phonetically similar and that OCPL was a prior registered user - have been affirmed by the Division Bench of the Madras High Court. The learned Single Judge also did not accept the defence of acquiescence put forth by UBPL. The factors that appear to have weighed with the learned Single Judge and the Division Bench were that the dosages of the two drugs and their respective prices were different.

30. While the principles of comity of jurisdiction ought to be respected, it does not mean that the IPAB should be bound by the orders of the High Court at the stage of interim injunction as the opinions expressed at that stage are at best tentative. After the enactment of the TM Act, 1999 the disputes regarding registration of marks and their rectification were left to be decided by the IPAB in the first place. Earlier this adjudicative function was with the High Court. The IPAB is therefore expected, as a special Tribunal, to form an independent view while at the same time respecting any final determination of the issue by a High Court on the question of deceptive similarity involving the same mark. The converse would not necessarily follow. Any view expressed by the IPAB on the issue in respect of a trade mark would at best have a persuasive effect on the High Court deciding a passing off or infringement action. In the instant case, the IPAB's impugned order cannot be held to be invalid only because it did not advert to, much less follow, the decision of the High Court at the stage of interim injunction.

31. This Court is also satisfied that the plea of UBPL of acquiescence is not convincing. There is nothing to show that despite knowing of the use by UBPL of the trade mark FORZID, OCPL took no steps to seek an injunction against UBPL.

Conclusion

32. For all of the aforementioned reasons, this Court does not find sufficient grounds having been made out for interference with the impugned order dated 14th October 2008 of the IPAB.

33. The writ petition and the pending application are dismissed with costs of Rs. 5,000/- which will be paid by the UBPL to OCPL within a period of four weeks. The interim order is vacated.

ILR (2011) V DELHI 406
CS(OS)

SH. RIPU DAMAN HARYAL & ANR. ....PLAINTIFFS

VERSUS

MISS GEETA CHOPRA & ANR. ....DEFENDANTS

(V.K. SHALI, J.)

CS(OS) NO. : 297/2009 DATE OF DECISION: 04.07.2011

Code of Civil Procedure, 1908—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 VII Rule 11 (d).

Important Issue Involved: (A) No right, interest or title in any immovable property passes on to the buyer on the basis of unregistered agreement to sell. Such a document is neither a sale document or can it be taken cognizance of since it is unregistered.

(B) The question of Limitation in a matter between the party and the Court; defendant can not be estopped from raising this plea even at the appellate stage.

(C) The agreement to sell can be used as a shield to protect the possession of property under section 53-A of the Transfer of Property Act, but cannot be a basis for claiming possession.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONERS : Mr. A'S. Chandhiok, Sr. Advocate with Mr. Vikram Nandrajog, Advocate.

FOR THE RESPONDANTS : Mr. Vikas Dhawan, Advocate.

CASES REFERRED TO:

1. *Suraj Lamp and Industries Pvt. Ltd.* vs. *State of Haryana & Anr.* (2009) 7 SCC 363.
2. *C Natrajan* vs. *Ashim Bai & Anr.* 2007 14 SCC 183.
3. *Hardesh Ores (P) Ltd.* vs. *Hede and Company* (2007) 5 SCC 614.
4. *N. V. Srinivasa Murthy & Ors* ˇvs. *Mariyamma (Dead)* (2005) 5 SCC 548.
5. *State of Rajasthan & Ors.* vs. *Basant Nahata,* AIR 2005 SC 3401.
6. *Popat and Kotecha Property* vs. *State Bank of India Staff Association* (2005) 7 SCC 510.
7. *State of Rajasthan & Ors.* vs. *Basant Nahata,* AIR 2005 SC 3401.
8. *N. V. Srinivasa ˇMurthy & Ors* vs. *Mariyamma (Dead)* (2005) 5 CSS 548.
9. *Chetak Construction Ltd.* vs. *Om Prakash & Ors.* AIR 2003 M.P. 145.
10. *Asha M. Jain* vs. *The Canara Bank & Ors.* 2002 II AD (Delhi) 734.
11. *Srimant Shamrao Suryavanshi & Anr.* vs. *Prahlad Bhairoba Suryavanshi (dead) by LRs. & Ors.* 2002 (3) SCC 676.
12. *Haryana Financial Corporation* vs. *Jagdamba Oil Mills* 2002 (3) SCC 496.
13. *N. Ramaiah* vs. *Nagaraj S.* AIR 2001 Karnataka 395.
14. *Seshumull M. Shah* vs. *Saye Abdul Rashid & Ors* AIR 1991 Karnataka 273.
15. *Roop Lal Sathi* vs. *Machhattar Singh Gill* (1982) 3 SCC 487.
16. *Faqir Chand* vs. *Ram Rattan Bhanot* AIR 1973 SC 921.
17. *Bhulkoo Ghaslya* vs. *Hiriyabai* AIR (36) 1949 Nag. 415.

RESULT: Suit dismissed.

V.K. SHALI, J.

1. This order shall dispose of an application bearing No. 4821/2009 filed by the defendants under Order VII Rule 11 CPC for rejection of the plaint.

2. Brief facts of the case are that the plaintiffs filed the present suit for declaration possession and injunction on 12.02.2009 which came up before the Court for the first time on 13.02.2009. It was alleged in the plaint that the ˇplot bearing no. S-106, Panchsheel Park, New Delhi measuring 505.90 sq. yards was owned by one Late Shri Joginder Nath Bharadwaj. It was 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. A copy of the lease deed has been filed on record and is admitted by the parties, which is marked as Ex.P-1. It has been alleged that Smt. Geeta Chopra is the widow of Late Shri Joginder Nath Bharadwaj and Rajesh Bharadwaj is the son. Both of them are defendant nos.1 and 2 respectively. It has been stated that the plaintiff no.1 and the defendants as well as Late Shri Joginder Nath Bharadwaj were known to each other as they were living in the same colony. They also used to meet at the Panchsheel Club of which they were members. It has been stated that Late Shri Joginder Nath Bharadwaj in order to generate funds to settle his son/ defendant no.2 in some business 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 bearing no. S-106, Panchsheel Park, New Delhi ˇfor a total sale consideration of Rs.9,50,000/- to the plaintiffs and their mother Smt. Krishna Haryal. The deceased Joginder Nath Bharadwaj is stated to have received the entire Sale consideration and executed not only the agreement to sell but also 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. The case of the plaintiffs is that the possession of the terrace of the first floor of the suit property was also handed over to them and they had put their locks and one guard named Shishu Pal to look after the said property. Joginder Nath Bharadwaj died on 02.04.1999, and therefore, it is stated that the title of the plaintiffs was perfected by operation of the registered WILL dated 11.06.1996. It is stated that the plaintiffs did not raise any construction on the second floor i.e. terrace of the first floor on the ground that Delhi building Bye-

laws were under consideration for being amended for permitting construction of the entire second floor as well as the third floor of the properties in Delhi, and therefore, the plaintiffs ˇpreferred to wait for the modified building bye-laws to be notified. It has been stated that since the relations between the plaintiffs and the defendants were cordial and there was absolutely no problem and the plaintiffs allegedly continued to be in possession of the premises sold to them through their guard. However, it is stated that a key of the terrace floor was given to the defendant in order to see their overhead water tanks. It has been stated that on 02.01.2009 when the plaintiff no. 1 visited the suit property he found that the air conditioners of the first floor where tenant was living, had been dismantled and house hold goods of the tenant were lying in a packed condition. The plaintiff no. 1 went to the suit property that is the terrace of the first floor and after locking the same came down to the ground floor and met defendant no.1. It is alleged that he was further surprised to see that even the goods of the defendant no. 1 were lying packed. On enquiry, the defendant no. 1 had stated that she is going to Dubai and the tenant of the first floor was vacating the property. On enquiring about defendant no. 2, the ˇdefendant no. 1 stated that he is shifting to Gurgaon. It has been further alleged that on the evening of 02.1.2009 at about 6.45 P.M. the plaintiff no. 1 along with his wife and son Viraj went to meet the defendant no. 1 at her residence while the plaintiff no. 1's wife and son went inside the residence of the defendant no. 1, the plaintiff no. 1 went to the terrace of the first floor and to his surprise, found one person removing the handle and lock on the entrance door of the terrace of the first floor and was trying to put lock of larger size then that of the plaintiff. The plaintiff no. 1 and his family members intimated the PCR but the police is stated to have not taken any action, as they were alleged to be in league with the defendants, whereupon he lodged a report with the ACP of the area that he was dispossessed from the terrace of the first floor which was sold to him by Late Shri Joginder Nath Bharadwaj. The plaintiffs have further stated that they have learnt in the year 2009 that the defendants made a false statement to the DDA that they are the only legal heirs of Late Shri Joginder Nath Bharadwaj without ˇdisclosing 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 present plaintiffs and applied for conversion of lease hold rights

into freehold. This request of conversion by the defendants was permitted by the DDA and a conveyance deed dated 30.06.2008 has been executed and registered in their favour. The plaintiffs further states that on the basis of these averments, the terrace of the first floor and half of the terrace of the second floor having been sold to the plaintiffs for a consideration of Rs.9,50,000/- with the 1/3rd right in the land underneath, they are entitled to a declaration that they are the owners of the entire terrace of the first floor etc. The plaintiffs have also stated that they are entitled to the possession of the aforesaid portion of the suit property. Apart from this, the plaintiffs have also claimed the mandatory injunction against the defendants. It is stated in the plaint that the cause of action accrued to file the suit on 29.3.1996 and 11.06.1996 when the ˇdocuments were executed in their favour and in any case it also accrued on 02.04.1999 on account of the death of Shri Joginder Nath Bharadwaj. It further arose on 2.1.2009 till which date the plaintiffs remained in possession and when they found the defendants changing the locks of the terrace floor and finally on 5.2.2009 when the plaintiff found that the defendants were puncturing the terrace floor and trying to sell the suit property. Along with the suit, an application under Order 39 Rules 1 and 2 CPC has been filed.

3. The suit came up for hearing for the first time on 13.02.2009 and this Court after hearing the learned counsel for the plaintiffs passed an ex-parte ad interim order restraining the defendants from creating any third party interest with regard to the title or possession of the property and were further restrained from demolishing or constructing the suit property. This order was modified by the Court on 23.4.2009 and it was ordered that without prejudice to the rights and contentions of the respective claims of the parties the defendants were permitted to raise ˇthe construction on the basement, ground floor and the first floor. Vide order dated 22.12.2009, the defendants were further permitted to raise construction over the first floor terrace as per plan duly sanctioned by the local authorities and subject to the condition that entire construction shall be at the risk and the cost of the defendants and they shall not claim any compensation if the decision is ultimately passed against them. It was also made clear that the defendants shall not part with the possession of the second floor of the construction so made, however, they were at liberty to use the said construction for their own benefit. The defendants were also restrained from creating any third party interest in the portion

so constructed.

4. Against the order dated 22.12.2009, an FAO(OS) No. 68/2010 was filed by the plaintiffs before the Division Bench of this Court which was treated as disposed of on the ground that the interest of the plaintiffs was sufficiently protected by the statement made by the learned senior counsel for the defendants that they shall raise the ˇconstruction at their own risk and the cost.

5. The defendants have contested the claim of the plaintiffs both on the question of maintainability as well as on merits. However, it is not necessary to advert to the same while considering the application filed by the defendants u/O 7 Rule 11 (d) CPC for rejection of the plaint. The only thing to be seen by the Court is as to what are the averments made in the plaint and their effect in the light of the legal position.

6. But before coming to the same, it may be pertinent here to mention that the application filed by the defendants under Order VII Rule 11 CPC seeking rejection of the plaint filed by the plaintiffs 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. It is stated that from the meaningful reading of the plaint, it is manifest that the declaration which is prayed for is based on unregistered agreement to sell dated 29.03.1996 and the registered GPA/ SPA/WILL dated 11.06.1996. It is further stated ˇthat the plaintiffs in their plaint have specifically averred that the cause of action has accrued to them firstly on 29.3.1996 to file the suit and in any case, it also accrued in their favour on 02.04.1999 when Sh. Joginder Nath Bharadwaj expired. It is further averred that it arose on 2.1.2009 when they found the defendants changing the lock and also on 5.2.2009, when the plaintiff found that they were puncturing the terrace. It has been stated by the learned counsel for the defendants that according to Article 58 of the Limitation Act a suit for declaration has to be filed within a period of three years from the date of accrual of cause of action, and according, to the plaintiffs own averment the cause of action firstly accrued in their favour on 29.3.1996 and secondly on 02.04.1999 when Late Shri Joginder Nath Bharadwaj died. In case limitation is reckoned from the date of death i.e. 02.04.1999, it would expire on 01.04.2002 while as the present suit for the declaration has been filed in the year 2009. It is further

averred in the application that the plaintiffs by a clever drafting of the plaint purported to file the present suit for ˇdeclaration and injunction merely as a camouflage while as 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. In this regard, the learned counsel for the defendants has stated that the agreement to sell (which is being termed as sale by the plaintiffs) is not duly registered and as per the provisions of Section 49 of the Indian Registration Act or Section 54 of the Transfer of Property Act, the said document is inadmissible in evidence. It is alleged that the 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.

7. The defendants have averred that in effect the plaintiffs have tried to camouflage the real relief by filing the present suit simplicitor for declaration with a view to avoid the filing of a suit for specific performance for perfecting their title, and therefore, applying the principle laid down by the Apex Court in case titled **N. V. Srinivasa Murthy & Ors ˇVs. Mariyamma (Dead)** (2005) 5 SCC 548 and **Hardesh Ores (P) Ltd. Vs. Hede and Company** (2007) 5 SCC 614 the present suit is liable to be rejected.

8. So far as the plaintiffs are concerned, they have contested the defendant's application for rejection of the plaint under Order VII Rule 11(d) CPC on the ground that the plaintiffs had filed an appeal bearing FAO (OS) No. 68/2010 against the order dated 22.12.2009 by virtue of which the defendants were permitted to raise the construction subject to their unilateral undertaking that they will not use the construction over the disputed portion and the same shall remain locked and unoccupied, is a clear admission that the defendants have given up their plea of rejection of the plaint under Order VII Rule 11 (d) CPC and have conceded that it being tried on its merit.

9. It is further stated in the reply that without prejudice to the aforesaid the suit cannot be rejected on the ground that the said suit is barred by limitation as well as on the ground that the agreement to sell is not a registered document. It is contended that under Section 54 of the ˇTransfer of property Act a distinction is to be drawn between the 'sale' and the 'mode of sale'.

10. It is contended that in the present case Late Shri Joginder Nath Bharadwaj, owner of the property bearing no. S-106, Panchsheel Park, New Delhi sold the entire terrace of the First Floor i.e. the Second Floor and half of the terrace of the Second Floor i.e. the Third Floor for a total sale consideration of Rs.9,50,000/- to the plaintiffs and their mother Smt. Krishna Haryal. The deceased stated to have executed an agreement to sell, affidavit and receipt dated 29.03.1996 after having received the entire sale consideration and handed over the vacant and peaceful possession of the same to the plaintiffs. It is further stated that Late Shri Joginder Nath Bharadwaj also executed the registered GPA with power to execute the sale deed vested in favour of the plaintiff no. 1 and SPA and WILL dated 11.06.1996. On the basis of the said documents, it is stated that this constituted a sale within the meaning of Section 54 of the Transfer of Property Act and resulted in transfer of ownership by Late Shri Joginder Nath ˇBharadwaj. It is averred that so far as the question of non-registration of the agreement to sell is concerned, it pertains to the mode of sale which does not in any manner detract from the sale of the property in question by the predecessor in interest of the defendant. In order to support this, it is stated that as per Clause 9 of the General Power of Attorney, the plaintiff no.1 was empowered to sell the suit property. This general power of attorney being registered and consideration having been paid has become irrevocable and does not lapse even on account of the death of Sh.Joginder Nath Bharadwaj. It is averred that illustrations appended to Section 202 of the Indian Contract Act clearly supports this view that an interest in the property which form the subject matter of agency, cannot in the absence of an express contract be terminated to the prejudice of such interest. Reliance in this regard is placed on case titled **Asha M. Jain Vs. State & Ors** 2002 II AD (Delhi) 734 to contend that the judgment of the Division Bench in Asha Jain's Case clearly recognizes the ownership of a property on the basis of ˇdocuments like agreement to sell, Power of Attorney, Will etc.

11. So far as the question of limitation is concerned, it is stated that the defendants have erroneously taken the period of limitation of three years from 29.03.1996 or alternatively w.e.f. 02.04.1999 without realizing the fact that the plaint makes clear mention that there was no issue with regard tothe title or the ownership of the plaintiffs in respect of the portion of the suit property till 02.01.2009 that is the date upto which they continued to be in possession of the said portion. It is stated that

it was only on the said date i.e. 02.01.2009 when an attempt was made by the defendants to dispossess the plaintiffs from the suit property that the cause of action arose in their favour to file the suit. It is further stated that it also arose on 5.2.2009 when the plaintiffs found that the defendants were puncturing the terrace. And even if the period of limitation of three years is taken into account, the said suit is still well within its time if reckoned from 02.01.2009 or from 5.2.2009. It has been further stated that so far as the relief of possession is concerned, a suit for possession can be filed by the plaintiffs up to the period of 12 years, and therefore, even if the period of limitation is reckoned as is mentioned in the plaint, the period of 12 years has to be reckoned from the date of dispossession, i.e., 02.01.2009 and therefore, the suit is well within its time.

12. I have heard the learned senior counsel, Mr. A'S. Chandhiok for the plaintiffs and Mr.Vikas Dhawan, for the defendants. I have also gone through the record. Before dealing with the respective contention of the parties, it may be pertinent here to refer to undisputed facts as alleged in the plaint.

(i) In paragraphs 5 and 6 of the plaint, the plaintiffs have claimed that the entire terrace of the first floor that is the second floor and half of the terrace of the second floor i.e. the third floor was sold to him by Late Shri Joginder Nath Bharadwaj by virtue of agreement to sell dated 29.3.1996 and WILL, General Power of Attorney etc. dated 11.6.1999, which were duly registered before the Sub Registrar and the possession was handed over to the plaintiffs.

(ii) In para 8 of the plaint, it is averred that Late Shri Joginder Nath Bharadwaj expired on 02.04.1999 and on the basis of the registered Will dated 11.6.1996, title of the plaintiffs was perfected.

(iii) In para 10 of the plaint, the plaintiffs have stated that they had purchased the property from the father of the defendants. besides being the owners of the property by virtue of the last WILL and testament of Sh.Joginder Nath Bharadwaj dated 11.06.1996. Similar, averments were made in para 15 and 16 of the plaint.

(iv) In para 18 of the plaint, it is averred that the cause of action accrued to the plaintiffs on 29.03.1996 when the property was sold to them by way of an agreement to sell and execution of the General Power of Attorney and will etc. on 11.6.1996 which were duly registered. It further arose, when their title to the part of the suit property was allegedly perfected on account of the death of Late Shri Joginder Nath Bharadwaj on 02.04.1999. The plaintiffs are also making reference to two dates dated 2.1.2009 when they allege that the defendants have put their locks on the terrace and secondly, on 5.2.2009 when they found that the defendants were getting the terrace punctured.

13. On the basis of these averments, the following three reliefs have been claimed by the plaintiffs:

"a) Pass a decree of declaration in favour of plaintiffs and against the defendants that plaintiffs are owners of entire terrace of first floor i.e. second floor and half of terrace of second floor i.e. third floor along with proportionate undivided 1/3rd rights in the land underneath of the property S-106, Panchsheel Park, New Delhi.

b) Pass a decree of possession in favour of plaintiffs and against the defendants with respect to the entire terrace of the first floor i.e. second floor of the property S-106, Panchsheel Park, New Delhi, directing defendants to be ejected therefrom and plaintiffs being put in possession of the same.

c) Pass a decree of permanent injunction restraining defendants from in any way selling, mortgaging, alienating, transferring, creating third party interest or parting with possession or the entire first floor i.e. second floor and half of terrace of second floor i.e. third floor and 1/3rd rights in the land underneath of the property S-106, Panchsheel Park, New Delhi or raising any construction or demolishing the said property."

14. The question to be considered is, as to whether the plaint is liable to be rejected under Order 7 Rule 11(d) CPC being barred by limitation as the contention of the defendants is that according to the averments made by the plaintiffs themselves the cause of action accrued

to them on 29.03.1996 when the agreement to sell was executed and in any case it was stated to have arisen in their favour on 02.04.1999 on account of the death of Late Shri Joginder Nath Bharadwaj. Though reference is made to the date 2.1.2009, the day they are allegedly dispossessed and the date 5.2.2009 when they contend that the defendants were puncturing the terrace. It has been contended that as a matter of fact the plaintiffs are seeking specific performance of an agreement dated 29.03.1996 on the basis of which they are purported to have purchased the property. Supporting documents dated 11.06.1996 are relied upon by them for this purpose. It has been contended that admittedly the plaintiffs are not in possession and the suit has been filed after an expiry of 13 ½ years by camouflaging the present suit for specific performance as a suit for declaration while as they ought to have filed a suit for specific performance within 3 years of accrual of the cause of action. It has been further contended that even if it is assumed that the present suit for declaration could be filed, the suit is not maintainable because in effect they ought to have claimed the consequential relief of specific performance, as they do not have the title to the property and they will have to first perfect the same. Reference is made to Section 34 of the Specific Relief Act which lays down that a suit for declaration would not be maintainable if a party omits to claim the consequential relief. It is contended that even a suit for declaration is to be filed within three years and in case the plaintiffs are claiming to have become owner on the basis of the Will made by Late Shri Joginder Nath Bharadwaj which was duly registered even then the declaration ought to have been sought within three years.

15. The second submission of the learned senior counsel for the defendants is that the plaintiffs are making contrary averments in the plaint. Firstly, they are claiming that they have purchased the property and the sale itself was completed under Section 54 of the Transfer of Property Act when the agreement to sell was executed. It has been urged that Section 54 of the Transfer of the Property Act specifically laid down as to how the sale is to be made and it has been defined as a transfer of ownership in exchange for a price paid or promised or part paid and part promised. It further lays down that such sale in the case of tangible immovable property of the value of Rs.100 and upwards has to be made only by a registered document. It has been contended that admittedly in the instant case the document which is relied upon by the plaintiffs is not a registered document, and therefore, it could not be treated as a document

of sale and consequentially no declaration can be claimed as the document itself is inadmissible in law. Further, it has been stated that the plaintiffs in para 10 has stated that they became the owner on the basis of the registered WILL, the moment Late Shri Joginder Nath Bharadwaj died on 02.04.1999. It has been contended by the learned counsel that either the property has been sold intervivos or it has been passed by way of testamentary succession. Admittedly the WILL of Late Shri Joginder Nath Bharadwaj has not been got probated, and therefore, ˇit could not be said that the property was passed on to the plaintiffs on the basis of the WILL of Late Sh.Joginder Nath Bharadwaj. In this regard, reference has been made to case titled **N. Ramaiah Vs. Nagaraj S.** AIR 2001 Karnataka 395, which makes a distinction between the intervivos sale and testamentary succession.

16. The third submission made by the learned senior counsel for the defendants is that the suit has been cleverly drafted by the plaintiffs only with a view to overcome the period of limitation which admittedly accrued in favour of the plaintiffs on 29.03.1996 and in any case according to their own submissions it accrued on 02.04.1999 and a meaningful reading of the plaint would clearly show that in effect what the plaintiffs are claiming is specific performance of the agreement to sell dated 29.03.1996 and it is only with a view to get over the bar of limitation that the plaintiffs have chosen to file the present suit after expiry of 13 ½ years by camouflaging it as a suit for declaration. The learned senior counsel for the plaintiffs have placed reliance on cases titled **N. V. Srinivasa ˇMurthy & Ors Vs. Mariyamma (Dead)** (2005) 5 CSS 548 and **Hardesh Ores (P) Ltd. Vs. Hede and Company** (2007) 5 SCC 614 in order to substantiate his plea.

17. The learned senior counsel Mr. A'S. Chandhiok for the plaintiffs has contested this and urged that in view of the order dated 27.04.2010 passed by the learned Appellate Court where the defendants have unilaterally submitted that they will not use the construction over the second floor and the third floor and will keep the same locked and unoccupied is in itself an admission made by the defendants that the Suit has to be adjudicated on merits by permitting the parties to adduce evidence.

18. So far as the merits of the case are concerned, the learned senior counsel for the plaintiffs has stated that there is a difference

between the sale and mode of sale. It has been contended that this difference is laid down in Section 54 of the Transfer of Property Act itself. It has been stated that sale is a transfer of ownership in exchange of price paid or promised or part paid or part promised. It has been contended that in the instant case admittedly Late Shri ˇJoginder Nath Bharadwaj had sold the entire terrace of the first floor that is the second floor and half of the terrace of the second floor i.e. the third floor and executed agreement to sell, affidavit, receipt, etc. on 29.03.1996 and thus having received the entire money, the sale was complete. Late Sh.Joginder Nath Bharadwaj had executed a General Power of Attorney/Special Power of Attorney/Will on 11.06.1996 which were duly registered before the Sub-Registrar. On the basis of these documents, the plaintiffs have become the owner of the suit property.

19. It has been further contended by the learned counsel that the General Power of Attorney which is purported to have been executed by Late Shri Joginder Nath Bharadwaj for consideration in favour of the plaintiffs is an irrevocable power of attorney which does not get lapsed on account of the death of the deceased. It is stated that such a contingency is specifically envisaged under Section 202 of the Contract Act.

20. The learned senior counsel has also placed reliance on the Division Bench judgments of this Court in case titled **Asha M. Jain Vs. The Canara Bank & Ors.** 2002 II AD (Delhi) 734 wherein the High Court of Delhi has recognized the sale of properties on the basis of General Power of Attorney, under Section 202 and it has been stated to be a valid defence under Section 53A of the Transfer of the Property Act. The learned senior counsel has also cited the judgment of the Apex Court in case titled **Suraj Lamp and Industries Pvt. Ltd. Vs. State of Haryana & Anr.** (2009) 7 SCC 363 to contend as not an authority on the question as to whether the sale of power of attorney is illegal or not, and therefore, not applicable to the facts of the present case. The learned senior counsel has referred to the judgment of Apex Court in case titled **State of Rajasthan & Ors. Vs. Basant Nahata,** AIR 2005 SC 3401 where in the Apex Court had observed that an Agreement to Sell executed in favour of an attorney is a document which cannot be refused registration on the ground that the State (of Rajasthan) has amended the Registration Act and introduced Section 22A and issued notification thereunder that such attorney be not registered ˇbeing opposed to public policies. It is

stated that the Apex Court had set aside the section 22A as unconstitutional. Apart from these some more judgments have been cited with which I will deal at appropriate stage.

21. So far as the averments made in the application that the suit is barred by limitation in view of Article 58 of the Limitation Act is concerned, it is contended that this is a misconceived argument as the plaint is to be read as a whole and not in an isolated manner. It is also stated that the plaint cannot be rejected in part. Even if the declaration is claimed to be barred it is stated that plaintiffs are claiming possession as well for which period of limitation is 12 years which has to be reckoned from 02.01.2009 or 05.02.2009. It is the case of the plaintiffs that they were in possession of the terrace floor above the first floor till 02.01.2009 when an attempt was made to dispossess them. Further, on 5.2.2009, the plaintiffs had noticed that the defendants were puncturing the terrace and therefore, there was hardly any occasion for the plaintiffs to come to the Court prior to that date. It is ˇstated that the averments made in the plaint, that the cause of action accrued for the first time on 29.3.1996 is only a background averment in the context that the plaintiffs acquired the right to the suit property on 29.03.1996 and the dispute arose in the year 2009, and therefore, the suit was filed in the year 2009 and it could not be said to be beyond limitation. The learned senior counsel placed reliance on the case titled **C Natrajan Vs. Ashim Bai & Anr.** 2007 14 SCC 183 in order to contend that the suit is within limitation.

22. On the basis of these averments, it has been contended that the suit of the plaintiffs is well within time and the application filed by the defendants is totally misconceived and without any merits.

23. In the light of the aforesaid facts and the respective submissions. The following points emerge to be considered as to whether the plaintiffs are entitled to a declaration to the effect that they are the owners of the suit property on the basis of the agreement to sell dated 29.03.1996 or they had became the owners of the suit property on the basis of ˇthe registered Will dated 02.04.1999 when Late Shri Joginder Nath Bharadwaj had died or alternatively whether the plaintiffs were required to file a suit for specific performance of the agreement dated 29.03.1996.

24. Section 54 of the Transfer of Property Act, 1882 defines sale as under:

54. "Sale" defined.- "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made: Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

25. A perusal of the aforesaid Section clearly shows that sale is a transfer of ownership in exchange of a price which is paid or promised to be paid and it is further stated that if the sale pertains to an immovable property the value of which is more than Rs.100/- and upwards the document is to be compulsorily registered. Section 17(1)(b) of the Registration Act, 1908 also makes non- testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of ˇthe value of one hundred rupees and upwards, to or in immovable property, as compulsorily registerable.

26. A reading of the aforesaid two provisions 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, therefore, the contention which is sought to be made by the learned counsel for the plaintiffs that there is a distinction between the sale and the mode of sale may be right but the fact remain that 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. Further, 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 ˇRegistration 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 29.3.1996 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 ˇthe entire plaint, is barred by limitation both under Article 54 or 58 of the Schedule to the Limitation Act.

27. As a matter of fact, a perusal of the agreement to sell itself shows that the plaintiffs were under an obligation to file a suit for specific performance if the defendant's predecessor in interest defaulted, it may be pertinent here to refer to few paragraphs of the agreement to sell dated 29.03.1996 which will clearly show that this was only an agreement to sell and the plaintiffs who are mentioned as parties 1, 3 and 4 in the said agreement were required to seek necessary permission from DDA as well as impleading co-operative housing society for perfecting their title which admittedly has not been done by them. The relevant clauses of the agreement to sell are as under:

"Clause 4: That the Second, Third and Fourth parties shall realize all the profits or the said terrace on the first floor after the date of execution of this agreement and the first party shall not create any charges or make any claim.

Clause 8: That the second, third and fourth parties shall obtain all the permissions, necessary approvals to complete the sale transaction including the following:

(a) Permission from the DDA to transfer the ˇaforesaid terrace right on first floor only of property in favour of the second, third and fourth parties or his/her/their nominee(s) at the cost of the second party.

(b) Permissions from the competent authority under the Urban Land (ceiling & Regulations) Act, 1976 if required, or in the alternative the first party shall produce the necessary affidavits(s), declarations or prescribed performas.

(c) On any other permission that may be required to transfer the said terrace right of the first floor only in favour of the second, third and fourth parties at the time of the registration of the sale deed at his/her/their own cost. The unearned increase, stamp duty, registration charges, conveyancing etc. shall be paid and borne by the second, third and fourth parties and in that even the first party shall not make any further claim demand and objection whatsoever. But the first party would provide necessary help, would provide necessary information and sign the execute required papers/documents; if so required by the concerned authority to do all or nay of the acts mentioned in point no.9.

Clause14: That in case the first party does not perform its part of the contract then the second, third and fourth parties shall be entitled to enforce **this contract by way of specific performance before the appropriate court** at the risk and cost of the first party"

28. A perusal of the aforesaid clauses clearly show that the plaintiffs were under an obligation to apply to the DDA for ˇobtaining necessary permission for perfecting their title, by way of sale in their favour, for

which there is a limitation contained in para 6(a) of the perpetual sub lease deed which reads as under:

"The Sub-lessee shall not sell, transfer, assign or otherwise part with the possession of the whole or any part of the residential plot in any form or manner, benami or otherwise, to a person who is not a member of the Lessee.

29. It may be pertinent here to mention that the perpetual sub lease which is an admitted document between the parties and marked as exhibit P-I dated 18.12.1968 is executed for and on behalf of the President of India by Cooperative Housing Building Society as a lessee and Late Shri Joginder Nath Bharadwaj as a sub lessee by way of tripartite agreement in terms of Government Grants Act 1998. 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 ˇthe 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.

30. Further in the agreement to sell itself it has been envisaged that in case any of the contracting parties, namely, the plaintiffs and the defendants do not adhere to the terms and conditions of the agreement to sell dated 29.03.1996, the aggrieved party have an option to go for a specific performance. In the instant case, the plaintiffs having been aggrieved admittedly ought to have filed a suit for specific performance and not a suit for declaration as has been done by them. In this regard, I agree with the submissions made by the learned counsel for the defendants that the plaintiffs have camouflaged the present ˇsuit 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 learned counsel for the defendants has rightly cited **N. V. Srinivasa Murthy & Ors Vs. Mariyamma (Dead)** where the Apex Court has upheld the rejection of a plaint because the party had omitted to claim the relief warranted on

the facts of the case only with a view to get around the bar of limitation. Also, in case titled **Hardesh Ores (P) Ltd. Vs. Hede and Company** the order of rejection of plaint was upheld by the Apex Court after observing that the plaint is to be read as a whole for the purpose of arriving at such a conclusion, has been fully complied with in the instant case. In the present case, I have not referred to the written statement at all and the plaint of the plaintiff has been seen as a whole. Further reliance can safely be placed on the judgment of the Apex Court in **T.Arivandandam Vs. T.V. Satyapal** SCC p. 468.

> "The trial court must remember that if on a meaningful – not formal – reading of the plaint it is manifestly vexatious and meritless in the sense of not disclosing a ˇclear right to sue, it should exercise its power under Order VII Rule 11 CPC taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a cause of action, the court must nip it in the bud at the first hearing by examining the part searchingly under Order 10 CPC. An activist judge is the answer to irresponsible law suits. The trial courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage. The Penal Code is also resourceful enough to meet such men (Chapter 11) and must triggered against them."

31. The contention of the learned counsel for the plaintiffs is that Late Shri Joginder Nath Bharadwaj had executed a General Power of Attorney on 11.06.1996 authorizing the plaintiffs to sell the property or part of property sold to them notwithstanding the fact that Late Shri Joginder Nath Bharadwaj had died. No doubt, Section 202 clearly lays down that where the principal executes a General Power of Attorney and a document of agency in favour of other persons to discharge an obligation qua the person in whose favour the attorney is executed the said attorney does not come to an end on account of death or insanity of the principal.

32. Section 202 of the Contract Act, 1872 reads as under:

> **"202 Termination of agency, where agent has an interest in subject matter.-** Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.
>
> **Illustrations:**
>
> (a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death.
>
> (b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death."

33. A perusal of the aforesaid Section would clearly show that the power of agency does not come to an end on account of the insanity or the death of the principal provided the document of agency confers a power on the agent to do something for his own benefit, like in illustrations 1 and 2, the sale of the property and payment thereof to the agent himself in discharge of debts.

34. If we look at the General Power of Attorney which is sought to be relied upon by the plaintiffs in the instant case, at the ˇvery outset it must be mentioned that it does not say that it is an irrevocable power of attorney. Even if this factor is assumed in favour of the plaintiff for the sake of argument, further, a reading of the General Power of Attorney does not show that it meets the requirements as envisaged under Section 202 of the Contract Act which in the instant case would be to perfect the title of the plaintiffs themselves on account of having paid an amount of Rs.9,50,000/- to Late Shri Joginder Nath Bharadwaj.

35. The plaintiffs in support of their contentions have relied on Clause 9 of the General Power of Attorney which read as under:

> "To execute, sign and present for registration, before proper registering authority, proper sale/conveyance deed, for conveying my rights, interests, liens and titles in the property only terrace of the said property, in favour of the intended purchaser(s) and for the purpose of conveying the same, absolutely forever in

favour of the intended purchaser(s) or his/her/their nominee (s) and to do all other acts, deeds and things which are necessary for the purpose, i.e. to receive the consideration and to admit the receipt thereof, and to deliver the possession to the said purchaser(s), or his/her/their nominee(s) either physical or constructive as may be feasible.

36. A perusal of the aforesaid clause shows that the agent, namely, the plaintiff no.1 Ripu Daman Haryal is only authorized to appear before the registering authority and execute the sale deed, conveyance deed or create right or title or interest in the suit property in favour of **"intending purchaser"** (emphasis added) and for the purpose of conveyance of the same.

37. Similarly in Clause 15 of the General Power of Attorney the agent namely the plaintiff no. 1 herein is permitted to further delegate the power of attorney in favour of any other person to perform all the acts which he is entitled to do under the power of attorney with liberty to cancel, withdraw or revoke the said powers conferred on the attorney so appointed by the plaintiff no.1.

38. Thus, the aforesaid perusal of the General Power of Attorney clearly shows that the plea of the plaintiffs is totally misconceived. In my considered opinion, keeping in view the language of the General Power of Attorney, Section 202 of the Contract Act, 1872 is not at all applicable to the facts of the present case.

39. The other contention of the learned senior counsel for the plaintiffs has been that the General Power of Attorney is a recognized mode of sale under Section 202 of the Contract Act as well as under Section 53A of the Transfer of Property Act. Reliance in this regard has been placed on case titled **Asha M. Jain Vs. The Canara Bank & Ors.** 2002 II AD (Delhi) 734.

40. Before referring to **Asha M. Jain's** case (Supra) it may be pertinent here to borne in mind that the Apex Court in case titled **Haryana Financial Corporation Vs. Jagdamba Oil Mills** 2002 (3) SCC 496 has specifically laid down that while applying the law laid down in judgment of the Apex Court to the facts of a particular case, the facts of the said reported judgment must be seen and co-related to the facts of the case to which the judgment is sought to be applied. Seen in this background,

it has been noticed that most of the judgments which have been referred by the plaintiffs are the judgments which do not apply to the facts of the present case. In **Asha M. Jain's** case (supra) the question was involved as to whether the property of a person who was claiming to be the owner on the basis of the Will and General Power of Attorney coupled with the transfer of possession could be attached or whether he could be considered as the owner. It was in this context that the Court upheld the plea that such a person was the owner and was competent to use the said documents coupled with the possession as a shield envisaged under Section 53 A of the Transfer of Property Act. In the present case, the facts are totally different, the plaintiffs are not in possession and the documents on the basis of which they are claiming the ownership are not registered though they require compulsory registration and the Will which is sought to be relied upon as a document of title cannot be considered as a document of title. Even probate on the basis of said Will has not been obtained, therefore, **Asha M. Jain's** case (supra) is totally distinguishable from the facts of the present case. Similarly, the judgment in **State of Rajasthan & Ors. Vs. Basant Nahata,** AIR 2005 SC 3401 is also distinguishable because the facts are totally different.

41. In the instant case, I have already observed that 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. In this regard I may state the judgments which have been relied upon by the plaintiffs in **Chetak Construction Ltd. Vs. Om Prakash & Ors.** AIR 2003 M.P. 145, **Bhulkoo Ghaslya Vs. Hiriyabai** AIR (36) 1949 Nag. 415, **Srimant Shamrao Suryavanshi & Anr. Vs. Prahlad Bhairoba Suryavanshi (dead) by LRs. & Ors.** 2002 (3) SCC 676 instead of supporting the plaintiffs are actually supporting the defendants because they are in possession. The plea stating that the suit for possession could be filed ˇwithin a period of 12 years from the date of dispossession does not apply to the present case because the possession is only a

consequential relief to the specific performance or the declaration which is barred as on date when the suit was filed.

42. The judgment cited by the learned senior counsel for the plaintiffs on the question of rejection in case titled **Popat and Kotecha Property Vs. State Bank of India Staff Association** (2005) 7 SCC 510 does not apply to the facts of the present case as in the reported judgment a disputed question of fact was involved and it was in that context that the Apex Court observed that the suit ought not to have been rejected as being barred by limitation. While as in the present case, there is no dispute about the documents having been exhibited and in any case averments made in the plaint have been taken to be correct. Similarly, in the case titled **C Natrajan Vs. Ashim Bai & Anr.** 2007 14 SCC 183 where it has been laid down that the allegations made in the plaint if taken to be correct in its entirety, must be the only ground for ˇconsideration as to whether the suit is barred by limitation or not. It has been specifically observed in the said judgment that the defence of the defendants is not taken into consideration and further only the applicability of one or the other provisions of the Limitation Act was considered. The ownership cannot be decisive for the purpose of determining the question as to whether the suit of the plaintiffs is falling under one Article or the other contained in the schedule to the Limitation Act.

43. I have gone through this judgment also and I do not feel that the said judgment supports the plaintiffs case in any manner. The defence of the defendants in the present case has not been considered at all. The averments made in the plaint having been taken to be correct and the question as to whether the suit is barred by limitation or not has been discussed from all possible angles with reference to Article 54 for Specific performance and declaration under Article 58. So far as the question of possession is concerned, no doubt the Article 65 envisages that the same can be claimed within 12 years but the ˇpossession in the present case is only a consequential relief and admittedly the plaintiffs are not in possession as on the date of the filing of the suit according to their own averments, therefore, the period of limitation of 12 years does not help the plaintiffs so as to bring the suit for declaration within the period of limitation as is sought to be done by the plaintiffs. Similarly, I have gone through the judgments in the case title **Seshumull M. Shah Vs. Saye Abdul Rashid & Ors.** AIR 1991 Karnataka 273 and **Roop Lal Sathi Vs.**

Machhattar Singh Gill (1982) 3 SCC 487, the same also does not help the plaintiffs in any manner whatsoever. The plaintiff's plaint has not been rejected in part, it has been rejected in its entirety.

44. So far as the contention of the learned senior counsel for the plaintiffs that in view of the order dated 27.04.2010 passed by the Division Bench of this Court, after recording the unilateral statement of the defendants that they shall keep the disputed portion locked and unoccupied and consequentially the suit cannot be rejected under Order VII Rule 11 (d) CPC, is concerned, I do not agree with the ˇsame. This is on account of the fact that it amounts to a waiver with regard to a provision of law or its applicability. 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, I do not think 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, I do not think it estopps the defendants from raising this plea as there is no estoppel against law. Reliance can be placed on **Faqir Chand Vs. Ram Rattan Bhanot** AIR 1973 SC 921.

CONCLUSION:

45. For the foregoing reasons, I reach to the following conclusions:

(i) That the case of the plaintiffs that they had purchased the property on the basis of an agreement to sell dated 29.03.1996 and the supporting documents dated 11.06.1999 and thus became the ˇowners thereof is not substantiated on account of the fact that document dated 29.03.1996 is only an agreement to sell and not a sale document as the document is not a registered document. The General Power of Attorney dated 11.06.1996 is not a document which falls within the parameters of section 202 of the Indian Contract Act.

(ii) The question of the plaintiffs being deemed to be the owners of the suit property on the basis of the agreement to sell, General Power of Attorney, Receipt, Will etc. in terms of case titled **Asha Jain** Case (Supra) is not correct and sustainable in the facts of this case. The agreement

to sell is unregistered. The will is not probated and even if it is taken to be a document, it does not confer title. The probate Court only determines the correctness of the Will.

(iii) A reference has been made to Section 53A of Transfer of Property Act by the plaintiffs but it does not save them as Section 53A of the Transfer of Property Act is only a shield not a sword and this shield could have ˇbeen set up by the plaintiffs only if they were in possession and against the action brought against them and therefore, this also does not help the plaintiffs in any manner.

(iv) According to the agreement to sell dated 29.03.1996 itself the plaintiffs were required to seek specific performance of the agreement to sell as is envisaged therein and according to Article 54 of the Limitation Act the said suit has to be instituted within a period of three years from the date of accrual of cause of action. Even if the suit for declaration is said to be correct, even then no relief of declaration can be granted because consequential relief of specific performance is not claimed and this declaration suit is hit by Section 34 of the Specific Relief Act. Secondly, even if the declaration is to be sought it had to be within 3 years according to Article 58 of the Limitation Act from the date of first accrual of cause of action which according to the plaintiff accrued on 29.3.1996. According to Section 9 of the Limitation Act, once the period of limitation starts, it does not stop and therefore, no help can be sought by simply saying that the cause of action further arose on 2.1.2009 or 5.2.2009.

(v) The plaintiffs, themselves have stated in para 18 that the cause of action accrued to them on 29.03.1996 firstly and secondly on 02.04.1999 and if the period of limitation is to be reckoned from either of the two dates the said period of limitation has come to an end long back on 01.4.2002 in both the cases of specific performance and

declaration.

(vi) It is correct that according to Article 65 of the Limitation Act, the period of limitation for filing the suit for possession is 12 years but for filing a suit for possession the plaintiffs must have a title to the property which admittedly according to their own averments there is none as there is inchoate title. They are seeking declaration which as a matter of fact is also not sustainable as they ought to have filed a suit for specific performance.

(vi) The suit on a meaningful reading of the plaint is a suit for specific performance. Even if it is taken to be a suit for declaration, in my view, the suit is barred by limitation on account of having not been filed within a permissible period of three years either in terms of Article 54 or Article 58 of the Limitation Act, if the period of limitation is reckoned from any of the dates i.e. 29.03.1996, 11.06.1996 and 02.04.1999.

43. For the foregoing reasons, the suit is rejected as being barred by limitation under Order VII Rule 11 (d). Since the suit itself has been dismissed as barred by limitation, the question of considering the application of the plaintiffs under Order VI Rule 17 CPC for amendment of the plaint does not arise and the same is also dismissed.

46. The order of stay granted by this Court on 13.2.2009 and modified subsequently stands vacated.

47. File be consigned to the Record Room.

ILR (2011) V DELHI 437
MAC. APP.

BAJAJ ALLIANZ GENERAL INSURANCE CO. LTD. ....APPELLANT

VERSUS

AKRAM HUSSAIN & ORS. ....RESPONDENTS

(REVA KHETRAPAL, J.)

MAC. APP. NO. : 306/2009 DATE OF DECISION: 18.07.2011

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.

Important Issue Involved: Expertise which is required to drive a motorcycle is quite different from the know how required by a person for driving a light motor vehicle. It can not be presumed that every person who is competent to drive LMV, will be skilled in driving a two wheeler as well.

[Ar Bh]

APPEARANCES:

FOR THE APPELLANT : Ms. Suman Bagga, Advocate.

FOR THE RESPONDENTS : Mr. Harpreet Singh Uppal, Advocate for the respondents No. 2 & 3.

CASES REFERRED TO:

1. *National Insurance Co. Ltd.* vs. *Geeta Bhat and Ors.,* AIR 2008 SC 1837.
2. *Oriental Insurance Co. Ltd.* vs. *Prithvi Raj* (2008) 2 SCC 338.
3. *United India Insurance Company Limited* vs. *Rakesh Kumar Arora and Others,* (2008) 13 SCC 298.

4. *National Insurance Co. Ltd.* vs. *Kaushalaya Devi* (2008) 8 SCC 246.

5. *National Insurance Co. Ltd.* vs. *Kusum Rai and Ors.* II (2006) ACC 19 (SC).

6. *National Insurance Co. Ltd.* vs. *Swaran Singh* (2004) 3 SCC 297.

7. National Insurance Co. Ltd. vs. Swaran Singh and Ors. I (2004) ACC 1 (SC).

8. *Rakesh Kumar Arora* vs. *Balwant Singh* 2001 (1) T.A.C. 677 (P&H).

9. *V. Mepherson* vs. *Shiv Charan Singh,* 1998 ACJ 601 (Del).

10. *United India Insurance Co. Ltd.* vs. *Gian Chand and Ors,* II (1997) ACC 437 (SC).

11. *Sohal Lal Passi* vs. *P. Sesh Reddy and Ors.* 1996 ACJ 1044.

12. *Skandia Insurance Co. Ltd.* vs. *Kokilaben Chandravadan,* (1987) 2 SCC 654.

RESULT: Allowed.

REVA KHETRAPAL, J.

1. This appeal is directed against the judgment and award dated 20.03.2009 passed by the Motor Accident Claims Tribunal, whereby ˇand whereunder compensation in the sum of Rs.2,32,000/- was awarded to the respondent No.1 on a claim petition preferred by him under Section 166 read with Section 140 of the Motor Vehicles Act, 1988.

2. With the consent of the parties, the appeal was taken up and heard at the admission stage.

3. Before adverting to the legal submissions of the parties, a few facts may be delineated so as to afford a factual background to the legal submissions sought to be urged. A claim petition was preferred by the respondent No.1 – Shri Akram Hussain claiming compensation for the grievous injuries sustained by him consequent to the motorcycle bearing No. DL-8-SU-5274 hitting his scooter from behind. It was alleged in the

claim petition that the accident was the result of the fast speed, and the rash and negligent manner in which the offending motorcycle was being driven. The driver, the owner and the insurer of the motorcycle, who were impleaded in the claim petition as respondents, filed their written statements denying their liability to pay compensation to the injured victim.

4. The appellant/Insurance Company took the plea that the respondent No.2 had a driving licence for driving a Light Motor Vehicle (Non-Transport), however, at the time of the accident, he was driving a motorcycle. The respondents No.2 and 3, on the other hand, took the stand that the respondent No.2 had a driving licence for a higher category, and therefore, it could not be said that he was incompetent to drive a lower category vehicle and that in any case, non-possession of a driving licence for a lower category of vehicle does not amount to violation of the terms and conditions of the Insurance policy.

5. The learned Claims Tribunal held that since the driver in the present case had a valid driving licence for driving LMV and was qualified to drive LMV, he apparently also possessed the qualification to drive a vehicle of a lower category. In these circumstances, it could not be said that the violation was so fundamental as would have contributed to the cause of the accident. The learned Claims Tribunal, therefore, refused to grant recovery rights to the appellant Insurance Company and directed the appellant to pay the entire award amount to the respondent No.1.

6. Aggrieved by the aforesaid findings of the Claims Tribunal, the appellant Insurance Company has preferred the present appeal on the ground that the learned Claims Tribunal failed to appreciate that the motorcycle comes under a different category from LMV (NT) and that if a person knows how to drive a motor car, it does not necessarily mean that he is qualified to drive a motorcycle as well.

7. In the above context, Ms. Suman Bagga, the learned counsel for the appellant, pointed out that in the course of his cross-examination, the respondent No.2, who was driving the alleged offending vehicle and who appeared in the witness-box as R1W1, categorically admitted that the vehicle driven by him was in the name of his mother and that he had a driving licence for driving LMV (NT). Ms. Bagga also referred to and relied upon the testimony of R3W2 – Shri Naresh Chand, LDC, Delhi Transport Authority, West Zone, Janak Puri, New Delhi who proved on

record the driving licence of the respondent No.2 (Ex.R3W2/A) as a driving licence for driving ˇLMV (NT) only, and in particular on the statement of the said witness that the respondent No.2 was not authorized to drive a motorcycle/two-wheeler under the driving licence held by him. Ms. Bagga contended that a motorcycle was an altogether different category of vehicle, which was incapable of being clubbed with any other category, and as the respondent No.2 was not holding a driving licence for driving a motorcycle at the time of the accident, there was a clear breach of the terms and conditions of the Insurance policy and hence the Insurance Company was not liable to pay any compensation to the injured- victim and the liability to pay compensation, if any, was that of the respondents No.2 and 3.

8. Ms. Bagga further urged that the learned Claims Tribunal failed to appreciate that the respondent No.2 being the son of the insured/ owner, the respondent No.3, was driving the motor cycle with the knowledge and consent of the insured/owner. The respondent No.3 had the full knowledge that the driving licence held by the respondent No.2 did not entitle him to drive a motorcycle. There was, thus, wilful breach of the terms and conditions of the policy on the ˇpart of the insured by allowing the respondent No.2 to drive the motor cycle owned by her without a valid and effective driving licence to drive the said vehicle. The appellant – Insurance Company, therefore, ought to have been exonerated of any liability in the present case, and at the very least, ought to have been given recovery rights to enable it to recover the awarded amount from the insured/owner.

9. Ms. Bagga further contended that impugned award was contrary to the principles of law laid down by the Hon'ble Supreme Court in the decisions rendered by it in the cases of **National Insurance Co. Ltd. vs. Swaran Singh and Ors.** I (2004) ACC 1 (SC); **United India Insurance Co. Ltd. vs. Gian Chand and Ors,** II (1997) ACC 437 (SC), and **National Insurance Co. Ltd. vs. Kusum Rai and Ors.** II (2006) ACC 19 (SC). In the aforesaid judgments, it has been clearly held that when the insured has handed over the vehicle for being driven to an unlicensed driver, the Insurance Company got exonerated from its liability to bear the claims of the third party, who might have suffered on account of the vehicular accident caused by such unlicensed driver.

10. Reference was also made by Ms. Suman Bagga, the learned counsel for the appellant, to the judgment of the Supreme Court rendered in the case of **National Insurance Co. Ltd. vs. Geeta Bhat and Ors.,** AIR 2008 SC 1837, the relevant part whereof reads as under:

> "An owner of the vehicle is bound to make reasonable enquiry as to whether the person who is authorized to drive the vehicle holds a licence or not. Such a licence not only must be an effective one but should also be a valid one. It should be issued for driving a category of vehicle as specified in Motor Vehicles Act and/or Rules framed thereunder."

11. Mr. Harpreet Singh Uppal, the learned counsel for the respondents No. 2 and 3, sought to rebut the aforesaid contentions of the learned counsel for the appellant by submitting that the Insurance Company had not taken any plea in its written statement that the breach of policy condition was wilful on the part of the insured. Furthermore, there was nothing on record to suggest that the keys of the offending vehicle were taken by the respondent No.2 with the consent of the insured. Mr. Uppal placed reliance upon the three-Judge Bench decisions of the Hon'ble Supreme Court rendered in the cases of **Sohal Lal Passi vs. P. Sesh Reddy and Ors.** 1996 ACJ 1044 and **National Insurance Company Ltd. vs. Swaran Singh** (2004) 3 SCC 297; the decision of this High Court in **V. Mepherson and Anr. vs. Shiv Charan Singh and Ors.** 1998 ACJ 601 and the decision of the Punjab and Haryana High Court in the case of **Rakesh Kumar Arora vs. Balwant Singh** 2001 (1) T.A.C. 677 (P&H).

12. He contended that the common thread which runs through all the aforesaid decisions is that in order to bring the case within the mischief of "breach", it must be proved by the Insurance Company that there was wilful default on the part of the insured. Where there is no evidence on record to indicate that the owner of the vehicle had parted with the keys of the vehicle, deliberately or knowingly, to a person who had caused the accident, it cannot be said that there was an express or implied consent on the part of the insured/owner, so as to exonerate the Insurance Company from the liability to pay compensation to the victim.

13. Mr. Uppal contended that in the case of **Sohan Lal Passi** (supra), the Hon'ble Supreme Court had gone to the extent of laying

down that technical objection should not be allowed to be raised by the Insurance Company. In that case, the person driving the vehicle was not even a driver and was in fact a cleaner, who was not holding any licence, but the actual driver who had a valid driving licence, had authorized him to drive the vehicle. In the circumstances, the Supreme Court held that no breach of the terms and conditions of the policy had been established. It observed:

> "In a case where the person who has got insured the vehicle with the insurance company, has appointed a duly licensed driver and if the accident takes place when the vehicle is being driven by a person not duly licensed on the basis of the authority of the driver duly authorised to drive the vehicle whether the insurance company in that event shall be absolved from its liability? While interpreting the contract of insurance, the Tribunal and Courts have to be conscious of the fact that right to claim compensation by heirs and legal representatives of the victims of the accident is not defeated on technical grounds. Unless it is established on the materials on record that it was the insured who had wilfully violated the condition of the policy by allowing a person not duly licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgement debtor in respect of the liability in view of sub-section (1) of section 96 of the Act."

It was further observed by the Supreme Court:

> "The whole concept of getting the vehicle insured by an insurance company is to provide an easy mode of getting compensation by the claimants, otherwise in normal course they had to pursue their claim against the owner from one forum to the other and ultimately to execute the order of Accidents Claims Tribunal for realisation of such amount by sale of properties of the owner of the vehicle."

14. In the case of **V. Mepherson** (supra) decided by a learned Single Judge of this Court, the car which had caused the accident was being driven by the son of the owner at the time of the accident. He had no licence to drive the car. The learned Tribunal mulcted the liability on the driver and owner and exempted the Insurance Company on the ground that the driver had no licence to drive the car. Setting aside the

judgment of the Tribunal, the High Court held that if it had been brought on record that the owner himself had allowed the vehicle to be driven by his son, who was not duly licenced, then, the bar created by sub-section (2) of Section 96 would have been attracted but the facts which had come on record showed that the son had in the absence of the father, who had gone out of station, used the vehicle without the consent and knowledge of his father. Interpreting ˇthe expression "breach" occurring in Section 96(2)(b), the Court held that it was incumbent upon the insurer to satisfy the Tribunal or the Court that such violation or infringement on the part of the insured was wilful and if the insurer was unable to establish wilful breach on the part of the insured, the Insurance Company could not repudiate its statutory liability.

15. Mr. Uppal also relied upon the following apposite observations made by the Supreme Court in the case of **Swaran Singh** (supra):

> "The insurance company is required to prove the breach of the condition of the contract of insurance by cogent evidence. In the event the insurance company fails to prove that there has been breach of conditions of the policy on the part of the insured, the insurance company cannot be absolved of its liability. This court did not lay down a degree of proof, but held that the parties alleging the breach must be held to have succeeded in establishing the breach of the conditions of the contract of insurance in the part of the insurance company by discharging its burden of proof. The Tribunal, must arrive at a finding on the basis of the materials available on the record."
>
> "The summary of our findings to the various issues as raised in these petitions are as follows:
>
> (i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.
>
> (ii) Insurer is entitled to raise a defence in a claim petition filed under Section 163A or Section 166 of the Motor Vehicles Act,

1988 inter alia in terms of Section 149(2)(a)(ii) of the said Act.

(iii) The breach of policy condition, e.g. disqualification of driver or invalid driving licence of the driver, as contained in Sub-section (2)(a)(ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof where for would be on them.

(v) The court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstance of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/ are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149(2) of the Act.

(vii) The question as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver, (a fake one or otherwise), does not ˇfulfil the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree."

16. It will be apposite at this stage to take a look at the provisions of law relevant for deciding the controversy in the present case. Section 2 (10) defines a driving licence as follows:

> Section 2 Clause (10):- "driving licence" means the licence issued by a competent authority under Chapter II authorizing the person specified therein to drive, otherwise than as a learner, a motor vehicle or a motor vehicle of any specified class of description;

17. The definitions of light motor vehicle and motor cycle which are set out in Clause (21) and Clause (27) of Section 2 read as follows:

> **Section 2 Clause (21):-** "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road roller the unladen weight of any of which, does not exceed 7,500 kilograms;
>
> **Section 2 Clause (27):-** "motor cycle" means a two-wheeled motor vehicle, inclusive of any detachable side-car having an extra wheel, attached to the motor vehicle;

18. Sections 3, 4 and 5 contained in Chapter II deal with the necessity for driving licence and mandate that:

> **"3. Necessity for driving licence.-**(1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorizing him to drive the vehicle; and no person shall so drive a transport vehicle other than a motor cab or motorcycle hired for his own use or rented under any scheme made under sub-section (2) of Section 75 unless his driving licence specifically entitles him to do so.
>
> (2) The conditions subject to which sub-section (1) shall not apply to a person receiving instructions in driving a motor vehicle shall be such as may be prescribed by the Central Government.

4. Age limit in connection with driving of motor vehicles.- (1) No person under the age of eighteen years shall drive a motor vehicle in any public place.

Provided that a motor cycle with engine capacity not exceeding 50cc may be driven in a public place by a person after attaining the age of sixteen years.

(2) Subject to the provisions of section 18, no person under the age of twenty years shall drive a transport vehicle in any public place.

(3) No learner's licence or driving licence shall be issued to any person to drive a vehicle of the class to which he has made an application unless he is eligible to drive that class of vehicle under this section.

5. Responsibility of owners of motor vehicles for contravention of sections 3 and 4.- No owner or person in charge of a motor vehicle shall cause or ˇpermit any person who does not satisfy the provisions of section 3 or section 4 to drive the vehicle."

19. Cumulatively read the aforesaid provisions of law make it incumbent upon a person driving a motor vehicle in any public place to hold a valid and effective driving licence issued to him by the Competent Authority under Chapter II, authorizing him to drive the motor vehicle of the class specified in the licence. It is also clear that a light motor vehicle has been classified as a separate and distinct class of vehicle than a motorcycle, which is a two wheeled motor vehicle as opposed to a light motor vehicle which means a transport vehicle or omni bus the gross weight of either of which, or motor car or tractor or road roller, the unladen weight of any of which, does not exceed 7,500 kilograms. While Clause 21 defines a light motor vehicle, the definition of a motorcycle is as contained in Clause 27. Thus, the two categories of vehicles must be held to be separate and distinct. Even otherwise, it stands to reason that the expertise which is required to drive a motorcycle is quite different from the know-how required by a person for driving a light motor vehicle, that is to say, it ˇcannot be assumed that every person who is competent to drive LMV, will be skilled in driving a two-wheeler as well.

20. Having arrived at the conclusion that the respondent No.2 was not holding a valid and effective driving licence, the only question which remains to be examined is whether there was a wilful breach on the part of the insured in allowing her son to drive the motorcycle owned and insured by her. R1W1 Mikul Bedi, who was the driver of the offending motorcycle, examined himself in the witness box and stated that he was driving the motorcycle belonging to his mother for which he was holding an L.M.V. licence. The insured, who was the owner of the motor vehicle, did not examine herself to state whether there was no wilful breach of the policy condition pertaining to driving licence on her part. R3W2, an official from the concerned Transport Authority, who proved on record the driving licence of the respondent No.2 for driving LMV (NT), in the course of his statement, clearly stated that the respondent No.2 was not authorized to drive a motorcycle/two-wheeler under the driving licence held by him.

21. In view of the aforesaid evidence on record, the inescapable conclusion, in my opinion, is that the insured-owner must be held guilty of deliberate breach of contract between him and the appellant. I am fortified in coming to the aforesaid conclusion from the decision of the Supreme Court rendered in the case of **United India Insurance Company Limited v. Rakesh Kumar Arora and Others,** (2008) 13 SCC 298. In the said case, the driver of the offending vehicle was a minor on the date of the accident and was not holding any driving licence. The insurer on the said ground denied its liability to reimburse the vehicle owner. The Tribunal while determining the issue of liability opined that the Insurance Company was not liable for payment of the amount of compensation to the claimants. However, an appeal filed against the said order was allowed by a learned Single Judge of the Punjab and Haryana High Court as follows:

> "After considering the rival contentions of the parties, I am of the opinion that the material point for determination is whether there was any breach of contract between the owner of the vehicle and the Insurance company. If the breach is committed on behalf of the vehicle, certainly the Insurance Company has a case. In order to bring the case within the mischief of ˇ'breach' it has to be proved that there was a willful default on the part of the insured. I have already stated above that no sane father

would like to give the custody or keys of the vehicle to his minor son aged fourteen years, much less to the friend of the minor. Had Rakesh Kumar Arora parted the possession of the vehicle to his son he would have contemplated very easily that by doing so he would have incited the trouble. The Hon'ble Supreme Court 1987 while interpreting the expression „breach. came to the conclusion that if it is proved on the record that the owner of the vehicle had done every thing in his power to keep, honour, and fulfil the promise, in such a situation he cannot be held guilty of a deliberate breach. There is no evidence on the record to indicate that the owner of the vehicle parted the keys of the vehicle to his son deliberately or knowingly. If in the absence of the father the son takes the keys of the vehicle and drives the vehicle for fun and causes accident, it cannot be said that there was an express or implied consent on the part of the owner. The judgments which have been relied upon by the learned Counsel for the Insurance Company may not be any assistance to him for the simple reason that in the said judgments it has proved prima facie that there was a breach of contract on the part of the insured."

22. A Letters Patent Appeal having been filed thereagainst, the Division Bench of the High Court by reason of the impugned judgment dismissed the said appeal and upheld the decision of the ˇlearned Single Judge, relying upon some precedents viz. **V. Mepherson v. Shiv Charan Singh,** 1998 ACJ 601 (Del) and **Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan,** (1987) 2 SCC 654.

23. The Supreme Court, allowing the appeal and setting aside the aforesaid judgment of the High Court of Punjab and Haryana (which has been heavily relied upon by the counsel for the respondents No.2 and 3), held as follows:

"9. Section 4 of the Motor Vehicles Act prohibits driving of a vehicle by any person under the age of eighteen years in any public place. Section 5 of the Act imposes a statutory responsibility upon the owners of the motor vehicles not to cause or permit any person who does not satisfy the provisions of Sections 3 or 4 to drive the vehicle.

10. The vehicle in question admittedly was being driven by Karan Arora who was aged about fifteen years. The Tribunal, as noticed hereinbefore, in our opinion, rightly held that Karan Arora did not hold any valid licence on the date of accident, namely 5-2-1997.

11. The learned single Judge as also the Division Bench of the High Court did not put unto themselves a correct question of law. They proceeded on a wrong premise that it was for the Insurance Company to prove breach of conditions of the contract of insurance.

12. The High Court did not advert to itself the provisions of Sections 4 and 5 of the Motor Vehicles Act and thus misdirected itself in law.

13. This aspect of the matter has been considered by this Court in **Oriental Insurance Co. Ltd. v. Prithvi Raj** (2008) 2 SCC 338 wherein upon taking into consideration a large number of decisions, it was held that the Insurance Company was not liable, stating: (SCC p.349, para 9)

"9. In the instant case, the State Commission has categorically found that the evidence on record clearly established that the licensing authority had not issued any license, as was claimed by the driver and the respondent. The evidence of Shri A.V.V. Rajan, Junior Assistant of the Office of the Jt. Commissioner and Secretary, RTA, Hyderabad who produced the official records clearly established that no driving license was issued to Shri Ravinder Kumar or Ravinder Singh in order to enable and legally permit him to drive a motor vehicle. There was no cross-examination of the said witness. The National Commission also found that there was no defect in the finding recorded by the State Commission in this regard."

14. Yet again, this Court in **National Insurance Co. Ltd. v. Kaushalaya Devi** (2008) 8 SCC 246 took the same view stating: (SCC pp.248-49, paras 10-11)

"10. The provisions relating to the necessity of having a license to drive a ˇvehicle are contained in Section 3, 4

and 10 of the Act. As various aspects of the said provisions vis-a-vis the liability of the Insurance Company to reimburse the owner in respect of a claim of a third party as provided in Section 149 thereof have been dealt with in several decisions, it is not necessary for us to reiterate the same once over again. Suffice it to notice some of the precedents operating in the field.

11. In **National Insurance Co. Ltd. v. Swaran Singh** (2004) 3 SCC 297 this Court held: (SCC p.336, paras 88-89)

"88. Section 10 of the Act provides for forms and contents of licences to drive. The licence has to be granted in the prescribed form. Thus, a licence to drive a light motor vehicle would entitle the holder thereof to drive the vehicle falling within that class or description.

89. Section 3 of the Act casts an obligation on a driver to hold an effective driving licence for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licences for various categories of vehicles mentioned in sub-section (2) of the said section.'

It was furthermore observed: (SCC p.337, paras 90-91)

'90. We have construed and determined the scope of sub-clause (ii) of sub-section (2)(a) of Section ˇ149 of the Act, Minor breaches of licence conditions, such as want of medical fitness certificate, requirement about age of the driver and the like not found to have been the direct cause of the accident, would be treated as minor breaches of inconsequential deviation in the matter of use of vehicles. Such minor and inconsequential deviations with regard to licensing conditions would not constitute sufficient ground to deny the benefit of coverage of insurance to the third parties.

91. On all pleas of breach of licensing conditions taken by the insurer, it would be open to the Tribunal to adjudicate the claim and decide inter se liability of insurer and insured; although where such adjudication is likely to entail undue

delay in decision of the claim of the victim, the Tribunal in its discretion may relegate the insurer to seek its remedy of reimbursement from the insured in the civil court.'

The decision in Swaran Singh, however, was held to be not applicable in relation to the owner or a passenger of a vehicle which is insured."

24. In view of the aforesaid authoritative pronouncement of the Supreme Court, the impugned judgment cannot be sustained. Since however, notice in the appeal was issued to the respondents No.2 and 3 on the limited question as to whether the appellant is entitled to recovery rights against the respondents No.2 and 3 and since no stay was granted by this Court to the appellant in respect of the award amount, it is directed that the appellant shall be entitled to recover the amount in question from the respondents No.2 and 3 in accordance with law.

25. The appeal is allowed accordingly.