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settlement between themselves—In terms of this arrangement, the parties shifted in different portions of the property and leased out the entire basement for commercial use—The original defendants No. 1 to 5 are alleged to be in possession and control of the entire estate except the portion of the property in occupation of the appellant—Alleged that defendants No. 1 to 6 were threatening to sell the entire property to defendant no.7, in order to pocket the consideration including the share of the appellant—In this background, partition is sought of the immovable property and rendition of accounts of the business apart from recovery of rent realized from the immovable property—Along with the suit, an application under Order XXXIX Rule 1 and 2 for interim relief filed seeking a restraint against the defendants from creating charge or transferring, selling or alienating the aforesaid immovable property and from dispossessing the appellant from the portion in her possession on the first floor, apart from a restraint against removing the account books from the business premises—Summons were issued in the suit as also notice in the application on 02.04.2002 and ad interim ex-parte orders were granted to the appellant—Application under Order XXXIX Rule 2A read with section 151 of the Code filed by the Plaintiff alleging that there has been violation of the status quo Order dated 02.04.2002—Respondents denied commission of any contempt stating that the ex-parte Order granted on 02.04.2002 simply required the parties to maintain status quo qua the possession and title of the said property and further restrained alienation, transfer or creating third party interest—In view of the Sale Deed, possession is stated to have already been passed on to the original defendant No. 7—There was, thus, no restrain order against the demolition of certain walls, which was carried out—This argument found favour with learned Singe Judge, who dismissed the contempt petition—Hence:- Present appeal—

Held:- Defendant should have moved the Court for varying the construction even though there was a restrictive injunction order—However, any additional relief qua these aspects was not granted to the appellant—Defendant is not guilty of willfully violating the interim orders passed by this Court and the interest of the appellant are protected—Though styled as CCP as CCP (OS), the petition is under Order XXXIX Rule 2A read with Section 151 of the said Code and even the prayers are made accordingly—No dispute as to the maintainability of the appeal from an order dismissing an application under Order XXXIX Rule 2A of the said Code in view of the provisions of Order XLIII Rule 1 of the said Code-However, on examination of this matter, there appears to be a conflict of view qua this issue—A learned Single Judge of the Punjab and Haryana High Court in *Rajinder Kaur vs. Sukhbir Singh,* 2002 Civil CC 125 MANU/PH/1830/2001 has held that there is no limitation whatsoever in the aforesaid Rule as to the nature of the order passed under this Rule—Thus, a restrictive meaning cannot be given that an appeal would not lie if the application is dismissed—On the other hand, learned Single Judge of the Gauhati High Court in *Shri Banamali Dey vs. Shri Satyendra Chanda & Ors.* (1990) 2GLR 408=MANU/GH/0164/1990 has concluded that an order refusing to take action under Rule 2A on the ground that there was no disobedience or breach of injunction cannot be said to be an order under Rule 2A and—Thus, no appeal would be maintainable against such an order under clause (r) of Rule of Order XLIII of the said Code—Division Bench of this Court in *The Bombay Metal Works (P) Ltd. Vs. Tara Singh & Ors.,* ILR (2006) I DELHI Has held that appeal would be maintainable from an order dismissing the application under Order XXXIX Rule 2A of the said Code—Aforesaid two Judgments have not been discussed in this cases and the perspective expressed by the Gauhati High Court has also not been examined—The

application filed in The Bombay Metal Works (P) Ltd. case (supra) was actually under Sections 2(a), 11 and 12 of the Contempt of Courts Act, 1971 and the learned Single Judge absolved the respondents from notice of contempt—An appeal was filed under Section 19 of the Contempt of Courts Act, which was pleaded to be by the respondents as not maintainable in view of the settled legal position—Appellants pleaded that the contempt application filed for disobedience of the interim orders purported to have been filed was actually under Order XXXIX Rule 2A of the Code and a wrong provision was cited—The appeal was, thus, treated as FAO (OS) and while discussing this aspect, it was observed that the appeal would be maintainable—It is not appropriate to in interfere with the dismissal order of that application for the reason recorded aforesaid and the rights and obligations of the parties would be determined in the suit, which has unfortunately taken large number of years—The appeal is accordingly dismissed leaving the parties to bear their own costs.

Jugan K. Mehta v. Sham Sunder Gulati & Ors. 534

— Suit for possession and mesne profit—The predecessor in interest late Sardar Sohan Singh, the father of plaintiff Nos. 1 and 2 as also the defendant Nos. 2 to 5 was a member of a Cooperative Society—On 14.01.1952 Sardar Sohan Singh was allotted the suit plot admeasuring 4132 sq. yds and an agreement was entered into by Sardar Sohan Singh with the Society—Pleaded that Sardar Sohan Singh paid the entire consideration with respect to the plot—Sardar Sohan Singh was stated to have friendly relations with Sir Sobha Singh, the father of defendant no.1/respondent no.1—Both of them were also partners in a partnership firm plans for construction were got sanctioned from appropriate authorities on an application made on behalf of Sardar Sohan Singh and the task

of constructing the building was entrusted by Sardar Sohan Singh to Sir Sobha Singh—Further, pleaded that the construction material from which the residential house on the suit plot was made was utilized out of the material of the partnership firm—After construction, the property was entrusted by Sardar Sohan Singh to Sir Sobha Singh for managing the property—Further pleaded that Sardar Sohan Singh continued to remain the owner of the plot in the records of the Society—Further pleaded in the plaint that the Society wrongly transferred the Suit plot by a sale deed in the name of defendant no.1/respondent no.1 on account of fraud and collusion—Execution of the sale deed in favour of defendant no.1/respondent no.1 was contrary to the rules and regulations of the Cooperative Society—When Sardar Sohan Singh approached the Society for executing the sale deed of the suit plot in his name, the Society informed Sardar Sohan Singh that the sale deed with respect to the suit plot had already been executed in favour of defendant no.1/respondent no.1 and thus, the existence of the sale deed come to the Knowledge of Sardar Sohan Singh and the plaintiffs—Defendant No. 1/ respondent No. 1 after retiring from Indian Army in about 1964, came into the possession of the house constructed on the suit plot and has been living there since then—On the basis of aforesaid facts, claiming that the cause of action had arisen either in January, 1964 or on 25.05.1963, the subject suit for possession and mesne profits come to be filed—Suit was contested—Contended that Sardar Sohan Singh after making initial payment of the cost of the plot, was not in a position to make construction on the plot which was a necessary requirement of the terms of allotment that construction must be completed within a specified period of time—On account of inability of Sardar Sohan Singh to complete the construction there was consequently a threat of cancellation of the allotment and forfeiture of the money paid—On account

of such threat of cancellation of the allotment and forfeiture of the amounts which were paid by Sardar Sohan Singh to the Society, Sardar Sohan Singh agreed to mutation of the plot in the name of the defendant no.1/respondent no.1 the son of Sir Sobha Singh—Sardar Sohan Singh wrote his letter dated 4.10.1954 to the Society to transfer the membership and the plot in the name of the defendant no.1/respondent no.1-By a resolution number 3-C passed in the meeting held on 13.10.1954, the Society agreed to transfer the suit plot in the name of defendant no.1/respondent. No.1 pursuant to the letter dated 4.10.1954 written by Sardar Sohan Singh to the Society—Sir Sobha Singh never acted as an attorney or an agent of Sardar Sohan Singh and, the fact of the matter was that Sir Sobha Singh was acting only for and on behalf of his son, the defendant no./respondent no. 1 with the Society—The written statement also denied the alleged plea of fraud and collusion as alleged by the plaintiffs in the plaint—It was further pleaded that as the sale deed was executed in the year 1960, and that right from the year 1960 the plaintiffs were aware of the sale deed having been executed in the name of defendant no.1/respondent no.1 and also of the defendant no.1/respondent no.1 being the owner of the suit property, the suit filed in the year 1975 was hence, time barred-Suit dismissed—Hence, present appeal—Held:- In the present case, there is admittedly an agreement in writing, dated 14.01.1952 by which the plot was agreed to be transferred/sold to Sardar Sohan Singh and which contained the terms of the transfer. Possession of the plot under this agreement was given to Sardar Sohan Singh. Sardar Sohan Singh paid the consideration as was them payable under this agreement dated 14.01.1952—However the basic requirement of being ready and willing to perform his part of the contract by Sardar Sohan Singh was that he had to make construction on this plot allotted by the Society within the Specific period of time—

The construction on the plot was made by Sir Sobha Singh—Therefore, the requirement of Section 53-A to Transfer of property Act, 1882 of readiness to perform his part of the contract was not complied with by Sardar Sohan Singh—No benefit can be derived by Sardar Sohan Singh or now his legal heirs by claiming that Sardar Sohan Singh had effective ownership rights in the suit plot by virtue of the agreement dated 14.01.1952—Sardar Sohan Singh in addition to the fact that he was not ready and willing to perform his part of contract (a necessary requirement of Section 53A) in fact voluntarily gave up his rights in the suit plot and the membership of the Society inasmuch as he stated that he could not make the construction on the suit plot and therefore, gave up his rights in favour of the defendant no.1/respondent no.1 vide letter dated 4.10.1954-By the specific language of section 53-A, rights which are reserved by the seller under the agreement, are not given to the proposed buyer and the Society, having reserved certain rights by requiring constructions to be completed by allottees in a specified time, was fully competent under such reserved right to transfer the plot Construction of the building on the plot was not made for and on behalf of Sardar Sohan Singh by Sir Sobha Singh by using/spending any alleged monies of Sardar Sohan Singh—Undisputed position which has come record is that there has not been shown any actual transfer of funds by Sardar Sohan Singh either to Sir Sobha Singh or to anybody else for raising of construction on the suit plot Sardar Sohan Singh in his lifetime never filed any suit to claim any right in the Suit property whether by seeking cancellation of the sale deed dated 3.12.1960 or seeking possession of the building thereon—Sardar Sohan Singh also in his lifetime, never revoked the letter dated 4.10.1954 seeking transfer of the membership and transfer of allotment of the suit plot to the defendant No.1. Building was constructed during the years

1957 to 1959 and the sale deed was executed on 3.12.1960 whereas Sardar Sohan Singh expired much later in the year 1974—Thus, it is only the legal heirs of Sardar Sohan Singh who have suddenly woken up after his death hoping that by speculation in litigation, they may be successful and be able to get some benefits.

Mukhinder Singh (Deceased) Through LRs. & Ors. v. *Gurbux Singh & Ors.* *578*

— Section 96—Appellants/plaintiff purchased the rights in the suit property by means of Agreement to Sell, Power of Attorney and will from previous owner through a chain of similar documents—Appellants/plaintiffs filed suit for possession and mesne profit claiming the Respondents to be illegal occupants/ trespassers in suit property-Respondents prayed for dismissal of the suit the ground that the appellants were not owners of the suit property and documents relied upon by appellant cannot confer any ownership rights in suit property-Trial Court dismissed the suit holding that they cannot be said to be the owners on the basis of the documents which do not confer ownership-Hence, present appeal—Held:- Once documents being original and registered documents, are filed and proved on record, the onus of proof that such documents are not genuine documents, in fact shifts to the opposite party—Ownership of the original owner cannot be disputed and the same is a strong proof of the ownership of the suit property of the appellants proved by means of chain of the title documents—All earlier owners are not required to be summoned—Original documents filed by Respondents not proved—Documents such as Agreement to sell, Power of Attorney, Will etc do not strictly confer ownership rights as a sale deed—Such documents create certain rights in an immovable property entitling the persons who have such documents to claim possession of the suit property—At least

the right to the suit property would stand transferred to the person in whose favour such documents have been executed—Ownership rights can be construed as entitling persons who have documents to claim possession of the suit property inasmuch as at least the right to the suit property would stand transferred to the person in whose favour such documents have been executed—Appeal accepted suit decreed.

O.P. Aggarwal & Anr. v. *Akshay Lal & Ors.* *645*

CODE OF CRIMINAL PROCEDURE, 1973—Section 320—Indian Penal Code, 1860—Section 323, 324, 354, 34—Offences being not compoundable, can FIR be quashed on settlement Held—Compounding of non compounding offences permissible as per the judgment of *B.S Joshi Vs, State of Haryana Nikhil Merchant vs. CBI and Manoj Sharma vs. State.* These three judgments have been referred to the larger bench vide judgment in case of Gain Singh vs. State. However till these are set aside, they hold the field—Petition allowed.

Teka Singh @ Titu & Ors. v. State & Anr. *475*

— Section 482, 468(2); Indian Companies Act, 1956—Section 63, 628: Petition for quashing of summoning order in complaint u/s 63 and 628—Petitioner contend that complaint beyond period of limitation—Held—Period of limitation in any offence commences only upon receipt of knowledge of breach-Period of limitation will not begin from the date of filling prospectus but from date of filing of balance sheet on which the complaint is based— Complaint within period of limitation—Petition dismissed.

Kuldeep Kumar Kohli & Ors. v. The Registrar of Companies for Delhi And Haryana *480*

— Section 200, 482—Indian Penal Code, 1860—Section 120-B 494A, 498A—Petition against order of MM dismissing the

complaint of the Petitioner—Petitioner after obtaining decree of divorce from foreign Court and after the subsequent marriage of the Respondent, filed criminal complaint of bigamy and cruelty against the Respondent alleging that foreign decree of divorce was an invalid decree—Held:- under Section 13 of CPC, a foreign judgment is conclusive as to any matter thereby directly adjudicated upon between the same parties except in cases specified thereunder. However, the right if any, to contend that the said foreign judgment is not conclusive can be only of the party who had himself/herself/itself not initiated the process of obtaining the said judgment and cannot be of a party at whose instance such foreign judgment has been obtained No. litigant can be allowed to abuse the process of the Courts or to approbate and reprobate as per convenience. The petitioner had deposed that she was in U.K. from 1993 to 1999. She has not even whispered, alleged or made out any case of any of the grounds for the foreign judgment of dissolution of her marriage with the respondent being not conclusive. For the said foreign judgment to be not conclusive, the petitioner was required to make out a case of the same being either pronounced by a Court having no jurisdiction and /or having been not given on the merits of the case or being founded on an incorrect view of international law or the proceedings resulting therein being opposed to natural justice or having been obtained by fraud or sustaining a claim founded on a breach of any law in force in India. Moreover, all the grounds specified in section 13 of the CPC and on establishment whereof a foreign judgment can be said to be not conclusive are such which can be set up only by a party not himself/herself/itself approaching the foreign Court. Here the petitioner who is challenging the judgment, was at the relevant time resident for a fairly long time within jurisdiction of the foreign Court, did not approach the foreign court under the dictates of the respondent and made out a case before the

foreign Court of obtaining the judgment-Petition dismissed.

— Section 173—Cross appeals filed by Insurance Company claiming recovery rights against owner of offending vehicle and cross objections filed by claimants for enhancement of compensation—Plea taken, driver did not possess a valid driving license on date of accident and Insurer was entitled to avoid liability—Per Contra Plea taken, insurer failed to establish breach of policy condition—Deceased was aged 50 years on date of accident—Claims Tribunal erred in taking deceased's age to be 68 years—Held—No effort was made by insurer to summon record from RTO with regard to renewed license produced by driver to show that license was not valid on date of accident—Investigation Officer not examined to rebut driver's contention that he had a valid driving license on date of accident which was seized by Investigating Officer-Mere filing of chargesheet under Section 3 of Act is not sufficient to hold that driver did not possess a valid driving license at time of accident—Since claimant's testimony that deceased was 50 years, was not challenged in cross examination and in view of contradictory documentary evidence, age favourable to claimants has to be considered for grant of compensation as provision of Section 166 is a piece of social legislation—Compensation enhanced.

— Section 204—Petition challenging the order passed by LD.M.M summoning the petitioner—Complaint filed alleging that main social networking websites are knowingly allowing contents and material which is dangerous to communal harmony, with common and malafide intentions and have failed

to remove the objectionable content for their wrongful gain-Ld. M.M passed the summoning order-Challenged-There is no averment against the petitioner in the complaint-No evidence produced against him-Respondent contends-complainant has missed the opportunity to make proper averments in the complaint and adduce evidence, in that situation he has a right to amend the same and lead the evidence thereafter-Held-There is no iota of evidence deposed qua the petitioner-Nor proved even by the complainant when he was examined as PW1—There should have been specific averments about the nature of act or omission and law violated and in the absence of the same, summons issued against the petitioner are not sustainable in law—There is no provision in Code of Criminal Procedure to amend the complaint or produce the documents after issuing of the summons—Magistrate has to carefully scrutinize the evidence brought on record and may even put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima-facie committed by all or any of the accused—The corrective measure of amending the complaint, cannot be accepted, being not tenable under law.

Yahoo India Pvt. Ltd. v. *State & Anr.* *634*

CONSTITUTION OF INDIA, 1950—Article 226—Territorial Jurisdiction Article 12—'State'—Respondent no.2 Jammu & Kashmir State Financial Corporation Set up by respondent no.1 to promote medium/large scale Industry in the State of J&K-Primary function of respondent no.2 to extend financial assistance to industrial projects to speed up industrial investment in the State—Respondent no. 2 invited investments in bonds issued by it; Guaranteed by respondent no.1-Petitioner subscribed to the said bond in Delhi by making payment in Delhi—Respondent no. 2 paid interest on the said bond in Delhi

occasionally-However, respondent defaulted in payment of half yearly installment of interest and in redeeming of bond upon maturity—On communication from petitioner repeatedly sent, respondent no.2 expressed its inability to make payment on the ground of shortage of fund-Stated that matter taken up with State government-Petitioner sent a legal notice—Thereafter, received partial payment—Due payments not made despite further reminder—Petitioner filed writ petition—Respondent did not deny facts—Pleaded financial stringency—Contended—Respondent located in the Stage of J&K-High Court Delhi had no territorial jurisdiction—Secondly, writ petition to seek recovery of money not maintainable—Court observed payment for purchase of bond made in Delhi; one payment of interest made in Delhi Substantial part of cause of action arisen in Delhi within the jurisdiction of Delhi High Court-Objection of territorial jurisdiction rejected-Regarding second objection-Observed-The jurisdiction under Court under Article 226 unfettered, the only fetters are those which the court have themselves placed on the said jurisdiction-Held-firstly, the primary relief to seek-enforcement of a sovereign guarantee of State of J&K-No question of disputed facts-Observed in a appropriate case writ petition as against State or an instrumentality of State arising out of a contractual obligation maintainable-Even though some disputed questions of facts arise for consideration, same cannot be ground to refuse to entertain writ petition in all the cases as matter of Rule-Issued direction to release amount-Writ Petition allowed.

Airports Authority of India and Ors. v. State of Jammu & Kashmir & Ors. *444*

— Article 226—Petitioner completed four and half years of medical course; furnished certificate—Issued provisional registration by MCI in 2000—Authenticity of this not certified by Moscow University—Provisional registration withdrawn on

29.05.2001—MCI intimated the police authority—Lodged FIR against petitioner under S. 420/468/471 IPC-Petitioner Contended—Misled into believing that diploma could be issued by Moscow University—The truth otherwise was the matter under investigation—He had gone back to Russia and completed the balance course from St. Petersburg State Medical Academy—This institution certified the petitioner having completed the course-Issued diploma on 23.06.2003—Petitioner returned—Attempted Screening test-Become successful-MCI admitted same—Denied registration on the ground of registration of criminal case—In earlier writ petition filed by the petitioner, High Court issued direction to the respondent to provisionally enroll him and permit his completion of compulsory, rotatory internship in India—Open to MCI to impose condition that in the event of adverse order in criminal proceedings it would take such action against petitioner a warranted under the law after reviewing the facts circumstances—The petitioner thereafter completed rotatory internship-Appeared in CET-NBE conducted by respondent no.2—Result not declared as be he had not been granted permanent registration by respondent no.1—Petitioner contended-The pendency of the criminal proceedings should not be allowed to mar the career prospect of the petitioner—Admittedly, the petitioner fully qualified and eligible for grant of permanent registration by MCI—Criminal trial may takes years to be completed—Petitioner could not be deprived of his right to profess his profession—Respondent MCI contended—Till the criminal case finally decided, petitioner could not be granted permanent registration—Respondent had no mechanism to track criminal proceedings—Held—Unless the petitioner held guilty, cannot be debarred or prevented from pursuing his profession—Even if held guilty, it need examination whether he should and if so, for what period, so prevented—MCI directed to grant conditional permanent

registration to the petitioner subject to condition that petitioner would give an undertaking to the court that he would keep updating the status of the pending criminal case after every six month-Writ disposed off.

— Article 227—Civil Procedure Code, 1908—Section 13—Criminal Procedure Code, 1973—Section 200, 482—Indian Penal Code, 1860—Section 120-B 494A, 498A—Petition against order of MM dismissing the complaint of the Petitioner—Petitioner after obtaining decree of divorce from foreign Court and after the subsequent marriage of the Respondent, filed criminal complaint of bigamy and cruelty against the Respondent alleging that foreign decree of divorce was an invalid decree—Held:- under Section 13 of CPC, a foreign judgment is conclusive as to any matter thereby directly adjudicated upon between the same parties except in cases specified thereunder. However, the right if any, to contend that the said foreign judgment is not conclusive can be only of the party who had himself/herself/itself not initiated the process of obtaining the said judgment and cannot be of a party at whose instance such foreign judgment has been obtained No. litigant can be allowed to abuse the process of the Courts or to approbate and reprobate as per convenience. The petitioner had deposed that she was in U.K. from 1993 to 1999. She has not even whispered, alleged or made out any case of any of the grounds for the foreign judgment of dissolution of her marriage with the respondent being not conclusive. For the said foreign judgment to be not conclusive, the petitioner was required to make out a case of the same being either pronounced by a Court having no jurisdiction and /or having been not given on the merits of the case or being founded on an incorrect view of international law or the

of the appellant had been filed—Appellant filed the Intra Court Appeal—Contention—Use of word 'shall' in section 20(1) is indicative of the imposition of penalty mandatory—Presence of information seeker is essential not for computing the penalty but also for establishing the default of the information officer—Exclusion of the information seeker from penalty proceedings would dilute the sprit of the Act—The role of the CIC is of an adjudicator—Held—Though Section 20(1) uses the word 'shall', before the words 'impose a penalty of Rs. Two hundred and fifty rupees but in juxtaposition with the words 'without reasonable cause, malafidely of knowingly or obstructed'—The second proviso thereto further uses the words, 'reasonably and diligently'—The question which arises is when the imposition of penalty is dependent on such variables, can it be said to be mandatory or possible of calculation with mathematical precision—All the expressions used are relative in nature and there may be degrees of, without reasonable cause, malafide, knowing or reasonableness, diligence etc.—The very fact that imposition of penalty is made dependent on such variables is indicative of the direction vested in the authority imposing the punishment—Once it is held that the quantum of fine is discretionary, there can be no challenge to the judicial review under Article 226 of the Constitution, of exercise of such discretion, of course within the well recognized limits—If this Court finds discretion to have been not appropriately exercised by the CIC, this Court can, in exercise of its power vary the penalty—Appeal dismissed.

Anand Bhushan v. *R.A. Haritash* *657*

— Article 226—Writ Petition quashing of notice issued by the High Court of Delhi provisionally short listing candidates on the basis of performance in the Delhi Judicial Service (Preliminary) Examination as there were faults in the question

paper and the answer key seeking re-evaluation after corrections/ deletions/ amendments to the questions and answer keys—Further, seeking restraint on Main examination till re-evaluation of the Preliminary Examination—HELD:- The questions would fall into three categories—The first being those questions where the answers reflected in the Answer Key are correct. The second category comprises of those questions in respect of which the option shown to be correct in the Answer Key is incorrect and instead another option as determined above is correct. The third category of questions covers (1) questions out of syllabus; (2) questions in respect of which the answer in the Answer Key is debatable; (3) questions in respect of which there are more than one correct option; (4) questions in respect of which none of the options is correct; and (5) questions which are confusing or do not supply complete information for a clear answer. As regards the first category, no change in the Answer Key is required. The Answer Key in respect of the second category of questions would have to be corrected and the OMR answer sheets would have to be re-evaluated. In case of the third category and when the table of the disputed questions is taken into considerations it is inferred that 12 questions need to be removed/delete from the purview of the said Delhi Judicial Service Exams and 7 questions need to be corrected—The status of the qualified students stands unaffected as it would be unfair on behalf of the court to tamper with the status of the student already selected. Coming on to the second condition stipulating that the number of candidates to be admitted to the main examination (written) should not be more than ten times the total number of vacancies of each category advertised This condition proved to be invalid as the general vacancies advertised were 23 and ten times 23 is 230 whereas the general candidates which have already been declared as qualified for taking the Main Examination (Written) is 235,

landlord to seek eviction of his tenant-In this factual scenario, the impugned judgment suffers from no infirmity.

Maheshwar Dayal (DECED) v. *Shanti Devi & Ors.* *613*

CONTEMPT OF COURTS ACTS, 1971—Section 19,11 & 12—IFCI Limited advanced a loan to M/s Koshika Telecom Ltd.—Loan was secured by hypothecation of the tower and other movable assets—Two of the directors gave personal guarantees—IFCI filed proceedings before DRT—*M/s Koshika Telecom Limited* was held liable for sum of Rs. 233,73,92,900.27 along with pendent lite and future interest @ 10% per annum from 19.07.2002 till realization with cost of Rs. 1.5 lakh and recovery certificate was issued in terms thereof—IFCI filed recovery proceedings—Moved application for sale property (towers) which were hypothecated—Recovery officer vide order dated 18.12.2007 directed attachment and sale of the hypothecated properties—However, the Company was wound up vide order dated 02.08.2005 and the Official Liquidator took over charge of its assets—The hypothecated assets were sold for a sum of Rs. 12 Crores—IFCI filed an application before the Recovery Officer praying for the proceeds realized from sale of assets to be made over to IFCI as the Official Liquidator had received only one claim which was yet to verified—Official Liquidator opposed the application—It appears that the Official Liquidator had a meeting with Ms. Shalini Soni, AGM (one of the contemnors) on 19.08.2009 where a decision was taken that the sale proceeds of the land will be deposited with the official liquidator—Official Liquidator filed a compliance/status report No. 281/2009 dated 06.10.2009 before learned Company judge and requested for appropriate directions—On 12.10.2010 Official Liquidator filed a report bearing No. 13/2010 for direction to IFCI to deposit the sale proceeds and expenses

for advertisement with Official Liquidator-IFCI Limited instead of depositing the sale proceeds with Official Liquidator, chose to file application before Recovery Officer praying that the sale proceeds received from the sale of assets of M/s Koshika Telecom Limited be directed to be appropriated by the IFCI Limited in partial discharge of the Recovery Certificate—Application allowed by the Recovery Officer on 22.02.2010 with a direction that IFCI would furnish and undertaking that in future if any eligible claim in excess of the amount available with the Official Liquidator is received by the Official Liquidator, the requisite amount will be remitted to the Official Liquidator within seven days—Official Liquidator being aggrieved by the non compliance of the directions of the learned Company judge dated 08.10.2008 filed a petition under Sections 11 and 12 of the Contempt of Courts Act, 1971 arraying Ms. Shalini Soni alone as a respondent/contemnor for not depositing the sale proceeds with official Liquidator—Official Liquidator filed an appeal before the DRT against the order of the Recovery Officer dated 22.02.2010—Appeal allowed partially observing that the Official Liquidator would be entitled to the amount to the extent of value of the land of the company while IFCI is entitled to the amount received from the sale of movable assets—IFCI also preferred an appeal before the DRAT—Appeal was dismissed by DRAT—IFCI assailed the Order of DRT and DRAT in WP (C) No. 5014/2010-WP(C) was allowed on 16.12.2010 IFCI was held entitled to retain the amounts both from the sale of movable and immovable assets of M/s Koshika Telecom Limited subject to the other directions—Though the Official Liquidator sought to withdraw the contempt proceedings on 08.03.2011 in view of orders passed by the division Bench, Learned Single Judge declined the prayer—Issued notice to IFCI through Managing Director (contemnor herein) and the Recovery Officer (contemnor herein)—Mr. Atul Kumar Rai is the Managing

Director of IFCI Limited—No notice was issued to him by name but only by designation—In response to the contempt notice, affidavits were filed by all the three contemnors—They all tendered unconditional apology—All the three contemnors were found guilty of contempt—Sentenced to undergo simple imprisonment for a period of one month—IFCI as an institution has been imposed with a fine of Rs. 5 lakh out of which Rs. 3,50,000/- should be deducted from the salary of Mr. Atul Kumar Rai while the balance amount should be deducted from the salary of Ms. Shalini Soni—Appeals—Held:- We are of the view that the controversy ought to have been put to a rest when the Official Liquidator itself wanted to withdraw the contempt petition on 08.03.2011—The learned single Judge did not even permit that but proceeded to issue notices further to the Managing Director of IFCI by Designation and Recovery Officer ostensibly to Know whether the Recovery Officer was aware of the orders passed by the learned Company Judge on 08.10.2009 when he passed the orders dated 22.02.2010—No notice was issued to Mr. Atul Kumar Rai in person, but since the affidavits filed on behalf of IFCI were not by the Managing Director, even the Managing Director filed his personal affidavit—All the there contemnors had tendered unqualified apology and the Recovery Officer had stated in so many words that he should have been more careful in analyzing the papers before him—We find that there is no case whatsoever of contempt made out against Mr. Atul Kumar Rai—The Recovery Officer ought to have perused the reply filed by the Official Liquidator given this situation, unqualified apology tendered more than met the requirement as it was not a case of any willful contumacious conduct for the court to either proceed with conviction or impose sentence and that too such a harsh one—All the three appeals are liable to be allowed—Orders of conviction dated 06.02.2012 and order on sentence dated 19.03.2012 are liable

to be set aside with the acceptance of apology on the part of Ms. Shalini Soni and Mr. R.K. Bansal while Mr. Atul Kumar Rai is held not to have any role in the matter in issue.

Atul Kumar Rai v. *Koshika Telecom Limited & Ors.* *741*

DELHI DEVELOPMENT ACT, 1957—Sections 14 & 29 (2)—Accused persons running marble shop in an area of 500 sq. ft. which as per Master Plan, could be used only for agricultural purposes or water body—Magistrate acquitted accused persons—Held:- Magistrate committed error in appreciating evidence by not believing CW1 Junior Engineer and giving more weightage to testimony of CW2 as compared to DW1 who was a junior officer—CWI testified about conducting inspection and finding marble shop of the accused functioning—Testimony of CW1 unshaken-Magistrate wrongly observed that testimony of CW2 Sales Tax Officers should be given more weightage as compared to DW1 who was officer of Junior Rank-Credence to testimony should not be based on post, but should be assessed by reading entire testimony—Testimony of CW1 cannot be disbelieved just because there was no independent corroboration—Judgment acquitting accused persons set aside and they held guilty of offence u/s 14 r/w Section 29 (2) of DDA Act—Respondents sentenced to be released after admonition—Accused company fined Rs. 100—Appeal allowed.

D.D.A. v. *VIP Marble Emporium & Ors.* *652*

DELHI RENT CONTROL ACT, 1958—Suit for possession and mesne profits—Premises let out to the appellant/respondent vide rent agreement dated 01.10.2006 for a period of three years by the husband of respondent/plaintiff—Tenancy terminated vide notice dated 31.03.2010 w.e.f. 30.04.2010—Failed to vacate the premises-Suit filed-Suit decreed for

the impugned judgment suffers from no infirmity.

Maheshwar Dayal (DECED) v. *Shanti Devi & Ors.* *613*

INDIAN COMPANIES ACT, 1956—Section 63, 628: Petition for quashing of summoning order in complaint u/s 63 and 628—Petitioner contend that complaint beyond period of limitation—Held—Period of limitation in any offence commences only upon receipt of knowledge of breach-Period of limitation will not begin from the date of filling prospectus but from date of filing of balance sheet on which the complaint is based— Complaint within period of limitation—Petition dismissed.

Kuldeep Kumar Kohli & Ors. v. The Registrar of Companies for Delhi and Haryana *480*

INDIAN CONTRACT ACT, 1872—Costs: Where Courts find that using Courts as a tool a litigant has perpetuated illegalities or has perpetuated an illegal possession, the courts must impose costs on such litigant which should be equal to the benefits derived by the litigant and harm and deprivation suffered by the rightful person, so as to check frivolous litigation and prevent the people from reaping a rich harvest of illegal acts through the Courts. Despite settled legal positions, the obvious wrong doers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that dice is always loaded in their favour, since even if they lose, the time gained is the real gain. This situation must be redeemed by the Courts. Purchaser's conduct dishonest-Both appeals dismissed with exemplary costs of Rs. 2,00,000/- on the Purchaser.

Parmanand Kansotia v. *Seetha Lath & Anr.* *488*

— Section 29—Indian Evidence Act, 1872—Section 91, 92, 114:

Agreement to sell—Suit by Purchaser for Specific performance-Suit by Seller for mandatory injunction and possession-Suits decreed in favour of seller—Appeal filed by Purchaser—Held—Purchaser failed to make payment of balance sale consideration—Purchaser's contention that oral agreement was entered into at the time of sale agreement which provided for deduction of amounts spent on renovation, furnishing etc. from the sale consideration, is barred under S. 29 of Contract Act and S. 91 and 92 of Evidence Act—Held—S. 114 of Evidence Act enables the Judge to infer one fact having regard to the common course of natural events or human conduct—In natural course of event the Seller hands over the vacant peaceful possession of the suit property to the Purchaser at a time of receiving the balance sale consideration and not before that—In exceptional cases possession is handed over where substantial payment has been made and there are special circumstance to secure the balance sale consideration, such as relationship between the parties. No. such special circumstance in the present case—It is improbable that the seller would have authorized purchaser to renovate, furnish without even specifying the amount. Appeal dismissed.

Parmanand Kansotia v. Seetha Lath & Anr. *488*

INDIAN EVIDENCE ACT, 1872—Section 91, 92, 114: Agreement to sell—Suit by Purchaser for Specific performance-Suit by Seller for mandatory injunction and possession-Suits decreed in favour of seller—Appeal filed by Purchaser—Held—Purchaser failed to make payment of balance sale consideration—Purchaser's contention that oral agreement was entered into at the time of sale agreement which provided for deduction of amounts spent on renovation, furnishing etc. from the sale consideration, is barred under S. 29 of Contract Act and S. 91 and 92 of Evidence Act—

reprobate as per convenience. The petitioner had deposed that she was in U.K. from 1993 to 1999. She has not even whispered, alleged or made out any case of any of the grounds for the foreign judgment of dissolution of her marriage with the respondent being not conclusive. For the said foreign judgment to be not conclusive, the petitioner was required to make out a case of the same being either pronounced by a Court having no jurisdiction and /or having been not given on the merits of the case or being founded on an incorrect view of international law or the proceedings resulting therein being opposed to natural justice or having been obtained by fraud or sustaining a claim founded on a breach of any law in force in India. Moreover, all the grounds specified in section 13 of the CPC and on establishment whereof a foreign judgment can be said to be not conclusive are such which can be set up only by a party not himself/herself/itself approaching the foreign Court. Here the petitioner who is challenging the judgment, was at the relevant time resident for a fairly long time within jurisdiction of the foreign Court, did not approach the foreign court under the dictates of the respondent and made out a case before the foreign Court of obtaining the judgment-Petition dismissed.

Meena Chaudhary @ Meena P.N. Singh v. Basant Kumar Chaudhary & Ors. *527*

— Section 323, 324, 354, 34—Offences being not compoundable, can FIR be quashed on settlement Held—Compounding of non compounding offences permissible as per the judgment of *B.S Joshi Vs, State of Haryana Nikhil Merchant vs. CBI and Manoj Sharma vs. State.* These three judgments have been referred to the larger bench vide judgment in case of Gain Singh vs. State. However till these are set aside, they hold the field—Petition allowed.

Teka Singh @ Titu & Ors. v. State & Anr. *475*

LIMITATION ACT, 1993—Section 27—As per Section 27 once the limitation for claiming a relief/right with respect to an immovable property expired, the right in the property itself is lost—This provision of Section 27 of the Limitation Act, 1963 is a departure from the normal law of limitation, and as per which normal law of limitation on expiry of limitation, right is not lost but only the entitlement to approach the Court is lost—Once it was clear to the plaintiff/appellants that from the year 1960 ownership in the suit property was being claimed by defendant no.1/respondent no.1 the period of 12 years for the appellants/plaintiffs to have filed a suit for possession with respect to this property under Article 65 commenced in 1960 itself—Once the limitation commenced in the year 1960, by the year 1972, the right to approach the Court by means of a suit for possession governed by Article 65 of the Limitation Act, 1963 was lost—Once the right is lost in the year 1972, the subject suit having been filed in the year 1975, the ownership of the defendant no.1/respondent no.1 becomes absolute by virtue of law of prescription contained in Section 27 of the Limitation Act, 1963—In view of the above, no. merit in the appeal, which is accordingly dismissed.

Mukhinder Singh (Deceased) Through LRs. & Ors. v. *Gurbux Singh & Ors.* *578*

MOTOR VEHICLE ACT, 1988—By these two cross Appeals, the parties impugn the judgment dated 19.01.2010 whereby a compensation of Rs. 1,03,68,744/- was awarded for the death of Atul Prashar, aged 37 years, who died in a motor accident, which took place on 18.01.2008, The MAC APP. No. 179/2010 has been filed by the legal representatives of the deceased i.e Neelam Prashar and others (hereinafter referred to as the "Claimants") whereas MAC. APP. No. 313/2010 has been preferred by the National Insurance Co. Ltd. (hereinafter referred to as "insurer") disputing the negligence on the part

of the driver of Maruti Esteem bearing Registration No. DL-2CAC-5813 and reduction of the amount of compensation awarded by the Motor Accident Claims Tribunal (the Tribunal)—It is urged for the Insurer that in order to prove negligence the Claimants examined PW- Dushyant Vasudev and PW-4 Ashish Aggarwal. The accident took place at about 6.30 AM. Both PW-2 & PW-4 were working in separate offices (though in the same vicinity) & their office would start at 9/ 9.30 AM. Thus, their presence at the time of the accident was highly improbable. If the testimony of these two witnesses is taken off the record, there is nothing to establish the negligence on the part of the driver of Maruti Esteem Car No.DL-2CAC-5813. It is well settled that in a claim petition negligence is required to be proved only on the test of preponderance of probabilities, The FIR in this case was registered on the basis of the statement of PW-2. The offending vehicle was seized from the spot. The driver of the Esteem car No. DL. 2CAC-5813 was not produced by the Insurer to rebut the testimony of PW-2 and PW-4-Pw-2 gave an explanation that he was called in the office because some guests were scheduled to come. In the absence of examination of the driver to rebut PW-2 and PW-4's testimonies, their presence at the spot at the time of accident cannot be doubted merely on the assumption that they could not have proceeded for the office early and that too, in the same vehicle. On the test of preponderance of probabilities, PW-2 and PW-4's testimonies that, the accident was caused on account of rash and negligent driving by the driver of Car No. DL 2CAC 5813, has to be accepted. It is held that the finding of fact reached by the Tribunal on this count cannot be faulted—It is well settled that for determination of loss of dependency, the amount paid to the deceased by his employer by way of perks should be included in the monthly income—The Tribunal fell into error in ignoring this amount of Rs. 1,250/- deduction

towards income tax is liable to be made as the net income of the deceased is the starting point for calculation of loss of dependency.

Neelam Prashar & Ors. v. Mintoo Thakur & Ors. ... 528

— Section 163A and 168—Second Schedule Clause 6(b)—Compensation—Accident took place on 04.11.2009—Parents of the claimants/respondent no. 1 to 3 died in the accident-Mother was a non-matriculate, Aged about 34 years Rendering gratuitous service to Husband and three children—Tribunal assessed the value of gratuitous service rendered by the deceased mother at Rs. 6000/- per month—Awarded compensation of Rs. 8,50,000/- Aggrieved, appellant/ respondent Insurance Company preferred appeal seeking reduction of Compensation—Alleged assessment for gratuitous services @ Rs. 6000/- per month arbitrary—Held:- Addition of 25% in the salary of non matriculate, multiplier of 16 applicable, Total compensation Works out to be Rs. 9,95,040/ -—No cross appeal—Compensation is less that what works out on the principles laid down—Appeal dismissed.

— MAC. APP. 563/2010

— Death of lady aged about 31 years—Taking care of five children—Doing tailoring work-value of gratuitous service taken @ Rs. 6000/- per month—Multiplier of 15 applied-compensation of Rs. 11,65,000/- awarded—Respondent/ Insurance Company preferred appeal—Held-no evidence of educational qualification;—Taken to be a non matriculate; multiplier of 16 applicable—Total compensation reduced to Rs.10,35,040/-—Appeal disposed of with directions.

— MAC. APP. No. 753/2011

— Death of a lady about 40 years—Claimed to be earning Rs.4000/- per month from sewing work-compensation of Rs. 4,10,000/- awarded—Aggrieved claimants/appellant preferred appeal—Held:- No evidence of earnings or qualification-taken

accident and was working as a conductor on the offending bus bearing No. Dl-IP-5998. The claims Tribunal took the minimum wages of Rs. 3,271/- into consideration, deducted 1/4th towards personal expenses, applied the multiplier of 18, added Rs. 60,00/- towards loss of love and affection and Rs. 20,000/- towards funeral expenses. The total compensation awarded is Rs. 6,09,902/- The Claims Tribunal exonerated the insurance company and held the driver and owner liable to pay the award amount—The appellants are the owner and driver of the offending vehicle and have challenged the impugned award on the limited ground that the offending vehicle was validly insured and, therefore, respondent No.1 alone is liable to pay the entire award amount to the claimants—Learned counsel for the appellants submit that the deceased, employed as a conductor, was validly covered under the insurance policy and therefore, respondent No.1 alone is responsible to pay the insurance amount—The liability of the insurance company in respect of the Workmen's Compensation in respect of the driver and conductor of the offending vehicle under Section 147(1) of the Motor Vehicles Act is statutory and therefore, respondent No.1 would be liable to pay the Workmen's Compensation. The insurance policy of the offending vehicle has been placed on record as Annexure-F (colly.) with the appeal in which respondent No.1 has charged the premium for Workmen's Compensation to the employee. Under Section 147(1) of the Motor Vehicle Act, 1988, the insurance company is required to compulsorily cover the liability in respect of the death or bodily injury of the driver and conductor in the case of public service vehicle. The contention of Respondent No. 1 that they have charged for premium for one employee is untenable in view of the statutory requirement of Section 147 (1) of the Motor Vehicle Act to cover the driver and the conductor. Even if the contention of respondent NO.1 that the policy covered one

employee is accepted, the policy should be construed to cover the deceased. In that view of the matter, this Court is of the view that respondent No.1 is liable to pay Workmen's Compensation in respect of death of the deceased and the remaining amount of compensation is liable to be paid by the appellants.-The appeal is partly allowed to the extent that out of the award amount of Rs. 6,09,902/-, respondent No.1 shall be liable to pay Rs. 3,49,294/- along with interest @ 7.5% per annum from the date of filling of the claim petition till realization to respondent Nos. 2 to 7. The remaining amount of Rs. 2,60,608/- (Rs. 6,09,902/- Rs. 3,49,294) along with interest @ 7.5% per annum for the date of filing of the claim petition till realization shall be paid by the appellants.

Prashant Dutta & Anr. v. *National Insurance Co. Ltd. & Ors.* *671*

REGISTRATION ACT, 1908—Section 49—Delhi Rent control Act, 1958—Suit for possession and mesne profits—Premises let out to the appellant/respondent vide rent agreement dated 01.10.2006 for a period of three years by the husband of respondent/plaintiff—Tenancy terminated vide notice dated 31.03.2010 w.e.f. 30.04.2010—Failed to vacate the premises-Suit filed-Suit decreed for possession under order 12 Rule 6 vide judgment, dated 14.11.2011—Aggrieved by the judgment filed the present appeal—Alleged tenancy was for manufacturing purposes—Notice terminating the tenancy should have been for a period of six month-Held—Lease deed unregistered—Terms cannot be looked into—Purpose of letting is not collateral purpose-notice valid—Appeal dismissed.

Sharvan Aggarwal v. *Kailash Rani*..... *459*

RIGHT OF CHILDREN TO FREE AND COMPULSORY EDUCATION ACT, 2009—Petitioner impugned Rule 10(3) Delhi RTE Rules and alternatively claimed that the Court should

frame guidelines for exercise of powers under Rule 10(3) for extending the limits of "neighbourhood" as defined under the Act and the Rules—Although the Act uses the term "neighbourhood", but does not define the same-However, the definition is found in the Rules, which prescribe the limits of neighbourhood in respect of children of Classes-I to V as within walking distance of 1Km and in respect of Children of Classes-IV to VIII as within 3km—Private unaided schools are required to admit children belonging to EWS and disadvantaged groups in Class-I to the extent of 25% of strength and resident of within the limits of neighbourhood—While admitting general category children, the private unaided schools do not follow the prescribed limits of neighbourhood—However, the respondent issued order directing that all schools shall ensure that no child under EWS and disadvantaged groups is denied admission on neighbourhood basis, so long as the locality of the child's residence falls within the distance criteria devised by the schools for the general category—Challenged—Held, Petitioner has no cause of action as it should not matter to the School whether the children of EWS and disadvantaged groups are residing within 1km or more and the grievance, if any should be of the children for inability of government to provide schools within the neighbourhood—Further held, the paramount purpose is to provide access to education and distance to be travelled by the child is secondary—Directed, admission shall first be offered to eligible students of EWS and disadvantaged groups residing within 1Km; in case vacancies remain unfilled, students residing within 3km shall be admitted; if still vacancies remain, students residing within 6km shall be admitted; and even thereafter if vacancies remain, students residing beyond 6km shall be considered.

Federation of Public Schools v. *Government of NCT of Delhi* *570*

RIGHT TO INFORMATION ACT, 2005—Section 20(1)—Delhi High Court Act, 1966—Section 10—Central Information Commission (CIC) imposed maximum penalty of Rs. 25,000/- on the respondent under section 20(1) of the Act for the delay of over 100 days in furnishing the information to the appellant—Chief Secretary, Govt. of Delhi was directed to recover the said amount from the salary of the respondent @ Rs. 5,000/- per month-Respondent preferred writ petition—Learned Single Judge allowed the writ petition—Reduced the penalty amount to Rs. 2,500/- recoverable from the salary of the respondent in ten equal monthly installments of Rs. 250/- per month—Reason—The question of penalty is essentially between the Court and the respondent and did not really concern the appellant who has been provided with information—Respondent took the charge of the post 14 days after the subject RTI application of the appellant had been filed—Appellant filed the Intra Court Appeal—Contention—Use of word 'shall' in section 20(1) is indicative of the imposition of penalty mandatory—Presence of information seeker is essential not only for computing the penalty but also for establishing the default of the information officer-Exclusion of the information seeker from penalty proceedings would dilute the sprit of the Act—The role of CIC is of an adjudicator—Held—A reading of Section 20 shows that while the opinion, as to a default having been committed by the Information Officer, is to be formed 'at the time of deciding any complaint or appeal', the hearing to be given to such Information Officer, is to be held after the decision on the Complaint or the appeal. The proceedings before the CIC, of hearing the Information Officer qua whom opinion of having committed a default has been formed and of imposition of penalty, in the exercise of supervisory powers of CIC and not in the exercise of adjudicatory Powers.

Anand Bhushan v. *R.A. Haritash* *657*

— Section 20(1)—Central Information Commission (CIC) imposed maximum penalty of Rs. 25,000/- the respondent under section 20(1) of the Act for delay of over 100 days in furnishing the information to the appellant—Chief Secretary, Govt. of Delhi was directed to recover the said amount from the salary of the respondent @ Rs. 5,000/- per month Respondent preferred writ petition—Learned Single Judge allowed the writ petition—Reduced the penalty amount to Rs. 2,500/- recoverable from the salary of the respondent in ten equal monthly installments of Rs. 250/- per month—Reason—The question of penalty is essentially between the Court and the respondent and did not really concern the appellant who has been provided with information—Respondent took the charge of the post 14 days after the subject RTI application of the appellant had been filed—Appellant filed the Intra Court Appeal—Contention—Use of word 'shall' in section 20(1) is indicative of the imposition of penalty mandatory—Presence of information seeker is essential not for computing the penalty but also for establishing the default of the information officer—Exclusion of the information seeker from penalty proceedings would dilute the sprit of the Act—The role of the CIC is of an adjudicator—Held—Though Section 20(1) uses the word 'shall', before the words 'impose a penalty of Rs. Two hundred and fifty rupees but in juxtaposition with the words 'without reasonable cause, malafidely of knowingly or obstructed'—The second proviso thereto further uses the words, 'reasonably and diligently'—The question which arises is when the imposition of penalty is dependent on such variables, can it be said to be mandatory or possible of calculation with mathematical precision—All the expressions used are relative in nature and there may be degrees of, without reasonable cause, malafide, knowing or reasonableness, diligence etc.—The very fact that imposition of penalty is made dependent on such variables is indicative

of the direction vested in the authority imposing the punishment—Once it is held that the quantum of fine is discretionary, there can be no challenge to the judicial review under Article 226 of the Constitution, of exercise of such discretion, of course within the well recognized limits—If this Court finds discretion to have been not appropriately exercised by the CIC, this Court can, in exercise of its power vary the penalty—Appeal dismissed.

Anand Bhushan v. *R.A. Haritash* *657*

SCHEDULE CAST & SCHEDULE TRIBES (PREVENTION OF ATROCITIES) ACT, 1989—Section 3(1) (X)—Petition Against non framing of charges by the L.d ASJ—Accused must have knowledge or awareness that the victim belongs to Scheduled Caste or Scheduled Tribe in order to constitution offence under S. 3.(1)(x) 'Public view' in S.3(1)(x) implied within view of group of people of the place/locality/village not linked with the Complaint through kingship, business, commercial or any other vested interest—Public view means presence of one or more persons who are neutral or impartial, even though he may be known to the complainant to attract ingredients of offence. Petition dismissed.

Kanhaiya Paswan v. *State & Ors.* *509*

TRANSFER OF PROPERTY ACT, 1882—Section 54—An ownership of a property is transferred by means of a registered sale deed as per Section 54—Every sale deed has an effect of divesting the transferor of the ownership of the property and the vesting of the ownership in the transferee—A Sale deed by which the ownership rights in an immovable property are transferred can be ignored only under two circumstances—First, it the sale deed is a nominal transaction or a paper transaction because the parties intended it to be so or secondly, if the document being the sale deed is void

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CRL.

DEVU SAMAL ….APPELLANT

VERSUS

THE STATE ….RESPONDENT

(MUKTA GUPTA, J.)

CRL. APPEAL NO. : 412/2000 DATE OF DECISION: 03.01.2012

Indian Penal Code, 1860—Section 376—As per prosecution appellant, relative of victim's husband, arranged job for her and husband-On the assurance that he will take prosecutrix to where her husband was working, accused took her to his quarter and raped her—Accused took prosecutrix to taxi stand and asked taxi driver to drop prosecutrix to her husband's place—When prosecutrix told taxi driver that appellant had committed rape, taxi driver called police on phone—Trial Court convicted accused u/s 376 IPC—Held as per examination-in-chief of prosecutrix. She was raped when she went to house of accused. However. In cross-examination she deposed that she was raped both at her residence and thereafter, when she went with the appellant to his quarter—As per FSL report underwear of prosecutrix gave AB group whereas on bedsheet it was B Group-In view of contradictory testimony of prosecutrix which is not supported by FSL report, Conviction set aside—Appellant acquitted-Appeal allowed.

[Ad Ch]

APPEARANCES:

FOR THE APPELLANT : Dr. R.S. Sasan, Amicus Curiae.

FOR THE RESPONDENT : Mr. Mukesh Gupta, APP for the State with ASI Suraj Mal, PS Tuglak Road.

RESULT: Appeal allowed.

MUKTA GUPTA, J.

1. By this appeal the Appellant challenges the judgment dated 20th May, 2000 passed by the learned Additional Sessions Judge convicting him for offence under Section 376 IPC and the order on sentence dated 22nd June, 2000 directing him to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs. 10,000/- and in default of payment of fine to undergo simple imprisonment for a period of six months.

2. Learned counsel for the Appellant contends that primarily two witnesses have been examined against the Appellant. The testimony of the Prosecutrix PW1 does not inspire confidence and is not trustworthy. In her examination-in-chief she states that the Appellant raped her at his house, however, in her cross-examination she states that she was at her residence. According to her the Appellant came to the premises where she was working and the landlady opened the house thereafter the Appellant took her to Sujan Singh Park. Though the clothes were stated to be seized however, no statement of the Prosecutrix has been recorded identifying the seized clothes. The PCR call received by the police was regarding a quarrel between the parties. Further the Prosecutrix stated that when rape was committed her feet were tied by the Appellant. Further the FSL report does not fortify the claim of the Prosecutrix. Though semen was found on the bed cover and the underwear of the prosecutrix, however, the same did not match with that of the Appellant. Further the vaginal smear gave AB group positive whereas on the bed sheet group B was found. Even as per the MLC there is no external injury on the prosecutrix except a cut on the lip though she has alleged that her legs and feet were tied. In view of the contradictory uninspiring evidence of the prosecutrix the Appellant is liable to be acquitted.

3. Learned APP for the State on the other hand contends that the Prosecutrix who appeared in the witness box has clearly deposed about the rape committed on her. Though there are certain contradictions in the cross-examination however, she has stated that during the mid night the

Appellant raped her by force at his quarter without her consent. The Appellant further gave her slap and threatened that he would tie her feet with her chin. The Prosecutrix was medically examined after the incident and as per the MLC there was cut mark on the lip which corroborates the version of the prosecutrix. Hence the appeal is liable to be dismissed.

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

5. PW1 the Prosecutrix in her testimony has stated that in the year 1998 she was working at Chitranjan Park with one Mr. Verma. The Appellant is a relation of her husband. The Appellant asked her to leave that job and arranged another job for her. The Appellant also arranged a job for her husband at some distant place. When the Prosecutrix contacted the Appellant to know the address of her husband, the Appellant assured that he will take her to the place where her husband was working. Thus the Appellant took her to his quarter on the evening of 8th April, 1998. During the night the Appellant raped her by using force at his quarter without her consent. The Appellant gave her a slap and threatened that he would tie her feet with a chain. Thereafter the Appellant took her to a taxi stand and asked the taxi driver to drop her to her husband's place. When the Prosecutrix told the taxi driver that the Appellant had committed rape with her the taxi driver called the police on telephone. Thereafter her statement was recorded vide Ex.PW1/A. The Prosecutrix was also examined medically. However, in her cross-examination the Prosecutrix has stated that she and her husband left the job from the house of Mr. Verma at the instance of the Appellant when he told that a relation of her husband had died and they had to go to their village. The Appellant came to her residence in the night when he committed rape on her but she did not remember the date and the day. The Appellant came at night and gave the bell. The door was opened by the landlady. Thereafter the Appellant took the Prosecutrix to his room in Sujan Singh Park in an auto. According to her the room of the accused was on the third floor and when the Appellant raped her none was present in that room. The Appellant tied both her feet and her legs while hands were free. Thereafter the Appellant brought her downstairs and took her to the taxi stand. At the taxi stand she wept and thereafter she was made to sit in the taxi and that the Appellant told the taxi driver to drop her at her husband's house. A perusal of the testimony of the Prosecutrix shows that as per her

examination the offence of rape was committed on her when she went to the house of the Appellant however, in the cross-examination she stated that it was committed both at her residence and thereafter when she went with the Appellant where he committed rape on her. Further when the rape was committed her feet were tied up. Moreover, as per the FSL report the vaginal swab of the Prosecutrix and the pajama, underwear and bed sheet of the prosecutrix gave positive of human semen. However, the underwear of the Prosecutrix gave AB group whereas on the bed sheet it was B group. Thus in view of the contradictory testimony of the prosecutrix which is not supported by the FSL report I think it is a fit case of grant of benefit of doubt to the Petitioner. Accordingly the impugned judgment of conviction and the order on sentence are set aside and the Appellant is acquitted of the charges framed.

6. The appeal is disposed of.

7. The Superintendent, Tihar Jail, is directed to release the Appellant forthwith, if not required in any other case.

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AIRPORTS AUTHORITY OF INDIA AND ORS. ....PETITIONERS

VERSUS

STATE OF JAMMU & KASHMIR & ORS. ....RESPONDENTS

(VIPIN SANGHI, J.)

W.P. (C). NO. : 76/2010 DATE OF DECISION: 04.01.2012

Constitution of India, 1950—Article 226—Territorial Jurisdiction Article 12—'State'—Respondent no.2 Jammu & Kashmir State Financial Corporation Set up by respondent no.1 to promote medium/large scale Industry in the State of J&K-Primary function of

respondent no.2 to extend financial assistance to industrial projects to speed up industrial investment in the State—Respondent no. 2 invited investments in bonds issued by it; Guaranteed by respondent no.1-Petitioner subscribed to the said bond in Delhi by making payment in Delhi—Respondent no. 2 paid interest on the said bond in Delhi occasionally-However, respondent defaulted in payment of half yearly installment of interest and in redeeming of bond upon maturity—On communication from petitioner repeatedly sent, respondent no.2 expressed its inability to make payment on the ground of shortage of fund-Stated that matter taken up with State government-Petitioner sent a legal notice—Thereafter, received partial payment—Due payments not made despite further reminder—Petitioner filed writ petition—Respondent did not deny facts—Pleaded financial stringency—Contended—Respondent located in the Stage of J&K-High Court Delhi had no territorial jurisdiction—Secondly, writ petition to seek recovery of money not maintainable—Court observed payment for purchase of bond made in Delhi; one payment of interest made in Delhi Substantial part of cause of action arisen in Delhi within the jurisdiction of Delhi High Court-Objection of territorial jurisdiction rejected-Regarding second objection-Observed-The jurisdiction under Court under Article 226 unfettered, the only fetters are those which the court have themselves placed on the said jurisdiction-Held-firstly, the primary relief to seek-enforcement of a sovereign guarantee of State of J&K-No question of disputed facts-Observed in a appropriate case writ petition as against State or an instrumentality of State arising out of a contractual obligation maintainable-Even though some disputed questions of facts arise for consideration, same cannot be ground to refuse to entertain writ petition in all the cases as matter of Rule-Issued direction to release amount-Writ Petition allowed.

The second objection raised by counsel for respondents that the present petition is not maintainable only to seek refund of the amounts due under the said bonds also cannot be accepted. The jurisdiction of the Court under Article 226 of the Constitution of India is unfettered. The only fetters are those which the Courts have itself placed on the exercise of its said jurisdiction. There are well known and well recognized grounds on which the Court chooses not to exercise its discretionary writ jurisdiction. One of them is, where disputed questions of fact are raised before it.

(Para 16)

The guarantee issued by the respondent no.1 is that of the State of Jammu and Kashmir, which is a sovereign guarantee. The State cannot say that it does not have the fund to honour its sovereign guarantee. The Court would enforce the sovereign guarantee, because a sovereign guarantee cannot be allowed to fail, if rule of law is to be upheld. This aspect, as well as the aspect of maintainability of the writ petition to recover amounts which have been guaranteed by the State has been dealt with by this Court in **Modern Food Industries (India) Limited** (supra). I consider it appropriate to extract the relevant portion of the said judgment, which stands affirmed by the Supreme Court. The same reads as follows:

> "4. Learned counsel for the Respondent have raised a Preliminary Objection with regard to the maintainability of the Writ Petition. It stands uncontroverted that Respondent No.1 had extended its sovereign guarantee to the Bonds issued in favour of investors, such as the Petitioners, issued by Respondent No.2. Over thirty years ago the Hon'ble Supreme Court had clarified in **The Gujarat State Financial Corporation vs. M/s. Lotus Hotels Pvt. Ltd.,** AIR 1983 SC 848 that it was too late in the day to contend that the "State can commit breach of a solemn undertaking on which other side has acted and then contend that the

party suffering by the breach of contract may sue for damages but cannot compel specific performance of the contract". The Apex Court applied the principle of promissory estoppel for enforcement of such contractual undertakings. Thereafter, similar views have been expressed in **Kumari Shrilekha Vidyarthi vs. State of U.P.,** JT 1990 (4) SC 211 by a Bench comprising J.S. Verma, J. (as the learned Chief Justice then was) and R.M. Sahai, J.

It was opined that "the primary source of the public law proceedings stems from the prerogative writs and the courts have, therefore, to evolve 'new tools' to give relief in public law by moulding it according to the situation with a view to preserve and protect the Rule of Law".

5. In **ABL International Ltd. vs. Export Credit Guarantee Corporation of India Limited,** JT 2003 (10) SC 300 the following principles were culled out and explained:

From the above discussion of ours, following legal principles emerge as to the maintainability of a writ petition:-

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of facts arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

6. Contemporaneously, the Bench presided by Sabyasachi Mukharji (as the learned Chief Justice then was) and S. Ranganathan, J. held in **Salonah Tea Company Ltd. vs. The Superintendent of Taxes, Nowgong,** AIR 1990 SC 772 that a Writ Court

was competent to order a refund of tax deposited under a mistaken understanding of the law. In **Smt. Nilabati Behera v. The State of Orissa,** JT 1993 (2) SC 503 the Apex Court did not find any fetters in granting relief to heirs of a victim of custodial death on the foundation of an infraction of fundamental rights guaranteed under Article 21 of the Constitution of India and observed as follows:

"Adverting to the grant of relief to the heirs of a victim of custodial death for the infraction or invasion of his rights guaranteed under Article 21 of the Constitution of India, it is not always enough to relegate him to the ordinary remedy of a civil suit to claim damages for the tortuous act of the State as that remedy in private law indeed is available to the aggrieved party. The citizen complaining of the infringement of the indefeasible right under Article 21 of the Constitution cannot be told that for the established violation of the fundamental right of life, he cannot get any relief under the public law by the Courts exercising writ jurisdiction. The primary source of the public law proceedings stems from the prerogative writs and the Courts have, therefore, to evolve 'new tools' to give relief in public law by moulding it according to the situation with a view to preserve and protect the Rule of Law. While concluding his first Hamlyn Lecture in 1949 under the tile 'Freedom under the law' Lord Denning in his own style warned:

"No one can suppose that the executive will never be guilty of the sins that are common to all of us. You may be sure that they will sometimes do things which they ought not to do: and will not do things that they ought to do. But if and when wrongs are thereby suffered by any of us what is the remedy? Our procedure for securing our personal freedom is efficient, our procedure for preventing the abuse of power if not. Just as the pick and shovel is no longer

suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up-do-date machinery, by declarations, injunctions and actions for negligence. This is not the task of Parliament, the Court must do this. Of all the great tasks that lie ahead this is the greatest. Properly exercised the new powers of the executive lead to the welfares state; but abused they lead to a totalitarian state. None such must ever be allowed in this country".

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the Court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The court has imposed upon itself certain restrictions in the exercise of this power [See: **Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors.** JT 1998 (7) SC 243 : 1998 (8) SCC 1]. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the court thinks it necessary to exercise the said jurisdiction.

7. In **State of Jammu and Kashmir vs. Ghulam Mohd. Dar,** (2004) 12 SCC 327, after noting that

writs in the nature of mandamus would not ordinarily issue for enforcement of a contract, it has been observed that a writ can issue when questions of public law character arise for consideration. The preliminary objection is wholly without substance and is rejected".

For the aforesaid reasons, the second objection of the respondent is also rejected. **(Para 18)**

Important Issue Involved: (i) If substantial cause of action has arisen within jurisdiction of Court, its territorial jurisdiction cannot be ousted. (ii) The writ petition for payment of money is maintainable against the State and its instrumentality for enforceing the contractual obligation.

[Gu Si]

APPEARANCES:

FOR THE PETITIONER : V.P. Chaudhary, Sr. Advocate. With Mr. Digvijay Rai, Advocate

FOR THE RESPONDENT : Mr. Sunil Fernandes for R-I&2.

CASES REFERRED TO:

1. *Airports Authority of India & Others* vs. *State of Uttar Pradesh & Anr.,* W.P.(C.) No.7949/2009.
2. *Modern Food Industries (India) Limited* vs. *State of Uttar Pradesh and Others,* bearing W.P.(C.) No.16462-63/2004.
3. *State of Jammu and Kashmir* vs. *Ghulam Mohd. Dar,* (2004) 12 SCC 327.
4. *ABL International Ltd.* vs. *Export Credit Guarantee Corporation of India Limited,* JT 2003 (10) SC 300.
5. *Whirlpool Corporation* vs. *Registrar of Trade Marks, Mumbai and Ors.* JT 1998 (7) SC 243 : 1998 (8) SCC 1.
6. *Smt. Nilabati Behera* vs. *The State of Orissa,* JT 1993 (2) SC 503.

7. *Kumari Shrilekha Vidyarthi* vs. *State of U.P.,* JT 1990 (4) SC 211.

8. *Salonah Tea Company Ltd.* vs. *The Superintendent of Taxes, Nowgong,* AIR 1990 SC 772.

9. *The Gujarat State Financial Corporation* vs. *M/s. Lotus Hotels Pvt. Ltd.,* AIR 1983 SC 848.

RESULT: Writ Petition allowed.

VIPIN SANGHI, J. (Oral)

1. The present writ petition under Article 226 of the Constitution of India has been preferred by the Airports Authority of India (the petitioner no.1); the C.P.F. Trusts constituted by the petitioner no.1 vide trust deed dated 08.06.1988, which has been formed for the purpose of managing the Contributory Provident Fund (CPF) of the employees of petitioner no.1, as petitioner no.2. The employees of petitioner no.1 are the beneficiaries of the said Trust, which has been constituted to prudently manage and invest the CPF of the said employees. Petitioner no.3 has been formed upon repeal of the National Airports Authority Act and International Airport Authority Act, as petitioner no.1 was desirous of constituting a Provident Fund Trust after merging of the existing Provident Fund Trust (National Airports Authority Employees Contributory Provident Fund Trust and International Airport Authority Employees Contributory Provident Fund Trust) under the erstwhile two repealed Acts. Petitioner no.3 has been registered vide registration dated 27.02.2009 before the Sub Registrar-V, New Delhi. All the petitioners are collectively and severally referred to as the petitioners.

2. The case of the petitioners is that the respondent no.2, i.e. Jammu and Kashmir State Financial Corporation is a financial institution set up by respondent no.1, the Government of Jammu and Kashmir, to promote medium/large scale industries in the State of Jammu and Kashmir. The primary function of respondent no.2 is to extend financial assistance to industrial projects and undertake such other activities as may be necessary to speed up industrial investment in the State.

3. The petitioners submit that respondent no.2 invited investments in bonds issued by it, which were guaranteed by respondent no.1. The bonds were of two kinds. Some of these bonds carried interest @

11.5%, while the others carried interest @ 10.5%. These bonds were offered by respondent no.2 through its agents in various locations including in Delhi. The petitioners submit that they subscribed to the said bonds in Delhi by making payments therefor in Delhi. The details of the bonds subscribed for by the petitioners are as follows:

Name of Bond	Bond Certificate No.	Date of Investment	Invested amount (Rs. in crores)	Date of redemption
10.5% JKFC Bonds 2011	000235	25.01.2005	Rs.5.00	29.03.2011
11.5% JKFC Bonds 2011	001067	25.01.2005	Rs.1.00	15.02.2011
11.5% JKFC Bonds 2011	001070	06.04.2005	Rs.4.40	06.09.2011

4. These bonds were sold through the Securities International Limited (formerly SREI International Securities Limited) having their office at 8, Central Lane, Bengali Market, New Delhi. The petitioners submit that the respondents paid interest on the said bonds occasionally at Delhi. However, the respondents have defaulted in the payment of half yearly installments of interest and in redeeming the bonds upon maturity.

5. According to the petitioners, respondent no.2 defaulted in payment of the half yearly interest on the 11.5% JKFC SLR Bonds 2011 and the 10.5% JKFC SLR Bonds 2011. Consequently, the petitioners sent a communication dated 27.09.2005 to respondent no.2. Further reminders were sent thereafter. However, the respondents did not pay the interest, and also did not return the original bond certificates to the petitioners.

6. The petitioners sent another communication dated 19.01.2006 enclosing the original bond certificate in respect of the 11.5% secured redeemable JKFC SLR Bond 2011 of the face value of Rs.1 crore, interest whereof was due and payable on 15.02.2006. The petitioner requested for payment on an urgent basis.

7. On 28.01.2006, respondent no.2 expressed its inability to make payment on the ground of facing shortage of funds. It was stated that the matter had been taken up with the State Government. The respondent no.2 vide its communication dated 04.02.2006 once again expressed its inability to make payment to the petitioners, either of the interest or of the principal amount, on the ground that its cumulative losses had reached Rs.200 crores as on March 2005.

8. The petitioners kept on demanding payment even thereafter, and the respondent again denied payment to the petitioners vide letter dated 21.07.2006. The petitioners sent a legal notice dated 05.03.2007 calling upon the respondents to make payment of interest due till 28.02.2007. Only thereafter, the petitioners received partial payment of an amount of Rs.50.60 lacs in respect of the 11.5% JKFC SLR Bonds of face value of Rs.4.5 crores for half year ending 06.09.2005 and 06.03.2006.

9. Respondent no.1 also issued a communication dated 19.04.2007 to respondent no.2 directing respondent no.2 to clear the outstanding dues of the petitioners. On 23.06.2008, the respondents communicated to the petitioners that the issue of discharge of liabilities of respondent no.2 had been taken up by the State Government. The petitioners were asked to await further action in the matter. Even the Secretary to the Government of India in the Ministry of Civil Aviation called upon the Chief Secretary of respondent no.1 to look into the matter and ensure payment of overdue interest to petitioner no.2 immediately. Further reminders were sent, but to no avail.

10. In this background, the petitioners have preferred the present writ petition.

11. The petitioners submit that a similar writ petition in the case of **Modern Food Industries (India) Limited v. State of Uttar Pradesh and Others,** bearing W.P.(C.) No.16462-63/2004 had been allowed by this court vide judgment dated 21.11.2005. The said judgment has been upheld by the Supreme Court, as the Special Leave Petition bearing No.3146/2006 and the Civil Appeal arising therefrom bearing C.A. No.6126/2008 has been dismissed.

12. Upon issuance of notice, respondent nos.1 and 2 have filed their counter affidavits. The said respondents do not deny the aforesaid

facts, and the fact that they have defaulted in making payment of the interest under the said bonds, and also the fact that the said bonds have not been redeemed on the due dates, which have already passed. The respondents plead financial stringency as the cause of their default in making the payments.

13. Learned counsel for the respondent has urged two legal submissions to oppose the present writ petition. It is firstly contended that since the respondents are located in the State of Jammu and Kashmir, this Court has no territorial jurisdiction. It is secondly argued that a writ petition to seek recovery of money alone is not maintainable.

14. In answer to the said submissions, Mr. Chaudhary, learned senior counsel for the petitioner places reliance upon the decision in **Airports Authority of India & Others v. State of Uttar Pradesh & Anr.,** W.P.(C.) No.7949/2009, wherein this Court had rejected a similar objection to the territorial jurisdiction of the Court. The Court had held that a substantial part of cause of action had arisen within the territorial jurisdiction of this Court. The information memorandum was circulated through the lead arrangers of PICUP in Delhi. The cheques for the investments were issued in Delhi.

15. I have already noticed herein above that the investments had been made by the petitioners in Delhi through the agents/lead arrangers of the respondent no.2 in Delhi, namely, the Securities International Limited. This is evident from their communication dated 20.01.2005, whereby they offered the said bonds to the petitioner. It is also evident from the documents placed on record, such as the payment voucher dated 02.04.2005 that the petitioner had made the payment for purchase of the bonds in Delhi. In fact, it is not even denied that one of payment of interest by the respondent no.2 was also made at Delhi. It is, therefore, clear that a substantial part of the cause of action has arisen within the jurisdiction of this Court. The objection to the territorial jurisdiction of this Court to entertain the present petition is, therefore, rejected.

16. The second objection raised by counsel for respondents that the present petition is not maintainable only to seek refund of the amounts due under the said bonds also cannot be accepted. The jurisdiction of the Court under Article 226 of the Constitution of India is unfettered. The only fetters are those which the Courts have itself placed on the exercise

of its said jurisdiction. There are well known and well recognized grounds on which the Court chooses not to exercise its discretionary writ jurisdiction. One of them is, where disputed questions of fact are raised before it.

17. In the present case, firstly, it may be noted that the primary relief is to seek enforcement of a sovereign guarantee of the State of Jammu and Kashmir. Moreover, there is absolutely no disputed question of fact arising before this Court. The factum of the petitioner having invested in the said bond is not in dispute. The fact that the said bonds were issued by respondent no.2, and guaranteed by respondent no.1 has also not been disputed. The fact that there was consistent default in payment of interest, and in redemption of the said bonds on the due dates is also not in dispute. It is not the respondents case that any other amounts have been paid under the said bonds, apart from those disclosed by the petitioners in the writ petition. There is no accounting dispute raised by the respondents.

18. The guarantee issued by the respondent no.1 is that of the State of Jammu and Kashmir, which is a sovereign guarantee. The State cannot say that it does not have the fund to honour its sovereign guarantee. The Court would enforce the sovereign guarantee, because a sovereign guarantee cannot be allowed to fail, if rule of law is to be upheld. This aspect, as well as the aspect of maintainability of the writ petition to recover amounts which have been guaranteed by the State has been dealt with by this Court in **Modern Food Industries (India) Limited** (supra). I consider it appropriate to extract the relevant portion of the said judgment, which stands affirmed by the Supreme Court. The same reads as follows:

> "4. Learned counsel for the Respondent have raised a Preliminary Objection with regard to the maintainability of the Writ Petition. It stands uncontroverted that Respondent No.1 had extended its sovereign guarantee to the Bonds issued in favour of investors, such as the Petitioners, issued by Respondent No.2. Over thirty years ago the Hon'ble Supreme Court had clarified in **The Gujarat State Financial Corporation vs. M/s. Lotus Hotels Pvt. Ltd.,** AIR 1983 SC 848 that it was too late in the day to contend that the "State can commit breach of a solemn undertaking on which other side has acted and then contend that the party suffering by

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It was opined that "the primary source of the public law proceedings stems from the prerogative writs and the courts have, therefore, to evolve 'new tools' to give relief in public law by moulding it according to the situation with a view to preserve and protect the Rule of Law".

5. In **ABL International Ltd. vs. Export Credit Guarantee Corporation of India Limited,** JT 2003 (10) SC 300 the following principles were culled out and explained:

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6. Contemporaneously, the Bench presided by Sabyasachi Mukharji (as the learned Chief Justice then was) and S. Ranganathan, J. held in **Salonah Tea Company Ltd. vs. The Superintendent of Taxes, Nowgong,** AIR 1990 SC 772 that a Writ Court was competent to order a refund of tax deposited under a mistaken understanding of the law. In **Smt. Nilabati Behera v. The State of Orissa,** JT 1993 (2) SC 503 the Apex Court did not find any fetters in granting relief to heirs of a victim of custodial death on the foundation of an infraction of fundamental rights guaranteed under Article 21 of the Constitution of India and observed as follows:

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of custodial death for the infraction or invasion of his rights guaranteed under Article 21 of the Constitution of India, it is not always enough to relegate him to the ordinary remedy of a civil suit to claim damages for the tortuous act of the State as that remedy in private law indeed is available to the aggrieved party. The citizen complaining of the infringement of the indefeasible right under Article 21 of the Constitution cannot be told that for the established violation of the fundamental right of life, he cannot get any relief under the public law by the Courts exercising writ jurisdiction. The primary source of the public law proceedings stems from the prerogative writs and the Courts have, therefore, to evolve 'new tools' to give relief in public law by moulding it according to the situation with a view to preserve and protect the Rule of Law. While concluding his first Hamlyn Lecture in 1949 under the tile 'Freedom under the law' Lord Denning in his own style warned:

"No one can suppose that the executive will never be guilty of the sins that are common to all of us. You may be sure that they will sometimes do things which they ought not to do: and will not do things that they ought to do. But if and when wrongs are thereby suffered by any of us what is the remedy? Our procedure for securing our personal freedom is efficient, our procedure for preventing the abuse of power if not. Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up-do-date machinery, by declarations, injunctions and actions for negligence. This is not the task of Parliament, the Court must do this. Of all the great tasks that lie ahead this is the greatest. Properly exercised the new powers of the executive lead to the welfares state; but abused they lead to a totalitarian state. None such must ever be allowed in this country".

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the Court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The court has imposed upon itself certain restrictions in the exercise of this power [See: **Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors.** JT 1998 (7) SC 243 : 1998 (8) SCC 1]. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the court thinks it necessary to exercise the said jurisdiction.

7. In **State of Jammu and Kashmir vs. Ghulam Mohd. Dar,** (2004) 12 SCC 327, after noting that writs in the nature of mandamus would not ordinarily issue for enforcement of a contract, it has been observed that a writ can issue when questions of public law character arise for consideration. The preliminary objection is wholly without substance and is rejected".

For the aforesaid reasons, the second objection of the respondent is also rejected.

19. Accordingly, the present writ petition is allowed and a direction is issued to respondent no.1 to honour its sovereign guarantee in respect of 11.5% and 10.5% JKFC SLR Bonds 2011 issued by Jammu and Kashmir State Financial Corporation i.e. respondent no.2, and to make payments of the amount due comprising of the face value of the bonds which is Rs.10,40,00,00/- alongwith interest upto the date of redemption at the rates prescribed in the said bonds. The overdue interest from the date of maturity/redemption shall be paid on the entire amounts found

due and payable on the due date of maturity/redemption at the rate of 8% p.a. till actual payment. The petitioners are also entitled to costs quantified at Rs.25,000/-.

ILR (2012) IV DELHI 459
RFA

SHARVAN AGGARWAL ….APPELLANT

VERSUS

KAILASH RANI ….RESPONDENT

(VALMIKI J. MEHTA, J.)

RFA NO. : 19/2012 DATE OF DECISION: 09.01.2012

Code of Civil Procedure, 1908—Order 12 Rule 6—Transfer of Property Act, 1882—Section 106—Registration Act, 1908—Section 49—Delhi Rent control Act, 1958—Suit for possession and mesne profits—Premises let out to the appellant/respondent vide rent agreement dated 01.10.2006 for a period of three years by the husband of respondent/plaintiff—Tenancy terminated vide notice dated 31.03.2010 w.e.f. 30.04.2010—Failed to vacate the premises-Suit filed-Suit decreed for possession under order 12 Rule 6 vide judgment, dated 14.11.2011—Aggrieved by the judgment filed the present appeal—Alleged tenancy was for manufacturing purposes—Notice terminating the tenancy should have been for a period of six month-Held—Lease deed unregistered—Terms cannot be looked into—Purpose of letting is not collateral purpose-notice valid—Appeal dismissed.

In the present case, the premises were originally let out to

the appellant/defendant by Sh. K.L.Chawla, who is the late husband of the respondent. It is not disputed that the respondent/plaintiff is one of the legal heirs of late Sh.K.L.Chawla and therefore will succeed as a co-owner to the suit property. The deceased Sh.K.L. Chawla was also survived by his son-Sh. Desh Raj Chawla. It is now settled law, as per the ratio of catena of judgments of the Supreme Court, that a co-owner is entitled to file a suit for possession, unless, it is shown that the other co-owner is objecting to such a suit. It is not an issue in the present case that there is any objection by Sh.Desh Raj Chawla to the subject suit for possession filed by the respondent/plaintiff. An owner of a property is always a landlord and the owner of a property is entitled to receive possession from an unauthorized occupant. Since the respondent/plaintiff is the widow of late Sh. K.L.Chawla, I am of the opinion that the Trial Court has rightly held that there is a relationship of landlord and tenant between the parties. **(Para 4)**

I have in the recent judgment reported as **M/s.Jeevan Diesels & Electricals Ltd. vs. M/s. Jasbir Singh Chadha (HUF) & Anr.** 2011 (182) DLT 402 held that **M/s.Jeevan Diesels & Electricals Ltd. vs. M/s. Jasbir Singh Chadha (HUF) & Anr.** 2011 (182) DLT 402uring purpose. **(Para 8)**

Important Issue Involved: A co-owner is entitled to file a suit for possession, unless it is shown that the other co-owner is objecting to such a suit. An owner of a property is always a landlord and the owner of a property is entitled to receive possession from an unauthorized occupant.

Even it is not proved that a legal notice was served prior to filing of the Suit, service of summons of the suit can be taken as a notice under section 106 of the Act. If alongwith the plaint, a copy of the notices is served no the tenant and once again, this can be taken as service of notice,

The Purpose of letting out is very much a main term of a lease deed, and no stretch of imagination the same can be said to be collateral purpose.

[Vi Ba]

APPEARANCES:

FOR THE APPELLANT : Mr. J.P. Sengh, Sr. Advocate with Mr. K.L. Nandwani and Ms. Ankita Gupta, Advocates.

FOR THE RESPONDENT : None.

CASE REFERRED TO:

1. *M/s.Jeevan Diesels & Electricals Ltd.* vs. *M/s. Jasbir Singh Chadha (HUF) & Anr.* 2011 (182) DLT 402.

RESULT: Appeal dismissed.

VALMIKI J. MEHTA, J. (ORAL)

1. The challenge by means of this Regular First Appeal (RFA) filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment dated 14.11.2011 of the Trial Court decreeing the suit of the respondent/landlord under Order 12 Rule 6 CPC, limited to the relief of possession. The suit on the aspect of payments of mesne profits is pending trial and disposal before the Trial Court.

2. The plaintiff/respondent in the plaint pleaded that the suit premises being A-103/7, Wazirpur Industrial Area, Delhi were let out to the appellant/defendant at Rs. 51,000/- per month vide rent agreement dated 1.10.2006 for a period of three years. It was pleaded that in spite of the tenancy having expired by efflux of time, the premises were not vacated and therefore the respondent/plaintiff by a notice dated 31.3.2010 terminated the tenancy with effect from 30.4.2010. The subject suit for possession and mesne profits thereafter came to be filed.

3. In a suit for possession of a premises which is outside the protection of Delhi Rent Control Act, 1958, the following three requirements have to be established:-

i) There is a relationship of landlord and tenant between the parties;

ii) The rate of rent is more than Rs. 3,500/- per month; and

iii) The monthly tenancy is terminated by means of a legal notice under Section 106 of the Transfer of Property Act, 1882 (hereinafter referred to as 'the Act').

4. In the present case, the premises were originally let out to the appellant/defendant by Sh. K.L.Chawla, who is the late husband of the respondent. It is not disputed that the respondent/plaintiff is one of the legal heirs of late Sh.K.L.Chawla and therefore will succeed as a co-owner to the suit property. The deceased Sh.K.L. Chawla was also survived by his son-Sh. Desh Raj Chawla. It is now settled law, as per the ratio of catena of judgments of the Supreme Court, that a co-owner is entitled to file a suit for possession, unless, it is shown that the other co-owner is objecting to such a suit. It is not an issue in the present case that there is any objection by Sh.Desh Raj Chawla to the subject suit for possession filed by the respondent/plaintiff. An owner of a property is always a landlord and the owner of a property is entitled to receive possession from an unauthorized occupant. Since the respondent/plaintiff is the widow of late Sh. K.L.Chawla, I am of the opinion that the Trial Court has rightly held that there is a relationship of landlord and tenant between the parties.

5. So far as the rate of rent is concerned, though the respondent/plaintiff claimed the rent to be Rs.51,000/- per month, the appellant/defendant claimed that original rent was Rs.11,000/- per month and which was subsequently enhanced to Rs.13,500/- per month. Therefore, even if we accept the stand of the appellant/defendant, the rate of rent is more than Rs.3,500/- per month, and thus the premises are outside the protection of the Delhi Rent Control Act, 1958 and consequently the suit for possession could have been filed terminating the monthly tenancy.

6. So far as the aspect of service of notice terminating tenancy under Section 106 of the Act is concerned, counsel for the appellant/defendant has very strongly argued that the premises in question were let out vide rent agreement dated 17.12.2003 for manufacturing purposes, i.e. for "Steel Hot Rolling etc" and therefore in terms of Section 106 of the Act, such a tenancy can only be terminated by a six months notice, and, since the notice which has been issued in the present case terminating

the tenancy was for a notice period of only one month, the same was defective and therefore the suit was pre-mature.

7. I have in the recent judgment reported as **M/s.Jeevan Diesels & Electricals Ltd. vs. M/s. Jasbir Singh Chadha (HUF) & Anr.** 2011 (182) DLT 402 held that even if it is not proved that a legal notice was served prior to filing of the suit, service of summons of the suit can be taken as a notice under Section 106 of the Act. I have also held in the judgment of **M/s.Jeevan Diesels** (Supra) that if along with the plaint, copy of the notice is served on the tenant and once again, this can be taken as service of notice. The aforesaid aspects can be taken note of under Order 7 Rule 7 CPC. I have held that Court should take a pragmatic view in view of the legislative intendment as demonstrated by Act 3 of 2003, amending Section 106 of the Act. An SLP against the said judgment being SLP No.15740/2011 has been dismissed by the Supreme Court on 7.7.2011.

8. The argument as raised on behalf of the appellant/defendant that the lease in this case should be held to be for a manufacturing purpose because it is so provided in para 3 of the lease deed dated 17.12.2003, is an argument which I reject inasmuch as the lease deed dated 17.12.2003 is not a registered document, and therefore, the terms of the lease deed cannot be looked into in view of the Section 49 of the Registration Act, 1908. I also do not agree with the argument of the learned senior counsel for the appellant that a letting purpose is a collateral purpose within the expression under Section 49 of the Registration Act, 1908. Surely, the purpose of letting out is very much a main term of a lease deed, and by no stretch of imagination the same can be said to a collateral purpose. I therefore hold that the lease deed dated 17.12.2003 cannot be looked into and once the same cannot be looked into, there is no basis to hold that the lease was created for a manufacturing purpose.

9. Even for the sake of argument if I accept that the lease was created for manufacturing purpose, then applying the ratio of **M/s.Jeevan Diesels** (Supra), a period of six months has definitely expired since the filing of the subject suit. The subject suit was filed on 1.5.2010, and the appellant/defendant was served in September, 2010, therefore, the appellant/defendant in any case had a six months notice to vacate the premises. Ultimately, which would be the date from which mesne profits would be

payable, is an issue which will be gone into by the Trial Court while deciding the issue of mense profits, however for the present, it cannot be said that the suit cannot be decreed so far as the limited relief of possession is concerned.

10. In view of the above, I do not find any merit in the appeal, which is accordingly dismissed, leaving the parties to bear their own costs.

ILR (2012) IV DELHI 464
W.P. (C)

RANGNATHAN PRASAD MANDADAPU ….PETITIONER

VERSUS

MEDICAL COUNCIL OF INDIA & ANR. ….RESPONDENTS

(VIPIN SANGHI, J.)

W.P. (C). NO. : 8745/2011 & 19767-68/2011 **DATE OF DECISION: 16.01.2012**

Constitution of India, 1950—Article 226—Petitioner completed four and half years of medical course; furnished certificate—Issued provisional registration by MCI in 2000—Authenticity of this not certified by Moscow University—Provisional registration withdrawn on 29.05.2001—MCI intimated the police authority—Lodged FIR against petitioner under S. 420/468/471 IPC-Petitioner Contended—Misled into believing that diploma could be issued by Moscow University—The truth otherwise was the matter under investigation—He had gone back to Russia and completed the balance course from St. Petersburg State Medical Academy—This institution certified the petitioner having

completed the course-Issued diploma on 23.06.2003—Petitioner returned—Attempted Screening test-Become successful-MCI admitted same—Denied registration on the ground of registration of criminal case—In earlier writ petition filed by the petitioner, High Court issued direction to the respondent to provisionally enroll him and permit his completion of compulsory, rotatory internship in India—Open to MCI to impose condition that in the event of adverse order in criminal proceedings it would take such action against petitioner a warranted under the law after reviewing the facts circumstances—The petitioner thereafter completed rotatory internship-Appeared in CET-NBE conducted by respondent no.2—Result not declared as be he had not been granted permanent registration by respondent no.1—Petitioner contended-The pendency of the criminal proceedings should not be allowed to mar the career prospect of the petitioner—Admittedly, the petitioner fully qualified and eligible for grant of permanent registration by MCI—Criminal trial may takes years to be completed—Petitioner could not be deprived of his right to profess his profession—Respondent MCI contended—Till the criminal case finally decided, petitioner could not be granted permanent registration—Respondent had no mechanism to track criminal proceedings—Held—Unless the petitioner held guilty, cannot be debarred or prevented from pursuing his profession—Even if held guilty, it need examination whether he should and if so, for what period, so prevented—MCI directed to grant conditional permanent registration to the petitioner subject to condition that petitioner would give an undertaking to the court that he would keep updating the status of the pending criminal case after every six month-Writ disposed off.

The petitioner having completed the compulsory rotatory internship, in my view, the pendency of the aforesaid criminal

proceedings cannot come in his way in obtaining a conditional permanent registration, as without any such registration, the petitioner will not be in a position to pursue his higher studies or be able to practice as a qualified doctor. The fact that various other similar cases may be pending is no ground to deny relief to the petitioner, to which he appears to be fairly, reasonably and equitably entitled. **(Para 9)**

Today, the issue is not whether the petitioner is academically qualified or not, to get permanent registration. He has the requisite qualification to get the permanent registration. The issue is only whether he is guilty of playing a fraud upon the MCI, in earlier submitting documents – wherein he claimed himself to be qualified. The issue is with regard to the said conduct of the petitioner. Unless the petitioner is held guilty in respect of that conduct, he cannot be debarred or prevented from pursuing his profession, as he is, admittedly, academically qualified. Even if he is held guilty, it would need examination whether he should, and if so, for what period, so prevented. **(Para 10)**

Important Issue Involved: (i) Mere pendency of criminal case, does not debar the individual from pursuing his profession.

[Gu Si]

APPEARANCES:

FOR THE PETITIONER : Ms. Suman Kapoor and Anand Shailani, Advocates.

FOR THE RESPONDENTS : Ms. Ashish Kumar and Amit Kumar, Advocates.

CASE REFERRED TO:

1. *Dr. Sukanta Ghosh* vs. *MCI* (LPA 376 of 2006).

RESULT: Writ disposed off.

VIPIN SANGHI, J. (Oral)

1. The petitioner has preferred the present writ petition under Article 226 of the Constitution of India, to seek a direction against respondent no.1, i.e. Medical Council of India (MCI) to grant permanent registration to the petitioner. The petitioner also seeks a direction to respondent no.2, i.e. National Board of Examinations (NBE) to recognize the petitioner's candidature in the CET, NBE December 2011 Examination. The petitioner also seeks a direction to respondent no.2 to communicate the result of the petitioner for the CET NBE examination held in December 2010.

2. The petitioner had earlier preferred a writ petition being W.P.(C.) No.5548/2006, which was allowed by the Court. A direction was issued to the respondent, MCI to provisionally enroll the petitioner with it, and to permit him to complete the compulsory rotatory internship in India. The relevant facts of the case, and the respective submissions of the parties, have been set out in the judgment dated 13.01.2009 passed in the aforesaid writ petition. I consider it appropriate to set out the relevant paragraphs of the said judgment:

> "2. The facts necessary for the purpose of deciding this case are that the petitioner had completed his intermediate (10+2) from the Board of Intermediate Education, Andhra Pradesh, with first division. He joined the medical course at the Russian Peoples Friendship University, Moscow in 1993. He alleges having completed Russian Language Course in that University (hereafter called "Moscow University"), in 1993-94, which was mandatory for foreign students and joined the first year of the medical course in 1995. He claims to have completed his medical course and obtained the M.D. Physician Degree from the St. Petersburg State Medical Academy (hereafter referred to as "St. Petersburg Academy") in 2003. The petitioner appeared in the Screening Test conducted by the National Board of Examination (NBE) for securing provisional registration, with the Medical Council of India (MCI); he qualified. It is alleged that at that stage, MCI refused to accept the application, contending that a First Information Report (FIR) alleging commission of offences (offences under Sections 420/468/471 IPC) by him, i.e. the petitioner were registered and pending against him. The petitioner

> contends that having regard to the judgment of the Supreme Court in W.P.(C.) No.604/2002 delivered on 16.11.2004, the guidelines for registration of doctors mandated that if candidates completed their medical course abroad, before 15.03.2002, and appeared in the Screening Test, they should be permitted registration.
>
> 3. The petitioner alleges having fulfilled the necessary requirements spelt out in the Supreme Court's judgment as is quoted in extenso from the ruling. He contends that since the M.D. Physician degree issued by the St. Petersburg Academy is a recognized qualification, therefore, the MCI, even after he being declared successful in the Screening Test, has unjustly denied him registration.
>
> 4. The petitioner alleges that he had completed four years of medical studies at the Russian University when he became aware that those who studied regularly for more than five years could directly join the final semester to obtain the medical degree. He alleges having completed the course and passed all exams in Medicine, Surgery, Pediatrics, Social Medicine, Obstetrics and Gynecology in the Moscow University in 2000 and further having obtained a degree through the then Dean. The petitioner contends that he believed the degree to be genuine, on the basis of which, he obtained provisional registration for internship at Vijaywada, Andhra Pradesh. Unfortunately, the information furnished to him was wrong and the degree was found to be fake by the MCI. As soon as he was informed by MCI about fake degree, he obtained Visa and went back to Russia to verify the genuineness of the document, and completed the rest of three semesters of study which he did at the St. Petersburg Academy. He claims having successfully completed the fifth year second semester and sixth year and the State Board Examination from the St. Petersburg Academy and then obtained the medical degree on 20.06.2003. The petitioner contends that the allegations about his involvement in forgery and submission of false documents are unfounded and that he was a victim of misrepresentation that led to his return to Russia to complete the balance course. In these circumstances, he states that having qualified in the Screening

Test, the respondent cannot deny registration merely on the basis of pendency of criminal prosecution.

5. The MCI contends that according to its procedure, certificates submitted by the applicants have to be verified by the concerned foreign Board or University. It is after this evaluation that applicants are permitted provisional recognition and allowed to start the 12 months mandatory internship. This, the counsel contends applies even to those students who completed a Six-years course.

6. The MCI contends that along with the application furnished earlier on 21.11.2000, the petitioner had furnished a degree certificate dated 14.06.2000, ostensibly issued by the Moscow University, stating that he had undertaken graduate medical course during the period 1994-2000. On the strength of these documents, the MCI had granted provisional registration on 18.12.2000 pending authenticity and verification of the documents. It claims that the authenticity verification received from the Embassy of India at Moscow on 14.05.2001 stated that the medical certificate dated 14.06.2000 was fake according to the information given by the Dean of Foreign Students Department, Moscow University, MCI, therefore, cancelled the provisional registration on 29.05.2011.

9. It is contended on behalf of the petitioner that the MCI harped on old facts and that the charge of suppression or misrepresentation is baseless. According to the petitioner, he is a victim of fraud and cannot be penalized doubly for it. Immediately on learning that the Russian State Medical University, Moscow had disclaimed his candidature, he returned to Moscow and on the basis of his admitted academic course undertaken by him, enrolled at the St. Petersburg State Medical Academy. It was contended that the Court had, on 19.02.2007, directed the respondent to verify the diploma/degree and the other documents submitted by the petitioner purportedly, issued by St. Petersburg Academy. The MCI was required to complete the verification process through appropriate channels. Further to this verification process, the MCI filed an affidavit on 17.11.2007.

10. The affidavit encloses copies of correspondence between the

Ministry of External Affairs, Govt. of India and the MCI. The Consulate General of India had sought verification from the St. Petersburg State Medical Academy, which on 04.09.2007, confirmed having issued the diploma certificate to the petitioner on 26.06.2003. The Consulate General communicated this through letter to the New Delhi office. This was communicated to the MCI by the Ministry of External Affairs through its letter dated 25.09.2007. The letter of the Consulate General to the foreign office in Delhi is as follows:

From : Congendia Saint Petersburg

To : Foreign New Delhi
Shri Rahul Srivastava, US (Russia), Eurasia
Division, MEA from Consul (Consular)

Reptd to: i) SO (Consular), MEA, Patiala HouseAnnexe
ii) Dr P. Kumar, Addl. Secy, MCI, Dwarka, ND

Subject: Verification of medical degree required in Court case

Please refer to your fax msg. No. Nil dated 17.8.2007 regarding checking of authenticity of medical degree of Dr. Ranganatha Prasad Mandadapu required in connection with a court matter.

His medical document was forwarded to concerned authorities in the St. Petersburg State Medical Academy named after I.I. Machnikav for immediate verification. They have now replied and confirmed issuing Doctor's Diploma No.DIS 0025552, Registration No.1133 to Mr. Ranganatha Prasad Mandadapu on 26.6.2003. A copy of their letter (in Russian) with its English translation is also faxed herewith.

Sd/- (Abhay Kumar)

Consul (Consular)

11. The preceding discussion shows that the petitioner apparently completed about four and half years medical course, furnished a certificate, which led to issuance of provisional registration, by the MCI in 2000. Further, the authenticity of this was not certified by the Moscow University and the provisional registration was withdrawn on 29.05.2001. The MCI intimated the police

authorities; this led to lodging of a First Information Report. The petitioner's version was that he was also misled into the believing that the diploma could be issued by the Moscow University. The truth or otherwise of that matter is pending investigation.

12. The petitioner contends (a fact now not denied by the MCI) having gone back to Russia and completed the balance course but from another institution, i.e. St. Petersburg State Medical Academy. The latter institution certified the petitioner's having completed the course and having issued the diploma on 23.06.2003. The petitioner came back and attempted the Screening Test. It is again not denied that he was successful in the process. The MCI, however, is denying registration on the ground of pendency of a criminal case.

13. In this Court's decision in **Dr. Sukanta Ghosh v. MCI** (LPA 376 of 2006), the petitioner's marksheet in the AISSCE issued by the CBSE in 1991 was under a cloud. He had like the present petitioner completed the medical course and also the compulsory rotator internship in Russia. The MCI, on account of pendency of criminal proceedings, cancelled his resignation.

The Court declined to interfere and held that MCI could consider the issue again after completion of the criminal proceedings. In the present case, the MCIs contention is primarily about the existence of criminal case and not pertaining to the genuineness of certificate, which led to awarding the degree. The degree was produced by the petitioner in 2000; he claimed to have obtained it from the Moscow University. The later events, however, are not in dispute at all. That the petitioner subsequently went to another institution in Russia, i.e. the St. Petersburg Academy which issued the certificate on 23.06.2003, which is acceptable to the MCI from the academic perspective; that the petitioner qualified in the Screening Test, (like other students, who complete their studies in foreign universities are required to), and that the St. Petersburg Academy has authenticated the document, which is now deemed found genuine are no longer in dispute. What, therefore, stands established is that the petitioner holds a valid degree, duly authenticated from a foreign university, i.e. St. Petersburg Academy. These acts, in the opinion of the Court,

distinguishes the petitioner's case from Dr. Sukanta Ghosh's case.

14. Besides above, the Court cannot ignore the fact that often times students are misled into situations where they turn up to be victims. Whether the petitioner really was entitled to a degree in 2000 or not and whether the document was fake and his role or responsibility are questions that will undoubtedly be gone into in criminal proceedings. However, the pendency of those proceedings cannot, in the opinion of the Court, automatically elevate the suspicions, howsoever strong, into proven facts, which should damn an individual's career, particularly in such cases. The MCIs "hands of" policy in not taking any action at all, without any rudiment of enquiry, can result in irreparable damage to the career and life of students who might ultimately turn out to be innocent. In this case, the petitioner had the ability to return to Russia and secure an acceptable medical qualification. In other cases, students may not be so fortunately placed. The MCI should in such circumstances, in the opinion of the Court, carry out its own independent investigation to verify whether such students are victims or are perpetrators and not merely assume the role of a by-stander.

15. In view of above discussion, this Court is of the opinion that the petitioner should be granted the relief he claims. A direction is, therefore, issued to the respondent MCI to provisionally enroll him with it and permit his completion of compulsory rotatory internship in India. While doing so, it is open to the MCI to impose a condition that in the event of an adverse order in the criminal proceedings, it would take such action against the petitioner as warranted in law after reviewing the facts and circumstances".

3. Consequent upon the aforesaid decision, the petitioner has completed his rotatory internship. The petitioner thereafter appeared in the CET NBE conducted by respondent no.2 in December 2010. However, the petitioner's result has not been declared by respondent no.2, as the petitioner has not been granted permanent registration by respondent no.1.

4. The submission of learned counsel for the petitioner is that the pendency of the criminal proceedings should not be allowed to mar the career prospects of the petitioner. Admittedly, the petitioner is fully qualified and eligible to be granted permanent registration by the MCI. The criminal trial may take years to get completed. The petitioner cannot be deprived his right to profess his profession merely because the said trial is pending.

5. The submission of counsel for the respondent, MCI is that the criminal proceeding against the petitioner is still pending. He submits that till the said criminal case is finally decided, the petitioner cannot be granted permanent registration. He further submits that the learned Single Judge, while allowing the petitioner's earlier writ petition had observed that it is open to the MCI to impose a condition that in the event of an adverse order in the criminal proceedings, it would take such action against the petitioner as warranted in law, after reviewing the facts and circumstances.

6. Counsel for the respondent further submits that there are a large number of other similar cases pending, and a decision in this case to allow the petitioner to seek permanent registration would have an impact on those cases as well. He further submits that the respondent has no mechanism of keeping a track on the criminal proceedings, and in case the petitioner is condemned in the criminal proceedings, the respondent would not even come to know, to be able to take action against him.

7. It is clear from the aforesaid judgment dated 13.01.2009 that the Court has accepted the position that the petitioner has successfully completed the entire medical course which is recognized by the MCI as a qualification falling within the schedules. The issue whether the petitioner was a culprit, or a victim, in the process of issuance of an earlier certificate, which is alleged to be fake, is still pending consideration before the concerned Court. As held by the learned Single Judge, the pendency of the said criminal proceedings should not be permitted to damn the petitioner's career, as the said proceedings are likely to take considerable time.

8. Undisputedly, the petitioner went back to complete the course upon it being discovered that earlier he had not completed the course, and only thereafter a fresh certificate was issued to him on 23.06.2003, which is acceptable to the MCI from the academic perspective. It is on

this basis that the Court had allowed the earlier writ petition and permitted the petitioner to undergo compulsory rotatory internship in India on the basis of a provisional registration.

9. The petitioner having completed the compulsory rotatory internship, in my view, the pendency of the aforesaid criminal proceedings cannot come in his way in obtaining a conditional permanent registration, as without any such registration, the petitioner will not be in a position to pursue his higher studies or be able to practice as a qualified doctor. The fact that various other similar cases may be pending is no ground to deny relief to the petitioner, to which he appears to be fairly, reasonably and equitably entitled.

10. Today, the issue is not whether the petitioner is academically qualified or not, to get permanent registration. He has the requisite qualification to get the permanent registration. The issue is only whether he is guilty of playing a fraud upon the MCI, in earlier submitting documents – wherein he claimed himself to be qualified. The issue is with regard to the said conduct of the petitioner. Unless the petitioner is held guilty in respect of that conduct, he cannot be debarred or prevented from pursuing his profession, as he is, admittedly, academically qualified. Even if he is held guilty, it would need examination whether he should, and if so, for what period, so prevented.

11. However, to safeguard the concern of the respondents, the petitioner should be subjected to terms.

12. Accordingly, this petition is allowed and I direct the respondent, MCI to grant conditional permanent registration to the petitioner, provided the petitioner fulfills all other terms and conditions required under the rules and regulations of the Medical Council of India, and not to deny the same to the petitioner only on account of the pendency of the criminal proceedings. This is subject to the condition that the petitioner gives an undertaking to this Court that the petitioner shall keep updating the status of the criminal case with the respondent every six months, i.e. on the 1st of January and 1st of July every year, and shall also provide certified copies of the order sheets of the criminal proceedings to the respondent MCI. The undertaking be furnished before this Court within four weeks with a copy to counsel for the respondent. Upon it being furnished, the

undertaking shall stand accepted, and shall bind the petitioner.

13. The conditional permanent registration that may be granted to the petitioner would not come in the way of the MCI in taking action against the petitioner, in case any adverse orders are passed in the criminal proceedings against the petitioner, as warranted in law, after reviewing the facts and circumstances.

14. Since the conditional permanent registration of the petitioner would be granted only after the passing of this order, the same cannot relate back and, therefore, the petitioner's attempt in the examination conducted by respondent no.2 in the past cannot be regularized. To that extent, the relief prayed for against respondent no.2 is not granted.

15. Petition stands disposed of in the above terms. Parties are left to bear their respective costs.

ILR (2012) IV DELHI 475
CRL. M.C

TEKA SINGH @ TITU & ORS. ….PETITIONERS

VERSUS

STATE & ANR. ….RESPONDENT

(SURESH KAIT, J.)

CRL. M.C. NO. : 189/2012 DATE OF DECISION: 18.01.2012

Code of Criminal Procedure, 1973—Section 320—Indian Penal Code, 1860—Section 323, 324, 354, 34—Offences being not compoundable, can FIR be quashed on settlement Held—Compounding of non compounding offences permissible as per the judgment of *B.S Joshi Vs, State of Haryana Nikhil Merchant vs. CBI and Manoj Sharma vs. State.* These three judgments have been

referred to the larger bench vide judgment in case of Gain Singh vs. State. However till these are set aside, they hold the field—Petition allowed.

The Division Bench of Mumbai High Court in **Nari Motiram Hira v. Avinash Balkrishnan & Anr.** in Crl.W.P.No.995/2010 decided on 03.02.2011 has permitted for compounding of the offences of 'non-compoundable' category as per Section 320 Cr. P.C. even after discussing **Gian Singh** (supra). **(Para 8)**

Therefore, I feel that unless and until, the decisions which have been referred above, are set aside or altered, by the larger Bench of the Supreme Court, all the above three decision hold the field and are the binding precedents. 10. In addition, the Supreme Court in **Shiji @ Pappu & Ors. v. Radhika & Anr** in Crl.Appeal No.2064/2011 decided on 14.11.2011 that the cases of non-compoundable nature can be compounded, certainly not after the conviction observing as under:-

> '..... That being so, continuance of the prosecution where the complainant is not ready to support the allegations which are now described by her as arising out of some "misunderstanding and misconception"; will be a futile exercise that will serve no purpose. It is noteworthy that the two alleged eye witnesses, who are closely related to the complainant, are also no longer supportive of the prosecution version. **The continuance of the proceedings is thus nothing but an empty formality. Section 482 Cr.P.C. could, in such circumstances, be justifiably invoked by the High Court to prevent abuse of the process of law and thereby preventing a wasteful exercise by the Courts below.'** **(Para 9)**

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Avinash Lakhanpal, Advocate.

FOR THE RESPONDENT : Mr. Navin Sharma, APP with Si Bansilal, PS Roop Nagar.

CASES REFERRED TO:

1. *Shiji @ Pappu & Ors.* vs. *Radhika & Anr* in Crl.Appeal No.2064/2011.
2. *Nari Motiram Hira* vs. *Avinash Balkrishnan & Anr.* in Crl.W.P.No.995/2010.
3. *Gian Singh* vs. *State of Punjab & Anr.* dated 23rd November, 2010 in SLP (Crl.) No.8989/2010.
4. *Nikhil Merchant* vs. *Central Bureau of Investigation and Anr.* (2008) 9 SCC 677.
5. *Manoj Sharma* vs. *State & Ors.* (2008) 16 SCC 1.
6. *B.S. Joshi* vs. *State of Haryana* (2003) 4 SCC 675.

RESULT: Petition allowed.

SURESH KAIT, J. (Oral)

Crl. M.A. 705/2012 (Exemption)

Exemption allowed, subject to all just exceptions. The application is disposed of.

Crl.M.C. 189/2012

1. Notice issued.

2. Learned APP accepts notice on behalf of the State/respondent No.1. Respondent No.2 is present in person in the Court.

3. Learned counsel for the petitioner submits that vide FIR No.180/2011 dated 22.11.2011, a case under Sections 323/324/354/34 Indian Penal Code, 1860 was registered at PS Roop Nagar against the petitioners on the complaint of respondent no.2.

4. Learned counsel further submits that respondent No.2 has settled all the issues qua the aforesaid FIR due to the intervention of the local people and common friends. Learned counsel further submits that respondent No.2 and the petitioners are from the same family, and therefore, just to stop enmity he has settled the matter with the petitioners.

5. Respondent no.2 is present in person who does not dispute the contention of learned counsel for the petitioner and states that if the present FIR is quashed, he has no objection.

6. Learned APP on the other hand submits that the offence under Section 324 is not compoundable and submits that the Division Bench of Hon'ble Supreme Court in **Gian Singh Vs. State of Punjab & Anr.** dated 23rd November, 2010 in SLP (Crl.) No.8989/2010 has referred the issues to the larger Bench, which were earlier decided in the case of **B.S. Joshi V. State of Haryana** (2003) 4 SCC 675, **Nikhil Merchant v. Central Bureau of Investigation and Anr.** (2008) 9 SCC 677 and **Manoj Sharma Vs, State & Ors.** (2008) 16 SCC 1 and has observed that Section 320 Cr. P.C. mentions certain offences as compoundable, certain other offences as compoundable with the permission of the Court and the other offences as non-compoundable vide Section 320(7) of the Code.

7. He submits that keeping in view the judgment in the case mentioned above, the instant case may be adjourned sine die till the disposal by the Larger Bench. He further submits that if this court is still inclined to quash the FIR, heavy costs be imposed.

8. The Division Bench of Mumbai High Court in **Nari Motiram Hira v. Avinash Balkrishnan & Anr.** in Crl.W.P.No.995/2010 decided on 03.02.2011 has permitted for compounding of the offences of 'non-compoundable' category as per Section 320 Cr. P.C. even after discussing **Gian Singh** (supra).

9. Therefore, I feel that unless and until, the decisions which have been referred above, are set aside or altered, by the larger Bench of the Supreme Court, all the above three decision hold the field and are the binding precedents. 10. In addition, the Supreme Court in **Shiji @ Pappu & Ors. v. Radhika & Anr** in Crl.Appeal No.2064/2011 decided on 14.11.2011 that the cases of non-compoundable nature can be compounded, certainly not after the conviction observing as under:-

> '..... That being so, continuance of the prosecution where the complainant is not ready to support the allegations which are now described by her as arising out of some "misunderstanding and misconception"; will be a futile exercise that will serve no

purpose. It is noteworthy that the two alleged eye witnesses, who are closely related to the complainant, are also no longer supportive of the prosecution version. **The continuance of the proceedings is thus nothing but an empty formality. Section 482 Cr.P.C. could, in such circumstances, be justifiably invoked by the High Court to prevent abuse of the process of law and thereby preventing a wasteful exercise by the Courts below.'**

11. Learned counsel for the petitioner submits that all the petitioners except petitioner No.5 are having dairy and they are in the business of selling milk, therefore, they shall supply milk for 15 days to the Children and destitute women at Nirmal Chhaya, Jail Road, Hari Nagar, Delhi.

12. Accordingly all the petitioners No.1 to 4 are directed to supply 25 litre milk each at Nirmal Chhaya. The milk shall be distributed daily to all the inmates of all homes situated there.

13. The superintendent, Nirmal Chhaya is further directed to ensure the purity of milk on daily basis.

14. In view of above discussion, FIR No.180/2011 registered at PS Roop Nagar against the petitioners and proceedings emanating thereto are hereby quashed.

15. Criminal M.C.No.189/2012 is allowed and disposed of in above terms.

16. Order dasti.

ILR (2012) IV DELHI 480
CRL. M.C

KULDEEP KUMAR KOHLI & ORS. ….PETITIONERS

VERSUS

THE REGISTRAR OF COMPANIES FOR DELHI AND HARYANA ….RESPONDENT

(M.L. MEHTA, J.)

CRL. M.C NO. : 371/2011 DATE OF DECISION: 19.01.2012

Code of Criminal Procedure, 1973—Section 482, 468(2); Indian Companies Act, 1956—Section 63, 628: Petition for quashing of summoning order in complaint u/s 63 and 628—Petitioner contend that complaint beyond period of limitation—Held—Period of limitation in any offence commences only upon receipt of knowledge of breach-Period of limitation will not begin from the date of filling prospectus but from date of filing of balance sheet on which the complaint is based—Complaint within period of limitation—Petition dismissed.

Thus from the above pronouncements , it can be gauged that the period of limitation in such offences will begin not from the date of filling of prospectus, as urged by the counsel for petitioner, but from the date of filling the balance sheet on which the complaint has been based. In the present case, the Registrar of Companies came to know about the commission of the offences after the filing of balance sheet by the petitioner for the year 1999-2001 and the complaint was filed in the year 2002 which is well within the prescribed limitation period of three years. Hence, the question of the period of limitation is answered in favour of the respondents and there is no ground for quashing of the

summoning order on this ground. **(Para 12)** **[An Ba]**

APPEARANCES:

FOR THE PETITIONER : O.P. Gaggar, Advocate.

FOR THE RESPONDENT : Mr. Khalid Arshad, Advocate.

CASES REFERRED TO:

1. *Manjit Jaju* vs. *Registrar of Companies, N.C.T. of Delhi and Haryana* [2011] 101 CLA 153 (Delhi).
2. *Ajay Jain* vs. *Registrar of Companies NCT of Delhi and Haryana* 2010 (119) DRJ 545.
3. *Bhupinder Kaur Singh and Ors.* vs. *Registrar of Companies* 142 (2007) DLT 277.
4. *Zandu Pharmaceutical Works Ltd. and Others* vs. *Mohd. Sharaful Haque And Another* (2005) 1 SCC 122.
5. *Manganese Ore (India) Ltd.* vs. *Municipal Council through its Chief Officer, Uttarwar* MANU/MH/0613/2002.
6. *Thomas Philip* vs. *Asst. Registrar being* Crl.M.C. No. 4113/2002.
7. *Anita Chadha* vs. *Registrar of Companies* 96 (1999) CC 265.
8. *State of Rajasthan* vs. *Sanjay Kumar and Ors.* MANU/SC/0335/1998 : (1998) 5 SCC 82.

RESULT: Petition dismissed.

M.L. MEHTA, J.

1. The present petition is preferred by the petitioner under section 482 of the Code of Criminal procedure 1973, for quashing of the complaint lodged by the respondents against the petitioner under section 63 and 628 of the Companies Act, 1956 pending in the Court of Metropolitan Magistrate, Delhi and for quashing of the summoning order dated 13.11.2002.

2. The petitioners were directors of a finance, leasing and investment

company named Pariksha Fin-invest-lease Pvt. Ltd having its registered office at B-18, Swami Dayanand Colony, Sarai Rohilla, Delhi-110007 since 27.8.1995. The object of the company was investments, financing, leasing, consultancy services etc. mentioned in the articles and memorandum of association. The said company became a public company and made a public issue of its equity shares in September 1996. In the prospectus issued for the said capital issue, the proposed deployment of the funds was given as leasing, finance and investments etc. The total issue size was Rs. 235 lakhs and the promoters' own contribution was Rs. 90 lakhs. The company shifted its' registered office to another leased premises at 71/77, Prem Nagar, Janakpuri, Delhi on 22.06.1998.

3. The Delhi Stock Exchange corresponded with the petitioners' company at the old address between August 1998 to March 1999. Due to the letters being returned undelivered, the DSE sent a letter to the residential address of the petitioners on 23.3.1999 warning them of their company being treated as vanishing company. The petitioners received a show cause notice number ROC/Pros/Vanishing/57377/6003 dated 30.4.02 under section 62,63 read with section 68 and section 628 of the Companies Act from the office of the Registrar of Companies. The then Deputy Registrar Mr.J.K. Jolly was appointed to inquire into the affairs of the company. On the above said premises two complaints being case no. 1333/2002 under section 62 and 68 of the Act and case number 1332/2002 under section 63 and 628 of the Act were lodged by Registrar of Companies in the court of MM against the petitioners on 13.11.2002.

4. In the present case i.e. complaint case 1332/2002, it has been alleged that the directors of the company did not utilize the funds from the public issue for the purpose mentioned in the prospectus and in fact the funds were allocated and invested in purposes which were not mentioned in the prospectus, therefore, the company and its directors have made false statements in the prospectus by not disclosing the true purpose of the prospectus.

5. I have heard the learned counsels for the petitioners and the respondent.

6. It is submitted by the learned counsel for the respondent that the funds for leased assets and the purchase of office space have not been used but have been diverted to investments for their own purposes.

Therefore, the directors are liable to be prosecuted u/s 63 and 628 of the companies Act, 1956.

Section 63 and section 628 of the companies Act, 1956 are reproduced as under:

63. Criminal liability for misstatements in prospectus. -

(1) Where a prospectus issued after the commencement of this Act includes any untrue statement, every person who authorised the issue of the prospectus shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to 1 [fifty thousand rupees], or with both, unless he proves either that the statement was immaterial or that he had reasonable ground to believe, and did up to the time of the issue of the prospectus believe, that the statement was true.

(2) A person shall not be deemed for the purposes of this section to have authorised the issue of a prospectus by reason only of his having given -

(a) the consent required by section 58 to the inclusion therein of a statement purporting to be made by him as an expert, or

(b) the consent required by 2[***] sub-section (3) of section 60.

628. PENALTY FOR FALSE STATEMENTS.

If in any return, report, certificate, balance sheet, prospectus, statement or other document required by or for the purposes of any of the provisions of this Act, any person makes a statement -

(a) which is false in any material particular, knowing it to be false; or

(b) which omits any material fact knowing it to be material;

he shall, save as otherwise expressly provided in this Act, be punishable with imprisonment for a term which may extend to two years, and shall also be liable to fine.

7. Per contra it is submitted by the learned counsel for the petitioners

that the funds of the company which were generated through public issue were deployed in the objects of the company and the office could not be purchased because the deal failed due to volatility in the property market. It is submitted that the Registrar of Companies did not take into account the report of the Deputy Registrar who had exonerated the petitioners from any criminal liability in his report. It is urged that the petitioners gave the notice of change in address to all the authorities like RBI, DSE and Income Tax Office by filling form 18. Another contention of the petitioners is that they have resigned from the directorship of the company before the filling of the complaint and hence no liability can be fastened on them. Amongst these grounds, the main ground taken up by the petitioners for quashing of the summoning order is that the complaint lodged by the Registrar of Companies is barred by time and is filed after the expiry of the limitation period. It is contended that the prospectus was issued by the company on 10.09.1996 and the impugned complaint no. 1332/2002 was filed on 13.11.2002 which is beyond the limitation period of three years under section 468(2) Cr.P.C.

8. At the outset, it must be mentioned that the petition having been filed after 8 years of passing of the summoning order, is highly belated and the petition finds no mention of any explanation of such a long delay. On this ground alone, it was liable to be dismissed.

9. Before adverting to the other grounds raised by the petitioner, it is important to lay down the rule as affirmed by various judgments regarding the initialization of the period of limitation in such offences. Needless to mention, the maximum punishment prescribed under the two sections of the complaint namely section 63 and 628 of the companies Act is two years. As per section 468(2) the maximum period of limitation for commencement of prosecution of these offences is three years. The point of examination now boils down to the question as to when does the limitation period begins. It is a well settled legal proposition that the period of limitation in any offence commences only upon the receipt of knowledge of breach.

10. Shedding light on this issue, this Court in **Ajay Jain Vs. Registrar of Companies NCT of Delhi and Haryana** 2010(119) DRJ 545 has held that the limitation would start only after the filing of the date of balance sheet and not from the date of the issue of prospectus. The relevant part of the judgment reads as under:

"5. As far as limitation aspect is concerned, limitation of offences under Sections 63 and 628 of the Companies Act, 1956 starts from the date of knowledge of making a false statement. The Registrar of Companies learnt about making of false statement after filing of balance sheet in the year 1999-2000, therefore, limitation would start only after the date of filing of balance sheet and not from the date of issuing prospectus and this plea, therefore, is not tenable."

11. The point was reiterated in **Manjit Jaju Vs. Registrar of Companies, N.C.T. of Delhi and Haryana** [2011] 101 CLA 153 (Delhi),

"4. The plea taken by the petitioner that the period of limitation has to be counted from the date of issuance of prospectus is a baseless plea. The offence under Section 63 of the Companies Act stands committed when prospectus containing untrue statement is issued and offence under Section 468 of the Companies Act is committed if the return, report, balance sheet, prospectus, the statement etc. issued by the company are found to contain untrue statements or false material or such vital material is omitted which has bearing. Both the offences are punishable with imprisonment upto two years and/or with fine. Thus, the period of limitation for both the offences is three years. However, the limitation would start from the date when Registrar of Companies acquired knowledge about false statement. The process of issuing prospectus or filing of balance sheet, statements, certificate cannot be a starting point of limitation as by such an act, the Registrar of Companies would not come to know whether the statement made in the prospectus was a false statement or truthful statement. Unless it is brought to its knowledge by the affected persons or an enquiry is held by Registrar of Companies about the truthfulness, the knowledge that the statement was false cannot be attributed to the Registrar of Companies. When the Registrar of Companies acquired knowledge about the false statement cannot be gone into by this Court under Section 482 Cr.P.C. as it involves a probe into the facts. When a complaint is filed before the Court of Magistrate under Section 63 and 628 of the Companies Act, the Court of Magistrate is supposed to take cognizance of the offence on the basis of allegations made

in the complaint. Whether the complaint was filed within period of limitation is a matter of evidence.

This Court in **Bhupinder Kaur Singh and Ors. v. Registrar of Companies** 142(2007) DLT 277 considered this question and observed as under:

11. Coming to the question of limitation, again this is a mixed question of law and fact. As mentioned above, falsity/misstatement in the prospectus can be proved by showing that funds were utilized ultimately for some other purpose, which event would happen subsequently and only when this is brought to the notice of the complainant and the complainant gets knowledge thereof that the period of limitation would run. See **Rajshree Sugar** (supra); **Anita Chadha v. Registrar of Companies** 96 (1999) CC 265; **Thomas Philip v. Asst. Registrar** being Crl.M.C. No. 4113/2002 decided by the High Court of Kerala; **Manganese Ore (India) Ltd. v. Municipal Council through its Chief Officer,** Uttarwar MANU/MH/0613/2002; and **State of Rajasthan v. Sanjay Kumar and Ors.** MANU/SC/0335/1998 : (1998) 5 SCC 82.

Therefore, at this stage the complaints cannot be thrown out on the ground of limitation and this is the issue which will have to be decided by the trial court after the evidence is led by the parties."

12. Thus from the above pronouncements , it can be gauged that the period of limitation in such offences will begin not from the date of filling of prospectus, as urged by the counsel for petitioner, but from the date of filling the balance sheet on which the complaint has been based. In the present case, the Registrar of Companies came to know about the commission of the offences after the filing of balance sheet by the petitioner for the year 1999-2001 and the complaint was filed in the year 2002 which is well within the prescribed limitation period of three years. Hence, the question of the period of limitation is answered in favour of the respondents and there is no ground for quashing of the summoning order on this ground.

13. The contention of the petitioners that they have resigned from the directorship of the company and hence cannot be made liable, does

not find any favour as the question that whether they had resigned or not is a question of fact which cannot be gone into by this court and only the trial court, during trial can decide this issue. With regard to the plea taken by the petitioners that the Registrar of Companies have not taken into account the report of the Inquiry Officer before filing the complaint does not hold water as it is the discretion of the Department to rely or not upon the report of its Officer. If it proceeds to take action against any entity based on incriminating material available, then it cannot be stated as a defense that the Department has not relied upon its internal communication with its Officers or any internal inquiry. These are all triable issues to assess the evidentiary value of the evidence that may be led by the parties.

14. The argument of the petitioners that the fact of change of address was duly notified to all the agencies including RBI, DSE and Income Tax Office, does not have any merit because after the perusal of the record it can be seen that only correspondence made in this regard was to the Registrar of Companies and no other authority. The petitioners cannot shift their liability arising out of their own inaction by stating that there was lack of communication between the various Authorities. The onus of notifying the various agencies about the change of address lied only and only on the petitioners which they have not been able to discharge.

15. Coming to the issue of power of High Court to quash the complaint and summoning order it has been categorically laid down that it would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises arrive at a conclusion that the proceedings are to be quashed. The complaint has to be read as a whole. If it appears that on consideration of the allegations in the light of the statement made on oath of the complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is mala fide, frivolous or vexatious. In that event there would be no justification for interference by the High Court. The Hon'ble Supreme Court in the case of **Zandu Pharmaceutical Works Ltd. And Others v. Mohd. Sharaful Haque And Another**(2005)1 SCC 122 held that:

> "When exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge. Judicial process should not be an instrument of oppression, or, needless harassment. Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time the section is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death."

16. From the facts and circumstances of the case it can be seen that a prima facie case has been made out against the petitioners and there is no reason to interfere with the order of the Ld. M.M. It cannot be said that the Magistrate has not viewed the ingredients of the complaint before taking cognizance and has passed a mechanical order.

17. I find no illegality in the impugned order of the trial court. The petition is hereby dismissed.

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RFA

PARMANAND KANSOTIA ….APPELLANT

VERSUS

SEETHA LATH & ANR. ….RESPONDENTS

(J.R. MIDHA, J.)

RFA NO. : 333/2010 & 362/2010 DATE OF DECISION: 20.01.2012

(A) Indian Contract Act, 1872—Section 29—Indian Evidence Act, 1872—Section 91, 92, 114: Agreement to sell—Suit by Purchaser for Specific performance-Suit by Seller

for mandatory injunction and possession-Suits decreed in favour of seller—Appeal filed by Purchaser—Held—Purchaser failed to make payment of balance sale consideration—Purchaser's contention that oral agreement was entered into at the time of sale agreement which provided for deduction of amounts spent on renovation, furnishing etc. from the sale consideration, is barred under S. 29 of Contract Act and S. 91 and 92 of Evidence Act—Held—S. 114 of Evidence Act enables the Judge to infer one fact having regard to the common course of natural events or human conduct—In natural course of event the Seller hands over the vacant peaceful possession of the suit property to the Purchaser at a time of receiving the balance sale consideration and not before that—In exceptional cases possession is handed over where substantial payment has been made and there are special circumstance to secure the balance sale consideration, such as relationship between the parties. No. such special circumstance in the present case—It is improbable that the seller would have authorized purchaser to renovate, furnish without even specifying the amount. Appeal dismissed.

Findings

9.1 The Purchaser has committed the breach of the sale agreement dated 20th September, 2005 by failing to make the payment of balance sale consideration of Rs. 12,65,000/- to the Seller on or before the 21st November, 2005 in terms of clause 9 of the sale agreement and, therefore, the Seller has rightly forfeited the earnest money in terms of the clause 9 and is entitled to the possession of the suit property from the Seller.

9.2 The Purchaser was admittedly never ready and willing to pay Rs. 2,65,000/- to the Seller. The Purchaser's own case is that he was ready and willing to pay Rs. 6,65,000/- after adjusting Rs. 4,00,000/- towards the cost of renovation,

furnishing and decoration and cash payment of Rs. 2,00,000/- alleged to have been made in February, 2006.

9.3 The Purchaser has failed to prove the cash payment of Rs. 2,00,000/- in February, 2006 to the Seller.

9.4 The Purchaser has failed to prove that the possession of the suit property was handed over by the Seller to him on 20th September, 2005. Although the sale agreement dated 20th September, 2005 records that the Seller shall handover the vacant and peaceful possession of the suit property to the Purchaser at the time of the sale agreement but the factum of actual handing over of the physical possession of the suit property has not been proved by the Purchaser. The Purchaser is, therefore, in unlawful possession of the suit property since 17th March, 2006 and is liable to pay mesne profits from the said date.

9.5 There was no agreement between the parties for renovation, furnishing, decoration and construction with modern fittings in the suit property by the Purchaser and for adjustment of the amount from the sale consideration and, therefore, the Purchaser is not entitled to adjust Rs. 4,00,000/- towards the alleged cost of renovation, furnishing, decoration and construction. There was no such clause in the sale agreement dated 20th September, 2005. No oral agreement in this regard has been proved by the Purchaser.

9.6 The Purchaser's contention that at the time of the sale agreement dated 20th September, 2005, there was an oral agreement that the Purchaser shall spend an unspecified amount for renovation, furnishing, decoration and construction with modern fittings and shall deduct/adjust the same from the sale consideration is barred by Section 29 of the Indian Contract Act. Section 29 of the Indian Contract Act declares all uncertain contracts to be void. The reason is obvious. What if the Purchaser would have claimed to have spent the entire balance sale consideration on renovation and sought the adjustment or would have spent

more than a balance sale consideration and made a claim against the Seller. Section 29 of the Indian Contract Act is reproduced hereinbelow:-

> **"29. Agreements void for uncertainty-** Agreements, the meaning of which is not certain, or capable of being made certain, are void."

9.7 The Purchaser's contention that at the time of the sale agreement dated 20th September, 2005, there was an oral agreement that the Purchaser shall spend an unspecified amount for renovation, furnishing, decoration and construction with modern fittings and shall deduct/adjust the same from the sale consideration is also barred by Sections 91 and 92 of the Indian Evidence Act as the terms of the sale agreement between the parties have been reduced into writing on 20th September, 2005 and evidence of any oral agreement for the purpose of contradicting, varying, adding and subtracting to its terms is barred by Sections 91 and 92 of the Indian Evidence Act.

9.8 This is a fit case for application of Section 114 of the Indian Evidence Act, which provides guidance for drawing natural presumptions. Section 114 of the Indian Evidence Act enables the Judge to infer one fact from existence of another proved fact having regard to the common course of natural events or human conduct. This section provides a guiding principle, namely that the Court shall be guided by its own experience and knowledge of the common course of natural events, and public and private affairs. Section 114 of the Indian Evidence Act is reproduced hereinbelow:-

> **"114. Court may presume existence of certain facts -** The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

9.9 In natural course of events, the Seller hands over

the vacant and peaceful possession of the suit property to the Purchaser at a time of receiving the balance sale consideration and not before that. However, in exceptional cases, the possession is handed over where substantial payment has been made and there are special circumstances to secure the balance sale consideration such as relationship between the parties. There are no special circumstances in the present case. It is improbable that the Seller would have authorized the Purchaser to carry out renovation, furnishing, decoration and construction in the suit property without even specifying the amount.

9.10 The Purchaser's contention that the Seller had limited Power of Attorney was not raised before the Trial Court and no evidence was led with respect thereof. The Purchaser cannot raise a new and contradictory plea for the first time in appeal. The Purchaser entered into the sale agreement with the Seller and sought specific performance against him. The Purchaser is estopped from disputing the authority of the Seller to sell the suit property. **(Para 9)**

(B) Costs: Where Courts find that using Courts as a tool a litigant has perpetuated illegalities or has perpetuated an illegal possession, the courts must impose costs on such litigant which should be equal to the benefits derived by the litigant and harm and deprivation suffered by the rightful person, so as to check frivolous litigation and prevent the people from reaping a rich harvest of illegal acts through the Courts. Despite settled legal positions, the obvious wrong doers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that dice is always loaded in their favour, since even if they lose, the time gained is the real gain. This situation must be redeemed by the Courts. Purchaser's conduct dishonest-Both appeals dismissed with exemplary

costs of Rs. 2,00,000/- on the Purchaser.

Conduct of the Purchaser

10.1 In **Dalip Singh v. State of U.P.,** (2010) 2 SCC 114, the Supreme Court noted as under:-

> "1. For many centuries, Indian society cherished two basic values of life i.e. 'Satya' (truth) and 'Ahimsa' (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence period has seen drastic changes in our value system. The materialism has over-shadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings. In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."

10.2 In **Padmawati and Ors. v. Harijan Sewak Sangh,** 154 (2008) DLT 411, this Court noted as under:

> "6. The case at hand shows that frivolous defences and frivolous litigation is a calculated venture involving no risks situation. You have only to engage professionals to prolong the litigation so as to deprive

> the rights of a person and enjoy the fruits of illegalities. I consider that in such cases where Court finds that using the Courts as a tool, a litigant has perpetuated illegalities or has perpetuated an illegal possession, the Court must impose costs on such litigants which should be equal to the benefits derived by the litigant and harm and deprivation suffered by the rightful person so as to check the frivolous litigation and prevent the people from reaping a rich harvest of illegal acts through the Courts. One of the aim of every judicial system has to be to discourage unjust enrichment using Courts as a tool. The costs imposed by the Courts must in all cases should be the real costs equal to deprivation suffered by the rightful person."

> **"9. Before parting with this case, I consider it necessary to pen down that one of the reasons for over-flowing of court dockets is the frivolous litigation in which the Courts are engaged by the litigants and which is dragged as long as possible. Even if these litigants ultimately loose the lis, they become the real victors and have the last laugh. This class of people who perpetuate illegal acts by obtaining stays and injunctions from the Courts must be made to pay the sufferer not only the entire illegal gains made by them as costs to the person deprived of his right and also must be burdened with exemplary costs. Faith of people in judiciary can only be sustained if the persons on the right side of the law do not feel that even if they keep fighting for justice in the Court and ultimately win, they would turn out to be a fool since winning a case after 20 or 30 years would make wrong doer as real gainer, who had reaped the benefits for all those years. Thus, it becomes the duty of the Courts to see that such wrong**

doers are discouraged at every step and even if they succeed in prolonging the litigation due to their money power, ultimately they must suffer the costs of all these years long litigation. Despite settled legal positions, the obvious wrong doers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that dice is always loaded in their favour, since even if they lose, the time gained is the real gain. This situation must be redeemed by the Courts."

(Emphasis supplied)

10.3 I agree with the findings by the learned Judge in **Padmawati's** case (supra) and wish to add a few words. There is another feature which has been observed and it is of unscrupulous persons filing false claims or defences with a view that the other person would get tired and would then agree to compromise with him by giving up some right or paying some money. If the other party is not able to continue contesting the case or the Court by reason of falsehood falls into an error, the wrong succeeds. Many times, the other party compromises, or at other times, he may continue to fight it out. But as far as the party in the wrong is concerned, as this Court noted in **Padmawati's** case (supra), even if these litigants ultimately lose the lis, they become the real victors and have the last laugh.

10.4 In the present case, the conduct of the Purchaser does not appear to be honest. The Purchaser has raised a dishonest plea with the hope that the Purchaser can, with the Court delays, drag the case for years and the other side would succumb to buy peace. If the other side does not so settle in the end, they are hardly compensated and remains a loser. The Purchaser has set up a false, frivolous and dishonest plea of an oral agreement to spend unspecified amount on the renovation, furnishing, decoration and construction with modern fittings of the suit property, claim of '4,00,000/- towards the renovation, furnishing, decoration and construction with modern fittings in the suit property and handing over of the possession of the suit property by the Seller on 20th September, 2005. The Purchaser has made false statements on oath before the learned Trial Court and this is a fit case to direct the prosecution of the Purchaser. However, considering that the Courts are already over-burdened, directing prosecution of the Purchaser would further burden the system. I feel that such litigating parties should be burdened with heavy cost to be paid to the State which spends money on providing the judicial infrastructure.

(Para 10)

[An Ba]

APPEARANCES:

FOR THE APPELLANT : Ms. Manasi Sahoo, Advocate.

FOR THE RESPONDENT : Mr. Partap Singh, Advocates.

CASES REFERRED TO:

1. *Dalip Singh* vs. *State of U.P.,* (2010) 2 SCC 114.
2. *Padmawati and Ors.* vs. *Harijan Sewak Sangh,* 154 (2008) DLT 411.

RESULT: Appeals dismissed.

J.R. MIDHA, J.

1. Vide sale agreement dated 20th September, 2005, Rajinder Prashad Rathi as attorney of Seetha Lath (hereinafter referred to as 'the Seller') agreed to sell the first floor without terrace rights of property bearing No.6549, Ward No.XVI, plot No.172, measuring about 1125 sq.ft. covered area, Khasra No.453/152 in Block 9-B, Gali No.1-2, Dev Nagar, Karol Bagh, New Delhi (hereinafter referred to as 'the suit property') to Parmanand Kansotia (hereinafter referred to as 'the Purchaser') for a total sale consideration of Rs. 15,65,000/-. The Purchaser paid a sum of Rs. 3,00,000/- to the Seller at the time of the sale agreement and agreed to pay the balance sale consideration on or before 21st November, 2005.

2. On 2nd November, 2006, the Purchaser instituted a suit for specific performance, permanent injunction and recovery bearing Suit

No.182/2006 against the Seller on the following averments:-

(i) At the time of the execution of the sale agreement dated 20th September, 2005, the suit property was not complete, furnished, decorated and renovated and it was agreed that the Purchaser shall spend his own funds for renovation, furnishing, decoration and construction with modern fittings and shall deduct/adjust the said amount from the sale consideration.

(ii) The Seller handed over the vacant and peaceful possession of the suit property to the Purchaser at the time of the sale agreement on 20th September, 2005 with liberty to renovate, furnish, decorate and construct with modern fittings.

(iii) The Purchaser spent a sum of '4,00,000/- towards the renovation, furnishing, decoration and construction with modern fittings and adjusted the said amount against the sale consideration. (iv) In the middle week of November, 2005, the Purchaser approached the Seller to execute the sale deed and receive the balance sale consideration of Rs. 8,65,000/- but the Seller sought time to execute the sale deed. Despite repeated requests and reminders, the Seller did not execute the sale deed in favour of the Purchaser. (v) In February, 2006, the Purchaser made cash payment of Rs. 2,00,000/- to the Seller for which Purchaser did not issue a receipt.

(vi) In June, 2006, the Purchaser again approached the Seller for execution of the sale deed against the payment of balance sale consideration of Rs. 6,65,000/-.

(vii) On 2nd July, 2006, the Seller visited the Purchaser and demanded further payment of Rs. 2,00,000/-. The Purchaser again offered to pay the balance sale consideration of Rs. 6,65,000/-. However, the Seller threatened the Purchaser with dire consequences.

(viii) On 29th October, 2006, the Seller again visited the Purchaser and threatened his wife and minor child to vacate the suit property. The Purchaser made a complaint

with police on 30th October, 2006.

(ix) The Purchaser is ready and willing to make the payment of Rs. 6,65,000/- towards the balance sale consideration.

3. The Seller raised the following defence in his written statement:-

3.1 The Purchaser committed the breach of the sale agreement dated 20th September, 2005 by failing to make the payment of balance sale consideration of Rs. 12,65,000/- on or before 21st November, 2005 and, therefore, the earnest money of Rs. 3,00,000/- has been forfeited by the Seller.

3.2 The Purchaser has encroached upon the suit property. The Seller came to know of the encroachment on 17th March, 2006 at about 2:30pm whereupon he lodged a complaint with the police on 22nd July, 2006 in respect of which DD No.15B was recorded on 4th August, 2006.

3.3 There was no agreement for renovation, furnishing, decoration and construction with modern fittings in the suit property between the parties.

3.4 The Seller never agreed for any amount to be spent by the Purchaser for renovation, furnishing, decoration and construction with modern fittings by the Purchaser or for deduction/adjustment of the same from the sale consideration.

3.5 The Seller had agreed to hand over the vacant and peaceful possession of the suit property at the time of the payment of the balance sale consideration of Rs. 12,65,000/-.

However, the Purchaser who got the sale agreement typed, dishonestly mentioned 'at the time of execution of sale agreement' instead of 'at the time of execution of sale deed and payment of balance amount of Rs. 12,65,000/-' in clause 2 of the agreement.

3.6 The Purchaser was never ready to make the payment of balance sale consideration of Rs. 12,65,000/-. The Seller denied the receipt of cash amount of Rs. 2,00,000/- from the Purchaser in February, 2006.

4. On 5th December, 2006, the Seller instituted Suit No.219/2006 for possession, mesne profits, permanent and mandatory injunction seeking

possession of the suit property, mesne profits at the rate of Rs. 12,000/- per month as well as permanent injunction on the ground that the Purchaser has trespassed into the suit property which came to the knowledge of the Seller on 17th March, 2006 at about 2:30 pm. The Seller lodged a written complaint with the police on 22nd July, 2006. According to the Seller, the Purchaser has committed the breach of the sale agreement dated 20th September, 2005 by failing to make the payment of balance sale consideration of Rs. 12,65,000/- on or before 21st November, 2005. The submissions made by the Seller in the plaint are same as set up in the written statement in Suit No.182/2006 whereas the defence set up by the Purchaser in this suit is same as the case set up in Suit No.182/2006.

5. Evidence in Suit No.182/2006

5.1 The Purchaser examined two witnesses. Shashi Bali, mother-in-law of the Purchaser appeared in the witness box as PW-1 and Rohtas Kumar Kansotia, the brother of the Purchaser appeared as PW-2. They both deposed about the sale agreement dated 20th September, 2005 and payment of Rs. 3,00,000/- at the time of the sale agreement to the Purchaser. They deposed that the Seller handed over the keys of the suit property to the Purchaser at the time of the sale agreement in their presence. They deposed that the building was old and without any fixtures and fittings, electricity connection and sanitary fittings and it was agreed between the parties to deduct the cost of renovation from the balance sale consideration. They deposed that Rs. 3,00,000/- was paid by the Purchaser to the Seller on 31st May, 2007. They also deposed that the Purchaser has spent Rs. 4,00,000/- towards renovation of electrical and sanitary fittings and has given cash amount of Rs. 2,00,000/- to the Seller in June/July, 2006 in their presence. The witnesses exhibited the affidavits as Ex.PW1 and Ex.PW1/A, photographs as Ex.PW1/B to Ex.PW1/E and bills towards cost of renovation as Ex.PW1/F to Ex.PW1/S which were objected to by the Seller.

5.2 PW-1, in cross-examination, could not tell the name of the photographer and the date when the photographs, Ex.PW1/B to Ex.PW1/E were taken. PW-1 could not tell the date of sale agreement. PW-1 did not visit the suit property prior to 20th September, 2005. She could not tell the amount paid by the Purchaser to the Seller on 20th September, 2005. She did not remember when the Purchaser had shifted to the suit

property. She could not tell, if the Purchaser appeared before the Office of the Sub-Registrar on 21st November, 2005. She could not tell if the demand drafts for the balance consideration amount were purchased from any bank by the Purchaser. She could not tell anything about the repairs of the suit property and whether expenses incurred for the same, were mentioned in the sale agreement. She testified that Rs. 2,00,000/- was paid in cash to the Seller in her presence but admitted that no receipt was issued/given by him.

5.3 PW-2, in cross-examination, stated that he did not remember as to who else had signed the sale agreement as witness. He testified that besides him and his brother, two other persons, namely, Seller and his father, Nand Lal Rathi were present. He further testified that the key was handed over for carrying out the necessary repairs in the suit property as the same was not fit for habitation. He admitted that this fact was not mentioned in the sale agreement. He testified that the key was handed to the Purchaser in good faith and that this fact was not mentioned in the sale agreement. He also admitted that it was not mentioned in the sale agreement that the amount to be spent on renovation would be adjusted against the amount of sale consideration. He could not tell when the sum of Rs. 2,00,000/- was given to the Seller. He admitted that there was no receipt regarding the payment of Rs. 2,00,000/- in cash. He testified that he could not say as to what rent the suit property can fetch in the market.

5.4 The Seller, Rajinder Prashad Rathi appeared in the witness box as DW-1 and deposed that he as a special attorney of Seetha Lath agreed to sell the suit property to the Purchaser for a total sale consideration of ‘15,65,000/- vide sale agreement dated 20th September, 2005, Ex.DW1/2. The site plan was proved as Ex.DW1/3. DW-1 admitted the payment of Rs. 3,00,000/- at the time of the sale agreement. The last date for payment of balance sale consideration of Rs. 12,65,000/- was on or before 21st November, 2005 as per the agreement. The Purchaser failed to make the payment of balance sale consideration of ‘12,65,000/- on or before 21st November, 2005 and, therefore, the earnest money of Rs. 3,00,000/- stood forfeited. DW-1 visited the suit property on 17th March, 2006 at about 2:30 pm and found that the lock of the outside gate was broken and the Purchaser was residing there. DW-1 lodged a written complaint with the police on 22nd July, 2006 which was converted into

FIR No.101/2007 under Sections 454/448/380/506 IPC, P.S. Prasad Nagar, marked as Ex.DW1/4, against the Purchaser. The Purchaser filed application for anticipatory bail before the learned District and Sessions Judge and agreed to make payment of Rs. 6,65,000/- without prejudice to his rights out of which he paid Rs. 3,00,000/- on 31st May, 2007. The balance amount of Rs. 3,65,000/- was agreed to be paid on 16th July, 2007 but was not paid. The copy of the orders dated 16th May, 2007, 31st May, 2007 and 8th August, 2007 were proved as Ex.DW1/5 to Ex.DW1/7. The power of attorney dated 8th December, 2004 and 4th January, 2007 were proved as Ex.DW1/8 and Ex.DW1/9.

5.5 DW-1, in cross-examination, stated that he did not receive any amount in cash after execution of the sale agreement. DW-1 stated that he never handed over the key of the suit property to the Purchaser. DW-1 stated that he had shown the suit property to the Purchaser before execution of the sale agreement. DW-1 denied that he had asked the Purchaser to renovate the suit property. DW-1, however, admitted the receipt of Rs. 3,00,000/- at the time of execution of sale agreement and further sum of Rs. 3,00,000/- by the order of Sessions Court.

6. Evidence in Suit No.219/2006

6.1. The Seller, Rajinder Prashad Rathi appeared in the witness box as PW-1 and made the same statement as made by him in Suit No.182/2006 as DW-1 and proved on the documents Ex.DW1/1 to Ex.DW1/9 in Suit No.182/2006 as Ex.PW1/1 to Ex.PW1/9.

6.2 Head Constable, Vikas Kumar, P.S. Rajinder Nagar appeared as PW-2 and proved the FIR No.101/2007 under Sections 454/448/380/506 IPC dated 22nd February, 2007 against the Purchaser.

6.3 The Purchaser examined two witnesses, Shashi Bali, mother-in-law of the Purchaser as DW-1 and Rohtas Kumar Kansotia, brother of Purchaser as DW-2 and they both made the same statement as made in Suit No.182/2006 as PW-1 and PW-2 and they relied on the documents Ex.PW1 and Ex.PW1/A to Ex.PW1/S in Suit No.182/2006.

7. Findings of the learned Trial Court in Suits No.182/2006 and 192/2006

The learned Trial Court dismissed the Purchaser's suit for specific performance, permanent injunction and recovery and decreed the Seller's

suit for possession, mesne profits, permanent and mandatory injunction. The findings of the learned Trial Court are as under:-

7.1 The Purchaser has committed the breach of the sale agreement dated 20th September, 2005 by failing to make the payment of balance sale consideration of Rs. 12,65,000/- on or before 21st November, 2006 and, therefore, the Seller has rightly forfeited the earnest money of Rs. 3,00,000/- in terms of clause 9 of the sale agreement.

7.2 The Purchaser has failed to prove the condition of the suit property at the time of the sale agreement. The Purchaser himself did not appear in the witness box. His mother-in-law, Shashi Bali appeared as PW-1 in Suit No.182/2006 and admitted that she had never visited the suit property prior to 20th September, 2005 and she could not be aware of its real condition at the time of the sale agreement. She could not tell when the Purchaser shifted to the suit property or visited the office of Sub-Registrar for execution of the agreement. The Purchaser's brother Rohtas Kumar Kansotia appeared as PW-2 in Suit No.182/2006 and deposed that the keys of the suit property were handed over in good faith and the condition of the suit property was seen after the execution of the sale agreement. He, however admitted that the sale agreement was silent about the alleged expenditure required to be incurred on the renovation of the suit property and could not tell if the same was subject to adjustment against the sale consideration amount.

7.3 The Purchaser was not entitled to deduct any amount towards the renovation, furnishing, decoration and construction in the suit property from the sale consideration as there was no clause in the sale agreement dated 20th September, 2005 that the Purchaser shall be entitled to carry out renovation, furnishing, decoration and construction in the suit property and to adjust the same from the sale consideration. The Purchaser has failed to prove any agreement with the Seller in this regard. The Purchaser has also failed to prove that he has incurred Rs. 4,00,000/- towards renovation, furnishing, decoration and construction in the suit property.

7.4 The Purchaser failed to prove the payment of Rs. 2,00,000/- in cash to the Seller in February, 2006.

7.5 The Purchaser failed to prove that the keys of the suit property were handed over by the Seller to him at the time of execution of the sale agreement dated 20th September, 2005.

7.6 The possession of the Purchaser over the suit property was held to be illegal.

7.7 The Purchaser was not entitled to a decree of specific performance, permanent injunction as well as recovery of money.

7.8 The Seller was entitled to possession, permanent injunction as well as mesne profits @ Rs. 8,000/- per month with effect from 17th March, 2006.

8. Grounds

The Purchaser has urged following grounds at the time of hearing of both the appeals:-

8.1 The Purchaser is entitled to decree of specific performance because the Purchaser has made the payment of earnest money of Rs. 3,00,000/- to the Seller on 20th September, 2005; cash amount of Rs. 2,00,000/- in February, 2006; lawfully adjusted the expenditure of Rs. 4,00,000/- on renovation, furnishing, decoration and construction; and was always ready and willing to make the payment of balance sale consideration of Rs. 6,65,000/- to the Seller. A further sum of Rs. 3,00,000/- out of Rs. 6,65,000/- has been paid to the Seller at the time of seeking the anticipatory bail from the Session Court and the Purchaser is ready to make the payment of balance sale consideration of Rs. 3,35,000/- to the Seller.

8.2 The Seller committed breach of the agreement dated 20th September, 2005 by failing to receive the balance sale consideration of Rs. 3,35,000/-.

8.3 At the time of execution of the sale agreement dated 20th September, 2005, the Seller had agreed that the Purchaser shall be entitled to adjust the amount incurred on renovation, furnishing, decoration and construction with modern fittings from the sale agreement.

8.4 The Purchaser is in lawful possession of the suit property since 20th September, 2005 when the Seller handed over the vacant and peaceful possession of the suit property to the Purchaser.

8.5 The Seller, Rajender Prasad Rathi had a limited Power of Attorney and could not execute the sale deed in favour of the Purchaser.

9. Findings

9.1 The Purchaser has committed the breach of the sale agreement dated 20th September, 2005 by failing to make the payment of balance sale consideration of Rs. 12,65,000/- to the Seller on or before the 21st November, 2005 in terms of clause 9 of the sale agreement and, therefore, the Seller has rightly forfeited the earnest money in terms of the clause 9 and is entitled to the possession of the suit property from the Seller.

9.2 The Purchaser was admittedly never ready and willing to pay Rs. 2,65,000/- to the Seller. The Purchaser's own case is that he was ready and willing to pay Rs. 6,65,000/- after adjusting Rs. 4,00,000/- towards the cost of renovation, furnishing and decoration and cash payment of Rs. 2,00,000/- alleged to have been made in February, 2006.

9.3 The Purchaser has failed to prove the cash payment of Rs. 2,00,000/- in February, 2006 to the Seller.

9.4 The Purchaser has failed to prove that the possession of the suit property was handed over by the Seller to him on 20th September, 2005. Although the sale agreement dated 20th September, 2005 records that the Seller shall handover the vacant and peaceful possession of the suit property to the Purchaser at the time of the sale agreement but the factum of actual handing over of the physical possession of the suit property has not been proved by the Purchaser. The Purchaser is, therefore, in unlawful possession of the suit property since 17th March, 2006 and is liable to pay mesne profits from the said date.

9.5 There was no agreement between the parties for renovation, furnishing, decoration and construction with modern fittings in the suit property by the Purchaser and for adjustment of the amount from the sale consideration and, therefore, the Purchaser is not entitled to adjust Rs. 4,00,000/- towards the alleged cost of renovation, furnishing, decoration and construction. There was no such clause in the sale agreement dated 20th September, 2005. No oral agreement in this regard has been proved by the Purchaser.

9.6 The Purchaser's contention that at the time of the sale agreement dated 20th September, 2005, there was an oral agreement that the Purchaser shall spend an unspecified amount for renovation, furnishing, decoration and construction with modern fittings and shall deduct/adjust

the same from the sale consideration is barred by Section 29 of the Indian Contract Act. Section 29 of the Indian Contract Act declares all uncertain contracts to be void. The reason is obvious. What if the Purchaser would have claimed to have spent the entire balance sale consideration on renovation and sought the adjustment or would have spent more than a balance sale consideration and made a claim against the Seller. Section 29 of the Indian Contract Act is reproduced hereinbelow:-

> **"29. Agreements void for uncertainty-** Agreements, the meaning of which is not certain, or capable of being made certain, are void."

9.7 The Purchaser's contention that at the time of the sale agreement dated 20th September, 2005, there was an oral agreement that the Purchaser shall spend an unspecified amount for renovation, furnishing, decoration and construction with modern fittings and shall deduct/adjust the same from the sale consideration is also barred by Sections 91 and 92 of the Indian Evidence Act as the terms of the sale agreement between the parties have been reduced into writing on 20th September, 2005 and evidence of any oral agreement for the purpose of contradicting, varying, adding and subtracting to its terms is barred by Sections 91 and 92 of the Indian Evidence Act.

9.8 This is a fit case for application of Section 114 of the Indian Evidence Act, which provides guidance for drawing natural presumptions. Section 114 of the Indian Evidence Act enables the Judge to infer one fact from existence of another proved fact having regard to the common course of natural events or human conduct. This section provides a guiding principle, namely that the Court shall be guided by its own experience and knowledge of the common course of natural events, and public and private affairs. Section 114 of the Indian Evidence Act is reproduced hereinbelow:-

> **"114. Court may presume existence of certain facts -** The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

9.9 In natural course of events, the Seller hands over the vacant

and peaceful possession of the suit property to the Purchaser at a time of receiving the balance sale consideration and not before that. However, in exceptional cases, the possession is handed over where substantial payment has been made and there are special circumstances to secure the balance sale consideration such as relationship between the parties. There are no special circumstances in the present case. It is improbable that the Seller would have authorized the Purchaser to carry out renovation, furnishing, decoration and construction in the suit property without even specifying the amount.

9.10 The Purchaser's contention that the Seller had limited Power of Attorney was not raised before the Trial Court and no evidence was led with respect thereof. The Purchaser cannot raise a new and contradictory plea for the first time in appeal. The Purchaser entered into the sale agreement with the Seller and sought specific performance against him. The Purchaser is estopped from disputing the authority of the Seller to sell the suit property.

10. Conduct of the Purchaser

10.1 In **Dalip Singh v. State of U.P.,** (2010) 2 SCC 114, the Supreme Court noted as under:-

> "1. For many centuries, Indian society cherished two basic values of life i.e. 'Satya' (truth) and 'Ahimsa' (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence period has seen drastic changes in our value system. The materialism has over-shadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings. In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have,

from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."

10.2 In **Padmawati and Ors. v. Harijan Sewak Sangh,** 154 (2008) DLT 411, this Court noted as under:

"6. The case at hand shows that frivolous defences and frivolous litigation is a calculated venture involving no risks situation. You have only to engage professionals to prolong the litigation so as to deprive the rights of a person and enjoy the fruits of illegalities. I consider that in such cases where Court finds that using the Courts as a tool, a litigant has perpetuated illegalities or has perpetuated an illegal possession, the Court must impose costs on such litigants which should be equal to the benefits derived by the litigant and harm and deprivation suffered by the rightful person so as to check the frivolous litigation and prevent the people from reaping a rich harvest of illegal acts through the Courts. One of the aim of every judicial system has to be to discourage unjust enrichment using Courts as a tool. The costs imposed by the Courts must in all cases should be the real costs equal to deprivation suffered by the rightful person."

"9. Before parting with this case, I consider it necessary to pen down that one of the reasons for over-flowing of court dockets is the frivolous litigation in which the Courts are engaged by the litigants and which is dragged as long as possible. Even if these litigants ultimately loose the lis, they become the real victors and have the last laugh. This class of people who perpetuate illegal acts by obtaining stays and injunctions from the Courts must be made to pay the sufferer not only the entire illegal gains made by them as costs to the person deprived of his right and also must be burdened with exemplary costs. Faith of people in judiciary can only be sustained if the persons on the right side of the law do not feel that even if they keep fighting for justice in the Court and ultimately win, they would turn out to be a fool since winning a case after 20 or 30 years would make wrong doer as real gainer, who had reaped the benefits for

all those years. Thus, it becomes the duty of the Courts to see that such wrong doers are discouraged at every step and even if they succeed in prolonging the litigation due to their money power, ultimately they must suffer the costs of all these years long litigation. Despite settled legal positions, the obvious wrong doers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that dice is always loaded in their favour, since even if they lose, the time gained is the real gain. This situation must be redeemed by the Courts."

(Emphasis supplied)

10.3 I agree with the findings by the learned Judge in **Padmawati's** case (supra) and wish to add a few words. There is another feature which has been observed and it is of unscrupulous persons filing false claims or defences with a view that the other person would get tired and would then agree to compromise with him by giving up some right or paying some money. If the other party is not able to continue contesting the case or the Court by reason of falsehood falls into an error, the wrong succeeds. Many times, the other party compromises, or at other times, he may continue to fight it out. But as far as the party in the wrong is concerned, as this Court noted in **Padmawati's** case (supra), even if these litigants ultimately lose the lis, they become the real victors and have the last laugh.

10.4 In the present case, the conduct of the Purchaser does not appear to be honest. The Purchaser has raised a dishonest plea with the hope that the Purchaser can, with the Court delays, drag the case for years and the other side would succumb to buy peace. If the other side does not so settle in the end, they are hardly compensated and remains a loser. The Purchaser has set up a false, frivolous and dishonest plea of an oral agreement to spend unspecified amount on the renovation, furnishing, decoration and construction with modern fittings of the suit property, claim of '4,00,000/- towards the renovation, furnishing, decoration and construction with modern fittings in the suit property and handing over of the possession of the suit property by the Seller on 20th September, 2005. The Purchaser has made false statements on oath before the learned Trial Court and this is a fit case to direct the prosecution of the Purchaser. However, considering that the Courts are already over-

burdened, directing prosecution of the Purchaser would further burden the system. I feel that such litigating parties should be burdened with heavy cost to be paid to the State which spends money on providing the judicial infrastructure.

11. Conclusion

11.1. In the facts and circumstances of this case, both the appeals are dismissed with exemplary cost of '2,00,000/- on the Purchaser. The cost shall be deposited by the Purchaser in the account of Delhi High Court Legal Services Committee within two weeks.

11.2. A copy of this judgment would be sent to the Secretary, Delhi High Court Legal Services Committee for his information and follow up action to recover the cost imposed if not paid as afore-directed.

ILR (2012) IV DELHI 509
CRL. M.C

KANHAIYA PASWAN ….PETITIONER

VERSUS

STATE & ORS. ….RESPONDENTS

(M.L. MEHTA, J.)

CRL. M.C. NO. : 224/2012 & CRL. M.A. NO. : 821/2012 **DATE OF DECISION: 20.01.2012**

Schedule Cast & Schedule Tribes (Prevention of Atrocities) Act, 1989—Section 3(1) (X)—Petition Against non framing of charges by the L.d ASJ—Accused must have knowledge or awareness that the victim belongs to Scheduled Caste or Scheduled Tribe in order to constitution offence under S. 3.(1)(x) 'Public view' in S.3(1)(x) implied within view of group of people of the

place/locality/village not linked with the Complaint through kingship, business, commercial or any other vested interest—Public view means presence of one or more persons who are neutral or impartial, even though he may be known to the complainant to attract ingredients of offence. Petition dismissed.

This Court in **Daya Bhatnagar and Ors. Vs. State** 109 (2004) DLT 905 held that the accused must have knowledge or awareness that the victim belongs to Scheduled Caste or Scheduled Tribe community and if an accused does not know that the person whom he is insulting, intimidating or humiliating is a member of a Scheduled Caste or Scheduled Tribe, no offence under the section would be constituted. It was also held that the expression 'public view' in section 3(1) (x) of the Act implied within view of a group of people of the place/locality/village not linked with the complainant through any kinship, business, commercial or any other vested interest, and who are not participating members with him in any way. This High Court interpreted the expression 'public view' in section 3(1)(x) of the Act as the presence of one or more persons who are neutral or impartial even though he may be known to the complainant to attract the ingredients of this offence. The offending expressions, therefore, should be uttered by the persons accused, in view of others unconnected with the complainant.

(Para 5)

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Sunil Mehta. Advocate.

FOR THE RESPONDENT : Mr. M.N. Dudeja, APP.

CASE REFERRED TO:

1. *Daya Bhatnagar and Ors.* vs. *State* 109 (2004) DLT 905.

RESULT: Petition dismissed.

M.L. MEHTA, J. (Oral)

1. The present petition is against the order dated 16.11.2011 of the learned ASJ in SC No. 06/2011, CC No. 590/2011, P.S. Inder puri whereby the learned ASJ was pleased to give a finding that prima facie no offence under section 3(1)(X) SC & ST (Prevention of Atrocities) Act, 1989 (hereinafter referred to as 'the Act') was made out against the accused persons.

2. Brief facts necessitating the present petition are that a complaint under section 3(1)(X) SC & ST Act was filed by one Kanhaiya Pawan against the accused persons alleging that on 14.07.2010 at about 4.00 pm when his wife Shrimati Bhagwanti was alone in the house, the accused persons entered his house, assaulted his wife and damaged the movables lying in the house. At that time, the accused persons also passed caste based derogatory remarks against Smt. Bhagwanti, a member of Scheduled Caste in order to insult, intimidate and humiliate her. The incident was allegedly witnessed by one G.S. Pandey, a friend of the complainant and by Nand Kishore, the neighbour of the complainant. No action was taken by the police despite various written complaints given by the complainant. Consequent to the statement of the complainant, victim and other witnesses recorded in the Court towards pre-summoning evidence, the accused persons were ordered to be summoned under section 3(X) of the Act and under Section 323/341 read with section 34 IPC. Aggrieved with the said order, the accused persons preferred a revision petition. In the mean time the complaint case on compliance of section 207 Cr.P.C. was committed to Sessions Court and learned ASJ passed the impugned order. Aggrieved with the said order, the petitioner/complainant has invoked the jurisdiction of this Court.

3. The learned counsel for the petitioner urged that the Ld ASJ had erred in not framing charge under section 3(1)(x) of the Act against the accused persons as prima facie case was made out against the accused persons.

4. The learned ASJ on consideration of the evidence available on record has given a finding of fact that there is not a whisper of any caste related remarks in the entire evidence of the complaint and hence no prima facie case under section 3(1) (x) of the Act is made out against

the accused persons. The learned ASJ records that in the entire complaint it was nowhere even whispered by the complainant that Nand Kishore or any other public person was also present there on 14.07.2010. The Ld ASJ further records that a perusal of the said complaints would reveal that the complainant did not aver even once therein that any of the accused persons had uttered any caste related remark with intent to insult, intimidate or humiliate the complainant or his wife at the time of alleged assault. Likewise in the statement of injured Bhagwanti Devi, recorded by the police in the presence of the complainant on the date of incident, it was nowhere alleged by the victim that the accused persons had made any caste based remarks intending to humiliate or threaten her on that day. Similarly, in the complaints to the police made by the complainant, Kanhaiya Paswan, it is nowhere mentioned that the incident was witnessed by G.S. Pandey and Nand Kishore or any other public person.

5. This Court in **Daya Bhatnagar and Ors. Vs. State** 109 (2004) DLT 905 held that the accused must have knowledge or awareness that the victim belongs to Scheduled Caste or Scheduled Tribe community and if an accused does not know that the person whom he is insulting, intimidating or humiliating is a member of a Scheduled Caste or Scheduled Tribe, no offence under the section would be constituted. It was also held that the expression 'public view' in section 3(1) (x) of the Act implied within view of a group of people of the place/locality/village not linked with the complainant through any kinship, business, commercial or any other vested interest, and who are not participating members with him in any way. This High Court interpreted the expression 'public view' in section 3(1)(x) of the Act as the presence of one or more persons who are neutral or impartial even though he may be known to the complainant to attract the ingredients of this offence. The offending expressions, therefore, should be uttered by the persons accused, in view of others unconnected with the complainant.

6. After a perusal of the complaint and considering the findings of the learned ASJ, I do not find any illegality or infirmity in the impugned order dated 16/11/2011 of the Ld ASJ and hence the present petition is dismissed.

ILR (2012) IV DELHI 513
RC. REV

GULSHAN RAI ….PETITIONER

VERSUS

SAMRENDRA BOSE SECY & ANR. ….RESPONDENTS

(INDERMEET KAUR, J.)

R.C. REV. NO. : 100/2011 DATE OF DECISION: 23.01.2012
AND CM NO. : 6814/2011

Delhi Rent Control Act, 1958—S.14(1)(e)—Bonafide necessity—Petitioner owner/landlord let out portion of first floor to the respondent—In remaining portions guest house run by landlord—Stated in eviction petition that he needs more space for expansion of business for bonafide need—Application for leave to defend filed by tenant—Contested that premises was property and house run by landlord was without permission—Building by laws prohibited the landlord from changing nature of heritage site—Landlord let out huge place on the ground floor to wine shop—Leave to defend granted since the property was heritage property and guest house cannot be run without permission which raises triable issue—Held—Tenant has no *locus-standi* to challenge the illegality of the landlord in running a guest house in a portion immediately adjacent to Bengali Club, the tenanted portion—The building bylaws do not prohibit such activities—Leave to defend cannot be granted as a matter of routine. If defence raised is moonshine, sham and illusioary—Leave to defend has to be refused—Landlord best judge of his requirement—It is not open to tenant or court to dictate to the landlord the manner or the style in which he must live—Order set aside—Eviction petition decreed.

Contention of the landlord specifically in the eviction petition is to the effect that after he gets the tenanted portion vacated and after taking necessary permission from the Department, he will get the unauthorized constructions (raised by the tenant) removed and thereafter after obtaining necessary permissions will expand his business of the guest house which he is admittedly carrying out from a portion of the first floor. This is an inter se arrangement between the owner/landlord and the MCD/Government Body, the tenant cannot raise an issue that merely because the property owned by the landlord is a heritage property he cannot run a guest house. If such an argument raised by the tenant is accepted then this would mean that in all such cases where the owner/landlord owns a heritage building he would never be able to get his property vacated only for the reason that it has a heritage status. This is definitely not the import of the Building Bye-laws which have been relied upon by the Trial Court holding that triable issues have arisen. Triable issues have to be gathered from the pleadings of the parties which include the application for leave to defend, reply to the said application as also the averments made in the eviction petition. As matter of routine leave to defend cannot be granted; if the defence raised is moonshine, sham, and illusory, the leave to defend has to be refused; otherwise the whole purpose and purport of the summary procedure as prescribed under section 25B of the DRCA would be defeated. In cases where no traible issue has been raised, the application for leave to defend has to be declined. The only triable issue raised by the tenant is that since it is a heritage property, a guest house cannot be run; admittedly, a guest house is being run from a portion of the said property; this has not been disputed by the tenant in his application for leave to defend; it is for the landlord to take the necessary permissions from the Heritage Zone of the MCD to extend his business of guest house to the disputed portion; nothing prevents him from adding more rooms to his

already existing guest house; this he can do only after gets an eviction order. **(Para 9)**

The Apex Court has time and again reiterated that the landlord is the best judge of his requirement; it is not open to the tenant or to the court to dictate to the landlord the manner or the style in which he must live. **(Para 10)**

Important Issue Involved: (i) Tenant or the Court cannot dictate the landlord the manner or the style in which he must live.

[Gu Si]

APPEARANCES:

FOR THE PETITIONER : Ms. Geeta Mehrotra and Mr. Rahul Tomar, Advocate.

FOR THE RESPONDENT : Mr. H.C. Kapur, Advocate.

CASES REFERRED TO:

1. *Sudesh Kumar Soni & anr.* vs. *Prabha Khanna & Anr.,*153 (2008) Delhi Law Times 652.
2. *Sait Nagjee Purushotham & Co. Ltd.* vs. *Vimalabai Prabhulal and Others,* (2005) 8 Supreme Court Cases 252.

RESULT: Petition Allowed.

INDERMEET KAUR, J. (Oral)

1. The order impugned before this court is the order dated 26.02.2011 wherein the application seeking leave to defend filed by the tenant in a pending eviction petition under Section 14(1) (e) of the Delhi Rent Control Act (DRCA) had been granted.

2. Record shows that the petitioner is the owner/landlord of the property bearing Municipal Nos. 1418-1421 and 1424-1427, Nicholson Road, Kashmere Gate, Delhi; a portion of the first floor has been tenanted out to the respondent i.e. Bengali Club; admittedly, remaining portion of the first floor is a Guest House which is being run by the landlord; his

contention in the eviction petition is that he needs more space for the expansion of his business of a guest house which is being run only from a part portion of the first floor; for his bonafide need, an eviction petition under Section 14(1)(e) of the DRCA was accordingly filed.

3. The averments made in the eviction petition have been perused. They disclose that what has been let out to the tenant is a portion as depicted in red colour; contention of the petitioner is that the tin shed which was in occupation of the tenant has been converted into the pacca masonary room as identified by the letters A and B in the site plan. The premises in occupation of the landlord on the first floor has been depicted in green colour; he has admittedly been running his business of guest house from the said premises; he wants more space for the expansion of his business of guest house; further contention being that after obtaining necessary permission he will remove the unauthorized construction on the second floor (as depicted in letters A and B in the site plan); thereafter he will use this first floor for the expanded portion of his guest house; his bonafide need has been established.

4. The application for leave to defend filed by the tenant has been perused. The contention is that the respondent is a Begali Club which was founded in the year 1925 which has rich heritage values; it is the life and soul of the Bengali Community in Delhi; it is located at a historical site which is the present premises; further contention being that the Municipal Corporation of Delhi has to conserve and preserve the heritage value of the premises; premises occupied by the tenant is a heritage property; in fact a Committee had been constituted by the MCD wherein the premises have been ascribed the status of a heritage property. Landlord is merely harassing the tenant; the Building Bye-laws (specially Clause 23.1.1 (a) & (C) of the Building Bye-Laws for the Union Territory of Delhi 1983 of the MCD) mandate that heritage buildings shall be conserved and preserved; further contention being that a guest house is being run by the landlord without obtaining the necessary permissions; he has no sanction; building bye-laws prohibits the landlord from changing the nature of a heritage site; in these circumstances, the bonafide need of the landlord is not made out; a guest house cannot be run from the said premises; even otherwise the need of expanding his business of Guest House is not a bonafide need. All these raise triable issues. Further contention is that the landlord has recently let out a huge place on the

ground floor to a wine shop which again reveals that landlord does not bonafidely require the said premises; his need is malafide.

5. Reply filed by the landlord to the corresponding paras of the leave to defend has also been perused; his contention is that there is no doubt that the property has been accorded a heritage status meaning thereby that the property has to be conserved and preserved as per the mandate of the bye-laws of the MCD; further contention being that since admittedly the petitioner is carrying on his business of guest house from a part portion of this premises; after the premises which are presently in occupation of the tenant are vacated, he will conserve and preserve the heritage status of the suit property for which nothing in writing has to be given. Attention has been drawn to the concerned bye-laws of the MCD to support this submission.

6. The impugned order has granted leave to defend to the tenant; this is largely on the finding arrived at in the impugned order that since this property has a heritage status, a guest house cannot be run from there without any permission and no licence or written permission has been filed on record by the landlord showing this fact that he has the necessary permission to run such a guest house from the said building. This raises a triable issue.

7. This court is of the view that the Trial Court has not adverted to the pleadings in the correct perspective; contention raised by the tenant as a triable issue was that a guest house cannot be run without legal sanction; his contention was not that a guest house was not being run; admittedly a Guest House is being run from a part portion of the first floor of the disputed premises. Tenant has contended that such a Guest House is without a licence from the MCD for which he shall be taking appropriate proceedings before the concerned authorities.

8. The tenant has nowhere disputed the ownership/landlordship of the respondent; his only submission being that since the 'Bengali Club' has a heritage status, no guest house without necessary sanction can be run from the said building. Record shows that it is an admitted fact that a guest house is being run from a part portion of the disputed premises; whether it is legal or illegal is a matter inter se between the landlord and the MCD; the tenant has no locus standi to challenge this illegality of his running a guest house which is admittedly being run by the landlord from

the portion immediately adjacent to the Bengali Club. The tenant has also not disputed the specific averment made by the landlord that the portions shown as letters A and B in the site plan were actually tin sheds and where he has now been made an unauthorized construction. Submission of the landlord is that after obtaining the possession of the disputed portion he will take the necessary permissions and after removing the unauthorized construction, he will expand his business of the guest house from the disputed portion. The building Bye-laws for the Union Territories of Delhi, 1983 have also been perused. They do not prohibit such an activity. Clause 23.1, 23.2 and 23.9 are relevant. A heritage building is required to be conserved and preserved; this is the responsibility of the owner of the heritage building; if the owner agrees to maintain the heritage building in its existing state and to preserve its heritage status with due repairs and gives a written undertaking to that effect, he may then be allowed, with the approval of the Heritage Conservation Committee to carry out commercial use/office/hotels even from a non-commercial area. This is specifically stated in clause 23.9; this is an incentive use of a heritage building.

9. Contention of the landlord specifically in the eviction petition is to the effect that after he gets the tenanted portion vacated and after taking necessary permission from the Department, he will get the unauthorized constructions (raised by the tenant) removed and thereafter after obtaining necessary permissions will expand his business of the guest house which he is admittedly carrying out from a portion of the first floor. This is an inter se arrangement between the owner/landlord and the MCD/Government Body, the tenant cannot raise an issue that merely because the property owned by the landlord is a heritage property he cannot run a guest house. If such an argument raised by the tenant is accepted then this would mean that in all such cases where the owner/landlord owns a heritage building he would never be able to get his property vacated only for the reason that it has a heritage status. This is definitely not the import of the Building Bye-laws which have been relied upon by the Trial Court holding that triable issues have arisen. Triable issues have to be gathered from the pleadings of the parties which include the application for leave to defend, reply to the said application as also the averments made in the eviction petition. As matter of routine leave to defend cannot be granted; if the defence raised is moonshine, sham, and illusory, the leave to defend has to be refused;

otherwise the whole purpose and purport of the summary procedure as prescribed under section 25B of the DRCA would be defeated. In cases where no traible issue has been raised, the application for leave to defend has to be declined. The only triable issue raised by the tenant is that since it is a heritage property, a guest house cannot be run; admittedly, a guest house is being run from a portion of the said property; this has not been disputed by the tenant in his application for leave to defend; it is for the landlord to take the necessary permissions from the Heritage Zone of the MCD to extend his business of guest house to the disputed portion; nothing prevents him from adding more rooms to his already existing guest house; this he can do only after gets an eviction order.

10. The Apex Court has time and again reiterated that the landlord is the best judge of his requirement; it is not open to the tenant or to the court to dictate to the landlord the manner or the style in which he must live.

11. In **Sudesh Kumar Soni & anr. Vs. Prabha Khanna & Anr.,**153 (2008) Delhi Law Times 652, the Court observed as under:-

> "It is not for tenant to dictate terms to landlord as to how else he can adjust himself without getting possession of tenanted premises-suitability has to be seen for convenience of landlord and his family members and on the basis of circumstances including their profession, vocation, style of living, habit and background."

12. In **Sait Nagjee Purushotham & Co. Ltd. Vs. Vimalabai Prabhulal and Others,** (2005) 8 Supreme Court Cases 252; the Court observed as under: "It is always the prerogative of the landlord that if he requires the premises in question for his bona fide use for expansion of business this is no ground to say that the landlords are already having their business at Chennai and Hyderabad therefore, it is not genuine need. It is not the tenant who can dictate the terms to the landlord and advise him what he should do and what he should not. It is always the privilege of the landlord to choose the nature of the business and the place of business." 13 In 2009(2) RCR 455 titled as Ram Babu Agarwal vs. Jay kishan Das, the Apex Court observed as under:-

> "However, as regards the question of bonafide need, we find that the main ground for rejecting the landlord's petition for

> eviction was that in the petition the landlord had alleged that he required the premises for his son Giriraj who wanted to do footwear business in the premises in question. The High Court has held that since Giriraj has no experience in the footwear business and was only helping his father in the cloth business, hence there was no bonafide need. We are of the opinion that a person can start a new business even if he has no experience in the new business. That does not mean that his claim for starting the new business must be rejected on the ground that it is a false claim. Many people start new businesses even if they do not have experience in the new business, and sometimes they are successful in the new business also."

13. Impugned order granting leave to defend in this scenario suffers from an illegality. It is accordingly set aside. Eviction petition is decreed.

ILR (2012) IV DELHI 520
MAC APP

NEELAM PRASHAR & ORS. ….APPELLANTS

VERSUS

MINTOO THAKUR & ORS. ….RESPONDENTS

(G.P. MITTAL, J.)

MAC APP. NO. : 179/2010 DATE OF DECISION: 23.01.2012

Motor Vehicle Act, 1988—By these two cross Appeals, the parties impugn the judgment dated 19.01.2010 whereby a compensation of Rs. 1,03,68,744/- was awarded for the death of Atul Prashar, aged 37 years, who died in a motor accident, which took place on 18.01.2008, The MAC APP. No. 179/2010 has been filed by the legal representatives of the deceased i.e Neelam Prashar and others (hereinafter referred to as

the "Claimants") whereas MAC. APP. No. 313/2010 has been preferred by the National Insurance Co. Ltd. (hereinafter referred to as "insurer") disputing the negligence on the part of the driver of Maruti Esteem bearing Registration No. DL-2CAC-5813 and reduction of the amount of compensation awarded by the Motor Accident Claims Tribunal (the Tribunal)—It is urged for the Insurer that in order to prove negligence the Claimants examined PW- Dushyant Vasudev and PW-4 Ashish Aggarwal. The accident took place at about 6.30 AM. Both PW-2 & PW-4 were working in separate offices (though in the same vicinity) & their office would start at 9/ 9.30 AM. Thus, their presence at the time of the accident was highly improbable. If the testimony of these two witnesses is taken off the record, there is nothing to establish the negligence on the part of the driver of Maruti Esteem Car No.DL-2CAC-5813. It is well settled that in a claim petition negligence is required to be proved only on the test of preponderance of probabilities, The FIR in this case was registered on the basis of the statement of PW-2. The offending vehicle was seized from the spot. The driver of the Esteem car No. DL. 2CAC-5813 was not produced by the Insurer to rebut the testimony of PW-2 and PW-4-Pw-2 gave an explanation that he was called in the office because some guests were scheduled to come. In the absence of examination of the driver to rebut PW-2 and PW-4's testimonies, their presence at the spot at the time of accident cannot be doubted merely on the assumption that they could not have proceeded for the office early and that too, in the same vehicle. On the test of preponderance of probabilities, PW-2 and PW-4's testimonies that, the accident was caused on account of rash and negligent driving by the driver of Car No. DL 2CAC 5813, has to be accepted. It is held that the finding of fact reached by the Tribunal on this count cannot be faulted—It is well settled that for determination of loss of

dependency, the amount paid to the deceased by his employer by way of perks should be included in the monthly income—The Tribunal fell into error in ignoring this amount of Rs. 1,250/- deduction towards income tax is liable to be made as the net income of the deceased is the starting point for calculation of loss of dependency.

Important Issue Involved: (A) It is well settled that in a claim petition negligence is required to be proved only on the test of preponderance of probabilities.

(B) It is well settled that for determination of loss of dependency, he amount paid to the deceased by his employer by way of perks should be included in the monthly income.

[Ch Sh]

APPEARANCES:

FOR THE APPELLANT : Mr. S.N. Prashar, Advocate.

FOR THE RESPONDENTS : Mr. Joy Basu, Advocates for R-1 to R-3

CASES REFERRED TO:

1. *National Insurance Co. Ltd.* vs. *Saroj & Ors.,* (2009) 13 SCC 508].
2. *Sarla Verma* vs. *DTC,* (2009) 6 SCC 121.
3. *National Insurance Co. Ltd.* vs. *Indira Srivastava,* I (2008) ACC 162 (SC).
4. *United India Insurance Co. Ltd. etc.* vs. *Patricia Jean Mahajan & Ors.,* (2002) 6 SCC 281.
5. *UP State Road Transport Corporation* vs. *Trilok Chandra & Ors.,* (1996) 4 SCC 362.
6. *Kerala State Road Transport Corporation* vs. *Susamma Thomas,* (1994) 2 SCC 176.

RESULT: Deposed of.

G.P. MITTAL, J.

1. By these two Cross Appeals, the parties impugn the judgment dated 19.01.2010 whereby a compensation of Rs. 1,03,68,744/- was awarded for the death of Atul Prashar aged 37 years, who died in a motor accident, which took place on 18.01.2008. The MAC. APP. No.179/2010 has been filed by the legal representatives of the deceased i.e. Neelam Prashar and others (hereinafter referred to as the "Claimants") whereas MAC. APP. No.313/2010 has been preferred by the National Insurance Co. Ltd. (hereinafter referred to as "insurer") disputing the negligence on the part of the driver of Maruti Esteem bearing Registration No.DL-2CAC-5813 and for reduction of the amount of compensation awarded by the Motor Accident Claims Tribunal (the Tribunal).

NEGLIGENCE: -

2. It is urged by the learned counsel for the Insurer that in order to prove negligence the Claimants examined PW-2 Dushyant Vasudev and PW-4 Ashish Aggarwal. The accident took place at about 6:30 AM. Both PW-2 & PW-4 were working in separate offices (though in the same vicinity) & their offices would start at 9/ 9:30 AM. Thus, their presence at the time of the accident was highly improbable. If the testimony of these two witnesses is taken off the record there is nothing to establish the negligence on the part of the driver of Maruti Esteem Car No.DL-2CAC-5813. It is well settled that in a claim petition negligence is required to be proved only on the test of preponderance of probabilities. The FIR in this case was registered on the basis of the statement of PW-2. The offending vehicle was seized from the spot. The driver of the Esteem Car No.DL-2CAC-5813 was not produced by the Insurer to rebut the testimony of PW-2 and PW-4. PW-2 gave an explanation that he was called early in the office because some guests were scheduled to come. In the absence of examination of the driver to rebut PW-2 and PW-4's testimonies their presence at the spot at the time of accident cannot be doubted merely on the assumption that they could not have proceeded for the office early and that too in the same vehicle. In my view, on the test of preponderance of probabilities, PW-2 and PW-4's testimonies that, the accident was caused on account of rash and negligent driving by the driver of Car No.DL-2CAC-5813 has to be accepted. I hold that

the finding of fact reached by the Tribunal on this count cannot be faulted.

QUANTUM OF COMPENSATION: -

3. For the purpose of loss of dependency the Tribunal took the deceased's income to be Rs. 78,477/- after deducting the conveyance allowance of Rs. 800/- per month and medical pay of Rs. 1,250/- per month. It is urged by the learned counsel for the Claimants that the medical pay was for the benefit of the deceased and his family members and should have been taken into consideration as part of the salary. It is submitted that the multiplier of '13' selected by the Tribunal as against '15' suggested in **Sarla Verma v. DTC,** (2009) 6 SCC 121 is on the lower side. The compensation towards loss of love and affection of Rs. 10,000/- is also very low and needs enhancement.

4. Per contra learned counsel for the Insurer submits that a deduction of Rs. 4,484/- on account of payment towards provident fund should have been made by the Tribunal as the said money did not come in deceased's hand to be spent on the family.

5. It is contended that in high income bracket when the multiplicand is high a lower multiplier can be selected to award just compensation. Reliance is placed on **United India Insurance Co. Ltd. etc. v. Patricia Jean Mahajan & Ors.,** (2002) 6 SCC 281.

6. It is well settled that for determination of loss of dependency, the amount paid to the deceased by his employer by way of perks should be included in the monthly income [**National Insurance Co. Ltd. v. Indira Srivastava,** I (2008) ACC 162 (SC); **National Insurance Co. Ltd. v. Saroj & Ors.,** (2009) 13 SCC 508]. The deduction of Rs. 4,484/- as shown in the salary slip Ex. PW-1/2 was for the future benefit of the family as this amount along with interest was payable to the deceased. Similarly, medical pay of Rs. 1,250/- was also given for taking case of the medical needs of the deceased and his family members. The Tribunal fell into error in ignoring this amount of Rs. 1,250/-, of course, deduction towards income tax is liable to be made as the net income of the deceased is the starting point for calculation of loss of dependency.

7. The deceased was working as a Senior Project Leader with M/s. Saksoft Ltd. He was a young person of 37 years and being in permanent

employment had good future prospects. The Tribunal did not commit any error in adding 50% of the deceased's income towards his future prospects.

8. As far as selection of multiplier is concerned at the age of 37 years the appropriate multiplier would be '15' whereas the Tribunal took the multiplier of '13'. The learned counsel for the Insurer tried to justify the lower multiplier on the ground that in case of higher multiplicand a lower multiplier can be selected. In the case of **Patricia Jeam Mahajan** (supra) the learned Single Judge applied the multiplier of '10', which was increased to '13' on the basis of the judgment in **Kerala State Road Transport Corporation v. Susamma Thomas,** (1994) 2 SCC 176 and **UP State Road Transport Corporation v. Trilok Chandra & Ors.,** (1996) 4 SCC 362 decided by a Division Bench of this Court. The Supreme Court reduced the multiplier to '10'. In para 19 and 20 of the report it was observed as under: -

> "19. In the present case the deceased was 39 years of age. His income was Rs. 1032 per month. Of course, the future prospects of advancement in life and career should also be sounded in terms of money to augment the multiplicand. While the chance of the multiplier is determined by two factors, namely, the rate of interest appropriate to a stable economy and the age of the deceased or of the claimant whichever is higher, the ascertainment of the multiplicand is a more difficult exercise. Indeed, many factors have to be put into the scales to evaluate the contingencies of the future. All contingencies of the future need not necessarily be baneful. The deceased person in this case had a more or less stable job. It will not be inappropriate to take a reasonably liberal view of the prospects of the future and in estimating the gross income it will be unreasonable to estimate the loss of dependency on the present actual income of Rs. 1032 per month. We think, having regard to the prospects of advancement in the future career, respecting which there is evidence on record, we will not be in error in making a higher estimate of monthly income at Rs. 2000 as the gross income. From this has to be deducted his personal living expenses, the quantum of which again depends on various factors such as whether the style of living was Spartan or bohemian. In the absence of evidence it is not unusual to

> deduct one-third of the gross income towards the personal living expenses and treat the balance as the amount likely to have been spent on the members of the family and the dependents. This loss of dependency should capitalize with the appropriate multiplier. In the present case we can take about Rs. 1400 per month or Rs. 17,000 per year as the loss of dependency and if capitalized on a multiplier of 12, which is appropriate to the age of the deceased, the compensation would work out to (Rs. 17,000 x 12 = Rs. 2,03,000) to which is added the usual award for loss of consortium and loss of the estate each in the conventional sum of Rs. 15,000.
>
> 20. We think, in all, a sum of Rs. 2,25,000 should be a fair, just and reasonable award in the circumstances of this case. The claim made for loss of future earnings of Rs. 50,000 on the prospects of future employment in USA was rightly negative by the Tribunal. The award under this head is clearly unjustified in the facts of the case."

9. It is important to note that in **Patricia Jean Mahajan** (supra) the dependents were parents aged 69/ 73 years and two daughters aged 17 and 19 years. The parents were residents of India whereas the daughters were residents of USA. The compensation on the multiplier of '10' came to be Rs. 10,38,00,000/-. In the case in hand the deceased left behind a minor son apart from a widow and the aged parents. The compensation awarded in this case was just above Rs. 1,00,00,000/-, which cannot be said to be astronomical. In the circumstances, there is no justification to apply a lower multiplier than the one suggested in **Sarla Verma** (supra).

10. If the deceased's father is not considered as a dependant because there is no evidence on this aspect; the loss of dependency comes to Rs. 80,527 – 800 + 50% x 12 – 3,79,524/- (income tax) – 1/3rd x 15 = Rs. 1,05,55,620/-.

11. Thus, it may be noticed that there is marginal difference in the amount of compensation of Rs. 1,03,38,744/- awarded by the Tribunal and the compensation of Rs. 1,05,55,620/-, which comes on the application of multiplier of '15'. The compensation awarded by the Tribunal, therefore, is just and reasonable and does not call for any interference.

12. Both the appeals are thus devoid of any merit, the same are

accordingly dismissed. No costs.

ILR (2012) IV DELHI 527
CRL. M.C

MEENA CHAUDHARY @ MEENA P.N. SINGH ….PETITIONER

VERSUS

BASANT KUMAR CHAUDHARY & ORS. ….RESPONDENTS

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

CRL M.C. NO. : 3845/2010 DATE OF DECISION: 25.01.2012

Constitution of India, 1950—Article 227—Civil Procedure Code, 1908—Section 13—Criminal Procedure Code, 1973—Section 200, 482—Indian Penal Code, 1860—Section 120-B 494A, 498A—Petition against order of MM dismissing the complaint of the Petitioner—Petitioner after obtaining decree of divorce from foreign Court and after the subsequent marriage of the Respondent, filed criminal complaint of bigamy and cruelty against the Respondent alleging that foreign decree of divorce was an invalid decree—Held:- under Section 13 of CPC, a foreign judgment is conclusive as to any matter thereby directly adjudicated upon between the same parties except in cases specified thereunder. However, the right if any, to contend that the said foreign judgment is not conclusive can be only of the party who had himself/herself/itself not initiated the process of obtaining the said judgment and cannot be of a party at whose instance such foreign judgment has been obtained No. litigant can be allowed to abuse the process of the Courts or to approbate and reprobate as per convenience. The

petitioner had deposed that she was in U.K. from 1993 to 1999. She has not even whispered, alleged or made out any case of any of the grounds for the foreign judgment of dissolution of her marriage with the respondent being not conclusive. For the said foreign judgment to be not conclusive, the petitioner was required to make out a case of the same being either pronounced by a Court having no jurisdiction and /or having been not given on the merits of the case or being founded on an incorrect view of international law or the proceedings resulting therein being opposed to natural justice or having been obtained by fraud or sustaining a claim founded on a breach of any law in force in India. Moreover, all the grounds specified in section 13 of the CPC and on establishment whereof a foreign judgment can be said to be not conclusive are such which can be set up only by a party not himself/herself/itself approaching the foreign Court. Here the petitioner who is challenging the judgment, was at the relevant time resident for a fairly long time within jurisdiction of the foreign Court, did not approach the foreign court under the dictates of the respondent and made out a case before the foreign Court of obtaining the judgment-Petition dismissed.

We may also notice that under Section 13 of CPC a foreign judgment is conclusive as to any matter thereby directly adjudicated upon between the same parties except in cases specified thereunder. However the right if any to contend that the said foreign judgment is not conclusive can be only of the party who had himself / herself / itself not initiated the process of obtaining the said judgment and cannot be of a party at whose instance such foreign judgment has been obtained. No litigant can be allowed to abuse the process of the Courts or to approbate and reprobate as per convenience. Mention at this stage may also be made of the finding recorded by the learned Metropolitan Magistrate and not disputed before us that the petitioner in the disputes with

her siblings before another Indian Court sought to justify her claim by contending herself to be a divorcee by virtue of the said foreign judgment. **(Para 5)**

Thus, whichever way we may look, we cannot find any error in the order of dismissal of the complaint aforesaid. We had also called for the records of the Court of the Metropolitan Magistrate and have perused the pre-summoning evidence led by the petitioner. The petitioner had deposed that she was in U.K. from 1993 to 1999. She has not even whispered, alleged or made out any case of any of the grounds for the foreign judgment of dissolution of her marriage with the respondent being not conclusive. For the said foreign judgment to be not conclusive, the petitioner was required to make out a case of the same being either pronounced by a Court having no jurisdiction and / or having been not given on the merits of the case or being founded on an incorrect view of international law or the proceedings resulting therein being opposed to natural justice or having been obtained by fraud or sustaining a claim founded on a breach of any law in force in India. Moreover all the grounds specified in Section 13 of the CPC and on establishment whereof a foreign judgment can be said to be not conclusive are such which can be set up only by a party not himself/herself/itself approaching the foreign Court. The judgments cited by the petitioner cannot be read as laying down and indeed do not lay down any absolute principle that a marriage under the Hindu Marriage Act, 1955 cannot be dissolved by a foreign Court. Here the petitioner who is challenging the judgment was at the relevant time resident for a fairly long time within the jurisdiction of the foreign Court, did not approach the foreign Court under the dictates of the respondent and made out a case before the foreign Court for obtaining the judgment. Indeed in **Y. Narasimha Rao** (supra) itself the Supreme Court held matrimonial action filed in the forum where the wife is domiciled or habitually and permanently resides or where the wife voluntarily and effectively submits to the foreign jurisdiction or where the wife consents to the grant of the relief by the foreign Court although the jurisdiction

of the foreign Court is not in accordance with the provisions of the Matrimonial Law of the parties, to be valid and the judgment of such foreign Court to be conclusive. We, therefore, do not find any merit in this petition.

(Para 6)

[An Ba]

APPEARANCES:

FOR THE PETITIONER : None

FOR THE RESPONDENT : Mr. Atul Jha, Advocate

CASES REFERRED TO:

1. *Ms. Dorothy Thomas* vs. *Rex Arul* MANU/TN/2876/2011.
2. *Y. Narasimha Rao* vs. *Y. Venkata Lakshmi* (1991) 3 SCC 451.
3. *Smt. Satya* vs. *Shri Teja Singh* (1975) 1 SCC 120.
4. *Asanalli Nagoor Meera* vs. *K.M. Madhu Meera* MANU/TN/0707/1925.

RESULT: Petition dismissed.

RAJIV SAHAI ENDLAW, J.

1. This petition has been preferred under Article 227 of the Constitution of India read with Section 482 of the Criminal Procedure Code (Cr.P.C.) impugning the order dated 26.08.2010 of the learned Metropolitan Magistrate dismissing the complaint under Section 200 of the Cr.P.C. filed by the petitioner of offence under Section 120-B read with Section 494 and Section 498A of the Indian Penal Code (IPC). This petition was listed before the learned Single Judge on 10.12.2010 when the petitioner appearing in person sought adjournment. The petitioner had also filed LPA No.64/2009 and contempt case No.C-386/2010. The petitioner on 03.05.2011, while appearing before the Division Bench in LPA No.64/2009 sought consolidation of the contempt petition as well this petition with the LPA and the matter was accordingly placed before Hon'ble the Chief Justice who vide order dated 22.05.2011 directed that the contempt petition as well as this petition be placed before the same

Division Bench before which the LPA was pending. It is for this reason that the matter is before us. We may also notice that though the LPA and the contempt petition have since been disposed of but the petitioner appearing in person stated that rather than sending back this petition to the learned Single Judge, we only should hear the same. In view of the said request and for the reason that by doing so, the petitioner is not being deprived of any remedy had the matter been considered by the learned Single Judge, we proceeded to hear the petitioner. The petitioner sought and was granted liberty to file written arguments which have also been filed.

2. The learned Metropolitan Magistrate after recording the statements of the petitioner and her witnesses held no case for summoning of the accused / respondent to have been made out for the reason of the petitioner herself having obtained decree of dissolution of her marriage with the respondent from the Court in U.K. and the respondent having so ceased to be the husband of the petitioner there being no question of his being guilty of the offence of bigamy under Section 494 of the IPC or of causing cruelty to the petitioner as wife under Section 498-A of the IPC. Qua the offence under Section 498-A of the IPC, reliance was also placed on the status report submitted by the police and on the petitioner having failed to make out any case of cruelty.

3. The argument of the petitioner before us, orally as well as in writing, is that the divorce decree obtained by her in U.K. being not a valid decree and hence not bringing to an end the relationship of husband and wife between the petitioner and the respondent. Reliance in this regard is placed on **Smt. Satya Vs. Shri Teja Singh** (1975) 1 SCC 120 and on **Y. Narasimha Rao Vs. Y. Venkata Lakshmi** (1991) 3 SCC 451. The Supreme Court in both **Smt. Satya and Y. Narasimha Rao** (supra) was faced with a situation of the husband setting up a decree of a foreign Court of dissolution of marriage as a defence to the claim / charge of the wife in the Indian Courts for maintenance or of bigamy. In both cases, the husband was found to have obtained the decree of foreign Court fraudulently.

4. The situation here is however converse. It is the petitioner herself who had obtained the decree from the foreign Court of dissolution of marriage and who now wants our Courts to ignore the same. Obviously, no case of the foreign decree having been obtained fraudulently can be

said to exist in this scenario. Rather the said foreign decree was at the sole initiative of the petitioner with the respondent having no role in the same and having not even contested the same. The question which arises is, can the petitioner, who by obtaining the said decree led the respondent to believe that his marriage with the petitioner stood dissolved and that he was free to remarry, can now be permitted to challenge the foreign decree obtained herself and charge the respondent with the offence of bigamy. In our opinion, no and the complaint has been rightly dismissed by the learned Metropolitan Magistrate. As far back as in **Asanalli Nagoor Meera Vs. K.M. Madhu Meera** MANU/TN/0707/1925, a division bench of the Madras High Court held that a litigant cannot be allowed to deny the jurisdiction which he himself invoked. The same principle was recently applied by a Single Judge of the same Court in **Ms. Dorothy Thomas Vs. Rex Arul** MANU/TN/2876/2011 in near similar facts.

5. We may also notice that under Section 13 of CPC a foreign judgment is conclusive as to any matter thereby directly adjudicated upon between the same parties except in cases specified thereunder. However the right if any to contend that the said foreign judgment is not conclusive can be only of the party who had himself / herself / itself not initiated the process of obtaining the said judgment and cannot be of a party at whose instance such foreign judgment has been obtained. No litigant can be allowed to abuse the process of the Courts or to approbate and reprobate as per convenience. Mention at this stage may also be made of the finding recorded by the learned Metropolitan Magistrate and not disputed before us that the petitioner in the disputes with her siblings before another Indian Court sought to justify her claim by contending herself to be a divorcee by virtue of the said foreign judgment.

6. Thus, whichever way we may look, we cannot find any error in the order of dismissal of the complaint aforesaid. We had also called for the records of the Court of the Metropolitan Magistrate and have perused the pre-summoning evidence led by the petitioner. The petitioner had deposed that she was in U.K. from 1993 to 1999. She has not even whispered, alleged or made out any case of any of the grounds for the foreign judgment of dissolution of her marriage with the respondent being not conclusive. For the said foreign judgment to be not conclusive, the petitioner was required to make out a case of the same being either pronounced by a Court having no jurisdiction and / or having been not

given on the merits of the case or being founded on an incorrect view of international law or the proceedings resulting therein being opposed to natural justice or having been obtained by fraud or sustaining a claim founded on a breach of any law in force in India. Moreover all the grounds specified in Section 13 of the CPC and on establishment whereof a foreign judgment can be said to be not conclusive are such which can be set up only by a party not himself/herself/itself approaching the foreign Court. The judgments cited by the petitioner cannot be read as laying down and indeed do not lay down any absolute principle that a marriage under the Hindu Marriage Act, 1955 cannot be dissolved by a foreign Court. Here the petitioner who is challenging the judgment was at the relevant time resident for a fairly long time within the jurisdiction of the foreign Court, did not approach the foreign Court under the dictates of the respondent and made out a case before the foreign Court for obtaining the judgment. Indeed in **Y. Narasimha Rao** (supra) itself the Supreme Court held matrimonial action filed in the forum where the wife is domiciled or habitually and permanently resides or where the wife voluntarily and effectively submits to the foreign jurisdiction or where the wife consents to the grant of the relief by the foreign Court although the jurisdiction of the foreign Court is not in accordance with the provisions of the Matrimonial Law of the parties, to be valid and the judgment of such foreign Court to be conclusive. We, therefore, do not find any merit in this petition.

7. Before parting with the case, we may observe that though the order of the Metropolitan Magistrate of dismissal of complaint is under Section 203 of the Cr.P.C. and is challengeable by way of Revision Petition under Section 397 read with Section 401 of the Cr.P.C. but since the matter had remained pending before this Court, though in the circumstances aforesaid for considerable time, we did not deem it appropriate to reject this petition on the said ground. The petition is accordingly dismissed. No order as to costs.

ILR (2012) IV DELHI 534
FAO (OS)

JUGAN K. MEHTA ….APPELLANT

VERSUS

SHAM SUNDER GULATI & ORS. ….RESPONDENTS

(SANJAY KISHAN KAUL & RAJIV SHAKDHER, JJ.)

FAO (OS) NO. : 249/2004 DATE OF DECISION: 30.01.2012

Code of Civil Procedure, 1908—Order XXXIX Rule 2A read with Section 151—Suit for partition and rendition of accounts by appellant against her siblings qua estate of her deceased father—Appellant claimed that as per the wishes of her father, soon after her marriage, she came in occupation and possession of the subject property—Appellant claims to have used the said portion as the residence till year 1974—Defendants struck a deal of settlement between themselves—In terms of this arrangement, the parties shifted in different portions of the property and leased out the entire basement for commercial use—The original defendants No. 1 to 5 are alleged to be in possession and control of the entire estate except the portion of the property in occupation of the appellant—Alleged that defendants No. 1 to 6 were threatening to sell the entire property to defendant no.7, in order to pocket the consideration including the share of the appellant—In this background, partition is sought of the immovable property and rendition of accounts of the business apart from recovery of rent realized from the immovable property—Along with the suit, an application under Order XXXIX Rule 1 and 2 for interim relief filed seeking a restraint against the defendants from creating charge or transferring, selling or alienating

the aforesaid immovable property and from dispossessing the appellant from the portion in her possession on the first floor, apart from a restraint against removing the account books from the business premises—Summons were issued in the suit as also notice in the application on 02.04.2002 and ad interim ex-parte orders were granted to the appellant—Application under Order XXXIX Rule 2A read with section 151 of the Code filed by the Plaintiff alleging that there has been violation of the status quo Order dated 02.04.2002—Respondents denied commission of any contempt stating that the ex-parte Order granted on 02.04.2002 simply required the parties to maintain status quo qua the possession and title of the said property and further restrained alienation, transfer or creating third party interest—In view of the Sale Deed, possession is stated to have already been passed on to the original defendant No. 7—There was, thus, no restrain order against the demolition of certain walls, which was carried out—This argument found favour with learned Singe Judge, who dismissed the contempt petition—Hence:- Present appeal—Held:- Defendant should have moved the Court for varying the construction even though there was a restrictive injunction order—However, any additional relief qua these aspects was not granted to the appellant—Defendant is not guilty of willfully violating the interim orders passed by this Court and the interest of the appellant are protected—Though styled as CCP as CCP (OS), the petition is under Order XXXIX Rule 2A read with Section 151 of the said Code and even the prayers are made accordingly—No dispute as to the maintainability of the appeal from an order dismissing an application under Order XXXIX Rule 2A of the said Code in view of the provisions of Order XLIII Rule 1 of the said Code-However, on examination of this matter, there appears to be a conflict of view qua this issue—A learned Single Judge of the Punjab and Haryana

High Court in *Rajinder Kaur vs. Sukhbir Singh,* 2002 Civil CC 125 MANU/PH/1830/2001 has held that there is no limitation whatsoever in the aforesaid Rule as to the nature of the order passed under this Rule—Thus, a restrictive meaning cannot be given that an appeal would not lie if the application is dismissed—On the other hand, learned Single Judge of the Gauhati High Court in *Shri Banamali Dey vs. Shri Satyendra Chanda & Ors.* (1990) 2GLR 408=MANU/GH/0164/1990 has concluded that an order refusing to take action under Rule 2A on the ground that there was no disobedience or breach of injunction cannot be said to be an order under Rule 2A and—Thus, no appeal would be maintainable against such an order under clause (r) of Rule of Order XLIII of the said Code—Division Bench of this Court in *The Bombay Metal Works (P) Ltd. Vs. Tara Singh & Ors.,* ILR (2006) I DELHI Has held that appeal would be maintainable from an order dismissing the application under Order XXXIX Rule 2A of the said Code—Aforesaid two Judgments have not been discussed in this cases and the perspective expressed by the Gauhati High Court has also not been examined—The application filed in The Bombay Metal Works (P) Ltd. case (supra) was actually under Sections 2(a), 11 and 12 of the Contempt of Courts Act, 1971 and the learned Single Judge absolved the respondents from notice of contempt—An appeal was filed under Section 19 of the Contempt of Courts Act, which was pleaded to be by the respondents as not maintainable in view of the settled legal position—Appellants pleaded that the contempt application filed for disobedience of the interim orders purported to have been filed was actually under Order XXXIX Rule 2A of the Code and a wrong provision was cited—The appeal was, thus, treated as FAO (OS) and while discussing this aspect, it was observed that the appeal would be maintainable—It is not appropriate to in interfere with the dismissal order of that application

for the reason recorded aforesaid and the rights and obligations of the parties would be determined in the suit, which has unfortunately taken large number of years—The appeal is accordingly dismissed leaving the parties to bear their own costs.

We find that there is something to be said about the view of the Gauhati High Court, but then a Division Bench of this Court in **The Bombay Metal Works (P) Ltd. v. Tara Singh & Ors.,** ILR (2006) I Delhi 840 has held that appeal would be maintainable from an order dismissing the application under Order XXXIX Rule 2A of the said Code. We may notice that the aforesaid two judgments (of the Gauhati High Court and the Punjab and Haryana High Court) have not been discussed in this case and the perspective expressed by the Gauhati High Court has also not been examined. The application filed in **The Bombay Metal Works (P) Ltd.'s** case (supra) was actually under Sections 2(a), 11 and 12 of the Contempt of Courts Act, 1971 and the learned Single Judge absolved the respondents from notice of contempt. An appeal was filed under Section 19 of the Contempt of Courts Act, which was pleaded to be by the respondents as not maintainable in view of the settled legal position. The appellants pleaded that the contempt application filed for disobedience of the interim orders purported to have been filed was actually under Order XXXIX Rule 2A of the said Code and a wrong provision was cited. The appeal was, thus, treated as FAO (OS) and while discussing this aspect, it was observed that the appeal would be maintainable.

(Para 17)

Important Issue Involved: No contravention of a status quo order result if the same restrained only further alienation of property if the alleged violation is regarding demolition and damage of the said property. Appeal of a dismissal of a contempt petition would lie if application styled under an application under order XXXIX Rule 2A r/w Section 151 of the CPC.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. S.P. Kalra, Sr. Adv, with Ms. Kirti K. Mehta, Advocate.

FOR THE RESPONDENTS : Mr. Sanjeev Sidhwani & Ms. Ekta Kalra, Advs, for Respondent Nos. 1 to 3. None for R-4

CASES REFERRED TO:

1. *The Bombay Metal Works (P) Ltd.* vs. *Tara Singh & Ors.,* ILR (2006) I Delhi 840.
2. *Midnapore Peoples. Coop. Bank Ltd. & Ors.* vs. *Chunilal Nanda & Ors.,* (2006) 5 SCC 399.
3. *Rajinder Kaur* vs. *Sukhbir Singh,* 2002 Civil CC 125 = MANU/PH/1830/2001.
4. *Satyabrata Biswas & Ors.* vs. *Kalyan Kumar Kisku & Ors.,* AIR 1994 SC 1837.
5. *Shri Banamali Dey* vs. *Shri Satyendra Chanda & Ors.,* (1990) 2 GLR 408 = MANU/GH/0164/1990.
6. *Bharat Coking Coal Ltd.* vs. *State of Bihar,* 1987 Supp SCC 394 at 398 : (AIR 1988 SC 127 at p. 129 para 5).
7. *Baradakanta Mishra* vs. *Mr. Justice Gatikrushna Misra, Chief Justice of the Orissa High Court,* (1975) 3 SCC 535.

RESULT: Appeal dismissed.

SANJAY KISHAN KAUL, J.

1. The appellant filed a suit, being CS (OS) No.736/2002, for partition and rendition of accounts against her siblings / their legal heirs qua the estate of her deceased father late Shri Mangal Sain Gulati. One of the immovable properties forming subject matter of the partition suit is a residential double-storey house with basement constructed on a plot measuring 1300 sq. yds. bearing Municipal No. 6909/31, Bungalow Road, Kamla Nagar, Delhi. The appellant claimed that as per the wishes of her

father, soon after her marriage, she came in occupation and possession of a part of the said property situated in the backyard on the first floor consisting of two independent rooms and bathroom-cum-latrine along with the roof of the said portion. The appellant claims to have used the said portion as the residence till the year 1974 when she shifted her residence.

2. The appellant alleged that soon after the demise of her mother on 30.03.1992, the original defendant No. 5, namely, Smt. Pushpa Mediratta (daughter of late Shri Mangal Sain Gulati); late Shri Prakash Chand Gulati (son of late Shri Mangal Sain Gulati) represented by his legal heirs, i.e., original defendants No. 2 to 4, namely, Smt. Chanchal Gulati (wife), Shri Raj Kumar Gulati (son) and Shri Chintu Gulati (son); and the original defendant No. 1, namely, Shri Sham Sunder Gulati (son of late Shri Mangal Sain Gulati) struck a deal of settlement between themselves with regard to the estate left behind by the father, namely, late Shri Mangal Sain Gulati. In terms of this arrangement, the parties shifted in different portions of the property and leased out the entire basement for commercial use. The original defendants No. 1 to 5 are alleged to be in possession and control of the entire estate of Shri Mangal Sain Gulati and her mother Smt. Vidya Vati Gulati except the portion of the property in occupation of the appellant. It was also alleged that defendants No. 1 to 6 were threatening to sell the entire property to defendant No. 7, namely, Smt. Neelam Sablok in order to pocket the entire consideration including the share of the appellant. This is the background in which partition is sought of the immovable property and rendition of accounts of the business apart from recovery of rent realized from the immovable property.

3. The appellant along with the suit filed an application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (for short, 'the said Code') for interim relief being IA No. 3171/2002 seeking a restraint against the defendants from creating any charge or transferring, selling or alienating the aforesaid immovable property and from dispossessing the appellant from the portion in her possession on the first floor apart from a restraint against removing the account books from the business premises. Summons were issued in the suit as also notice in the application on 02.04.2002 and ad interim ex-parte orders were granted to the appellant directing the parties to maintain status quo in respect of title

and possession of the premises as on that date and restraining the parties from alienating, selling, transferring or creating third-party interest in the aforesaid immovable property.

4. On the summons and notice being served, original defendant No. 7, Smt. Neelam Sablok moved an application, being IA No.4447/2002, under Order XXXIX Rule 4 of the said Code. The application records that the title of the property vested with Shri Mangal Sain Gulati in pursuance to a Sale Deed dated 19.01.1973, who executed a registered Will dated 16.04.1981 bequeathing the said immovable property in equal share to his two sons, namely, Shri Prakash Chand Gulati and Shri Sham Sunder Gulati with a right of residence to his wife, Smt. Vidya Vati Gulati during her lifetime. The daughters were not bequeathed any share. On the death of Shri Mangal Sain Gulati, his wife continued to reside in the said property till her demise on 30.03.1992. Affidavits are stated to have been affirmed by all the legal heirs of late Shri Mangal Sain Gulati including the appellant giving their no objection to the Will and, thus, the property was mutated in the name of the two sons vide letter dated 19.07.1995. The said two sons agreed to sell the property to the applicant (i.e., the original defendant No. 7 / respondent No. 4 herein) for a consideration of Rs.40 lakhs and executed the Sale Deed on 11.10.2000 in respect of their undivided portions, which was duly registered. The applicant claimed to be in physical possession of the first floor even prior to execution of the Sale Deed and was given symbolic, proprietary and constructive possession of the entire property purchased by her and started collecting rent from the tenants. The property stood mutated in the name of the applicant. These two applications were finally disposed of by a detailed Order of the learned Single Judge dated 25.08.2003 confirming the Order passed on 02.04.2002 with a modification that in case original defendant No. 7 wanted to transfer the title or possession of the property further as claimed by her, she would seek prior permission from the Court. We are informed that an appeal was preferred against this Order by defendant No. 7 being FAO (OS) No. 366/2003, but was withdrawn on 29.08.2006.

5. Insofar as the controversy in the present appeal is concerned, the same arises out of an Order passed on 27.09.2004 in CCP (OS) No. 90/2004 filed by the appellant. The allegation in this application is that there has been violation of the status quo Order dated 02.04.2002 as

confirmed on 25.08.2003. It may be noticed that though the contempt petition was styled as such, in the heading, it is stated to be an application under Order XXXIX Rule 2A read with Section 151 of the said Code.

6. The husband of the appellant, namely, Shri Kirti K. Mehta claims to have visited the suit premises on 09.07.2004 at about 4 p.m. when he found that the entire roof of the first and ground floors barring the outer walls of the suit premises were demolished causing extensive damage to the suit premises. On enquiry, it was found that the demolition had commenced on 25.06.2004 during the summer vacations of the High Court and was carried out under instructions of the respondents / contemnors, i.e., Shri Sham Sunder Gulati (son), Shri Raj Kumar Gulati (grandson), Shri Chintu Gulati (grandson) and Smt. Neelam Sablok to facilitate construction of a multi-storey commercial complex, which was funded by the husband of Smt. Neelam Sablok.

7. The respondents denied commission of any contempt alleging that the appellant had raised a frivolous claim after 20 years of the demise of her father; 10 years after the demise of her mother; and two years after the property was sold to the original defendant No. 7 (respondent No. 4 in the contempt petition as also herein) by a registered Sale Deed. Insofar as the Orders dated 02.04.2002 and 25.08.2003 are concerned, it was stated that the ex-parte Order granted on 02.04.2002 simply required the parties to maintain status quo qua the possession and title of the said property and further restrained alienation, transfer or creating third-party interest. In view of the Sale Deed, possession is stated to have already been passed on to the original defendant No. 7 and the Order dated 25.08.2003 had declined to go into the issue of the claim of possession of the appellant without recording evidence. There was, thus, no restraint order against the demolition of certain walls, which was carried out. This argument found favour with learned Single Judge, who dismissed the contempt petition by the impugned Order dated 27.09.2004.

8. A further development, which has taken place, is that another set of interim applications was decided by learned Single Judge on 17.01.2006 by a detailed Order. This included IA No. 4283/2004 filed in CCP (OS) No. 90/2004 (which had already been dismissed by then) as also another application filed by the appellant under Order XXXIX Rules 1 and 2 of the said Code being IA No. 9942/2003. One further application considered was filed by the original defendant No. 7 seeking vacation and modification

of an Order dated 16.02.2005 passed on IA No. 1181/2005 in CCP (OS) No. 90/2004. The Order dated 16.02.2005 was passed post-dismissal of the contempt petition restraining the defendants from carrying on any construction in the suit property. The appellant also claimed at that stage of time that IA No. 4283/2004 seeking sealing of the property and the contempt petition was pending, which also required orders to be passed. Learned Single Judge noticed that the Order dated 25.08.2003 clearly held that whether the appellant was in possession of the property or not could not be decided without recording evidence and only restrained further transfer by the original defendant No. 7 without permission of court. The dismissal of the contempt petition (which is assailed in the present appeal) was also noticed. Learned Single Judge concluded that while dismissing the contempt petition on 25.08.2003, it had been noticed that no specific order has been passed against the original defendant No. 7 restraining carrying out any further construction. In view of dismissal of the contempt petition, the interim applications filed in that contempt petition were also dismissed. Learned Single Judge after discussing the provisions of Section 44 of The Transfer of Property Act, 1881 and Section 4 of The Partition Act, 1893 qua the issue of keeping away strangers, who may purchase undivided shares of co-sharers, found against the appellant as the entire house had been sold to the original defendant No. 7. The house was not even a dwelling house in the sense that a part of it was sold to some other persons by an earlier Sale Deed dated 16.06.1997. Various applications filed by the appellant were dismissed and the original defendant No. 7 was permitted to construct.

9. This Order was assailed in FAO (OS) No. 211/2006. The appeal was disposed of on 25.07.2006 specifically permitting the original defendant No. 7 to continue construction with the direction that in case the appellant succeeds in the suit, the entire construction made by the original defendant No. 7 would abide by the directions in the decree to be passed in the suit and the construction would not give any right or special equity in favour of the original defendant No. 7. We are informed by learned counsel for respondents No. 1 to 3 (no counsel appeared for respondent No. 4, who was the original defendant No. 7) that the construction has been completed and the property is occupied by the original defendant No. 7 / respondent No. 4 herein.

10. We set out these detailed facts pre and post contempt petition

as well as the appeal as they are material for determining the controversy in question.

11. On consideration of the matter, we find that the Orders passed by the learned Single Judge on 25.08.2003 confirming the injunction order was restrictive in its nature only qua a further transfer / sale by the original defendant No. 7. In fact, the original defendant No. 7 was permitted to transfer title and possession of the property with prior permission of the Court. The subsequent endeavours by the appellant to prevent construction by the original defendant No. 7 also failed right up to the Division Bench. What weighed with learned Single Judge while passing the impugned Order dated 27.09.2004 was that no status quo order had been passed qua construction on the property, but only maintenance of status quo in respect of the title and possession of the premises was directed. Such an order was also passed without the Court being informed of the registered Sale Deed already entered into two years. prior to the suit transferring title to the original defendant No. 7.

12. Leaned counsel for the appellant strongly relied upon the observations of the Supreme Court in **Satyabrata Biswas & Ors. v. Kalyan Kumar Kisku & Ors.,** AIR 1994 SC 1837 while analyzing what was meant by a status quo order. We reproduce the relevant paras as under:

> "25. In Wharton's Law Lexicon 14th Edition at page 951 Status Quo has been defined as meaning:
>
> > "The existing state of things at any given date; e.g., Status quo ante bellum, the state of things before the war."
>
> 26. According to Black's Law Dictionary 6th Edition the relevant passage occurs:
>
> > "The existing state of things at any given date. Status quo ante bellum the state of things before the law. "Status quo" to be preserved by a preliminary injunction is the last actual, peaceable, uncontested status which preceded the pending controversy."
>
> 27. This Court in **Bharat Coking Coal Ltd. v. State of Bihar,** 1987 Supp SCC 394 at 398 : (AIR 1988 SC 127 at p. 129 para 5) stated thus:

> "According to the ordinary legal connotation, the term "status quo' implies the existing state of things at any given point of time."" It is, thus, the plea of learned counsel for the appellant that the existent state of affairs had to continue till a given point of time, which would encompass not tampering with the construction.

13. We find some merit in this plea of learned counsel for the appellant and it would have been advisable for the original defendant No. 7 to move the Court for varying the construction thereon even though there was a restrictive injunction order. However, we cannot simultaneously lose sight of the fact that any additional relief qua these aspects was not granted to the appellant while confirming the Order on 25.08.2003 and the incident which has led to contempt proceedings is post that date. Despite the incident, on a conspectus of the overall facts, learned Single Judge found that the original defendant No. 7 should not be restrained from carrying out further construction and that Order dated 17.01.2006 received the imprimatur of the Division Bench on 25.07.2006. We are, thus, not inclined to hold that the original defendant No. 7 (i.e., respondent No. 4 in the contempt petition as also herein) is guilty of willfully violating the interim Orders passed by this Court and the interest of the appellant are protected in terms of the Orders of the Division Bench dated 25.07.2006 passed in FAO (OS) No. 211/2006. We may notice that during the course of arguments, learned counsel for the appellant stated that he was really pressing the appeal only against respondent No. 4 herein.

14. In the end, we may also notice one additional fact arising from the mis-description of the application of the appellant as CCP (OS) even though he describes it as an application under Order XXXIX Rule 2A read with Section 151 of the said Code. This has some ramification as, if the contempt petition is dismissed, no appeal would be maintainable before this Court in view of the judgment of the Supreme Court in **Baradakanta Mishra v. Mr. Justice Gatikrushna Misra, Chief Justice of the Orissa High Court,** (1975) 3 SCC 535 and **Midnapore Peoples. Coop. Bank Ltd. & Ors. v. Chunilal Nanda & Ors.,** (2006) 5 SCC 399. However, learned counsel for the appellant submitted that the application was filed under Order XXXIX Rule 2A read with Section 151 of the said Code and not as a contempt petition as per the description and an Order passed on an application under Order XXXIX Rule 2A read

with Section 151 of the said Code is appealable in view of the provisions of Order XLIII Rule 1(r) of the said Code. Thus, he claims that a mis-description should not block the remedy for the appellant.

15. We may only notice that it is the appellant, who herself styled the application as CCP (OS), though the heading showed that it was an application made under Order XXXIX Rule 2A read with Section 151 of the said Code. The fault lay at the door of the appellant. However, we are not inclined to take a technical view of the matter as though styled as CCP (OS), the petition is under Order XXXIX Rule 2A read with Section 151 of the said Code and even the prayers are made accordingly. Thus, we have considered the appeal on merits.

16. We may add in the aforesaid context that learned counsel for either of the parties did not dispute the maintainability of the appeal from an order dismissing an application under Order XXXIX Rule 2A of the said Code in view of the provisions of Order XLIII Rule 1(r) of the said Code, which reads as under:

> **"ORDER XLIII. APPEALS FROM ORDERS**
>
> 1. Appeals from orders
>
> ... ...
>
> (r) an order under Rule 1, Rule 2, Rule 2A, Rule 4 or Rule 10 of Order XXXIX;"

However, on examination of this matter ourselves, we find that there appears to be a conflict of view qua this issue. A learned Single Judge of the Punjab and Haryana High Court in **Rajinder Kaur v. Sukhbir Singh,** 2002 Civil CC 125 = MANU/PH/1830/2001 has held that there is no limitation whatsoever in the aforesaid Rule as to the nature of the order passed under this Rule. Thus, a restrictive meaning cannot be given that an appeal would not lie if the application is dismissed. On the other hand, learned Single Judge of the Gauhati High Court in **Shri Banamali Dey v. Shri Satyendra Chanda & Ors.,** (1990) 2 GLR 408 = MANU/GH/0164/1990 has held that an order passed by the Court holding there was no disobedience or breach of injunction granted by it is not an order within the meaning of Rule 2A and, thus,

> the question of passing an order under Rule 2A will arise only in a case where on consideration of the information received by it, the Court is satisfied that there is disobedience or breach of injunction granted by it. The learned Judge concluded that an order refusing to take action under Rule 2A on the ground that there was no disobedience or breach of injunction cannot be said to be an order under Rule 2A and, thus, no appeal would be maintainable against such an order under clause (r) of Rule 1 of Order XLIII of the said Code.

17. We find that there is something to be said about the view of the Gauhati High Court, but then a Division Bench of this Court in **The Bombay Metal Works (P) Ltd. v. Tara Singh & Ors.,** ILR (2006) I Delhi 840 has held that appeal would be maintainable from an order dismissing the application under Order XXXIX Rule 2A of the said Code. We may notice that the aforesaid two judgments (of the Gauhati High Court and the Punjab and Haryana High Court) have not been discussed in this case and the perspective expressed by the Gauhati High Court has also not been examined. The application filed in **The Bombay Metal Works (P) Ltd.'s** case (supra) was actually under Sections 2(a), 11 and 12 of the Contempt of Courts Act, 1971 and the learned Single Judge absolved the respondents from notice of contempt. An appeal was filed under Section 19 of the Contempt of Courts Act, which was pleaded to be by the respondents as not maintainable in view of the settled legal position. The appellants pleaded that the contempt application filed for disobedience of the interim orders purported to have been filed was actually under Order XXXIX Rule 2A of the said Code and a wrong provision was cited. The appeal was, thus, treated as FAO (OS) and while discussing this aspect, it was observed that the appeal would be maintainable.

18. However, since neither of the counsels canvassed or assisted us in this behalf, we are not inclined to go into this question any further leaving the question at large.

19. We, thus, do not completely agree with the basis of the conclusion of learned Single Judge in the impugned Order dated 27.09.2004, but do not deem it appropriate to interfere with the dismissal order of that application for the reasons recorded aforesaid and the rights and obligations of the parties would be determined in the suit, which has unfortunately

taken large number of years, issues having been framed on 14.11.2003 and the first witness of the plaintiff PW–1 having entered the witness box in 2004. The suit is at the stage of rebuttal evidence fixed on 31.1.2012 before the Ld. Joint Registrar.

20. The appeal is accordingly dismissed leaving the parties to bear their own costs.

ILR (2012) IV DELHI 547
MAC. APP.

ROYAL SUNDARAM ALLIANCE INSURANCE CO LTD. ….APPELLANT

VERSUS

MASTER MANMEET SINGH & ORS. ….RESPONDENTS

(G.P. MITTAL, J.)

MAC. APP. NO. : 590/2011, 563/2010,7 53/2011, 772/2011, 857/2011, 289/2010 **DATE OF DECISION: 30.01.2012**

Motor Vehicle Act, 1988—Section 163A and 168—Second Schedule Clause 6(b)—Compensation—Accident took place on 04.11.2009—Parents of the claimants/respondent no. 1 to 3 died in the accident-Mother was a non-matriculate, Aged about 34 years Rendering gratuitous service to Husband and three children—Tribunal assessed the value of gratuitous service rendered by the deceased mother at Rs. 6000/- per month—Awarded compensation of Rs. 8,50,000/- Aggrieved, appellant/respondent Insurance Company preferred appeal seeking reduction of Compensation—Alleged assessment for gratuitous services @ Rs. 6000/- per month arbitrary—Held:- Addition of 25% in the salary of non matriculate, multiplier of 16 applicable, Total compensation Works out to be Rs. 9,95,040/-—No cross appeal—Compensation is less that what works out on the principles laid down—Appeal dismissed.

MAC. APP. 563/2010

Death of lady aged about 31 years—Taking care of five children—Doing tailoring work-value of gratuitous service taken @ Rs. 6000/- per month—Multiplier of 15 applied-compensation of Rs. 11,65,000/- awarded—Respondent/Insurance Company preferred appeal—Held-no evidence of educational qualification;—Taken to be a non matriculate; multiplier of 16 applicable—Total compensation reduced to Rs.10,35,040/-—Appeal disposed of with directions.

MAC. APP. No. 753/2011

Death of a lady about 40 years—Claimed to be earning Rs.4000/- per month from sewing work-compensation of Rs. 4,10,000/- awarded—Aggrieved claimants/appellant preferred appeal—Held:- No evidence of earnings or qualification-taken to be a non matriculate—Multiplier of 15 applicable—Overall compensation comes toRs.9,63,575/-—Appeal allowed-Compensation enhanced.

MAC. APP. No. 772/2011

Death of a lady-left behind her husband, four sons and a daughter—Tribunal valued gratuitous services @ Rs. 3000/-per month—Awarded compensation of Rs.6,41,00/- Aggrieved claimants/App. Preferred the appeal—Held:- No evidence of her educational qualification—Taken to be a non matriculate-Age of

deceased taken to be between 35 to 40 years-Multiplier of 15 applicable—Total compensation comes to Rs. 13,56,250/-—Appeal allowed—Compensation enhanced.

MAC. APP. No. 857/2011

Death of lady aged about 40 years—Died on 19.05.2010—Left behind husband and five children out of which three were minors—Compensation of Rs. 4,68,300/- awarded by the Tribunal—Aggrieved claimants/app. Preferred appeal seeking enhancement of compensation—No cross appeal by Insurance Company—No evidence as to educational qualification—Held:- Taken to be a non matriculate—Multiplier of 15 applicable—Over all compensation comes to Rs. 13,56,250/-—Appeal allowed-Compensation enhanced.

MAC. APP. No. 289/2010

Accident took place on 17.11.2007—Death of a lady aged 31 years-Claimed to be working as computer editor earning Rs. 4600/- per month—Held:- Taken to be housewife-Gratuitous services rendered valued at Rs. 3000/- per month—Multiplier of 16 applied—Awarded compensation of Rs. 11,97,000/- Aggrieved Insurance Company preferred appeal seeking reduction of compensation—Held:- Educational qualification considered to be as a matriculate—Aged 31 years—Multiplier of 16 applicable—Overall compensation Rs. 9,80,320/-—Appeal Allowed—compensation reduced.

Important Issue Involved: (A) A readymade formula given in Clause 6(b) of the Second Schedule cannot be adopted to award just and fair compensation which is the very basis of an award passed under Section 168 of the MV Act.

(B) The value of services rendered by a home maker should be taken as minimum salary of a non matriculate, matriculate or a Graduate (in the absence of any evidence to the contrary). In case of a young mother and wife there should be an addition 25% of the minimum salary/wages as per the educational qualification i.e graduate, matriculate or non-matriculate, addition of 15% in case of middle aged mother and wife and nil in case of a wife beyond the age of years as the children become independent by the that time. The value of gratuitous services rendered should be gradually reduced after the age of 55 years, even though mothers take care of their children and even when they are married.

[Vi Ku]

APPEARANCES:

FOR THE APPELLANT : Ms. Suman Bagga, Advocate, s. Manjusha Wadhwa, Advocate, Mr. Sanjeev Srivastava, Advocate, Mr. Navneet Goayal, Advocate with Ms. Suman N. Rawat , Advocate., Mr. O.P. Mannie, Advocate, Mr. Kanwal Chaudhary, Advocate

FOR THE RESPONDENT : Mr. Gurmit Singh Hans, Advocate, Ms. Manjeet Chawla, Advocate, Ms. Suman Bagga, Advocate for R-3, Mr. K.L. Nandwani, Advocate for R-3/UIICL, Mr. S.N. Parashar, Advocate.

CASES REFERRED TO:

1. *National Insurance Company Limited* vs. *Deepika & Ors.,* 2010 (4) ACJ 2221.
2. *Arun Kumar Agrawal & Anr.* vs. *National Insurance Company Limited.,* (2010) 9 SCC 218.
3. *Lata Wadhwa & Ors.* vs. *State of Bihar & Ors.,* (2001) 8 SCC 197.

4. *M.S. Grewal* vs. *Deep Chand Sood,* (2001) 8 SCC 151.
5. *Lata Wadhwa & Ors.* vs. *State of Bihar & Ors.,* (2001) 8 SCC 197.
6. *Helen C. Rebello* vs. *Maharashtra SRTC,* 1999 (1) SCC 90.
7. *General Manager, Kerala State Road Transport Corporation, Trivandrum* vs. *Susamma Thomas (Mrs.) and Ors.* (1994) 2 SCC 176.
8. *A. Rajam* vs. *M. Manikya Reddy & Anr.,* MANU/AP/0303/1988.
9. *Mehmet* vs. *Perry* 1978 ACJ 112 (QBD, England).
10. *Mehmet* vs. *Perry,* (1977) 2 All ER 529 (DC).
11. *Regan* vs. *Williamson* 1977 ACJ 331 (QBD England).
12. *Morris* vs. *Rigby* (1966) 110 Sol Jo 834.
13. *Gobald Motor Service Ltd. & Anr.* vs. *R.M.K. Veluswami & Ors.,* AIR 1962 SC 1.
14. *Berry* vs. *Humm & Co.,* (1915) 1 KB 627.

RESULT: Applications disposed of.

G.P. MITTAL, J.

MAC.APP. 590/2011

1. The Appellant Royal Sundaram Alliance Insurance Company Limited seeks reduction of compensation of '8,50,000/- awarded in favour of the Respondents (Claimants) by the Motor Accident Claims Tribunal, (the Claims Tribunal) by judgment dated 05.04.2011 for the death of their mother Jasvinder Kaur who died in an accident which took place on 04.11.2009.

2. In fact, Respondents No. 1 to 3's father Harvinder Singh also lost his life in this very accident.

3. The contention raised on behalf of the Appellant is that the Tribunal arbitrarily took the value of the gratuitous services rendered by the deceased as Rs.6,000/- per month which is against the law laid down by the Supreme Court.

4. To assess the value of services rendered by a homemaker so as to calculate the loss of dependency in case of her death in a road accident is an uphill task. Sometimes the Claims Tribunals have taken the salary of a skilled worker and sometimes have taken 50% wages of a skilled worker. Clause 6 (b) of the Second Schedule to Section 163-A of the Motor Vehicles Act, 1988 (M.V.Act) lays down that the income of a non-earning spouse shall be considered to be one-third of the income of the surviving spouse. There seems to be no logic behind this. If I may say so, it is totally arbitrary and, therefore, can only be restricted to the grant of compensation as per the structured formula in petitions filed under Section 163-A of the M.V. Act.

5. The Claims Tribunal (in MAC APP.590/2011) referred to the judgment of **Lata Wadhwa & Ors. v. State of Bihar & Ors.,** (2001) 8 SCC 197; **M.S. Grewal v. Deep Chand Sood,** (2001) 8 SCC 151; some English decisions and it heavily relied upon the judgment in **Arun Kumar Agrawal & Anr. v. National Insurance Company Limited.,** (2010) 9 SCC 218 to hold that it is difficult to value the services rendered by a wife and a mother. It did not follow Clause 6 (b) of the second Schedule to the M.V. Act to take one-third of the surviving spouse's income as taken in **Arun Kumar Agrawal** (supra) as the Hon'le Supreme Court in the aforesaid decision had lamented that taking one-third of the surviving spouse's income was not based on any sound principle.

6. The Tribunal relied on Lata Wadhwa whereby value of the services rendered by a housewife aged upto 59 years was taken as Rs.3,000/-. The Tribunal doubled it to Rs. 6,000/- on account of inflation as **Lata Wadhwa** (supra) was decided in the year 2001 selected a multiplier of '15' and after deduction of one-third towards the personal living expenses, computed the loss of dependency as Rs.7,20,000/-. The Tribunal further awarded a sum of Rs.1,00,000/- towards loss of love and affection, Rs.25,000/- towards funeral charges and Rs. 5,000/- towards loss to estate to compute the overall compensation as Rs.8,50,000/-. There is no Appeal by the Claimants.

7. Section 168 of the Act enjoins the Claims Tribunal to hold an inquiry into the claim to make an award determining the amount of compensation which appears to it to be just and reasonable. It has to be borne in mind that the compensation is not expected to be a windfall or a bonanza nor it should be niggardly. In **Helen C. Rebello v. Maharashtra**

SRTC, 1999 (1) SCC 90, the Supreme Court held that *"the Court and Tribunals have a duty to weigh the various factors and quantify the amount of compensation, which should be just. What would be "just" compensation is a vexed question. There can be no golden rule applicable to all cases for measuring the value of human life or a limb. Measure of damages cannot be arrived at by precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar or special features, if any."*

8. First of all, I would deal with Clause 6 (b) of the second Schedule to the M.V. Act (under Section 163A) which provides that the income of a non-earning spouse, who has died, may be taken as one-third of the income of the surviving spouse. It goes without saying that similar kind of services is rendered by a home maker whether in the middle or in the low income group. Is there any justification to relate the income of the housewife to that of her husband?

9. To give an example there is a senior Clerk 'A', a Junior level Officer 'B' and a middle level Officer 'C' working with the Govt.; A,B and C draw a salary of Rs. 15,000/-, Rs.30,000/- and Rs. 60,000/- respectively. The wives of all the three are looking after their respective homes and caring for the children. All of them are Graduates. If we apply the criterion as laid down in the second Schedule, the value of services rendered in case of 'A', 'B' and 'C' would be Rs.5,000/-, Rs.10,000/- and Rs.20,000/- per month respectively. The husband and the children would be entitled to compensation on the assumed loss of dependency as mentioned above. There would be wide disparity in the award of compensation.

10. In the three examples quoted above, although the deceased's spouse might be rendering the same services for the husband and the children, i.e. to cook food, to buy clothes, wash and iron them, to work as a tutor for the children, to give necessary instructions to the children as to their upbringing, and so on. The compensation awarded in the case of 'A' would be X amount; in case of 'B' would be 2X amount and in case of 'C' would be 4X amount.

11. Similarly, take an example of X,Y and Z who are in their respective enterprises and earning Rs. 5 lacs, Rs. 10 lacs and Rs. 15 lacs per annum respectively. Not only there would be wide disparity in the

grant of compensation in respect of the death of their spouse, the compensation awarded for loss of services rendered by a housewife of a husband in a very high bracket based on this principle may be unjust enrichment. Again there may be cases where if the husband is having a very high income his wife really might not be contributing so much towards the home making. Thus, I am of the view that a readymade formula given in Clause 6 (b) of the second Schedule cannot be adopted to award just and fair compensation which is the very basis of an award passed under Section 168 of the M.V. Act.

12. In the case of **General Manager, Kerala State Road Transport Corporation, Trivandrum v. Susamma Thomas (Mrs.) and Ors.** (1994) 2 SCC 176, it was held as under:-

> "5.....The determination of the quantum must answer what contemporary society "would deem to be a fair sum such as would allow the wrongdoer to hold up his head among his neighbours and say with their approval that he has done the fair thing". The amount awarded must not be niggardly since the law values life and limb in a free society in generous scales'. All this means that the sum awarded must be fair and reasonable by accepted legal standards."

13. In Arun Kumar Agrawal the Supreme Court referred to Kemp and Kemp on Quantum of Damages, (Special Edn., 1986), **Berry v. Humm & Co.,** (1915) 1 KB 627 and **Mehmet v. Perry,** (1977) 2 All ER 529 (DC). Paras 22, 23, 25 and 26 of the report are extracted hereunder:-

> "22. We may now deal with the question formulated in the opening paragraph of this judgment. In Kemp and Kemp on Quantum of Damages, (Special Edition - 1986), the authors have identified various heads under which the husband can claim compensation on the death of his wife. These include loss of the wife's contribution to the household from her earnings, the additional expenses incurred or likely to be incurred by having the household run by a house-keeper or servant, instead of the wife, the expenses incurred in buying clothes for the children instead of having them made by the wife, and similarly having his own clothes mended or stitched elsewhere than by his wife,

and the loss of that element of security provided to the husband where his employment was insecure or his health was bad and where the wife could go out and work for a living.

23. In England the courts used to award damages solely on the basis of pecuniary loss to family due to the demise of the wife. A departure from this rule came to be made in **Berry v. Humm and Co.** (1915) 1 K.B. 627 where the plaintiff claimed damages for the death of his wife caused due to the negligence of the defendant's servants. After taking cognizance of some precedents, the learned Judge observed:

> I can see no reason in principle why such pecuniary loss should be limited to the value of money lost, or the money value of things lost, as contributions of food or clothing, and why I should be bound to exclude the monetary loss incurred by replacing services rendered gratuitously by a relative, if there was a reasonable prospect of their being rendered freely in the future but for the death.

x x x x x x x x x x x x

25. In Mehmet v. Perry, the pecuniary value of a wife's services were assessed and granted under the following heads:

> (a) Loss to the family of the wife's housekeeping services.
>
> (b) Loss suffered by the children of the personal attention of their mother, apart from housekeeping services rendered by her.
>
> (c) Loss of the wife's personal care and attention, which the husband had suffered, in addition to the loss of her housekeeping services.

26. In India the Courts have recognised that the contribution made by the wife to the house is invaluable and cannot be computed in terms of money. The gratuitous services rendered by wife with true love and affection to the children and her husband and managing the household affairs cannot be equated with the services rendered by others. A wife/mother does not work by the clock. She is in the constant attendance of the family throughout the day and night unless she is employed and

is required to attend the employer's work for particular hours. She takes care of all the requirements of husband and children including cooking of food, washing of clothes, etc. She teaches small children and provides invaluable guidance to them for their future life. A housekeeper or maidservant can do the household work, such as cooking food, washing clothes and utensils, keeping the house clean etc., but she can never be a substitute for a wife/mother who renders selfless service to her husband and children."

14. The Supreme Court observed that in view of the multifarious services rendered by the housewife, it is difficult to value those services in terms of money. But then some estimate has to be made in terms of money to award compensation. In Para 27 of the report, the Supreme Court said as under:-

> "27. It is not possible to quantify any amount in lieu of the services rendered by the wife/mother to the family i.e. husband and children. However, for the purpose of award of compensation to the dependents, some pecuniary estimate has to be made of the services of housewife/mother. In that context, the term 'services' is required to be given a broad meaning and must be construed by taking into account the loss of personal care and attention given by the deceased to her children as a mother and to her husband as a wife. They are entitled to adequate compensation in lieu of the loss of gratuitous services rendered by the deceased. The amount payable to the dependants cannot be diminished on the ground that some close relation like a grandmother may volunteer to render some of the services to the family which the deceased was giving earlier."

15. The Supreme Court referred to the judgment passed by the Madras High Court in **National Insurance Company Limited v. Deepika & Ors.,** 2010 (4) ACJ 2221. Para 54 to 57 of the judgment in Arun Kumar Agrawal are extracted hereunder:-

> "54. India is a signatory to the said Convention and ratified the CEDAW Convention on 9.7.1993. But even then no law has been made for proper evaluation of the household work by women as homemakers.

55. The Madras High Court in **Deepika** (supra) has observed very pertinently:

> "9. The UNICEF in 2000, noted that 'unpaid care work is the foundation of human experience'. The care work is that which is done by a woman as a mother and definitely in India, the woman herself will be the last person to give this role an economic value, given the social concept of the role of a mother. But when we are evaluating the loss suffered by the child because her mother died in an accident, we think we must give a monetary value to the work of a caregiver, for afterall, the home is the basic unit on which our civilised society rests."

56. The Madras High Court in its very illuminating judgment in **Deepika** (supra) has further referred to various methods by which the assessment of work of a homemaker can be made and the relevant portion from para 10 of the said judgment is extracted below:

> "10.....that there have been efforts to understand the value of a homemaker's unpaid labour by different methods. One is, the opportunity cost which evaluates her wages by assessing what she would have earned had she not remained at home, viz., the opportunity lost. The second is, the partnership method which assumes that a marriage is an equal economic partnership and in this method, the homemaker's salary is valued at half her husband's salary. Yet another method is to evaluate homemaking by determining how much it would cost to replace the homemaker with paid workers. This is called the Replacement Method."

57. Various aspects of the nature of homemaker's job have been described in para 11 which are very relevant and are extracted below:-

> "11. The role of a housewife includes managing budgets, co-ordinating activities, balancing accounts, helping children with education, managing help at home, nursing care etc. One formula that has been arrived at determines the value

> of the housewife as, Value of housewife = husband's income - wife's income + value of husband's household services, which means the wife's value will increase inversely proportionate to the extent of participation by the husband in the household duties. The Australian Family Property Law provides that while distributing properties in matrimonial matters, for instance, one has to factor in 'the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of a homemaker or parent.."
>
> In para 13, the Division Bench of the High Court has observed and, in my view very rightly, that time has come to scientifically assess the value of the unpaid homemaker both in accident claims and in matters of division of matrimonial properties."

16. In Deepika the value of the services rendered by the housewife was again related to that of the husband. In that case the husband's income was found to be Rs. 5,500/- per month, its 50% i.e. Rs. 2750/- was taken towards domestic services in addition to Rs. 750/- as income from the work carried out by the wife.

17. Earlier in some cases the High Courts took 50% wages of the unskilled / skilled workers and in some cases the entire wages of a skilled worker was taken to make an attempt to arrive at a figure to compute the dependency. The Delhi High Court in **Amar Singh Thukral v. Sandeed Chhatwal,** ILR (2004) 2 Del 1, very reluctantly took the salary of a skilled worker as per the minimum wages applied in Delhi, while observing as under:-

> "....Since there is no scientific method of assessing the contribution of a housewife to her household, in cases such as the present, resort should be had to the wages of a skilled worker as per the Minimum Rates of Wages in Delhi. Although, this may sound uncharitable, if not demeaning to a housewife, there is hardly any other option available in the absence of any statutory guidelines."

18. The Supreme Court in *Arun Kumar Agrawal* did not approve the adoption of the salary of a skilled worker to compute the loss of dependency. In this case, Hon'ble Mr. Justice A.K. Ganguly while penning a separate concurrent judgment expressed hope that the legislature would come with some better method to arrive at the value of the services of the housewife. In para 65 of the report it was observed:-

> "65. For the reasons aforesaid, while agreeing with the views of Brother Singhvi, J., I would humbly add, that time has come for the Parliament to have a rethinking for properly assessing the value of homemakers and householders, work and suitably amending the provisions of Motor Vehicles Act and other related laws for giving compensation when the victim is a woman and a homemaker. Amendments in matrimonial laws may also be made in order to give effect to the mandate of Article 15(1) in the Constitution."

19. In **Lata Wadhwa** (supra) a number of persons including women and children died; the Supreme Court assessed the compensation while taking the value of the services rendered by a housewife between the age group of 22-59 as Rs. 3,000/- per month and in the case of women aged 62 years and above at Rs.21,00/- per annum.

20. The minimum wages of a Graduate at the time of the fire accident in **Lata Wadhwa** (supra) as notified in the State of Delhi were just Rs.898/-. The compensation was awarded in the year 2001 when the minimum wages of a Graduate were Rs.3339/-, of a matriculate were Rs.3027/- and that of a skilled worker were Rs. 3003/-. It is important to note that no interest on the compensation was awarded from the date of the accident till the date of the payment in **Lata Wadhwa** (supra). Many Tribunals and High Courts have adopted the compensation granted in case of **Lata Wadhwa** (supra) to be just and fair in motor accident cases, where the deceased was a house wife. But, the compensation in **Lata Wadhwa** was awarded because there was loss of life of so many women and children when a fire broke out while they were participating in a function organized by Tata Iron & Steel Company. It was not a statutory compensation under the Motor Vehicles Act. Moreover, difficulty also arises as on account of inflation, the wages and salaries have increased manifold. In this case, the Tribunal held that the compensation in **Lata Wadhwa** was awarded in the year 2001 and doubled it to Rs. 6,000/- to

compute the loss of dependency. The Tribunal further deducted one-third of the assumed income towards the personal living expenses and computed the loss of dependency on the income of Rs.4,000/- per month which according to the Appellant is exorbitant and excessive. No deduction was made by the Supreme Court in the assumed value of services rendered at Rs.3,000/- per month while computing the loss of dependency.

21. The services rendered by a housewife cannot be counted; cooking, washing, ironing clothes and stitching clothes (in some cases) for the husband and children, teaching and guiding children, working as a nurse whenever the husband or the child/children are sick, are some of the major activities of a housewife. She has no fixed hours of work; she is always in attendance to take care of each and every need of the whole family at the cost of her personal comfort and health. The services rendered by a housewife may differ from case to case considering her qualification, financial strata and the social status of the family to which she belongs.

22. The Claimants, therefore, must lead evidence to prove the services rendered by a non working female. In the absence of any evidence to the contrary, the value of the services, if I may say so, has to have some relation to the educational qualification of the deceased.

23. Thus, the value of services rendered by a home maker should be taken as the minimum salary of a non-matriculate, matriculate or a Graduate, (in the absence of any evidence to the contrary). In case of a young mother and a wife there should be an addition of 25% of the minimum salary/wages as per the educational qualification i.e. Graduate, matriculate or non-matriculate. There should be addition of 15% in the case of a middle aged mother and a wife and 'NIL' in case of a wife and a mother beyond the age of 50 years as the children become independent by that time. The value of gratuitous services rendered should be gradually reduced after the age of 55 years, even though mothers take care of their children (irrespective of their ages) and even when they (the children) are married.

24. The next question that falls for consideration is whether there should be any deduction towards the personal living expenses of the deceased (Home maker). While awarding damages there is balancing of the loss to the Claimants of the pecuniary benefits with the gain of the

pecuniary advantages which comes to them by reason of death. In **Gobald Motor Service Ltd. & Anr. v. R.M.K. Veluswami & Ors.,** AIR 1962 SC 1, it was observed as under:-

> ".... The general rule which has always prevailed in regard to the assessment of damages under the Fatal Accidents Acts is well settled, namely, that any benefit accruing to a dependant by reason of the relevant death must be taken into account. Under those Acts the balance of loss and gain to a dependant by the death must be ascertained, the position of each dependant being considered separately."

25. In **A. Rajam v. M. Manikya Reddy & Anr.,** MANU/AP/0303/1988, the Hon'ble Mr. Justice M.J. Rao (as he then was) referred to a number of English decisions.

26. In **Morris v. Rigby** (1966) 110 Sol Jo 834, the husband who was a medical officer, earning £ 2,820 a year, claimed damages for the death of his wife. He had five children aged two to fifteen years. He got his wife's sister to come and take care of them and do the domestic duties, paying her a gross wage of £ 20 a week. The judge awarded £ 8,000 and the award was confirmed.

27. The Learned Judge further referred to **Regan v. Williamson** 1977 ACJ 331 (QBD England) where the housekeeper employed was a relative. There, the wife was 37 years when she died and she left behind her husband and four sons aged 13, 10, 7 and 2 years respectively. A relative came daily (except weekends) to provide meals and to look after the boys. She was paid £ 16 per week and it cost the Plaintiff further £ 6.50 per week for her food, journeys to and from her home and for national insurance stamp. The Plaintiff estimated that his wife's loss had cost him £ 10 per week to cloth and feed his children and himself. Watkins, J. held that though, according to precedents, - 22.50 (£ 16+6.50) per week minus £ 10 per week, would be sufficient as justice required that the term 'services' should be widely construed. Watkins, J. observed:-

> "I am, with due respect to the other Judges to whom I have been referred, of the view that the word 'services' has been too narrowly construed. It should, at least, include an acknowledgement that a wife and mother does not work to set hours and, still less, to rule. She is in constant attendance, save

> for those hours when she is, if that is a fact, at work. During some of those hours she may well give the children instructions on essential matters to do with their upbringing and, possibly, with such things as their home work. This sort of attention seems to be as much a service, and probably more valuable to them, than the other kinds of service conventionally so regarded."

.. and hastened to add:- "am aware that there are good mothers and bad mothers. It so happens that I am concerned in the present case with a woman who was a good wife and mother". On the basis, the figure for dependency was raised from £ 12.50 (£ 22.50 -10.0) per week to £ 20 per week and a further sum of £ 1.50 was added for the deceased's financial contribution to the home, had she eventually gone out to work again. A multiplier of 11 was applied as the Plaintiff was 43 years. The award under the Fatal Accidents Act, was £ 1238.

28. Learned Judge further referred to **Mehmet v. Perry** 1978 ACJ 112 (QBD, England), wherein the husband had to look after five children aged 14, 11, 7, 6 and 3 years respectively. The two youngest children suffered from a serious hereditary blood disease requiring medication and frequent visits to the hospital. Consequently, the husband had to give up his employment after his wife's death and devoted his full time to care for the family. Between September, 1973 when his wife was killed and the trial that was conducted in October, 1976, his net average loss of earnings were £ 1,500 a year. His future net loss would be at the rate of £ 2,000 a year. It was held by Brain Neill, QC (sitting as a deputy Judge) that, in view of the medical evidence concerning the health of the children his giving up of his job was proper and that damages should be assessed not at the cost of employing a housekeeper but by reference to the Plaintiff's loss of wages, since the loss of wages represented the cost of providing the services of a full time housekeeper in substitution for his wife. In addition, the children were entitled, on the basis of **Regan v. Williamson** 1977 ACJ 331 (QBD, England), to get £ 1,500 as part of their damages, a sum of £ 1,000 for the loss of 'personal attention' to them by a 'mother' which is distinct from her services as a housekeeper but, that sum must be kept within modest limits as the Plaintiff was at home all the time. The Plaintiff as a husband was also held to be entitled to some damages for his loss of the 'personal care and attention of the wife' but that sum should be quite small to avoid any overlap with the

damages awarded for housekeeping services. The last two children require to support for 12 years, as per medical advice. A multiplier of 8 was adopted for the family as a unit and 12 for the Plaintiff and a sum of £ 19,000 was arrived at.

29. While awarding compensation for loss of gratuitous services rendered by a homemaker the Claims Tribunals or the Court simply value the services. It goes without saying that the husband looks after the wife and some amount is definitely spent on her maintenance. But, whether that amount is liable to be deducted from the value of the gratuitous services rendered by her?

30. As held in **Gobald Motor Service Ltd.** and Helen C. Rebello that while estimating damages, the pecuniary loss has to be arrived at by balancing on the one hand the loss to the Claimants of the future pecuniary benefits that would have accrued to him with the gain of the pecuniary advantages which comes to him from whatever sources by reason of the death.

31. In, **Regan v. Williamson,** the learned Judge found that the expenditure on the deceased housewife was - 10 per week. While the value of gratuitous services rendered by her was £ 22.50 per week. The figure on dependency of £ 12.50 (£ 22.50 - £ 10.0) was taken as - 21.50 per week. Thus, the amount spent on personal living expenditure was not really deducted in Regan v. Williamson.

32. Even on the basis of Gobald Motor Service Ltd. and Helen C. Rebello, the pecuniary advantages which the Claimant gets on account of accidental death is only liable to be deducted. The amount of money paid on account of death by the Life Insurance Corporation was held to be not deductable in Helen C. Rebello.

33. Thus, if a deceased housewife who lost her life in a motor accident would have died a natural death, the pecuniary advantage on account of savings made of the expenditure required for her maintenance would have otherwise also accrued to the benefit of the Claimants. Since this pecuniary advantage does not become receivable only on account of accidental death, in my view, the portion of the husband's income (spent on the deceased's maintenance) cannot be deducted.

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

services rendered by a housewife shall be:-

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

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

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

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

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

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

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

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

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

35. Turning to the facts of this case; the accident took place on

04.11.2009. As per the certificate proved during the inquiry before the Tribunal, the deceased Jasvinder Kaur was a non-matriculate. The minimum wages of a non-matriculate on the date of the accident were '4146/-. She was about 34 years of age. She was rendering gratuitous services towards her husband and three children. The husband also lost his life in this very accident.

36. On the basis of the principles laid down earlier, after an addition of 25% in the wages/salary of a non-Matriculate and on applying the multiplier of '16', the loss of dependency works out as Rs. 9,95,040/- . After adding notional sums of Rs.25,000/- towards loss of love and affection; and Rs.5,000/- towards funeral expenses, the overall compensation comes to Rs. 10,25,040/-.

37. Although the compensation of Rs.8,50,000/- awarded by the Tribunal is less than the compensation which works out based on the principles carved out above, in the absence of any Cross Objections or Cross Appeal by the Respondents Claimants, the award of Rs. 8,50,000/- needs no interference.

38. MAC APP. 590/2011 is accordingly dismissed. No costs.

39. Pending applications also stand disposed of.

MAC.APP. 563/2010

40. In this Appeal the Appellant Oriental Insurance Company Limited challenges the award of compensation of Rs. 11,65,000/- for the death of deceased Urmila @ Dulari. She was aged about 31 years. The Respondents Claimants claimed that apart from household work and taking care of her five children, she was also doing tailoring work.

41. In the absence of any reliable evidence with regard to the tailoring work which was being carried on by the deceased, the value of the gratuitous services rendered by the deceased was taken as Rs.6,000/- per month and on applying the multiplier of '15', the loss of dependency was worked out as Rs.10,80,000/-. After adding notional sums under pecuniary and non-pecuniary heads, an overall compensation of Rs. 11,65,000/- was awarded.

42. No evidence was produced as to the qualification of the deceased. Therefore, the minimum wages of a non-Matriculate will be taken which

were Rs. 4146/- per month on the date of the accident.

43. On the principles culled out in the earlier portion of this judgment, the loss of dependency works out as Rs.9,95,040/- (Rs. 4146/- + 25% x 12 x 16). After adding notional sums of Rs. 25,000/- towards loss of love and affection, Rs.10,000/- towards loss of consortium, and Rs. 5,000/- towards funeral expenses, the overall compensation comes to Rs. 10,35,040/-.

44. The overall compensation is reduced from Rs.11,65,000/- to Rs. 10,35,040/-, which shall be paid to the Respondents No.1 to 6 in terms of the Tribunal's award alongwith the interest @ 7.5% per annum to be paid from the date of the filing of the petition till the date of payment.

45. MAC.APP. 563/2010 is allowed in above terms. No costs.

46. Pending applications also stand disposed of.

MAC.APP. 753/2011

47. This Appeal relates to the death of Ramwati, who was aged about 40 years at the time of the accident. It was claimed that the deceased apart from doing household work was doing sewing work at her home and earned Rs. 4,000/- per month.

48. In the absence of any reliable evidence, the Tribunal took guidance from the judgment of the Supreme Court in **Lata Wadhwa** (supra) and computed the loss of dependency as Rs.3,60,000/-. The overall compensation of Rs.4,10,000/- was awarded.

49. The Appellants did not produce any documentary evidence either with regard to the deceased doing any work of sewing or tailoring or with respect to her qualification. The compensation has to be computed on the basis of salary of a non-Matriculate according to the principles culled out in the earlier part of the judgment. The minimum wages of a non-matriculate on the date of the accident were Rs.4127/-.

50. The loss of dependency is re-assessed as Rs. 9,28,575/- (4127/- + 25% x 12 x 15). After adding notional sums of Rs.25,000/- towards loss of love and affection, instead of Rs.30,000/- (as granted by the Tribunal), and Rs. 10,000/- towards funeral expenses, the overall compensation comes to Rs. 9,63,575/-.

51. The overall compensation is thus enhanced from Rs.4,10,000/- to Rs.9,63,575/-. Respondent No.3 United India Insurance Company Limited is directed to deposit the enhanced amount within 30 days.

52. The compensation awarded shall carry interest @ 7.5% per annum from the date of the filing of the petition till the date of payment and shall be paid to the Appellants No.1 to 3 in the same proportion as given by the Tribunal.

53. MAC.APP. 753/2011 is allowed in above terms. No costs.

54. Pending applications also stand disposed of.

MAC.APP. 772/2011

55. In this Appeal, deceased Sabita Devi died leaving behind, her husband, one major son, three minor sons and one minor daughter.

56. On the basis of **Lata Wadhwa** (supra), the Tribunal took the value of gratuitous services as Rs. 3000/- per month and awarded a sum of Rs.5,76,000/- towards the loss of dependency. After adding notional sums under various conventional heads, an overall compensation of Rs. 6,41,000/- was granted. (There is a clerical mistake in mentioning the total sum of Rs. 6,86,000/- by the Tribunal).

57. There is no documentary evidence with regard to the deceased's educational qualification. Her age as per the Identity Card issued by the Election Commission of India was 33+ years on the date of the accident.

58. The Insurance Company represented the deceased's age to be 37 years. Since deceased left behind a major son, I am not inclined to take her age as 33+ years. I would assume her age to be between 35 to 40 years (at least 35 years) for the purpose of selection of the multiplier.

59. On the basis of the principles laid down earlier, after an addition of 25% in the wages/salary of a non-Matriculate, which were Rs.5850/- on the date of the accident and on applying the multiplier of '15', the loss of dependency works out as Rs. 13,16,250/-. After adding notional sums of Rs.25,000/- towards loss of love and affection, Rs.10,000/- towards loss of consortium and Rs. 5,000/- towards funeral expenses, the overall compensation comes to Rs. 13,56,250/-.

60. The overall compensation is enhanced from Rs. 6,41,000/- to

Rs. 13,56,250/-. Respondent No.3 United India Insurance Company Limited is directed to deposit the enhanced amount within 30 days along with the interest.

61. The compensation awarded shall carry interest @ 7.5% per annum from the date of the order of the Tribunal till the date of payment.

62. The compensation awarded shall be paid to the Appellants No.1 to 6 in terms of the Tribunal's award.

63. MAC APP. 772/2011 is allowed in above terms. No costs.

MAC.APP. 857/2011

64. This Appeal is for enhancement of compensation of Rs. 4,68,300/- awarded by the Claims Tribunal for the death of Dayawati who was aged about 40 years (as per the Ration Card Ex.PW-1/2) on the date of the death on 19.05.2010. She left behind, her husband and five children. Out of the five children, three were minor. There is no Cross Appeal by the Insurance Company.

65. There is no documentary evidence with regard to the deceased's educational qualification. Her age as per the Ration Card, as stated earlier, was 40 years on the date of the accident.

66. On the basis of the principles laid down earlier, after an addition of 25% in the wages/salary of a non-Matriculate, which were Rs.5850/- on the date of the accident and on applying the multiplier of '15', the loss of dependency works out as Rs. 13,16,250/-. (5850/- + 25% X 12 X 15). After adding notional sums of Rs.25,000/- towards loss of love and affection, Rs.10,000/- towards loss of consortium and Rs.5,000/- towards funeral expenses, the overall compensation comes to Rs. 13,56,250/-.

67. The overall compensation is enhanced from Rs.4,68,300/- to Rs. 13,56,250/-. Respondent No.3 ICICI Lombard Insurance Company Limited is directed to deposit the enhanced amount within 30 days along with the interest.

68. The compensation awarded shall carry interest @ 7.5% per annum from the date of the order of the Tribunal till the date of payment.

69. The compensation awarded shall be paid to the Appellants No.1

to 6 in the proportion as awarded by the Tribunal.

70. MAC APP. 857/2011 is allowed in above terms. No costs.

MAC.APP. 289/2010

71. The Appellant New India Assurance Company Limited seeks reduction of the compensation of Rs. 11,97,000/- awarded for the death of Madhu who was aged about 31 years on the date of the accident, which took place on 17.11.2007.

72. During inquiry before the Claims Tribunal it was claimed that the deceased was working as a Computer Editor in Ash Films, Plot No.54, First Floor, Sector-2, Rohini and was drawing a salary of ' 4,600/- per month.

73. In the absence of any cogent evidence, the same was disbelieved by the Claims Tribunal. On the basis of the judgment in **Lata Wadhwa & Ors. v. State of Bihar & Ors.,** (2001) 8 SCC 197, where the income of the housewife for gratuitous services was estimated to be Rs. 3,000/- per month. The Claims Tribunal increased it by 100% on the ground of inflation as **Lata Wadhwa** (supra) was decided in the year 2001; selected a multiplier of '16', computed the loss of dependency as Rs. 11,52,000/-. The Tribunal further awarded a sum of Rs.20,000/- towards loss of love and affection, Rs.10,000/- towards loss of consortium, Rs. 10,000/- towards loss of estate and Rs. 5,000/- towards funeral charges to compute the overall compensation as Rs. 11,97,000/-. There is no Appeal by the Claimants.

74. The deceased shall be considered as a Matriculate as she got a compartment in Senior Secondary School Examination. Her age was established to be 31 years as per the Marksheet Ex.PW-1/1.

75. On the basis of the principles laid down earlier, after addition of 25% in the wages of a Matriculate and on applying the multiplier of '16', the loss of dependency works out as Rs. 9,40,320/- (3918/- + 25% x 12 x 16).

76. After adding a notional sum of Rs. 10,000/- towards loss of consortium, Rs.5,000/- towards funeral expenses and Rs. 25,000/- towards loss of love and affection, the overall compensation is reassessed as Rs. 9,80,320/-.

77. The overall compensation is reduced from Rs. 11,97,000/- to Rs. 9,80,320/-. The excess amount deposited by the Appellant Insurance Company shall be refunded along with interest earned, if any, during the pendency of the Appeal. Statutory amount of Rs. 25,000/- shall also be refunded to the Appellant.

78. 50% of the award amount was ordered to be released in favour of the Respondents Claimants by order dated 26.11.2000. Rest of the amount payable shall be released/held in fixed deposit in terms of the Tribunal's award.

79. MAC.APP. 289/2010 is allowed in above terms. No costs.

80. Pending applications also stand disposed of.

ILR (2012) IV DELHI 570
W.P. (C)

FEDERATION OF PUBLIC SCHOOLS ….PETITIONER

VERSUS

GOVERNMENT OF NCT OF DELHI ….RESPONDENT

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

W.P. (C). NO. : 636/2012 DATE OF DECISION: 31.01.2012

Right of Children to Free and Compulsory Education Act, 2009—Petitioner impugned Rule 10(3) Delhi RTE Rules and alternatively claimed that the Court should frame guidelines for exercise of powers under Rule 10(3) for extending the limits of "neighbourhood" as defined under the Act and the Rules—Although the Act uses the term "neighbourhood", but does not define the same-However, the definition is found in

the Rules, which prescribe the limits of neighbourhood in respect of children of Classes-I to V as within walking distance of 1Km and in respect of Children of Classes-IV to VIII as within 3km—Private unaided schools are required to admit children belonging to EWS and disadvantaged groups in Class-I to the extent of 25% of strength and resident of within the limits of neighbourhood—While admitting general category children, the private unaided schools do not follow the prescribed limits of neighbourhood—However, the respondent issued order directing that all schools shall ensure that no child under EWS and disadvantaged groups is denied admission on neighbourhood basis, so long as the locality of the child's residence falls within the distance criteria devised by the schools for the general category—Challenged—Held, Petitioner has no cause of action as it should not matter to the School whether the children of EWS and disadvantaged groups are residing within 1km or more and the grievance, if any should be of the children for inability of government to provide schools within the neighbourhood—Further held, the paramount purpose is to provide access to education and distance to be travelled by the child is secondary—Directed, admission shall first be offered to eligible students of EWS and disadvantaged groups residing within 1Km; in case vacancies remain unfilled, students residing within 3km shall be admitted; if still vacancies remain, students residing within 6km shall be admitted; and even thereafter if vacancies remain, students residing beyond 6km shall be considered.

We are however of the view that the paramount purpose is to provide access to education. Whether for that access, the child is to travel within 1 Km. or more is secondary. It is apparent from the executive order of the Director of Education and the Notification aforesaid that if the obligation on the private unaided schools to admit children belonging to EWS

and disadvantaged groups is limited to those children only, who are residing within a distance of 1 Km. from the school, the same may result in a large number of such children even though willing for the sake of acquiring education to travel more than 1 Km. being deprived thereof for the reason of there being no seats in the school within their neighbourhood. It may also result in several of the private unaided schools who do not have sufficient number of such children within their defined neighbourhood allocating the seats so remaining unfilled to the general category students.

(Para 10)

We are of the opinion that the criteria aforesaid can be adopted for the purpose of admission under the RTE Act and the Rules aforesaid. The petitioner also, as aforesaid in the alternative has sought guidelines from this Court. We are also of the view that the RTE Act being comparatively recent, and hiccups being faced in implementation thereof, considering the laudable objective thereof, it becomes the bounden duty of this Court to ensure that such hiccups do not defeat the purpose of its enactment. After hearing the counsel for the respondent GNCTD, we direct as under:

(i) Admission shall first be offered to eligible students belonging to EWS and disadvantaged group residing within 1 Km. of the specific schools;

(ii) In case the vacancies remain unfilled, students residing within 3 kms. of the schools shall be admitted;

(iii) If there are still vacancies, then the admission shall be offered to other students residing within 6 kms. of the institutions;

(iv) Students residing beyond 6 kms. shall be admitted only in case vacancies remain unfilled even after considering all the students within 6 kms. area.

(Para 13)

Important Issue Involved: Paramount purpose of RTE Act is to provide access to education and distance to be travelled by the child is secondary.

APPEARANCES:

FOR THE PETITIONER : Mr. N.K. Kaul, Sr. Advocate with Mr. P.D. Gupta, Advocate & Mr. Kamal Gupta, Advocates.

FOR THE RESPONDENT : Ms. Purnima Maheshwari, Advocate for GNCTD. Mr. Ashok Agarwal, Advocate as Intervener.

CASE REFERRED TO:

1. *Social Jurist* vs. *Govt. of NCT of Delhi* W.P.(C) No.3156/2002.

RESULT: Petition Disposed of.

A.K. SIKRI, THE ACTING CHIEF JUSTICE

1. W.P.(C) No.636/2012 is preferred on behalf of approximately 326 private unaided recognized schools functioning in Delhi impugning the Notification No.F.15(172)/DE/ACT/2011/7290-7304 dated 27.01.2012 issued by the Lieutenant Governor of Delhi in exercise of powers conferred under Section 35 and 38 of the Right of Children to Free and Compulsory Education Act, 2009 (RTE Act) read with Sub-Rule 3 of Rule 10 of Delhi Right of Children to Free and Compulsory Education Rules, 2011 (hereinafter called Delhi RTE Rules). The petition also impugns Rule 10(3) of the Delhi RTE Rules. The petitioner alternatively has claimed that this Court should lay down Guidelines and pre-conditions for exercise of power under Rule 10(3) of the Delhi RTE Rules for extending the limits / area of "neighbourhood" as defined under the RTE Act and the Delhi RTE Rules.

2. The RTE Act was enacted in implementation of the mandate and spirit of Article 21A of the Constitution of India inserted vide 86th Amendment Act, 2002. Article 21A provides for free and compulsory education of all children in the age group of 6 to 14 years as a Fundamental Right. To achieve this goal, Section 12(1)(c) requires private unaided

schools, some of which in Delhi are represented by the petitioner to admit in Class-I , to the extent of at least 25% of the strength of that class, children belonging to Economically Weaker Sections (EWS) and disadvantaged groups in the neighbourhood and provide free and compulsory elementary education till its completion. Such Schools, under Section 12(2) of the RTE Act shall be reimbursed expenditure so incurred by them to the extent of per child expenditure incurred by the State or the actual amount charged from the child whichever is less. Since some Schools were already under obligation (as per the term of allotment of land to them) to provide free education to a specified number of children, the second proviso to Section 12 (2) provides that the Schools shall be not entitled to reimburse to the extent of the said obligation.

3. Though the RTE Act in Section 12 (supra) and also elsewhere uses the word "neighbourhood" but does not define the same. Such definition is however to be found in the Right of Children to Free and Compulsory Education Rules, 2010 (RTE Rules) which prescribe the limit of neighbourhood in respect of children in Classes-I to V as within walking distance of 1 Km. and in respect of children in Classes VI to VIII as within 3 Kms. The Delhi RTE Rules also similarly prescribe the limits of neighbourhood as radial distance of 1 Km. from the residence of child in Classes I to V and radial distance of 3 Kms. from the residence of the child in Classes VI to VIII. Thus the private unaided schools members of the petitioner under the Act and the Rules aforesaid are required to admit children belonging to the EWS and disadvantaged groups in Class I to the extent of 25% of the strength and resident of within the limits of neighbourhood aforesaid.

4. The respondent through Director of Education, however vide order dated 16.12.2011 directed as follows:

> "All schools shall ensure that no child under economically weaker sections and disadvantaged group is denied admission on neighbourhood / distance basis so long as the locality of the child's residence falls within the distance criteria devised by the schools for the general category children."

It being a common ground that the private unaided schools while admitting general category children does not follow the limits of neighbourhood as prescribed for the children from EWS and disadvantaged groups, the

aforesaid order mandated extending the limits of neighbourhood for the children belonging to EWS and disadvantaged groups.

5. The petitioner filed W.P.(C) 40/2012 impugning the said order and the learned Single Judge of this Court while issuing notice of the said writ petition, on the contention of the petitioner that the Director of Education could not have vide order aforesaid extended the limits of neighbourhood as prescribed in the Rules, as an ad interim measure stayed the operation of the same. The said writ petition is listed next before the learned Single Judge on 10.02.2012.

6. However, now the Notification dated 27.01.2012 (impugned in this petition) has been issued extending the limit of neighbourhood. Apparently, the said Notification has been issued to get over the challenge in W.P.(C) No.40/2012 on the ground of the Director of Education being not entitled to extend the limits of neighbourhood by an executive order.

7. Mr. N.K. Kaul, Senior counsel for the petitioner has contended that once the definition of neighourhood is to be understood in the same manner as applicable to students of general category, it would mean that there is no distance prescribed at all and even the children belonging to the EWS and disadvantaged group who are residing at far away places would have to be admitted by the private unaided schools. He contends that the same is not only violative of the Rules aforesaid but also goes against the very scheme of the Act. Our attention is drawn to the report of April, 2010 of the Committee on Implementation of the RTE Act and to the 213th Report on the RTE Bill of the department related Parliament Standing Committee of Human Resource Development and which report was presented to the Rajya Sabha. Therefrom, it is pointed out that concerns and apprehensions were expressed about the distance / time for commutation and need was felt to define neighbourhood appropriately to also ensure access to education within reasonable reach of children. It is also contended that admission in far way schools may lead to high dropout rate. The senior counsel for the petitioner contends that the Notification aforesaid and Rule 10(3) of the Delhi RTE Rules (which enables the Government to for the purposes of filling up the requisite percentage of seats reserved for children of EWS and disadvantaged groups extend the limits of neighbourhood from time to time) in exercise of powers whereunder the same has been issued are ulra vires the RTE Act, the RTE Rules as well as the Delhi RTE Rules and the spirit of

neighbourhood school.

8. We have at the outset enquired as to what is the cause of action or the reason for the private unaided schools to be aggrieved from the Notification aforesaid or the extension of the limits of neighbourhood; it is not in dispute that the said private unaided schools under the Act and the Rules aforesaid are obliged to fill up 25% of the seats in Class I and / or at the entry level if below Class I from children belonging to EWS and disadvantaged groups – it should not matter to the School whether such children are residing within a distance of one kilometer or more. The grievance if any should be of the children and/ or their parents for the inability of the Government, inspite of legislation, being unable to provide schools within the neighbourhood as defined.

9. Though the senior counsel for the petitioner has been unable to show as to how the private unaided schools are affected, he has contended that being a stakeholder, they are interested in compliance of the laws. It is argued that the Notification and the exercise of power under Rule 10(3) of the Delhi RTE Rules to the extent of doing away rather than extending the limits of neighbourhood is bad.

10. We are however of the view that the paramount purpose is to provide access to education. Whether for that access, the child is to travel within 1 Km. or more is secondary. It is apparent from the executive order of the Director of Education and the Notification aforesaid that if the obligation on the private unaided schools to admit children belonging to EWS and disadvantaged groups is limited to those children only, who are residing within a distance of 1 Km. from the school, the same may result in a large number of such children even though willing for the sake of acquiring education to travel more than 1 Km. being deprived thereof for the reason of there being no seats in the school within their neighbourhood. It may also result in several of the private unaided schools who do not have sufficient number of such children within their defined neighbourhood allocating the seats so remaining unfilled to the general category students.

11. In the circumstances, we at the instance of the private unaided schools who are not found to be aggrieved from the Notification aforesaid not inclined to entertain W.P.(C) No.636/2012 challenging the same.

12. We also find that the problem already stands answered by a

formula devised by the Division Bench of this Court in its judgment dated 30.05.2007 in W.P.(C) No.3156/2002 titled **Social Jurist Vs. Govt. of NCT of Delhi.** No doubt that writ petition was filed before the RTE Act had been enacted. However, the issue was almost identical in nature. The said judgment was rendered in a public interest litigation mandating the Schools who had been allotted land on concessional rates to give admission to children belonging to EWS. The issue of distance / neighbourhood had also arisen for consideration while dealing with the said aspect and the following solution was devised:

> "Admission shall be first offered to eligible students from poorer sections residing within 3 kilometers of the institutions. In case vacancies remain unfilled, students residing within 6 kilometers of the institutions shall be admitted. Students residing beyond 6 kilometers shall be offered admission only in case the vacancies remain unfilled even after considering all students within 6 kilometers area."

13. We are of the opinion that the criteria aforesaid can be adopted for the purpose of admission under the RTE Act and the Rules aforesaid. The petitioner also, as aforesaid in the alternative has sought guidelines from this Court. We are also of the view that the RTE Act being comparatively recent, and hiccups being faced in implementation thereof, considering the laudable objective thereof, it becomes the bounden duty of this Court to ensure that such hiccups do not defeat the purpose of its enactment. After hearing the counsel for the respondent GNCTD, we direct as under:

(i) Admission shall first be offered to eligible students belonging to EWS and disadvantaged group residing within 1 Km. of the specific schools;

(ii) In case the vacancies remain unfilled, students residing within 3 kms. of the schools shall be admitted;

(iii) If there are still vacancies, then the admission shall be offered to other students residing within 6 kms. of the institutions;

(iv) Students residing beyond 6 kms. shall be admitted only in case vacancies remain unfilled even after considering all the students within 6 kms. area.

14. The senior counsel for the petitioner has stated that as per the Schedule for admission announced earlier, the admission process is to close soon. He seeks extension thereof, to enable the private unaided schools to make admission in accordance with the guidelines aforesaid.

15. We find merit in the aforesaid contention. Since the clarification / guidelines aforesaid has been issued now we are confident that further two weeks time shall be allowed to the schools to complete the admission process.

16. However, finding that the executive order dated 16.12.2011 earlier issued and which has been stayed in W.P.(C) No.40/2012, we have with the consent of the counsels taken that writ petition also on our board today. The counsel for the petitioner admits that upon issuance of the Notification challenged in W.P.(C) No.636/2012, W.P.(C) No.40/2012 has become infructuous.

17. Accordingly, W.P.(C) No.636/2012 is disposed of in terms of above and W.P.(C) No.40/2012 is disposed of as infructuous.

ILR (2012) IV DELHI 578
RFA

MUKHINDER SINGH (DECEASED) THROUGH LRs. & ORS. ….APPELLANTS

VERSUS

GURBUX SINGH & ORS. ….RESPONDENTS

(VALMIKI J. MEHTA, J.)

RFA NO. : 377/2010 DATE OF DECISION: 02.02.2012

(A) Code of Civil Procedure, 1908—Suit for possession and mesne profit—The predecessor in interest late Sardar Sohan Singh, the father of plaintiff Nos. 1 and

2 as also the defendant Nos. 2 to 5 was a member of a Cooperative Society—On 14.01.1952 Sardar Sohan Singh was allotted the suit plot admeasuring 4132 sq. yds and an agreement was entered into by Sardar Sohan Singh with the Society—Pleaded that Sardar Sohan Singh paid the entire consideration with respect to the plot—Sardar Sohan Singh was stated to have friendly relations with Sir Sobha Singh, the father of defendant no.1/respondent no.1—Both of them were also partners in a partnership firm plans for construction were got sanctioned from appropriate authorities on an application made on behalf of Sardar Sohan Singh and the task of constructing the building was entrusted by Sardar Sohan Singh to Sir Sobha Singh—Further, pleaded that the construction material from which the residential house on the suit plot was made was utilized out of the material of the partnership firm—After construction, the property was entrusted by Sardar Sohan Singh to Sir Sobha Singh for managing the property—Further pleaded that Sardar Sohan Singh continued to remain the owner of the plot in the records of the Society—Further pleaded in the plaint that the Society wrongly transferred the Suit plot by a sale deed in the name of defendant no.1/respondent no.1 on account of fraud and collusion—Execution of the sale deed in favour of defendant no.1/respondent no.1 was contrary to the rules and regulations of the Cooperative Society—When Sardar Sohan Singh approached the Society for executing the sale deed of the suit plot in his name, the Society informed Sardar Sohan Singh that the sale deed with respect to the suit plot had already been executed in favour of defendant no.1/respondent no.1 and thus, the existence of the sale deed come to the Knowledge of Sardar Sohan Singh and the plaintiffs—Defendant No. 1/respondent No. 1 after retiring from Indian Army in about 1964, came into the possession of the house constructed on the suit plot and has been living there

since then—On the basis of aforesaid facts, claiming that the cause of action had arisen either in January, 1964 or on 25.05.1963, the subject suit for possession and mesne profits come to be filed—Suit was contested—Contended that Sardar Sohan Singh after making initial payment of the cost of the plot, was not in a position to make construction on the plot which was a necessary requirement of the terms of allotment that construction must be completed within a specified period of time—On account of inability of Sardar Sohan Singh to complete the construction there was consequently a threat of cancellation of the allotment and forfeiture of the money paid—On account of such threat of cancellation of the allotment and forfeiture of the amounts which were paid by Sardar Sohan Singh to the Society, Sardar Sohan Singh agreed to mutation of the plot in the name of the defendant no.1/respondent no.1 the son of Sir Sobha Singh—Sardar Sohan Singh wrote his letter dated 4.10.1954 to the Society to transfer the membership and the plot in the name of the defendant no.1/respondent no.1-By a resolution number 3-C passed in the meeting held on 13.10.1954, the Society agreed to transfer the suit plot in the name of defendant no.1/respondent. No.1 pursuant to the letter dated 4.10.1954 written by Sardar Sohan Singh to the Society—Sir Sobha Singh never acted as an attorney or an agent of Sardar Sohan Singh and, the fact of the matter was that Sir Sobha Singh was acting only for and on behalf of his son, the defendant no./respondent no. 1 with the Society—The written statement also denied the alleged plea of fraud and collusion as alleged by the plaintiffs in the plaint—It was further pleaded that as the sale deed was executed in the year 1960, and that right from the year 1960 the plaintiffs were aware of the sale deed having been executed in the name of defendant no.1/respondent no.1 and also of the defendant no.1/respondent no.1 being the owner of the suit property,

the suit filed in the year 1975 was hence, time barred- Suit dismissed—Hence, present appeal—Held:- In the present case, there is admittedly an agreement in writing, dated 14.01.1952 by which the plot was agreed to be transferred/sold to Sardar Sohan Singh and which contained the terms of the transfer. Possession of the plot under this agreement was given to Sardar Sohan Singh. Sardar Sohan Singh paid the consideration as was them payable under this agreement dated 14.01.1952—However the basic requirement of being ready and willing to perform his part of the contract by Sardar Sohan Singh was that he had to make construction on this plot allotted by the Society within the Specific period of time—The construction on the plot was made by Sir Sobha Singh—Therefore, the requirement of Section 53-A to Transfer of property Act, 1882 of readiness to perform his part of the contract was not complied with by Sardar Sohan Singh—No benefit can be derived by Sardar Sohan Singh or now his legal heirs by claiming that Sardar Sohan Singh had effective ownership rights in the suit plot by virtue of the agreement dated 14.01.1952—Sardar Sohan Singh in addition to the fact that he was not ready and willing to perform his part of contract (a necessary requirement of Section 53A) in fact voluntarily gave up his rights in the suit plot and the membership of the Society inasmuch as he stated that he could not make the construction on the suit plot and therefore, gave up his rights in favour of the defendant no.1/respondent no.1 vide letter dated 4.10.1954-By the specific language of section 53-A, rights which are reserved by the seller under the agreement, are not given to the proposed buyer and the Society, having reserved certain rights by requiring constructions to be completed by allottees in a specified time, was fully competent under such reserved right to transfer the plot Construction of the building on the plot was not made for and on behalf of

Sardar Sohan Singh by Sir Sobha Singh by using/spending any alleged monies of Sardar Sohan Singh—Undisputed position which has come record is that there has not been shown any actual transfer of funds by Sardar Sohan Singh either to Sir Sobha Singh or to anybody else for raising of construction on the suit plot Sardar Sohan Singh in his lifetime never filed any suit to claim any right in the Suit property whether by seeking cancellation of the sale deed dated 3.12.1960 or seeking possession of the building thereon—Sardar Sohan Singh also in his lifetime, never revoked the letter dated 4.10.1954 seeking transfer of the membership and transfer of allotment of the suit plot to the defendant No.1. Building was constructed during the years 1957 to 1959 and the sale deed was executed on 3.12.1960 whereas Sardar Sohan Singh expired much later in the year 1974—Thus, it is only the legal heirs of Sardar Sohan Singh who have suddenly woken up after his death hoping that by speculation in litigation, they may be successful and be able to get some benefits.

(B) Transfer of Property Act, 1882—Section 54—An ownership of a property is transferred by means of a registered sale deed as per Section 54—Every sale deed has an effect of divesting the transferor of the ownership of the property and the vesting of the ownership in the transferee—A Sale deed by which the ownership rights in an immovable property are transferred can be ignored only under two circumstances—First, it the sale deed is a nominal transaction or a paper transaction because the parties intended it to be so or secondly, if the document being the sale deed is void ab initio. It is in these two circumstances that it is not necessary to have the sale deed set aside inasmuch as the sale cannot have he effect of transferring ownership—However, in all other cases where it is pleaded that deed is a voidable

document because it ought not to have been executed or there is a fraudulent transfer of title by means of the particular sale deed or for any reason which makes the transfer voidable (and not void), it is necessary that a suit has to be filed for cancellation of such a sale deed within a period of three of years from the date a person comes to know of execution and existence of the sale deed which goes against the interest of such person-This is the mandate of Article 59 of the Limitation Act, 1963—In the facts of the present case, the Knowledge of the appellants/ plaintiff and their predecessor in interest, Sardar Sohan Singh of the existence of the sale deed dated 03.12.1950, is actually from 1960 itself-On registration of the sale deed dated 3.12.1960, the appellants/ plaintiffs and Sardar Sohan Singh in accordance with Section 3 of Transfer of property Act, 1882 were deemed to have notice of the fact that the sale deed was actually executed—Suit of the appellants/plaintiffs, even if the present suit was one for cancellation of the sale deed dated 3.12.1960, would have become barred by 1963, or at best 1965/1966 even if we take the knowledge from the year 1963, as pleaded by the appellants/plaintiff. Once, there cannot be cancellation of the sale deed, the ownership of the defendant no.1/respondent no.1 become final and also the disentitlement of the appellants/plaintiff to the reliefs claimed in the suit of possession and mesne profits.

(C) Indian Evidence Act, 1872—Section 115—Appellants/ plaintiff are estopped from filing the subject suit—As per the provision of Section 115 of a person has a belief that he is the owner of a plot, and such person thereafter builds on the plot having the impression that he is the owner of the plot, and the real owner stands by and allows him to construct on the plot, the real owner is then estopped in law from claiming any rights on the plot once the third person has made

construction on the plot—Sir Sobha Singh was entitled to have an impression that it was the defendant no.1/ respondent no.1 who is the owner of the plot inasmuch as there was a letter dated 4.10.1954 by Sardar Sohan Singh to the society for transfer of the plot and membership and which letter was never revoked—Defendant no.1/respondent no.1 is also the owner of the suit property on the basis of the principal of estoppel enshrined in section 115 of the Evidence Act, 1872.

(D) Limitation Act, 1993—Section 27—As per Section 27 once the limitation for claiming a relief/right with respect to an immovable property expired, the right in the property itself is lost—This provision of Section 27 of the Limitation Act, 1963 is a departure from the normal law of limitation, and as per which normal law of limitation on expiry of limitation, right is not lost but only the entitlement to approach the Court is lost—Once it was clear to the plaintiff/appellants that from the year 1960 ownership in the suit property was being claimed by defendant no.1/respondent no.1 the period of 12 years for the appellants/plaintiffs to have filed a suit for possession with respect to this property under Article 65 commenced in 1960 itself—Once the limitation commenced in the year 1960, by the year 1972, the right to approach the Court by means of a suit for possession governed by Article 65 of the Limitation Act, 1963 was lost—Once the right is lost in the year 1972, the subject suit having been filed in the year 1975, the ownership of the defendant no.1/ respondent no.1 becomes absolute by virtue of law of prescription contained in Section 27 of the Limitation Act, 1963—In view of the above, no. merit in the appeal, which is accordingly dismissed.

Now, on the aspect as to who incurred the construction cost for making the building on the suit plot between the years

1957 to 1959 i.e. whether the construction was made by Sir Sobha Singh for and on behalf of Sardar Sohan Singh or it was made by Sir Sobha Singh for and on behalf of his son-the defendant no.1/respondent no.1. Before proceeding further, I may at this stage itself mention that the undisputed position which has come on record is that actually no moneys were paid specifically with respect to construction of the building on the plot by Sardar Sohan Singh to Sir Sobha Singh. The case as put up on behalf of the plaintiffs/appellants was that construction was made on the suit plot by Sir Sobha Singh out of the funds of Sardar Sohan Singh lying to the latter's credit in the partnership firm. There is also a related aspect that the construction is stated to have been made out of the materials of the partnership firm. Let us examine these aspects. **(Para 8)**

Important Issue Involved: A Civil case is decided on balance of probabilities-The balance of probabilities in the present case shows that it is the defendant no.1/respondent no.1 who was the owner of the property-The defendant no.1/respondent no.1 and his father-Sir Sobha Singh have represented themselves to the world at large as the owners from the year 1960 and which aspect was never challenged by the appellants or their predecessor-In-interest within the period of limitation-Any alleged rights/ownership claims are thereby destroyed-Also even assuming there is a fraud which is played upon a person, even with respect to such fraud, the necessary action. In law has to take place within three years under Article 113 of the Limitation Act, 1963 and if such an action is not taken, a person cannot interminably seek disentitlement to the ownership of another person on the ground of fraud when there is a proper registered sale deed, which is in this case is of the year 1960 i.e. about 52 years back. Also as already observed above, this litigation has been initiated after the death of Sardar Sohan Singh, and who in his lifetime did not file a suit claiming rights in the suit property.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANTS : Mr. Rajiv Sawhney. Senior Advocate with Mr. Gourav Duggal, Advocate and Mr. Vineet Jhanji, Advocate.

FOR THE RESPONDENT : Mr. Amit S. Chadha, Senior Advocate with Mr. Kunal Sinha. Advocate for respondent No.1.

CASES REFERRED TO:

1. *Ramrameshwari Devi and Others* vs. *Nirmala Devi and Others,* (2011) 8 SCC 249.
2. *Prem Singh* vs. *Birbal* 2006 (5) SCC 353.
3. *Salem Advocate Bar Association* vs. *Union of India* (2005)6 SCC 344.
4. *Balavant N. Viswamitra and Ors.* vs. *Yadav Sadashiv Mule (deceased by L.Rs.) and others,* AIR 2004 SC 4377.
5. *D. N. Venkatarayappa and Anr.* vs. *State of Karnataka & Ors.* (1997) 7 SCC 567.
6. *Harbans Kaur & Ors.* vs. *Bhola Nath & Anr.* 57(1995) DLT 101.

RESULT: Appeal dismissed.

VALMIKI J. MEHTA, J. (ORAL)

1. This Regular First Appeal (RFA), filed under Section 96 of Code of Civil Procedure, 1908 (CPC), impugns the judgment of the trial Court dated 14.1.2010 dismissing the suit of the plaintiffs (late plaintiff No.1-Shri Mukhinder Singh and others) who are legal heirs of late Sardar Sohan Singh. By the suit the plaintiffs claimed possession of the suit property being plot No. 8, Friends Colony, New Delhi measuring 4132 sq. yds. alongwith the building constructed thereon. Besides praying for the relief of possession, mesne profits were also claimed. The suit was filed against the defendant no.1/respondent no.1-Sh. Gurbux Singh who was a resident of the suit property and was claiming ownership rights therein. The defendant Nos.2 to 5 are the other legal heirs of late Sardar

Sohan Singh. For the sake of convenience, reference in this judgment to the appellants would mean reference to the original plaintiffs. This I am stating because one of the plaintiffs i.e. plaintiff No. 1-Sh. Mukhinder Singh expired during the pendency of the suit and whose legal heirs were consequently brought on record.

2. The case of the plaintiffs as set out in the plaint was that their predecessor-in-interest late Sardar Sohan Singh, the father of plaintiff Nos.1 and 2 as also the defendant Nos.2 to 5 (defendant No. 2 being one other son and defendant Nos.3 to 5 being the daughters, plaintiff Nos.3 and 4 are the sons of plaintiff No.1-Sh. Mukhinder Singh and plaintiff No.5 is the son of plaintiff No.2-Sh. Sukhinder Singh), was a member of a Cooperative Society known as Nathu Ram Friends Colony Co-operative House Building Society. Sardar Sohan Singh became a member of this Cooperative society on 16.1.1950. On 14.1.1952 Sardar Sohan Singh was allotted the suit plot admeasuring 4132 sq. yds and an agreement was entered into by Sardar Sohan Singh with the society. It was pleaded that the said Sardar Sohan Singh paid the entire consideration with respect to the plot being the amount of Rs. 11,824/-. Sardar Sohan Singh was stated to have friendly relations with Sir Sobha Singh, who was the father of defendant no.1/respondent no.1 and both of them were also partners in a partnership firm which was engaged in construction (the name of this firm has not come either in the pleadings or in the evidence of the parties). It was further pleaded that Sir Sobha Singh was entrusted by late Sardar Sohan Singh the task to correspond and deal with the society in all matters pertaining to the suit plot and the physical possession of the plot was also accordingly with Sir Sobha Singh. The plans for construction were got sanctioned from appropriate authorities on an application made on behalf of Sardar Sohan Singh and the task of constructing the building was entrusted by Sardar Sohan Singh to Sir Sobha Singh. It was further pleaded that the construction material from which the residential house on the suit plot was made was utilized out of the material of the partnership firm in which Sir Sobha Singh and Sardar Sohan Singh were partners alongwith one G.S. Banga. It was further averred that on the basis of the aforesaid understanding Sir Sobha Singh started construction of the house for and on behalf of Sardar Sohan Singh and after construction, the property was entrusted by Sardar Sohan Singh to Sir Sobha Singh for managing the property in the best interest of Sardar Sohan Singh. It is further pleaded that Sardar Sohan

Singh continued to remain the owner of the plot in the records of the society. It is further pleaded in the plaint that the society wrongly transferred the suit plot by a sale deed dated 3.12.1960 in the name of defendant no.1/respondent no.1 on account of fraud and collusion and hence this action of the Society was not binding on Sardar Sohan Singh. It was also alleged that the execution of the sale deed in favour of defendant no.1/respondent no.1 was contrary to the rules and regulations of the cooperative society. It was then pleaded that on or about 14.5.1963 when Sardar Sohan Singh approached the society for executing the sale deed of the suit plot in his name, the society by its letter dated 23.5.1963 informed Sardar Sohan Singh that the sale deed with respect to the suit plot had already been executed in favour of defendant no.1/respondent no.1 on 3.12.1960, and that thus only on 23.5.1963/25.5.1963 the existence of the sale deed dated 3.12.1960 came to the knowledge of Sardar Sohan Singh and the plaintiffs. It was pleaded that defendant No. 1/respondent No.1 after retiring from Indian Army in about 1964 came into the possession of the house constructed on the suit plot (the plot and the building hereinafter referred to together as the 'suit property') and has been living there since then. There was further reference in the suit of certain litigation initiated by the society against the parties to the present suit, however, the same is not material for the disposal of the present appeal. Suffice to say that the said suit filed by the society has been dismissed in default and for non-prosecution. In the said suit, the society had however supported the present defendant No. 1/respondent No.1-Sh. Gurbux Singh. While referring to this suit filed by the society it will be necessary to mention that all the parties to the present suit were the defendants in the suit filed by the society and the exhibit marks of the documents and the depositions of the witnesses referred to in the present suit and in this appeal are those in the society's suit as the society's suit was consolidated with the subject suit and evidence was led in the suit which was filed by the society. The numbering of the exhibited documents which will be thus referred to would be a bit incongruous initially in view of the said position. On the basis of the aforesaid facts, claiming that the cause of action had arisen either in January, 1964 or on 25.5.1963, the subject suit for possession and mesne profits came to be filed.

3. The suit was contested by the defendant no.1/respondent No.1. There were various defences, however, the golden thread which runs

through the defence on merits was that Sardar Sohan Singh after making initial payment of the cost of the plot, was not in a position to make construction on the plot, and which was a necessary requirement of the terms of the allotment that construction must be completed within a specified period of time, and on account of inability of Sardar Sohan Singh to complete the construction there was consequently a threat of cancellation of the allotment and forfeiture of the moneys paid. It was pleaded that on account of such threat of cancellation of the allotment and forfeiture of the amounts which were paid by Sardar Sohan Singh to the society, Sardar Sohan Singh agreed to mutation of the plot in the name of the defendant no.1/respondent no.1, the son of Sir Sobha Singh, a close friend of Sardar Sohan Singh. In furtherance of the intention/ desire of Sardar Sohan Singh for mutation, he wrote his letter dated 4.10.1954 to the society to transfer the membership and the plot in the name of the defendant no.1/respondent no.1. The further case of defendant no.1/respondent no.1 in the written statement was that by a resolution number 3-C passed in the meeting held on 13.10.1954, the society agreed to transfer the suit plot in the name of defendant no.1/respondent no.1 pursuant to the letter dated 4.10.1954 written by Sardar Sohan Singh to the society. This letter dated 4.10.1954 stated that defendant no.1/ respondent no.1/Gurbux Singh was the 'nephew' of Sardar Sohan Singh and which relationship was stated inasmuch as, as per the then existing rules of the society (which were subsequently amended to include transfer to a non-blood relation) the plot allotted to a member could only be transferred to a close relation. The defendant no.1/respondent no.1 vide its letter dated 20.10.1954 sent the complete arrears due to the society payable as on that date, being the amount of Rs. 1180/-, and requested the society to transfer the plot in his name. The society by its letter dated 22.11.1954 informed Sardar Sohan Singh about payment of dues by the defendant no.1/respondent no.1 and also of payment of the membership fee with the cost of the share. It was pleaded that by this letter dated 22.11.1954, Sardar Sohan Singh was informed by the society that defendant no.1/respondent no.1 was allotted the suit plot. It was thereafter pleaded in the written statement that Sir Sobha Singh never acted as an attorney or an agent of Sardar Sohan Singh and, the fact of the matter was that Sir Sobha Singh was acting only for and on behalf of his son, the defendant no.1/respondent no.1, with the society. The defendant no.1/ respondent no.1 also denied that any funds were spent by Sardar Sohan

Singh for construction, much less from the alleged partnership in which Sardar Sohan Singh and Sir Sobha Singh were the partners. It is further pleaded that the payments made by Sardar Sohan Singh totaling to '50,000/ - towards his capital in the partnership firm was an issue of the partnership firm and the same had no co-relation with the ownership of the suit plot or the construction made thereon. It was further pleaded that the society by means of a proper resolution transferred the membership of the society to defendant no.1/respondent no.1, issued a membership certificate, and thereafter executed a sale deed dated 3.12.1960 in favour of defendant no.1/respondent no.1 which was duly registered with the concerned Sub-Registrar. The resolution of the General Body of the society confirming the transfer of the suit property to defendant No. 1/respondent No.1 was stated to be dated 13.12.1959. It was further pleaded that the entire construction was made between the years 1957 to 1959 by late Sir Sobha Singh out of his own funds, for and on behalf of his son-defendant no.1/respondent no.1/Sh. Gurbux Singh. The written statement also denied the alleged plea of fraud and collusion as alleged by the plaintiffs in the plaint. It was further pleaded that as the sale deed was executed in the year 1960, and that right from the year 1960 the plaintiffs were aware of the sale deed having been executed in the name of defendant no.1/ respondent no.1 and also of the defendant no.1/respondent no.1 being the owner of the suit property, the suit filed in the year 1975 was hence time barred.

4. After completion of pleadings, the trial Court framed issues on 10.12.1976. Additional issues were framed on 20.9.1984. These issues read as under:-

"1. Whether the court fee has been properly paid?

2. Whether the suit is not maintainable in the present form?

3. Whether this court has no jurisdiction to try the suit?

4. Whether the suit is bad for non-joinder or mis-joinder or multifariousness of parties, as alleged by the contesting defendant?

5. Whether the plaintiffs constitute a joint Hindu Family as alleged in the plaint?

6. Whether the suit is liable to be stayed under section 10 of the

C.P.C. as alleged by the contesting defendant?

7. Whether the suit is within limitation?

8. Whether the plaintiffs are stopped from filing this suit on the grounds alleged by defendant no.1?

9. Whether late S. Sohan Singh was allotted plot no.8, Friends Colony, New Delhi by the Society and was given possession thereof, as alleged?

10. Was the plot in question transferred to defendant no.1 by the society, as alleged by the contesting defendant?

11. Whether the sale deed of the plot in dispute was fraudulently executed by the Society in favour of defendant no.1, as alleged in the plaint? If so, its effect.

12. Whether the plot in question was allotted to defendant no.1 on 22/11/1954 as alleged in para 25 of the written statement?

13. If the preceding issue is decided in the affirmative, whether defendant no.1is in open possession of the same and had constructed the house thereon?

14. Whether the plaintiffs are entitled to claim mesne profits? If so, for which period and what amount?

15. Relief.

Additional issues framed on 20/09/84:-

1. Whether the house in question was constructed by S. Sobha Singh for and on behalf of S. Sohan Singh from the material left over available with the partnership firm and whether the plaintiff S. Sohan Singh also gave Rs. 30,000/- to S. Sobha Singh towards the construction of the super-structure, as alleged, thus becoming owner of the house?

2. If the plaintiffs are entitled to possession of the property in dispute, is defendant no.1 entitled to any compensation? If so, to what amount would the defendant be entitled?

3. Whether the plaintiff, S. Sohan Singh, paid full consideration

for the plot no.8, Friends Colony, New Delhi as alleged in paragraph 3 of the plaint?"

5. Before this Court, the arguments were addressed by learned Senior counsel for both the parties under the following basic heads:-

(i) Whether Sardar Sohan Singh had become the owner of the suit plot by virtue of Section 53A of Transfer of Property Act, 1882 as then applicable? This aspect would also cover various other related aspects with respect to actual physical possession or constructive possession or whether the possession of Sir Sobha Singh was as a trustee for and on behalf of Sardar Sohan Singh or for the defendant no.1/respondent no.1, also as to whether the membership of the society was validly transferred to the defendant no.1/respondent no.1 and whether the society passed the necessary resolutions for transferring of membership of the society and the suit plot to defendant no.1/respondent no.1. Included in this head will be whether Sir Sobha Singh acted as an attorney for and on behalf of Sardar Sohan Singh or that he acted only for and on behalf of his son-defendant no.1/respondent no.1/Sh. Gurbux Singh.

(ii) Whether and if the sale deed dated 3.12.1960 was executed by the society in favour of defendant no.1/respondent no.1 on account of fraud and collusion, if so its effect?

(iii) Whether defendant no.1/respondent no.1 was the owner of the property by virtue of principle of estoppel and also by adverse possession.

(iv) Whether the suit of the plaintiffs was barred by time inasmuch as actual notice/knowledge or deemed notice/knowledge of the existence of the sale deed was there of the plaintiffs from 1960 and admittedly since 1963, and the suit which was filed for possession without seeking cancellation of the sale deed dated 3.12.1960 filed in the year 1975 was barred by Article 59 of the Limitation Act, 1963.

6. The first aspect is the aspect with respect to Section 53A of the Transfer of Property Act, 1882 and which section deals with the doctrine of part performance and the rights created thereby in an immovable property. Before proceeding I must state that there is no pleading or any issue framed in the suit on the aspect of Sardar Sohan Singh having rights under Section 53-A however the appellants/plaintiffs in the interest of justice have been allowed to argue on this basis. Under Section 53A,

once there is an agreement in writing signed by the parties containing the terms on which the immovable property has to be transferred, and pursuant to such agreement, the proposed seller receives consideration and transfers possession of the property to the proposed buyer, then notwithstanding that no sale deed has been executed and registered yet the seller of the suit property cannot claim any right, title or interest in such property as against the proposed buyer except the rights reserved under the agreement. In the present case, there is admittedly an agreement in writing, dated 14.1.1952 by which the plot was agreed to be transferred/sold to Sardar Sohan Singh and which contained the terms of the transfer. Possession of the plot under this agreement was given to Sardar Sohan Singh. Sardar Sohan Singh paid the consideration as was then payable under this agreement dated 14.1.1952.

The issue, however, is whether Sardar Sohan Singh had performed and was always ready and willing and continued to be ready and willing to perform all the terms of the contract as contained in the agreement dated 14.1.1952. To this, I must say that the answer has to be in negative. This I say so because the basic requirement of being ready and willing to perform his part of the contract by Sardar Sohan Singh was that he had to make construction on this plot allotted by the society within the specific period of time. The construction on the plot was made by Sir Sobha Singh. The issue as to whether this construction was made by Sir Sobha Singh out of the funds of Sardar Sohan Singh and as a trustee of Sardar Sohan Singh is an aspect which will be discussed by me later, however, it is important to note that on account of his inability to make the constructions, Sardar Sohan Singh vide letter dated 4.10.1954 (Ex.P-28) wrote to the society that the plot and the membership on account of his aforestated inability, be transferred to the defendant no.1/respondent no.1. This letter, Ex.P-28 specifically stated that Sardar Sohan Singh was not in a position to construct the house. Of course, this letter also stated that defendant no.1/respondent no.1 was the nephew of Sardar Sohan Singh and which is factually incorrect, however, the effect of this factually incorrect statement made by the Sardar Sohan Singh has no effect as will be dealt with by me hereafter. Therefore the requirement of Section 53-A of Transfer of Property Act, 1882 of readiness to perform his part of the contract was not complied with by Sardar Sohan Singh and therefore in my opinion no benefit can be derived by Sardar Sohan Singh or now his legal heirs being the appellants/plaintiffs with

respect to the agreement dated 14.1.1952 by claiming that Sardar Sohan Singh had effective ownership rights in the suit plot by virtue of the agreement dated 14.1.1952. Sardar Sohan Singh admittedly did not make any construction on the suit property till 1957. Even after 1957 when construction started on the suit plot and which was completed till 1959 the same was made by Sir Sobha Singh. In fact, a particular amount of arrears was also not paid by Sardar Sohan Singh and which amount of ‘ 1180/- was paid by the defendant no.1/respondent no.1 and even to this extent there is a breach of non-performance by Sardar Sohan Singh of the terms of the agreement dated 14.1.1952.

7. There is, in my opinion, one other very important reason for holding that Sardar Sohan Singh cannot have the benefit of Section 53A of the Transfer of Property Act, 1882. This reason is that rights which are claimed by a proposed buyer under Section 53A; and I am assuming at this stage that all the requirement of Section 53A were complied with by Sardar Sohan Singh; are such rights which till the actual sale deed in terms of Section 54 of Transfer of Property Act, 1882, is executed, can surely be given up by the person in whose favour the agreement to sell which creates rights under Section 53A is entered into. In the present case, by virtue of letter, Ex.P-28 dated 4.10.1954 Sardar Sohan Singh voluntarily gave up his rights under the agreement dated 14.1.1952 with respect to suit property and unfortunately on which agreement a claim is now being made to have rights under the doctrine of part performance enshrined in Section 53A. Surely, a proposed buyer after complying with the requirement of Section 53A, and by which he could have rights in an immovable property, can voluntarily give up such rights. This legal position cannot be doubted. In the facts of the case, Sardar Sohan Singh in addition to the fact that he was not ready and willing to perform his part of contract (a necessary requirement of Section 53A) in fact voluntarily gave up his rights in the suit plot and the membership of the society inasmuch as he stated that he could not make the construction on the suit plot and therefore gave up his rights in favour of the defendant no.1/respondent no.1 vide letter dated 4.10.1954. I may also additionally and independently mention here that by the specific language of Section 53-A, rights which are reserved by the seller under the agreement are not given to the proposed buyer and the society, having reserved certain rights by requiring constructions to be completed by allottees in a specified time, was fully competent under such reserved right to transfer the plot

to the defendant No.1/respondent No.1.

8. Now, on the aspect as to who incurred the construction cost for making the building on the suit plot between the years 1957 to 1959 i.e. whether the construction was made by Sir Sobha Singh for and on behalf of Sardar Sohan Singh or it was made by Sir Sobha Singh for and on behalf of his son- the defendant no.1/respondent no.1. Before proceeding further, I may at this stage itself mention that the undisputed position which has come on record is that actually no moneys were paid specifically with respect to construction of the building on the plot by Sardar Sohan Singh to Sir Sobha Singh. The case as put up on behalf of the plaintiffs/appellants was that construction was made on the suit plot by Sir Sobha Singh out of the funds of Sardar Sohan Singh lying to the latter's credit in the partnership firm. There is also a related aspect that the construction is stated to have been made out of the materials of the partnership firm. Let us examine these aspects.

9. In this case, when it is pleaded that Sardar Sohan Singh had moneys to his credit in a partnership firm having one other partner as Sir Sobha Singh and one Mr. G.S. Banga, the onus to so prove was on the plaintiffs who had to establish that: (i) there was in fact credit amount of Sardar Sohan Singh in the partnership firm, and (ii) such amounts were in fact spent and utilized for construction of the building on the suit plot. In this regard, there is absolutely no documentary evidence in the suit as to Sardar Sohan Singh having any credit/amounts lying in the partnership firm or that such credit/amounts were in fact used for construction on the building on the suit plot. On the contrary, when Sardar Sohan Singh wrote his letter dated 11.2.1960, Ex.D2W3/7, to Sh. G.S. Banga, the other partner in the partnership firm, Sardar Sohan Singh in this letter expressed his apology for making a statement that the construction material belonging to the firm or the funds of the firm were utilized for making construction of a building on the suit plot. This letter dated 11.2.1960, Ex.D2W3/7, was written by Sardar Sohan Singh in response to the letter dated 8.1.1960, Ex.D2W3/3, of Sh. G.S. Banga to Sardar Sohan Singh. These two letters are most crucial and therefore I am reproducing the entire contents of the two letters and which read as under:-

"Ref. No._____ Date 8th January, 1960

My dear Sardar Sahib,

S.B. Sir Sobha Singh has shown me your letter of the 4th January, 1960, in which you have mentioned that the house in Friends. Colony on Mathura Road was built with the material and labour provided by the partnership business.

It gave me a rude shock to see these remarks. I have done work in your partnership for the past ten years or so. These remarks reflect on my honesty. I can assure you that not a single brick or a bag of cement or a pound of steel was used in building this house, from the partnership business. All the material used for the construction of the house was purchased and the scaffolding material was received from Sujan Singh Park. Supervision and other necessities were provided directly by Sardar Bahadur Sir Sobha Singh. The partnership accounts have nothing to do with the construction of the house. All the payments are made directly by Sardar Sahib and debited to Brigadier Gurbux Singh's account. Any service that I have done in checking up the measurements or rates from time to time that Sardar Sahib asked me, I have done that in my personal capacity as I have been doing in your case also. I hope you will kindly realize the difficult position that you have mentioned to me in your letter. I am sending a copy of this letter to S.B. Sir Sobha Singh also to clear my position.

With regard to the partnership account, I am sorry they were delayed as there were some disputes about the sales-tax as well as the final measurements of the work and I could not get payment also to know the actual position. The accounts are now ready and I will be sending to you a copy of the same within this week.

With best wishes and kind regards,

Yours sincerely,

(G.S. Banga)

Sardar Sohan Singh,
Rais-i-Azam of Rawalpindi,
C/o Sir Buta Singh,

Nowshera House,
Amritsar."

"Ex.D-2 W3/7

Regd.A.D. Dated: 11.2.1960

From: Sohan Singh

Dear Mr. Bagga,

Reference your letter of 8.1.60, I am sorry for the misunderstanding, I have never meant any reflection on you when I had written the letter regarding the building of the house in the Friends Colony. That was the impression given to me and besides my funds in this firm. I was naturally under the impression that the same was utilized for building on my plot. May I request you to please send me if possible a copy of the building account that you have sent to Brig Sardar Gurbux Singh Ji.

Regarding the balance sheet of the firm, I am going through it, and will return the same after reconciling with my banking account. In this connection I will ask you to please send me a copy of the Income Tax returns submitted to the Income Tax Department as well as the balance sheets for the period that the firm has been in existence as I had not got those copies.

The balance sheet that you have sent now is upto 31.3.58 when there were incomplete works in hand which had to be completed, and were completed later on, the dissolution of the firm can only be completed after all the assets have been collected in hand and disposed and liabilities met.

You will therefore please send me a final account as it is almost a year after the closing. Sorry for the delay in acknowledging your letter as I have been on the move.

Tries to hear in good time.

Yours sincerely,

Sd/- Sohan Singh.

Sh. G.S.Banga, M.A.,
K-52, Jangpura,

New Delhi." (underlining added)

The aforesaid letters, in my opinion, leave no manner of doubt that not a single rupee of Sardar Sohan Singh was spent towards the construction of the building on the plot. It is thus clear that the construction of the building on the plot was not made for and on behalf of Sardar Sohan Singh by Sir Sobha Singh by using/spending any alleged moneys of Sardar Sohan Singh. Obviously, this was an outright false stand of the plaintiffs and therefore it has been rightly disbelieved by the trial Court. At the cost of repetition I would seek to reiterate that the undisputed position which has come on record is that there has not been shown any actual transfer of funds by Sardar Sohan Singh either to Sir Sobha Singh or to anybody else for raising of construction on the suit plot. Further, if really the construction was made by Sir Sobha Singh for and on behalf of Sardar Sohan Singh on the suit plot, then, surely original documents with respect to construction would have been taken by Sardar Sohan Singh from Sir Sobha Singh, however, no original documents whatsoever of construction i.e. the purchase vouchers or bills or any such original documents were filed by the appellants/plaintiffs and therefore such documents would only have been in the power and possession of Sir Sobha Singh as he had spent his moneys for and on behalf of his son-defendant no.1/respondent no.1. A very important aspect which has to be noted is that Sardar Sohan Singh in his lifetime never filed any suit to claim any right in the suit property whether by seeking cancellation of the sale deed dated 3.12.1960 or seeking possession of the building thereon. Sardar Sohan Singh also in his lifetime never revoked the letter dated 4.10.1954 seeking transfer of the membership and transfer of allotment of the suit plot to the defendant No.1. As already stated above, building was constructed during the years 1957 to 1959 and the sale deed was executed on 3.12.1960 whereas Sardar Sohan Singh expired much later in the year 1974. Thus, it is only the legal heirs of Sardar Sohan Singh who have suddenly woken up after his death hoping that by speculation in litigation they may be successful and be able to get some benefits. However, the trial Court has rightly on various counts, including the aspect which is being discussed, rejected the case of the appellants/plaintiffs and dismissed the suit.

10. The next related aspect in this regard is of certain letters which were written by Sir Sobha Singh to the society, by Sardar Sohan Singh

to Sir Sobha Singh and by the society to Sardar Sohan Singh and on which correspondence lot of emphasis was laid by the counsel for the appellants/plaintiffs to contend that Sir Sobha Singh was acting only as an attorney or an agent of Sardar Sohan Singh i.e. he was acting only for and on behalf of Sardar Sohan Singh and not on behalf of Gurbux Singh/defendant No.1/son of Sir Sobha Singh.

11. Learned senior counsel for the appellants, in this regard, laid great stress and emphasis on the following letters:- Ex.P-30 being a letter dated 16.10.1954 written by the society to Sardar Sohan Singh, Ex.P-34 letter dated 22.11.1954 from the society to Sardar Sohan Singh, Ex.P-43 letter dated 8.11.1956 from Sir Sobha Singh to the society, Ex.P-44 letter dated 10.11.1956 from the society to Sardar Sohan Singh, Ex.D-7 letter dated 13.10.1956 from Sardar Sohan Singh to the society, Ex.D2/12 by the society to Sardar Sohan Singh, Ex.D2W1/X4 letter dated 21.2.1957 from Sardar Sohan Singh to the society and so on.

There are some other letters also, however, in my opinion, the aforesaid letters are the letters which are really important. In fact, even out of the aforesaid letters the most important letters on which great stress was sought to be laid by the learned senior counsel for the appellants were Ex.D2W1/X4 (dated 21.2.1957), Ex.D-7(dated 13.10.1956), Ex.P-44 (dated 10.11.1956) and Ex.P-43(dated 8.11.1956). The reason why great stress has been laid on these letters is that in Ex.D2W1/X4 (dated 21.2.1957) being a letter by Sir Sobha Singh, he has described himself as an attorney for Sardar Sohan Singh, Ex.P-43 (dated 8.11.1956) contains a statement that Sir Sobha Singh mentions the house to be of Sardar Sohan Singh and in Ex.D-7 (dated 13.10.1956) Sardar Sohan Singh speaks of Sir Sobha Singh doing needful on behalf of Sardar Sohan Singh.

12. In my opinion, the entire chain of correspondence whether they be from the society to Sardar Sohan Singh, Sardar Sohan Singh to the society, Sardar Sohan Singh to Sir Sobha Singh and Sir Sobha Singh to Sardar Sohan Singh or Sir Sobha Singh to the society and vice versa, has to be read in context that by an existing earlier letter dated 4.10.1954 of Sardar Sohan Singh to the Society, there was already a request made to transfer the membership and the plot to the defendant no.1/respondent no.1, and finality of which proceeding was seemingly in a partial limbo inasmuch as though there was a Resolution 3-C making reference of

transfer of the membership and the plot to the defendant no.1/respondent no.1, however, it was necessary as per that resolution to be enquired and found out if the defendant no.1/respondent no.1 was the blood relation of Sardar Sohan Singh. Obviously, till there was an actual transfer of membership, and the consequent execution of the sale deed by the society in favour of the defendant no.1/respondent no.1, the letters which were to be written to the society either by Sir Sobha Singh or by Sardar Sohan Singh had to be worded which would in effect have two subject matters. One subject matter was that in the record, Sardar Sohan Singh continued to be the nominal owner, however, the second subject matter was that there was also an existential fact of the letter dated 4.10.1954 (and which admittedly was never revoked) under which the membership was to be transferred to the defendant no.1/respondent no.1 by Sardar Sohan Singh himself. It is therefore in this context that if either Sir Sobha Singh or the society or even Sardar Sohan Singh refers to the house to be of Sardar Sohan Singh or Sir Sobha Singh acting as the attorney, cannot really make too much difference because in reality there was an existing intent to transfer the plot and membership to the defendant no.1/respondent no.1, and which process had not achieved finality and was taking some time. It is in this interregnum period that this correspondence existed when there was no actual transfer of the suit plot to the defendant no.1/respondent no.1 by means of execution of the sale deed but a request was pending. Therefore, merely because in some of the aforesaid letters, Sir Sobha Singh has referred to himself as acting as an attorney for Sardar Sohan Singh (and which was bound to be till actual execution of the sale deed in favour of defendant no.1/respondent no.1), will not take the case of the appellants much further, keeping in view the contextual position between the period from 1954 till 3.12.1960 when ultimately the sale deed was executed. I am therefore of the opinion that the letters which have been relied upon on behalf of the appellants, cannot have the effect of reverting the position away from the letter dated 4.10.1954 inasmuch as there has never been written any specific letter by Sardar Sohan Singh to the society or to Sir Sobha Singh withdrawing the letter dated 4.10.1954. Also, during this relevant period it is only because of the partial limbo position as stated above prevailing that the sanctioning of the plans was done in the name of Sardar Sohan Singh, however, as already stated, that cannot in any manner mean that there was any revocation of the position prevailing as per the letter dated 4.10.1954 sent

by Sardar Sohan Singh to the society for transfer of the membership and the allotment of the plot to defendant no.1/respondent no.1.

13. With respect to the issue that the society has wrongly and illegally transferred the membership as also ownership of the plot to the defendant no.1/respondent no.1 under the sale deed dated 3.12.1960, I am of the opinion that a society is an entity which is governed by rules which are in the nature of contractual terms between its members, and even if there was violation of some contractual rules of the society (such rules not being statutory in character) unless and until the general body of the society specifically passed a resolution cancelling the sale deed dated 3.12.1960, it cannot be argued on behalf of the appellants that sale deed cannot confer the ownership rights on the defendant no.1/respondent no.1, and that the ownership rights continued to vest with Sardar Sohan Singh. While on this aspect, I must also state that prior o the execution of the sale deed dated 3.12.1960 in favour of the defendant no.1/ respondent no.1 by the society, a resolution dated 28.11.1954 (which is attached to the letter Ex.P-38 dated 24.12.1954) exhibited as Ex.P-38A, was already passed by the society that transfer can take place not only to a close blood relation but also to a friend of the member of the society. The contents of the said resolution dated 28.11.1954 thus expanded the list of proposed transferees from the members to a non-blood relation. Therefore, the strict requirement of the transfer only to a blood relation having been done away by the society, surely, therefore the transfer of membership and execution of the sale deed by the society in favour of the defendant no.1/respondent no.1 cannot be said to be void and illegal as is being contended on behalf of the appellants inasmuch as the society would be alive to its resolution dated 28.11.1954 at the time of execution of the sale deed dated 3.12.1960.

14. A summary of the above stated position till now shows that the appellants cannot claim the benefit of Section 53A, there was an inchoate situation of a partial limbo from 1954 till 1960 resulting in the particular correspondence as also sanctioning of the plans in the name of Sardar Sohan Singh, and finally the fact that the society ultimately allowed transfer of membership not only to blood relations but also to friends and a sale deed dated 3.12.1960 was executed and registered in favour of the respondent No.1 which was never challenged by Sardar Sohan Singh in his lifetime. All the aforesaid aspects are to be read with the factum of

continued validity and non-withdrawal of the letter dated 4.10.1954 by Sardar Sohan Singh, by writing any letter to the society stating that his letter dated 4.10.1954 stands revoked and that there should not be transfer of the membership and the allotment of the plot to the defendant no.1/ respondent no.1.

15. The next main issue which was argued before this Court was with respect to whether the suit was barred by time. Related to this issue is the issue as to whether a suit for possession could be filed in the year 1975 without first seeking cancellation of the sale deed executed way back on 3.12.1960 by the society in favour of the defendant no.1/ respondent no.1. This subject will also cover the issue of whether there is any fraud or collusion in getting the sale deed dated 3.12.1960 executed by the society in favour of defendant no.1/respondent no.1.

An ownership of a property is transferred by means of a registered sale deed as per Section 54 of the Transfer of Property Act, 1882. Every sale deed has an effect of divesting the transferor of the ownership of the property and the vesting of the ownership in the transferee. A sale deed by which the ownership rights in an immovable property are transferred can be ignored only under two circumstances. Firstly, if the sale deed is a nominal transaction or a paper transaction because the parties intended it to be so or secondly, if the document being the sale deed is void ab initio. It is in these two circumstances that it is not necessary to have the sale deed set aside inasmuch as the sale deed cannot have the effect of transferring ownership. However, in all other cases where it is pleaded that sale deed is a voidable document because it ought not to have been executed or there is a fraudulent transfer of title by means of the particular sale deed or for any reason which makes the transfer voidable (and not void), it is necessary that a suit has to be filed for cancellation of such a sale deed within a period of three years from the date a person comes to know of execution and existence of the sale deed which goes against the interest of such person. This is the mandate of Article 59 of the Limitation Act, 1963.

16. In the facts of the present case, in my opinion, the knowledge of the appellants/plaintiffs and their predecessor-in-interest, Sardar Sohan Singh of the existence of the sale deed dated 3.12.1960 is actually from 1960 itself. This knowledge of the appellants/plaintiffs and their predecessor-in-interest Sardar Sohan Singh is from the year 1960 itself

is a knowledge which is both actual/factual knowledge as also deemed knowledge.

The knowledge is an actual knowledge inasmuch as in the cross examination of the late plaintiff no.1 conducted on 8.8.1990, the plaintiff No.1 specifically admitted that the appellants/plaintiffs and Sardar Sohan Singh came to know of the fraud in the year 1960 itself. In my opinion, this is a vital admission showing knowledge and existence of sale deed dated 3.12.1960 from the year 1960 itself. Besides this categorical admission, I would like to refer to Section 3 of the Transfer of Property Act, 1882 and which provides that when "a person is said to have notice". As per this definitional clause in Section 3 of the Transfer of Property Act, 1882, a person is said to have a notice of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it. Explanation 1 to this definitional clause provides that where there is a transaction related to immovable property by a registered instrument, then acquiring of interest in such property shall be known to the world at large by means of a deemed notice on the registration of such instrument before the sub-Registrar. In my opinion, if the appellants/plaintiffs have only conveniently contended that they came to know of the sale deed in the year 1963, because if knowledge of the sale deed of 1960 is only conveniently alleged of 1963 then, why not in 1964 or why not in 1965 or why not in 1966 and so on. Obviously, the date given of the year 1963 is a conjured date and was thus shown to be false by the admission made by Sh. Mukhinder Singh/plaintiff no.1 in his cross-examination dated 8.8.1990. Also, on registration of the sale deed dated 3.12.1960, the appellants/plaintiffs and Sardar Sohan Singh in accordance with Section 3 of Transfer of Property Act, 1882 were deemed to have notice of the fact that the sale deed was actually executed. The plaintiffs or Sardar Sohan Singh but for wilful abstention of making an enquiry, they ought to have made, would have come to know of the execution of the sale deed within at best a few months or a year thereafter. I therefore hold that in fact, the suit of the appellants/plaintiffs, even if the present suit was one for cancellation of the sale deed dated 3.12.1960, would have become barred by 1963, or at best by 1965/1966 even if we take the knowledge from the year 1963 as pleaded by the appellants/plaintiffs. Once, there cannot be cancellation of the sale deed, the ownership of the defendant no.1/respondent no.1 becomes final and also the

disentitlement of the appellants/plaintiff to the reliefs claimed in the suit of possession and mesne profits.

17. The Supreme Court in the judgment reported as **Prem Singh vs. Birbal** 2006 (5) SCC 353 has held that Article 59 applies to voidable transactions and not void transactions. Therefore, the allegedly voidable sale deed dated 3.12.1960 (having been executed by the society, and not being challenged by the society) has the conclusive effect of transfer of title in favour of defendant No.1/respondent No.1 since the same was not challenged within a period of 3 years under Article 59. The effect therefore is of barring the plaintiffs from challenging the sale deed 3 years after the knowledge was derived by the appellants/plaintiffs of the sale deed. Though, the defendant no.1/respondent no.1 claims that the appellants came to know of the sale deed in the year 1960 itself, however, even if we take the knowledge of the appellants of the sale deed in the year 1963 as per the admitted case, the challenge to the sale deed for the same to be cancelled becomes barred by limitation at the end of the year 1965 or at best in the year 1966. The subject suit was filed in the year 1975 and even in the subject suit no relief was sought for cancellation of the sale deed dated 3.12.1960. If no challenge is laid, and no relief is claimed, surely, the Court cannot grant such relief which legally is barred, and once no such relief can be claimed or granted, and thus the sale deed dated 3.12.1960 stands, surely title/ownership of the suit property would be of the defendant no.1/respondent no.1. This is because it cannot be that a sale deed of a property can exist by which title is of the defendant no.1/respondent no.1 in law (and hence he is the owner), yet, someone else can claim an ownership and claim possession of the property. Since the appellants/plaintiffs were in fact well-aware that a challenge if laid by the subject suit to the sale deed then the same would be held to be barred under Article 59 of the Limitation Act, 1963, therefore they filed a simplicitor suit seeking only the reliefs of possession and mesne profits without asking for cancellation of the sale deed dated 3.12.1960 on the grounds/facts which were pleaded in the plaint itself. When we read the plaint, no manner of doubt is left that in fact, the sale deed is also being challenged as being fraud and collusive. Since no specific prayer seeking cancellation of the sale deed is asked for, ownership will continue in law to be vested with the defendant no.1/respondent no.1, and if ownership continues to be vested with defendant no.1/respondent no.1, surely the right to possession fails. I therefore hold that the subject suit for possession

was not maintainable because the right to seek cancellation of the sale deed had become barred by time at the maximum in around the year 1965/1966, and therefore, no relief can be granted in a suit filed in the year 1975 for cancellation of the sale deed. At the cost of repetition it is stated that if the sale deed stands, ownership of the defendant no.1/ respondent no.1 stands, and if the ownership of the defendant no.1/ respondent no.1 stands, appellants/plaintiffs are not entitled to the reliefs of possession and mesne profits as claimed with respect to the suit property.

18. In my opinion, the trial Court has also rightly decided issue no.8 by holding that the appellants/plaintiffs are estopped from filing the subject suit. Though, the Trial Court has not given a very detailed reasoning, in my opinion, really the reasoning of the Trial Court is based upon Section 115 of the Evidence Act, 1872. As per the provision of Section 115 of the Evidence Act, if a person has a belief that he is the owner of a plot, and such person thereafter builds on the plot having the impression that he is the owner of the plot, and the real owner stands by and allows him to construct on the plot, the real owner is then estopped in law from claiming any rights on the plot once the third person has made the construction on the plot. While giving these observations, I reiterate the finding that the defendant no.1/respondent no.1 and Sir Sobha Singh were entitled to have an impression that it was the defendant no.1/ respondent no.1 who is the owner of the plot inasmuch as there was a letter dated 4.10.1954 by Sardar Sohan Singh to the society for transfer of the plot and membership and which letter was never revoked, taken with the fact that pursuant to such letter there was a resolution of the society 3-C (Ex.P8) by which there was a transfer, though conditional on defendant no.1/respondent no.1 being a blood relation and that in 1954 itself transfer was made permissible to a person who was not a close relation. Further, and as already discussed above, no amount whatsoever was paid by Sardar Sohan Singh to Sir Sobha Singh for construction on the plot. Also never any income tax returns were filed, which have been proved on record, to show that Sardar Sohan Singh during his lifetime ever claimed ownership of the suit plot.

I may note that there was an earlier round of litigation with respect to production of income tax records of the appellants/plaintiffs as also Sardar Sohan Singh, and a learned single Judge of this Court had rejected

the prayer of the defendant no.1/respondent no.1 to summon the income tax records of the appellants/plaintiffs and Sardar Sohan Singh, however, the order of this Court was set aside by the Hon'ble Supreme Court and the defendant no.1/respondent no.1 was allowed to summon the income tax records of the appellants/plaintiffs and Sardar Sohan Singh. By that stage it was however too late, and the necessary records in the income tax department were no longer available, possibly having been weeded out. But, that cannot mean that the appellants/plaintiffs who are bound to have possession of such records, ought not to have filed such records and therefore, I draw an adverse inference against the appellants/plaintiffs for concealing the income tax and wealth tax returns of the appellants/ plaintiffs as also of late Sardar Sohan Singh. The defendant no. 1/respondent No.1 has on the contrary filed his tax returns showing that he had claimed ownership of the suit property and represented himself to be the owner of the suit property in the tax records. These income tax and wealth tax returns have been filed and exhibited before the Trial Court as Ex.PW4/1 to Ex.PW4/12.

19. Accordingly, I am of the opinion that the defendant no.1/ respondent no.1 is also the owner of the suit property on the basis of the principle of estoppel enshrined in Section 115 of the Evidence Act, 1872 and I uphold the finding of the Trial Court on issue no.8 with respect to estoppel against the plaintiffs/appellants.

20. That finally leaves this Court for deciding the issue with regard to the claim of ownership of the suit property by the defendant no.1/ respondent no.1 on the ground of adverse possession. Related to this aspect is also whether the suit of the appellants/plaintiffs is barred by time as per Article 65 of the Limitation Act, 1963.

I have already while discussing the issue of suit being barred by time for cancellation of sale deed by virtue of Article 59 held that Sardar Sohan Singh and the appellants/plaintiffs had both actual and deemed knowledge of execution of the sale deed dated 3.12.1960 in the year 1960 itself. There cannot be a more clear-cut proof of the claim of ownership of the property by the defendant no.1/respondent no.1 and the consequent challenge to the ownership rights of Sardar Sohan Singh than by a duly registered sale deed. Of course, calling the right claimed by the defendant no.1/respondent no.1 as one of adverse possession is a

misnomer, inasmuch as what is really claimed is the ownership of the defendant no.1/respondent no.1 by virtue of law of prescription contained in Section 27 of the Limitation Act, 1963 as the suit for possession on the basis of the claim of ownership rights was not filed as per Article 65 within 12 years of the knowledge that defendant no.1/respondent no.1 is claiming the ownership rights. A heading of a claim is not material but it is the substance of the claim which has to be seen. As per Section 27 of the Limitation act, 1963, once the limitation for claiming a relief/right with respect to an immovable property expires, the right in the property itself is lost. This provision of Section 27 of the Limitation Act, 1963 is a departure from the normal law of limitation, and as per which normal law of limitation on expiry of limitation, right is not lost but only the entitlement to approach the Court is lost. Merely because the defendant no.1/respondent no.1 has ill advisedly claimed ownership of the property by adverse possession, cannot have the effect of extinguishing finality to the ownership of the defendant no.1/respondent no.1 by law of prescription contained in Section 27 of the Limitation Act, 1963 read with Article 65 of the Limitation Act, 1963. Once it was clear to the plaintiffs/appellants that from the year 1960 ownership in the suit property was being claimed by the defendant no.1/respondent no.1(and surely, there cannot be a more blatant act of claiming ownership of a property than by a sale deed), the period of 12 years for the appellants/plaintiffs to have filed a suit for possession with respect to this property under Article 65 commenced in 1960 itself. Once the limitation commenced in the year 1960, by the year 1972, the right to approach the Court by means of a suit for possession governed by Article 65 of the Limitation Act, 1963 was lost. Once the right is lost in the year 1972, the subject suit having been filed in the year 1975, the ownership of the defendant no.1/respondent no.1 becomes absolute by virtue of law of prescription contained in Section 27 of the Limitation Act, 1963. I, in view of the aforesaid, also find no weight in the submission made on behalf of the appellants/ plaintiffs that defendant no.1/respondent no.1 has to fail because the claim of title and adverse possession cannot be concurrently set up.

21. Learned senior counsel for the appellants/plaintiffs had also during the course of his arguments sought to lay great emphasis on certain contradictions between the pleadings of the defendant no.1/ respondent no.1 and the evidence led by him and on his behalf on the

aspect of claiming ownership by title from the year 1954 and also simultaneously by adverse possession from the year 1954 itself. Further contradictions were pleaded to exist on the basis of the sale deed of the year 1960 and in fact also claiming ownership by title from the year 1954 itself by virtue of the letter dated 4.10.1954. It was further argued that fraud should be held to be established on account of closeness of relations between Sir Nathu Ram, who was the Secretary of the society, with the family of the defendant no.1/respondent no.1 and Sir Sobha Singh.

In my opinion, even assuming that these contradictions exist, they cannot take away the finality to the factual position and the legal position which I have discussed in detail above that defendant no.1/respondent no.1 was the owner of the plot under the sale deed dated 3.12.1960 and the building was constructed by the moneys only of Sir Sobha Singh and not of Sardar Sohan Singh, besides the aspects of the suit being time-barred and not maintainable as framed. Also, in India the doctrine of *falsus in uno, falsus in omnibus* has no application, i.e. merely because a person is said to be lying or should not be believed on one point, does not mean that he should be necessarily treated for not being believed on all other aspects of his case. This doctrine is rightly not applied in India inasmuch as in every case, every person in his favour seeks to speak some untruths by manipulating facts and it is almost a non-existent case that each and every averment of fact; each and every issue; each and every legal argument and each and every document, is only and only in favour of one party and which party does not speak even a single lie or does not make a single false statement. Therefore, in my opinion, the so called contradictions cannot in any manner take the case of the appellants/ plaintiffs forward for entitling them to the relief of possession and mesne profits in view of the other detailed findings and conclusions which have been arrived at as stated above.

22. Learned senior counsel for the appellants/plaintiffs firstly has relied upon judgments being a judgment of learned single Judge of this Court in the case of **Harbans Kaur & Ors. vs. Bhola Nath & Anr.** 57(1995) DLT 101 and the judgment of the Supreme Court in the case of **D. N. Venkatarayappa and Anr. vs. State of Karnataka & Ors.** (1997) 7 SCC 567 in support of his arguments. The judgment in the case of **Harbans Kaur** (supra) is relied upon for the proposition that if a trespasser makes construction on somebody else's property, the trespasser

will not become owner of the property. The judgment in the case of **Harbans Kaur** (supra) is also relied upon in support of the argument that mere payment of house tax will not make a person an owner. The judgment in the case of **D. N. Venkatarayappa** (supra) is relied upon in support of the proposition that the plea of adverse possession has to be very strictly proved.

In my opinion, both the judgments which the learned senior counsel for the appellants wanted to rely upon have no application to the facts of the present case. The judgment of **Harbans Kaur** (supra) does not apply inasmuch as I have already held above that the defendant no.1/respondent no.1 was under a bonafide belief that he is the owner of the plot and therefore raised construction under such bonafide belief entitling him the rights under Section 115 of the Evidence Act, 1872. The present case is not one where defendant no.1/respondent no.1 was a rank trespasser inasmuch as the letter dated 4.10.1954 clearly showed the intention of Sardar Sohan Singh to transfer the membership and the suit plot to the defendant no.1/respondent no.1 and the respondent no1/defendant no.1 had also paid the arrears then due of Rs. 1180/-. Sir Sobha Singh and defendant no.1/respondent no.1, in the detailed facts of this case noted above, were rightly under the impression that defendant no.1/respondent no.1 would formally become the owner of the plot and were thus entitled to construct on the plot on the basis of their belief in their ownership rights in the plot. Similarly mere payment of property tax cannot by itself make a person an owner as held in the case of **Harbans Kaur** (supra), however, in the present case the claim of ownership is based in addition to payment of house tax, on the grounds of ownership of the plot under the sale deed dated 3.12.1960 and also of the ownership of the building by incurring the entire cost of construction thereof. Merely because in the house tax records the property may have been till about 1969 or so in the name of Sardar Sohan Singh, however, that aspect has to be considered alongwith the counter balance of not only the sale deed dated 3.12.1960 being in the name of defendant no.1/respondent no.1 (and which is in law final on the issue of ownership of the plot) but also that in the income tax and wealth tax records the suit property is shown to be of the ownership of the defendant no.1/respondent no.1. Also, it is settled law that mutation in the house tax records cannot make such person, in whose name mutation is there, an owner once a title document being a sale deed of the property is in the name of

somebody else and who is also shown and declared as owner in the income tax and wealth tax records.

There is no dispute to the legal proposition laid down in the case of **D. N. Venkatarayappa and Anr.** (supra) that adverse possession has to be very strictly proved, however in this case the strictness of onus is very much discharged because of the claim of ownership by a sale deed (read with the doctrine of prescription contained in Section 27 of the Limitation Act, 1963) and also of having filed tax returns, both with the income tax and the wealth tax authorities. For the sake of arguments, assuming a case of adverse possession had to be proved (issue is actually of suit for possession being time barred under Article 65), then surely a registered sale deed of the year 1960 taken with the income tax/wealth tax records are strict evidence required in law for proving adverse possession i.e. a possession claiming ownership which is open, hostile and continuous. However, I need not delve on this aspect further inasmuch as I have already held above that the issue is not of adverse possession but of the suit for possession having become time barred under Article 65 and of ownership vesting absolutely in defendant no.1/respondent no.1 by virtue of law of prescription contained in Section 27 of the Limitation Act, 1963.

The learned Senior counsel for the appellants secondly relied upon the judgment in the case of **Balavant N. Viswamitra and Ors. Vs. Yadav Sadashiv Mule (deceased by L.Rs.) and others,** AIR 2004 SC 4377 for the proposition that once the physical possession of the suit plot was given to Sardar Sohan Singh, then, the possession which was with Sir Sobha Singh could be only as a trustee and for and on behalf of Sardar Sohan Singh. It was also argued that once construction is made on a plot which was given in trust to Sir Sobha Singh by Sardar Sohan Singh, neither Sir Sobha Singh nor the defendant No.1/respondent No.1 can claim any right in the plot or the construction made thereon. To the legal proposition, there cannot be dispute, however, in my opinion, in the present case physical possession which was transferred by Sardar Sohan Singh to Sir Sobha Singh after the letter dated 4.10.1954 was written (and as per which the membership as also allotment of the plot had to be transferred to the defendant no.1/respondent no.1), the possession of Sir Sobha Singh cannot in any manner be said to be thereafter in trust for and on behalf of Sardar Sohan Singh but possession stood transferred to

him for and on behalf of the defendant No.1/respondent No.1-his son. I need not repeat here the arguments which have already been dealt with by me above with respect to the contextual position existing from the year 1954 to 1960 when the sale deed was executed by the society in favour of defendant no.1/respondent no.1.

23. Finally suo moto, on the issue of equities in the case on the ground that Sardar Sohan Singh had paid a sum of Rs. 11,824/- for the plot and therefore it can be argued that it is unfair and inequitable for the defendant no.1/respondent no.1 to claim ownership of the plot. However, the defendant no.1/respondent no.1 in around the year 1960 itself when the sale deed was executed had sought to repay back this amount by crediting this amount in the bank account of Sardar Sohan Singh, however, it has come on record that this amount which was credited in the account of Sardar Sohan Singh was transferred back by Sardar Sohan Singh. Therefore, neither in law, nor in equity, the appellants/plaintiffs can be said to have any claim with respect to the suit property.

24. A civil case is decided on balance of probabilities. The balance of probabilities in the present case shows that it is the defendant no.1/ respondent no.1 who was the owner of the property. The defendant no.1/respondent no.1 and his father-Sir Sobha Singh have represented themselves to the world at large as the owners from the year 1960 and which aspect was never challenged by the appellants or their predecessor-in-interest within the period of limitation. Any alleged rights/ownership claims are thereby destroyed. Also even assuming there is a fraud which is played upon a person, even with respect to such fraud, the necessary action in law has to take place within three years under Article 113 of the Limitation Act, 1963 and if such an action is not taken, a person cannot interminably seek disentitlement to the ownership of another person on the ground of fraud, when there is a proper registered sale deed, which is in this case is of the year 1960 i.e. about 52 years back. Also as already observed above, this litigation has been initiated after the death of Sardar Sohan Singh, and who in his lifetime did not file a suit claiming rights in the suit property.

25. In view of the above, I do not find any merit in the appeal, which is accordingly dismissed. In my opinion, the appellants/plaintiffs are wholly ill-advised in trying to speculate in litigation for claiming rights in the suit property, since Sardar Sohan Singh himself never filed any suit

during his lifetime to claim rights in the suit property. Supreme Court recently in the case of **Ramrameshwari Devi and Others v. Nirmala Devi and Others,** (2011) 8 SCC 249 has held that it is high time that actual costs be imposed. The Supreme Court has also stated that unnecessary delays in litigation leads to huge costs upon the person who is ultimately successful, and unless actual costs are awarded dishonesty of unnecessary litigation will never come to an end. The Supreme Court has in an earlier Division Bench judgment of three Judges in the case of **Salem Advocate Bar Association Vs. Union of India** (2005)6 SCC 344 has also held (in para 37) that it is high time that actual costs be awarded. I am also empowered to impose actual costs by virtue of **Volume V** of the **Punjab High Court Rules and Orders (as applicable to Delhi) Chapter VI Part I Rule 15.**

Before commencement of arguments in the appeal I had made it known to both the parties that costs in this case will follow the final decision. I, therefore, while dismissing the appeal direct that the defendant no.1/respondent no.1 file in this Court an affidavit by way of the costs incurred by him for the lawyers. fees for defending this appeal. This affidavit of the costs incurred will be supported by the necessary certificates of the lawyers of having received the fees with respect to this appeal. This affidavit alongwith certificates of lawyers be filed within a period of four weeks from today. The costs as stated in such affidavits supported by the certificates of lawyers will be the costs in favour of the defendant no.1/respondent no.1 and against the appellants.

26. The appeal is dismissed with costs as stated above. Trial Court record be sent back.

C.M. No.18265/2011

These cross-objections filed on behalf of defendant no.1/respondent no.1 will stand decided in terms of the aforesaid judgment.

Application stands disposed of accordingly.

ILR (2012) IV DELHI 613
CM (M)

MAHESHWAR DAYAL (DECED) ….PETITIONER

VERSUS

SHANTI DEVI & ORS. RESPONDENTS

(INDERMEET KAUR, J.)

CM(M) NO. : 642/2010 & CM NOS. 941/2009, 28/2001 & 7629/2009 **DATE OF DECISION: 06.02.2012**

Delhi Rent Control Act, 1958—Section 14 (1)(b) Constitution of India, 1950—Article 227—Stand of the tenant was that the premises in question had been taken on rent by Mohan Lal only for his son Anand Parkash and this was with the consent of the landlord who was living in the same premises and who was fully aware of the fact that Anand Parkash is carrying on the business from the said premises; there was no subletting—The ARC on the basis of the oral and documentary evidence had returned a finding that it was the deceased Mohan Lal who was the tenant in the premises but since Anand Parkash was carrying on business in these premises from the very beginning which was also admitted by the landlord, no inference of parting with possession/subletting/assignment by Mohan Lal favour of Anand Parkash could be made;—An appeal was preferred before the ARCT. The ARCT drew a conclusion that the tenant was Mohan Lal; he had parted with possession of the premises in favour of his son Anand Parkash who was carrying on business in the same premises; ground of subletting under Section 14(1)(b) stood confirmed in favour of the landlord. Mohan Lal had died during the pendency

of the eviction proceedings, the premises being commercial premises and Anand Parkash being the son and legal heir of deceased Mohan Lal had inherited this tenancy from his father;—The Judgment of *Gain Devi vs. Jiwan Kaur,* AIR 1985 SC 796 was relied upon to give a finding that such a tenant i.e. Anand Prakash being in possession of the premises in the capacity as legal representative of deceased father Mohan Lal, he could be evicted from the suit premises—Petition of the landlord accordingly stood dismissed—It is well settled that to make out a case for sub-letting or parting with possession, it means giving of possession to persons other than those to whom the possession had been given by the original lessor and that parting with possession must have been made by the tenant —Article 66 of the Limitation Act, 1963 was held applicable i.e period of 12 years was available to the landlord to seek eviction of his tenant-In this factual scenario, the impugned judgment suffers from no infirmity.

Important Issue Involved: It is well settled that to make out a case for sub-letting or parting with possession, it means giving of possession to persons other than those to whom the possession had been given by the original lessor and that parting with possession must been made by the tenant.

[Ch Sh]

APPEARANCES:

FOR THE PETITIONER : Mr. Sanjay Jain, Sr. Advocate, with Mr. Atul Jain and Ms. Ruchi Jain, Advocate.

FOR THE RESPONDENTS : Mr. Vijay Kishan Jetly, Mr. B.B. Gupta and Mr. Vikram Jetly, Advocates.

CASES REFERRED TO:

1. *Shyam Sunder Dawa* vs. *J.D. Kapoor & another,* 136 (2007) DLT 219.
2. *Imdad Ali* vs. *Keshav Chand and Others* AIR 2003 Supreme Court 1863.
3. *Surya Dev Rai* vs. *Ram Chander Rai & Ors.* (2003) 6 SCC 675.
4. *Corporation Bank & Anr.* vs. *Navin J. Shah,* JT 2000 (1) SC 317.
5. *Mukri Gopalan* vs. *Cheppilat Puthanpurayil Aboobacker;* JT 1995 (5) S.C. 296.
6. *Ganpat Ram Sharma and Others* vs. *Smt. Gayatri Devi,* AIR 1987 SC 2016.
7. *Kashi Ram* vs. *Rakesh Arora* AIR 1987 SC 2230.
8. *Gian Devi* vs. *Jiwan Kaur,* AIR 1985 SC 796.

RESULT: Dismissed.

INDERMEET KAUR, J.

1. The order impugned before this Court is the judgment and decree dated 31.05.1989 passed by the Additional Rent Control Tribunal (ARCT) endorsing the finding of the Additional Rent Controller (ARC) dated 15.02.1986 whereby the eviction petition filed by the landlord Maheshwar Dayal (through legal representatives) seeking eviction of the tenant Shanti Devi (legal heirs of the original tenant) under Section 14 (1)(b) of the Delhi Rent Control Act (DRCA) had been dismissed. The reasoning of the ARCT was however a reasoning different from that adopted by the ARC. Both the two Courts below had dismissed the eviction petition filed by the landlord.

2. The aggrieved party is the landlord. He has filed this petition under Article 227 of the Constitution of India. At the outset, learned counsel for the respondent has pointed out that the right of second appeal as contained in Section 39 of the DRCA has since been abrogated and the powers of superintendence as contained under Article 227 of the Constitution are not the powers of an appellate forum; fact findings cannot be interfered with; unless and until there is a patent illegality or

a manifest injustice which has been caused to one party qua the other, interference under the powers of superintendence are not called for. This legal position is undisputed.

3. It is in this background that this petition shall be viewed.

4. Record shows that the landlord had filed an earlier eviction petition on 20.06.1963 (Suit No. 560/1963); this was on the ground of subletting; it was directed against Mohan Lal; contention was that Mohan Lal had sublet these premises to Anand Parkash; this petition was dismissed on 11.06.1966 by the ARC primarily on the ground that notice prior to the filing of the eviction petition had not been sent to the tenant. Appeal preferred against this order was dismissed on 19.07.1970 by the ARCT. The view of the ARC that requirement of notice not having been complied with was endorsed; eviction petition of the landlord stood dismissed.

5. On 01.02.1971, legal notice under Section 14 (1)(b) of the DRCA was served by the landlord upon the tenant (Ex.PW-7/2); contention was that the tenant Mohan Lal has sublet these premises to Anand Parkash and others including 'Parkash Trading Corporation' through Ram Parkash; eviction was accordingly prayed for. Reply to this legal notice was sent by the tenant on 25.02.1971 (Ex.PW-7/5); this contention was denied; stand of the tenant was that the premises in question had been taken on rent by Mohan Lal only for his son Anand Parkash and this was with the consent of the landlord who was living in the same premises and who was fully aware of the fact that Anand Parkash is carrying on the business from the said premises; there was no subletting.

6. Present eviction petition was thereafter filed on 03.04.1973. Premises in dispute is one Baithak in property bearing No. 1876, Haveli, Jugal Kishore, Gali Ghantewali, Chandni Chowk, Delhi which had been rented out to the tenant at a rent of Rs. 75/- per month excluding house-tax and other charges. Averments made in the legal notice were reiterated in the eviction petition; it was contended that Mohan Lal has sublet these premises to Anand Parkash and others including 'Parkash Trading Corporation' through Ram Parkash and also to 'Mohan Lal Anand Parkash' without the knowledge and consent of the petitioner. Needless to state that these averments were disputed.

7. Oral and documentary evidence was led by the respective parties which included five witnesses examined on behalf of the landlord and six

witnesses examined on behalf of the tenant. AW-4 had proved the electricity connection in the name of Mohan Lal; rent receipt was also in favour of Mohan Lal. AW-5 had proved the telephone record to show that M/s Parkash Trading Corporation had a telephone installed in the disputed premises up to 21.05.1963 whereafter the firm was dissolved and the telephone was thereafter shifted from the said premises. Attention has been drawn to that part of the testimony of AW-5 wherein he has stated that the premises had been taken on rent by Mohan Lal for the business of his son. The tenant had produced six witnesses. Anand Parkash, the son of Mohan Lal was examined RW-5. He was a partner in the firm M/s Anand Parkash Ganga Prasad; prior thereto he was the sole proprietor of 'Mohan Lal Anand Parkash' which business was closed in 1952; further deposition being to the effect that the landlord was living in the same premises and he very well knew that Anand Praksh was carrying on his business from the disputed premises; counter-foils of rent receipts Ex. AW-7/11 to Ex. AW-7/19 were proved showing the same to be either in the name of Mohan Lal or by Anand Parkash on behalf of Mohan Lal. Partnership deed of M/s Parkash Trading Corporation Ex. RW-5/X13 was proved substantiating the averment that Anand Parkash was a partner in the said firm; thereafter this firm was dissolved and another partnership deed was executed Ex.RW-5/X15.

8. The ARC on the basis of the oral and documentary evidence had returned a finding that it was the deceased Mohan Lal who was the tenant in the premises but since Anand Parkash was carrying on business in these premises from the very beginning which was also admitted by the landlord, no inference of parting with possession/subletting/assignment by Mohan Lal in favour of Anand Parkash could be made; the landlord was well aware of the fact that Anand Parkash was carrying on his business from the disputed premises as he used to see Anand Parkash in the premises as he himself was living in the same premises; the ground of subletting was not made out in favour of the landlord. This eviction petition was dismissed.

9. An appeal was preferred before the ARCT. The ARCT had examined oral and documentary evidence and drew a conclusion that the tenant was Mohan Lal; he had parted with possession of the premises in favour of his son Anand Parkash who was carrying on business in the same premises; ground of subletting under Section 14 (1)(b) stood

confirmed in favour of the landlord. Mohan Lal had died during the pendency of the eviction proceedings and the premises being commercial premises and Anand Parkash being the son and legal heir of deceased Mohan Lal had inherited this tenancy from his father; the judgment of **Gian Devi Vs. Jiwan Kaur,** AIR 1985 SC 796 was relied upon to return a finding that such a tenant i.e. Anand Parkash being in possession of the premises in the capacity as legal representative of deceased father Mohan Lal, he could not be evicted from the suit premises. Petition of the landlord accordingly stood dismissed.

10. This judgment is the subject matter of present proceedings before this Court. On behalf of the petitioner, vehement arguments had been addressed; his contention is that ARCT has returned a finding in favour of the landlord holding that a ground of subletting is made out; once that stood established the protective umbrella of inheritable tenancy could not be granted to the tenant as the tenant at best could only step into the shoes of his deceased father; once the father has been found guilty of having contravened the provisions of Section 14 (1)(b) of the DRCA and a right had accrued in favour of the landlord, no better right could accrue in favour of the legal representative/son of tenant and as such Anand Parkash is liable to be evicted forthwith. Reliance has been placed upon a judgment of the Apex Court reported as AIR 2003 Supreme Court 1863 **Imdad Ali Vs Keshav Chand and Others** to support this argument; contention being that the heirs of deceased tenant could only step into the shoes of deceased tenant and all rights and obligations of the deceased tenant devolved upon such a tenant; the original tenant admittedly having been contravened the provisions of Section 14 (1)(b) of the DRCA, no better right could accrue in favour of his legal representative. Learned counsel for the petitioner has pointed out that the judgment relied upon by the RCT in Civil Revision No. 1877/1987 Ram Sarup (deceased) represented by **Harish Kumar & Another VS. Lal Chand & Others** is a half page judgment which judgment was at best per-incuriam; it is not a ratio which can per-se be made applicable to the present case.

11. Per contra, the respondent submits that the evidence recorded in the court below both oral and documentary has in fact established that a case of sub-letting was not made out and the findings of the ARC on

this ground which was the first fact finding returned on reasoned grounds could not be interfered with by the RCT which has to hear an appeal under Section 38 of the DRCA only on a substantial question of law. The submission of the respondent being that ground under Section 14 (1)(b) was not established; further submission being that the present petition has even otherwise been filed in the year 1973 when admittedly even as per the case of the petitioner, the sub-tenancy was created in the year 1950; bar of limitation is also applicable. To support this submission reliance has been placed upon AIR 1987 SC 2016 **Ganpat Ram Sharma and Others VS. Smt. Gayatri Devi,** AIR 1987 SC 2230 **Kashi Ram Vs. Rakesh Arora** and JT 1995 (5) S.C. 296 **Mukri Gopalan Vs. Cheppilat Puthanpurayil Aboobacker;** submission being that Article 66 of the Limitation Act, 1963 contemplates a period of 12 years for filing of a suit for possession by a landlord against his tenant which period has long since expired; subletting as per the case of the landlord is of the year 1950 and the present petition having been filed on 03.04.1973 i.e. 23 years later suffers from delay and latches as well. The judgment of the RCT on no count calls for no interference.

12. Record has been perused. The landlord Maheshwar Dayal had been examined as AW-7 wherein in his cross-examination he has admitted that Mohan Lal had taken the premises for the business of his son Anand Parkash; further that Anand Parkash right from the inception of the tenancy was using these premises. The ARC had returned a finding that Mohan Lal was a tenant; in para 25, it has been noted that there was no evidence on record to suggest that Anand Parkash or for that matter M/s Mohan Lal Anand Parkash or Parkash Trading Corporation ever paid any rent to Mohan Lal; there was nothing to show that there was any transfer of any interest in the estate of Mohan Lal in favour of Anand Parkash or Parkash Trading Corporation; there was also nothing to show that Mohan Lal had divested himself of all rights as a tenant. In para 26, the ARC had noted that premises in dispute were being used by Anand Parkash for carrying on his business as a sole proprietor of M/s Mohan Lal Anand Parkash. From his version (examined as RW-5), it is clear that this business was being carried out by Anand Prakash from the very beginning; after discussing the case law in para 27, the ARC had returned a finding that no inference could be drawn that there has been any subletting or parting with possession of the premises by Mohan Lal in favour of Anand Parkash; the landlord was in fact living in the same

building as the tenant and he very well knew that from the beginning that Anand Parkash was running his business from the premises in dispute showing that the landlord was well aware that the premises had been taken by Mohan Lal for the business of his son Anand Parkash. This is the conclusion of the ARC in para 29. Thereafter in para 30, the ARC had noted that in view of judgment of **Gian Devi** (supra) since the original tenant had expired, his son i.e. Anand Parkash has stepped into his shoes and the commercial tenancy being an inheritable asset, he has inherited this tenancy and as such the ground of subletting is even otherwise not made out. The ARC had dismissed the eviction petition on the aforenoted reasons.

13. This reasoning arrived at by the ARC was a sound reasoning based on the facts deduced from the evidence both oral and documentary. An appeal under Section 38 of the DRCA is an appeal which lies only on a question of law. In a judgment of this Court reported as 136 (2007) DLT 219, **Shyam Sunder Dawa Vs. J.D. Kapoor & another,** a Bench of this Court had noted that where the reasoning of the ARC is based on the appreciation of evidence and no question of law has been raised, the Tribunal should not interfere with the finding of the Rent Controller.

14. Oral and documentary evidence was re-appreciated by the Tribunal; in para 5, the RCT after examination of the documentary evidence which included the partnership deeds Ex. RW-5/1, Ex. RW-5/3 & Ex. RW-5/15 had returned a finding that Mohan Lal, the original tenant had no concern with the business being run in the premises; it was Anand Parkash who was carrying on the business under the name of M/s Mohan Lal Anand Parkash and this was right from 1953; in the same paragraph, the RCT has recorded that he has no reason to disagree with the finding recorded by the ARC that the tenancy had not been created in the name of Mohan Lal but in the name of Anand Parkash; this finding in fact appears to be contrary to the earlier discussion noted by the RCT which was that merely because Anand Parkash had signed on the counter foils would not confer tenancy rights upon him; further part of the RCT judgment has recorded a finding that it was the case of the landlord himself that it was Anand Parkash who had been carrying out the business in the suit premises and has been paying rent from the beginning; Mohan Lal has never claimed any right or interest in the demised premises; however in the later part of this paragraph, the RCT had observed that

obvious conclusion in view of the discussion is that the tenancy right has been assigned and the possession of the premises has been parted with by Mohan Lal in favour of his son Anand Prakash and the case squarely falls within the ambit of Section 14 (1)(b) of the Act. This finding of the RCT is not only contrary to his own observation and finding returned in the earlier part of the paragraph but is also contrary to the record; it is clearly perverse.

15. The ARC was the first fact finding court. It has on balance of probabilities after weighing the evidence both oral and documentary rightly noted that the tenancy although was in the name of Mohan Lal but right from the inception Mohan Lal had taken these premises for the business purpose of his son Anand Parkash and this had in fact been admitted by the landlord (AW-7) himself in his cross-examination (as noted supra); the landlord was living in the same premises as the tenanted premises; he was well aware of the fact that right from the beginning it was Anand Parkash who was carrying on the business from the demised premises; the ARC had returned a correct and cogent finding that the premises had been taken on rent by Mohan Lal for the business of his son Anand Parkash and as such the question of parting with possession/assigning/subletting by Mohan Lal in favour of his son Anand Parkash in this factual scenario did not arise. The RCT has reversed this finding for no plausible reason; in fact the discussion (as noted supra) of the RCT is contrary to the conclusion drawn by him; in one breath, the RCT was of the view that the premises had been taken on rent by Mohan Lal for the business purpose of his son Anand Parkash which fact was well known to the landlord who was living in the same premises; the RCT had also noted the cross-examination of the landlord (AW-7) wherein he had admitted this fact that the premises had been taken on rent by Mohan Lal from the very inception for the business purpose of his son Anand Parkash; yet after this discussion, he had returned a contrary conclusion holding that the ground under Section 14 (1)(b) of the DRCA has been made out in favour of the landlord. In this scenario this finding returned by the RCT is a gross illegality bordering on perversity; it has to be set aside.

16. It is well settled that to make out a case for sub-letting or parting with possession, it means giving of possession to persons other than those to whom the possession had been given by the original lessor

and that parted with possession must have been made by the tenant. In this factual scenario this had not been made out. 17 Section 14 (1)(b) of the DRCA reads as follows:-

> **14. Protection of tenant against eviction. -**
>
> (1) Notwithstanding anything to the contrary contained in any other law or contract, no order or decree for the recovery of possession of any premises shall be made by and court or Controller in favour of the landlord against a tenet: Provided that the Controller may, on an application made to him in the prescribed manner, make an order for the recovery of possession of the premises on one or more of the following grounds only, namely:-
>
> (a) xxxxxxxxxxx
>
> (b) That the tenant has, on or after the 9th day of June, 1952, sublet, assigned or otherwise without obtaining the consent in writing of the landlord;

18. Although admittedly no cross-objections have been filed by the respondent/landlord in the present proceedings yet this Court in its power of superintendence has the power to cure all injustice, manifest errors and illegalities committed by the Tribunal and are the subject matter of power of superintendence of this Court.

19. In (2003) 6 SCC 675 **Surya Dev Rai Vs. Ram Chander Rai & Ors.** in the context of the power of superintendence available to the High Court has noted herein as under:

> "On the other hand, supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction."

20. The contrary conclusion arrived at by the RCT which is wholly opposed to the discussion noted by him in his preceding paras is a

manifest perversity which is borne out from the record and has to be cured. This is clearly one such case. The premises had been taken on rent by Mohan Lal for the business of his son Anand Parkash who was in fact running this business right from the inception. Rent receipts were also signed either by Mohan Lal or by Anand Parkash on behalf of Mohan Lal. Although Mohan Lal was himself not carrying on any business from the said premises yet it is apparent that he had complete supervisory control over this business which was being run by Anand Parkash for which purpose premises had been taken on rent by Mohan Lal. Ground under Section 14(1)(b) of the DRCA was clearly not established

21. The Apex Court in the case of **Gian Devi** (supra) had examined the question of inheritance of statutory tenancies; this constitutional Bench judgment had inter-alia noted as follows:-

> "It is not in dispute that so long as the contractual tenancy remains subsisting, the contractual tenancy creates heritable rights; and, on the death of a contractual tenant, the heirs and legal representatives step into the position of the contractual tenant; and, the same way on the death of a landlord the heirs and legal of a representatives of a landlord become entitled to all the rights and privileges of the contractual tenancy and also come under all the obligations under the contractual tenancy."
>
> xxxxxxxxxxxxx
>
> "Accordingly, we hold that if the Rent Act in question defines a tenant in substance to mean a tenant who continues to remain in possession even after the termination of the contractual tenancy till a decree for eviction against him is passed', the tenant even after the determination of the tenancy continues to have an estate or interest in the tenanted premises and the tenancy rights both in respect of residential promises and commercial premises are heritable. The heirs of the deceased tenant in the absence of any provision in the Rent Act to the contrary will step into the position of the decreased tenant and all the rights and obligations of the deceased tenant including the protection afforded to the deceased tenant under the Act will devolve on the heirs of the deceased tenant. As the protection afforded by the Rent Act to a tenant after determination of the tenancy and to his heirs on the death of such tenant is a creation of the Act for the benefit of the tenants, it is open to the Legislature which provides for such protection to make appropriate provisions in the Act with regard to the nature and extent of the benefit and protection to be enjoyed and the manner in which the same is to be enjoyed. If the Legislature makes any provision in the Act limiting or restricting the benefit and the nature of the protection to be enjoyed in a specified manner by any particular class of heirs of the deceased tenant on any condition laid down being fulfilled, the benefit of the protection has necessarily to be enjoyed on the fulfilment of the condition in the manner and to the extent stipulated in the Act. The Legislature which by the Rent Act seeks to confer the benefit on the tenants and to afford protection against eviction, is perfectly competent to make appropriate provision regulating the nature of protection and the manner and extent of enjoyment of such tenancy rights after the termination of contractual tenancy of the tenant including the rights and the nature of protection of the heirs on the death of the tenant. Such appropriate provision may be made by the Legislature both with regard to the residential tenancy and commercial tenancy. It is, however, entirely for the Legislature to decide whether the Legislature will make such provision or not. In the absence of any provision regulating the right of inheritance, and the manner and extent thereof and inthe absence of any condition being stipulated with regard to the devolution of tenancy rights on the heirs on the death of the tenant, the devolution of tenancy rights must necessarily be in accordance with the ordinary law of succession."

22. The Punjab & Haryana High Court in similar facts in the case **Ram Sarup** (supra) applying the ratio of Gian Devi, while dealing with an eviction petition under Section 14 (1)(b) of the DRCA had noted that since the original tenant during the pendency of the eviction petition has died, his son having inherited the tenancy was entitled to the protective umbrella of the DRCA he being a tenant within the meaning of Section 2 (l) of the DRCA; grounds of subletting under Section 14 (1)(b) which although stood established initially had to be given a go-bye because of this supervening event. The submission of the learned counsel for the petitioner before this Court is that the argument propounded by the petitioner has not been taken care of in this judgment which is only a half

page judgment; his submission is that the protective umbrella of the DRCA is not available to such a sinful tenant; contention being that this tenant i.e. Anand Prakash has no better rights than that of his deceased father namely Mohan Lal; since it has been held by the RCT that Mohan Lal has contravened the provisions of Section 14 (1)(b) and has sublet the premises in favour of Anand Parkash, Anand Parkash cannot stand on a better footing than that of Mohan Lal and as such Anand Prakash is liable to be evicted forthwith; similar submission being reiterated that the legal heir tenant inherits both the rights and obligations of the original tenant.

23. This submission of the petitioner is without force. Beside the fact that this Court has affirmed the finding of the ARC holding that the ground under Section 14 (1)(b) has not been established; even otherwise this submission of the petitioner has been dealt with in para 2 of the judgment which reads inter-alia as follows:-

> "2. Shri R.L. Sarin vehemently contends that once a ground of eviction is established in favour of the landlord no supervening facts can take away that right of the landlord. This broad-based argument to my mind, is not applicable on the peculiar facts of this case. The alleged sub-tenant has become, a tenant in his own right during the pendency of the proceedings. Now he cannot be held to be a sub-tenant. Otherwise the rule laid down by the Supreme Court in Gian **Devi's** case (supra) would become meaningless. Accordingly, I am of the view that the decision of the Appellate Authority is perfectly just and legal this revision is dismissed."

Thus this contention has no merit.

24. Eviction petition has been filed on 03.04.1973. Even as per the case of the landlord (as is evident from the grounds of appeal in the eviction petition) it has been contended that Mohan Lal has illegally sublet these premises to Anand Parkash after 09.06.1952; this is the specific averment made in this eviction petition which was filed almost 21 years later. The Apex Court in **Ganpat Ram Sharma** (Supra) while dealing with a petition under Section 14 (1)(h) of the DRCA had inter-alia noted as follows:-

> "The other aspect apart from the question of limitation to which we shall briefly refer is that the landlord must be quick in taking his action after the accrual of the cause of action, and if by his inaction the tenant allows the premises to go out of his hands then it is the landlord who is to be blamed and not the tenant.
>
> xxxxxxxxxx
>
> The next aspect of the matter is which article of the Limitation Act would be applicable. Reference was made to Article 66 and Article 67 of the Limitation Act, 1963 (hereinafter called the Limitation Act) which stipulates that for possession of immovable property the cause of action arises or accrues when the plaintiff has become entitled to possession by reason of any forfeiture or breach of condition. Article 67 stipulates a period of twelve years when the tenancy is determined. Article 113 deals with suit for which no period of limitation is provided elsewhere in this Schedule. On the facts of this case it is clear that Article 66 would apply because no determination in this case is necessary and that is well-settled now. Determination by notice under section 106 of the Transfer of Property Act is no longer necessary."

25. Article 66 of the Limitation Act, 1963 was held applicable i.e. period of 12 years was available to the landlord to seek eviction of his tenant. In the judgment of **Mukri Gopalan** (Supra), the Apex Court while dealing with the powers of the Appellate Authority under the Kerala Buildings (Lease and Rent Control) Act, 1965 had in this context noted as follows:-

> 22. As a result of the aforesaid discussion it must be held that appellate authority constituted under Section 18 of the Kerala Rent Act, 1965 functions as a court and the period of limitation prescribed therein under Section 18 governing appeals by aggrieved parties will be computed keeping in view the provisions of Sections 4 to 24 of the Limitation Act, 1963 such proceedings will attract Section 29(2) of the Limitation Act and consequently Section 5 of the Limitation Act would also be applicable to such proceedings"

26. In JT 2000 (1) SC 317 **Corporation Bank & Anr. Vs. Navin J. Shah,** the Apex Court while examining the question as to whether the

law of limitation is applicable to the Consumer Courts has held that although there is no limitation period prescribed under the Consumer Protection Act; a claim petition nevertheless has to be preferred within a reasonable time and 'reasonable time' would be a period of three years as is prescribed under the Limitation Act for a claim of that nature; the principle being that the grievance has to be addressed within a reasonable time. Even on this count, the claim of the petitioner must fail.

27. In this factual scenario, the impugned judgment suffers from no infirmity. Dismissed.

ILR (2012) IV DELHI 627
MAC APP

NATIONAL INSURANCE COMPANY LTD. ….APPELLANT

VERSUS

RAM RATI DEVI & ORS. ….RESPONDENTS

(G.P. MITTAL, J.)

MAC APP. NO. : 676/2007 & 98/2012 **DATE OF DECISION: 08.02.2012**

Motor Vehicle Act, 1988—Section 3, 5, 149 (2) (a) (ii), 166 and 181—Code of Criminal Procedure, 1973—Section 173—Cross appeals filed by Insurance Company claiming recovery rights against owner of offending vehicle and cross objections filed by claimants for enhancement of compensation—Plea taken, driver did not possess a valid driving license on date of accident and Insurer was entitled to avoid liability—Per Contra Plea taken, insurer failed to establish breach of policy condition—Deceased was aged 50 years on date of accident—Claims Tribunal

erred in taking deceased's age to be 68 years—Held—No effort was made by insurer to summon record from RTO with regard to renewed license produced by driver to show that license was not valid on date of accident—Investigation Officer not examined to rebut driver's contention that he had a valid driving license on date of accident which was seized by Investigating Officer-Mere filing of chargesheet under Section 3 of Act is not sufficient to hold that driver did not possess a valid driving license at time of accident—Since claimant's testimony that deceased was 50 years, was not challenged in cross examination and in view of contradictory documentary evidence, age favourable to claimants has to be considered for grant of compensation as provision of Section 166 is a piece of social legislation—Compensation enhanced.

My attention was drawn to the report under Section 173 Cr.P.C. filed against the driver and owner who were prosecuted under Section 3 and 5 read with Section 181 of the Motor Vehicles Act. The Appellant did not produce the IO of the case to rebut the driver's contention that he had a valid driving licence on the date of the accident which was seized by the IO. Mere filing of the charge sheet under Section 3 of the Act is not sufficient to hold that the driver did not possess a valid driving licence at the time of the accident. Thus, merely on filing of the charge sheet, it would be difficult to show that the driver did not possess a valid driving licence on the date of the accident. **(Para 8)**

Now coming to the Cross Appeal for enhancement of compensation. It would be relevant to refer to the Affidavit of Ram Rati Devi (the Claimant). She gave her age to be 50 years and deposed that her son was earning Rs. 6,000/- per month and sent her Rs.5,000/- per month. The Claims Tribunal's finding of taking the deceased's income to be Rs. 5,000/- per month has not been challenged. The Claimant produced on record her Identity Card issued by the Mukhia of Gram Champaran, Dumria, which showed the age of the

First Respondent (the Claimant) to be 50 years on 11.09.2004. There is another document i.e. Voter Identity Card issued on 24.09.2005 which shows her age to be 68 years as on 01.01.2005. Since the Claimant's testimony that she was 50 years was not challenged in cross-examination. In view of the contradictory documentary evidence, the age favourable to the Claimants has to be considered for grant of compensation as the provision of Section 166 is a piece of social legislation. **(Para 12)**

Important Issue Involved: (A) Mere filing of the charge sheet under Section 3 of the Motor Vehicles Act, 1988 is not sufficient to hold that the driver did not possess a valid driving license at the time of accident.

(B) where there is contradictory documentary evidence, the age favourable to the claimants has to be considered for grant of compensation as the provision of Section 166 in a piece of Social legislation.

[Ar Bh]

APPEARANCES:

FOR THE APPELLANT : Mr. Manoj Ranjan Sinha, Advocate Mr. Vivekanana Rana, Advocate for R-1 & R-2.

FOR THE RESPONDENT : Mr. A.K. Chaudhary, Advocate for R-1 & R-2.

RESULT: Appeal of insurance company dismissed and appeal of claimants allowed.

G.P. MITTAL, J.

1. These are two Cross Appeals filed by the National Insurance Company Limited claiming recovery rights against the owner of the offending vehicle i.e. Maruti Car No.DL-2CL-8035.

2. Cross Objections registered as MAC APP. 98/2012 are filed by

the Claimants to seek enhancement of compensation of Rs. 1,85,000/- for the death of Awadh Kumar, who was aged about 28 years on the date of the accident which took place on 24.06.2004.

3. For the sake of convenience, National Insurance Company which is Appellant in MAC APP. 676/2007 shall be referred to as the Appellant. First and Second Respondents who are the deceased's parents shall be referred to as the Claimants. Third and Fourth Respondents who are owner and driver of the offending vehicle shall be referred to as owner and driver respectively.

4. Since the owner and the driver did not assail the judgment dated 16.10.2007 impugned herein and the Insurance Company does not challenge the finding on negligence, I am not required to go into the question of proving negligence.

5. The contention raised on behalf of the Appellant is that it was established during inquiry before the Claims Tribunal that the driver did not possess a valid driving licence on the date of the accident. The Appellant was entitled to avoid liability under Section 149 (2)(a)(ii) of the Motor Vehicles Act. The Appellant was at least entitled to be granted the recovery rights.

6. It is urged on behalf of the Claimants that the Insurance Company failed to establish the breach of the policy condition and thus, the Claims Tribunal rightly held that the Appellant could not avoid its liability to pay the compensation. It is submitted that the deceased was aged about 50 years on the date of the accident; the Claims Tribunal erred in taking the deceased's age to be 68 years on the basis of Voter Identity Card issued by the Election Commission of India when there was other evidence on record to show that the deceased was aged only 50 years.

7. First of all, I would deal with the issue of liability of the Insurance Company. Driver of the offending vehicle entered the witness box as RW2. It is true that he denied that the accident was caused by him. As stated earlier, I am not to go into this finding as the owner and the driver have not appealed on the factum of accident caused by the driver due to his negligence. The driver Mohd. Zameer testified that he was taken to the Police Station on 27.04.2004 by the owner of the vehicle. His driving licence was seized by the IO. He made a complaint Ex.RW2/1 regarding his implication to the Vigilance Department. In cross-examination,

the witness deposed that the receipt regarding the seizure of the driving licence is not traceable. He testified that he had brought his renewed driving licence. Copy of the said driving licence is proved as Ex.RW2/1. The licence was valid for the period 05.07.2004 to 04.07.2004. The date of issue of this licence was 18.10.2000. No effort was made by the Appellant (the Insurer) to summon the record from the RTO with regard to this licence to show that this driving licence was not valid on the date of the accident. It was argued on behalf of the Appellant that the driving licence issued on 18.10.2000 must have been valid for three years. But, this would only be a speculation as Appellant had an opportunity to summon the record from the RTO and to prove that the driving licence was not valid on the date of the accident.

8. My attention was drawn to the report under Section 173 Cr.P.C. filed against the driver and owner who were prosecuted under Section 3 and 5 read with Section 181 of the Motor Vehicles Act. The Appellant did not produce the IO of the case to rebut the driver's contention that he had a valid driving licence on the date of the accident which was seized by the IO. Mere filing of the charge sheet under Section 3 of the Act is not sufficient to hold that the driver did not possess a valid driving licence at the time of the accident. Thus, merely on filing of the charge sheet, it would be difficult to show that the driver did not possess a valid driving licence on the date of the accident.

9. The Claims Tribunal dealt with the contention raised on behalf of the Appellant Insurance Company as under:-

> "9..... The facts in the present case to an extent are different from the facts in the case being relied upon by R3/Insurance Company in as much as that copy of the driving license has been placed on record by R2, which is Ex.RW2/1, though R2 also appeared as a witness and testified that his driving license was seized by the police and Ex.RW2/1 is the copy of the renewed driving license. In answer to a suggestion on behalf of R3/Insurance Company, R2 has denied that driving license, Ex.RW2/1 was not a renewed license but only a fresh license. In his evidence, R2 has also proved the copy of the complaint made to the Vigilance Department, which is also Ex.RW2/1 and in the complaint to Vigilance Department, R2 has claimed that his driving license was seized by the IO of the case and was not returned

> when he had gone to recollect the driving license after 3-4 days. Though, it is a fact that R2, the driver of the offending vehicle has failed to produce the receipt given by the IO of the case when his driving license as alleged was seized but after copy of the driving license was placed on record by R2, R3/Insurance Company had the opportunity to summon a witness form Licensing Authority by whom the driving license, Ex.RW2/1 was issued to prove the fact whether driving license was a renewed license or not and whether R2 was having a driving license at the time of accident, but no evidence to that effect has been produced. R3/Insurance Company has failed to discharge the onus to prove that offending vehicle was being driven in violation of terms and condition of the insurance policy at the time of accident and as such, R3/Insurance Company cannot avoid its liability to indemnify R1, the owner of the offending vehicle for any liability he may incur because of the death caused due to rash and negligent driving of his vehicle."

10. The findings of the Claims Tribunal that the Insurance Company failed to discharge the onus to prove the breach of the policy condition cannot be faulted. The Appellant was thus not entitled to avoid the liability.

11. MAC APP. 676/2007 filed by the Appellant Insurance Company is devoid of any merit; the same is accordingly dismissed. No costs.

MAC APP.98/2012

12. Now coming to the Cross Appeal for enhancement of compensation. It would be relevant to refer to the Affidavit of Ram Rati Devi (the Claimant). She gave her age to be 50 years and deposed that her son was earning Rs. 6,000/- per month and sent her Rs.5,000/- per month. The Claims Tribunal's finding of taking the deceased's income to be Rs. 5,000/- per month has not been challenged. The Claimant produced on record her Identity Card issued by the Mukhia of Gram Champaran, Dumria, which showed the age of the First Respondent (the Claimant) to be 50 years on 11.09.2004. There is another document i.e. Voter Identity Card issued on 24.09.2005 which shows her age to be 68 years as on 01.01.2005. Since the Claimant's testimony that she was 50 years was not challenged in cross-examination. In view of the

contradictory documentary evidence, the age favourable to the Claimants has to be considered for grant of compensation as the provision of Section 166 is a piece of social legislation.

13. The loss of dependency taking the multiplier of '13' would come to Rs. 3,90,000/- (Rs. 5,000/- - 50% x 12 x 13). On further addition of sums of Rs.25,000/- towards loss of love and affection, Rs. 10,000/- towards funeral expenses and ' 10,000/- towards loss to estate, the overall compensation comes of Rs. 4,35,000/-.

14. Thus, the compensation awarded stands enhanced from Rs. 1,85,000/- to Rs. 4,35,000/-. The Claims Tribunal granted interest @ 9% per annum from the date of the filing of the petition till the date of award. Considering that the accident took place in the year 2007, I would reduce the interest on the amount awarded by the Claims Tribunal to 7.5% per annum. The enhanced amount of Rs. 2,50,000/- shall also carry interest @ 7.5% per annum from the date of petition till the date of payment.

15. The Appellant National Insurance Company is directed to deposit the enhanced amount along with the upto date interest within 30 days with UCO Bank, Delhi High Court Branch, New Delhi.

16. On deposit of the amount, 25% of the enhanced amount along with the proportionate interest shall be released immediately to the First Respondent Smt. Ram Rati Devi, the mother of the deceased. Rest 75% shall be held in three equal fixed deposits for a period of one year, two years, and three years respectively in the name of the First Respondent in UCO Bank, Delhi High Court Branch, New Delhi.

17. MAC APP. 98/2012 is allowed in above terms.

18. No costs.

19. Pending applications also stand disposed of.

ILR (2012) IV DELHI 634
CRL. M.C

YAHOO INDIA PVT. LTD. ….PETITIONER

VERSUS

STATE & ANR. ….RESPONDENTS

(SURESH KAIT, J.)

CRL. M.C. NO. : 205/2012 DATE OF DECISION: 02.03.2012
& CRL. M.A. NO. : 771/2012

Constitution of India, 1950—Article 226, 227—Criminal Procedure Code, 1974—Section 204—Petition challenging the order passed by LD.M.M summoning the petitioner—Complaint filed alleging that main social networking websites are knowingly allowing contents and material which is dangerous to communal harmony, with common and malafide intentions and have failed to remove the objectionable content for their wrongful gain-Ld. M.M passed the summoning order-Challenged-There is no averment against the petitioner in the complaint-No evidence produced against him-Respondent contends- complainant has missed the opportunity to make proper averments in the complaint and adduce evidence, in that situation he has a right to amend the same and lead the evidence thereafter-Held-There is no iota of evidence deposed qua the petitioner-Nor proved even by the complainant when he was examined as PW1—There should have been specific averments about the nature of act or omission and law violated and in the absence of the same, summons issued against the petitioner are not sustainable in law—There is no provision in Code of Criminal Procedure to amend the complaint or produce the documents after issuing of the summons—

Magistrate has to carefully scrutinize the evidence brought on record and may even put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima-facie committed by all or any of the accused—The corrective measure of amending the complaint, cannot be accepted, being not tenable under law.

There is no iota of evidence has been deposed qua the petitioner. Nor proved even by the complainant when he was examined as PW1. There should have been specific averments about the nature of act or omission and law violated and in the absence of the same, summons issued against the petitioner are not sustainable in law.

(Para 26)

There is no provision in Cr.P.C. to amend the complaint or produce the documents after issuing the summons.

(Para 27)

Important Issue Involved: There is no provision in Cr. P.C to amend the complaint or produce the documents after issuing of the summons.

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Arvind Nigam, Senior Advocate with Mr. Sanjay Kumar, Adv.

FOR THE RESPONDENTS : Mr. Navin Sharma, APP for respondent No.1. Mr. S.P.M. Tripathi, Adv for R-2.

CASES REFERRED TO:

1. *Pepsi Foods Ltd. & Ors.* vs. *Special Judicial Magistrate and Others* AIR 1998 SC 128.
2. *State of Haryana & Ors.* vs. *Bhajan Lal & Ors.* 1992 Supp(1) SCC 335.

RESULT: Petition allowed.

SURESH KAIT, J. (Oral)

1. Vide the instant petition, the petitioner has assailed the impugned order dated 23.12.2004 passed by learned Metropolitan Magistrate, whereby the petitioner has been summoned.

2. Mr.Arvind Nigam, learned Senior Advocate appearing on behalf of petitioner submits that the order dated 23.12.2011 passed by learned Metropolitan Magistrate, New Delhi is without application of mind because of the fact that neither averments were made against the petitioner in the complaint nor any evidence produced against him.

3. Learned counsel has drawn the attention of this Court to the complaint being filed by respondent No.2 vide complaint case No.136/11 wherein the petitioner has been impleaded as respondent/ accused No.11.

4. Learned counsel has submitted that respondent No.2 in para No.11 of the complaint does not contain any allegation against the petitioner and same reads as under:-

> "11. That the main social networking websites are Google, Facebook, Youtube, Orkut, Broadreader, Mylot, Zomei Time, Shyni Blog, Blogspot, Exbii.com, IMC India. These accused persons knowingly well these facts that these contents and materials are most dangerous for the community and peace of the harmony, but with common and malafide intention and hands under glove with each other failed to remove the same for the wrongful gain."

5. Learned Senior counsel has further drawn the attention of this Court to the impugned order wherein it is observed that the complainant has alleged that the main social networking websites are Google, Facebook, Youtube, Orkut, Broadreader, Mylot, Zombi Time, Shyni Blog, Blogsopt, Exbii.com, IMC India. It is further alleged that the accused persons knowingly, allowed these contents and material to be hosted in the websites which is dangerous to communal harmony with common and malafide intentions and have failed to remove the objectionable content for their wrongful gain.

6. Learned Senior Advocate further referred to the deposition of complainant as CW1 made before learned Trial Court, who produced documents Ex.CW1/A-1 to Ex.CW1/A-16 which have been down loaded from website namely www.Zombietime.com. He further deposed that Ex.CW1/A-17 has been down loaded from Orkut which is arrayed as accused Nos.4 & 10. He also proved on record that Ex.CW1/A-18 downloaded from website mylot.com which is per se defamatory to all politicians. It is further deposed that Ex.CW1/A-19 to Ex.CW1/A-22 were downloaded from the post of topix.com as the contents are dangerous for social structure and community. He further deposed that Ex.CW1/A-23 to Ex.CW1/A-36 which are posted by the service provider youtube.com without any sensor or prohibitory or disclaimer which is also dangerous for communal harmony and peace. It is further deposed that Ex.CW1/A-37 to Ex. CW1/A-48 are taken from website Facebook, and has also proved on record that Ex.CW1/A-49 to Ex.CW1/A-52 as provided by the blogspot.com which is arrayed as accused No.6 & 9 in the complaint and these documents are obscene and against the culture of this country.

7. Respondent No.2/complainant has also deposed that document Ex.CW1/A-53 has been taken from the website exbii.com which provides service through google.com and the document Ex.CW1/A/54 has been taken from the website indimedia.org and has been shown as an article posted by imcindia.com, which is against Hinduism and defamatory to the religion. He further deposed that Ex.CW1/A-55 provided by broadreader.com which is defamatory to Indian politicians and document Ex.CW1/A-56 and Ex.CW1/A-57 have been taken from the service provider blogsopt.com which have been provided by the websites.

8. Learned counsel for petitioner submits that firstly there is no averment against the petitioner in the complaint; and secondly, there is on evidence adduced on record by the complainant or other witnesses, which is relatable to the petitioner.

9. He further submitted that petitioner is not a social networking site and he is only email provider, therefore, under Section 79 of the IT Act being intermediary, petitioner is exempted. Therefore, the impugned summoning order deserves to be set aside qua the petitioner.

10. On the other hand, ld. counsel for respondent No.2 submits

that there is specific averment against the petitioner in para No.7 of the complaint filed before learned Trial Court, which reads as under:-

> "7. That such content, if allowed to be hosted on these websites would seriously damage the secular fabric of India and would severely hurt the sentiment of general public following different religions. Following are the websites which host the said objectionable content as provided to the Hon'ble Court in a sealed envelope:-
>
> 1. Facebook,
> 2. Youtube,
> 3. Google,
> 4. Yahoo,
> 5. Orkut,
> 6. Broadreader,
> 7. Mylot,
> 8. Zombie Time,
> 9. Shyni Blog,
> 10. Blogsopt
> 11. Exbii.com,
> 12. IMC India"

11. Mr. Naveen Sharma, ld. APP appearing for State / R-1, has submitted that in para No.7 of the complaint, as mentioned above, there are allegations against the petitioner, however, has fairly conceded that the contents of the same have not been proved / exhibited by any of witnesses, appeared in the witness box at the time of pre-summoning evidence.

12. He further submitted that at the time of summoning of respondent, learned Trial Court has to see only prima facie case against the petitioner and it is not necessary to exhibit the evidence against him. Moreso, in status report filed by the SHO, police station Tuglaq Road, New Delhi clearly mentions that during the course of inquiry it is revealed that the documents are available on various websites and copies can be down

loaded from there.

13. Learned counsel for respondent No.2/complainant has submitted that CW3 Dr.Aziz Ahmad Khan, has been examined on behalf of the complainant before learned Trial Court. The status report filed, as mentioned above, allegations are there against the petitioners also, therefore, the summoning order issued by learned Trial Court is just and proper. Ld. Trial Court in the order dated 16.12.2011 observed that complainant examined four witnesses on oath in the Court in support of the complaint as CW1 to CW4. The documents are supplied are prima facie and palpably indecent and likely to spread communal violence and hence these documents may be kept under sealed cover.

14. Learned counsel for respondent No.2 further submitted that in the order of learned Trial Court, as mentioned above, after considering the submissions made and material produced on record, found it fit to hold an inquiry through the SHO concerned regarding the authenticity of the documents, as filed.

15. Mr. Arvind Nigam, learned Senior Advocate appearing on behalf of petitioner, in rejoinder has argued that in the report dated 17.12.2011 filed by SHO, police station Tuglaq Road, New Delhi clearly mentioned the documents received with it containing indecent documents. However, no documents against the act or omission of the petitioner neither proved in the Court nor provided to the SHO concerned, nor the SHO filed the said document against the petitioner along with its report dated 17.12.2011.

16. He further submitted that the documents Ex.CW1/A-1 to Ex.CW1/57 are the documents qua other parties; nor a single document has been filed with the complaint against the petitioner. In the complaint, there is no averment for the act or omission of the petitioner and even in the testimony of four witnesses examined on oath on behalf of complaint, not a single iota of evidence has been deposed qua the petitioner or proved when the complainant examined himself as CW1.

17. Learned counsel further submits that at least in the complaint, there should have been specific averments that what the petitioner has done which law has been violatied and what kind of act or omission he has committed thereto. In the absence of aforesaid averments or evidence, the summoning order against the petitioner could not have been issued against the petitioner.

18. The settled law is that at the time of summoning, the magistrate should not be casual while issuing the summoning order because it led to the complete trial for the person; therefore, before issuing the summons, concerned magistrate has to apply its mind while going through the complaint and evidence adduced on record.

19. Learned counsel has relied upon **State of Haryana & Ors v. Bhajan Lal & Ors** 1992 Supp(1) SCC 335 wherein the Apex Court has formulated seven points on the subject, which are as under:-

> "(1) where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused;
>
> (2) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code;
>
> (3) where the uncontroverted allegations made in the FIR or 'complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;
>
> (4) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code;
>
> (5) where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;
>
> (6) where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for

the grievance of the aggrieved party;

(7) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

20. Ld. Counsel submitted that the case of the petitioner is squarely covered under very 1st Principle of the case of **Bhajan Lal** (Supra)

21. Learned counsel for has relied upon the provisions contained in Section 190, 200 and 204 of the Cr. P.C. For convenience same are reproduced as under:-

"190. Congnizance of offences by Magistrate:- (1) Subject to the provisions of this Chapter, any Magistrate of the first class, specially empowered in this behalf under sub- section (2), may take cognizance of any offence-

(a) Upon receiving a complaint of facts which constitute such offence;

(b) Upon it police report of such facts;

(c) Upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.

200. Examination of Complainant:-

A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) If a public servant acting or purporting to act in the discharge of his official duties or a court has made the complaint; or

(b) If the Magistrate makes over the case for inquiry, or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

204. Issue of process:-

(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be-

(a) A summons-case, he shall issue his summons for the attendance of the accused, or

(b) A warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of section 87."

22. He further submitted that under Criminal Procedure Code, step to step procedure is prescribed, and the Magistrate is bound by the

procedure mentioned above. If sufficient material is on record, then he may issue summons against the person. But in the present case, there is no material against the petitioner; despite learned Trial Court while passing the impugned order has observed that there is prima facie material on record against the accused persons for committing offences under Section 292/293/120 Indian Penal Code, 1860 and they are liable to be summoned for facing trial for the same. 23. Learned counsel for respondent No.2 has further submitted that if respondent No.2/complainant has missed the opportunity to make proper averments in the complaint and adduced evidence, in that situation he has a right to amend the same and lead the evidence thereafter.

24. Mr.Nigam, learned Senior Advocate submits that in Cr. P.C. there is no provision to amend the complaint. Therefore, since, there are no allegations against the petitioner in the complaint and there is no evidence on record, in that situation the impugned order dated 23.12.2011 has to be set aside qua the petitioners.

25. I am of the considered opinion that neither allegations are against petitioner nor evidence thereto. Even report filed by SHO does not prove anything against the petitioner. No averments for the act or omission of the petitioner are made in the complaint nor has been brought by the testimony of 4 witnesses examined on oath on behalf of the complainant.

26. There is no iota of evidence has been deposed qua the petitioner. Nor proved even by the complainant when he was examined as PW1. There should have been specific averments about the nature of act or omission and law violated and in the absence of the same, summons issued against the petitioner are not sustainable in law.

27. There is no provision in Cr.P.C. to amend the complaint or produce the documents after issuing the summons.

28. Law is settled in case of **Pepsi Foods Ltd. & Ors. v. Special Judicial Magistrate and Others** AIR 1998 SC 128 wherein it is held that summoning of an accused in a criminal case is a serious matter. Criminal Law cannot be set into motion as a matter of course. It is not that the complainant has to bring only witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of Magistrate summoning the accused must reflect that he has applied his

mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary as well in support thereof and would that be sufficient for the complainant to succeed in brining charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of accused.

29. Magistrate has to carefully scrutinize the evidence brought on record and may even put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.

30. Considering the above facts and circumstances of the case in hand, and in the light of law discussed above I find force in the submission of learned counsel for petitioner. The corrective measure of amending the complaint, as put forth by learned counsel for respondent No.2, cannot be accepted, being not tenable under law.

31. Accordingly, the impugned order dated 23.12.2011 passed by learned Metropolitan Magistrate, New Delhi in complaint case No.136/11 titled **'Vinay Rai v. Facebook India & Ors'** qua petitioner is accordingly set aside.

32. Therefore, Crl.M.C.No.205/2012 is allowed with no order as to costs.

33. Before parting with present order, I make it clear that whatever observed herein shall not be construed as finding on merit of the case, which is pending trial qua other accused persons and the proceedings.

34. In view of above, Crl.M.A.No.771/2012 does not require further adjudication and stands disposed of.

ILR (2012) IV DELHI 645
RFA

O.P. AGGARWAL & ANR. ….APPELLANTS

VERSUS

AKSHAY LAL & ORS. ….RESPONDENTS

(VALMIKI J. MEHTA, J.)

RFA NO. : 127/2004 DATE OF DECISION: 15.03.2012

Code of Civil Procedure, 1908—Section 96—Appellants/plaintiff purchased the rights in the suit property by means of Agreement to Sell, Power of Attorney and will from previous owner through a chain of similar documents—Appellants/plaintiffs filed suit for possession and mesne profit claiming the Respondents to be illegal occupants/trespassers in suit property-Respondents prayed for dismissal of the suit the ground that the appellants were not owners of the suit property and documents relied upon by appellant cannot confer any ownership rights in suit property-Trial Court dismissed the suit holding that they cannot be said to be the owners on the basis of the documents which do not confer ownership-Hence, present appeal—Held:- Once documents being original and registered documents, are filed and proved on record, the onus of proof that such documents are not genuine documents, in fact shifts to the opposite party—Ownership of the original owner cannot be disputed and the same is a strong proof of the ownership of the suit property of the appellants proved by means of chain of the title documents—All earlier owners are not required to be summoned—Original documents filed by Respondents not proved—Documents such as Agreement to sell, Power of Attorney, Will etc do not strictly confer ownership rights as a sale deed—Such documents create certain

rights in an immovable property entitling the persons who have such documents to claim possession of the suit property—At least the right to the suit property would stand transferred to the person in whose favour such documents have been executed—Ownership rights can be construed as entitling persons who have documents to claim possession of the suit property inasmuch as at least the right to the suit property would stand transferred to the person in whose favour such documents have been executed—Appeal accepted suit decreed.

No doubt, documents such as Agreement to Sell, Power of Attorney, Will etc do not strictly confer ownership rights as a sale deed, however, such documents create certain rights in an immovable property, though which are strictly not ownership rights but definitely the same can be construed as entitling the persons who have such documents to claim possession of the suit property inasmuch as at least the right to the suit property would stand transferred to the person in whose favour such documents have been executed. The Supreme Court in the recent judgment of **Suraj Lamp Industries Pvt. Ltd. Vs. State of Haryana and Anr.** 183 (2011) DLT 1(SC) has reiterated the rights created by virtue of Section 53A of Transfer of Property Act, 1882 and Section 202 of the Contract Act, 1872 in paras 12, 13 and 16 of the said judgment. **(Para 11)**

Important Issue Involved: Documents such as Agreement to sell, Power of attorney, Will etc do not strictly confer ownership rights as a sale deed-Such documents create certain rights in an immovable property entitling the persons who have such documents to claim possession of the suit property-At least the right to the suit property would stand transferred to the person in whose favour such documents have been executed.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANTS : Mr. O.P. Aggarwal, Advocate.

FOR THE RESPONDENT : Mr. Atar Singh Tokas, Advocate.

CASE REFERRED TO:

1. *Suraj Lamp Industries Pvt. Ltd.* vs. *State of Haryana and Anr.* 183 (2011) DLT 1(SC).

RESULT: Appeal allowed.

VALMIKI J. MEHTA, J. (ORAL)

1. The appellant No.1, who is an Advocate, states that he has informed Mr. Atar Singh Tokas, counsel for the respondents, and Mr. Tokas informed him that the respondents have taken back the file from him. I am not inclined to adjourn this old appeal any further as this matter is on the Regular Board of this Court since 2.2.2012.

2. The challenge by means of this Regular First Appeal(RFA) filed under Section 96 of Code of Civil Procedure, 1908 (CPC) is to the impugned judgment and decree of the trial Court dated 13.12.2003 dismissing the suit filed by the appellants/plaintiffs for possession and mesne profits with respect to the suit property bearing MCD No.500/23, Plot No.29, Gali No.10, Bhikam Singh Colony, Behind Masjid, Shahdara, Delhi.

3. The facts of this case are that the appellants/plaintiffs by means of usual documents being the Agreement to Sell, Power of Attorney, Will etc all dated 11.2.2002(Power of Attorney and Will being duly registered with the sub-Registrar, Delhi) purchased the rights in the suit property from one Sh. Sadat Ali Khan. Sh. Sadat Ali Khan had purchased the suit property from Smt. Jasbeer Kaur by means of similar set of documents dated 18.12.1998, and some of which documents are registered documents. Smt. Jasbeer Kaur had purchased the property from Sh. Chanan Singh vide similar set of documents dated 3.12.1997. Sh. Chanan Singh was the son of Sardar Dasondha Singh, who had purchased the suit property from the original owner, namely, Shree Ram Sarvaria and Sons Ltd. by means of a registered sale deed dated 16.3.1955. The appellants/plaintiffs claimed that the respondents were illegal occupants/ trespassers in possession of the suit property and therefore after putting

them to notice of their illegal occupation, the subject suit was filed.

4. The respondents/defendants appeared and contested the suit and prayed for dismissal of the suit on the ground that the appellants/plaintiffs were not the owners of the suit property. It was also pleaded that the documents relied upon by the appellants/plaintiffs cannot confer any ownership rights in the suit property. It was also pleaded that the earlier chain of title deeds as relied upon by the appellants/plaintiffs were fabricated documents. The respondents/defendants claimed that the suit property was transferred by one Smt. Sakeena Begum in favour of Mohd. Saleem by means of documents dated 22.5.1989. Mohd. Saleem is thereafter said to have transferred the suit property by means of documents dated 14.6.1991 to one Sh. Vijay Gupta and whereafter by means of the documents dated 23.10.1996, the defendant No.4 had purchased the rights in the suit property.

5. After completion of pleadings, the trial Court framed the following issues:-

"1. Whether the suit of the Plaintiff is not maintainable and liable to be dismissed as alleged in P.O. No.1 to 7?

2. Whether the Plaintiff is entitled to the declaration as prayed?

3. Whether the Plaintiff is entitled to the possession as prayed?

4. Whether the Plaintiff is entitled to the injunction as prayed?

5. Whether the Plaitiff is entitled to the damages? If so, at what rate and for what period?

6. Relief."

6. The trial Court has dismissed the suit by arriving at the findings and conclusions under issue Nos.2 to 4 that the appellants/plaintiffs cannot be said to be owners of the property inasmuch as the documents such as the Agreement to Sell, Power of Attorney etc do not confer ownership rights in the suit property. The trial Court also held that the documents which have been proved and exhibited by the appellants cannot be looked into in the absence of the persons, who executed such documents, having not been summoned to prove these documents.

7. In my opinion, the impugned judgment is illegal, and the appeal deserves to be allowed by setting aside the impugned judgment by decreeing

the suit of the appellants/plaintiffs. The jamabandi which has been filed and proved on record by the defendants themselves as Ex.DW2/1 shows that the ownership of the first/original owner-M/s. Shree Ram Sarwaria & Sons Limited is duly shown in this record as one of the co-owners of the khasra No.259 of Vishwasnagar Colony, village Karkardooma, Shahdara. The ownership of the original owner-Shree Ram Sarwaria & Sons Limited therefore cannot be disputed. Shree Ram Sarwaria & Sons Limited had executed a registered sale deed in favour of Sardar Dasondha Singh and which registered sale deed in original has been proved and exhibited in the trial Court as Ex.PW1/8. The possession of this original title deed, with the appellants/plaintiffs is a very strong proof of the ownership of the suit property being of the appellants/plaintiffs by means of chain of title documents which have also been referred to above. The appellants/plaintiffs has also filed, proved and exhibited the various title documents in a chain as Ex.PW1/1 to Ex.PW1/15. I do not agree with the trial Court that it was necessary that the executants of such documents had necessarily to be summoned to prove these documents inasmuch as if what the trial Court holds is accepted, it will be necessary that to prove the chain of title deeds running into decades all earlier owners have to be summoned. This is not required to be done. Once documents pertaining to rights in the property, and such documents being original documents and also registered documents, are filed and proved on record, the onus of proof that such documents are not genuine documents, in fact, shifts to the opposite party. Further, the fact that the defendants/respondents are not owners becomes clear from the fact that the earlier owner who is claimed to be the owner of the property on behalf of the respondents/ defendants is stated to be one Smt. Sakeena Begum, but how Smt. Sakeena Begum is the owner of this property is not shown on record. It was necessary for the respondents/defendants to show that Smt. Sakeena Begum had purchased from the original owner Shree Ram Sarvaria and Sons Ltd, however, there is no document to connect Smt. Sakeena Begum with Shree Ram Sarvaria and Sons Ltd. Therefore, once Smt. Sakeena Begum herself never had title, no rights in the property flow to the so called subsequent purchasers, namely, Mohd. Saleem, Sh. Vijay Gupta and defendant No.4-Smt. Sundra Devi.

8. I must at this stage itself mention that the defendants/respondents though filed certain original documents, however the said documents were not proved as no one on behalf of the respondents/defendants

stepped into the witness box either to prove the case as set up in the written statement or the so called chain of title documents of the suit property. The only evidence which was led on behalf of the respondents/ defendants was of two witnesses, DW1 and DW2, and which official witnesses proved the jamabandi and the alleged Award of the Government acquiring the suit land. A party to a case who does not have the courage to step into the witness box to prove his case and is not willing to be cross-examined cannot be allowed to succeed.

9. The trial Court has rightly held that mere filing of the Award cannot mean that the Government became the owner inasmuch as the Government becomes the owner of the land only after possession of the land is taken under Section 16 of the Land Acquisition Act, 1894 and which is not so proved on record and nor is the Government claiming any rights in the suit property. So far as the jamabandi, Ex.DW2/1 is concerned, I have already held that the same shows the ownership of the suit property originally in the name of Shree Ram Sarwaria & Sons Limited.

10. A civil case is decided on balance of probabilities. The preponderance of probabilities in the present case shows that the respondents/defendants had no right, title and interest in the suit property. Whereas on the one hand, appellants/plaintiffs proved the entire chain of title documents including the registered sale deed dated 16.3.1955 in favour of Sh. Dasondha Singh by Shree Ram Sarwaria & Sons Limited, the respondents/defendants failed to even prove the so called documents by which they derived title, and which in any case did not confer title upon them as it is not shown as to how the so called owner Smt. Sakeena Begum had become owner of the suit property by purchasing the same from original owner Shree Ram Sarwaria & Sons Limited. As already stated above, the respondents/defendants did not have the courage to step into the witness box and be subjected to cross-examination.

11. No doubt, documents such as Agreement to Sell, Power of Attorney, Will etc do not strictly confer ownership rights as a sale deed, however, such documents create certain rights in an immovable property, though which are strictly not ownership rights but definitely the same can be construed as entitling the persons who have such documents to claim possession of the suit property inasmuch as at least the right to the suit property would stand transferred to the person in whose favour such

documents have been executed. The Supreme Court in the recent judgment of **Suraj Lamp Industries Pvt. Ltd. Vs. State of Haryana and Anr.** 183 (2011) DLT 1(SC) has reiterated the rights created by virtue of Section 53A of Transfer of Property Act, 1882 and Section 202 of the Contract Act, 1872 in paras 12, 13 and 16 of the said judgment.

12. The appellant No.1/plaintiff No.1 in the affidavit by way of evidence has stated in the examination-in-chief that the suit property can easily earn Rs. 2,000/- per month and which amount should be awarded in favour of the appellants/plaintiffs. There is no cross-examination to this aspect by the respondents/defendants. Also, considering that the suit property is of 200 sq. yds, an amount of Rs. 2,000/- per month cannot, in any manner, be said to be unreasonable.

13. In view of the above, appeal is accepted. Suit of the appellants/plaintiffs is decreed for possession with respect to property admeasuring 200 sq. yds. bearing MCD No.500/23, Plot No.29, Gali No.10, Bhikam Singh Colony, Behind Masjid, Shahdara, Delhi. The appellants/plaintiffs are also granted mesne profits @ Rs. 2000/- per month from the date of filing of the suit till the appellants/plaintiffs receive actual physical vacant possession from the respondents/defendants. Decree sheet with respect to mesne profits be prepared after the appellants/plaintiffs pays/files the Court fees with respect to mesne profits. Appellants are also entitled to costs of this appeal. Trial Court record be sent back.

14. At this stage, counsel for the respondents/defendants appears and states that in fact he has duly issued legal notice to the respondent No.1 for discharge, and which notice has been filed alongwith the list of documents dated 6.3.2012 in this Court. Accordingly, it is observed that the Advocate, Mr. Atar Singh Tokas has duly notified the respondent No.1, and who shall accordingly bear the consequences of the appeal having been heard and disposed of ex parte.

ILR (2012) IV DELHI 652
CRL APPEAL

D.D.A. ….APPELLANT

VERSUS

VIP MARBLE EMPORIUM & ORS. ….RESPONDENTS

(V.K. SHALI, J.)

CRL. APPEAL. NO. : 940/2011 DATE OF DECISION: 19.03.2012

Delhi Development Act, 1957—Sections 14 & 29 (2)—Accused persons running marble shop in an area of 500 sq. ft. which as per Master Plan, could be used only for agricultural purposes or water body—Magistrate acquitted accused persons—Held:- Magistrate committed error in appreciating evidence by not believing CW1 Junior Engineer and giving more weightage to testimony of CW2 as compared to DW1 who was a junior officer—CWI testified about conducting inspection and finding marble shop of the accused functioning—Testimony of CW1 unshaken-Magistrate wrongly observed that testimony of CW2 Sales Tax Officers should be given more weightage as compared to DW1 who was officer of Junior Rank-Credence to testimony should not be based on post, but should be assessed by reading entire testimony—Testimony of CW1 cannot be disbelieved just because there was no independent corroboration—Judgment acquitting accused persons set aside and they held guilty of offence u/s 14 r/w Section 29 (2) of DDA Act—Respondents sentenced to be released after admonition—Accused company fined Rs. 100—Appeal allowed.

[Ad Ch]

APPEARANCES:

FOR THE APPELLANT : Mr. Rajesh, Mahajan, Advocate.

FOR THE RESPONDENT : Mr. Vikram Singh, Advocate.

RESULT: Appeal Allowed.

V.K. SHALI, J.

1. This is an appeal filed by the appellant against the judgment dated 07.04.2007 passed by Sh. A. K. Chaturvedi, the learned Metropolitan Magistrate, New Delhi in complaint case titled **M/s DDA Vs. VIP Marble Emporium & Ors.** acquitting the accused company and its partners for an offence under Section 14 read with Section 29(2) of the Delhi Development Act, 1957 for misusing the premises contrary to the Master Plan/Zonal Development Plan.

2. Briefly stated the facts of the case are that on 02.08.2001, an inspection was conducted by Mr. S. C. Saxena, Junior Engineer, DDA whereupon accused Fayaz Ahmed and Shahdat Ali, allegedly partners, were found putting to use the premises no. 372, Sultanpur, Main Mehrauli Gurgaon Road, Village Ghitorni, New Delhi, for running a shop of marble emporium at the ground floor under the name and style of M/s VIP Marble Emporium in an area of about 500 sq. ft. The said premises according to the appellant could have been used only for agricultural purpose or as water body as per the Master Plan or Zonal Development Plan. The appellant, in support of his case had examined two witness, namely, Sh. S. C. Saxena, Junior Engineer, DDA as CW1, who proved the Zonal Map as Exhibit CW1/B, Lay Out Plan as Exhibit CW1/C, Show Cause Notice as Exhibit CW1/D, Sanctioned Plan as Exhibit CW1/E, and Complaint as Exhibit CW 1/F, copy of the Resolution as Exhibit CW1/G-F1 and Gazette Notification as Exhibit CW1/H-H1.

3. The second witness examined on behalf of the appellant was Mr. S. K. Sharma, UDC, Sales Tax Department, New Delhi who testified that the application dated 11.06.1999 for change of address from 428/3, Swatantar Senani Market, Ghitorni to 372, Sultanpur, Main Mehrauli Gurgaon Road, Village Ghitorni, New Delhi was applied for by the respondent. Documents proved in this regard are Exhibit as CW2/A and copy of assessment order as Exhibit CW 2/B-D. Thereafter, the appellant moved an application under Section 311 Cr.P.C., CW-3 Sh. M.L. Ahuja,

STO was examined and he proved his earlier statement and verification report dated 11.05.2004 Exhibit CW-3/DY. The inspection was done on 11.05.2004 by the officials of the DDA whereupon it was found that no business was being run at 372, Sultanpur, Main Mehrauli Gurgaon Road, Village Ghitorni, New Delhi. The statement of the accused was recorded and thereafter the respondent-accused examined two witnesses DW1/Kamaludin who stated that the shop of the respondent/accused no. 1 was also at 372, Sultanpur, Main Mehrauli Gurgaon Road, Village Ghitorni, New Delhi and the said shop was functioning till about 3-4 months ago and it had been lying sealed for the last four months. The witness was examined on 05.02.2007. Similarly, DW-2/Fayaz Ahmed was also examined by the accused persons to prove their defence that they were not functioning from 372, Sultanpur, Main Mehrauli Gurgaon Road, Village Ghitorni, New Delhi.

4. After hearing the arguments, the learned Magistrate acquitted the respondents/accused persons by observing that the petitioner has failed to prove the guilt of the respondents/accused beyond reasonable doubt. In this regard, it referred to the testimony of CW-3/Mr. M. L. Ahuja, STO who proved verification report as Exhibit CW-3/DY, which was an inspection report by the DDA conducted on 11.05.2004 indicating that no marble shop was functioning on that date at 372, Sultanpur, Main Mehrauli Gurgaon Road, Village Ghitorni, New Delhi. The learned Magistrate observed that CW-2 was only a clerk while as CW-3 was a Sales Tax Officer, and thus, a person of much higher rank, and accordingly, his testimony carries more weight so as to make him believe that no marble shop was functioning at the address given in question.

5. I have heard the learned counsel for the appellant as well as the learned counsel for the respondent-accused and have also gone through the record.

6. Mr. Rajesh Mahajan, the learned counsel for the appellant has stated that the learned Magistrate has failed to appreciate the fact that the verification report Exhibit as CW-3/DY approved by CW-3 was a report with reference to the inspection dated 11.05.2004, while as the inspection, on the basis of which, the respondents/accused were prosecuted was dated 02.08.2001. It was also contended by him that the learned Magistrate has grossly erred by observing that since CW-3 is a Sales Tax Officer is much superior in rank than that of DW-2, therefore, his testimony

carries more weightage. The learned counsel for the respondents/accused could not refute this contention in any manner, except it was contended that as on date no marble shop is functioning at the address in question.

7. I have considered the submissions, made by the learned counsel for the appellant and have gone through the record.

8. The learned Magistrate seems to have fallen into an error in appreciating the evidence by observing that the verification report exhibit as CW-3/DY was an inspection report conducted on 11.05.2004 on which date admittedly no marble shop was functioning at the address in question. That cannot make any reasonable person to conclude that the shop was not in existence on 02.08.2001. CW-1 is the Junior Engineer who has specifically stated that on 02.08.2001, he had conducted the inspection along with his team, of the premises in question and a marble shop was found to be functioning from the said address. This testimony has remained unshaken and there is absolutely no reason as to why the government servant would testify falsely against the respondent/accused. It has also not been the case of the respondent/accused that CW-1 had any enmity to testify against them. The learned Magistrate seems to have fallen into an error by observing that the testimony of CW-3 is that of a Sales Tax Officer (hereinafter referred to as 'STO') while as the testimony of DW-1 is a junior level officer and much below in rank to STO, and therefore, credence could not be given to the same. The credence to the testimony of a witness is not to be based on the post which he holds, a poor person may be truthful as compared to a rich person or holder of a higher post. There cannot be a generalization in this regard. The reasoning adopted by the learned Magistrate is totally erroneous. The truthfulness and the credence of the witness has to be assessed by reading the entire testimony and the examination-in-chief as well as the cross-examination of the witness and then arrive at a conclusion as to whether his testimony inspires confidence so as to believe in what he says. In the instant case, I have gone through the testimony of CW-1 and I do not find any infirmity which will make me disbelieve that he is deposing falsely against the respondents/accused that they were running a marble shop. It is a different thing that in that area, there may have been other marble shops, but only one marble shop has been booked for the purpose of being prosecuted. But even then, this is not brought about in the cross-examination, and consequently, the Court cannot venture

into conjecture and surmises in this regard. It was also inappropriate on the part of the learned Magistrate to observe that there is no independent corroboration to the testimony of CW-1, and therefore, his testimony cannot be relied upon. Admittedly, CW-1, is an official of a public body and there was no reason to disbelieve the testimony of this person and although having an independent corroboration would always have been better, but in the absence of the same, it could not be said that the testimony of CW-1 cannot be relied upon. I do not subscribe to this kind of conclusion arrived at by the learned Magistrate, and therefore, I feel that it is not in dispute that the area in question can be used only for agricultural purpose or for water body. In this regard, the appellant has proved necessary plans to which the area can be put to use, therefore, the judgment acquitting the respondents/accused, in my view, is liable to be set aside being erroneous.

9. I, accordingly, set aside the judgment dated 07.04.2007 and hold the respondents/accused guilty of having violated Section 14 read with Section 29(2) of the Delhi Development Act, 1957. Now comes the question of imposing sentence, I feel that the matter is old one and the respondents/accused, admittedly, have closed the marble shop w.e.f. 11.05.2005 which is proved by the documents, exhibited as CW-3/DY by the appellant themselves and a lenient view deserves to be taken to release all the respondents/accused persons except the company after admonition. So far as the company is concerned, though it cannot be admonished, it is visited with a token fine of Rs.100/- which shall be deposited with the learned Trial Court within 15 days failing which, it shall be realized by resorting to processes of law. Accordingly, the appeal stands allowed as herein above.

ILR (2012) IV DELHI 657
LPA

ANAND BHUSHAN ….APPELLANT

VERSUS

R.A. HARITASH ….RESPONDENT

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

LPA NO. : 777/2010 DATE OF DECISION: 29.03.2012

(A) Constitution of India, 1950—Article 226 & 227—Right to Information Act, 2005—Section 20(1)—Delhi High Court Act, 1966—Section 10—Central Information Commission (CIC) imposed maximum penalty of Rs. 25,000/- on the respondent under section 20(1) of the Act for the delay of over 100 days in furnishing the information to the appellant—Chief Secretary, Govt. of Delhi was directed to recover the said amount from the salary of the respondent @ Rs. 5,000/- per month-Respondent preferred writ petition—Learned Single Judge allowed the writ petition—Reduced the penalty amount to Rs. 2,500/- recoverable from the salary of the respondent in ten equal monthly installments of Rs. 250/- per month—Reason—The question of penalty is essentially between the Court and the respondent and did not really concern the appellant who has been provided with information—Respondent took the charge of the post 14 days after the subject RTI application of the appellant had been filed—Appellant filed the Intra Court Appeal—Contention—Use of word 'shall' in section 20(1) is indicative of the imposition of penalty mandatory—Presence of information seeker is essential not only for computing the penalty but also for establishing the default of the information officer-Exclusion of the information seeker from penalty

proceedings would dilute the sprit of the Act—The role of CIC is of an adjudicator—Held—A reading of Section 20 shows that while the opinion, as to a default having been committed by the Information Officer, is to be formed 'at the time of deciding any complaint or appeal', the hearing to be given to such Information Officer, is to be held after the decision on the Complaint or the appeal. The proceedings before the CIC, of hearing the Information Officer qua whom opinion of having committed a default has been formed and of imposition of penalty, in the exercise of supervisory powers of CIC and not in the exercise of adjudicatory Powers.

The power of the CIC, under Section 20, of imposing penalty is to be seen in this light and context. A reading of Section 20 shows (as also held by us in Ankur Mutreja) that while the opinion, as to a default having been committed by the Information Officer, is to be formed 'at the time of deciding any complaint or appeal', the hearing to be given to such Information Officer, is to be held after the decision on the complaint or the appeal. The proceedings before the CIC, of hearing the Information Officer qua whom opinion of having committed a default has been formed and of imposition of penalty, are in our opinion, in the exercise of supervisory powers of CIC and not in the exercise of adjudicatory powers. As already held by us in Ankur Mutreja, there is no provision, for payment of penalty or any part thereof, to the information seeker. The information seeker has no locus in the penalty proceedings, beyond the decision of the complaint/appeal and while taking which decision opinion of default having been committed is to be formed, and at which stage the complainant/information seeker is heard.

(Para 9)

(B) Constitution of India, 1950—Article 226 & 227—Right to Information Act, 2005—Section 20(1)—Central Information Commission (CIC) imposed maximum

penalty of Rs. 25,000/- on the respondent under section 20(1) of the Act for the delay of over 100 days in furnishing the Information to the appellant-Chief Secretary, Govt. of Delhi was directed to recover the said amount from the salary of the respondent @ Rs. 5,000/- per month—Respondent preferred Writ petition—Learned Single Judge allowed the writ petition—Reduced the penalty amount to Rs. 2,500/- recoverable from the salary of the respondent in ten equal monthly installments of Rs. 250/- per month—Reason—The question of penalty is essentially between the Court and the respondent and did not really concern the appellant who has been provided with information—Respondent took the charge of the post 14 days after the subject RTI application of the appellant had been filed—Appellant filed the Intra Court Appeal—Contention—Use of word 'shall' in section 20(1) is indicative of the imposition of penalty mandatory—Presence of information seeker is essential not only for computing the penalty but also for establishing the default of the information officer-Exclusion of the information seeker from penalty proceedings would dilute the spirit of the Act—No notice of the petition was given to the appellant before reducing the penalty—The role of the CIC is of an adjudicator—Held—In the context of RTI Act, merely because the CIC, while deciding the complaints/ appeals is required to hear the complainant/ information seeker, would not require the CIC to hear them while punishing the erring Information Officer, in exercise of its Supervisory Powers—We may reiterate that the complainant/information seeker has the remedy of seeking costs and compensation and thus the argument of 'being left remediless' is misconceived-However, 'penalty' is not to be mixed with costs and compensation—The participation of the information seeker in the penalty proceeding has nothing to do with the principal of accountability—Since the

information seeker has no right of participation in penalty proceedings, the question of right of being heard in opposition to writ petition challenging imposition of penalty dose not arise-Error was committed by the learned Single Judge in reducing the penalty without hearing the appellant.

We may reiterate that the complainant/information seeker has the remedy of seeking costs and compensation and thus the argument of 'being left remediless' is misconceived. However 'penalty' is not to be mixed with costs and compensation. **(Para 11)**

We are also of the view that the participation of the information seeker in the penalty proceeding has nothing to do with the principle of accountability. **(Para 12)**

Needless to say that if the information seeker has no right of participation in penalty proceedings, as held by us, the question of right of being heard in opposition to writ petition challenging imposition of penalty does not arise. We therefore hold that no error was committed by the learned Single Judge in reducing the penalty without hearing the appellant. **(Para 13)**

(C) Constitution of India, 1950—Article 226 & 227—Right to Information Act, 2005—Section 20(1)—Central Information Commission (CIC) imposed maximum penalty of Rs. 25,000/- the respondent under section 20(1) of the Act for delay of over 100 days in furnishing the information to the appellant—Chief Secretary, Govt. of Delhi was directed to recover the said amount from the salary of the respondent @ Rs. 5,000/- per month Respondent preferred writ petition—Learned Single Judge allowed the writ petition—Reduced the penalty amount to Rs. 2,500/- recoverable from the salary of the respondent in ten equal monthly installments of Rs. 250/- per month—Reason—The question of penalty is essentially between the Court and the respondent

and did not really concern the appellant who has been provided with information—Respondent took the charge of the post 14 days after the subject RTI application of the appellant had been filed—Appellant filed the Intra Court Appeal—Contention—Use of word 'shall' in section 20(1) is indicative of the imposition of penalty mandatory—Presence of information seeker is essential not for computing the penalty but also for establishing the default of the information officer—Exclusion of the information seeker from penalty proceedings would dilute the sprit of the Act—The role of the CIC is of an adjudicator—Held—Though Section 20(1) uses the word 'shall', before the words 'impose a penalty of Rs. Two hundred and fifty rupees but in juxtaposition with the words 'without reasonable cause, malafidely of knowingly or obstructed'—The second proviso thereto further uses the words, 'reasonably and diligently'—The question which arises is when the imposition of penalty is dependent on such variables, can it be said to be mandatory or possible of calculation with mathematical precision—All the expressions used are relative in nature and there may be degrees of, without reasonable cause, malafide, knowing or reasonableness, diligence etc.—The very fact that imposition of penalty is made dependent on such variables is indicative of the direction vested in the authority imposing the punishment—Once it is held that the quantum of fine is discretionary, there can be no challenge to the judicial review under Article 226 of the Constitution, of exercise of such discretion, of course within the well recognized limits—If this Court finds discretion to have been not appropriately exercised by the CIC, this Court can, in exercise of its power vary the penalty—Appeal dismissed.

We may at the outset notice that a Division Bench of this Court in judgment dated 6th January. 2011 in LPA 782/2010 titled **Central Information Commission v. Department of**

Posts, inspite of the argument raised that that Single Judge ought not to have reduced the penalty imposed by the CIC but finding sufficient explanation for the delay in supplying information, upheld the order of the Single Judge, reducing the penalty. Though Section 20(1) uses the word 'shall', before the words 'impose a penalty of Rs. two hundred and fifty rupees' but in juxtaposition with the words 'without reasonable cause, malafidely or knowingly or obstructed'. The second proviso thereto further uses the words, 'reasonably and diligently'. The question which arises is when the imposition of penalty is dependent on such variables, can it be said to be mandatory or possible of calculation with mathematical precision. All the expressions used are relative in nature and there may be degrees of, without reasonable cause, malafide, knowing or reasonableness, diligence etc. We are unable to bring ourselves to hold that the aforesaid provision intends punishment on the same scale for all degrees of neglect in action, diligence etc. The very fact that imposition of penalty is made dependent on such variables is indicative of the discretion vested in the authority imposing the punishment. The Supreme Court in **Carpenter Classic Exim P. Ltd. V. Commnr. of Customs** (Imports) (2009) 11 SCC 293 was concerned with Section 114 A, Customs Act, 1962 which also used the word 'shall' in conjunction with expression 'willful mis- statement or suppression of facts'; it was held that provision of penalty was not mandatory since discretion had been vested in the penalty imposing authority. Similarly in **Superintendent and Remembrancer of Legal Affairs to Government of West Bengal V. Abani Maity** (1979) 4 SCC 85, the words 'shall be liable for confiscation' in section 63 (1) of Bengal Excise Act, 1909, were held to be not conveying an absolute imperative but merely a possibility of attracting such penalty inspite of use of the word 'shall'. It was held that discretion is vested in the court in that case, to impose or not to impose the penalty. **(Para 15)**

Once it is held that the quantum of fine is discretionary,

there can be no challenge to the judicial review under Article 226 of the Constitution, of exercise of such discretion, of course within the well recognized limits. If this Court finds discretion to have been not appropriately exercised by the CIC, this Court can in exercise of its powers vary the penalty. In the facts of the present case, we find the learned Single Judge to have for valid reasons with which we have no reason to differ, reduced the penalty. We, therefore do not find any merits in this appeal and dismiss the same. No order as to costs. **(Para 16)**

Important Issue Involved: (A) Information seeker has no right of participation in penalty proceedings.

(B) The word 'shall' appearing in Section 20 (1) does not make it mandatory to impose the maximum penalty in each case; discretion is vested in the authority in imposition of cost.

[Vi Ba]

APPEARANCES:

FOR THE APPELLANT : Ms. Girija Krishan Varma, Advocate.

FOR THE RESPONDENT : Mr. P.S. Parma, Advocate for Mr. A.S. Chandhiok, ASG/Amicus Curiae.

CASES REFERRED TO:

1. *Ankur Mutreja* vs. *Delhi University* 9th January, 2012 in LPA 764/2011.
2. *Sree Narayana College* vs. *State of Kerala* MANU/KE/0238/2010.
3. *Competition Commission of India* vs. *Steel Authority of India Ltd.* (2010) 10 SCC 744.
4. *Central Information Commission* vs. *Department of Posts,* 2011 in LPA 782/2010.

5. *Carpenter Classic Exim P. Ltd.* vs. *Commnr. of Customs (Imports)* (2009) 11 SCC 293.
6. *Bhagat Singh* vs. *Chief Information Commissioner* 146(2008) DLT 385.
7. *Nathi Devi* vs. *Radha Devi Gupta* (2005) 2 SCC 271.
8. *Surya Dev Rai* vs. *Ram Chander Rai* (2003) 6 SCC 675.
9. *Superintendent and Remembrancer of Legal Affairs to Government of West Bengal* vs. *Abani Maity* (1979) 4 SCC 85.
10. *The State of U.P.* vs. *Raj Narain* (1975) 4 SCC 428.

RESULT: Appeal Dismissed.

RAJIV SAHAI ENDLAW, J.

1. This Intra Court appeal impugns the order dated 26th May, 2010 of the learned Single Judge allowing W.P.(C) No.3670/2010 preferred by the respondent. The respondent, at the relevant time was the Dy. Director of Education and Public Information Officer of the Directorate of Education, Govt. of NCT of Delhi. The respondent had filed the writ petition impugning the order dated 14th April, 2010 of the Central Information Commission (CIC) imposing maximum penalty of Rs.25,000/- on the respondent, under Section 20(1) of the Right to Information Act, 2005 for the delay of over 100 days in furnishing the information to the appellant. The Chief Secretary, Govt. of Delhi was directed to recover the said amount from the salary of the respondent @ Rs. 5,000/- per month.

2. The learned Single Judge, vide order impugned in this appeal, reduced the penalty amount to Rs. 2,500/- recoverable from the salary of the respondent in ten equal monthly installments of Rs. 250/- per month. The learned Single Judge held that the question of penalty is essentially between the Court and the respondent and did not really concern the appellant who has been provided with the information. Yet another reason given for so reducing the penalty was that the respondent had taken charge of the said post 14 days after the subject RTI application of the appellant had been filed.

3. Notice of this appeal was issued primarily on the ground, that the

learned Single Judge, being of the view aforesaid, had decided the writ petition even without issuing notice to the appellant, though the appellant had been impleaded as respondent in the writ petition. Hearing in this appeal was commenced on 11th March, 2011 when the following order was passed:-

> "Heard Ms. Girija Krishan Varma, learned counsel for the appellant and the respondent in person. In course of hearing of this appeal, Ms. Verma has raised the following contentions:-
>
> (a) The learned single Judge has disposed of the writ petition without notice to the appellant, who had sought the information under the Right to Information Act, 2005 on the ground that the question of penalty is essentially between the Court and the petitioner and does not really concern the respondents which makes the order vulnerable as the exposition of law in the said manner is contrary to the spirit of the 2005 Act.
>
> (b) If, the language employed under Section 20 of the 2005 Act, which deals with penalties, is appropriately read it would clearly convey that every day's delay shall invite penalty of Rs.250/- with the rider that the said penalty shall not exceed Rs.25,000/- and the first proviso deals with grant of reasonable opportunity to bring the concept of natural justice and the second proviso requires reasonable diligence but if reasonable diligence is not shown, discharging regard being had to the onus of proof as engrafted in the said proviso, it is obligatory on the part of the Commission to impose penalty of Rs.250/- per day. Elaborating the said submission, it is contended by her that certain days, delay may be explained and some days, delay, if not explained, would invite the penalty which is mandatory because of the words used in Section 20 of the Act viz., "shall impose penalty"
>
> (c) If there is penalty provision in the Act, the High Court in exercise of power of judicial review cannot reduce the said penalty unless a categorical finding is recorded that reasonable explanation has been proffered/offered for certain days. Pyramiding the said contention, it is put forth by Ms. Verma that the discretion by the Court is not attracted in exercise of power under Articles 226 or 227 of the Constitution of India unless the finding with regard to reasonable explanation as recorded by the Commission is reversed.
>
> (d) If the Court in exercise of power of judicial review is allowed to reduce the penalty that would frustrate the purpose of the Act which is a progressive legislation to introduce transparency in democracy for the purpose of good governance. In view of the issues raised, we would like to have the assistance of the learned Solicitor General in the matter. Let the matter be listed on 3rd May, 2011 at 2.15 pm. Ms. Zubeda Begum, learned counsel for the State undertakes to apprise the learned Solicitor General about the order passed today. A copy of the order be given dasti under signature of the Court Master to Ms. Zubeda Begum."

4. The matter was thereafter adjourned from time to time.

5. We have however recently vide our judgment dated 9th January, 2012 in LPA 764/2011 titled **Ankur Mutreja v. Delhi University held that;**

a) the Act does not provide for the CIC to, in the penalty proceedings, hear the information seeker, though there is no bar also thereagainst if the CIC so desires;

b) that the information seeker cannot as a matter of right claim audience in the penalty proceedings which are between the CIC and the erring information officer;

c) there is no provision in the Act for payment of penalty or any part thereof imposed/recovered from the erring information officer to the information seeker;

d) the penalty proceedings are akin to contempt proceedings, the settled position wherein is that after bringing the facts to the notice of the Court, it becomes a matter between the Court and the contemnor and the informant or the relator does not become a complainant or petitioner in contempt proceedings.

6. The aforesaid judgment was brought to the attention of the counsel for the appellant. The counsel for the appellant has however besides orally arguing the matter also submitted written submissions. Her arguments may be summarized as under:-

i) that the use of the word "shall" in Section 20(1) is indicative of, the imposition of penalty being mandatory, where the information officer has refused to or delays in receiving the RTI application or when does not give or delays in giving the information sought; ii). that the presence of the information seeker is essential not only for computing the penalty but also for establishing the default of the information officer;

iii) that the penalty proceedings under Section 20(1) are adversarial in nature;

iv) that the position of the information seeker, in penalty proceedings, is akin to that of public prosecutor;

v) that since Section 20(1) provides for a hearing to be given to the information officer, there can be no hearing without the information seeker; vi). the second proviso to Section 20(1), putting the burden of proving that he acted reasonably and diligently, on the information officer is also indicative of the penalty proceedings being adversarial in nature; if the information seeker was not to be a party to the said proceedings, the question of onus/burden would not have arisen; the question of shifting the burden arises only in an adversarial situation; vii). that the role of CIC is only that of an Adjudicator; viii). that exclusion of the information seeker from penalty proceedings would dilute the spirit of the Act; ix). that the Act is not only about sharing of information and promoting transparency but is also intended to bring about accountability and taking away the right of the information seeker to participate in the penalty proceedings is against the principle of accountability;

x) Section 23 of the Act bars the jurisdiction of Courts; the information seeker thus has no other remedy against the erring information officer.

7. The counsel for the appellant has also handed over a compilation of the following judgments:-

(i) **Surya Dev Rai v. Ram Chander Rai** (2003) 6 SCC 675;

(ii) **Nathi Devi v. Radha Devi Gupta** (2005) 2 SCC 271;

(iii) **The State of U.P. v. Raj Narain** (1975) 4 SCC 428;

(iv) **Bhagat Singh v. Chief Information Commissioner** 146(2008) DLT 385 &

(v) **Sree Narayana College v. State of Kerala** MANU/KE/0238/2010.

and of certain Articles, Parliamentary debates etc. on the Act.

8. We have in **Ankur Mutreja** (supra) given detailed reasons for the conclusions aforesaid reached therein and which cover contentions 6(ii) to (viii) & (x) aforesaid of the counsel for the appellant herein and we do not feel the need to reiterate the same. We may only add that the role of the CIC, under the Act, is not confined to that of an Adjudicator. The CIC under the RTI Act enjoys a dual position. The CIC, established under Section 12 of the Act, has been, a) under Section 18 vested with the duty to receive and enquire into complaints of non-performance and non-compliance of provisions of the Act and relating to access to records under the Act; b) empowered under Section 19(3) to hear second appeals against decision of Information Officer and the First Appellate Authority; c) empowered under Section 19(8) to, while deciding such appeals, to require any public authority to take such steps as may be necessary for compliance of provisions of the Act; and, d) and is to, under Section 25 of the Act prepare annual report on the implementation of the provisions of the Act. The CIC thus, besides the adjudicatory role also has a supervisory role in the implementation of the Act.

9. The power of the CIC, under Section 20, of imposing penalty is to be seen in this light and context. A reading of Section 20 shows (as also held by us in Ankur Mutreja) that while the opinion, as to a default having been committed by the Information Officer, is to be formed 'at the time of deciding any complaint or appeal', the hearing to be given to such Information Officer, is to be held after the decision on the complaint or the appeal. The proceedings before the CIC, of hearing the Information Officer qua whom opinion of having committed a default has been formed and of imposition of penalty, are in our opinion, in the exercise of supervisory powers of CIC and not in the exercise of

adjudicatory powers. As already held by us in Ankur Mutreja, there is no provision, for payment of penalty or any part thereof, to the information seeker. The information seeker has no locus in the penalty proceedings, beyond the decision of the complaint/appeal and while taking which decision opinion of default having been committed is to be formed, and at which stage the complainant/information seeker is heard.

10. The Supreme Court in **Competition Commission of India vs. Steel Authority of India Ltd.** (2010) 10 SCC 744 held that the Competition Commission constituted under the Competition Act, 2002 discharges different functions under different provisions of the Act and the procedure to be followed in its inquisitorial and regulatory powers/ functions is not to be influenced by the procedure prescribed to be followed in exercise of its adjudicatory powers. In the context of the RTI Act also, merely because the CIC, while deciding the complaints/appeals is required to hear the complainant/information seeker, would not require the CIC to hear them while punishing the erring Information Officer, in exercise of its supervisory powers.

11. We may reiterate that the complainant/information seeker has the remedy of seeking costs and compensation and thus the argument of 'being left remediless' is misconceived. However 'penalty' is not to be mixed with costs and compensation.

12. We are also of the view that the participation of the information seeker in the penalty proceeding has nothing to do with the principle of accountability.

13. Needless to say that if the information seeker has no right of participation in penalty proceedings, as held by us, the question of right of being heard in opposition to writ petition challenging imposition of penalty does not arise. We therefore hold that no error was committed by the learned Single Judge in reducing the penalty without hearing the appellant.

14. That brings us to the question, whether the penalty prescribed in Section 20 of the Act is mandatory and the scope of interference with such penalty in exercise of powers of judicial review under Article 226 of Constitution of India.

15. We may at the outset notice that a Division Bench of this Court

in judgment dated 6th January. 2011 in LPA 782/2010 titled **Central Information Commission v. Department of Posts,** inspite of the argument raised that that Single Judge ought not to have reduced the penalty imposed by the CIC but finding sufficient explanation for the delay in supplying information, upheld the order of the Single Judge, reducing the penalty. Though Section 20(1) uses the word 'shall', before the words 'impose a penalty of Rs. two hundred and fifty rupees' but in juxtaposition with the words 'without reasonable cause, malafidely or knowingly or obstructed'. The second proviso thereto further uses the words, 'reasonably and diligently'. The question which arises is when the imposition of penalty is dependent on such variables, can it be said to be mandatory or possible of calculation with mathematical precision. All the expressions used are relative in nature and there may be degrees of, without reasonable cause, malafide, knowing or reasonableness, diligence etc. We are unable to bring ourselves to hold that the aforesaid provision intends punishment on the same scale for all degrees of neglect in action, diligence etc. The very fact that imposition of penalty is made dependent on such variables is indicative of the discretion vested in the authority imposing the punishment. The Supreme Court in **Carpenter Classic Exim P. Ltd. V. Commnr. of Customs** (Imports) (2009) 11 SCC 293 was concerned with Section 114 A, Customs Act, 1962 which also used the word 'shall' in conjunction with expression 'willful mis-statement or suppression of facts'; it was held that provision of penalty was not mandatory since discretion had been vested in the penalty imposing authority. Similarly in **Superintendent and Remembrancer of Legal Affairs to Government of West Bengal V. Abani Maity** (1979) 4 SCC 85, the words 'shall be liable for confiscation' in section 63 (1) of Bengal Excise Act, 1909, were held to be not conveying an absolute imperative but merely a possibility of attracting such penalty inspite of use of the word 'shall.. It was held that discretion is vested in the court in that case, to impose or not to impose the penalty.

16. Once it is held that the quantum of fine is discretionary, there can be no challenge to the judicial review under Article 226 of the Constitution, of exercise of such discretion, of course within the well recognized limits. If this Court finds discretion to have been not appropriately exercised by the CIC, this Court can in exercise of its powers vary the penalty. In the facts of the present case, we find the learned Single Judge to have for valid reasons with which we have no

reason to differ, reduced the penalty. We, therefore do not find any merits in this appeal and dismiss the same. No order as to costs.

ILR (2012) IV DELHI 671
MAC. APP.

PRASHANT DUTTA & ANR. ….APPELLANTS

VERSUS

NATIONAL INSURANCE CO. LTD. & ORS. ….RESPONDENTS

(J.R. MIDHA, J.)

MAC. APP. NO. : 556/2007 DATE OF DECISION: 30.03.2012

Motor Vehicle Act, 1988—The accident dated 4th June, 2006 resulted in death of Om Prakash. The deceased was survived by his widow, mother and four children who filed the claim petition before the Claim Tribunal-The deceased was aged 27 years at the time of the accident and was working as a conductor on the offending bus bearing No. DI-IP-5998. The claims Tribunal took the minimum wages of Rs. 3,271/- into consideration, deducted 1/4th towards personal expenses, applied the multiplier of 18, added Rs. 60,00/- towards loss of love and affection and Rs. 20,000/- towards funeral expenses. The total compensation awarded is Rs. 6,09,902/- The Claims Tribunal exonerated the insurance company and held the driver and owner liable to pay the award amount—The appellants are the owner and driver of the offending vehicle and have challenged the impugned award on the limited ground that the offending vehicle was validly insured and, therefore, respondent No.1 alone is liable to pay the entire award amount to the

claimants—Learned counsel for the appellants submit that the deceased, employed as a conductor, was validly covered under the insurance policy and therefore, respondent No.1 alone is responsible to pay the insurance amount—The liability of the insurance company in respect of the Workmen's Compensation in respect of the driver and conductor of the offending vehicle under Section 147(1) of the Motor Vehicles Act is statutory and therefore, respondent No.1 would be liable to pay the Workmen's Compensation. The insurance policy of the offending vehicle has been placed on record as Annexure-F (colly.) with the appeal in which respondent No.1 has charged the premium for Workmen's Compensation to the employee. Under Section 147(1) of the Motor Vehicle Act, 1988, the insurance company is required to compulsorily cover the liability in respect of the death or bodily injury of the driver and conductor in the case of public service vehicle. The contention of Respondent No. 1 that they have charged for premium for one employee is untenable in view of the statutory requirement of Section 147 (1) of the Motor Vehicle Act to cover the driver and the conductor. Even if the contention of respondent NO.1 that the policy covered one employee is accepted, the policy should be construed to cover the deceased. In that view of the matter, this Court is of the view that respondent No.1 is liable to pay Workmen's Compensation in respect of death of the deceased and the remaining amount of compensation is liable to be paid by the appellants.-The appeal is partly allowed to the extent that out of the award amount of Rs. 6,09,902/-, respondent No.1 shall be liable to pay Rs. 3,49,294/- along with interest @ 7.5% per annum from the date of filling of the claim petition till realization to respondent Nos. 2 to 7. The remaining amount of Rs. 2,60,608/- (Rs. 6,09,902/- Rs. 3,49,294) along with interest @ 7.5% per annum for the date of filing of the claim petition till realization shall be paid

by the appellants.

Important Issue Involved: Under Section 147(1) of the Motor Vehicle Act, 1988 the insurance company is required to compulsorily cover the liability in respect of the death of bodily injury of the driver and conductor in the case of public service vehicle.

[Ch Sh]

APPEARANCES:

FOR THE APPELLANT : Mr. Amit Sethi, Advocate.

FOR THE RESPONDENT : Ms. Shantha Devi Raman and Mr. Sunil Kumar Tiwari, Advocates. For R-1.

RESULT: Disposed of.

J.R. MIDHA, J.

1. The accident dated 4th June, 2006 resulted in the death of Om Prakash. The deceased was survived by his widow, mother and four children who filed the claim petition before the Claims Tribunal. The deceased was aged 27 years at the time of the accident and was working as a conductor on the offending bus bearing No.DL-1P-5998. The Claims Tribunal took the minimum wages of Rs. 3,271/- into consideration, deducted 1/4th towards personal expenses, applied the multiplier of 18, added Rs. 60,000/- towards loss of love and affection and Rs. 20,000/- towards funeral expenses. The total compensation awarded is Rs. 6,09,902/-. The Claims Tribunal exonerated the insurance company and held the driver and owner liable to pay the award amount.

2. The appellants are the owner and driver of the offending vehicle and have challenged the impugned award on the limited ground that the offending vehicle was validly insured and, therefore, respondent No.1 alone is liable to pay the entire award amount to the claimants. Learned counsel for the appellants submit that the deceased, employed as a conductor, was validly covered under the insurance policy and, therefore, respondent No.1 alone is responsible to pay the insurance amount.

3. The widow of the deceased appeared in the witness box as PW-1 and deposed that her husband was on duty on the vehicle as a conductor at the time of the accident. She reiterated the same in her cross-examination. The learned Trial Court has taken the deceased to be helper on the basis of the statement of respondent No.1 who appeared in the witness box as RW-1. However, respondent No.1 did not produce any document to show that the deceased was a helper. Respondent No.1 did not lead any evidence to rebut the evidence of PW-1 that the deceased was a conductor. The term conductor has been defined in Section 2(5) of the Motor Vehicles Act as a person engaged in collecting fares from passengers, regulating their entrance into and exit from the vehicle and performing such other functions as may be prescribed. The offending vehicle involved in the present case is a chartered bus which is a contract carriage as defined in Section 2(7) of the Motor Vehicles Act. Since there is no requirement of ticketing in a chartered bus, the person who regulates the entrance/exit of the passengers and other functions is a conductor within the meaning of Section 2(5) of the Act even if he has been named as a helper. In the present case, this Court is of the view that the deceased was a conductor on the offending vehicle as per the testimony of PW- 1. However, even assuming that the deceased was a helper as contended by respondent No.1, he falls within the meaning of conductor under Section 2(5) of the Motor Vehicles Act as he was performing the work of a conductor and there was no other conductor on the chartered bus.

4. The liability of the insurance company in respect of the Workmen's Compensation in respect of the driver and conductor of the offending vehicle under Section 147(1) of the Motor Vehicles Act is statutory and, therefore, respondent No.1 would be liable to pay the Workmen's Compensation. The insurance policy of the offending vehicle has been placed on record as Annexure-F (colly.) with the appeal in which respondent No.1 has charged the premium for Workmen's Compensation to the employee. Under Section 147(1) of the Motor Vehicles Act, 1988, the insurance company is required to compulsorily cover the liability in respect of the death or bodily injury of the driver and conductor in the case of public service vehicle. The contention of respondent No.1 that they have charged for premium for one employee is untenable in view of the statutory requirement of Section 147 (1) of the Motor Vehicles Act to cover the driver and the conductor. Even if the contention

of respondent No.1 that the policy covered one employee is accepted, the policy should be construed to cover the deceased. In that view of the matter, this Court is of the view that respondent No.1 is liable to pay Workmen's Compensation in respect of death of the deceased and the remaining amount of compensation is liable to be paid by the appellants.

5. The liability of respondent No.1 under the Workmen's Compensation Act, 1923 is computed to be Rs. 3,49,294/- (Rs. 3,271/ 2 x Rs. 213.57) taking the minimum wages of Rs. 3,271/- per month as the income of the deceased.

6. The appeal is partly allowed to the extent that out of the award amount of Rs. 6,09,902/-, respondent No.1 shall be liable to pay Rs. 3,49,294/- along with interest @ 7.5% per annum from the date of filing of the claim petition till realization to respondent Nos.2 to 7. The remaining amount of Rs. 2,60,608/- (Rs. 6,09,902 - Rs. 3,49,294) along with interest @ 7.5% per annum for the date of filing of the claim petition till realization shall be paid by the appellants.

7. The appellants deposited a sum of Rs. 3,31,650/- with the Registrar General of this Court in terms of the order dated 12th September, 2007. The aforesaid amount was initially kept in fixed deposit. Vide order dated 10th March, 2008, the aforesaid amount along with interest thereon was directed to be remitted to the Claims Tribunal and the Claims Tribunal was directed to disburse the said amount to the claimants in terms of the award. Accordingly, a sum of Rs. 3,41,344/- was sent to the Claims Tribunal on 16th May, 2008. The liability of the appellants in terms of this judgment as on 16th May, 2008 was Rs. 2,96,442/- (Rs. 2,60,608 +' interest of Rs. 35,834/- for the period 17th July, 2006 to 16th May, 2008) which has been paid to the claimants. The appellants are thus entitled to refund of Rs. 44,902/- (Rs. 3,41,344 – Rs. 2,96,442) from respondent No.1. Respondent No.1 is directed to make the payment of the aforesaid amount of Rs. 44,902/- along with interest @7.5% per annum with effect from 16th May, 2008 up to the date of realization to appellant No.1 within 30 days. Respondent No.1 is also directed to deposit Rs. 3,49,294/- along with interest @7.5% per annum from the date of filing of the claim petition (17th July, 2006) till realization with UCO Bank, Delhi High Court Branch by means of a cheque drawn in the name of UCO Bank A/c Lokesh within 30 days. Upon the aforesaid amount being deposited, UCO Bank shall keep the said amount in fixed

deposit till further orders.

8. The order of disbursement of the said amount shall be passed after examining the claimants on 27th April, 2012. Let the Court notice be issued to respondent Nos.2 to 7 as well as their counsel, returnable on 27th April, 2012. The Court notice shall indicate that the claimants shall remain present in Court on the next date of hearing. Copy of the judgment be sent to respondents No.2 to 7.

9. The statutory amount of Rs. 25,000/- deposited by the appellants along with these appeals be refunded back to the appellants through counsel within four weeks.

ILR (2012) IV DELHI 676
W.P. (C)

GUNJAN SINHA JAIN ….PETITIONER

VERSUS

REGISTRAR GENERAL ....RESPONDENT
HIGH COURT OF DELHI

(BADRAR DURREZ AHMAD, J,)

W.P. (C) NO. : 449/2012 DATE OF DECISION: 09.04.2012

Constitution of India, 1950—Article 226—Writ Petition quashing of notice issued by the High Court of Delhi provisionally short listing candidates on the basis of performance in the Delhi Judicial Service (Preliminary) Examination as there were faults in the question paper and the answer key seeking re-evaluation after corrections/ deletions/ amendments to the questions and answer keys—Further, seeking restraint on Main examination till re-evaluation of the Preliminary Examination—HELD:- The questions would fall into three

categories—The first being those questions where the answers reflected in the Answer Key are correct. The second category comprises of those questions in respect of which the option shown to be correct in the Answer Key is incorrect and instead another option as determined above is correct. The third category of questions covers (1) questions out of syllabus; (2) questions in respect of which the answer in the Answer Key is debatable; (3) questions in respect of which there are more than one correct option; (4) questions in respect of which none of the options is correct; and (5) questions which are confusing or do not supply complete information for a clear answer. As regards the first category, no change in the Answer Key is required. The Answer Key in respect of the second category of questions would have to be corrected and the OMR answer sheets would have to be re-evaluated. In case of the third category and when the table of the disputed questions is taken into considerations it is inferred that 12 questions need to be removed/delete from the purview of the said Delhi Judicial Service Exams and 7 questions need to be corrected—The status of the qualified students stands unaffected as it would be unfair on behalf of the court to tamper with the status of the student already selected. Coming on to the second condition stipulating that the number of candidates to be admitted to the main examination (written) should not be more than ten times the total number of vacancies of each category advertised This condition proved to be invalid as the general vacancies advertised were 23 and ten times 23 is 230 whereas the general candidates which have already been declared as qualified for taking the Main Examination (Written) is 235, therefore, it would be unfair to shut out such candidates on the basis of the second condition.

In view of the above discussion, the questions would fall into

three categories. The first being those questions where the answers reflected in the Answer Key are correct. This category would include all those questions which have not been discussed above (i.e., questions in respect of which there was no challenge at the hearing) and those questions in respect of which the answers shown in the Answer Key have been found to be correct by us. The second category comprises of those questions in respect of which the option shown to be correct in the Answer Key is incorrect and instead another option as determined above is correct. The third category of questions covers (1) questions out of syllabus; (2) questions in respect of which the answer in the Answer Key is debatable; (3) questions in respect of which there are more than one correct option; (4) questions in respect of which none of the options is correct; and (5) questions which are confusing or do not supply complete information for a clear answer. **(Para 75)**

As regards the first category, no change in the Answer Key is required. The Answer Key in respect of the second category of questions would have to be corrected and the OMR answer sheets would have to be re-evaluated. Insofar as the third category is concerned, questions falling in this category would have to be removed from the purview of the examination. A summary of all the disputed questions is given in tabular form below:

Question No.	Answer as per the Answer Key	Correct Answer(s)	Out of Syllabus	Action
60	(2)	(1)	No	Correct the Answer Key
61	(3)	(3), (4)	No	Remove
69	(3)	(3)	No	No change
71	(3)	(3)	No	No change
80	(2)	none	No	Remove
84	(4)	none	No	Remove

90	(2)	(2)	No	No change
97	(4)	(2)	No	Correct the Answer Key
99	(2)	none	No	Remove
100	(2)	(1) or (2), debatable	No	Remove
105	—	—	Yes	Remove
112	—	—	Yes	Remove
140	(4)	(3), (4)	No	Remove
150	—	—	Yes	Remove
165	(2)	(1)	No	Correct the Answer Key
166	(1)	(1) or (3), debatable	No	Remove
170	(1)	(1)	No	No change
172	(3)	(3)	No	No change
175	(1)	(1)	No	No change
177	(2)	(2)	No	No change
182	(4)	(1) or (4)	No	Remove
187	—	—	Yes	Remove
188	(1)	(3)	No	Correct the Answer Key
191	(2)	(3)	No	Correct the Answer Key
195	(4)	(1)	No	Correct the Answer Key
197	(4)	(1)	No	Correct the Answer Key

(Para 76)

From the above table, with respect to the questions discussed above, it is evident that 12 questions would have to be removed/ deleted from the purview of the said DJS Exam, 7 questions would require corrections in the Answer Key as indicated above and 7 questions (alongwith the 174 other questions not disputed in the course of arguments) require no change in the Answer Key. **(Para 77)**

Now, the point for consideration at this stage is how is this re-evaluation to be done? We must make it clear that the 276 candidates who have been declared as qualified for the DJS Main Examination (Written) are not before us and, therefore, it would not be fair to disturb their status as qualified candidates. At the same time, insofar as the others are concerned, we must also keep in mind the following twin criteria of qualification in the said DJS exam:

> (1) Minimum qualifying marks in the preliminary examination of 60% for general and 55% for reserved categories (i.e, Scheduled Castes, Scheduled Tribes and Physically Handicapped [Blind/ low vision], [orthopaedic]);
>
> (2) The number of candidates to be admitted to the main examination should not be more than ten (10) times the total number of vacancies of each category advertised. **(Para 78)**

Let us first consider the condition with regard to minimum qualifying marks. When there were 200 questions, the maximum possible marks were 200 on the basis of one mark for each correct answer. Consequently, the minimum qualifying marks for general candidates was 120 (60% of 200) and for reserved candidates it was (55% of 200). Because we have directed that 12 questions be removed from the purview of consideration for the purposes of re-evaluation, the minimum qualifying marks would also change. It would become 112.8 (60% of 188) for general candidates and 103.4 (55% of 188) for the reserved categories. **(Para 79)**

We now come to the second condition which stipulates that the number of candidates to be admitted to the main

examination (written) should not be more than ten times the total number of vacancies of each category advertised. Let us take the case of general vacancies which were advertised as 23 in number. Ten times 23 would mean that up to 230 general candidates could qualify. But, as mentioned above, 235 general candidates have already been declared as qualified for taking the Main Examination (Written). We are, therefore, faced with a problem. If we strictly follow this condition then there is no scope for any other candidates (other than the 235 who have been declared qualified) to qualify. But, that would be unfair to them as the question paper itself, as we have seen above, was not free from faults. Hypothetically speaking, a candidate may have left the 12 questions, which are now to be removed, and, therefore, he would have scored a zero for those questions. What is worse, he may have answered all those 12 questions wrongly (in terms of the Answer Key) and, therefore, he would have received minus (-) 3 marks because of 25% negative marking. And, all this, for no fault on his part as the 12 questions ought not to have been there in the question paper. Therefore, it would be unfair to shut out such candidates on the basis of the second condition.**(Para 80)**

We must harmonize the requirement of the second condition with the requirement of not disturbing the candidates who have been declared as qualified as also with the requirement of justice, fairness and equity insofar as the other candidates are concerned. We feel that this would be possible:

(1) by re-evaluating the OMR answer sheets of all the general category candidates on the lines summarized in the table set out above;

(2) by selecting the top 230 candidates in order of merit subject to the minimum qualifying marks of 112.8; and

(3) by adding the names of those candidates, if any, who were earlier declared as qualified but do not find a place in the top 230 candidates after re-evaluation.

In this manner, all persons who could legitimately claim to be in the top 230 would be included and all those who were earlier declared as having qualified would also retain their declared status. Although, the final number of qualified candidates may exceed the figure of 230, this is the only way, according to us, to harmonize the rules with the competing claims of the candidates in a just and fair manner. A similar exercise would also have to be conducted in respect of each of the reserved categories. The entire exercise be completed by the respondents within a period of two weeks. Consequently, the Main Examination (Written) would also have to be re-scheduled and, to give enough time for preparation, we feel that it should not be earlier than the 26.05.2012.

We hope that these observations are kept in mind for future examinations conducted by the respondents. **(Para 84)**

With these observations, the writ petitions are allowed to the extent indicated above. In the circumstances, the parties are left to bear their own costs. **(Para 85)**

Important Issue Involved: The questions in an Examination must be clear and provide all the necessary information leading to the appropriate answer. Questions which have doubtful or debatable answer should be excluded. Questions requiring detailed analysis should be best left for an essay type examination and are not suited to multiple choice tests.

[An Ba]

APPEARANCES:

FOR THE PETITIONER	**:**	Mr. R.K. Handoo with Mr. Akhilesh Arora
FOR THE RESPONDENT	**:**	Mr. Vijay R. Datar with Mr. Chetan Lokur.

CASES REFERRED TO:

1. *Anil Verman* vs. *Raheja Developers Private Limited:* FAO(OS) No. 96/1999 decided on 22.09.2011.
2. *Maharashtra State Electricity Distribution Co. Ltd.* vs. *Datar Switchgear Ltd.:* (2010) 10 SCC 479.
3. *Virendra Singh* vs. *State of Madhya Pradesh:* (2010) 8 SCC 407.
4. *Adcon Electronics Private Limited* vs. *Daulat:* (2001) 7 SCC 698.
5. *Malay Kumar Ganguly* vs. *Dr Sukumar Mukherjee:* (2009) 9 SCC 221.
6. *Pooja Gambhir* vs. *Parveen Jain* Arb.P. No. 191/2009 decided on 22.09.2009.
7. *Vipul Infrastructure Developers* vs. *Rohit Kochhar:* 2008 IV AD (Delhi) 63.
8. *Mrs Bhawna Seth* vs. *DLF Universal Limited:* AIR 2007 Del 189.
9. *Harshad Chiman Lal Modi* vs. *DLF Universal Ltd:* (2005) 7 SCC 791.
10. *Peerless General Finance and Investment Co. Ltd* vs. *Jitendra Kumar Khan:* 2004 (4) CHN 255.
11. *Union of India* vs. *Karam Chand Thapar & Bros (Coal Sales) Ltd:* (2004) 3 SCC 504.
12. *Narayan Prasad Lohia* vs. *Nikunj Kumar Lohia:* (2002) 3 SCC 572.
13. *Nirmal Pasi* vs. *State of Bihar:* JT 2002 (6) SC 28.
14. *State Aided Bank of Travancore* vs. *Dhrit Ram:* AIR 1942 PC 6.
15. *Scarf* vs. *Jardine:* (1882) 7 App.Cas. 345.

RESULT: Writ petition allowed.

BADAR DURREZ AHMED, J.

1. In this batch of petitions, the petitioners seek the quashing of the

notice dated 23.12.2011 issued by the High Court of Delhi (hereinafter referred to as 'the DHC') whereby, on the basis of performance in the Delhi Judicial Service (Preliminary) Examination (hereinafter referred to as 'the said DJS Exam') held on 18.12.2011, 276 candidates have been short-listed for being provisionally admitted to the Delhi Judicial Service Examination (Written), subject to verification of their eligibility. The petitioners also seek a writ directing the DHC to evaluate the marks afresh of all the candidates who appeared for the said DJS Exam based on the corrections/ deletions/ amendments to the questions and answer keys. The petitioners also pray that the DHC be restrained from conducting the Delhi Judicial Service Examination (Main) till the entire results of the said DJS Exam are processed afresh.

2. The DHC had, in September 2011, issued a public notice in respect of 50 vacancies in the Delhi Judicial Service [23-general, 6 – SC, 15 – ST, 5 – Physically handicapped (blind/ low vision), 1 – Physically handicapped (orthopaedic)], indicating that for filling up those vacancies it would hold an examination in two successive stages:–

(1) Delhi Judicial Service Preliminary Examination (objective type with 25% negative marking) for selection for the main examination, and

(2) Delhi Judicial Service Main Examination (Written) for selection of candidates for calling for Viva Voce test.

3. In these petitions we are concerned with the Preliminary Examination (viz. the said DJS Exam) which was held on 18.12.2011 in which a total of 7250 candidates (including the petitioners herein) appeared. According to the syllabus for the said DJS Exam, the candidates were to be tested for their general knowledge and aptitude, their power of expression and flair in English, their knowledge of objective type legal problems and their solutions covering the Constitution of India, Code of Civil Procedure, Code of Criminal Procedure, Indian Penal Code, Contract Act, Partnership Act, principles governing arbitration law, Evidence Act, the Specific Relief Act and the Limitation Act.

4. The said DJS Exam was of the duration of 2 hours and 30 minutes and comprised of 200 objective type questions carrying multiple choices. Candidates were supplied with different booklet series -'E', 'H', 'K' and 'P' and corresponding OMR (Optical Mark Recognition) answer

sheets. In each of the series, the said 200 questions were common but had been placed at different serial numbers. The OMR answer sheets were similarly prepared. For the purposes of convenience we shall be referring to booklet series 'E' and to the answer key in respect thereof.

5. The instructions for candidates, inter alia, stipulated as under:"

5. The duration of the test is 2 hours 30 minutes.

6. There are 200 questions. Each question has four answer options marked (1), (2), (3) and (4).

7. Answers are to be marked on the OMR Answer Sheet, which is provided separately.

8. Choose the most appropriate answer option and darken the oval completely, corresponding to (1), (2), (3) or (4) against the relevant question number.

9. Use only HB pencil to darken the oval for answering.

10. Do not darken more than one oval against any question, as the scanner will read such marking as wrong answer.

11. If you wish to change any answer, erase completely the one already marked and darken the fresh oval with an HB pencil.

12. Each question carries equal mark (s). There is Negative Marking and 25% marks will be deducted for every wrong answer.

xxxx xxxx xxxx xxxx xxxx

16. The right to exclude any question(s) from final evaluation rests with the testing authority."

6. As per the appendix read with Rule 15 of the Delhi Judicial Services Rules, the minimum qualifying marks in the preliminary exam is 60% for general and 55% for the reserved categories i.e., Scheduled Castes, Scheduled Tribes and Physically Handicapped. However, there is another limitation prescribed in the said Appendix and that is that the number of the candidates to be admitted to the main examination (written) should not be more than ten times the total number of vacancies of each category advertised. After the conduct of the said DJS Exam on 18.12.2011 and on evaluation of the OMR Answer Sheets submitted by the candidates,

a list of 276 candidates (in alphabetical order), who had been short-listed for being provisionally admitted to the Delhi Judicial Service main examination (written) [i.e., the second stage of the examination process], was notified by the DHC through a notice dated 23.12.2011 which is impugned before us. The break-up of the 276 qualified candidates was – 235 -General, 27 -SC, 7 -ST, 03 -Physically handicapped (blind/low vision), 04 -Physically handicapped (Orthopaedic). The mark obtained by the last qualified candidate of the 'General' category was 123.50.

7. The petitioners claim that the question paper contained many questions which were not properly phrased or were outside the syllabus. It is also contended on behalf of the petitioners that many of the answers as provided in the Answer Keys are clearly wrong and there are others where the answers are not free from doubt. Furthermore, several questions have more than one correct answer whereas the answer key shows only one of them to be correct. The petitioners contend that questions which are outside the syllabus and questions where the answers are doubtful or have more than one correct answer have to deleted from consideration. Those questions for which the answer key shows an incorrect answer should be re-evaluated after correcting the answer key. Then, the answer sheets of all the candidates be re-processed and the corrected list of qualified candidates be published. An argument had also been raised on behalf of the petitioners that the question paper itself was too long. In this connection it was submitted that as the candidates were required to answer 200 questions in 2 hours and 30 minutes (150 minutes), they had, on an average, only 45 seconds to read the question, understand it and mark the answer in the OMR answer sheet. Some of the questions, according to the petitioners, were so long that they would take much more than 45 seconds even to read. Such questions, as submitted on behalf of the petitioners, ought not to have even been included in an objective type multiple choice test. Anyhow, we are not required to go into the aspect of the length of the question paper inasmuch as it was equally long or short for all the candidates and would not hurt their relative chances. Though, that is one aspect which the paper setters must keep in mind for future examinations.

8. The learned counsel for the DHC conceded that some of the questions / answers were incorrect but, with regard to most, he, on instructions, maintained that the questions and answers were correct.

Our task would have been easy if the respondent had itself undertaken the responsibility of self-correction. Unfortunately, that was not to be and both sides have cast upon us the burden to adjudicate upon the correctness or otherwise of several questions and answers. We think that it is appropriate to point out that the petitioners had, in their petitions, pointed to many questions and answers which, according to them, either required deletion or correction but, we are only limiting discussion to those that were seriously pressed before us during arguments.

Question No. 60

60. Ram aged 25 years, tells Shyam who is aged 17 years and on account at the death of his father is sad, that if Shyam dies by jumping in a burning pyre of a woman he i.e. Shyam would meet his father in heaven and would find bliss. Shyam, aged 17 years, knows that by doing so he would be committing suicide, but on account of instigation by Ram suffers death by jumping in the burning pyre of a woman. Ram is guilty of:

(1) Abetment for the suicide committed by Shyam.

(2) Murder of Shyam.

(3) No offence.

(4) Both (1) & (2) above.

9. As per the Answer Key, answer (2) [*Murder of Shyam*] has been shown as the correct answer. It was rightly conceded by the learned counsel for the DHC that the correct answer is (1) [*Abetment for the suicide committed by Shyam*]. At this juncture it would be appropriate to examine the fall-out of this mistake. Those candidates who had correctly answered (1) would have been negatively marked minus (-) 0.25 because the answer key, albeit wrongly, showed (2) to be the correct answer. And, what is more, those candidates who wrongly answered (2) would have been given 1 mark each! This is double injustice in action.

Question No. 61

61. The accused driver of a truck while driving on the left side i.e. his side of the road, sees a cyclist coming from the opposite direction, but on the wrong side of the road i.e. in the lane on which the truck was being driven; the road being narrow and the truck driver sensing that the cyclist was peddling negligently, maneuvers his truck on the opposite lane and simultaneously the cyclist suddenly moves to his lane and as a result the truck over-runs the cyclist, causing the death of the cyclist. The truck driver is not guilty of the offence of causing death by rash and negligent act because:

(1) He did not have the necessary mens rea.

(2) He acted bona fide.

(3) The truck driver upon seeing the risk tried to avoid the risk.

(4) Was justified in driving the truck on to the opposite lane.

10. On behalf of the petitioners, it was argued that although option (3) [*The truck driver upon seeing the risk tried to avoid the risk] is a correct answer as shown in the Answer Key, even option (4) [Was justified in driving the truck on to the opposite lane*] would not be wrong. We agree. Section 304A IPC deals with 'causing death by negligence'. The ingredients of section 304A, inter alia, require that the person who caused the death of another must have done so by a 'rash or negligent act'. Clearly, if the truck driver upon seeing the risk tried to avoid the risk, he cannot be regarded as having acted rashly or negligently. Furthermore, if the truck driver was 'justified' in driving the truck on to the opposite lane, it cannot be said that he did a 'rash or negligent act'. So, both options (3) and (4) are correct. Consequently, this question would have to be removed for the purpose of marking.

Question No. 69

69. When examined under Section 313 Cr.P.C., a circumstance incriminating the accused is not put to the accused for his explanation. The said circumstance cannot be used against the accused because:

(1) It is inadmissible in evidence.

(2) It becomes irrelevant for purposes of evidence.

(3) Law mandates that it cannot-be taken into consideration.

(4) All of the above.

11. It was contended by the learned counsel for the petitioners that option (4) is the correct answer. However, as per the Answer Key, the correct answer is option (3). The contention of the petitioners is not tenable. The question is not of admissibility or relevance of evidence. It is simply that a circumstance not put to the accused when he is examined under section 313 CrPC cannot be used against the accused. This position is clear from the observations of the Supreme Court in the case of **Nirmal Pasi v. State of Bihar:** JT 2002 (6) SC 28 to the following effect:

> "The purpose of recording statement under Section 313 of the Cr.P.C. is to enable the accused person to explain any circumstances appearing in the evidence against him. A piece of incriminating evidence relied on by the prosecution and found proved by the court so as to rest the conviction of the accused thereon must be put to the accused in his statement under Section 313 of the Cr.P.C. enabling him to offer such explanation as he may choose to do. Unless that is done, the piece of incriminating evidence cannot be relied on for finding a verdict of guilty."

Consequently, the answer indicated in the Answer Key is correct.

Question No. 71

71. The employer has told the employee in the morning that when the employee leaves the office in the evening to go to his house, he should pick up Rs 50,000/-lying in the drawer of the employer and WP(C) No. 449/12 & ORS. Page 13 of 64 deliver the same to 'X', to whom the employer owes Rs 50,000/-. At 12.00 noon, in the absence of the employer, the employee picks up the money and absconds. The employee is liable to be charged for:

(1) Criminal breach of trust

(2) Cheating

(3) Theft

(4) Criminal misappropriation

12. The Answer Key shows option (3) [*Theft*] as the correct answer.

On behalf of the petitioners it was contended that option (1) [*Criminal breach of trust*] ought to be regarded as the correct answer. Let us, straightaway, examine the contention of the petitioners. For this purpose we would have to look at section 405 of the Indian Penal Code, 1860, which deals with criminal breach of trust. The relevant portion of the said section 405 is as follows:

> **"Section 405. Criminal breach of trust**
>
> Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust".
>
> xxxx xxxx xxxx xxxx xxxx"

13. It is clear upon a plain reading of the above provision that, in order to constitute the offence of criminal breach of trust, "entrustment" is an essential ingredient. If there is no entrustment there cannot be any criminal breach of trust. The entrustment may be in any manner but, there must be entrustment. In the facts given in the question at hand, there is no entrustment. The employer has not handed over the sum of Rs 50,000/-to the employee. The employer has merely informed the employee that a sum of Rs 50,000/-is lying in the drawer. His specific instructions being that when the employee leaves the office in the evening to go to his house he should pick up the said sum lying in the drawer for delivery to X. The entrustment, if at all, would come into operation only if the specific instructions are followed, that is, when the employee leaves the office "in the evening to go his house" he should pick up the money for delivery to X. But, that is not what the employee did. He took the money at 12 noon itself (not in the evening when he was to go home) and absconded. There was no entrustment to him at 12 noon. He also did not have dominion over the said sum at 12 noon. Therefore, this cannot be regarded as a case of criminal breach of trust.

14. On the other hand, it is a clear case of theft. A look at section

378 of the Indian Penal Code, 1860 would immediately make this clear:

> **"Section 378. Theft**
>
> Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.
>
> xxxx xxxx xxxx xxxx xxxx"
>
> The employee, intending to take dishonestly the said sum of Rs 50,000/out of the possession of the employer, without his consent, moved the said cash from the drawer into his hands for the purpose of such taking. As such, he committed theft. As long as the money remained in the employer's drawer, it has to be regarded as being in the employer's possession. The employer had not given his consent to the employee to remove the money from the drawer at 12 noon. Therefore, it was removed from the possession of the employer without his consent and obviously the intent was dishonest, as suggested by the given facts, because the employee disappeared with the money.

15. Thus, option (3) as shown in the Answer Key is the correct answer.

Question No. 80

> 80. If a series of acts are so connected together as to form the same transaction, and more than one offence is committed by the same person:
>
> (1) He shall be charged and tried separately for every such offence.
>
> (2) He shall be charged with every such offence and tried at one trial for all the offences.
>
> (3) Some of the offences may he clubbed and tried at one trial.
>
> (4) All of the above.

16. It was contended on behalf of the petitioners that none of the options is correct. On the other hand, the learned counsel for the DHC

drew our attention to the provisions of section 220(1) of the Code of Criminal Procedure, 1973 to support the fact that the Answer Key shows option (2) [*He shall be charged with every such offence and tried at one trial for all the offences*] as the right answer.

17. Section 220 of the Code of Criminal Procedure, 1973, so much as is relevant, reads as under:"

> **220. Trial for more than one offence.**
>
> (1) If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.
>
> xxxx xxxx xxxx xxxx xxxx"

A simple reading of the said provision reveals that the word used is "may", whereas option (2) uses the word "shall". Consequently, the question itself has been styled incorrectly. As such, it would have to be deleted from consideration.

Question No. 84

> 84. Which of the following charges cannot be compounded without permission of the court before which the prosecution is pending?
>
> (1) Section 298 of the IPC.
>
> (2) Section 426 of the IPC.
>
> (3) Section 491 of the IPC.
>
> (4) Section 388 of the IPC.

18. According to the Answer Key, answer (4) is the correct answer. However, the petitioners contend that the question itself is wrong as none of the four options are correct. To decide this, we have to look at section 320 of the Code of Criminal Procedure, 1973 which deals with 'compounding of offences'. Sub-section (1) gives the list of offences which do not require the permission of the court before which the prosecution is pending. Sections 298, 426 and 491 IPC (ie., options (1), (2) and (3)) are listed therein. In other words, these offences may be compounded without the permission of the court. Now, sub-section (2)

of section 320 CrPC lists those offences under the Indian Penal Code which are compoundable but, only with the permission of the Court before which any prosecution for such an offence is pending. Section 388 IPC, which is the fourth option in the question at hand, does not find any mention in this list also. Meaning thereby that, the offence punishable under section 388 IPC is not compoundable at all!

19. The manner in which question No. 84 has been put indicates that at least one of the four offences mentioned therein 'cannot be compounded without permission of the court'. Or, in other words, at least one of the four offences can be compounded only with the permission of the court. But, none of the given options provides an answer to the question. This is so because the first three options are all compoundable without the permission of the court and the fourth option (section 388 IPC) is not compoundable at all, with or without the permission of the court. We, therefore, have to agree with the contention of the petitioners that none of the suggested answers to Question No.84 are correct. Hence, Question No. 84 would have to be deleted for the purposes of evaluating the candidates.

Question No. 90

90. Which of the following statement is correct ?

(1) Section 34 IPC creates a substantive offence.

(2) Section 34 IPC introduces the principle of vicarious liability for an offence committed by the co-accused.

(3) Section 34 IPC recognizes that the co-participant in a crime must be made liable for his act in the commission of the crime by the co-accused.

(4) Both (2) & (3) above.

20. It was submitted on behalf of the petitioners that none of the options (1) to (4) are correct. The Answer Key shows option (2) [Section 34 IPC introduces the principle of vicarious liability for an offence committed by the co-accused] as the correct answer. There are several Supreme Court decisions which support the contention that section 34 of the Indian Penal Code involves vicarious liability. For example, in **Virendra Singh v. State of Madhya Pradesh:** (2010) 8 SCC 407, the Supreme Court, after referring to many earlier decisions, held as under:

> "42. Under the Indian Penal Code, a person is responsible for his own act. A person can also be vicariously responsible for the acts of others if he had a common intention to commit the acts or if the offence is committed by any member of the unlawful assembly in prosecution of the common object of that assembly, then also he can be vicariously responsible. **Under the Indian Penal Code, two sections, namely, Sections 34 and 149, deal with the circumstances when a person is vicariously responsible for the acts of others.**
>
> 43. **The vicarious or constructive liability under Section 34 IPC** can arise only when two conditions stand fulfilled, i.e., the mental element or the intention to commit the criminal act conjointly with another or others; and the other is the actual participation in one form or the other in the commission of the crime." (emphasis supplied)

21. We may also refer to the Supreme Court decision in **Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd.:** (2010) 10 SCC 479 wherein it observed:

> "It is trite that Section 34 IPC does not constitute a substantive offence, and is merely in the nature of a rule of evidence, and liability is fastened on a person who may have not been directly involved in the commission of the offence on the basis of a pre-arranged plan between that person and the persons who actually committed the offence."
>
> (emphasis supplied)

It is obvious, therefore, that option (2), as indicated in the Answer Key, is correct.

Question No. 97

97. Under Section 200 Cr.P.C. recording of pre-summoning evidence may be dispensed with if:

(1) The complaint is supported by an affidavit of the complainant.

(2) The complaint is made in writing by a public servant.

(3) The Magistrate feels that ends of justice require pre-summoning evidence to be dispensed with. (4) None of the above.

22. The Answer Key shows option (4) as the correct answer. According to the petitioners, it is option (2) [The complaint is made in writing by a public servant] which is the correct answer. The learned counsel for the DHC conceded that option (2) is the correct answer and that the mistake in the Answer Key, which shows option (4) as the correct answer, needs to be rectified and the OMR answer sheets need to be reevaluated.

Question No. 99

99. Which of the following statements is/are correct?

(1) Mens rea is not an essential ingredient of an offence punishable under Section 107 IPC.

(2) Mens rea is not an essential ingredient of an offence punishable under Section 304-A IPC.

(3) Mens rea is not an essential ingredient of an offence punishable under Section 364-A IPC.

(4) Both (1) & (2) above.

23. According to the Answer Key, option (2) [*Mens rea is not an essential ingredient of an offence punishable under Section 304-A IPC*] is the correct answer. The learned counsel for the DHC fairly conceded that this is not right in view of the Supreme Court decision in **Jacob Mathew v. State of Punjab:** (2005) 6 SCC 1 wherein the Court observed as under:

> "(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

> (6) The word 'gross' has not been used in Section 304A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in Section 304A of the IPC has to be read as qualified by the word 'grossly'."

(underlining added)

A similar view was taken in a subsequent decision in **Malay Kumar Ganguly v. Dr Sukumar Mukherjee:** (2009) 9 SCC 221.

24. Clearly, option (2) is not the correct answer. In fact, none of the options is correct. As a result, this question would have to be deleted for the purposes of evaluating the candidates.

Question No.100

100. Perjury resulting in the conviction of a person for an offence punishable with death, attracts the maximum penalty of:

(1) Death. (2) Imprisonment for life

(3) RI for 10 years. (4) RI for 10 years and fine.

25. It was submitted on behalf of the petitioners that option (1) [*Death*] is the correct answer but the Answer Key indicates option (2) [*Imprisonment for life*] as being correct. The learned counsel for the DHC referred to the provisions of the first part of section 194 IPC to support the contention that option (2) [*Imprisonment for life*] is the correct answer. Section 194 IPC is as under:

> **"194. Giving or fabricating false evidence with intent to procure conviction of capital offence**
>
> Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which is capital by the law for the time being in force in India shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine;
>
> **if innocent person be thereby convicted and executed. -** and if an innocent person be convicted and executed in consequence

of such false evidence, the person who gives such false evidence shall be punished either with death or the punishment hereinbefore described."

26. The section has two parts. The first part deals with the intention or knowledge of the person fabricating or giving false evidence, that by giving or fabricating false evidence he intends to cause or has the knowledge that it is likely to cause, any person to be convicted of a capital offence. It does not deal with a situation where the targeted person is actually convicted. The first part would apply irrespective of whether the targeted person is convicted or not. But, the second part will apply only if the targeted person, though innocent, is convicted and executed in consequence of the false evidence. The maximum penalty under the first part is imprisonment for life and the maximum penalty under the second part is Death.

27. Thus, we have to see as to whether, given the information in question No.100, the penalty falls under the first or the second part of section 194 IPC. The penalty of death under the second part of section 194 IPC requires two conditions to be fulfilled. The first being that an innocent person must be convicted as a consequence the false evidence and the second being that such person should also have been executed. The question, however, only speaks of conviction. Vital information, as to whether the person in question has been executed or not, has not been supplied. In order to answer the question, a candidate would have to presume either that the convicted person has also been executed or that he has not been executed. Either presumption would alter the answer. If it is presumed that the convicted person has been executed, then the second part would apply and, consequently, option (1) [Death] would be the correct answer. On the other hand, if it is presumed that the convicted person has not been executed, then, the first part would apply and option (2) [Imprisonment for life] would be the correct answer.

28. Therefore, since a candidate cannot be expected to answer a multiple choice question on a presumption made by him, we feel that that this question ought to be removed from consideration.

Question No. 140

140. Which of the following rivers does not flow west to east?

(1) Ganga

(2) Yamuna

(3) Sutlej

(4) Narmada

29. As per the Answer Key, option (4) [Narmada] is the correct answer. The learned counsel for the DHC conceded that option (3) [Sutlej] would also be correct as the Sutlej flows west and south-west for the most part. Therefore, it would a river which 'does not flow west to east'. Consequently, both options (3) and (4) are correct.

Question No. 165

165. Which of the following statements is incorrect:

(1) Temporary injunction may be granted only at the time of institution of a suit.

(2) Temporary injunction may be granted at any stage of a suit.

(3) Temporary injunctions are regulated by the Code of Civil Procedure, 1908.

(4) Temporary injunctions are a form of preventive relief.

30. The Answer Key shows option (2) as the correct answer. According to the petitioners, it is option (1) [*Temporary injunction may be granted only at the time of institution of a suit*] which is the correct answer. The learned counsel for the DHC conceded that option (1) is the correct answer and that the mistake in the Answer Key, which shows option (2) as the correct answer, needs to be rectified and the OMR answer sheets need to be re-evaluated.

Question No. 166

166. As per the Civil Procedure Code as applicable to Delhi, a suit for specific performance of a contract of sale of immovable property can be filed:

(1) Only in the Court within whose jurisdiction the property is situated.

(2) Either in the Court where the immovable property is situated or also in the Court where the defendant resides.

(3) Besides the Courts mentioned in (2) above, also in the Court within those jurisdiction the Contract was entered into.

(4) Only in the High Court of Delhi.

31. The Answer Key shows option (1) [*Only in the Court within whose jurisdiction the property is situated*] to be the correct answer. However, on behalf of the petitioners it was contended that, in the case of a suit where specific performance of a contract of sale of immovable property simpliciter is prayed for, option (3) [*Besides the Courts mentioned in (2) above, also in the Court within those jurisdiction the Contract was entered into*] would be the correct answer. According to them, option (1) would be the correct answer where a prayer in respect of title or possession is made in addition to the relief of specific performance. Since the question as framed indicates that the suit is for specific performance simpliciter, it is option (3) and not option (1) which is the correct answer. In support, they relied upon **Adcon Electronics Private Limited v Daulat:** (2001) 7 SCC 698 and **Mrs Bhawna Seth v. DLF Universal Limited:** AIR 2007 Del 189. In **Adcon Electronics** (supra), the question before the Supreme Court was – 'whether a suit simpliciter for specific performance of contract for sale of immovable property is a "suit for land" within clause 12 of the Letters Patent of the High Court of Judicature at Bombay?' After referring, inter alia, to the provisions of section 22 of the Specific Relief Act, 1963, the Supreme Court held:

> "In its true sense, a suit simpliciter for specific performance of contract for sale of land is a suit for enforcement of terms of contract. The title to the land as such is not the subject-matter of the suit."

32. Bhawna Seth (supra) is a decision of a learned single judge of this court. In that case, a distinction was drawn between the Supreme Court decisions in **Harshad Chiman Lal Modi v. DLF Universal Ltd:** (2005) 7 SCC 791 and **Adcon Electronics** (supra) in the following manner:

> "20. On consideration of the aforesaid judgments, I am of the view, that there can be no doubt that where in a suit for specific performance possession is also claimed as a relief, the competent Court to deal with the matter is the Court where the property is

located in view of Section 16 of the said Code, the judgment in **Harshad Chiman Lal Modi** case (AIR 2005 SC 4461) (supra) clearly lays down the said proposition. However, what cannot be lost sight of is that the judgment is in the facts of the case where the relief of possession was specifically claimed. The question as to what would happen where the relief for possession is not claimed does not form subject-matter of a relief in **Harshad Chiman Lal Modi** case (supra).

22. **M/s. Adcon Electronics Pvt. Ltd.** case (supra) deals with the distinction in a case simpliciter for specific performance as against a case where possession is also prayed. This issue is not discussed in **Harshad Chiman Lal Modi** case (supra) nor has the judgment in **Adcon Electronics Pvt. Ltd.** case (supra) been apparently cited in the proceedings in **Harshad Chiman Lal Modi case** (supra). Thus, both the judgments would operate in their respective areas. **M/s. Adcon Electronics Pvt. Ltd.** case (supra) clearly sets down that in a suit for simpliciter specific performance the same does not amount to a suit for land. If it is a simpliciter suit for specific performance, i.e. for enforcement of Contract for Sale and for execution of sale, in that event there can be no good ground for holding that such a suit is for determination of title to the land or that the decree in it would operate on the land. The observations made in the judgment in **M/s. Moolji Jaitha and Co. v. The Khandesh Spinning and Weaving Mills Co. Ltd.** referred to in the said judgment being a judgment of the Federal Court was approved by the Supreme Court, as noted in paragraph 15 of the Adcon Electronics Pvt. Ltd. case (supra). Thus a distinction has been carved out in respect of a suit where no possession had been claimed of the land in question."

33. We may point out that in **Bhawna Seth** (supra) another decision of a learned single judge of this court in the case of **Rohit Kochhar v. Vipul Infrastructure Developers Limited:** 2005 (122) DLT 480 was referred to.

> "28. I need not, therefore, deal with the various decisions of this Court and other High Courts relied upon by Counsel for the defendants for the reason that the decision of the Supreme Court

in **Adcon Electronic's** case (supra) holds the field. The said decision has taken into account Section 22 of the Specific Relief Act. Decision categorically holds that a suit seeking specific performance of an agreement to sell simplicitor even if it relates to immovable property is not a suit in which the relief claimed relates to title or to land. The suit is for enforcement of terms of contract. Decision categorically holds that it is at the option of the plaintiff to seek delivery of possession. Decision categorically holds that unless possession of immovable property is specifically prayed for, suit could be instituted within the local limits of the Court having jurisdiction where the defendant resides, carries on business or personally works for gain."

34. However, in appeal [**Vipul Infrastructure Developers v. Rohit Kochhar:** 2008 IV AD (Delhi) 63], a Division Bench of this court, set aside the decision of the learned single judge in **Rohit Kochhar** (supra) by holding that the **Adcon Electronics** decision was distinguishable as it had been rendered in the context of the expression "suit for land" in clause 12 of the Letters Patent of the High Court of Judicature at Bombay. But, as observed in a subsequent Division Bench decision of this court in [**Anil Verman v Raheja Developers Private Limited:** FAO(OS) No. 96/1999 decided on 22.09.2011], the Division Bench decision in **Vipul Infrastructure** (supra) is the subject matter of a Special Leave Petition [SLP(civil) Nos.10169-10171/2008] which is pending before the Supreme Court. Interestingly, in **Anil Verman** (supra), the Division Bench observed that the legal position with regard to the plea of a distinction between a suit for specific performance simpliciter and a suit where the relief for possession is also claimed, was 'fluid'. The exact words used are:

"16. We are in a legally fluid situation on the basic plea of a distinction between a suit for specific performance simplicitor and a suit where the relief for possession is also claimed. It is our view that the principles set out in **Adcon Electronics Pvt. Ltd.'s** case (supra) would come into play where no relief of possession was claimed. The field of the factual matrix would be material to determine whether the principles of Adcon Electronics Pvt. Ltd.'s case (supra) would come into play or not. But then in Vipul Infrastructure Developers Ltd.'s case (supra), a co-

ordinate Bench of this Court had taken a different view without specifically discussing this aspect. The matter is little more complicated arising out of the pendency of the SLP against that Order of the Division Bench where interim orders are operating."

(underlining added)

35. While on law the Division Bench in **Anil Verman** (supra) took a view different from the one in **Vipul Infrastructure** (supra), it chose not to refer the issue to a larger Bench or to await the judgment of the Supreme Court because it came to the conclusion that the suit, in the case before it, was not a suit for specific performance simpliciter without the relief of possession. It held as under :

"17. We, however, do not consider it necessary to refer this issue to a larger Bench or await the judgment of the Supreme Court for the reasons set out hereinafter.

18. It is our view that the plaint as framed in the present case is not a suit filed simplicitor for specific performance without any relief of possession. The relief of possession has, in fact, been claimed albeit by not stating so in so many words. Thus, the appellant cannot avail of the benefit of the principles set out in **Adcon Electronics Pvt. Ltd.'s** case (supra) to file the suit in Delhi by claiming that it is merely a suit for specific performance and the reliefs as claimed can be enforced by the personal obedience of the defendant."

36. All this shows that the question at hand does not have a definite answer. In the view of a Division Bench of this court in **Anil Verman** (supra) the position in law is "fluid". In this backdrop, in our view, the issue as to whether option (1) or option (3) is the correct answer, is debatable. Hence it would be best if the question itself is removed from the purview of marking.

Question No. 170

170. An arbitration agreement providing for arbitration of four arbitrators is, under the Arbitration & Conciliation Act, 1996, to be construed as an agreement for arbitration by:

(1) Sole arbitrator.

(2) Five arbitrators.

(3) Three arbitrators.

(4) Four arbitrators only.

37. On the strength of the Supreme Court decision in **Narayan Prasad Lohia v. Nikunj Kumar Lohia:** (2002) 3 SCC 572, it has been contended on behalf of the petitioners that option (4) [*Four arbitrators only*] is the correct answer and not option (1) [*Sole arbitrator*], as shown in the Answer Key. Section 10 of the Arbitration and Conciliation Act, 1996 provides for the number of arbitrators. It reads as under:

> **"10. Number of arbitrators.ù** (1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.
>
> (2) Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator."

38. A simple reading of the said section makes it clear that while the parties are free to determine the number of arbitrators, that number shall not be an even number. If a determination of the number of arbitrators is not made at all or is not made in terms of sub-section (1) of section 10, the statutory stipulation in sub-section (2) is that the arbitral tribunal shall consist of a sole arbitrator. Thus, where the parties determine an even number of arbitrators, it would not be construed as a determination in terms of section 10(1). The obvious corollary of which is that, in such a case, the arbitral tribunal shall consist of a sole arbitrator. This is exactly what has been held by a learned single judge of this court in **Dr Deepashree v. Sultan Chand and sons:** AIR 2009 Delhi 85, wherein the learned single judge noted the Supreme Court decision in **Narayan Prasad Lohia** (supra) and distinguished the same by holding that the latter was a post award matter where the two arbitrators had given an award which was challenged on the ground of being contrary to the statutory provisions and was, therefore, void. The learned single judge further held that the question which was under the consideration of the Supreme Court was as to whether the mandatory provisions of the Arbitration and Conciliation Act, 1996 could be waived by the parties and that it was in that context that the Supreme Court held that section 10 of the said Act was derogable. The learned single judge specifically

observed that the provisions of Section 10(2) of the said Act were not directly in issue and that the Supreme Court was not faced with a situation such as when the Chief Justice or his designate has to decide under Section 11 as to whether the arbitral tribunal ought to consist of two Arbitrators (as agreed upon by the parties) or to a Sole Arbitrator (in view of section 10(2)). Consequently, the learned single judge was of the view that the Supreme Court decision in **Narayan Prasad Lohia** (supra) was not a judgment on the issue raised in the case before him.

39. A similar decision was rendered by the learned single judge in **Pooja Gambhir v. Parveen Jain:** Arb.P. No. 191/2009 decided on 22.09.2009.

40. So, the decisions of learned single judges of this court on the aspect of interplay of the provisions of sub-sections (1) and (2) of section 10 of the Arbitration and Conciliation Act, 1996 point in the direction that, where parties agree to an even number of arbitrators, such an agreement would not be an agreement within the meaning of section 10(1) of the Act and consequently section 10(2) would come into play and the arbitral tribunal would have to comprise of a sole arbitrator.

41. No Division Bench decision on this point has been brought to our notice. We should also make it clear that we are not expressing any opinion as to the correctness of the Single Bench decisions of this court. That is left open for consideration in an appropriate case in a dispute inter partes. However, from the standpoint of a candidate in the said DJS exam, he/she is to guided by the law as it stands. Consequently, option (1) [*Sole arbitrator*], as shown in the Answer Key, would have to be regarded as correct. In fine, no change is called for insofar as this question is concerned.

Question No. 172

172. An arbitration award under the Arbitration and Conciliation Act,1996:

(1) Has the status of a decree immediately on publication / pronouncement thereof.

(2) Does not have the status of a decree.

(3) Has the status of a decree only after the time of three months for making an application to set aside the same

has expired or such application having been made has been refused.

(4) Has the status of a decree only after time of three months and a further period of 30 days for making an application to set aside the same has expired or such application having been made has been refused.

42. According to the petitioners, option (4) is the correct answer. However, as per the Answer Key, it is option (3) which is the correct answer. The relevant provisions are sections 34(3) and 36 of the Arbitration and Conciliation Act, 1996, which are reproduced below:

"34. Application for setting aside arbitral award. -

(1) xxxx xxxx xxxx xxxx

(2) xxxx xxxx xxxx xxxx

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) xxxx xxxx xxxx xxxx"

"36. Enforcement. - Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court."

43. A reading of the said provisions would indicate that an award becomes enforceable as a decree when the time for making an application to aside the award under section 34 has expired or in case such an application has been made, it has been refused. The time for making an application for setting aside an award is three months from the relevant

date. This is provided in section 34(3). However, the proviso thereto permits the court to entertain such an application within a further period of thirty days if it is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months. But, this does not mean that the expression – 'the time for making an application to set aside the arbitral award under section 34'– refers to a period of three months and thirty days. The moment the period of three months expires, the award becomes enforceable as a decree. The person seeking enforcement of the award cannot be expected to assume that, after the three-month period is over, the unsuccessful party would be filing such an application by invoking the proviso to section 34(3).

44. Consequently, the answer as per the Answer Key is correct.

Question No. 175

175. In an arbitration between two parties before an arbitrator appointed by the Chief Justice of the High Court (in exercise of powers under Section 11 of the Arbitration & Conciliation Act, 1996), the rival parties have filed claims against each other. When the arbitration was at an advanced stage, the parties are of the opinion that the arbitrator is likely to reject the claims / counter claims of both the parties. The parties jointly inform the arbitrator that they are not willing for arbitration before him and stop appearing before him. The parties thereafter:

(1) Are entitled to appoint another arbitrator and to start arbitration proceedings de novo

(2) Are not entitled to a second round, the same being in contravention of public policy prohibiting forum shopping.

(3) Are entitled to appoint another arbitrator but the discretion whether to commence the arbitration proceedings de novo or from the stage where left by the earlier arbitrator is of the Arbitrator and not of the parties.

(4) Cannot themselves appoint the second arbitrator and are required to again approach the Chief Justice for appointment of another arbitrator.

45. The Answer Key shows option (1) as the correct answer.

However, the petitioners contend that the correct answer should be option (4). Section 15 of the Arbitration and Conciliation Act, 1996 is relevant.

It reads as under:

"15. Termination of mandate and substitution of arbitrator. -

(1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate -

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal."

46. So, by agreement the parties may terminate the mandate of an arbitrator. When that happens, by virtue of section 15(2), a s ubstitute arbitrator shall be appointed 'according to the rules that were applicable to the appointment of the arbitrator being replaced'. It is obvious that if there is an agreed procedure for appointing the arbitrator, the same would be applicable. However, if there is no agreed procedure, then section 11(5) of the said Act would apply. Section 11(5) stipulates that in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him. Even in the case of an agreed procedure, if a party fails to act

as required under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment. This is provided in section 11(6) of the said Act. It is, therefore, clear that in the case of an arbitration with a sole arbitrator the Chief Justice can be called upon for appointment of the arbitrator when the parties fail to agree or when one party fails to act in accordance with an agreed procedure. Where there is agreement between the parties as to the arbitrator, the question of requiring the Chief justice to appoint the arbitrator does not arise. Thus, option (4) is certainly not the right answer.

47. A plain reading of sub-sections (3) and (4) of section 15 would show that if agreed by the parties the arbitration proceedings may be started de novo. Consequently, option (1) is the correct answer. This being as per the Answer Key, no change is required insofar as this question is concerned.

Question No. 177

177. A Private Limited Company having registered office at Delhi advances monies to another Private Limited Company also at Delhi. Disputes and differences arise relating to the said transaction and the parties agree to the arbitration at Mumbai by a retired Judge of the Bombay High Court who both trust. The arbitrator delivers an award at Mumbai. The Private Limited Company which had advanced monies during the pendency of the arbitration proceedings also shifts its registered office at Mumbai. The award dismisses the claims of the said Private Limited Company. The challenge to the said award can be made:

(1) Only in the Courts at Mumbai where the arbitration award was pronounced.

(2) Only in the Courts at Delhi.

(3) Either in the Court at Mumbai or in the Court at Delhi.

(4) Though challenge can be made in the Court at Mumbai also but the Court at Mumbai will return the objection for filing in the Court at Delhi, the challenge being to an award of the retired Judge of the Bombay High Court.

48. In terms of the Answer Key, option (2) [*Only in the Courts at Delhi*] is the correct answer. The petitioners suggest that option (3) [*Either in the Court at Mumbai or in the Court at Delhi*] would be the right answer.

49. Section 34 of the Arbitration and Conciliation Act, 1996 makes provision for an application for setting aside an arbitral award. The opening words of section 34(1) are – "Recourse to a Court against an arbitral award may be made only by an application for setting aside such award...". Clearly, such an application must be made to a "court". Which court? The answer lies in section 2(1)(e) of the said Act which reads as follows:" 2.

Definitions. -

(1) In this Part, unless the context otherwise requires, -

xxxx xxxx xxxx xxxx xxxx

(e) "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

xxxx xxxx xxxx xxxx xxxx"

50. The crucial words are – *"having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit"*. The question, therefore, is – if there had been no arbitration clause, where could the suit have been filed? This takes us to section 20 of the Code of Civil Procedure, 1908, which would be applicable in the facts of the question at hand. Section 20 of the Code reads as under:

"20. Other suits to be instituted where defendants reside or cause of action arises.

Subject to the limitations aforesaid, every suit shall be instituted in Court within the local limits of whose jurisdiction

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises. Explanation.-A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place."

51. Now, let us go back to the facts. If we refer to the Private Limited Company which advanced the money and the Private Limited Company which received the money as A and B, respectively, it is apparent that A has a claim against B. The money was advanced in Delhi. The disputes arose in Delhi. Thus, the entire cause of action arose in Delhi. At that point of time, both A and B carried on business in Delhi. It is only during the arbitration proceedings that A shifted its registered office to Mumbai. But, that would not alter the place of suing inasmuch as it is the place of business of the defendant (i.e., B) which is relevant and not the places of business of the plaintiff (i.e., A).

52. Consequently, Delhi is the only place where a suit could have been filed. Therefore, option (2) [Only in the Courts at Delhi], as indicated in the Answer Key, is the correct answer.

Question No. 182

182. A time barred debt can be claimed:

(1) As a set off. (3) As a fresh suit.

(2) As a counter claim. (4) None of the above.

53. According to the petitioners, option (1) [As a set off] is the correct answer. But, the Answer Key shows option (4) [None of the above] to be the correct answer.

54. There can be a legal set-off and an equitable set-off. The question does not specify which. Therefore, it must be presumed that it refers to both kinds of set-off. Order VIII Rule 6 of the Code of Civil Procedure, 1908 deals with legal set-off. But, independent of the provisions of the said Code, there also exists the concept of equitable setoff. This would be clear from the following observations of the Supreme Court in **Union of India v. Karam Chand Thapar & Bros (Coal Sales) Ltd:** (2004) 3 SCC 504, with reference to the provisions of Order VIII Rule 6 of the said Code:"

> 17. Sub-rule (1) of Rule 6 of Order 8 of the CPC provides as under :
>
> **"6. Particulars of set-off to be given in written statement.** -(1) Where in a suit for the recovery of money the defendant claims to setoff against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off."
>
> 18. What the rule deals with is legal setoff. The claim sought to be set-off must be for an ascertained sum of money and legally recoverable by the claimant. What is more significant is that both the parties must fill the same character in respect of the two claims sought to be set-off or adjusted. Apart from the rule enacted in Rule 6 abovesaid there exists a right to set-off, called equitable, independently of the provisions of the Code. Such mutual debts and credits or cross-demands, to be available for extinction by way of equitable setoff, must have arisen out of the same transaction or ought to be so connected in their nature and circumstances as to make it inequitable for the Court to allow the claim before it and leave the defendant high and dry for

> the present unless he files a cross-suit of his own. When a plea in the nature of equitable setoff is raised it is not done as of right and the discretion lies with the Court to entertain and allow such plea or not to do so."

55. Once it is clear that there can be two kinds of set-offs and that the question does not distinguish between either of them, what needs to be seen is whether in either case a time barred claim can be claimed as a set-off. A Division Bench of the Calcutta High Court in the case of **Peerless General Finance and Investment Co. Ltd v. Jitendra Kumar Khan:** 2004 (4) CHN 255 noted as under:

> "14. In the case of Ramdhari Singh, reported at 19 CWN 1183, also a Division Bench judgement, it was opined that the right of set-off exists not only in cases of mutual debits and credits but also where cross-demands arise out of the same transaction or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross-suit. It was also said there that an equitable set-off is to be permitted in the defendants' pleadings "more specially when a fresh suit, may be barred by limitation".
>
> (underlining added)

56. It was further observed in the said decision as follows:"

> 18. In the facts of the present case, in our opinion, it would be inequitable to permit the plaintiffs to recover its unliquidated damages, provided he is able to prove the case at trial, without allowing the defendants to setoff the amounts outstanding on an old debt, provided the existence of the loan and the existence of still outstanding amounts can be sufficiently proved by the defendants at trial apart from the question of limitation.
>
> 19. We are of the opinion that section 3 of the Limitation Act of 1963 does not relate to equitable setoffs at all. The most important distinction between a legal set-off as mentioned in the Code, and an equitable set-off as formulated by Judge made law, is that at the end of a suit, a legal set-off might result in a sum of money being paid to the defendants alone without the plaintiff's being held to be entitled to any recovery at all; but in the case of an

equitable set-off, which is time-barred, this can never happen. Such an equitable set-off can only wipe off pro tanto the plaintiffs' claim. If the plaintiffs claim is not proved at all and if the defendants' barred equitable set-off is proved to the full extent, even then the defendants cannot claim a decree because the whole purpose why he was allowed to plead a barred equitable set-off was that it was inequitable to allow the plaintiff to recover, leaving the defendants equitable claims out of consideration altogether. If the plaintiff is recovering nothing, then nothing inequitable is done if the defendants equitable set-off is completely brushed off."

So, there is judicial precedent that a time barred debt may be claimed by way of an equitable set-off. Therefore, option (1) cannot be regarded as a wrong answer. But, at the same time, we must also keep in mind that some candidates may have had in mind only a legal set-off. This is so because the question does not specify the kind of set-off. So, candidates, who worked out the solution on the understanding that the question dealt with legal set-off and the provisions of Order 8 Rule 6 CPC, and, consequently, chose option (4), also cannot be faulted. But, as there cannot be two correct answers for the same question in the scheme of the 'OMR Sheet' based test, the question would have to be removed from consideration so that neither those candidates who chose option (1) nor those who chose option (4) are negatively marked.

Question No. 188

188. A, B and C are partners in a firm. C retires and X is admitted as a new partner. The firm did not give a public notice of the change but continued its business in its old firm name. Z, a customer of the firm, deals with the firm after the change and the firm becomes indebted to him:

(1) Z cansue A, B, C and X.

(2) Z cansue A, B and C.

(3) Z can sue either A, B and C, or, A, B and X.

(4) Z can sue A and B only.

57. The petitioners contend that option (3) is the correct answer in view of the decision in the case of **Scarf v. Jardine:** (1882) 7 App.Cas.

345. On the other hand, the learned counsel for the DHC drew our attention to section 32(3) of the Indian Partnership Act, 1932 and submitted that a plain reading of the provision would suggest that C alongwith A, B and X would be liable to Z. Therefore, according to him, option (1) has correctly been shown in the Answer Key.

58. Lindlay & Banks on Partnership, 18th edition, has dealt with the subject of 'incoming and outgoing partners' in the following manner at pages 99-100:

"..Assume that A and B carry on business under the name X & Co. Neither A nor B holds himself out as a member of that firm to anyone who does not know of his connection with it. Thus, if A retires from the firm but gives no notice thereof, he will remain liable to existing customers who know of that connection and continue to deal with the firm on the assumption that he is still a partner; but A will incur no liability to new customers of X & Co. who have never heard of him. If, on A's retirement, C enters into partnership with B, and B and C thereafter carry on business under the name X & Co., even an old customer of X & Co., who continues to deal with the firm and has no notice of A's retirement or C's admission, cannot truly say that A ever held himself out as a partner with C or with both B and C. Consequently, such an old customer cannot maintain an action against A, B and C jointly for a debt contracted by X & Co. after A's retirement. What he may do is either sue A and B, on the ground that he dealt with X & Co. relying on the fact that they were both still members of that firm, or sue B and C, on the ground that they are his real debtors. He must, however, elect between those two options: he may not sue A, B and C on the ground that B and C are in truth the partners of X & Co. and that A is stopped from denying that he is a member of that firm. This was decided in *Scarf v. Jardine*."

59. Coming, now, to the question at hand, we have two sets of partners of the firm (1) A, B and C and (2) A, B and X. However, no public notice of the retirement of C or the admission of X is given and the business is continued in the old firm name. Thus, Z, who is presumably an old customer of the firm, cannot say that C held himself out as a

partner with X or with A, B and X. This is so because Z, when he dealt with the firm subsequent to the retirement of C and admission of X, was not aware of this change at all. There are only two possibilities: either Z knew of the change or Z did not know of the change. If Z did not know of the change, he would continue to think that the firm comprised of A, B and C. If he did not know about the change, he would be aware that the firm comprised of A, B and X and that C was no longer a partner. In either eventuality, there would be no occasion for Z to believe that C was a partner with X or with A, B and X. As a result, Z cannot bring an action against all (A, B, C and X) jointly. The reason being that C never held out to Z that he (C) and X were ever partners at the same time with A and B.

60. At the same time, since no public notice was given of the change-over in the partnership, C's liability to third parties for acts done by the firm after his retirement would continue. Therefore, Z has to decide as to whether he wants to sue C or not? If he chooses to sue C, he can only do so in conjunction with A and B but, not in conjunction with X. Because C and X were never partners together. To make it clear, Z may either sue A, B and C on the ground that he dealt with the firm relying on the fact that they were still the partners of the firm or Z may sue A,B and X on the ground that they are his real debtors. The two claims are mutually exclusive and it is for this reason that Z has to elect one of the two options available to him.

61. Let us now examine, section 32(3) of the Indian Partnership Act, 1932. The said provision is as under:"

> **32. Retirement of a partner**
>
> (1) xxxx xxxx xxxx xxxx
>
> (2) xxxx xxxx xxxx xxxx
>
> (3) Notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement:
>
> PROVIDED that a retired partner is not liable to any third party who deals with the firm without knowing that he was a partner.
>
> (4) Notices under sub-section (3) may be given by the retired partner or by any partner of the reconstituted firm."

62. The first point to be noted is that the said provision only speaks of retirement of a partner and does not deal with a situation of retirement and admission of a new partner. Obviously, therefore, the expression "he and the partners" would refer to the retiring partner and the other partners of the firm immediately prior to his retirement (viz. C and A and B in the context of the question under consideration). It would exclude reference to a partner (viz. X) who is subsequently admitted as a partner in the firm. Furthermore, all that this provision says is that if public notice is not given of the retirement of a partner, the retiring partner and the other partners would 'continue' to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement. It does not in any way detract from the rule in **Scarf v. Jardine** (supra). Zcansue A, B and C because of section 32(3) or, alternatively, A, B and X because they, in fact, are the partners in the firm. But, he cannot sue A, B, C and X together because C and X were never partners.

63. Consequently, option (3) [Z can sue either A, B and C, or, A, B and X] is the correct answer and not option (1).

Question No. 191

> 191. If only a part of the consideration or object is unlawful, the contract under Section 24 of the Indian Contract Act, 1872 shall be:
>
> (1) Valid to the extent the same are lawful.
>
> (2) Void to the extent the same are unlawful.
>
> (3) Void as a whole.
>
> (4) Valid as a whole.

64. The Answer Key shows option (2) [*Void to the extent the same are unlawaful*] as the correct answer. According to the petitioners, it is option (3) [*Void as a whole*] which is the correct answer. The learned counsel for the DHC conceded that option (3) is the correct answer and that the mistake in the Answer Key, which shows option (2) as the

correct answer, needs to be rectified and the OMR answer sheets need to be reevaluated.

Question No. 195

195. Which of the following is an offer?

(1) A bid at an auction sale.

(2) Banker's catalogue of charges.

(3) Menu card at a restaurant.

(4) All of the above.

65. According to the petitioners, the correct answer is option (1) [*A bid at an auction sale*]. On the other hand, on behalf of the DHC it was maintained that option (4) [*All of the above*] has been correctly shown in the Answer Key as the right answer.

66. Undoubtedly, 'a bid at an auction sale' is an 'offer' or, more accurately in terms of section 2(a) of The Indian Contract Act, 1872, a proposal. But, in view of the Privy Council decision in the case of **State Aided Bank of Travancore v. Dhrit Ram:** AIR 1942 PC 6, a banker's catalogue of charges is not an offer. Clearly, therefore, option (4) is not the correct answer. Furthermore, a menu card at a restaurant is also not an offer. It is only an invitation for offers. Thus, the only correct answer is option (1), as suggested by the petitioners.

Question No. 197

197. In which of the following cases, a contingent contract becomes void:

(1) If the contract contemplates the happening of the event within a certain time, and event does not happen or its happening becomes impossible.

(2) If the performance is made to depend upon an event which is already impossible.

(3) If the event contemplated does not happen.

(4) Both (1) & (2) above

67. According to the petitioners, the correct answer is option (1). Whereas, according to the Answer Key, the correct answer is option (4)

[*Both (1) & (2) above*]. Thus, there is agreement that, at least, option (1) is one of the correct answers. This is also straightaway apparent from the first part of section 35 of the Indian Contract Act, 1872, which is as under:

> **"35. When contracts become void, which are contingent on happening of specified event within fixed time**
>
> Contingent contracts to do or not to do anything, if a specified uncertain event happens within a fixed time, become void, if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.
>
> xxxx xxxx xxxx xxxx xxxx"

Therefore, we have to examine as to whether Option (2) is also correct. If that be so, then, option (4) [*Both (1) & (2) above*] would be the correct answer. However, if option (2) is not a correct answer then, option (1) would be the right answer.

68. The learned counsel for the DHC drew our attention to section 36 of the Indian Contract Act, 1872 in support of his contention that option (2) would also be a correct answer. The said section 36 is as under:"

> 36. Agreements contingent on impossible event void Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to agreement at the time when it is made."

The question as framed mentions a "contingent contract" becoming void. But, section 36 does not deal with that at all. It refers to "contingent agreements". A contingent agreement whose performance depends upon the happening of an 'already' impossible event is void in view of section 36. Such a contingent agreement does not even mature into a contract which may subsequently become void. There is no contract but, only a void contingent agreement. We must also point out that by virtue of section 10 of the said Act, all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void by the said Act. Since a "contingent agreement" whose

performance depends upon the happening of an 'already' impossible event is void, as aforesaid, such an agreement cannot even be regarded as a contract. Therefore, section 36 cannot be regarded as one dealing with "contingent contracts" which subsequently, become void because of certain circumstances. That being the position, option (2) cannot be a correct answer.

69. As a result, the only correct answer to this question is option (1) and not option (4). The Answer Key, which shows option (4) as the correct answer, needs to be rectified and the OMR answer sheets need to be re-evaluated.

OUT OF SYLLABUS

70. At this point, it would be appropriate to recall that according to the syllabus for the said DJS Exam , the candidates were to be tested for:

(1) their general knowledge and aptitude,

(2) their power of expression and flair in English,

(3) their knowledge of objective type legal problems and their solutions covering:

(i) The Constitution of India,

(ii) Code of Civil Procedure,

(iii) Code of Criminal Procedure,

(iv) Indian Penal Code,

(v) Contract Act,

(vi) Partnership Act,

(vii) Principles governing arbitration law,

(viii) Evidence Act,

(ix) The Specific Relief Act and

(x) The Limitation Act.

Question No. 105

105. Which one of the following thinkers called jurisprudence as the "Philosophy of Positive Law" ?

(1) Salmond (2) H.L.A. Hart

(3) Roscoe Pound (4) John Austin

71. This question relates to jurisprudence, which was not part of the syllabus. According to the learned counsel for the DHC, it was a question on general knowledge. We cannot persuade ourselves to agree with this contention. The question by its very nature refers to jurisprudence. As such, this question has to be removed from the purview of the DJS exam.

Question No. 112

112. The SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 rescinded

(1) SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997.

(2) SEBI (Disclosure and Investor Protection) Guidelines, 2000

(3) SEBI (Prohibition Of Insider Trading) Regulations, 1992.

(4) SEBI (Delisting of Securities) Guidelines, 2003.

72. The SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 is also outside the syllabus. Therefore, this question has to be removed from the purview of the DJS exam.

Question No. 150

150. The Pure Theory of Law which saw Law as a Norm of Action was advocated by

(1) A.V. Dicey (2) Leon Duguit

(3) Francois Geny (4) Hans Kelsen

73. This question is also of jurisprudence, which was not part of the syllabus. Consequently, this question has to be removed from the purview of the DJS exam.

Question No. 187

187. Upon the coming into force of the Limited Liability Partnership Act, 2008:

(1) The Indian Partnership Act, 1932 stands repealed.

(2) The provisions of the Indian Partnership Act, 1932 ipso

facto apply to Limited Liability Partnerships (LLPs) also.

(3) Both the Acts co-exist but the provisions of the Indian Partnership Act, 1932 are not applicable to LLPs save as otherwise provided.

(4) The Limited Liability Partnership Act, 2008 is applicable to only metropolitan cities as defined therein and the Indian Partnership Act, 1932 continues to apply to the rest of the country.

74. Clearly, this question tests the knowledge of a candidate in respect of the Limited Liability Partnership Act, 2008 which, admittedly, was not part of the syllabus. Consequently, this question has to be deleted for the purposes of the said DJS exam.

SUMMARY

75. In view of the above discussion, the questions would fall into three categories. The first being those questions where the answers reflected in the Answer Key are correct. This category would include all those questions which have not been discussed above (i.e., questions in respect of which there was no challenge at the hearing) and those questions in respect of which the answers shown in the Answer Key have been found to be correct by us. The second category comprises of those questions in respect of which the option shown to be correct in the Answer Key is incorrect and instead another option as determined above is correct. The third category of questions covers (1) questions out of syllabus; (2) questions in respect of which the answer in the Answer Key is debatable; (3) questions in respect of which there are more than one correct option; (4) questions in respect of which none of the options is correct; and (5) questions which are confusing or do not supply complete information for a clear answer.

76. As regards the first category, no change in the Answer Key is required. The Answer Key in respect of the second category of questions would have to be corrected and the OMR answer sheets would have to be re-evaluated. Insofar as the third category is concerned, questions falling in this category would have to be removed from the purview of the examination. A summary of all the disputed questions is given in tabular form below:

Question No.	Answer as per the Answer Key	Correct Answer(s)	Out of Syllabus	Action
60	(2)	(1)	No	Correct the Answer Key
61	(3)	(3), (4)	No	Remove
69	(3)	(3)	No	No change
71	(3)	(3)	No	No change
80	(2)	none	No	Remove
84	(4)	none	No	Remove
90	(2)	(2)	No	No change
97	(4)	(2)	No	Correct the Answer Key
99	(2)	None	No	Remove
100	(2)	(1) or (2), debatable	No	Remove
105	—	—	Yes	Remove
112	—	—	Yes	Remove
140	(4)	(3), (4)	No	Remove
150	—	—	Yes	Remove
165	(2)	(1)	No	Correct the Answer Key
166	(1)	(1) or (3), debatable	No	Remove
170	(1)	(1)	No	No change
172	(3)	(3)	No	No change
175	(1)	(1)	No	No change
177	(2)	(2)	No	No change
182	(4)	(1) or (4)	No	Remove
187	—	—	Yes	Remove
188	(1)	(3)	No	Correct the Answer Key

191	(2)	(3)	No	Correct the Answer Key
195	(4)	(1)	No	Correct the Answer Key
197	(4)	(1)	No	Correct the Answer Key

77. From the above table, with respect to the questions discussed above, it is evident that 12 questions would have to be removed/ deleted from the purview of the said DJS Exam, 7 questions would require corrections in the Answer Key as indicated above and 7 questions (alongwith the 174 other questions not disputed in the course of arguments) require no change in the Answer Key.

78. Now, the point for consideration at this stage is how is this reevaluation to be done? We must make it clear that the 276 candidates who have been declared as qualified for the DJS Main Examination (Written) are not before us and, therefore, it would not be fair to disturb their status as qualified candidates. At the same time, insofar as the others are concerned, we must also keep in mind the following twin criteria of qualification in the said DJS exam:

(1) Minimum qualifying marks in the preliminary examination of 60% for general and 55% for reserved categories (i.e, Scheduled Castes, Scheduled Tribes and Physically Handicapped [Blind/ low vision], [orthopaedic]);

(2) The number of candidates to be admitted to the main examination should not be more than ten (10) times the total number of vacancies of each category advertised.

79. Let us first consider the condition with regard to minimum qualifying marks. When there were 200 questions, the maximum possible marks were 200 on the basis of one mark for each correct answer. Consequently, the minimum qualifying marks for general candidates was 120 (60% of 200) and for reserved candidates it was (55% of 200). Because we have directed that 12 questions be removed from the purview of consideration for the purposes of re-evaluation, the minimum qualifying marks would also change. It would become 112.8 (60% of 188) for general candidates and 103.4 (55% of 188) for the reserved categories.

80. We now come to the second condition which stipulates that the number of candidates to be admitted to the main examination (written) should not be more than ten times the total number of vacancies of each category advertised. Let us take the case of general vacancies which were advertised as 23 in number. Ten times 23 would mean that up to 230 general candidates could qualify. But, as mentioned above, 235 general candidates have already been declared as qualified for taking the Main Examination (Written). We are, therefore, faced with a problem. If we strictly follow this condition then there is no scope for any other candidates (other than the 235 who have been declared qualified) to qualify. But, that would be unfair to them as the question paper itself, as we have seen above, was not free from faults. Hypothetically speaking, a candidate may have left the 12 questions, which are now to be removed, and, therefore, he would have scored a zero for those questions. What is worse, he may have answered all those 12 questions wrongly (in terms of the Answer Key) and, therefore, he would have received minus (-) 3 marks because of 25% negative marking. And, all this, for no fault on his part as the 12 questions ought not to have been there in the question paper. Therefore, it would be unfair to shut out such candidates on the basis of the second condition.

81. We must harmonize the requirement of the second condition with the requirement of not disturbing the candidates who have been declared as qualified as also with the requirement of justice, fairness and equity insofar as the other candidates are concerned. We feel that this would be possible:

(1) by re-evaluating the OMR answer sheets of all the general category candidates on the lines summarized in the table set out above;

(2) by selecting the top 230 candidates in order of merit subject to the minimum qualifying marks of 112.8; and

(3) by adding the names of those candidates, if any, who were earlier declared as qualified but do not find a place in the top 230 candidates after re-evaluation.

In this manner, all persons who could legitimately claim to be in the top 230 would be included and all those who were earlier declared as having qualified would also retain their declared status. Although, the final number

of qualified candidates may exceed the figure of 230, this is the only way, according to us, to harmonize the rules with the competing claims of the candidates in a just and fair manner. A similar exercise would also have to be conducted in respect of each of the reserved categories. The entire exercise be completed by the respondents within a period of two weeks. Consequently, the Main Examination (Written) would also have to be re-scheduled and, to give enough time for preparation, we feel that it should not be earlier than the 26.05.2012.

Long Questions

82. At the beginning of this judgment we had stated that though the objection to the length of questions had been taken, we were not required to examine that aspect insofar as this examination was concerned inasmuch as the questions were equally lengthy for all and did not hurt the relative chances of the candidates. However, for the future we would like to point out that lengthy questions ought to be avoided considering the fact that a candidate has only 45 seconds on an average to read, understand and select the right option. By way of illustration we quote two questions (Question Nos. 63 and 176) which clearly fall in the category of lengthy questions:

> 63. In a writing containing an acknowledge by 'A' that he will sell his house in Kolkata to 'B' for a sum of Rs 50,00,000/- or Rs 60,00,000/-and having blank space with respect to the particulars of the house i.e. the house number, the street number and the colony not being written, and it not being in dispute that 'A' has a house on a plot of land ad-measuring 300 sq. yards and another house on a plot of land admeasuring 1000 sq. yards at Kolkata, in a suit filed by 'B' against 'A', 'B' can lead evidence:
>
> (1) To prove that market rate for land in Kolkata is Rs 18,000/- per sq. yard in the colony where 'A's house was situated; to make good the deficiency in the writing by linking the price of Rs 18,000/-per sq. yard as only applicable to the plot ad-measuring 300 sq. yards and the rest being the value of the building.
>
> (2) To prove that unintentionally the house number got omitted to be written and that the writing pertained to the 300 sq. yards land and unintentionally the sum of Rs 50,00,000/-

> - written on the writing got omitted to be scored of.
>
> (3) To prove that the property number was left blank because 'A' told him that he would be exchanging his house on the 300 sq. yard plot of land with another house in a similar colony with his brother and later on the house number would be filled up.
>
> (4) None of the above.
>
> 176. 'A' has lent monies to 'B' under a written agreement containing an arbitration clause. The agreement does not specify the time of repayment. Rather the money was repayable on demand by 'A'. 'A' after five years of the date when the loan was made demanded money which was not repaid by 'B'. The parties could not arrive at a consensus on the appointment of arbitrator also. 'A' filed an application under Section 11 of the Arbitration & Conciliation Act, 1996 before the Chief Justice of the High Court for appointment of an arbitrator. 'B' in response to the said application contends that the claim of 'A' is stale and barred by time and thus arbitrator be not appointed. The Chief Justice:
>
> (1) Is bound to appoint the arbitrator leaving the plea of limitation open for decision in arbitration award.
>
> (2) Is bound to dismiss the application for appointment of arbitrator since the claim adjudication whereof is sought by arbitration is barred by time.
>
> (3) Is required to make 'B' deposit the money in Court and then appoint the arbitrator and refer the parties to arbitration.
>
> (4) Is required to require 'A' to furnish security for actual costs of arbitration to be incurred by 'B' and then appoint the arbitrator and refer the parties to arbitration.

83. Before concluding this judgment, we would also like to observe that, for the future, the respondents should take care in framing questions for such multiple-choice tests. The questions must be clear and provide all the necessary information leading to the appropriate answer. Questions which have doubtful or debatable answers should be excluded. As we

have seen some of the questions in this examination require detailed reasoning and consideration which is not possible in the time frame of 45 seconds. Such questions are best left for an essay type examination and are not suited to multiple choice tests. In this light, it would be appropriate to refer to the Supreme Court's decision in **Kanpur University v. Samir Gupta:** (1984) 1 SCC 73, wherein the Supreme Court, in the context of 'multiple choice objective-type test', inter alia, observed as under:-

> "..... Fourthly, in a system of 'multiple choice objective-type test', care must be taken to see that questions having an ambiguous import are not set in the papers. That kind of system of examination involves merely the tick-marking of the correct answer, it leaves no scope for reasoning or argument. The answer is 'yes' or 'no'. That is why the questions have to be clear and unequivocal."

84. We hope that these observations are kept in mind for future examinations conducted by the respondents.

85. With these observations, the writ petitions are allowed to the extent indicated above. In the circumstances, the parties are left to bear their own costs.

ILR (2012) IV DELHI 728
W.P. (C)

NARENDER KUMAR ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(ANIL KUMAR & SUDERSHAN KUMAR MISRA, JJ.)

W.P. (C) NO. : 1629/2012 DATE OF DECISION: 10.04.2012

Constitution of India, 1950—Article 226—Disciplinary proceedings—Misconduct imputed against petitioner was unauthorized absenteeism from duty as he repeatedly did not report for duty at the airport in time—Petitioner submitted reply to the charge memorandum and after considering the same, was awarded punishment of censure—Appeal filed by petitioner was dismissed—After dismissal of appeal, petitioner filed an application seeking certain documents without disclosing the relevance of the same and without disclosing as to how he would be prejudiced if the same are not supplied—In reply, the respondents pointed out that under the relevant rule, there was no provision to supply documents which were not relied upon in the chargesheet—However, later on, same of the documents were supplied to petitioner—Revision filed by petitioner also dismissed-Writ petition challenging the punishment and dismissal of appeal and revision-Petitioner contended without imputing any mala fides or perversity that other members of the staff also go for the call of nature and break fast, etc but no action was taken against them—Respondents contended that wherever a member of the force leaves for call of nature or other absence, entries are made in registers and explanations

rendered by petitioner were disbelieved by disciplinary authority as well as appellate authority—Held, as regards non-supply of certain documents, petitioner ought to have established the prejudice as a matter of fact and prejudice cannot be based on apprehension—Further held, the totality of circumstances of the case do not reflect non-application of mind or disproportionate punishment.

The petitioner did not claim the copies of any documents before the Disciplinary Authority and the Appellate Authority and he claimed certain documents without disclosing the reasons for the same and without disclosing as to why he could not sought the copies of the same before the Disciplinary and Appellate Authority, by filing applications before the Revisional Authority. Copies of three documents were also supplied to the petitioner. Even in the revision petition, the petitioner failed to disclose as to how he has been prejudiced in absence of other documents copies of which were sought by him and which were not supplied, as he had not given any reason for not demanding them before the Disciplinary and the Appellate Authority. The petitioner has not even alleged properly as to how he had been prejudiced on account of copies of certain documents not given to him. The petitioner ought to have established the prejudice as a matter of fact. The prejudice cannot be based on apprehension or even a reasonable suspicion, nor the disciplinary proceedings can be vitiated on hyper technical approach. The punishment awarded to the petitioner cannot be quashed on the basis of apprehended prejudice. The Supreme Court in para 89 of **Alok Kumar Vs Union of India & ors.,** (2010) 5 SCC 349 had held as under:-

> "89. The well-established canons controlling the field of bias in service jurisprudence can reasonably be extended to the element of prejudice as well in such matters. Prejudice de facto should not be based on a mere apprehension or even on a reasonable suspicion. It is important that the element of prejudice should

> exist as a matter of fact or there should be such definite inference of likelihood of prejudice flowing from such default which relates to statutory violations. It will not be permissible to set aside the departmental enquiries in any of these classes merely on the basis of apprehended prejudice...."

Violations of mandatory statutory rules would tantamount to prejudice. But where the rule is merely directory, element of de facto prejudice needs to be pleaded and shown. Where the authorities rely upon a large number of documents majority of which are furnished and an opportunity is granted to the delinquent to defend himself except some of the documents are not furnished, the onus is on the delinquent the show that non-furnishing of some of the documents had resulted in de facto prejudice and he has been put to a disadvantage as a result thereof. Element of prejudice should exist as a matter of fact or there should be such definite inferences of likelihood of prejudice flowing from such default which relates to statutory violations. Departmental actions cannot be set aside on the basis of apprehended prejudice. Prejudice normally would be a matter of fact and a fact must be pleaded and shown by cogent documentation to be true. The petitioner has failed on all counts in this regard. The documents were not demanded before the Disciplinary Authority, nor any grounds taken in the appeal filed before the Appellate Authority, nor any such grounds canvassed before the Appellate Authority. Even before the Revisional Authority it has not been averred as to how the petitioner got prejudiced on account of non-supply of the copies of some of the documents demanded by him out of which, copies of three main documents were given to him. The respondents had not relied on these documents in their Charge Sheet. How the petitioner got prejudiced has not been canvassed before the revisional authority. Consequently, on this ground the punishment of 'censure' awarded to the petitioner cannot be vitiated.

(Para 19)

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. O.P. Agarwal, Advocate

FOR THE RESPONDENT : Mr. Ravinder Agarwal, Advocate

CASES REFERRED TO:

1. *Alok Kumar* vs. *Union of India & ors.,* (2010) 5 SCC 349.
2. *M.V.Bijlani* vs. *Union of India & Ors.* (2006) 5 SCC 88.
3. *Durga Prashad* vs. *Chief Controller of Imports and Exports,* AIR 1970 SC 769.

RESULT: Petition dismissed.

ANIL KUMAR, J.

CM No.3556/2012

Allowed subject to all just exceptions. Application is disposed of.

W.P.(C) No.1629/2012

1. The petitioner has sought quashing of penalty of "censure" awarded by order dated 9th December, 2009 and dismissal of his appeal by order dated 15th May, 2010 and rejection of his revision petition by order dated 3rd February, 2011. The petitioner has also sought directions to the respondents to give the petitioner one more opportunity to appear in LDCE for the post of Assistant Commandant in future, as he was deprived of this opportunity when he had applied on 10th November, 2009.

2. The petitioner was issued a charge memorandum dated 14th November, 2009 imputing that the petitioner on 20th October, 2009 was posted at Domestic Airport from 0330 hours to 0700 hours, however, he reached his place of duty at 0405 hours instead of 0330 hours and thereafter, he remained absent from 0520 hours to 0535 hours from his frisking duty. He was posted at X Ray machine No.H where he did not take interest in his duty and intentionally operated X Ray machine slowly. The other charge imputed against the petitioner was that on 2nd November,

2009, the petitioner was posted from 0700 hours to 2000 hours on X Ray machine of terminal 2 and during his period of duty he remained absent without permission from any competent officer from 0759 hours to 0833 hours. The third charge imputed against the petitioner was that on 3rd November, 2009 he was posted from 2000 hours to 0700 hours at X Bis No.5 in SHA of terminal 2. It transpired that the petitioner on his own left X Bis No.5 for checking baggages separately which was checked by Constable A.K.Sharma.

3. The petitioner submitted a reply dated 17th November, 2009 contending, inter-alia, that he was posted at NITC for duty prior to his posting for duty at domestic Airport. However, no time was prescribed for going from NITC to Domestic Airport. Whenever the transport was provided and he was relieved from NITC, he went from NITC and joined the duty at domestic terminal. He further contended that he did not close frisking booth and X BIS/frisking was functioning. He contended that he left for bathroom for 6 minutes after obtaining permission from Assistant Commandant. Regarding the first charge that he operated the X Ray machine slowly, the petitioner alleged that functioning of the machine depends on the type of baggage. He submitted that if any delay took place it was on account of the factors other than the petitioner deliberately operating the machine slowly.

4. Regarding the second charge about his posting on 2nd November, 2009, he contended that all force members go to take breakfast/food after adjusting duty. He admitted that he had gone after adjusting duty but the time mentioned in the charge was not correct and he had gone for breakfast from 0807 hours to 0830 hours, as about 20-25 minutes are spent for breakfast/lunch which can be confirmed from the register or can be ascertained from other force members.

5. Regarding the third charge, the petitioner alleged that category of bags of passengers are different and the stamp is affixed on bags by SOS and stamp is not affixed by guard/screener, nor there is any such circular to get the bags stamped by guard. He contended that in absence of clear and specific order, the guard checked bags with negligence which led to loss of time. The petitioner asserted that he did the work of operating hand machine and bag checking and also got it done from the guards for which, instead of charging him he should have been appreciated.

6. The petitioner also referred to his clean record of 16 years and that he had got only one chance in the year 2009 of consideration for promotion to the next post and any type of sentence will deprive him from this chance.

7. The pleas and contentions raised by the petitioner were considered and order dated 9th December, 2009 was passed holding that the reply of the petitioner was not completely satisfactory. It was held that any misconduct and negligence on the part of the petitioner could not be ignored on the ground that he had only one opportunity to be included in AC/LDCE. The Assistant Commandant found that the charges against the petitioner were made out, however, considering the earlier service of the petitioner and in order to give an opportunity to the petitioner to improve himself and taking a lenient view under Schedule I of Rule 32 of the CISF Manual, 2001, the sentence of "Parninda" (Censure) was passed against the petitioner. The petitioner was also communicated by order dated 9th December, 2009 that he could file an appeal within 30 days from the receipt of the order against his punishment.

8. Against the order dated 9th December, 2009 the petitioner filed an appeal before the Commandant, Central Industrial Security Force dated 28th December, 2009. The petitioner reiterated the pleas raised by him in the reply dated 17th November, 2009 to the chargesheet. Regarding charge No.3, the petitioner contended that it was concocted as there was no standard as to how much time is to be taken in clearance of one baggage, as clearance of the bag depends on the type of bag also. The petitioner also asserted that the memorandum of charge against him was on account of conspiracy against him as only he was charged, whereas all the force members go for breakfast/food daily and the charge sheet had not been issued against any other member of the force on this account.

9. The appeal filed by the petitioner was, however, dismissed by the Appellate Authority by order dated 15th May, 2010. The Appellate Authority considered the charges framed against the petitioner, his reply and the order dated 9th December, 2009. The Appellate Authority held that it was apparent that the petitioner was unable to comply the instructions given by senior officers from time to time and he committed violations repeatedly. Considering the repeated violations committed by

the petitioner, the Appellate Authority also held that the punishment of "Parninda" (Censure) was appropriate. The Appellate Authority categorically incorporated in the order that the petitioner has not produced and referred to any such fact which would require any interference by the Appellate Authority against the order of the Disciplinary Authority.

10. After the dismissal of the appeal, the petitioner filed an application dated 15th May, 2010 seeking certain documents. The petitioner did not disclose the relevancy of the documents demanded by him, nor disclosed any reasons as to why he had not relied on or demanded these documents before the Appellate and Disciplinary Authority. The petitioner also did not disclose as to how he would be prejudiced, in case the copies of documents demanded by him are not supplied to him. The details of the documents which were sought by the petitioner are as under:-

1. Domestic ID X ray rotation register.
2. Standing order ID XBIS Number H
3. CCTV footage dated 20.10.09 time 0520 to 0535.
4. Bathroom (illegible) register
5. Deployment strength to XBIS number H.
6. Standing order NITL XBIS number 6
7. On dated 2.11.2009 GD Extract.
8. Lunch/breakfast system
9. Register/paper for outgoing lunch/breakfast.
10. Office order for leaving breakfast/lunch.
11. NITC XBIS Number 5 standing order.
12. XBIS number 5 on dated 3.11.09 deployment SOS strength
13. Order to Const./Screener Bagage checking.
14. CCTV footage on dated 3.11.09.
15. If have any complaint of pay/staff.
16. On dated 3.11.09 GD Extract.

17. Detail (illegible) of SI/E D.K.Pandey from XBIS number 09205 with GD Extract.

11. The petitioner asserted that since no attention was paid to his submissions, therefore, the documents sought by him were necessary. The petitioner, however, did not disclose in his application as to why the alleged documents were not sought by him earlier in reply to the charge memo, in his reply dated 17th November, 2009. The petitioner also did not disclose any reason as to how the documents sought by him were relevant for the allegations made by him and how he would be prejudiced in absence of the documents sought by him. In reply to the application filed by the petitioner, before filing the revision petition it was communicated to the petitioner that under Rule 37 of the CISF Manual, 2001 there was no provision to make the documents available of any type along with the chargesheet which were not relied on or the basis of charge sheet. It is pertinent to notice that in the memorandum of charge dated 14th November, 2009 no documents were specifically referred to or relied by the respondents.

12. Later on, pursuant to the request made by the petitioner, he was, however, given the copies of NITC X Ray rotation Register; GD extract dated 2nd November, 2009 and GD extract dated 3rd November, 2009. The petitioner also sent other applications reiterating the demand for other documents, however, none of the applications detailed as to why these documents could not be sought by the petitioner prior to the order of 'censure' passed by the Disciplinary Authority. The petitioner also did not disclose as to why no grounds were taken by the petitioner in the appeal filed by him before the Appellate Authority in respect of the documents which were sought by the petitioner at the time of filing the revision petition. The petitioner thereafter, filed the revision petition, however, no new grounds were raised by the petitioner except reiterating the pleas and contentions raised by the petitioner earlier. The petitioner, however, contended that non supply of documents to him was contrary to the fundamental principles of natural justice and that he has been deprived of his right to defend himself.

13. The revision petition was also dismissed by the Revisional Authority by order dated 3rd February, 2011 holding that the petitioner had committed the lapses repeatedly. It was held that he committed first lapse on 20th October, 2009 when he left the frisking duty unattended.

Despite the lapse committed by him on 20th October, 2009 he committed the same mistake on 2nd November, 2009. His plea that he had left the X Bis Machine for physical checking of bags on 3rd November, 2009 on the ground that it could not be left to the constable was not accepted, holding that the constable also has the requisite experience and training and a constable understands his responsibility well. In the circumstances, it was held that not once but repeatedly the petitioner left his appointed place of duty without any justifiable reason and in the circumstances the Revisional Authority did not find any illegality or irrationality in the orders of the Disciplinary Authority or the Appellate Authority.

14. The Revisional Authority also considered the penalty of 'censure' awarded to the petitioner as proportional and appropriate for the misconduct on the part of the petitioner. The plea of the petitioner that he had an unblemished record was also negated, as, in fact, the petitioner had been warned twice for various other acts of indiscipline by the Disciplinary and the Appellate Authority. The Revisional Authority held that the petitioner has not brought out any new points in the revision petition and has repeated the factual aspects and thus there was no merit in the revision petition and thus dismissed the revision petition.

15. The petitioner has challenged the order of the Disciplinary Authority, Appellate Authority and Revisional Authority in the present writ petition reiterating the pleas on the facts as had been raised by the petitioner before the Disciplinary Authority. The petitioner has laid emphasis that LDCE scheme which was introduced only for the departmental candidate and not for the open market personnel and that the penalty of 'censure' has restricted his last opportunity as the petitioner has now become overage. The petitioner also contended that the penalty of 'censure' could not be a bar in granting promotion to the petitioner, if found fit by the Departmental Promotion Committee. The petitioner also asserted that the respondents ought to have initiated action against him under Rule 36 of the CISF Rules, 2001 which was not done intentionally because no charge would have been proved against the petitioner in that case. The petitioner also contended that by penalizing him with the penalty of 'censure' he has been deliberately deprived of availing an opportunity of competing in LDCE-2009.

16. This Court has heard the learned counsel for the petitioner and Mr.Ravinder Agarwal, Central Government Standing Counsel who has

appeared on advance notice. The learned counsel for the respondents has contended that if the petitioner was aggrieved of not considering his application for LDCE-2009, then the petitioner ought to have approached the authorities or this Court in 2009. Regarding the penalty of 'censure', the learned counsel for the respondents contended that the petitioner has failed to point out any such illegality, irregularity or perversity in the order of the authorities which will require any interference by this Court. The petitioner has repeated the factual aspects and this Court will not re-appreciate the facts and substitute the decision of the appropriate authorities with the different inferences if any, arrived at by this Court.

17. This cannot be disputed that for issuing a writ under Article 226 of the Constitution of India, it has always been in the discretion of the Court to interfere or not depending upon the facts and circumstances of each case. The Supreme Court in **Durga Prashad v. Chief Controller of Imports and Exports,** AIR 1970 SC 769 had held that even where there is an allegation of breach of certain rights, the grant of relief is discretionary and such discretion has to be exercised judiciously and reasonably. It is also no more res integra that the jurisdiction of the Court for judicial review is limited. The Court in exercise of its jurisdiction under Article 226 of the Constitution of India does not go into the correctness and the truth of the charges, nor it can take over the functions of the disciplinary authority. This Court does not sit in appeal against the findings of the disciplinary authority and assume the role of the appellate authority.

18. It is also pertinent that no malafides or perversities have even been imputed by the petitioner except contending that the other members of the force also go for the call of nature and for breakfast etc. but no action has been taken against them. The respondents have categorically contended that the entries are made in the register, if any, when member of the force leave for the call of nature and for other absence. The petitioner gave the explanations which have been considered by the Disciplinary Authority and the Appellate Authority and were disbelieved. The petitioner admitted his absence, however, justified the same on the ground that other members of the force also do the similar things. This could not be a valid justification in the facts and circumstances and in law. The allegation of the petitioner is too vague and cannot be accepted. If this plea of the petitioner has been rejected by the Disciplinary and

Appellate Authority, their orders cannot be faulted on the grounds raised by the petitioner.

19. The petitioner did not claim the copies of any documents before the Disciplinary Authority and the Appellate Authority and he claimed certain documents without disclosing the reasons for the same and without disclosing as to why he could not sought the copies of the same before the Disciplinary and Appellate Authority, by filing applications before the Revisional Authority. Copies of three documents were also supplied to the petitioner. Even in the revision petition, the petitioner failed to disclose as to how he has been prejudiced in absence of other documents copies of which were sought by him and which were not supplied, as he had not given any reason for not demanding them before the Disciplinary and the Appellate Authority. The petitioner has not even alleged properly as to how he had been prejudiced on account of copies of certain documents not given to him. The petitioner ought to have established the prejudice as a matter of fact. The prejudice cannot be based on apprehension or even a reasonable suspicion, nor the disciplinary proceedings can be vitiated on hyper technical approach. The punishment awarded to the petitioner cannot be quashed on the basis of apprehended prejudice. The Supreme Court in para 89 of **Alok Kumar Vs Union of India & ors.,** (2010) 5 SCC 349 had held as under:-

> "89. The well-established canons controlling the field of bias in service jurisprudence can reasonably be extended to the element of prejudice as well in such matters. Prejudice de facto should not be based on a mere apprehension or even on a reasonable suspicion. It is important that the element of prejudice should exist as a matter of fact or there should be such definite inference of likelihood of prejudice flowing from such default which relates to statutory violations. It will not be permissible to set aside the departmental enquiries in any of these classes merely on the basis of apprehended prejudice...."

Violations of mandatory statutory rules would tantamount to prejudice. But where the rule is merely directory, element of de facto prejudice needs to be pleaded and shown. Where the authorities rely upon a large number of documents majority of which are furnished and an opportunity is granted to the delinquent to defend himself except some of the documents are not furnished, the onus is on the delinquent the show that non-

furnishing of some of the documents had resulted in de facto prejudice and he has been put to a disadvantage as a result thereof. Element of prejudice should exist as a matter of fact or there should be such definite inferences of likelihood of prejudice flowing from such default which relates to statutory violations. Departmental actions cannot be set aside on the basis of apprehended prejudice. Prejudice normally would be a matter of fact and a fact must be pleaded and shown by cogent documentation to be true. The petitioner has failed on all counts in this regard. The documents were not demanded before the Disciplinary Authority, nor any grounds taken in the appeal filed before the Appellate Authority, nor any such grounds canvassed before the Appellate Authority. Even before the Revisional Authority it has not been averred as to how the petitioner got prejudiced on account of non-supply of the copies of some of the documents demanded by him out of which, copies of three main documents were given to him. The respondents had not relied on these documents in their Charge Sheet. How the petitioner got prejudiced has not been canvassed before the revisional authority. Consequently, on this ground the punishment of 'censure' awarded to the petitioner cannot be vitiated.

20. The petitioner has also relied on his service record. The respondents have rightly contended that the repeated lapses on the part of the petitioner could not be condoned, as he was repeatedly given opportunities and the lapse on the part of the petitioner was not solitary as he committed the lapse on 20th October, 2009, thereafter on 2nd November, 2009 and yet again on 3rd November, 2009.

21. The respondents have also pointed out that the plea of the petitioner that his record is unblemished is also not correct as in other proceedings against him he had been warned by the disciplinary, as well as, the appellate authority which fact has not been denied by the petitioner in the writ petition.

22. The other grounds on which the action of the respondents could be challenged by the petitioner was by pointing out illegalities, irrationalities or procedural improprieties. The learned counsel for the petitioner cannot refute that whether the actions of the respondents fall within any of the categories has to be established and mere assertion in this regard is not sufficient. To be "irrational" it has to be held that on material, the decision of the respondents is so outrageous, as to be in

total defiance of logic or moral standards. The petitioner has not denied that he was not absent from the duty as has been alleged by the respondents except contending that this is a normal thing and that the exact timings as given by the respondents is not correct. Since the petitioner admitted his absence, it was for him to give plausible and justifiable reason and in the circumstances, if the respondents have held that the charges against the petitioner had been established, it cannot be held that the decision of the respondents is irrational. The petitioner has been awarded the penalty of 'censure. only which cannot be held to be so disproportionate as to be considered as outrageous and in total defiance of logic or moral standards. The learned counsel for the petitioner has also not been able to show any patent error or manifest error in the exercise of power by the respondents. The petitioner's counsel has failed to show any such relevant factor which will make the decision of the respondents unreasonable or that the respondents have taken into consideration irrelevant factors. The Supreme Court in (2006) 5 SCC 88, **M.V.Bijlani v. Union of India & Ors.** had held that the judicial review is of decision making process and not of reapprecation of evidence. The Supreme Court in para 25 at page 95 had held as under:-

> "25. It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings, however, being quasi-criminal in nature, there should be some evidence to prove the charge. Although the charges in a departmental proceeding are not required to be proved like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analyzing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with....."

23. In the totality of facts and circumstances, it cannot be inferred that there is no application of mind on the part of the disciplinary authority and the appellate and revisional authority or that the charges against the

petitioner were vague or that the punishment imposed is shocking to the conscience of the Court. None of the grounds which would entail interference by this Court in exercise of its power of review are made out in the facts and circumstances.

24. For the foregoing reasons and in the totality of facts and circumstances there is no such illegality, irregularity or perversity which will require any interference by this Court in exercise of its jurisdiction against the order of the respondents. The writ petition, in the facts and circumstances, is without any merit and it is, therefore, dismissed.

ILR (2012) IV DELHI 741
CONT. APPEAL.

ATUL KUMAR RAI ….APPELLANT

VERSUS

KOSHIKA TELECOM LIMITED & ORS. ….RESPONDENTS

(SANJAY KISHAN KAUL & RAJIV SHAKDHER, JJ.)

CONT. APPEAL (C) NO. : 6/2012, 8/2012 & 9/2012 **DATE OF DECISION: 17.04.2012**

Contempt of Courts Acts, 1971—Section 19,11 & 12—IFCI Limited advanced a loan to M/s Koshika Telecom Ltd.—Loan was secured by hypothecation of the tower and other movable assets—Two of the directors gave personal guarantees—IFCI filed proceedings before DRT—*M/s Koshika Telecom Limited* was held liable for sum of Rs. 233,73,92,900.27 along with pendent lite and future interest @ 10% per annum from 19.07.2002 till realization with cost of Rs. 1.5 lakh and recovery certificate was issued in terms thereof—IFCI filed recovery proceedings—Moved application for sale

property (towers) which were hypothecated—Recovery officer vide order dated 18.12.2007 directed attachment and sale of the hypothecated properties—However, the Company was wound up vide order dated 02.08.2005 and the Official Liquidator took over charge of its assets—The hypothecated assets were sold for a sum of Rs. 12 Crores—IFCI filed an application before the Recovery Officer praying for the proceeds realized from sale of assets to be made over to IFCI as the Official Liquidator had received only one claim which was yet to verified—Official Liquidator opposed the application—It appears that the Official Liquidator had a meeting with Ms. Shalini Soni, AGM (one of the contemnors) on 19.08.2009 where a decision was taken that the sale proceeds of the land will be deposited with the official liquidator—Official Liquidator filed a compliance/status report No. 281/2009 dated 06.10.2009 before learned Company judge and requested for appropriate directions—On 12.10.2010 Official Liquidator filed a report bearing No. 13/2010 for direction to IFCI to deposit the sale proceeds and expenses for advertisement with Official Liquidator-IFCI Limited instead of depositing the sale proceeds with Official Liquidator, chose to file application before Recovery Officer praying that the sale proceeds received from the sale of assets of M/s Koshika Telecom Limited be directed to be appropriated by the IFCI Limited in partial discharge of the Recovery Certificate—Application allowed by the Recovery Officer on 22.02.2010 with a direction that IFCI would furnish and undertaking that in future if any eligible claim in excess of the amount available with the Official Liquidator is received by the Official Liquidator, the requisite amount will be remitted to the Official Liquidator within seven days—Official Liquidator being aggrieved by the non compliance of the directions of the learned Company judge dated 08.10.2008 filed a petition under Sections 11 and 12 of the Contempt of

Courts Act, 1971 arraying Ms. Shalini Soni alone as a respondent/contemnor for not depositing the sale proceeds with official Liquidator—Official Liquidator filed an appeal before the DRT against the order of the Recovery Officer dated 22.02.2010—Appeal allowed partially observing that the Official Liquidator would be entitled to the amount to the extent of value of the land of the company while IFCI is entitled to the amount received from the sale of movable assets—IFCI also preferred an appeal before the DRAT—Appeal was dismissed by DRAT—IFCI assailed the Order of DRT and DRAT in WP (C) No. 5014/2010-WP(C) was allowed on 16.12.2010 IFCI was held entitled to retain the amounts both from the sale of movable and immovable assets of M/s Koshika Telecom Limited subject to the other directions—Though the Official Liquidator sought to withdraw the contempt proceedings on 08.03.2011 in view of orders passed by the division Bench, Learned Single Judge declined the prayer—Issued notice to IFCI through Managing Director (contemnor herein) and the Recovery Officer (contemnor herein)—Mr. Atul Kumar Rai is the Managing Director of IFCI Limited—No notice was issued to him by name but only by designation—In response to the contempt notice, affidavits were filed by all the three contemnors—They all tendered unconditional apology—All the three contemnors were found guilty of contempt—Sentenced to undergo simple imprisonment for a period of one month—IFCI as an institution has been imposed with a fine of Rs. 5 lakh out of which Rs. 3,50,000/- should be deducted from the salary of Mr. Atul Kumar Rai while the balance amount should be deducted from the salary of Ms. Shalini Soni—Appeals—Held:- We are of the view that the controversy ought to have been put to a rest when the Official Liquidator itself wanted to withdraw the contempt petition on 08.03.2011—The learned single Judge did not even permit that but proceeded

to issue notices further to the Managing Director of IFCI by Designation and Recovery Officer ostensibly to Know whether the Recovery Officer was aware of the orders passed by the learned Company Judge on 08.10.2009 when he passed the orders dated 22.02.2010—No notice was issued to Mr. Atul Kumar Rai in person, but since the affidavits filed on behalf of IFCI were not by the Managing Director, even the Managing Director filed his personal affidavit—All the there contemnors had tendered unqualified apology and the Recovery Officer had stated in so many words that he should have been more careful in analyzing the papers before him—We find that there is no case whatsoever of contempt made out against Mr. Atul Kumar Rai—The Recovery Officer ought to have perused the reply filed by the Official Liquidator given this situation, unqualified apology tendered more than met the requirement as it was not a case of any willful contumacious conduct for the court to either proceed with conviction or impose sentence and that too such a harsh one—All the three appeals are liable to be allowed—Orders of conviction dated 06.02.2012 and order on sentence dated 19.03.2012 are liable to be set aside with the acceptance of apology on the part of Ms. Shalini Soni and Mr. R.K. Bansal while Mr. Atul Kumar Rai is held not to have any role in the matter in issue.

We are of the view that especially taking into consideration the orders of the Division Bench dated 06.12.2010, the controversy ought to have been put to a rest when the Official Liquidator itself wanted to withdraw the contempt petition on 08.03.2011. The learned single Judge did not even permit that but proceeded to issue notices further to the Managing Director of IFCI by designation and Recovery Officer ostensibly to know whether the Recovery Officer was aware of the orders passed by the learned Company Judge on 08.10.2009 when he passed the orders dated 22.02.2010.

No notice was issued to Mr.Atul Kumar Rai in person, but since the affidavits filed on behalf of IFCI were not by the Managing Director, even the Managing Director filed his personal affidavit. All the three contemnors had tendered unqualified apology and the Recovery Officer had stated in so many words that he should have been more careful in analyzing the papers before him. This is of course apart from the fact that we are of the view that the order dated 08.10.2009 itself was not free from doubt for the manner in which it was framed. **(Para 34)**

We find that there is no case whatsoever of contempt made out against Mr.Atul Kumar Rai while Ms.Shalini Soni ought to have been more careful in first assailing the order dated 08.10.2009 in appeal before filing an application before the Recovery Officer on which orders were passed on 22.02.2010. Similarly, the Recovery Officer ought to have perused the reply filed by the Official Liquidator. Given this situation, unqualified apology tendered more than met the requirement as it was not a case of any willful contumacious conduct for the court to either proceed with conviction or impose sentence and that too such a harsh one.**(Para 35)**

We are, thus, of the unequivocal view that all the three appeals are liable to be allowed, orders of conviction dated 06.02.2012 and order on sentence dated 19.03.2012 are liable to be set aside with the acceptance of apology on the part of Ms.Shalini Soni and Mr.R.K.Bansal while Mr.Atul Kumar Rai is held not to have any role in the matter in issue. **(Para 37)**

[Vi Ba]

APPEARANCES:

FOR THE APPELLANT : Mr. Mukul Rohatgi, Sr. Adv. with Mr. Suresh Dobhal, Ms Alapna Poddar and Mr. Rahul Tyagi, Advocates.

FOR THE RESPONDENTS : Mr. Rajiv Bahl Advocate for R-1/OL. Mr. P.S. Bindra, Advocate for R-2.

CASES REFERRED TO:

1. *Allahabad Bank* vs. *Canara Bank & Anr.;* 2000(4) SCC 406.
2. *Central Bank of India* vs. *Sarojini Kumari;* 1999 Cri L.J. 2130 (RAJ).
3. *Supreme Court Bar Association* vs. *Union of India & Anr.;* (1998) 4 SCC 409.
4. *Shri Baradakanta Mishra* vs. *The Registrar of Orissa HC* and *Anr. and State of Orissa* vs. *Shri Baradakanta Mishra & Anr;* AIR 1974 SC 710.

RESULT: Appeals Allowed.

SANJAY KISHAN KAUL, J.

1. The contempt jurisdiction has to be exercised with care and caution by a court. It is not to be used either with vindictiveness or to "teach a lesson". The civil contempt involves a private injury and ought to be punished when a degree of misconduct is involved and proved. "The defiance should be willful and intentional as opposed to unintentional, accidental, casual or bona fide conduct." {**Central Bank of India Vs. Sarojini Kumari;** 1999 Cri L.J. 2130 (RAJ)}. There has to be a conscious effort or attempt on the part of the contemnor to willfully disobey the orders of a court and the discretion given to the Court, while arming it with contempt power, has to be exercised to ensure that the dignity of the court and majesty of law is maintained. 2. A contemnor must always be given an opportunity to repent. The repentence on the part of the contemnor and tendering of unqualified apology should be permitted to help him escape from rigorous punishment. The courts cannot be unduly touchy on the issue of contempt where orders have not been implemented forthwith especially when the effect of those very orders is effaced by pronouncements from appellate courts. We hasten to add that this is not meant to be a licence for violation of an order till it subsists. It is in this context that it was observed by a Constitution Bench of the Supreme Court in **Shri Baradakanta Mishra v. The Registrar of Orissa HC**

and Anr. and **State of Orissa v. Shri Baradakanta Mishra & Anr;** AIR 1974 SC 710 that "A heavy hand is wasted severity where a lighter sentence may serve as well." In the same judgment, it was observed as under:

> "We ought never to forget that the power to punish for contempt large as it is, must always be exercised cautionsly, wisely, and with circumspection. Frequent or indiscriminate use of this power in anger or irritation would not help to sustain the dignity or status of the court, but may sometimes affect it adversely." (Special Reference No.1 of 1964; (1965) 1 SCR 413; referred to in Baradakanta Mishra)

3. We have set out the parameters and the legal position at the threshold itself before analyzing the facts of the case. This became necessary as we are faced with a situation where despite the opposite party expressing against pursuing the contempt in view of certain subsequent orders, the learned single Judge has taken upon himself to proceed with the civil contempt, to convict the parties of contumacious conduct and willful disobedience and thereafter sentence them to heavy fine and simple imprisonment.

4. IFCI limited advanced loans to M/s Koshika Telecom Ltd. for setting up a telecom business. The loans were secured by hypothecation of the tower and other movable assets and two of the directors of the company gave personal guarantees. The service of the loan became irregular and since there were persistent defaults, IFCI filed proceedings before DRT for recovery of its debts, which was registered as OA No.148/2002. The financial status of M/s Koshika Telecom Limited, however, continued to deteriorate, resulting in a winding up petition bearing No.75/2002 being filed before the company court titled as **"Lord Krishna Bank Ltd. v. Koshika Telecom Limited"**. The company was wound up vide order dated 02.08.2005 and the Official Liquidator took over charge of its assets.

5. The application filed by IFCI before the DRT was disposed of on 20.04.2006 holding M/s Koshika Telecom Limited liable for a sum of Rs.233,73,92,900.27 along with pendente lite and future interest @ 10% per annum from 19.07.2002 till realization with costs of Rs.1.5 lakhs and the Recovery Certificate was issued in terms thereof.

6. In order to recover its dues, IFCI filed recovery proceedings which were registered as RC No.43/2006. In those proceedings, IFCI filed an application for sale of property (towers) mentioned in schedule, which were hypothecated with it. The Recovery Officer on 18.12.2007 directed attachment and sale of the hypothecated properties of M/s Koshika. However, in view of the appointment of the Official Liquidator, an application was filed in the company petition by the Official Liquidator aggrieved by the order dated 18.12.2007. In the meantime, some of the hypothecated assets were sold by IFCI in its auction and part of the sale proceeds amounting to Rs. 12 crores came to be deposited with it. The application so filed by the Official Liquidator was, however, withdrawn on 05.02.2008 with liberty to file an appeal under Section 30 of The Recovery Of Debts Due To Banks And Financial Institutions Act, 1993. ('the RDDBFI Act' for short)

7. The Official Liquidator thereafter filed an appeal before the DRT against the order dated 18.12.2007 of the Recovery Officer which was dismissed on 25.07.2008. The DRT relied upon the judgment in **Allahabad Bank v. Canara Bank & Anr.;** 2000(4) SCC 406 where it was held that even if a company is in liquidation, the provisions of RDDBFI Act allow the RO to sell the properties of the debtors by giving notice and hearing to the OL and that the adjudication, execution and distribution of the sale proceeds and working out priorities as between banking and financial institutions and other creditors of the company so far as the monies realized under the RDDBFI act are concerned, has to be done by the Tribunal and not by the Company Court.

8. The Official Liquidator thereafter filed an appeal before the DRAT which was disposed of on 05.11.2008 as compromised by the parties and thereafter the Recovery Officer proceeded to sell the remaining properties in auction.

9. The IFCI filed an application before the Recovery Officer praying for the proceeds realized from sale of assets to be made over to IFCI as the Official Liquidator had received only one claim which was yet to be verified and no other claim had been received either from the workmen or from secured or unsecured creditors. The total realization from the assets sold by IFCI, being in the range of about 12 crores, a large amount of the debt of IFCI remained unsatisfied. This application was, however, opposed by the Official Liquidator. It appears that that the

Official Liquidator had a meeting with Ms.Shalini Soni, AGM (one of the contemnors) on 19.08.2009 where a decision was taken that the sale proceeds of the land will be deposited with the Official Liquidator. The Official Liquidator filed a compliance/status report No.281/2009 dated 06.10.2009 before the learned Company Judge and requested for appropriate directions to be issued inter alia for publishing the claims once again in newspapers with the expenses to be borne by the IFCI, the secured creditor, and for directions to be given to IFCI to deposit the sale proceedings with the Official Liquidator forthwith. On 08.10.2009, the learned Single Judge took the report on record and issued the following order:

> "Directions may also issue to IFCI, as prayed for, including a direction to the IFCI to pay for the expenses of the publication of the advertisement inviting the claims."

10. The aforesaid order thus shows that while a specific direction was issued to the IFCI to pay the expenses of the publication of advertisement inviting the claims, no other specific direction was issued. A specific direction was worded in a manner as if it was "inclusive" while the general directions were that all the directions, as prayed for, may be issued to the IFCI. If one was to turn to the report dated 06.10.2009, there were a number of directions prayed for against IFCI:

> i) Permission to publish the claims once again in newspapers with costs borne by IFCI.
>
> ii) IFCI to provide details consisting of date of sale, amount of sale and date of handing over the possession to the auction purchasers.
>
> iii) **IFCI to deposit the sale proceeds with the Official Liquidator forthwith.**
>
> iv) IFCI to ensure availability of security guards for protection of properties of the M/s Koshika Telecom Limited and to provide details of guards along with photographs, details of PF/ESI and details of payment made to them, attendance sheet, the attendance sheet, the salary register and the account form which payment is realized to guards etc.

11. A meeting is stated to have been held again between the Official Liquidator and Ms Shalini Soni on 26.10.2009 for deposit of sale proceeds and expenses for advertisement and the Official Liquidator filed a report bearing no.13/2010 on 12.01.2010 for directions to IFCI to deposit the sale proceeds with the Official Liquidator.

12. The IFCI limited instead of depositing the sale proceeds with the Official Liquidator, chose to file an application on 09.12.2009 before the Recovery Officer praying that the sale proceedings received from the sale of assets of M/s Koshika Telecom Limited be directed to be appropriated by the IFCI Limited in partial discharge of the Recovery Certificate. This application was allowed by the Recovery Officer on 22.02.2010 with a direction that IFCI would furnish an undertaking by an competent officer that in future if any eligible claim in excess of the amount available with the Official Liquidator is received by the Official Liquidator, the requisite amount will be remitted to the Official Liquidator within seven days. This was apparently so because other than the amount realized from the movable assets, IFCI stands in queue with other unsecured creditors, secured creditors and the workmen's liability naturally take precedence over it. The Recovery Officer also directed that a sum of Rs.1 crore will be kept with the Official Liquidator on provisional basis for defraying various expenses. The Official Liquidator was, however, aggrieved by the non compliance of the directions of the learned Company Judge dated 08.10.2009 and thus filed a petition under Sections 11 and 12 of The Contempt of Courts Act, 1971, which was registered as CCP No.30/2010 in Company Petition No.75/2002 arraying Ms. Shalini Soni alone as a respondent/contemnor for not depositing the sale proceeds with the Official Liquidator.

13. The Official Liquidator also filed an appeal before the DRT against the order of the Recovery Officer dated 22.02.2010 which was allowed by the DRT on 11.06.2010 partially observing that that the Official Liquidator would be entitled to the amount to the extent of value of the land of the company while IFCI is entitled to the amount received from the sale of movable assets including microwave ovens and machineries. The IFCI also preferred an appeal being Appeal No.286/2010 before the DRAT being aggrieved by the aforesaid order of the DRT. This appeal was dismissed on 13.07.2010 by the DRAT.

14. The IFCI assailed the order of the DRT and DRAT in WP(C)

No.5014/2010. The Division Bench (of which one of us Sanjay Kishan Kaul, J. was a member) issued notice on the writ petition on 28.07.2010 and stayed the orders of the DRT and DRAT relating to realization of the amounts from the IFCI.

15. Since the contempt petition filed in the company petition was pending, Ms Shalini Soni filed reply to the contempt petition pleading that IFCI had given all the information called for by the Official Liquidator; though IFCI was ready to bear the expenses for the advertisement, the Official Liquidator had not quantified the expenses, and that, the sale proceeds as per the order of the Recovery Officer had been kept by IFCI in a no-lien interesting bearing account and the rest in FDR with a nationalized bank. It was stated that when no claims were received by the Official Liquidator, the IFCI filed the application for release of the entire amount to it and the Recovery Officer had allowed that application except a sum of Rs.1 crore to be kept with the Official Liquidator. The DRT had modified the order to the extent that the IFCI will be allowed to retain monies received from the sale of movable properties and the appeal of IFCI before DRAT was dismissed. The matter was pending in writ petition before the High Court.

16. The WP(C) No.5014/2010 was allowed on 06.12.2010. The Division Bench noticed that the counsel for IFCI on the first date itself had confined the grievance to the direction contained in the order dated 11.06.2010 of the DRT affirmed by the DRAT vide Order dated 13.07.2010 to the extent that it directed that realization from sale of immovable assets should be deposited with the Official Liquidator. The order dated 28.07.2010 issuing notice recorded the concession of the learned senior counsel for IFCI that there was no dispute with the proposition that IFCI is not a secured creditor qua the amount realized from sale of immovable properties and thus the lien of employees would have precedence and if there was any other unsecured creditor, whose claim is verified, the claim of the IFCI would stand alongside such unsecured creditor. However, no such claim had been received despite an earlier advertisement, but in case any such claim was received in pursuance to a subsequent advertisement, the same could be dealt with as recorded in that order especially keeping in mind the undertaking already given by the IFCI pursuant to the order of the Recovery Officer dated 22.02.2010. Learned counsel conceded that the expenses for future

advertisements would be borne by the IFCI out of the amount lying in account with IFCI. The Division Bench noted in its order dated 06.12.2010 that the counter affidavit of the Official Liquidator did not enlighten them any further and it was not disputed that no claims had been received in pursuance to the first advertisement except one claim, but even the particulars of that claim had not been set out nor the same had been verified. The costs of advertisements were not indicated nor was the Official Liquidator in a position to state so even on the date of hearing. The Division Bench found that the facts of the case were peculiar as the money was lying with IFCI, a public financial institution, to the extent of sale realization from the immovable properties in respect of which the IFCI was not a secured creditor, but no other claims had been verified to show that there were other unsecured creditors or claim of workmen which was yet to be satisfied. The amount realized from sale of both the movable and immovable assets was not even fraction of the amount which was due to the petitioner under the decree. The operative paragraphs of the order dated 06.12.2010 are as under:

> "11.The function of the OL is only to ensure that the claims of secured creditors are satisfied to the extent it can be and unsecured creditors get the remaining amount pari passu. No such unsecured creditor has come to light despite an advertisement being issued. The OL is somehow keen only for the amount to be transmitted to it, the objective of which is not clear to us. If there were other claims then naturally the role of OL comes into play and he would have to distribute the amount pari passu. The amount is secured as it is lying with the petitioner-Corporation, which is a public financial institution, and has been only provisionally appropriated in terms of the orders of the Recovery Officer.
>
> 12. We thus consider it appropriate to modify the impugned orders and permit the petitioner to retain the amount realized against sale of immovable properties making it clear that the claims of any unsecured creditors would rank pari passu with that of the petitioner-Corporation to that extent and the claim of workmen would first have to be satisfied. Insofar as the advertisement costs are concerned, the OL to communicate the costs in writing to the petitioner-Corporation and the petitioner-Corporation will make the payment to OL of that amount along

with 20 per cent additional amount to defray the incidental expenses. The petitioner-Corporation will abide by the undertaking given on its behalf before the DRT as well as before us on 28.07.2010.

13. The writ petition is allowed in the aforesaid terms leaving the parties to bear their own costs."

17. The effect of the aforesaid order is that IFCI was held entitled to retain the amounts both from the sale of movable and immovable assets of M/s Koshika Telecom Limited subject to the other directions contained as aforesaid. This should have brought an end to the controversy qua the amount i.e. the issue arising as to whether this amount had to be deposited by the IFCI with the Official Liquidator. However, this did not happen even though the Official Liquidator sought to withdraw the contempt proceedings on 08.03.2011 before the learned single Judge in view of the orders passed by the Division bench on 06.12.2010. The learned single Judge in effect declined the prayer for withdrawal of the contempt proceedings and wanted to enquire as to whether the Recovery Officer was aware of the orders passed by the learned Company Judge on 08.10.2009 while passing the orders dated 22.02.2010 and consequently the Official Liquidator did not press the withdrawal of the contempt proceedings. The learned single Judge proceeded to issue notice for the first time on 23.05.2011 to IFCI through its Managing Director (contemnor herein) and the Recovery Officer (contemnor herein). The Recovery Officer was issued the notice as to why he had passed the order on 22.02.2010 contrary to the order of the learned Company Judge dated 08.10.2009. It may be added that Mr.Atul Kumar Rai is the Managing Director of IFCI Limited and the contemnor before us, but no notice was issued to him by name, but only by designation. This order was passed despite the learned single Judge being apprised of the order passed by the Division Bench on 06.12.2010 putting the controversy at rest.

18. In response to the contempt notice, affidavits were filed by all the three contemnors. It would be appropriate now to deal with each of these affidavits separately.

19. On behalf of IFCI, initially a reply supported by an affidavit of Sh. Avinash Kumar as Assistant General Manager was filed whereby an unconditional apology was tendered to the Court. The relevant facts

which have already been sketched out hereinabove were set out in the affidavit. The affidavit states that the IFCI was given copies of the orders passed by the learned Company Judge on 08.10.2009 for the first time on 22.02.2010 as annexures to the reply filed before the Recovery Officer and that in the prior meeting held on 26.10.2009 in the chamber of the Official Liquidator, attended by Ms Shalini Soni, AGM, copies of the order dated 08.10.2009 and report no.281/2009 were not supplied. It is also stated that since the Official Liquidator was aggrieved by the order passed by the Recover Officer on 22.02.2010, an appeal was filed before the DRT which was partially allowed on 11.06.2010. The order dated 11.06.2010 had been challenged by the IFCI before the DRAT which challenge was rejected on 13.07.2010 and it is thereafter that WP(C) No.5014/2010 was filed. The Official Liquidator filed a counter affidavit in that writ petition taking all the pleas including that IFCI was in contempt of order dated 08.10.2009, but the writ petition was allowed on 06.12.2010. It was also emphasized that the plea of the Official Liquidator seeking appropriation of the amount was contrary to the judgment of the Supreme Court in **Allahabad Bank v. Canara Bank & Anr.'s** case (supra) as it is the Recovery Office alone who could have prioritized the debt amongst banks, financial institutions and other creditors. It appears that at the insistence of the learned Single Judge, the Managing Director also filed a personal affidavit on 11.08.2011 tendering an unconditional apology stating that he had no knowledge of the developments leading to the filing of the contempt petition nor was he aware of the orders passed on 08.10.2009.

20. The affidavit filed by Ms.Shalini Soni is more or less in the same terms as of Mr.Avinash Kumar. While tendering an unqualified apology, it has been categorically stated that she had attended a meeting called by the Official Liquidator on 26.10.2009 where she had expressed her readiness to fulfil all the requirements for compliance of the orders of the court and to furnish the relevant information. However, the expenses were not quantified for inviting the claims and thus IFCI could not have deposited the amount without knowing how much to deposit. The Official Liquidator was also a party to the sale proceedings conducted by the Recovery Officer and was a part of the Assets Sale Committee constituted for purposes of sale of assets of M/s Koshika Telecom Limited.

21. The affidavit of Mr.R.K.Bansal, the Recovery Officer, also

tenders unqualified apology. The factual position has been explained in the affidavit stating that the copy of the order dated 08.10.2009 itself did not indicate that IFCI had been directed to remit the entire sale proceeds of the assets of the M/s Koshika Telecom Limited to the Official Liquidator. This aspect became clear only when the order dated 08.10.2009 is read with the compliance/status report no. 281/2009 dated 06.10.2009. At the time of hearing of the application of IFCI, it is pleaded that true spirit of the order dated 08.10.2009 passed by the learned Company Judge was not brought to the notice of the Recovery Officer by any of the parties during the course of the arguments. He further goes on state in para 10 of the affidavit as under:

> " 10. That in the hindsight, the Deponent states that he ought to have read the entire application and the reliefs/directions that had been sought by the Official Liquidator. This as stated, was a bona fide oversight and was totally unintentional."

22. We may notice that all the contemnors had appeared before the Court also and submitted to tender an unqualified apology. The learned single Judge, however, in terms of the order dated 06.02.2012 while noticing the apology tendered in the affidavits, has still found them guilty of contempt and stated that the fact of the apology was only a matter to be considered as a mitigating circumstance on the point of sentence. The learned single Judge found that the order passed by the Recovery Officer on 22.02.2010 showed that the order passed on 08.10.2009 by the learned Company Judge was duly communicated to Ms Shalini Soni which in turn would amount to a communication to IFCI including its Managing Director. The remedy, as per the opinion of the learned single Judge, if IFCI was aggrieved by the order dated 08.10.2009, was to assail it in appeal and merely because the order dated 08.10.2009 ultimately became inoperative on account of orders passed by the Division Bench was held not to assist the contemnors. The learned single Judge from observations in para 16 appears to have been weighed down by the fact that the IFCI is a public financial institution having a legal department and thus should have acted in accordance with law. Similarly, qua the Recovery Officer, it has been found that the order dated 08.10.2009 had been placed before him in the record, the defence that this was not specifically pointed out to him cannot be accepted.

23. Mr.Atul Kumar Rai assailed the order of the learned single

Judge dated 06.02.2012 holding him guilty of contempt by filing a special leave petition being SLP No.6394/2010 before the Supreme Court which was disposed of on 17.02.2012. The Supreme Court noticed that the controversy related to the issue as to whether an appeal would lie under Section 19 of the Contempt of Courts Act, 1971 before the Division Bench of the High Court against the order of conviction or whether both the order of conviction and sentence have to be assailed only at the stage when the order of sentence is passed i.e. that the order of conviction cannot be assailed in appeal. The Supreme Court did not express any final opinion on this question in the order dated 17.02.2012 as undisputably an appeal would be maintainable after pronouncement of punishment/ sentence by the High Court. The special leave petition was accordingly disposed of with a direction that the punishment/sentence imposed upon the petitioner would remain suspended for a period of four weeks to enable the petitioner to file an appeal to seek an appropriate order from the appellate court in terms of Section 19(2) of the Contempt of Courts Act, 1971. The SLP of Ms.Shalini Soni was, however, listed on 23.02.2012 which was disposed of on the analogy of SLP(C) No.6394/2012. Mr.R.K.Bansal, however, did not file any SLP. The learned single Judge thereafter heard the parties on 24.02.2012, 01.03.2012 and 06.03.2012 before reserving the judgment. It may be noticed that in the meantime an application for review had also been filed by Mr.Atul Kumar Rai on 21.02.2012, on which also arguments were heard. The learned single Judge found that adopting the path of pardon for the contemnors was yielding disastrous results as far as the sanctity and obedience of judicial orders was concerned and litigants were gathering the impression that the moment apology is tendered even while maintaining that no contempt was committed, the Court would melt down and pardon them. The learned single Judge was thus not inclined to show any leniency and found it a dangerous trend that the parties obtained relief from the subordinate authorities which stood declined by this Court. All the three contemnors were sentenced to undergo simple imprisonment for a period of one month. IFCI as an institution has been imposed with a fine of Rs. 5 lakhs, out of which Rs.3,50,000/- should be deducted from the salary of Mr.Atul Kumar Rai while the balance amount should be deducted from the salary of Ms.Shalini Soni.

24. The three contemnors have thus assailed the orders of conviction and sentence before us in these appeals.

25. We have heard the learned counsel for the appellants as well as the learned counsel for the Official Liquidator. The learned counsel for the Official Liquidator has really nothing to add and in fact stated that the Official Liquidator had formed an opinion to withdraw the contempt proceedings in view of the subsequent orders of the Division Bench dated 06.12.2010, but this request was declined by the learned single Judge who proceeded to hear the contempt petition on merits. One common thread which permeates the submissions advanced on behalf of all the three contemnors is that the counsels accept that the appropriate remedy against the order dated 08.10.2009 of the learned Company Judge was for IFCI to have approached the appellate court. This was not done. It was, however, submitted that the appellants had tendered unqualified apology and were not motivated by any personal gains. The IFCI was only seeking to recover its dues and the amounts realized were only a fraction of the total amount found due under the Recovery Certificate. The function of the Official Liquidator was to protect the monies and assets of the company in liquidation (M/s Koshika Telecom Limited), to meet liabilities of the creditors, statutory dues, workmen's dues etc. An advertisement was published by the Official Liquidator in various newspapers, but except for one claim no other claims were lodged. This shows that there were no other secured or unsecured creditors or workmen's dues. The single claim received had also not been verified. The IFCI is a public sector enterprise and the money was as safe with it as with the Official Liquidator. The assets had been sold with the Official Liquidator on the Assets Sale Committee and thus there was complete transparency in the sale of the assets. The IFCI had already given an undertaking that in case any claims were lodged by even unsecured creditors, they would stand pari passu with such claims or workers claims qua the unsecured assets of M/s Koshika Telecom Limited.

26. The learned counsel appearing for Ms.Shalini Soni confessed that it may have been a case of over-enthusiasm on the part of Ms.Shalini Soni to secure the amount for IFCI Limited on the basis of a legal understanding that there were two separate proceedings and that the rights of IFCI were protected in the proceedings before the DRT. This was stated to be not a whimsical view of Ms.Shalini Soni, but that the Supreme Court itself in **Allahabad Bank v. Canara Bank & Anr.'s** case (supra) had opined that for a company in liquidation, the proceedings of the RDDBFI Act allow the Recovery Officer to sell the properties of

the debtors by giving notice and hearing to the OL and that the adjudication, execution and distribution of the sale proceeds and working and priorities as between banking and financial institutions and other creditors of the company so far as the monies realized under the RDDBFI Act are concerned, has to be done by the Tribunal and not by the Company Court. It was under the belief of such a bona fide view that the proceedings were initiated before the Recovery Officer.

27. One may add that it cannot be disputed that the controversy qua these amounts stood at rest in view of the judgment of the Division Bench of this Court on 06.12.2010 and interim protection had been granted in those proceedings on 28.07.2010. Thus the view propounded by IFCI, in fact, prevailed. This order has not been assailed further and has become final and binding. Of course, this would not be an answer to the plea that between 08.10.2009 and the orders being passed by the Division Bench, the IFCI was required to comply with the directions of the learned Company Judge or ought to have assailed the same in appeal which they failed to do.

28. One cannot but take notice of another fact. On the company going into liquidation, reports are filed by the Official Liquidator from time to time on which orders/directions are passed by the Company Court. These are stated to be in the nature of chamber proceedings though we are informed that as per the current practice, the learned Judge for convenience sake takes these matters in court. The compliance/status report no.281/2009 filed by the Official Liquidator on 06.10.2009 sought various directions which have been set out by us while discussing this report. The learned Company Judge while passing the order dated 08.10.2009 did not issue specific directions qua all the prayers made. In fact, what was observed was that the directions may also issue to IFCI, "as prayed for", followed up with the expression "including a direction to the IFCI to pay for the expenses of the publication of the advertisement inviting the claims." Thus, on the one hand, learned Company Judge considering one of the directions as an important one, has issued a specific direction while not issuing such a specific direction qua the issue of deposit of the amount by IFCI with the Official Liquidator. If one may say so, certainly some ambiguity could arise from the interim directions passed.

29. We are of the view that the complete controversy stood examined

in the order passed by the Division Bench on 06.12.2010. We have already reproduced the operative portion of the directions hereinbefore to indicate the line of reasoning which weighed with the Division Bench. The function of the Official Liquidator was not to keep monies with itself for the sake of it. The Official Liquidator is a custodian for purposes of meeting the claims of various kinds of creditors, statutory dues and workmen's dues. In the facts of the present case, even the first advertisement issued by the Official Liquidator did not result in any claims whatsoever except one claim. This fact had to be balanced with the astronomical claim outstanding to IFCI from the company in liquidation (M/s Koshika Telecom Limited) where only a fraction was realized from sale of assets. IFCI is a public sector enterprise and the monies were fully secured with it. IFCI had also given an undertaking that it is only qua the hypothecated material that it could appropriate the amounts while the amounts realized from the remaining assets were available for all kinds of creditors. Thus whether the amount would lie with the Official Liquidator or IFCI, it was equally secure especially when there were no other claims forthcoming which would reduce the entitlement of IFCI to appropriate the balance amount.

30. One cannot also lose sight of the fact that, it is not an endeavour by any individual to appropriate the amounts to itself contrary to orders of the Court. Ms.Shalini Soni was of the bona fide view that the rights of the IFCI to appropriate the amount should be agitated before the Recovery Officer on account of the proceedings arising from the Recovery Certificate. This view apparently had its basis in the judgment of the Supreme Court in **Allahabad Bank v. Canara Bank & Anr.'s** case (supra). The only fault of Ms.Shalini Soni was that once the order was passed by the learned Company Judge on 08.10.2009 and the IFCI was aggrieved by it, before approaching the Recovery Officer, judicial propriety demanded that the order dated 08.10.2009 ought to have been assailed before the appellate court.

31. Similarly, the Recovery Officer ought to have been also more careful (the fact which he admits in its affidavit) before passing the order dated 22.02.2010, to call upon the IFCI to take out the necessary proceedings to first get the order dated 08.10.2009 stayed.

32. Insofar as Mr.Atul Kumar Rai is concerned, we may note that it is not as if the head of the institution looks to the nitty gritty of each

transaction or each dispute. The matter pertained to a loan account which had resulted in a Recovery Certificate. It is not as if this aspect was brought to the notice of the board or the Managing Director at any stage when proceedings were taking place with discussions between Ms.Shalini Soni and the Official Liquidator for utilization of the sale proceeds. Merely because Mr.Atul Kumar Rai happens to be the Managing Director will not fasten him with a vicarious liability especially in the nature of such contempt jurisdiction and thus Mr.Atul Kumar Rai cannot be faulted at all. Despite this, assuming the overall responsibility as a head of the organization, Mr.Atul Kumar Rai had tendered an unqualified apology while stating that it was the then Chief General Manager of IFCI who was looking to the aspect in question. Mr.Atul Kumar Rai is the CEO and MD of IFCI apart from the additional responsibilities of subsidiaries of IFCI being IFCI Infrastructure Limited, IFCI Factors Limited, IFCI Venture Capital Funds Limited and IFCI Financial Services Limited. The organizations work in an established procedure of hierarchy and it is informed that IFCI alone has more than 600 cases pending all over the country, having a lending portfolio in excess of Rs.16,000 crores.

33. We may usefully refer to the provisions of Section 12 of the Contempt of Courts Act, 1971 in respect of the aforesaid. Section 12(4) of the said Act reads as under:

> " (4) Where the person found guilty of contempt of court in respect of any undertaking given to a court is a company, every person who, at the time the contempt was committed, was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the contempt and the punishment may be enforced, with the leave of the court, by the detention in civil prison of each such person.
>
> Provided that nothing contained in this sub section shall render any such person liable to such punishment if he proves that the contempt was committed without his knowledge or that he exercised all due diligence to prevent its commission."
>
> (emphasis supplied)

Thus, the aforesaid makes it clear that merely because a corporate entity is alleged to have committed contempt would not be a ground to make

the CEO/Managing Director or head of the organization liable for contempt if he had no knowledge of the same. If in the perspective of this Section, the aforesaid facts are analyzed, we find that Mr.Atul Kumar Rai as CEO has categorically averred in his affidavit that he was not aware of the proceedings which is not unusual considering 600 cases are pending in respect of IFCI and the CEO cannot be expected to look to each case unless it is brought to his notice.

34. We are of the view that especially taking into consideration the orders of the Division Bench dated 06.12.2010, the controversy ought to have been put to a rest when the Official Liquidator itself wanted to withdraw the contempt petition on 08.03.2011. The learned single Judge did not even permit that but proceeded to issue notices further to the Managing Director of IFCI by designation and Recovery Officer ostensibly to know whether the Recovery Officer was aware of the orders passed by the learned Company Judge on 08.10.2009 when he passed the orders dated 22.02.2010. No notice was issued to Mr.Atul Kumar Rai in person, but since the affidavits filed on behalf of IFCI were not by the Managing Director, even the Managing Director filed his personal affidavit. All the three contemnors had tendered unqualified apology and the Recovery Officer had stated in so many words that he should have been more careful in analyzing the papers before him. This is of course apart from the fact that we are of the view that the order dated 08.10.2009 itself was not free from doubt for the manner in which it was framed.

35. We find that there is no case whatsoever of contempt made out against Mr.Atul Kumar Rai while Ms.Shalini Soni ought to have been more careful in first assailing the order dated 08.10.2009 in appeal before filing an application before the Recovery Officer on which orders were passed on 22.02.2010. Similarly, the Recovery Officer ought to have perused the reply filed by the Official Liquidator. Given this situation, unqualified apology tendered more than met the requirement as it was not a case of any willful contumacious conduct for the court to either proceed with conviction or impose sentence and that too such a harsh one.

36. The question whether there is contempt of court or not is a serious one as the court is both the accuser as well as the judge of the accusation requiring the court to act with as great circumspection as

possible making all allowances for errors of judgment and difficulties arising from inveterate practices in courts and tribunals. The punishment and that too with such severity would arise only in a case of clear contumacious conduct, which has not been explained. It is only in the case of a deliberate lapse and disregard to one's duties and in defiance of authority that such extreme measures are called for. To take action in a case where the contemnor has unconditionally apologized even though the lapse is not deliberate would "certainly sound the death knell of what Dean Roscoe Pound calls *"judicial justice"* and the Rule of Law." (In **Re: S.Mulgaonkar** (1978) 3 SCC 339)

37. We are, thus, of the unequivocal view that all the three appeals are liable to be allowed, orders of conviction dated 06.02.2012 and order on sentence dated 19.03.2012 are liable to be set aside with the acceptance of apology on the part of Ms.Shalini Soni and Mr.R.K.Bansal while Mr.Atul Kumar Rai is held not to have any role in the matter in issue.

38. We may also notice another aspect of the matter arising from the quantum of fine imposed on the contemnors. Section 12(1) of the Contempt of Courts Act, 1971 Act provides for a fine which may extend to Rs.2,000/-, but the fine imposed in the present case is running into lakhs. This is contrary to the statutory provisions. Such fine would not be sustainable in view of the observations of a Constitution Bench of the Supreme Court in **Supreme Court Bar Association v. Union of India & Anr.;** (1998) 4 SCC 409. However, this matter need not detain us any further since we have already held that the present case is not one which should have invited either a conviction or a sentence. 39. The appeals are allowed in the aforesaid terms leaving the parties to bear their own costs.

CM No.5248/2012 in Cont.Appeal (C) No.06/2012

CM No.5834/2012 in Cont.Appeal (C) No.08/2012

CM No.6108/2012 in Cont.Appeal (C) No.09/2012

No further directions are called for on these applications in view of the disposal of the appeals.

The applications stand disposed of.

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ANCIENT MONUMENT ACT, 1958—Second respondent had purchased a property in Nizamuddin East—Sought permission to construct upon it—Local authorities MCD etc. to process the application for sanction of the plan after the Archaeological Survey of India (ASI) accorded the approval—By virtue of notification dated 16.06.1992 of ASI, all construction within 100 meters of the protected monuments were prohibited—The ASI used to consider application for permission within this area on case-to-case basis—Constituted an expert Committee—The High Court in an earlier LPA held that the notification constituting the Expert Committee and consequent permission accorded by it, beyond the authority conferred upon the ASI by Act—Had a snow boiling effect since ongoing construction at various stages throughout country jeopardized—The executive step-in and issued an ordinance setting up an Authority to oversee implementation of enactment and at the same time validating subject to certain condition, permission granted by expert committee from time to time—Later on, the ordinance was replaced by an Act which amended the Ancient Monument Act, 1958—Appellant filed writ petition against the grant of permission—Contended the permission granted to the second respondent illegal and could not be implemented—The permissions conditioned upon time would be routinely extended and this defeats the very concept of prohibited area—ASI contented before Ld. Single Judge in view of the amended provision of the Act, the petition had been rendered merit less—Single Judge accepted the arguments that provision validates the permission and not the construction already carried out—The question which arose was whether the said permission was time bound—If so,

whether the validation by amendment of the Act of the said permission permitted the extension of time for raising the construction—Court Observed—The permission as recommended by EAC and as granted by Director General, ASI were not time bound—Such condition of time was added by Superintending Archaeologist while communicating the permission to the applicant to ensure compliance—Observed—Countersigning Authority cannot add to the conditions attached to the permission by primary authority—Thus, superintending archaeologist as countersigning Authority, had no power to add to the condition attached to the permission—Appeal dismissed.

ARBITRATION AND CONCILIATION ACT, 1996—Section 33—Indian Evidence Act, 1872—Section 114—Dispute arose qua contract awarded by Respondent to appellant for carrying out earth work for railway formation in construction of minor bridges—To settle dispute, Arbitration clause invoked, arbitrator made and published award in favour of appellant, amount was to be paid within two months from date of award—Appellant found clerical mistakes in award and thus filed application under Section 33 of Act—Application was sent on 18.06.2002 by UPC addressed to arbitrator and copy of it was sent to Respondent also—Learned Arbitrator was not available in Delhi from 18.06.2002 to 28.06.2002 though his office and residence remained open—Another communication was sent by appellant dated 22.07.2002 once again under UPC making reference to earlier application dated 18.06.2002 received by learned Arbitrator—Appellant was informed by office of Arbitrator about non receipt of application dated 18.06.2002—Respondent opposed second application of appellant on ground that no application dated 18.06.2002 was moved by appellant and subsequent application

was time barred—However, learned Arbitrator made necessary corrections in award by way of two applications moved by appellant—Aggrieved by said order, Respondent filed objections—Learned Single judge though sustained plea of limitation and reached to a conclusion in favour of Respondent but did not examine merits of the claim of appellant seeking correction—Thus, aggrieved appellant preferred appeal—According to Respondent application dated 18.06.2002 sent under UPC could not raise presumption in favour of appellant—Held:- Sending a communication by UPC is a mode of service as an acceptable mode of service and a presumption can be drawn under Section 114 (f) of Indian Evidence Act, 1872 in that regard—This, however, does not mean that presumption is not rebuttable and must follow in any case since there may be surrounding circumstances which may create suspicion or other facts may be brought to notice which would belie plea.

— Section 9 & 11—Code of Civil Procedure, 1908—Section 16 & 20—Petitioner & Respondent entered into MOU/Agreement whereby Respondent company agreed to transfer its rights, title and interest in contiguous agricultural land measuring 150 acres to petitioner for total consideration of Rs. 102 Crores—Petitioner Company agreed for a value derived after reducing liabilities of Respondent Company—Separated detailed agreement covering all aspects of transaction had to be executed within 30 days from date of MOU—Land was situated on By Pass Road, Village Valla & Village Verka, District Amritsar, Punjab, approved by Government of Punjab for development of residential colony—However, due to failure of respondent Company in giving specific details of complete contiguous land and its revenue records, measurement, interest etc. for purpose of ascertaining value of shares, separate

detailed agreement for transfer of shares never got executed—According to petitioner, it came to know that respondent was only having 80 acres of clear and developable contiguous land as against false representation of having approximately 150 acres of clear land—Said fact was deliberately suppressed by respondent company at the time of execution of MOU whereas petitioner duly acted upon MOU and made various payments to respondent company from time to time—Subsequently, petitioner company learnt that promoters of respondent Company were already in process of transferring share holding of Company and immovable assets to third party, therefore they filed petition seeking restraint orders against respondent Company from transferring, mortgaging creating any charge or lien on share holding of Company etc. and also prayed for appointment of Indian arbitrator to adjudicate dispute between parties—However, Respondent challenged jurisdiction of Delhi courts alleging land was situated in Amritsar and MOU executed between parties was essentially agreement for transfer of said land and purchase of share holding of respondent Company was only a method for transfer of land—Therefore, petition was hit by proviso of Section 16 (d) of Code—On behalf of petitioner, it was urged that they were not claiming specific performance of MOU or possession of land—Also, respondent Company had its registered office in Delhi—Petitioner was also in New Delhi, agreement was executed in New Delhi, meetings of two representatives, both pre and post MOU, took place in Delhi and shares of respondent Company were agreed to be transferred in Delhi; therefore, Delhi Courts had jurisdiction—Held:- If an agreement is for sale and purchase of immovable property then Delhi Court does not has jurisdiction and petition will be required to be filed at a place where land is situated—Whereas, if it was an agreement to sale and purchase of shares, compliance of which can be obtained by personal obedience then Delhi Court has jurisdiction—Relief claimed by petitioner does not simply

involve transfer of shares in books or in office of Registrar of Companies, but it would also involve transfer of possession of land in question—Therefore, Delhi Courts lack jurisdiction over subject matter.

Ansal Housing & Construction Ltd. v. *AJB Developers (P) Ltd.* *418*

CARRIERS ACT, 1865—Sections 8 and 9—Section 10—Appellant/defendant took upon transportation of packages of colour picture tubes from Malanpur to New Delhi—Goods loaded in truck covered under the Marine Insurance Policy—Truck met with an accident—Respondent/plaintiff suffered loss of Rs. 3,03,715—Notice under Section 10 Carriers Act served vide letter dated 23.04.1999—Claim lodged with the Insurance company—Surveyor appointed who gave report dated 13.04.1999 and 30.04.1999—Claim settled by insurance company—Being subrogated filed the suit—Held—Part of cause of action arose at Delhi—The Court at Delhi has territorial jurisdiction—Suit decreed—Aggrieved appellant/defendant filed the regular first appeal—Held—Truck of the transporter appellant/defendant involved in accident—Statutory liability on account of negligence fastened—Part of cause of action arisen in Delhi—Court at Delhi have territorial jurisdiction—Appeal dismissed.

Roadlines Corporation (P) Ltd. v. *Oriental Insurance Co. Ltd. & Anr.* *22*

CENTRAL CIVIL SERVICES (CONDUCT) RULES, 1964— Government servant holding a elective office in National Sports Federation—Central Government entitled to lay down guidelines—The petitioner a government servant, serving under Govt. of UP—Claimed special interest in sports of shooting and associated with National Rifle Association—Co-opted as honorary Treasurer of the Association and continued till 2005—Contested election for the post and elected till the

expiry of four years terms till 2009—Again election held—Re-elected Treasurer of NRAI for four years which would expire in 2013—Show cause notice issued by NRAI following the Govt. advice dated 24.12.2010 that petitioner as a serving government servant might not continue as treasurer for a period exceeding four years or one term whichever less, as to why governing body should not consider his removal from the post of honorary Treasurer—Meeting of governing body held on 28.03.2011—Show cause notice considered—General Body passed resolution to remove the petitioner—Petitioner contended that Central Government Circular not applicable to him *ipso-facto*—Further contended that petitioner belongs to Uttar Pradesh States Service and was not Central Government Servant and CCS (Conduct Rules) were not applicable to him—State of U.P. not made any similar rules/instructions—Per-contra State Government/UT Administration bound by said circular in relation to National Sports Federation—National Sports Federation recognized and regulated by Central Government—Received aid and funds from Central Government—Further contended that in public interest, the government servant whether in the Central Government or State Government should not be involved in Sports Federation for an indefinite period in an elected capacity as it was bound to affect the discharge of their primary responsibilities and duties as government servant—Held—Central Government entitled to lay down guidelines to govern National Sports Federation—Such guidelines bound on and enforceable against National Sports Federation—A Central Government aided and funded the activity and regulated them—It is true that a senior government servant in the Central Government should be available to it to render his services and no activity unconnected with his official duties should be allowed to interfere in efficient discharge of such duties; it was equally true for State government servant—Further the decision of General Body removing him has not been assailed—Writ

Petition Dismissed.

Shyam Singh Yadav v. *National Rifle Association of India* *1*

CENTRAL EXCISE ACT, 1944—Section 11A;—Limitation Act, 1963—Section 5—Petition against notices and letter of demand of interest on duty short paid-No direction on interest in the order—Whether demand of interest is barred on account of delay and laches—Held—Period of limitation unless otherwise stipulated by the statute which applies to a claim for the principal amount, should also apply to the claim for interest thereon—Held—In present case period of limitation for demand for duty would be one year therefore, period of limitation for demand for interest also would be one year—Demand beyond the period of limitation would be hit by principles of limitation—Demand for interest quashed—Petition allowed.

Kwality Ice Cream Company and Anr. v. *Union of India and Ors.* *30*

CODE OF CIVIL PROCEDURE, 1908—Section 20—Territorial Jurisdiction—Carriers Act, 1865—Sections 8 and 9—Section 10—Appellant/defendant took upon transportation of packages of colour picture tubes from Malanpur to New Delhi—Goods loaded in truck covered under the Marine Insurance Policy—Truck met with an accident—Respondent/plaintiff suffered loss of Rs. 3,03,715—Notice under Section 10 Carriers Act served vide letter dated 23.04.1999—Claim lodged with the Insurance company—Surveyor appointed who gave report dated 13.04.1999 and 30.04.1999—Claim settled by insurance company—Being subrogated filed the suit—Held—Part of cause of action arose at Delhi—The Court at Delhi has territorial jurisdiction—Suit decreed—Aggrieved appellant/defendant filed the regular first appeal—Held—Truck of the transporter appellant/defendant involved in accident—Statutory liability on account of negligence fastened—P vujuart of cause

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Roadlines Corporation (P) Ltd. v. *Oriental Insurance Co. Ltd. & Anr.* *22*

— Section 16 & 20—Petitioner & Respondent entered into MOU/Agreement whereby Respondent company agreed to transfer its rights, title and interest in contiguous agricultural land measuring 150 acres to petitioner for total consideration of Rs. 102 Crores—Petitioner Company agreed for a value derived after reducing liabilities of Respondent Company—Separated detailed agreement covering all aspects of transaction had to be executed within 30 days from date of MOU—Land was situated on By Pass Road, Village Valla & Village Verka, District Amritsar, Punjab, approved by Government of Punjab for development of residential colony—However, due to failure of respondent Company in giving specific details of complete contiguous land and its revenue records, measurement, interest etc. for purpose of ascertaining value of shares, separate detailed agreement for transfer of shares never got executed—According to petitioner, it came to know that respondent was only having 80 acres of clear and developable contiguous land as against false representation of having approximately 150 acres of clear land—Said fact was deliberately suppressed by respondent company at the time of execution of MOU whereas petitioner duly acted upon MOU and made various payments to respondent company from time to time—Subsequently, petitioner company learnt that promoters of respondent Company were already in process of transferring share holding of Company and immovable assets to third party, therefore they filed petition seeking restraint orders against respondent Company from transferring, mortgaging creating any charge or lien on share holding of Company etc. and also prayed for appointment of Indian arbitrator to adjudicate dispute between parties—

However, Respondent challenged jurisdiction of Delhi courts alleging land was situated in Amritsar and MOU executed between parties was essentially agreement for transfer of said land and purchase of share holding of respondent Company was only a method for transfer of land—Therefore, petition was hit by proviso of Section 16 (d) of Code—On behalf of petitioner, it was urged that they were not claiming specific performance of MOU or possession of land—Also, respondent Company had its registered office in Delhi—Petitioner was also in New Delhi, agreement was executed in New Delhi, meetings of two representatives, both pre and post MOU, took place in Delhi and shares of respondent Company were agreed to be transferred in Delhi; therefore, Delhi Courts had jurisdiction—Held:- If an agreement is for sale and purchase of immovable property then Delhi Court does not has jurisdiction and petition will be required to be filed at a place where land is situated—Whereas, if it was an agreement to sale and purchase of shares, compliance of which can be obtained by personal obedience then Delhi Court has jurisdiction—Relief claimed by petitioner does not simply involve transfer of shares in books or in office of Registrar of Companies, but it would also involve transfer of possession of land in question—Therefore, Delhi Courts lack jurisdiction over subject matter.

Ansal Housing & Construction Ltd. v. *AJB Developers (P) Ltd.* *418*

— Section 144, 151—Application seeking direction to petitioner to pay for loss occurred on account of fluctuation in foreign currency while remitting the amount payable under Letter of Credit pursuant to order of High Court and in terms of subsequent order of Supreme Court-Maintainability—Held—Applicant could maintain an application u/s 144 for any loss it may have suffered as a result of the orders of this Court which were set aside by the Supreme Court—On merits,

however the application fails as there was no guarantee in the contract or L/C that Applicant would be paid in a currency other than US$. Since there is in international trade a time lag between the transaction and receipt of proceeds, hedging of risks associated with currency exchange fluctuations in not unknown. Exporters and importers are exposed to and therefore anticipate and account for such risks. Application Dismissed.

PEC Limited v. *Thai Maparn Trading Co. Limited & Anr.*..... *35*

— Order 12 Rule 6—Transfer of Property Act, 1882—Section 106 & 116—Respondent/landlord wrote a letter 28.12.2010 after expiry of tenancy by efflux of time, to vacate the property—Appellant did not vacate; legal notice sent on 4.2.2011 terminating the tenancy—Appellant failed to vacate—Appellant bank had account of respondent in their branch—Started depositing rent in the account—Claimed by tenant that by acceptance of such deposit fresh tenancy came into existence—Landlord when came to know of surreptitious and unilateral deposit of rent, wrote a letter dated 12.07.2011 that deposit of rent was without any instruction on their behalf and the deposit would be taken without prejudice to their right—Court observed any amount received after the termination of tenancy can surely be taken as charges towards use and occupation because after all the tenant had continued to use and occupy tenanted premises and was liable consequently to pay user charges—Fresh tenancy is a bilateral matter of contract coming into existence—Unless there is bilateral action and an agreement entered into to create fresh tenancy, mere acceptance of rent after termination of tenancy cannot create fresh tenancy—Appellant Bank Contended that since the appellant disputed all the aspect in the written statement, decree could not be passed by Trial Court under Order 12 Rule 6—Held—Contention to be misconceived as

existence of relationship of landlord and tenant, the factum of premises not having protection of Delhi Rent Control Act, 1958, and fact of tenancy termination by service of a legal notice not disputed in the written statement—Fresh tenancy also not found to have been created—Appeal dismissed.

Punjab National Bank v. *Virendra Prakash & Anr.* *110*

— Section 35—Cost—Actual, realistic and proper cost would go a long way to control false pleadings and also unnecessary adjournments—Dishonest and unnecessary litigation is a strain on judicial system—Cost of Rs. 2 lacs imposed.

Punjab National Bank v. *Virendra Prakash & Anr.* . *110*

— Order 39, Rule I and 2—Trade Marks Act, 1999—Section 11, 23, 28, 31 and 134—Copyright Act, 1957—Section 62—Trade Marks Rule, 2002—Rule 37—Plaintiff registered trade mark owner of expression "SHRIRAM" for vast range of products since 1960—By interim order, defendants restrained from manufacturing or selling any produce by name of "SHRIRAM CARTAP" which is deceptively similar trademark of plaintiff—Case of defendants that they have got registration of trade mark from registry—Date of registration relates back to date of application—Plaintiff is entitled to continue with suit for passing off which is still maintainable but defendants are residing and carrying on their business outside jurisdiction of this court—Plaintiff under action of passing off can not take advantage of section 134(2) of Act in order to invoke territorial jurisdiction—Plaint is liable to be returned because of lack of territorial jurisdiction—Held—Defendants did not amend written statement after obtaining registration nor defendants have filed any application for return of plaint—Defendants in their written statement have not denied existence of territorial jurisdiction of this Court—On date of institution, this court had jurisdiction to entertain and try proceedings on basis of

provisions under law—One fails to understand as to why defendants are now challenging jurisdiction on passing off when in written statement in cause of action, defendants admitted territorial jurisdiction—Registration has been secured by defendants which has been although applied prior but, was prosecuted and obtained pursuant to interim orders passed by this court in matter—Registrar of Trade Marks has not cited previously registered trade mark of plaintiff as a matter of conflicting mark in examination report and proceeded to grant registration without citing plaintiff's prior registered mark and also perhaps not been informed about interim orders and seisin of dispute by this Court and granted registration contrary to Rule 37 of T M Rules—By ignoring mandatory provisions of Act and granting registration to defendants, it is clear that it is done with malafide intention, in order to defeat orders passed by court—It is a triable question whether registration of defendants is actually a valid one or is it just entry wrongly remaining on register, depending upon inference which court is going to draw by way of impact of subsequent events—Objection qua jurisdiction at this stage can not be sustained and same is dismissed.

DCM Shri Ram Consolidated v. *Sree Ram Agro Ltd. & Ors.* *119*

— Order 12 Rule 6—Transfer of Property Act, 1882—Section 106—Registration Act, 1908—Section 49—Delhi Rent control Act, 1958—Suit for possession and mesne profits—Premises let out to the appellant/respondent vide rent agreement dated 01.10.2006 for a period of three years by the husband of respondent/plaintiff—Tenancy terminated vide notice dated 31.03.2010 w.e.f. 30.04.2010—Failed to vacate the premises-Suit filed-Suit decreed for possession under order 12 Rule 6 vide judgment, dated 14.11.2011—Aggrieved by the judgment filed the present appeal—Alleged tenancy was for manufacturing purposes—Notice terminating the tenancy

should have been for a period of six month-Held—Lease deed unregistered—Terms cannot be looked into—Purpose of letting is not collateral purpose-notice valid—Appeal dismissed.

Sharvan Aggarwal v. *Kailash Rani* *459*

— Section 13—Criminal Procedure Code, 1973—Section 200, 482—Indian Penal Code, 1860—Section 120-B 494A, 498A—Petition against order of MM dismissing the complaint of the Petitioner—Petitioner after obtaining decree of divorce from foreign Court and after the subsequent marriage of the Respondent, filed criminal complaint of bigamy and cruelty against the Respondent alleging that foreign decree of divorce was an invalid decree—Held:- under Section 13 of CPC, a foreign judgment is conclusive as to any matter thereby directly adjudicated upon between the same parties except in cases specified thereunder. However, the right if any, to contend that the said foreign judgment is not conclusive can be only of the party who had himself/herself/itself not initiated the process of obtaining the said judgment and cannot be of a party at whose instance such foreign judgment has been obtained No. litigant can be allowed to abuse the process of the Courts or to approbate and reprobate as per convenience. The petitioner had deposed that she was in U.K. from 1993 to 1999. She has not even whispered, alleged or made out any case of any of the grounds for the foreign judgment of dissolution of her marriage with the respondent being not conclusive. For the said foreign judgment to be not conclusive, the petitioner was required to make out a case of the same being either pronounced by a Court having no jurisdiction and /or having been not given on the merits of the case or being founded on an incorrect view of international law or the proceedings resulting therein being opposed to natural justice or having been obtained by fraud or sustaining a claim founded on a breach of any law in force in India. Moreover, all the grounds specified in section 13 of the CPC and on

establishment whereof a foreign judgment can be said to be not conclusive are such which can be set up only by a party not himself/herself/itself approaching the foreign Court. Here the petitioner who is challenging the judgment, was at the relevant time resident for a fairly long time within jurisdiction of the foreign Court, did not approach the foreign court under the dictates of the respondent and made out a case before the foreign Court of obtaining the judgment-Petition dismissed.

Meena Chaudhary @ Meena P.N. Singh v. *Basant Kumar Chaudhary & Ors.* *527*

— Order XXXIX Rule 2A read with Section 151—Suit for partition and rendition of accounts by appellant against her siblings qua estate of her deceased father—Appellant claimed that as per the wishes of her father, soon after her marriage, she came in occupation and possession of the subject property—Appellant claims to have used the said portion as the residence till year 1974—Defendants struck a deal of settlement between themselves—In terms of this arrangement, the parties shifted in different portions of the property and leased out the entire basement for commercial use—The original defendants No. 1 to 5 are alleged to be in possession and control of the entire estate except the portion of the property in occupation of the appellant—Alleged that defendants No. 1 to 6 were threatening to sell the entire property to defendant no.7, in order to pocket the consideration including the share of the appellant—In this background, partition is sought of the immovable property and rendition of accounts of the business apart from recovery of rent realized from the immovable property—Along with the suit, an application under Order XXXIX Rule 1 and 2 for interim relief filed seeking a restraint against the defendants from creating charge or transferring, selling or alienating the aforesaid immovable property and from dispossessing the appellant from the portion in her possession on the first floor,

apart from a restraint against removing the account books from the business premises—Summons were issued in the suit as also notice in the application on 02.04.2002 and ad interim ex-parte orders were granted to the appellant—Application under Order XXXIX Rule 2A read with section 151 of the Code filed by the Plaintiff alleging that there has been violation of the status quo Order dated 02.04.2002—Respondents denied commission of any contempt stating that the ex-parte Order granted on 02.04.2002 simply required the parties to maintain status quo qua the possession and title of the said property and further restrained alienation, transfer or creating third party interest—In view of the Sale Deed, possession is stated to have already been passed on to the original defendant No. 7—There was, thus, no restrain order against the demolition of certain walls, which was carried out—This argument found favour with learned Singe Judge, who dismissed the contempt petition—Hence:- Present appeal—Held:- Defendant should have moved the Court for varying the construction even though there was a restrictive injunction order—However, any additional relief qua these aspects was not granted to the appellant—Defendant is not guilty of willfully violating the interim orders passed by this Court and the interest of the appellant are protected—Though styled as CCP as CCP (OS), the petition is under Order XXXIX Rule 2A read with Section 151 of the said Code and even the prayers are made accordingly—No dispute as to the maintainability of the appeal from an order dismissing an application under Order XXXIX Rule 2A of the said Code in view of the provisions of Order XLIII Rule 1 of the said Code-However, on examination of this matter, there appears to be a conflict of view qua this issue—A learned Single Judge of the Punjab and Haryana High Court in *Rajinder Kaur vs. Sukhbir Singh,* 2002 Civil CC 125 MANU/PH/1830/2001 has held that there is no limitation whatsoever in the aforesaid Rule as to the nature of the order

passed under this Rule—Thus, a restrictive meaning cannot be given that an appeal would not lie if the application is dismissed—On the other hand, learned Single Judge of the Gauhati High Court in *Shri Banamali Dey vs. Shri Satyendra Chanda & Ors.* (1990) 2GLR 408=MANU/GH/0164/1990 has concluded that an order refusing to take action under Rule 2A on the ground that there was no disobedience or breach of injunction cannot be said to be an order under Rule 2A and—Thus, no appeal would be maintainable against such an order under clause (r) of Rule of Order XLIII of the said Code—Division Bench of this Court in *The Bombay Metal Works (P) Ltd. Vs. Tara Singh & Ors.,* ILR (2006) I DELHI Has held that appeal would be maintainable from an order dismissing the application under Order XXXIX Rule 2A of the said Code—Aforesaid two Judgments have not been discussed in this cases and the perspective expressed by the Gauhati High Court has also not been examined—The application filed in The Bombay Metal Works (P) Ltd. case (supra) was actually under Sections 2(a), 11 and 12 of the Contempt of Courts Act, 1971 and the learned Single Judge absolved the respondents from notice of contempt—An appeal was filed under Section 19 of the Contempt of Courts Act, which was pleaded to be by the respondents as not maintainable in view of the settled legal position—Appellants pleaded that the contempt application filed for disobedience of the interim orders purported to have been filed was actually under Order XXXIX Rule 2A of the Code and a wrong provision was cited—The appeal was, thus, treated as FAO (OS) and while discussing this aspect, it was observed that the appeal would be maintainable—It is not appropriate to in interfere with the dismissal order of that application for the reason recorded aforesaid and the rights and obligations of the parties would be determined in the suit, which has unfortunately taken large number of years—The appeal is

accordingly dismissed leaving the parties to bear their own costs.

Jugan K. Mehta v. *Sham Sunder Gulati & Ors.* *534*

— Suit for possession and mesne profit—The predecessor in interest late Sardar Sohan Singh, the father of plaintiff Nos. 1 and 2 as also the defendant Nos. 2 to 5 was a member of a Cooperative Society—On 14.01.1952 Sardar Sohan Singh was allotted the suit plot admeasuring 4132 sq. yds and an agreement was entered into by Sardar Sohan Singh with the Society—Pleaded that Sardar Sohan Singh paid the entire consideration with respect to the plot—Sardar Sohan Singh was stated to have friendly relations with Sir Sobha Singh, the father of defendant no.1/respondent no.1—Both of them were also partners in a partnership firm plans for construction were got sanctioned from appropriate authorities on an application made on behalf of Sardar Sohan Singh and the task of constructing the building was entrusted by Sardar Sohan Singh to Sir Sobha Singh—Further, pleaded that the construction material from which the residential house on the suit plot was made was utilized out of the material of the partnership firm—After construction, the property was entrusted by Sardar Sohan Singh to Sir Sobha Singh for managing the property—Further pleaded that Sardar Sohan Singh continued to remain the owner of the plot in the records of the Society—Further pleaded in the plaint that the Society wrongly transferred the Suit plot by a sale deed in the name of defendant no.1/respondent no.1 on account of fraud and collusion—Execution of the sale deed in favour of defendant no.1/respondent no.1 was contrary to the rules and regulations of the Cooperative Society—When Sardar Sohan Singh approached the Society for executing the sale deed of the suit plot in his name, the Society informed Sardar Sohan Singh that the sale deed with respect to the suit plot had already been executed in favour of defendant no.1/respondent no.1 and

thus, the existence of the sale deed come to the Knowledge of Sardar Sohan Singh and the plaintiffs—Defendant No. 1/ respondent No. 1 after retiring from Indian Army in about 1964, came into the possession of the house constructed on the suit plot and has been living there since then—On the basis of aforesaid facts, claiming that the cause of action had arisen either in January, 1964 or on 25.05.1963, the subject suit for possession and mesne profits come to be filed—Suit was contested—Contended that Sardar Sohan Singh after making initial payment of the cost of the plot, was not in a position to make construction on the plot which was a necessary requirement of the terms of allotment that construction must be completed within a specified period of time—On account of inability of Sardar Sohan Singh to complete the construction there was consequently a threat of cancellation of the allotment and forfeiture of the money paid—On account of such threat of cancellation of the allotment and forfeiture of the amounts which were paid by Sardar Sohan Singh to the Society, Sardar Sohan Singh agreed to mutation of the plot in the name of the defendant no.1/respondent no.1 the son of Sir Sobha Singh—Sardar Sohan Singh wrote his letter dated 4.10.1954 to the Society to transfer the membership and the plot in the name of the defendant no.1/respondent no.1-By a resolution number 3-C passed in the meeting held on 13.10.1954, the Society agreed to transfer the suit plot in the name of defendant no.1/respondent. No.1 pursuant to the letter dated 4.10.1954 written by Sardar Sohan Singh to the Society—Sir Sobha Singh never acted as an attorney or an agent of Sardar Sohan Singh and, the fact of the matter was that Sir Sobha Singh was acting only for and on behalf of his son, the defendant no./respondent no. 1 with the Society—The written statement also denied the alleged plea of fraud and collusion as alleged by the plaintiffs in the plaint—It was further pleaded that as the sale deed was executed in the year 1960, and that right from the year 1960 the plaintiffs were

aware of the sale deed having been executed in the name of defendant no.1/respondent no.1 and also of the defendant no.1/respondent no.1 being the owner of the suit property, the suit filed in the year 1975 was hence, time barred-Suit dismissed—Hence, present appeal—Held:- In the present case, there is admittedly an agreement in writing, dated 14.01.1952 by which the plot was agreed to be transferred/sold to Sardar Sohan Singh and which contained the terms of the transfer. Possession of the plot under this agreement was given to Sardar Sohan Singh. Sardar Sohan Singh paid the consideration as was them payable under this agreement dated 14.01.1952—However the basic requirement of being ready and willing to perform his part of the contract by Sardar Sohan Singh was that he had to make construction on this plot allotted by the Society within the Specific period of time—The construction on the plot was made by Sir Sobha Singh—Therefore, the requirement of Section 53-A to Transfer of property Act, 1882 of readiness to perform his part of the contract was not complied with by Sardar Sohan Singh—No benefit can be derived by Sardar Sohan Singh or now his legal heirs by claiming that Sardar Sohan Singh had effective ownership rights in the suit plot by virtue of the agreement dated 14.01.1952—Sardar Sohan Singh in addition to the fact that he was not ready and willing to perform his part of contract (a necessary requirement of Section 53A) in fact voluntarily gave up his rights in the suit plot and the membership of the Society inasmuch as he stated that he could not make the construction on the suit plot and therefore, gave up his rights in favour of the defendant no.1/respondent no.1 vide letter dated 4.10.1954-By the specific language of section 53-A, rights which are reserved by the seller under the agreement, are not given to the proposed buyer and the Society, having reserved certain rights by requiring constructions to be completed by allottees in a specified time,

was fully competent under such reserved right to transfer the plot Construction of the building on the plot was not made for and on behalf of Sardar Sohan Singh by Sir Sobha Singh by using/spending any alleged monies of Sardar Sohan Singh—Undisputed position which has come record is that there has not been shown any actual transfer of funds by Sardar Sohan Singh either to Sir Sobha Singh or to anybody else for raising of construction on the suit plot Sardar Sohan Singh in his lifetime never filed any suit to claim any right in the Suit property whether by seeking cancellation of the sale deed dated 3.12.1960 or seeking possession of the building thereon—Sardar Sohan Singh also in his lifetime, never revoked the letter dated 4.10.1954 seeking transfer of the membership and transfer of allotment of the suit plot to the defendant No.1. Building was constructed during the years 1957 to 1959 and the sale deed was executed on 3.12.1960 whereas Sardar Sohan Singh expired much later in the year 1974—Thus, it is only the legal heirs of Sardar Sohan Singh who have suddenly woken up after his death hoping that by speculation in litigation, they may be successful and be able to get some benefits.

Mukhinder Singh (Deceased) Through LRs. & Ors. v. *Gurbux Singh & Ors.* *578*

— Section 96—Appellants/plaintiff purchased the rights in the suit property by means of Agreement to Sell, Power of Attorney and will from previous owner through a chain of similar documents—Appellants/plaintiffs filed suit for possession and mesne profit claiming the Respondents to be illegal occupants/trespassers in suit property-Respondents prayed for dismissal of the suit the ground that the appellants were not owners of the suit property and documents relied upon by appellant cannot confer any ownership rights in suit property-Trial Court dismissed the suit holding that they cannot be said to be the

owners on the basis of the documents which do not confer ownership-Hence, present appeal—Held:- Once documents being original and registered documents, are filed and proved on record, the onus of proof that such documents are not genuine documents, in fact shifts to the opposite party—Ownership of the original owner cannot be disputed and the same is a strong proof of the ownership of the suit property of the appellants proved by means of chain of the title documents—All earlier owners are not required to be summoned—Original documents filed by Respondents not proved—Documents such as Agreement to sell, Power of Attorney, Will etc do not strictly confer ownership rights as a sale deed—Such documents create certain rights in an immovable property entitling the persons who have such documents to claim possession of the suit property—At least the right to the suit property would stand transferred to the person in whose favour such documents have been executed—Ownership rights can be construed as entitling persons who have documents to claim possession of the suit property inasmuch as at least the right to the suit property would stand transferred to the person in whose favour such documents have been executed—Appeal accepted suit decreed.

O.P. Aggarwal & Anr. v. *Akshay Lal & Ors.* *645*

CODE OF CRIMINAL PROCEDURE, 1973—Section 105—Prevention of Corruption Act, 1988—Section 13—Indian Penal Code, 1860—Section 120B & 420—Petitioner Company charge sheeted along with other accused by CBI for alleged commission of offences under Section 120-B, read with Section 420 IPC and Section 13 (2) read with Section 13(1)(d) of Act—Petitioner summoned through its CEO by diplomatic channels through Ministry of External Affairs, Interpol—Accordingly Embassy of India, Berne sent letter enclosing summons in original informing him about next date of hearing before Special Judge, Delhi—Petitioner though

admitted service of summons, but urged service as not in compliance with Exchange of letters—Accordingly, Learned Special Judge issued fresh summons to petitioner as per Exchange of letters which was forwarded by Embassy of India at Berne to FOJ in Switzerland which further informed Indian Embassy that summons were issued—However, petitioner again admitted delivery of fresh summons but disputed validity of service and filed two applications before learned Special Judge—Learned Special Judge disposed of applications holding petitioner duly served and intentionally avoided appearance to delay trial—Orders challenged by petitioner urging, FOJ at Berne not competent authority to serve summons on petitioner and notification not issued as per Section 105 Cr.P.C.—Moreover, Letter of Exchange dated 20.02.1989 between India and Switzerland relates only to purpose of investigations—Held:- In case of summons to an accused issued by a court in India shall be served or executed at any place in any Country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such Country or place for service or execution of summons or warrants in relation to the criminal matters, may be sent in duplicate in such forms, directed to such Court, Judge or Magistrate and sent to such authority for transmission, as the Central Government may by notification specify in this behalf—Though serving or execution of summons at a place or country is mandatory, however, sending of such summons or warrants to such court, Judge or Magistrate and to such authority for transmission as may be notified is directory in nature—Exchange of letters dated. 20.02.1989 is a binding treaty between India and Switzerland, even applicable for service of summons to compel the presence of a person who is accused of an offence for trial and for determining whether to place such person on trial—Summons served through FOJ,

designated agency as per Swiss Federal laws amounted to valid service of summons.

Swiss Timing Ltd. v. *CBI & Anr.* *234*

— Section 299—Charge sheet was laid under Section 302/307/34 IPC against accused persons which also included name of two appellants as accused persons—However, appellants absconded during trial and were declared proclaimed offenders—Trial of other two co accused persons ended in their acquittal as none of prosecution witnesses to occurrence as well as complainant had supported case of prosecution—Thereafter, appellants were apprehended and were also sent to face trial under same offences—They pleaded discharge from offences before learned ASJ on ground that as trial of other two accused persons had resulted in acquittal and evidence to be produced by prosecution in case two appellants were made to face trial, would remain same and ultimately, case would result in their acquittal also—However, learned ASJ turned down their pleas and they were charged for having committed offences punishable under Section 302/307/34 IPC and were ordered to face trial—Aggrieved by said order, appellants preferred petition urging that same witnesses had not identified other accused persons facing trial at that time and same would happen during trial of said petitioners also—Thus, they be discharged—On behalf of State, it was urged at stage of framing of charge, Court has to consider statement of witnesses recorded under Section 161 of the Code and other material collected by prosecution to prove its case—Statements of witnesses recorded during trial of co accused persons can at most be treated as under Section 299 of Code against said two appellants and same can be read against them only in contingency i.e. witness is not available being dead or incapable giving evidence or his personal presence cannot be procured without an amount of delay, expense or inconvenience—Also, witnesses had mainly deposed during

trial of co accused persons against those accused persons only and had no occasion to identify appellants and to depose about their role in alleged occurrence—Hence, acquittal of co accused is no bar to trial of appellants who had absconded at that time—Held:- Where evidence is inseparable and indivisible and on same set of evidence, co-accused have been acquitted then remaining accused need not face trial—However, if evidence is separable and divisible and there are specific allegations and accusations against accused who were not there in case at time of trial of co-accused who were acquitted, then it would be a subject matter of trial.

Inder Singh Bist v. *State* *253*

— Section 482—Prevention of Corruption Act, 1988—Section 27—Petitioner preferred petition seeking discharge in criminal case filed by CBI against him on ground sanction granted to prosecute against him, was not valid—He had moved application before learned Special Judge seeking discharge on ground of invalidity of sanction which was dismissed and thus, petitioner preferred petition under Section 482 of Code—On behalf of CBI, it was urged once charge was framed in warrant trial case, instituted either on complaint or on police report, trial court had no power under code to discharge accused—Trial Court could either acquit or convict accused unless it decided to proceed under Section 325 and 360 of Code, except where prosecution must fail for want of fundamental defect, such as want of sanction—Also, sanction order was perfectly authenticated and duly authorized, therefore, discharge could not be sought on ground of invalidity and that too, at stage when case was fixed for final arguments—Held:- Court is not to go into technicalities of sanctioning order—Justice cannot be at beck and call of technical infirmities—Court is only bound to see that sanctioning authority after careful consideration of material

that is brought forth, has passed an order that shows application of mind.

Hawa Singh v. *CBI* *290*

— Section 321—Maharashtra Control of Organized Crime Act, 1999—Sections 3(2) & 3(4)—Extradition Act, 1962—Section 21—Respondent was named as one of accused in FIR No. 88/2002, under Section 387/506/507/201/120-B IPC and Section 3(2), Section 3(4) of MCOCA, read with Section 120B IPC—Charge-sheet was laid against five accused persons, out of which four were sent to stand trial but Respondent was shown as absconder—Trial commenced against four accused persons, in the meanwhile, Respondent was located in Portugal—In pursuance of an existing Interpol notice and Red Corner Notice, extradition proceedings against him were initiated—Government of Portugal granted extradition subject to specific condition that Respondent would not be visited with punishment of death or imprisonment for a term more than 25 years—Said specific condition was solemnly assured by Government of India and accordingly, extradition of Respondent was granted by Government of Portugal in respect of 8 cases against him—Although competent authority granted sanction under Section 23 (2) of MCOCA to prosecute respondent and Supplementary chargesheet was also filed against him before the Designated Court—However, after filing of charge sheet, Government of NCT of Delhi, reconsidered case of Respondent in view of extradition condition laid by Government of Portugal and solemn assurance given by Government of India—Hence, prosecution filed application under Section 321 of Code seeking permission from Designated Court to withdraw prosecution of Respondent for offences punishable under Section 3 (2) & 3(4) of MCOCA read with Section 120-B IPC as both these offences were not in line with conditions imposed in Extradition Order—Learned

Designated Court dismissed application—Aggrieved, State preferred petition for setting aside order as well as quashing of framing of charges against Respondent—Held:- Power of seeking withdrawal of prosecution is essentially an executive function and Special Public Prosecutor, unlike a Judge, is supposed to receive a request seeking withdrawal of prosecution from Executive—It is after receipt of such request from Executive, Special Public Prosecutor is required to apply his mind and then decide as to whether case is fit to be withdrawn from prosecution and leason for withdrawal could be social, economic or even political—Withdrawal of prosecution must be bonafide for a public purpose and in interest of justice—Further, while undertaking such an exercise, Special Public Prosecutor is not required to sift the evidence, which has been gathered by prosecution as sought to be produced or is produced before the Court.

State of NCT of Delhi v. *ABU Salem Abdul Qayoom Ansari* *307*

— Section 155—Indian Penal Code, 1860—Section 186, 353, 323, 34—Petitioner/State challenged order of learned Additional Session Judge (learned ASJ) whereby learned ASJ had set aside order of learned Metropolitan Magistrate (MM) dismissing application of Respondents seeking discharge under Section 155 (2) of Code—According to petitioner, complainant/Labour Inspector visited Mother Dairy Office to deliver letter meeting—After delivering letter, when he was coming back to his office Respondents came there, abused him and also gave him beatings—On allegations of complainant, complaint was filed on basis of which FIR under Section 186/353/34 IPC was registered—After investigation, charge sheet was laid—Learned Metropolitan Magistrate after hearing parties on framing of charge, ordered that no offence under Section 186/353/34 IPC was made out, however,

Respondents were held liable to be prosecuted for offence punishable under Section 323/34 IPC—Respondents then filed application before learned MM under Section 155 (2) of Code seeking discharge on ground that Section 323 IPC was non cognizable offence which could not had been investigated without prior permission of learned MM—Application dismissed as not maintainable—Aggrieved Respondents preferred revision petition before learned ASJ which was allowed holding that Magistrate should not have converted case under Section 323 IPC because neither cognizance was taken of that offence initially nor police had alleged any offence under Section 323/3 IPC was made out—Also, permission was not sought by police to investigate case of non cognizable offence which is mandatory—Petitioner challenged said order and urged investigation does not stand vitiated warranting quashing of FIR in case where initially FIR was registered for cognizable offence, however, charge was framed for non cognizable offence—Held:- Even if the Police does not file a charge-sheet for a particular offence, though made out on the facts of the case, nor does the Magistrate take cognizance thereon, at the stage of framing of the charge, Learned Trial Court is supposed to apply its independent mind and come to the conclusion as to what offences are made out from the evidence collected by the prosecution. At that stage the Trial Court is not bound by the offences invoked in the charge-sheet or the offences for which cognizance has been taken—In such a situation the charge-sheet has to be treated as a complaint in view of the explanation to Section 2 (d) Cr. P.C. and the Police Officer filing the charge-sheet as complainant.

State v. *Lal Singh & Ors.* *329*

— Section 320—Indian Penal Code, 1860—Section 323, 324, 354, 34—Offences being not compoundable, can FIR be quashed on settlement Held—Compounding of non compounding offences permissible as per the judgment of *B.S*

Joshi Vs, State of Haryana Nikhil Merchant vs. CBI and Manoj Sharma vs. State. These three judgments have been referred to the larger bench vide judgment in case of Gain Singh vs. State. However till these are set aside, they hold the field—Petition allowed.

Teka Singh @ Titu & Ors. v. *State & Anr.* *475*

— Section 482, 468(2); Indian Companies Act, 1956—Section 63, 628: Petition for quashing of summoning order in complaint u/s 63 and 628—Petitioner contend that complaint beyond period of limitation—Held—Period of limitation in any offence commences only upon receipt of knowledge of breach-Period of limitation will not begin from the date of filling prospectus but from date of filing of balance sheet on which the complaint is based— Complaint within period of limitation—Petition dismissed.

Kuldeep Kumar Kohli & Ors. v. *The Registrar of Companies for Delhi And Haryana* *480*

— Section 200, 482—Indian Penal Code, 1860—Section 120-B 494A, 498A—Petition against order of MM dismissing the complaint of the Petitioner—Petitioner after obtaining decree of divorce from foreign Court and after the subsequent marriage of the Respondent, filed criminal complaint of bigamy and cruelty against the Respondent alleging that foreign decree of divorce was an invalid decree—Held:- under Section 13 of CPC, a foreign judgment is conclusive as to any matter thereby directly adjudicated upon between the same parties except in cases specified thereunder. However, the right if any, to contend that the said foreign judgment is not conclusive can be only of the party who had himself/herself/itself not initiated the process of obtaining the said judgment and cannot be of a party at whose instance such foreign judgment has been obtained No. litigant can be allowed to abuse the process of the Courts or to approbate and reprobate as per convenience.

The petitioner had deposed that she was in U.K. from 1993 to 1999. She has not even whispered, alleged or made out any case of any of the grounds for the foreign judgment of dissolution of her marriage with the respondent being not conclusive. For the said foreign judgment to be not conclusive, the petitioner was required to make out a case of the same being either pronounced by a Court having no jurisdiction and /or having been not given on the merits of the case or being founded on an incorrect view of international law or the proceedings resulting therein being opposed to natural justice or having been obtained by fraud or sustaining a claim founded on a breach of any law in force in India. Moreover, all the grounds specified in section 13 of the CPC and on establishment whereof a foreign judgment can be said to be not conclusive are such which can be set up only by a party not himself/herself/itself approaching the foreign Court. Here the petitioner who is challenging the judgment, was at the relevant time resident for a fairly long time within jurisdiction of the foreign Court, did not approach the foreign court under the dictates of the respondent and made out a case before the foreign Court of obtaining the judgment-Petition dismissed.

Meena Chaudhary @ Meena P.N. Singh v. *Basant Kumar Chaudhary & Ors.* *527*

— Section 173—Cross appeals filed by Insurance Company claiming recovery rights against owner of offending vehicle and cross objections filed by claimants for enhancement of compensation—Plea taken, driver did not possess a valid driving license on date of accident and Insurer was entitled to avoid liability—Per Contra Plea taken, insurer failed to establish breach of policy condition—Deceased was aged 50 years on date of accident—Claims Tribunal erred in taking deceased's age to be 68 years—Held—No effort was made by insurer to summon record from RTO with regard to renewed license produced by driver to show that license was

not valid on date of accident—Investigation Officer not examined to rebut driver's contention that he had a valid driving license on date of accident which was seized by Investigating Officer-Mere filing of chargesheet under Section 3 of Act is not sufficient to hold that driver did not possess a valid driving license at time of accident—Since claimant's testimony that deceased was 50 years, was not challenged in cross examination and in view of contradictory documentary evidence, age favourable to claimants has to be considered for grant of compensation as provision of Section 166 is a piece of social legislation—Compensation enhanced.

National Insurance Company Ltd. v. *Ram Rati Devi & Ors.* *627*

— Section 204—Petition challenging the order passed by LD.M.M summoning the petitioner—Complaint filed alleging that main social networking websites are knowingly allowing contents and material which is dangerous to communal harmony, with common and malafide intentions and have failed to remove the objectionable content for their wrongful gain-Ld. M.M passed the summoning order-Challenged-There is no averment against the petitioner in the complaint-No evidence produced against him-Respondent contends-complainant has missed the opportunity to make proper averments in the complaint and adduce evidence, in that situation he has a right to amend the same and lead the evidence thereafter-Held-There is no iota of evidence deposed qua the petitioner-Nor proved even by the complainant when he was examined as PW1—There should have been specific averments about the nature of act or omission and law violated and in the absence of the same, summons issued against the petitioner are not sustainable in law—There is no provision in Code of Criminal Procedure to amend the complaint or produce the documents after issuing of the summons—Magistrate has to carefully scrutinize the evidence brought on

record and may even put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima-facie committed by all or any of the accused—The corrective measure of amending the complaint, cannot be accepted, being not tenable under law.

Yahoo India Pvt. Ltd. v. *State & Anr.* *634*

CONSTITUTION OF INDIA, 1950—Article 226—Central Civil Services (Conduct) Rules, 1964—Government servant holding a elective office in National Sports Federation—Central Government entitled to lay down guidelines—The petitioner a government servant, serving under Govt. of UP—Claimed special interest in sports of shooting and associated with National Rifle Association—Co-opted as honorary Treasurer of the Association and continued till 2005—Contested election for the post and elected till the expiry of four years terms till 2009—Again election held—Re-elected Treasurer of NRAI for four years which would expire in 2013—Show cause notice issued by NRAI following the Govt. advice dated 24.12.2010 that petitioner as a serving government servant might not continue as treasurer for a period exceeding four years or one term whichever less, as to why governing body should not consider his removal from the post of honorary Treasurer—Meeting of governing body held on 28.03.2011—Show cause notice considered—General Body passed resolution to remove the petitioner—Petitioner contended that Central Government Circular not applicable to him *ipso-facto*—Further contended that petitioner belongs to Uttar Pradesh States Service and was not Central Government Servant and CCS (Conduct Rules) were not applicable to him—State of U.P. not made any similar rules/instructions—Per-contra State Government/UT Administration bound by said circular in relation to National Sports Federation—National

Sports Federation recognized and regulated by Central Government—Received aid and funds from Central Government—Further contended that in public interest, the government servant whether in the Central Government or State Government should not be involved in Sports Federation for an indefinite period in an elected capacity as it was bound to affect the discharge of their primary responsibilities and duties as government servant—Held—Central Government entitled to lay down guidelines to govern National Sports Federation—Such guidelines bound on and enforceable against National Sports Federation—A Central Government aided and funded the activity and regulated them—It is true that a senior government servant in the Central Government should be available to it to render his services and no activity unconnected with his official duties should be allowed to interfere in efficient discharge of such duties; it was equally true for State government servant—Further the decision of General Body removing him has not been assailed—Writ Petition Dismissed.

Shyam Singh Yadav v. *National Rifle Association of India* *1*

— Article 226—Central Excise Act, 1944—Section 11A; Limitation Act, 1963—Section 5—Petition against notices and letter of demand of interest on duty short paid-No direction on interest in the order—Whether demand of interest is barred on account of delay and laches—Held—Period of limitation unless otherwise stipulated by the statute which applies to a claim for the principal amount, should also apply to the claim for interest thereon—Held—In present case period of limitation for demand for duty would be one year therefore, period of limitation for demand for interest also would be one year—Demand beyond the period of limitation would be hit by principles of limitation—

Demand for interest quashed—Petition allowed.

Kwality Ice Cream Company and Anr. v. *Union of India and Ors.* *30*

— Article 227—Delhi Land Reforms Act, 1954—Bhumidari—Delay and lches—Appellant assailed the order of Financial Commissioner in Writ Petition—Writ Petition came up for hearing in the year 2001—Dismissed in default as none appeared—Application made by counsel for restoration on the ground that he left practice but could not withdraw from the case due to lack of communication—Restored; came up for hearing on 6th September, 2004—Ld. Single Judge directed to list the writ petition with connected writ petition in the presence of proxy counsel—Matter taken up on 26th of October, 2004—File of the connected case summoned—Transpired that it was dismissed on 23rd July, 2004 for non-prosecution—None appeared on behalf of appellant—Dismissed for non-appearance—Appellant filed CM in 2011 for recall after delay of seven years—Dismissed by Ld. Single Judge—Non-explanation of non-appearance—Filed LPA—Contended that earlier counsel was ailing and not appearing who expired on 1st June, 2008—Held—No doubt if the applicant whose writ petition was dismissed for non-prosecution is able to show sufficient cause for non-appearance and able to explain the delay satisfactorily for approaching the Court, liberal approach has to be taken—Normally endeavour of the court should be to deal with the matter on merit—It is also trite litigant have to be vigilant and take part in the proceedings with due diligence—Court will not come to rescue of such applicant if negligence established—Application dismissed.

Man Singh Decd Thr Lrs v. *Gaon Sabha Jindpur & Ors.* *50*

— Article 226—Writ Petition—Central Board of School Examination—Bye Law 69.2—Date of Birth Correction—Petitioner stated her date of birth wrongly noted in the record of respondent/CBSE as 20.02.1986 instead of actual date of birth 12.10.1988—Fact could be verified and enclosed with writ petition—CBSE opposed the petition on the ground that not entitled to relief of change of date of birth so belatedly—Request could not be considered in view of Bye Law 69.2 which provides request to be made within two years of declaration of result of 10th examination—Passed 10th examination in the year 2004—Made representation after five years—Permits such correction only in circumstances arising out of clerical error—Petitioner had to approach CBSE through Head of School—Not impleaded head of school as party—Herself filled up the date of birth in various documents submitted by her during school days—Observed, documents placed on record—Discharge slip dated 15.10.1988 issued by Military Hospital MH Danapur Cant. indicated name of father Sh. S.N. Singh Unit 56 APO—Under column of date of birth two dates were shown—One 12.10.1988 and other 15.10.1988—Other documents was gazette notification dated 10.12.2009 which was got published by her notifying her date of birth as 12.10.1988—In copy of progress report of 1996-1997 of Kendriya Vidhyalaya where she was studying in class 3rd, date of birth shown as 20.02.1986—CBSE filed on record copy of petitioner's application for admission in Kendriya Vidyalaya Baliganj. Applicant to fill up date of words in figure as well as in words which showed her date of birth as 20.02.1986—Same was the case in the transfer certificate—An extract of school register where she was studying in class X showed her date of birth as 20.02.1986—The bye laws provides for request of correction within two years from the declaration of result of examination—Stand of petitioner falsified—Held—It was for the petitioner to place on record

to establish her stand that right through her school days where she had taken admission from time to time, had recorded her date of birth as 12.10.1988—Further, she had approached the head of school from where she had taken the class 10th examination to point out the error—She failed to do so—Writ Petition dismissed.

Nutan Kumari v. *CBSE* *56*

— Article 227—Delhi Rent Control Act, 1958—Section 14 (1) (d)—Subletting—Eviction petition filed against tenant on the ground of subletting to respondent no. 2—Premises comprised of one room on the second floor—Tenant unauthorizedly constructed bathroom and latrine—Contended that tenant parted with possession in favour of respondent no.2 in the year 1988 without his consent in writing—Common written statement filed claiming continuously living with family of respondent no. 2 and denied premises sublet to sub-tenant—As per evidence, respondent no.2 was permitted to live with tenant after 1984 riots for which no rent was charged—Documents such as voter I-card, passport, electric connection in the name of tenant—ARC held that no subletting or parting with possession proved—Appeal before Additional Rent Control Tribunal endorsed the finding of ARC—Preferred writ petition—Held, there cannot be subletting unless the lessee parted with legal possession—The mere fact that some other person was allowed to use the premises while lessee retained the legal possession, not enough to create a sub-lease—The power of Court under Article 227 limited; unless and until manifest illegality or injustice suffered no scope for interference—Petition Dismissed.

Sardar Dalip Singh Loyal & Sons v. *Jagdish Singh ... 67*

— Article 226—Land of petitioners acquired for public purpose of Rohini Residential Scheme—Petitioners moved application seeking release of compensation in their favour—One AR

objected before LAC that petitioners had got more land during consolidation proceedings than was due to them at his cost and that land of petitioners belong to Gaon Sabha—Land Acquisition Collector, (LAC) disposed of objections finding that there is no merit in objections and there was no prima facie dispute of apportionment and directed release of compensation in favour of petitioners—AR filed proceedings before Financial Commissioner (FC) seeking implementation of certain documents, which petitioners claimed were forged—FC issued direction to Deputy Commissioner (West) to inquire into objections raised by AR qua consolidation and directed compensation be not released in favour of any party—Revenue authorities submitted that documents on basis of which AR had claimed rights, were not genuine and were based on forged documents—Revision Petition dismissed by FC and compensation including principal amount and interest released in favour of petitioners—Writ filed before High Court claiming interest in respect of delayed payment—Plea taken, compensation has not been paid by LAC to petitioners for period of delay when proceedings were pending before FC and period when inquiry in pursuance to order of FC, took place—If FC has passed a wrong order, petitioners should not be made to pay for it by sacrificing interest for that period of time—Held—LAC did not cause any delay and a decision was taken promptly on objections of AR that prima facie no case was established for reference of dispute qua apportionment—LAC is not a beneficiary of any amount but only seeks to distribute amount obtained from beneficiary of land—Interest is also paid by beneficiary—LAC was willing to disburse amount after dealing with objections of AR but for interdict by order of FC-LAC is not party which persuaded court to pass order which was ultimately held unsustainable—LAC was handicapped by reason of interdict of order passed by FC and thus, could not itself deposit amount with reference court—Petitioners did not assail order of FC and

thus accepted order—Acceptance of order of FC implies petitioners were satisfied with arrangement that inquiry should be made qua claim of AR and amount should not be disbursed till such inquiry is complete—If petitioners were aggrieved by these directions, nothing prevented petitioners from assailing the same in appropriate proceedings—Principle of restitution by LAC would not apply as LAC was not responsible for what happened—Petitioners have not claimed any relief against AR nor AR has been impleaded as a respondent in present proceedings.

Hardwari LAl and Anr. v. *Land Acquisition Collector/ADM (W) and Anr.* *194*

— Respondents sought mandamus against appellants commanding them to immediately complete election process and conduct elections—Learned Single Judge, directed appellants to first complete process of preparation of fresh electoral rolls and process of delimitation of wards/ constituencies before notifying general elections to post of members of Respondent Delhi Sikh Gurudwara Management Committee (DSGMC)—Aggrieved, appellants preferred appeal urging election process had begun and the court could not have interfered with election process—Held:- The word election cannot be restricted to the electoral process commencing from issuance of notification and has to be interpreted to mean every stage from date of notification calling for election and the courts cannot interfere in the electoral process—Election process had clearly begun by publication of schedule of election—Order of Single Judge set aside.

Directorate of Gurdwara Elections & Others v. *Dashmesh Sewa Society (Regd.) & Others* *219*

— Article 227—Writ Petition—Letters Patent Appeal—Ancient Monument Act, 1958—Second respondent had purchased a

property in Nizamuddin East—Sought permission to construct upon it—Local authorities MCD etc. to process the application for sanction of the plan after the Archaeological Survey of India (ASI) accorded the approval—By virtue of notification dated 16.06.1992 of ASI, all construction within 100 meters of the protected monuments were prohibited—The ASI used to consider application for permission within this area on case-to-case basis—Constituted an expert Committee—The High Court in an earlier LPA held that the notification constituting the Expert Committee and consequent permission accorded by it, beyond the authority conferred upon the ASI by Act—Had a snow boiling effect since ongoing construction at various stages throughout country jeopardized—The executive step-in and issued an ordinance setting up an Authority to oversee implementation of enactment and at the same time validating subject to certain condition, permission granted by expert committee from time to time—Later on, the ordinance was replaced by an Act which amended the Ancient Monument Act, 1958—Appellant filed writ petition against the grant of permission—Contended the permission granted to the second respondent illegal and could not be implemented—The permissions conditioned upon time would be routinely extended and this defeats the very concept of prohibited area—ASI contented before Ld. Single Judge in view of the amended provision of the Act, the petition had been rendered merit less—Single Judge accepted the arguments that provision validates the permission and not the construction already carried out—The question which arose was whether the said permission was time bound—If so, whether the validation by amendment of the Act of the said permission permitted the extension of time for raising the construction—Court Observed—The permission as recommended by EAC and as granted by Director General, ASI were not time bound—Such condition of time was added by Superintending Archaeologist while communicating the permission to the applicant to ensure

compliance—Observed—Countersigning Authority cannot add to the conditions attached to the permission by primary authority—Thus, superintending archaeologist as countersigning Authority, had no power to add to the condition attached to the permission—Appeal dismissed.

Vijaya Laxmi v. *Archaeological Survey of India & Ors.* *186*

— Article 227—Writ Petition—Letters Patent Appeal—Industrial Dispute Act, 1947—Section 2 (j)—Industry—Rajghat Samadhi Act, 1951—Powers & Duties—The appellants engaged as security guard by Rajghat Samadhi Committee (RSC), appointed in September, 1997 and November 1998 respectively—Services terminated on 8.9.2000 and 12.02.2001 respectively—Appellants raised industrial dispute—Referred to Central Government Industrial Tribunal (CGIT) to adjudicate whether termination illegal and/or unjustified—Respondent took preliminary objection—Reference not maintainable as RSC not industry—CGIT returned the findings that respondent was industry—Vide common award directed reinstatement of the appellants with 25% back wages—RSC filed writ petition allowed by Single Judge—Petitioner preferred Letters Patent Appeal (LPA)—Held—That RSC was constituted under Rajghat Samadhi Act, 1951—Powers and duties of the committee defined—The committee empowered to make byelaws Inter-alia for appointment of such person as may be necessary—To determine the terms and conditions of services of such employee—The function of Committee inter-alia included organizing of special function on 2nd October, and 30th January to observe birth and death anniversary of Mahatma Gandhi—Observed—The Samadhi attracts large number of tourists and other visitors including school children—These visitors are attracted to the Samadhi out of reverence for Mahatma Gandhi to pay respect to him and to imbibe the ideals

from Gandhian atmosphere created and maintained at Samadhi—The Rajghat Samadhi thus, akin to place of worship—The test for ambit of definition of industry is production and/or of distribution of goods and services calculated to satisfy human wants and wishes—Excludes the activity, spiritual or religious—Appeal dismissed.

Assem Abbas v. *Rajghat Samadhi Committee & Anr.* *143*

— Article 226—Territorial Jurisdiction Article 12—'State'—Respondent no.2 Jammu & Kashmir State Financial Corporation Set up by respondent no.1 to promote medium/large scale Industry in the State of J&K-Primary function of respondent no.2 to extend financial assistance to industrial projects to speed up industrial investment in the State—Respondent no. 2 invited investments in bonds issued by it; Guaranteed by respondent no.1-Petitioner subscribed to the said bond in Delhi by making payment in Delhi—Respondent no. 2 paid interest on the said bond in Delhi occasionally-However, respondent defaulted in payment of half yearly installment of interest and in redeeming of bond upon maturity—On communication from petitioner repeatedly sent, respondent no.2 expressed its inability to make payment on the ground of shortage of fund-Stated that matter taken up with State government-Petitioner sent a legal notice—Thereafter, received partial payment—Due payments not made despite further reminder—Petitioner filed writ petition—Respondent did not deny facts—Pleaded financial stringency—Contended—Respondent located in the Stage of J&K-High Court Delhi had no territorial jurisdiction—Secondly, writ petition to seek recovery of money not maintainable—Court observed payment for purchase of bond made in Delhi; one payment of interest made in Delhi Substantial part of cause of action arisen in Delhi within the jurisdiction of Delhi High

Court-Objection of territorial jurisdiction rejected-Regarding second objection-Observed-The jurisdiction under Court under Article 226 unfettered, the only fetters are those which the court have themselves placed on the said jurisdiction-Held-firstly, the primary relief to seek-enforcement of a sovereign guarantee of State of J&K-No question of disputed facts-Observed in a appropriate case writ petition as against State or an instrumentality of State arising out of a contractual obligation maintainable-Even though some disputed questions of facts arise for consideration, same cannot be ground to refuse to entertain writ petition in all the cases as matter of Rule-Issued direction to release amount-Writ Petition allowed.

Airports Authority of India and Ors. v. *State of Jammu & Kashmir & Ors.* *444*

— Article 226—Petitioner completed four and half years of medical course; furnished certificate—Issued provisional registration by MCI in 2000—Authenticity of this not certified by Moscow University—Provisional registration withdrawn on 29.05.2001—MCI intimated the police authority—Lodged FIR against petitioner under S. 420/468/471 IPC-Petitioner Contended—Misled into believing that diploma could be issued by Moscow University—The truth otherwise was the matter under investigation—He had gone back to Russia and completed the balance course from St. Petersburg State Medical Academy—This institution certified the petitioner having completed the course-Issued diploma on 23.06.2003—Petitioner returned—Attempted Screening test-Become successful-MCI admitted same—Denied registration on the ground of registration of criminal case—In earlier writ petition filed by the petitioner, High Court issued direction to the respondent to provisionally enroll him and permit his completion of compulsory, rotatory internship in India—Open to MCI to impose condition that in the event of adverse order in criminal proceedings it would take such action against

petitioner a warranted under the law after reviewing the facts circumstances—The petitioner thereafter completed rotatory internship-Appeared in CET-NBE conducted by respondent no.2—Result not declared as be he had not been granted permanent registration by respondent no.1—Petitioner contended-The pendency of the criminal proceedings should not be allowed to mar the career prospect of the petitioner—Admittedly, the petitioner fully qualified and eligible for grant of permanent registration by MCI—Criminal trial may takes years to be completed—Petitioner could not be deprived of his right to profess his profession—Respondent MCI contended—Till the criminal case finally decided, petitioner could not be granted permanent registration—Respondent had no mechanism to track criminal proceedings—Held—Unless the petitioner held guilty, cannot be debarred or prevented from pursuing his profession—Even if held guilty, it need examination whether he should and if so, for what period, so prevented—MCI directed to grant conditional permanent registration to the petitioner subject to condition that petitioner would give an undertaking to the court that he would keep updating the status of the pending criminal case after every six month-Writ disposed off.

Rangnathan Prasad Mandadapu v. *Medical Council of India & Anr.* *464*

— Article 227—Civil Procedure Code, 1908—Section 13—Criminal Procedure Code, 1973—Section 200, 482—Indian Penal Code, 1860—Section 120-B 494A, 498A—Petition against order of MM dismissing the complaint of the Petitioner—Petitioner after obtaining decree of divorce from foreign Court and after the subsequent marriage of the Respondent, filed criminal complaint of bigamy and cruelty against the Respondent alleging that foreign decree of divorce was an invalid decree—Held:- under Section 13 of CPC, a

foreign judgment is conclusive as to any matter thereby directly adjudicated upon between the same parties except in cases specified thereunder. However, the right if any, to contend that the said foreign judgment is not conclusive can be only of the party who had himself/herself/itself not initiated the process of obtaining the said judgment and cannot be of a party at whose instance such foreign judgment has been obtained No. litigant can be allowed to abuse the process of the Courts or to approbate and reprobate as per convenience. The petitioner had deposed that she was in U.K. from 1993 to 1999. She has not even whispered, alleged or made out any case of any of the grounds for the foreign judgment of dissolution of her marriage with the respondent being not conclusive. For the said foreign judgment to be not conclusive, the petitioner was required to make out a case of the same being either pronounced by a Court having no jurisdiction and /or having been not given on the merits of the case or being founded on an incorrect view of international law or the proceedings resulting therein being opposed to natural justice or having been obtained by fraud or sustaining a claim founded on a breach of any law in force in India. Moreover, all the grounds specified in section 13 of the CPC and on establishment whereof a foreign judgment can be said to be not conclusive are such which can be set up only by a party not himself/herself/itself approaching the foreign Court. Here the petitioner who is challenging the judgment, was at the relevant time resident for a fairly long time within jurisdiction of the foreign Court, did not approach the foreign court under the dictates of the respondent and made out a case before the foreign Court of obtaining the judgment-Petition dismissed.

Meena Chaudhary @ Meena P.N. Singh v. *Basant Kumar Chaudhary & Ors.* *527*

— Article 226, 227—Criminal Procedure Code, 1974—Section

204—Petition challenging the order passed by LD.M.M summoning the petitioner—Complaint filed alleging that main social networking websites are knowingly allowing contents and material which is dangerous to communal harmony, with common and malafide intentions and have failed to remove the objectionable content for their wrongful gain-Ld. M.M passed the summoning order-Challenged-There is no averment against the petitioner in the complaint-No evidence produced against him-Respondent contends- complainant has missed the opportunity to make proper averments in the complaint and adduce evidence, in that situation he has a right to amend the same and lead the evidence thereafter-Held-There is no iota of evidence deposed qua the petitioner-Nor proved even by the complainant when he was examined as PW1—There should have been specific averments about the nature of act or omission and law violated and in the absence of the same, summons issued against the petitioner are not sustainable in law—There is no provision in Code of Criminal Procedure to amend the complaint or produce the documents after issuing of the summons—Magistrate has to carefully scrutinize the evidence brought on record and may even put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima-facie committed by all or any of the accused—The corrective measure of amending the complaint, cannot be accepted, being not tenable under law.

Yahoo India Pvt. Ltd. v. *State & Anr.* *634*

— Article 226 & 227—Right to Information Act, 2005—Section 20(1)—Delhi High Court Act, 1966—Section 10—Central Information Commission (CIC) imposed maximum penalty of Rs. 25,000/- on the respondent under section 20(1) of the Act for the delay of over 100 days in furnishing the information to the appellant—Chief Secretary, Govt. of Delhi was directed

to recover the said amount from the salary of the respondent @ Rs. 5,000/- per month-Respondent preferred writ petition—Learned Single Judge allowed the writ petition—Reduced the penalty amount to Rs. 2,500/- recoverable from the salary of the respondent in ten equal monthly installments of Rs. 250/- per month—Reason—The question of penalty is essentially between the Court and the respondent and did not really concern the appellant who has been provided with information—Respondent took the charge of the post 14 days after the subject RTI application of the appellant had been filed—Appellant filed the Intra Court Appeal—Contention—Use of word 'shall' in section 20(1) is indicative of the imposition of penalty mandatory—Presence of information seeker is essential not only for computing the penalty but also for establishing the default of the information officer-Exclusion of the information seeker from penalty proceedings would dilute the sprit of the Act—The role of CIC is of an adjudicator—Held—A reading of Section 20 shows that while the opinion, as to a default having been committed by the Information Officer, is to be formed 'at the time of deciding any complaint or appeal', the hearing to be given to such Information Officer, is to be held after the decision on the Complaint or the appeal. The proceedings before the CIC, of hearing the Information Officer qua whom opinion of having committed a default has been formed and of imposition of penalty, in the exercise of supervisory powers of CIC and not in the exercise of adjudicatory Powers.

Anand Bhushan v. *R.A. Haritash* *657*

— Article 226 & 227—Right to Information Act, 2005—Section 20(1)—Central Information Commission (CIC) imposed maximum penalty of Rs. 25,000/- on the respondent under section 20(1) of the Act for the delay of over 100 days in furnishing the Information to the appellant-Chief Secretary,

Govt. of Delhi was directed to recover the said amount from the salary of the respondent @ Rs. 5,000/- per month—Respondent preferred Writ petition—Learned Single Judge allowed the writ petition—Reduced the penalty amount to Rs. 2,500/- recoverable from the salary of the respondent in ten equal monthly installments of Rs. 250/- per month—Reason—The question of penalty is essentially between the Court and the respondent and did not really concern the appellant who has been provided with information—Respondent took the charge of the post 14 days after the subject RTI application of the appellant had been filed—Appellant filed the Intra Court Appeal—Contention—Use of word 'shall' in section 20(1) is indicative of the imposition of penalty mandatory—Presence of information seeker is essential not only for computing the penalty but also for establishing the default of the information officer-Exclusion of the information seeker from penalty proceedings would dilute the spirit of the Act—No notice of the petition was given to the appellant before reducing the penalty—The role of the CIC is of an adjudicator—Held—In the context of RTI Act, merely because the CIC, while deciding the complaints/appeals is required to hear the complainant/information seeker, would not require the CIC to hear them while punishing the erring Information Officer, in exercise of its Supervisory Powers—We may reiterate that the complainant/information seeker has the remedy of seeking costs and compensation and thus the argument of 'being left remediless' is misconceived-However, 'penalty' is not to be mixed with costs and compensation—The participation of the information seeker in the penalty proceeding has nothing to do with the principal of accountability—Since the information seeker has no right of participation in penalty proceedings, the question of right of being heard in opposition to writ petition challenging imposition of penalty dose not arise-Error was committed by the learned Single Judge in reducing the penalty

without hearing the appellant.

Anand Bhushan v. *R.A. Haritash* *657*

— Article 226 & 227—Right to Information Act, 2005—Section 20(1)—Central Information Commission (CIC) imposed maximum penalty of Rs. 25,000/- the respondent under section 20(1) of the Act for delay of over 100 days in furnishing the information to the appellant—Chief Secretary, Govt. of Delhi was directed to recover the said amount from the salary of the respondent @ Rs. 5,000/- per month Respondent preferred writ petition—Learned Single Judge allowed the writ petition—Reduced the penalty amount to Rs. 2,500/- recoverable from the salary of the respondent in ten equal monthly installments of Rs. 250/- per month—Reason—The question of penalty is essentially between the Court and the respondent and did not really concern the appellant who has been provided with information—Respondent took the charge of the post 14 days after the subject RTI application of the appellant had been filed—Appellant filed the Intra Court Appeal—Contention—Use of word 'shall' in section 20(1) is indicative of the imposition of penalty mandatory—Presence of information seeker is essential not for computing the penalty but also for establishing the default of the information officer—Exclusion of the information seeker from penalty proceedings would dilute the sprit of the Act—The role of the CIC is of an adjudicator—Held—Though Section 20(1) uses the word 'shall', before the words 'impose a penalty of Rs. Two hundred and fifty rupees but in juxtaposition with the words 'without reasonable cause, malafidely of knowingly or obstructed'—The second proviso thereto further uses the words, 'reasonably and diligently'—The question which arises is when the imposition of penalty is dependent on such variables, can it be said to be mandatory or possible of calculation with mathematical precision—All the expressions

used are relative in nature and there may be degrees of, without reasonable cause, malafide, knowing or reasonableness, diligence etc.—The very fact that imposition of penalty is made dependent on such variables is indicative of the direction vested in the authority imposing the punishment—Once it is held that the quantum of fine is discretionary, there can be no challenge to the judicial review under Article 226 of the Constitution, of exercise of such discretion, of course within the well recognized limits—If this Court finds discretion to have been not appropriately exercised by the CIC, this Court can, in exercise of its power vary the penalty—Appeal dismissed.

Anand Bhushan v. *R.A. Haritash* *657*

— Article 226—Writ Petition quashing of notice issued by the High Court of Delhi provisionally short listing candidates on the basis of performance in the Delhi Judicial Service (Preliminary) Examination as there were faults in the question paper and the answer key seeking re-evaluation after corrections/ deletions/ amendments to the questions and answer keys—Further, seeking restraint on Main examination till re-evaluation of the Preliminary Examination—HELD:- The questions would fall into three categories—The first being those questions where the answers reflected in the Answer Key are correct. The second category comprises of those questions in respect of which the option shown to be correct in the Answer Key is incorrect and instead another option as determined above is correct. The third category of questions covers (1) questions out of syllabus; (2) questions in respect of which the answer in the Answer Key is debatable; (3) questions in respect of which there are more than one correct option; (4) questions in respect of which none of the options is correct; and (5) questions which are confusing or do not supply complete information for a clear answer. As regards the first category, no change in the Answer Key is required.

The Answer Key in respect of the second category of questions would have to be corrected and the OMR answer sheets would have to be re-evaluated. In case of the third category and when the table of the disputed questions is taken into considerations it is inferred that 12 questions need to be removed/delete from the purview of the said Delhi Judicial Service Exams and 7 questions need to be corrected—The status of the qualified students stands unaffected as it would be unfair on behalf of the court to tamper with the status of the student already selected. Coming on to the second condition stipulating that the number of candidates to be admitted to the main examination (written) should not be more than ten times the total number of vacancies of each category advertised This condition proved to be invalid as the general vacancies advertised were 23 and ten times 23 is 230 whereas the general candidates which have already been declared as qualified for taking the Main Examination (Written) is 235, therefore, it would be unfair to shut out such candidates on the basis of the second condition.

Gunjan Sinha Jain v. *Registrar General High Court of Delhi* *676*

— Article 226—Disciplinary proceedings—Misconduct imputed against petitioner was unauthorized absenteeism from duty as he repeatedly did not report for duty at the airport in time—Petitioner submitted reply to the charge memorandum and after considering the same, was awarded punishment of censure—Appeal filed by petitioner was dismissed—After dismissal of appeal, petitioner filed an application seeking certain documents without disclosing the relevance of the same and without disclosing as to how he would be prejudiced if the same are not supplied—In reply, the respondents pointed out that under the relevant rule, there was no provision to supply documents which were not relied upon in the chargesheet—

However, later on, same of the documents were supplied to petitioner—Revision filed by petitioner also dismissed-Writ petition challenging the punishment and dismissal of appeal and revision-Petitioner contended without imputing any mala fides or perversity that other members of the staff also go for the call of nature and break fast, etc but no action was taken against them—Respondents contended that wherever a member of the force leaves for call of nature or other absence, entries are made in registers and explanations rendered by petitioner were disbelieved by disciplinary authority as well as appellate authority—Held, as regards non-supply of certain documents, petitioner ought to have established the prejudice as a matter of fact and prejudice cannot be based on apprehension—Further held, the totality of circumstances of the case do not reflect non-application of mind or disproportionate punishment.

Narender Kumar v. *Union of India & Ors.* *728*

— Article 227—Stand of the tenant was that the premises in question had been taken on rent by Mohan Lal only for his son Anand Parkash and this was with the consent of the landlord who was living in the same premises and who was fully aware of the fact that Anand Parkash is carrying on the business from the said premises; there was no subletting—The ARC on the basis of the oral and documentary evidence had returned a finding that it was the deceased Mohan Lal who was the tenant in the premises but since Anand Parkash was carrying on business in these premises from the very beginning which was also admitted by the landlord, no inference of parting with possession/subletting/assignment by Mohan Lal favour of Anand Parkash could be made;—An appeal was preferred before the ARCT. The ARCT drew a conclusion that the tenant was Mohan Lal; he had parted with possession of the premises in favour of his son Anand Parkash

who was carrying on business in the same premises; ground of subletting under Section 14(1)(b) stood confirmed in favour of the landlord. Mohan Lal had died during the pendency of the eviction proceedings, the premises being commercial premises and Anand Parkash being the son and legal heir of deceased Mohan Lal had inherited this tenancy from his father;—The Judgment of *Gain Devi vs. Jiwan Kaur,* AIR 1985 SC 796 was relied upon to give a finding that such a tenant i.e. Anand Prakash being in possession of the premises in the capacity as legal representative of deceased father Mohan Lal, he could be evicted from the suit premises—Petition of the landlord accordingly stood dismissed—It is well settled that to make out a case for sub-letting or parting with possession, it means giving of possession to persons other than those to whom the possession had been given by the original lessor and that parting with possession must have been made by the tenant —Article 66 of the Limitation Act, 1963 was held applicable i.e period of 12 years was available to the landlord to seek eviction of his tenant-In this factual scenario, the impugned judgment suffers from no infirmity.

Maheshwar Dayal (DECED) v. *Shanti Devi & Ors.* *613*

COPYRIGHT ACT, 1957—Section 62—Trade Marks Rule, 2002—Rule 37—Plaintiff registered trade mark owner of expression "SHRIRAM" for vast range of products since 1960—By interim order, defendants restrained from manufacturing or selling any produce by name of "SHRIRAM CARTAP" which is deceptively similar trademark of plaintiff—Case of defendants that they have got registration of trade mark from registry—Date of registration relates back to date of application—Plaintiff is entitled to continue with suit for passing off which is still maintainable but defendants are residing and carrying on their business outside jurisdiction of this court—Plaintiff under action of passing off can not take

advantage of section 134(2) of Act in order to invoke territorial jurisdiction—Plaint is liable to be returned because of lack of territorial jurisdiction—Held—Defendants did not amend written statement after obtaining registration nor defendants have filed any application for return of plaint—Defendants in their written statement have not denied existence of territorial jurisdiction of this Court—On date of institution, this court had jurisdiction to entertain and try proceedings on basis of provisions under law—One fails to understand as to why defendants are now challenging jurisdiction on passing off when in written statement in cause of action, defendants admitted territorial jurisdiction—Registration has been secured by defendants which has been although applied prior but, was prosecuted and obtained pursuant to interim orders passed by this court in matter—Registrar of Trade Marks has not cited previously registered trade mark of plaintiff as a matter of conflicting mark in examination report and proceeded to grant registration without citing plaintiff's prior registered mark and also perhaps not been informed about interim orders and seisin of dispute by this Court and granted registration contrary to Rule 37 of T M Rules—By ignoring mandatory provisions of Act and granting registration to defendants, it is clear that it is done with malafide intention, in order to defeat orders passed by court—It is a triable question whether registration of defendants is actually a valid one or is it just entry wrongly remaining on register, depending upon inference which court is going to draw by way of impact of subsequent events—Objection qua jurisdiction at this stage can not be sustained and same is dismissed.

DCM Shri Ram Consolidated v. *Sree Ram Agro Ltd. & Ors.* *119*

CONTEMPT OF COURTS ACTS, 1971—Section 19,11 & 12—IFCI Limited advanced a loan to M/s Koshika Telecom Ltd.—Loan was secured by hypothecation of the tower and other

movable assets—Two of the directors gave personal guarantees—IFCI filed proceedings before DRT—*M/s Koshika Telecom Limited* was held liable for sum of Rs. 233,73,92,900.27 along with pendent lite and future interest @ 10% per annum from 19.07.2002 till realization with cost of Rs. 1.5 lakh and recovery certificate was issued in terms thereof—IFCI filed recovery proceedings—Moved application for sale property (towers) which were hypothecated—Recovery officer vide order dated 18.12.2007 directed attachment and sale of the hypothecated properties—However, the Company was wound up vide order dated 02.08.2005 and the Official Liquidator took over charge of its assets—The hypothecated assets were sold for a sum of Rs. 12 Crores—IFCI filed an application before the Recovery Officer praying for the proceeds realized from sale of assets to be made over to IFCI as the Official Liquidator had received only one claim which was yet to verified—Official Liquidator opposed the application—It appears that the Official Liquidator had a meeting with Ms. Shalini Soni, AGM (one of the contemnors) on 19.08.2009 where a decision was taken that the sale proceeds of the land will be deposited with the official liquidator—Official Liquidator filed a compliance/status report No. 281/2009 dated 06.10.2009 before learned Company judge and requested for appropriate directions—On 12.10.2010 Official Liquidator filed a report bearing No. 13/2010 for direction to IFCI to deposit the sale proceeds and expenses for advertisement with Official Liquidator-IFCI Limited instead of depositing the sale proceeds with Official Liquidator, chose to file application before Recovery Officer praying that the sale proceeds received from the sale of assets of M/s Koshika Telecom Limited be directed to be appropriated by the IFCI Limited in partial discharge of the Recovery Certificate—Application allowed by the Recovery Officer on 22.02.2010 with a direction that IFCI would furnish and undertaking that in future if any eligible claim in excess of the amount available

with the Official Liquidator is received by the Official Liquidator, the requisite amount will be remitted to the Official Liquidator within seven days—Official Liquidator being aggrieved by the non compliance of the directions of the learned Company judge dated 08.10.2008 filed a petition under Sections 11 and 12 of the Contempt of Courts Act, 1971 arraying Ms. Shalini Soni alone as a respondent/contemnor for not depositing the sale proceeds with official Liquidator—Official Liquidator filed an appeal before the DRT against the order of the Recovery Officer dated 22.02.2010—Appeal allowed partially observing that the Official Liquidator would be entitled to the amount to the extent of value of the land of the company while IFCI is entitled to the amount received from the sale of movable assets—IFCI also preferred an appeal before the DRAT—Appeal was dismissed by DRAT—IFCI assailed the Order of DRT and DRAT in WP (C) No. 5014/2010-WP(C) was allowed on 16.12.2010 IFCI was held entitled to retain the amounts both from the sale of movable and immovable assets of M/s Koshika Telecom Limited subject to the other directions—Though the Official Liquidator sought to withdraw the contempt proceedings on 08.03.2011 in view of orders passed by the division Bench, Learned Single Judge declined the prayer—Issued notice to IFCI through Managing Director (contemnor herein) and the Recovery Officer (contemnor herein)—Mr. Atul Kumar Rai is the Managing Director of IFCI Limited—No notice was issued to him by name but only by designation—In response to the contempt notice, affidavits were filed by all the three contemnors—They all tendered unconditional apology—All the three contemnors were found guilty of contempt—Sentenced to undergo simple imprisonment for a period of one month—IFCI as an institution has been imposed with a fine of Rs. 5 lakh out of which Rs. 3,50,000/- should be deducted from the salary of Mr. Atul Kumar Rai while the balance amount should be deducted from the salary of Ms. Shalini Soni—Appeals—Held:-

We are of the view that the controversy ought to have been put to a rest when the Official Liquidator itself wanted to withdraw the contempt petition on 08.03.2011—The learned single Judge did not even permit that but proceeded to issue notices further to the Managing Director of IFCI by Designation and Recovery Officer ostensibly to Know whether the Recovery Officer was aware of the orders passed by the learned Company Judge on 08.10.2009 when he passed the orders dated 22.02.2010—No notice was issued to Mr. Atul Kumar Rai in person, but since the affidavits filed on behalf of IFCI were not by the Managing Director, even the Managing Director filed his personal affidavit—All the there contemnors had tendered unqualified apology and the Recovery Officer had stated in so many words that he should have been more careful in analyzing the papers before him—We find that there is no case whatsoever of contempt made out against Mr. Atul Kumar Rai—The Recovery Officer ought to have perused the reply filed by the Official Liquidator given this situation, unqualified apology tendered more than met the requirement as it was not a case of any willful contumacious conduct for the court to either proceed with conviction or impose sentence and that too such a harsh one—All the three appeals are liable to be allowed—Orders of conviction dated 06.02.2012 and order on sentence dated 19.03.2012 are liable to be set aside with the acceptance of apology on the part of Ms. Shalini Soni and Mr. R.K. Bansal while Mr. Atul Kumar Rai is held not to have any role in the matter in issue.

Atul Kumar Rai v. *Koshika Telecom Limited & Ors.* *741*

COURT FEES ACT 1870—Whether a suit requiring the defendant to execute a formal deed is one of specific performance and whether court fees is payable on the entire sale consideration or only on the valuation of the suit by the plaintiff—Order dated 09.04.2008 of the Trial Court directing the plaintiff to

pay the ad-valorem court fee on the amount of sale consideration of Rs. 24,32,950/-, wherein the petitioner had filed a suit for perpetual, mandatory injunction and damages impugned—Held:- Wholesome reading of the plaint clearly shows that what the plaintiff had sought was not a relief of specific performance but it was a direction to the defendant to execute the formality of the sale deed which he had not cared to do in spite of his obligation under Section 55(1)(d) of Transfer of Property Act. It is not in dispute that the defendant has received the entire purchase money; and had also handed over possession of the flats to the plaintiff; Admittedly, the plaintiffs were in possession of the suit property at the time when the suit was filed. In these circumstances, the court fee appended to the plaint which was as per the valuation made by the plaintiff suffers from no infirmity.

Dalmia Cement (Bharat) Ltd. v. *Hansalya Properties Ltd. & Anr.* *151*

DELHI DEVELOPMENT ACT, 1957—Sections 14 & 29 (2)—Accused persons running marble shop in an area of 500 sq. ft. which as per Master Plan, could be used only for agricultural purposes or water body—Magistrate acquitted accused persons—Held:- Magistrate committed error in appreciating evidence by not believing CW1 Junior Engineer and giving more weightage to testimony of CW2 as compared to DW1 who was a junior officer—CWI testified about conducting inspection and finding marble shop of the accused functioning—Testimony of CW1 unshaken-Magistrate wrongly observed that testimony of CW2 Sales Tax Officers should be given more weightage as compared to DW1 who was officer of Junior Rank-Credence to testimony should not be based on post, but should be assessed by reading entire testimony—Testimony of CW1 cannot be disbelieved just because there was no independent corroboration—Judgment

acquitting accused persons set aside and they held guilty of offence u/s 14 r/w Section 29 (2) of DDA Act—Respondents sentenced to be released after admonition—Accused company fined Rs. 100—Appeal allowed.

D.D.A. v. *VIP Marble Emporium & Ors.* *652*

DELHI LAND REFORMS ACT, 1954—Bhumidari—Delay and lches—Appellant assailed the order of Financial Commissioner in Writ Petition—Writ Petition came up for hearing in the year 2001—Dismissed in default as none appeared—Application made by counsel for restoration on the ground that he left practice but could not withdraw from the case due to lack of communication—Restored; came up for hearing on 6th September, 2004—Ld. Single Judge directed to list the writ petition with connected writ petition in the presence of proxy counsel—Matter taken up on 26th of October, 2004—File of the connected case summoned—Transpired that it was dismissed on 23rd July, 2004 for non-prosecution—None appeared on behalf of appellant—Dismissed for non-appearance—Appellant filed CM in 2011 for recall after delay of seven years—Dismissed by Ld. Single Judge—Non-explanation of non-appearance—Filed LPA—Contended that earlier counsel was ailing and not appearing who expired on 1st June, 2008—Held—No doubt if the applicant whose writ petition was dismissed for non-prosecution is able to show sufficient cause for non-appearance and able to explain the delay satisfactorily for approaching the Court, liberal approach has to be taken—Normally endeavour of the court should be to deal with the matter on merit—It is also trite litigant have to be vigilant and take part in the proceedings with due diligence—Court will not come to rescue of such applicant if negligence established—Application dismissed.

Man Singh Decd Thr Lrs v. *Gaon Sabha Jindpur & Ors.* *50*

DELHI RENT CONTROL ACT, 1958—Section 14 (1) (d)—Subletting—Eviction petition filed against tenant on the ground of subletting to respondent no. 2—Premises comprised of one room on the second floor—Tenant unauthorizedly constructed bathroom and latrine—Contended that tenant parted with possession in favour of respondent no.2 in the year 1988 without his consent in writing—Common written statement filed claiming continuously living with family of respondent no. 2 and denied premises sublet to sub-tenant—As per evidence, respondent no.2 was permitted to live with tenant after 1984 riots for which no rent was charged—Documents such as voter I-card, passport, electric connection in the name of tenant—ARC held that no subletting or parting with possession proved—Appeal before Additional Rent Control Tribunal endorsed the finding of ARC—Preferred writ petition—Held, there cannot be subletting unless the lessee parted with legal possession—The mere fact that some other person was allowed to use the premises while lessee retained the legal possession, not enough to create a sub-lease—The power of Court under Article 227 limited; unless and until manifest illegality or injustice suffered no scope for interference—Petition Dismissed.

Sardar Dalip Singh Loyal & Sons v. *Jagdish Singh* ... *67*

— Suit for possession and mesne profits—Premises let out to the appellant/respondent vide rent agreement dated 01.10.2006 for a period of three years by the husband of respondent/plaintiff—Tenancy terminated vide notice dated 31.03.2010 w.e.f. 30.04.2010—Failed to vacate the premises-Suit filed-Suit decreed for possession under order 12 Rule 6 vide judgment, dated 14.11.2011—Aggrieved by the judgment filed the present appeal—Alleged tenancy was for manufacturing purposes—Notice terminating the tenancy should have been for a period of six month-Held—Lease deed unregistered—

Terms cannot be looked into—Purpose of letting is not collateral purpose-notice valid—Appeal dismissed.

Sharvan Aggarwal v. *Kailash Rani* *459*

— S.14(1)(e)—Bonafide necessity—Petitioner owner/landlord let out portion of first floor to the respondent—In remaining portions guest house run by landlord—Stated in eviction petition that he needs more space for expansion of business for bonafide need—Application for leave to defend filed by tenant—Contested that premises was property and house run by landlord was without permission—Building by laws prohibited the landlord from changing nature of heritage site—Landlord let out huge place on the ground floor to wine shop—Leave to defend granted since the property was heritage property and guest house cannot be run without permission which raises triable issue—Held—Tenant has no *locus-standi* to challenge the illegality of the landlord in running a guest house in a portion immediately adjacent to Bengali Club, the tenanted portion—The building bylaws do not prohibit such activities—Leave to defend cannot be granted as a matter of routine. If defence raised is moonshine, sham and illusioary—Leave to defend has to be refused—Landlord best judge of his requirement—It is not open to tenant or court to dictate to the landlord the manner or the style in which he must live—Order set aside—Eviction petition decreed.

Gulshan Rai v. *Samrendra Bose Secy & Anr.* *513*

— Section 14 (1)(b) Constitution of India, 1950—Article 227—Stand of the tenant was that the premises in question had been taken on rent by Mohan Lal only for his son Anand Parkash and this was with the consent of the landlord who was living in the same premises and who was fully aware of the fact that Anand Parkash is carrying on the business from the said

premises; there was no subletting—The ARC on the basis of the oral and documentary evidence had returned a finding that it was the deceased Mohan Lal who was the tenant in the premises but since Anand Parkash was carrying on business in these premises from the very beginning which was also admitted by the landlord, no inference of parting with possession/subletting/assignment by Mohan Lal favour of Anand Parkash could be made;—An appeal was preferred before the ARCT. The ARCT drew a conclusion that the tenant was Mohan Lal; he had parted with possession of the premises in favour of his son Anand Parkash who was carrying on business in the same premises; ground of subletting under Section 14(1)(b) stood confirmed in favour of the landlord. Mohan Lal had died during the pendency of the eviction proceedings, the premises being commercial premises and Anand Parkash being the son and legal heir of deceased Mohan Lal had inherited this tenancy from his father;—The Judgment of *Gain Devi vs. Jiwan Kaur,* AIR 1985 SC 796 was relied upon to give a finding that such a tenant i.e. Anand Prakash being in possession of the premises in the capacity as legal representative of deceased father Mohan Lal, he could be evicted from the suit premises—Petition of the landlord accordingly stood dismissed—It is well settled that to make out a case for sub-letting or parting with possession, it means giving of possession to persons other than those to whom the possession had been given by the original lessor and that parting with possession must have been made by the tenant —Article 66 of the Limitation Act, 1963 was held applicable i.e period of 12 years was available to the landlord to seek eviction of his tenant-In this factual scenario, the impugned judgment suffers from no infirmity.

Maheshwar Dayal (DECED) v. *Shanti Devi*

& Ors. *613*

EAST PUNJAB HOLDINGS (CONSOLIDATION OF FRAGMENTATION) ACT, 1948—Section 42—Constitution of India, 1950—Article 226—Land of petitioners acquired for public purpose of Rohini Residential Scheme—Petitioners moved application seeking release of compensation in their favour—One AR objected before LAC that petitioners had got more land during consolidation proceedings than was due to them at his cost and that land of petitioners belong to Gaon Sabha—Land Acquisition Collector, (LAC) disposed of objections finding that there is no merit in objections and there was no prima facie dispute of apportionment and directed release of compensation in favour of petitioners—AR filed proceedings before Financial Commissioner (FC) seeking implementation of certain documents, which petitioners claimed were forged—FC issued direction to Deputy Commissioner (West) to inquire into objections raised by AR qua consolidation and directed compensation be not released in favour of any party—Revenue authorities submitted that documents on basis of which AR had claimed rights, were not genuine and were based on forged documents—Revision Petition dismissed by FC and compensation including principal amount and interest released in favour of petitioners—Writ filed before High Court claiming interest in respect of delayed payment—Plea taken, compensation has not been paid by LAC to petitioners for period of delay when proceedings were pending before FC and period when inquiry in pursuance to order of FC, took place—If FC has passed a wrong order, petitioners should not be made to pay for it by sacrificing interest for that period of time—Held—LAC did not cause any delay and a decision was taken promptly on objections of AR that prima facie no case was established for reference of dispute qua apportionment—LAC is not a beneficiary of any amount but only seeks to distribute amount obtained from beneficiary of land—Interest is also paid by beneficiary—LAC was willing to disburse amount after dealing with objections

of AR but for interdict by order of FC-LAC is not party which persuaded court to pass order which was ultimately held unsustainable—LAC was handicapped by reason of interdict of order passed by FC and thus, could not itself deposit amount with reference court—Petitioners did not assail order of FC and thus accepted order—Acceptance of order of FC implies petitioners were satisfied with arrangement that inquiry should be made qua claim of AR and amount should not be disbursed till such inquiry is complete—If petitioners were aggrieved by these directions, nothing prevented petitioners from assailing the same in appropriate proceedings—Principle of restitution by LAC would not apply as LAC was not responsible for what happened—Petitioners have not claimed any relief against AR nor AR has been impleaded as a respondent in present proceedings.

Hardwari LAl and Anr. v. *Land Acquisition Collector/ADM (W) and Anr.* *194*

EXTRADITION ACT, 1962—Section 21—Respondent was named as one of accused in FIR No. 88/2002, under Section 387/506/507/201/120-B IPC and Section 3(2), Section 3(4) of MCOCA, read with Section 120B IPC—Charge-sheet was laid against five accused persons, out of which four were sent to stand trial but Respondent was shown as absconder—Trial commenced against four accused persons, in the meanwhile, Respondent was located in Portugal—In pursuance of an existing Interpol notice and Red Corner Notice, extradition proceedings against him were initiated—Government of Portugal granted extradition subject to specific condition that Respondent would not be visited with punishment of death or imprisonment for a term more than 25 years—Said specific condition was solemnly assured by Government of India and accordingly, extradition of Respondent was granted by Government of Portugal in respect of 8 cases against him—

Although competent authority granted sanction under Section 23 (2) of MCOCA to prosecute respondent and Supplementary chargesheet was also filed against him before the Designated Court—However, after filing of charge sheet, Government of NCT of Delhi, reconsidered case of Respondent in view of extradition condition laid by Government of Portugal and solemn assurance given by Government of India—Hence, prosecution filed application under Section 321 of Code seeking permission from Designated Court to withdraw prosecution of Respondent for offences punishable under Section 3 (2) & 3(4) of MCOCA read with Section 120-B IPC as both these offences were not in line with conditions imposed in Extradition Order—Learned Designated Court dismissed application—Aggrieved, State preferred petition for setting aside order as well as quashing of framing of charges against Respondent—Held:- Power of seeking withdrawal of prosecution is essentially an executive function and Special Public Prosecutor, unlike a Judge, is supposed to receive a request seeking withdrawal of prosecution from Executive—It is after receipt of such request from Executive, Special Public Prosecutor is required to apply his mind and then decide as to whether case is fit to be withdrawn from prosecution and leason for withdrawal could be social, economic or even political—Withdrawal of prosecution must be bonafide for a public purpose and in interest of justice—Further, while undertaking such an exercise, Special Public Prosecutor is not required to sift the evidence, which has been gathered by prosecution as sought to be produced or is produced before the Court.

State of NCT of Delhi v. *ABU Salem Abdul Qayoom Ansari* *307*

FOREIGN EXCHANGE MANAGEMENT ACT, 1999 (FEMA)—Section 37 and 38—Challenge in this Intra-Court Appeal is to the judgment dated 4th May, 2011 of the Learned Single Judge allowing W.P. (C) No. 4542/2010 preferred by the respondent and directing the appellant to pay to the respondent simple interest @ 6% per annum on the sum of Rs. 7,75,000/- from the date of seizure i.e. 3rd January, 2003 till 31st December, 2007 and @ 9% per annum from 1st January, 2008 till 1st December, 2008—Brief Facts—Writ petition filed by the respondent pleading that the appellant had on 3rd January, 2003 seized Rs. 7,75,000/- in Indian currency and foreign currency equivalent to Rs. 96,000/- from the custody of the respondent and Proceedings initiated under the provisions of FEMA—Adjudicating authority vide order dated 28th June, 2004 forfeited the seized currency and also imposed a penalty of Rs. 5 lacs on the respondent—Respondent filed an appeal before the Appellate Tribunal for Foreign Exchange—Appeal allowed vide order dated 17th December, 2007 which order has attained finality but the seized currency was not returned inspite of repeated request and ultimately the Indian currency was released only on 1st December, 2008 and foreign currency on 02.02.2009—The respondent contended that his monies having been wrongfully withheld by the appellant, he was entitled to interest @ 24% per annum thereon from the date of seizure till return—Also contended that in fact under Rule 8 of the Foreign Exchange Management (Encashment of Draft, Cheque, Instrument and Payment of Interest) Rules, 2000 the return/refund should have been accompanied with interest @ 6% per annum. Held—While Rule 8(i) applies to return of seized currency after completion of investigation, Rule 8 (ii) applies to return of seized currency during adjudication—Again, while Rule 8(i) uses the words "shall be returned..... with interest at the rate of 6% per annum.....", Rule 8 (ii) uses the words "may pass such

order returning ..... together with interest at the rate of 6% per annum.....". The use of different words "shall" and "may" in Sub Rules (i) and (ii) respectively indicate that while it is mandatory to pay interest @6% per annum, when seized currency is returned on completion of investigation, it is not so when return is pursuant to adjudication and in which case, it is in the discretion of adjudicating authority whether interest is to be paid or not—In the present case the Appellate Tribunal for Foreign Exchange while allowing the appeal of the respondent did not award any interest to the respondent—No discussion whatsoever on the aspect of interest—Not even known whether interest was claimed by the respondent before the Appellate Tribunal—The settled position in Law (see *Santa Sila Devi Vs. Dhirendra Nath Sen* AIR 1963 SC 1677) is that if the order / judgment is silent on a particular aspect, that relief is deemed to have been declined. It thus, has to be necessarily held that the Appellate Tribunal did not deem it appropriate to award any interest under Rule 8(ii) to the respondent—Respondent if was aggrieved by non grant of interest, the remedy of further appeal under Section 35 of FEMA to this Court—That right not availed.

— Rule 8 was expressly made applicable to seizure under Section 37 of FEMA of Indian currency—Section 37 was omnibus provision regarding seizure be it for contravention of which so ever provisions—Seizure in present case was admittedly not by Directorate of Enforcement (DOE) but by Police—However, Section 38 of Act provides for empowerment of other officers including Police to affect such seizure—Proceedings in present case pursuant to initial seizure by Police, were admittedly by FEMA—In this view of matter, it was irrelevant whether initial seizure was by police or by DOE

and seizure was deemed to be under Section 37 of FEMA—However, FEMA does carve out distinction between Indian currency and foreign currency—Rules aforesaid enable adjudicating authority to direct payment of interest @6% per annum while passing order for return of Indian currency only and did not empower adjudicating authority to direct payment of any interest while directing return of foreign currency—Thus, there could be no order for payment of interest on return of seized foreign currency under Rule 8—Position which thus, unfolds was that interest at rate of 6% per annum under Rule 8 could had been awarded to respondent on seized Indian currency only—Single Judge had however, applying said Rule also awarded interest on seized foreign currency which could not be sustained. Hence, appeal partly allowed and writ petition of respondent dismissed.

INCOME TAX ACT, 1961—Section 245—Petitioner challenged order passed by Settlement Commission whereby it had accepted settlement application of petitioner in part—Also, it observed: *"No immunity is granted in respect of income contained in the seized papers on the basis of which computation of income has been made in the settlement application and which has been held not to belong to the applicant company by us. The department will be free to initiate penalty and prosecution proceedings, in respect of these papers in appropriate hands as per law".* According to petitioner, said observation of Settlement Commission required to be set aside being destructive of very objective, letter and spirit behind settlement provisions elucidated in Section 245D (4) and 245-I of Act—Also, settlement is contrary to law as order ceases to be conclusive, final and is uncertain—Held:-

Under Act, Income Tax Officer can and he must, tax right person and right person alone—"Right person" is person who is liable to be taxed according to law with respect to a particular income, the expression "wrong person" is obviously used as opposite of expression of right person—Merely because a "wrong person" is taxed with respect to a particular income, Assessing Officer is not precluded from taking "Right person" with respect to that income—Settlement Commission had substantially accepted surrender of income made by petitioner and also granted them immunity from penalty and prosecution—Computation of taxable income in case of petitioner does not mean that said papers or seized materials cannot be used if they disclose or relate to income of a third person.

Gupta Perfumers (P) Ltd. v. *Income Tax Settlement Commission & Ors.* *345*

INDIAN COMPANIES ACT, 1956—Section 63, 628: Petition for quashing of summoning order in complaint u/s 63 and 628—Petitioner contend that complaint beyond period of limitation—Held—Period of limitation in any offence commences only upon receipt of knowledge of breach-Period of limitation will not begin from the date of filling prospectus but from date of filing of balance sheet on which the complaint is based— Complaint within period of limitation—Petition dismissed.

Kuldeep Kumar Kohli & Ors. v. *The Registrar of Companies for Delhi and Haryana* *480*

INDIAN CONTRACT ACT, 1872—Costs: Where Courts find that using Courts as a tool a litigant has perpetuated illegalities or has perpetuated an illegal possession, the courts must impose costs on such litigant which should be equal to the

benefits derived by the litigant and harm and deprivation suffered by the rightful person, so as to check frivolous litigation and prevent the people from reaping a rich harvest of illegal acts through the Courts. Despite settled legal positions, the obvious wrong doers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that dice is always loaded in their favour, since even if they lose, the time gained is the real gain. This situation must be redeemed by the Courts. Purchaser's conduct dishonest-Both appeals dismissed with exemplary costs of Rs. 2,00,000/- on the Purchaser.

Parmanand Kansotia v. *Seetha Lath & Anr.* *488*

— Section 29—Indian Evidence Act, 1872—Section 91, 92, 114: Agreement to sell—Suit by Purchaser for Specific performance-Suit by Seller for mandatory injunction and possession-Suits decreed in favour of seller—Appeal filed by Purchaser—Held—Purchaser failed to make payment of balance sale consideration—Purchaser's contention that oral agreement was entered into at the time of sale agreement which provided for deduction of amounts spent on renovation, furnishing etc. from the sale consideration, is barred under S. 29 of Contract Act and S. 91 and 92 of Evidence Act—Held—S. 114 of Evidence Act enables the Judge to infer one fact having regard to the common course of natural events or human conduct—In natural course of event the Seller hands over the vacant peaceful possession of the suit property to the Purchaser at a time of receiving the balance sale consideration and not before that—In exceptional cases possession is handed over where substantial payment has been made and there are special circumstance to secure the balance sale consideration, such as relationship between the parties. No. such special circumstance in the present case—It is

improbable that the seller would have authorized purchaser to renovate, furnish without even specifying the amount. Appeal dismissed.

Parmanand Kansotia v. *Seetha Lath & Anr.* *488*

INDIAN EVIDENCE ACT, 1872—Section 114—Dispute arose qua contract awarded by Respondent to appellant for carrying out earth work for railway formation in construction of minor bridges—To settle dispute, Arbitration clause invoked, arbitrator made and published award in favour of appellant, amount was to be paid within two months from date of award—Appellant found clerical mistakes in award and thus filed application under Section 33 of Act—Application was sent on 18.06.2002 by UPC addressed to arbitrator and copy of it was sent to Respondent also—Learned Arbitrator was not available in Delhi from 18.06.2002 to 28.06.2002 though his office and residence remained open—Another communication was sent by appellant dated 22.07.2002 once again under UPC making reference to earlier application dated 18.06.2002 received by learned Arbitrator—Appellant was informed by office of Arbitrator about non receipt of application dated 18.06.2002—Respondent opposed second application of appellant on ground that no application dated 18.06.2002 was moved by appellant and subsequent application was time barred—However, learned Arbitrator made necessary corrections in award by way of two applications moved by appellant—Aggrieved by said order, Respondent filed objections—Learned Single judge though sustained plea of limitation and reached to a conclusion in favour of Respondent but did not examine merits of the claim of appellant seeking correction—Thus, aggrieved appellant preferred appeal—According to Respondent application dated 18.06.2002 sent under UPC could not raise presumption in favour of appellant—Held:- Sending a communication by UPC is a mode

of service as an acceptable mode of service and a presumption can be drawn under Section 114 (f) of Indian Evidence Act, 1872 in that regard—This, however, does not mean that presumption is not rebuttable and must follow in any case since there may be surrounding circumstances which may create suspicion or other facts may be brought to notice which would belie plea.

Budhiraja Mining & Constructions Ltd. v. *Ircon International Ltd. & Anr.* *273*

— Section 91, 92, 114: Agreement to sell—Suit by Purchaser for Specific performance-Suit by Seller for mandatory injunction and possession-Suits decreed in favour of seller—Appeal filed by Purchaser—Held—Purchaser failed to make payment of balance sale consideration—Purchaser's contention that oral agreement was entered into at the time of sale agreement which provided for deduction of amounts spent on renovation, furnishing etc. from the sale consideration, is barred under S. 29 of Contract Act and S. 91 and 92 of Evidence Act—Held—S. 114 of Evidence Act enables the Judge to infer one fact having regard to the common course of natural events or human conduct—In natural course of event the Seller hands over the vacant peaceful possession of the suit property to the Purchaser at a time of receiving the balance sale consideration and not before that—In exceptional cases possession is handed over where substantial payment has been made and there are special circumstance to secure the balance sale consideration, such as relationship between the parties. No. such special circumstance in the present case—It is improbable that the seller would have authorized purchaser to renovate, furnish without even specifying the amount. Appeal dismissed.

Parmanand Kansotia v. *Seetha Lath & Anr.* *488*

— Section 115—Appellants/plaintiff are estopped from filing the subject suit—As per the provision of Section 115 of a person has a belief that he is the owner of a plot, and such person thereafter builds on the plot having the impression that he is the owner of the plot, and the real owner stands by and allows him to construct on the plot, the real owner is then estopped in law from claiming any rights on the plot once the third person has made construction on the plot—Sir Sobha Singh was entitled to have an impression that it was the defendant no.1/respondent no.1 who is the owner of the plot inasmuch as there was a letter dated 4.10.1954 by Sardar Sohan Singh to the society for transfer of the plot and membership and which letter was never revoked—Defendant no.1/respondent no.1 is also the owner of the suit property on the basis of the principal of estoppel enshrined in section 115 of the Evidence Act, 1872.

Mukhinder Singh (Deceased) Through LRs. & Ors. v. *Gurbux Singh & Ors.* *578*

INDIAN PENAL CODE, 1860—Section 120B & 420—Petitioner Company charge sheeted along with other accused by CBI for alleged commission of offences under Section 120-B, read with Section 420 IPC and Section 13 (2) read with Section 13(1)(d) of Act—Petitioner summoned through its CEO by diplomatic channels through Ministry of External Affairs, Interpol—Accordingly Embassy of India, Berne sent letter enclosing summons in original informing him about next date of hearing before Special Judge, Delhi—Petitioner though admitted service of summons, but urged service as not in compliance with Exchange of letters—Accordingly, Learned Special Judge issued fresh summons to petitioner as per Exchange of letters which was forwarded by Embassy of India at Berne to FOJ in Switzerland which further informed Indian Embassy that summons were issued—However, petitioner

again admitted delivery of fresh summons but disputed validity of service and filed two applications before learned Special Judge—Learned Special Judge disposed of applications holding petitioner duly served and intentionally avoided appearance to delay trial—Orders challenged by petitioner urging, FOJ at Berne not competent authority to serve summons on petitioner and notification not issued as per Section 105 Cr.P.C.—Moreover, Letter of Exchange dated 20.02.1989 between India and Switzerland relates only to purpose of investigations—Held:- In case of summons to an accused issued by a court in India shall be served or executed at any place in any Country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such Country or place for service or execution of summons or warrants in relation to the criminal matters, may be sent in duplicate in such forms, directed to such Court, Judge or Magistrate and sent to such authority for transmission, as the Central Government may by notification specify in this behalf—Though serving or execution of summons at a place or country is mandatory, however, sending of such summons or warrants to such court, Judge or Magistrate and to such authority for transmission as may be notified is directory in nature—Exchange of letters dated. 20.02.1989 is a binding treaty between India and Switzerland, even applicable for service of summons to compel the presence of a person who is accused of an offence for trial and for determining whether to place such person on trial—Summons served through FOJ, designated agency as per Swiss Federal laws amounted to valid service of summons.

Swiss Timing Ltd. v. *CBI & Anr.* *234*

— Section 186, 353, 323, 34—Petitioner/State challenged order of learned Additional Session Judge (learned ASJ) whereby

learned ASJ had set aside order of learned Metropolitan Magistrate (MM) dismissing application of Respondents seeking discharge under Section 155 (2) of Code—According to petitioner, complainant/Labour Inspector visited Mother Dairy Office to deliver letter meeting—After delivering letter, when he was coming back to his office Respondents came there, abused him and also gave him beatings—On allegations of complainant, complaint was filed on basis of which FIR under Section 186/353/34 IPC was registered—After investigation, charge sheet was laid—Learned Metropolitan Magistrate after hearing parties on framing of charge, ordered that no offence under Section 186/353/34 IPC was made out, however, Respondents were held liable to be prosecuted for offence punishable under Section 323/34 IPC—Respondents then filed application before learned MM under Section 155 (2) of Code seeking discharge on ground that Section 323 IPC was non cognizable offence which could not had been investigated without prior permission of learned MM—Application dismissed as not maintainable—Aggrieved Respondents preferred revision petition before learned ASJ which was allowed holding that Magistrate should not have converted case under Section 323 IPC because neither cognizance was taken of that offence initially nor police had alleged any offence under Section 323/3 IPC was made out—Also, permission was not sought by police to investigate case of non cognizable offence which is mandatory—Petitioner challenged said order and urged investigation does not stand vitiated warranting quashing of FIR in case where initially FIR was registered for cognizable offence, however, charge was framed for non cognizable offence—Held:- Even if the Police does not file a charge-sheet for a particular offence, though made out on the facts of the case, nor does the Magistrate take cognizance thereon, at the stage of framing of the charge, Learned Trial Court is supposed to apply its independent mind and come to the conclusion as to what offences are made

out from the evidence collected by the prosecution. At that stage the Trial Court is not bound by the offences invoked in the charge-sheet or the offences for which cognizance has been taken—In such a situation the charge-sheet has to be treated as a complaint in view of the explanation to Section 2 (d) Cr. P.C. and the Police Officer filing the charge-sheet as complainant.

State v. *Lal Singh & Ors.* *329*

— Section 489B—Appellant assailed judgment convicting him under Section 489B of Code—Appellant urged, besides other lacunas in prosecution case, it further failed on ground that no public witness was joined by police inspite of appellant being apprehended from a crowded place, thus, alleged recovery of Indian currency notes was planted on appellant—Held:- Presumption that a person acts honestly and legally applies as much in favour of police officers as of other—It is not proper and permissible to doubt evidence of police officers if there is no proof of ill-will, rancor or spite against accused—Judicial approach must not be to distrust and suspect their evidence on oath without good and sufficient ground thereof.

Shamim @ Bhura v. *The State of Delhi* *284*

— Section 376—As per prosecution appellant, relative of victim's husband, arranged job for her and husband-On the assurance that he will take prosecutrix to where her husband was working, accused took her to his quarter and raped her—Accused took prosecutrix to taxi stand and asked taxi driver to drop prosecutrix to her husband's place—When prosecutrix told taxi driver that appellant had committed rape, taxi driver called police on phone—Trial Court convicted accused u/s 376 IPC-Held as per examination-in-chief of

prosecutrix. She was raped when she went to house of accused. However. In cross-examination she deposed that she was raped both at her residence and thereafter, when she went with the appellant to his quarter—As per FSL report underwear of prosecutrix gave AB group whereas on bedsheet it was B Group-In view of contradictory testimony of prosecutrix which is not supported by FSL report, Conviction set aside-Appellant acquitted-Appeal allowed.

Devu Samal v. *The State* *441*

— Section 120-B 494A, 498A—Petition against order of MM dismissing the complaint of the Petitioner—Petitioner after obtaining decree of divorce from foreign Court and after the subsequent marriage of the Respondent, filed criminal complaint of bigamy and cruelty against the Respondent alleging that foreign decree of divorce was an invalid decree—Held:- under Section 13 of CPC, a foreign judgment is conclusive as to any matter thereby directly adjudicated upon between the same parties except in cases specified thereunder. However, the right if any, to contend that the said foreign judgment is not conclusive can be only of the party who had himself/herself/itself not initiated the process of obtaining the said judgment and cannot be of a party at whose instance such foreign judgment has been obtained No. litigant can be allowed to abuse the process of the Courts or to approbate and reprobate as per convenience. The petitioner had deposed that she was in U.K. from 1993 to 1999. She has not even whispered, alleged or made out any case of any of the grounds for the foreign judgment of dissolution of her marriage with the respondent being not conclusive. For the said foreign judgment to be not conclusive, the petitioner was required to make out a case of the same being either pronounced by a Court having no jurisdiction and /or having been not given on the merits of the case or being founded on an incorrect view

of international law or the proceedings resulting therein being opposed to natural justice or having been obtained by fraud or sustaining a claim founded on a breach of any law in force in India. Moreover, all the grounds specified in section 13 of the CPC and on establishment whereof a foreign judgment can be said to be not conclusive are such which can be set up only by a party not himself/herself/itself approaching the foreign Court. Here the petitioner who is challenging the judgment, was at the relevant time resident for a fairly long time within jurisdiction of the foreign Court, did not approach the foreign court under the dictates of the respondent and made out a case before the foreign Court of obtaining the judgment-Petition dismissed.

Meena Chaudhary @ Meena P.N. Singh v. *Basant Kumar Chaudhary & Ors.* *527*

— Section 323, 324, 354, 34—Offences being not compoundable, can FIR be quashed on settlement Held—Compounding of non compounding offences permissible as per the judgment of *B.S Joshi Vs, State of Haryana Nikhil Merchant vs. CBI and Manoj Sharma vs. State.* These three judgments have been referred to the larger bench vide judgment in case of Gain Singh vs. State. However till these are set aside, they hold the field—Petition allowed.

Teka Singh @ Titu & Ors. v. *State & Anr.*..... *475*

INDUSTRIAL DISPUTE ACT, 1947—Section 2 (j)—Industry—Rajghat Samadhi Act, 1951—Powers & Duties—The appellants engaged as security guard by Rajghat Samadhi Committee (RSC), appointed in September, 1997 and November 1998 respectively—Services terminated on 8.9.2000 and 12.02.2001 respectively—Appellants raised industrial dispute—Referred to Central Government Industrial Tribunal

(CGIT) to adjudicate whether termination illegal and/or unjustified—Respondent took preliminary objection—Reference not maintainable as RSC not industry—CGIT returned the findings that respondent was industry—Vide common award directed reinstatement of the appellants with 25% back wages—RSC filed writ petition allowed by Single Judge—Petitioner preferred Letters Patent Appeal (LPA)—Held—That RSC was constituted under Rajghat Samadhi Act, 1951—Powers and duties of the committee defined—The committee empowered to make byelaws Inter-alia for appointment of such person as may be necessary—To determine the terms and conditions of services of such employee—The function of Committee inter-alia included organizing of special function on 2nd October, and 30th January to observe birth and death anniversary of Mahatma Gandhi—Observed—The Samadhi attracts large number of tourists and other visitors including school children—These visitors are attracted to the Samadhi out of reverence for Mahatma Gandhi to pay respect to him and to imbibe the ideals from Gandhian atmosphere created and maintained at Samadhi—The Rajghat Samadhi thus, akin to place of worship—The test for ambit of definition of industry is production and/or of distribution of goods and services calculated to satisfy human wants and wishes—Excludes the activity, spiritual or religious—Appeal dismissed.

Assem Abbas v. *Rajghat Samadhi Committee & Anr.* *143*

LAND ACQUISITION ACT, 1894—Section 4, 6, 16, 18, 30, 31, 34—East Punjab Holdings (Consolidation of Fragmentation) Act, 1948—Section 42—Constitution of India, 1950—Article 226—Land of petitioners acquired for public purpose of Rohini Residential Scheme—Petitioners moved application seeking release of compensation in their favour—

One AR objected before LAC that petitioners had got more land during consolidation proceedings than was due to them at his cost and that land of petitioners belong to Gaon Sabha—Land Acquisition Collector, (LAC) disposed of objections finding that there is no merit in objections and there was no prima facie dispute of apportionment and directed release of compensation in favour of petitioners—AR filed proceedings before Financial Commissioner (FC) seeking implementation of certain documents, which petitioners claimed were forged—FC issued direction to Deputy Commissioner (West) to inquire into objections raised by AR qua consolidation and directed compensation be not released in favour of any party—Revenue authorities submitted that documents on basis of which AR had claimed rights, were not genuine and were based on forged documents—Revision Petition dismissed by FC and compensation including principal amount and interest released in favour of petitioners—Writ filed before High Court claiming interest in respect of delayed payment—Plea taken, compensation has not been paid by LAC to petitioners for period of delay when proceedings were pending before FC and period when inquiry in pursuance to order of FC, took place—If FC has passed a wrong order, petitioners should not be made to pay for it by sacrificing interest for that period of time—Held—LAC did not cause any delay and a decision was taken promptly on objections of AR that prima facie no case was established for reference of dispute qua apportionment—LAC is not a beneficiary of any amount but only seeks to distribute amount obtained from beneficiary of land—Interest is also paid by beneficiary—LAC was willing to disburse amount after dealing with objections of AR but for interdict by order of FC-LAC is not party which persuaded court to pass order which was ultimately held unsustainable—LAC was handicapped by reason of interdict of order passed by FC and thus, could not itself deposit amount with

reference court—Petitioners did not assail order of FC and thus accepted order—Acceptance of order of FC implies petitioners were satisfied with arrangement that inquiry should be made qua claim of AR and amount should not be disbursed till such inquiry is complete—If petitioners were aggrieved by these directions, nothing prevented petitioners from assailing the same in appropriate proceedings—Principle of restitution by LAC would not apply as LAC was not responsible for what happened—Petitioners have not claimed any relief against AR nor AR has been impleaded as a respondent in present proceedings.

Hardwari LAl and Anr. v. *Land Acquisition Collector/ADM (W) and Anr.* *194*

LIMITATION ACT, 1963—Section 5—Petition against notices and letter of demand of interest on duty short paid-No direction on interest in the order—Whether demand of interest is barred on account of delay and laches—Held—Period of limitation unless otherwise stipulated by the statute which applies to a claim for the principal amount, should also apply to the claim for interest thereon—Held—In present case period of limitation for demand for duty would be one year therefore, period of limitation for demand for interest also would be one year—Demand beyond the period of limitation would be hit by principles of limitation—Demand for interest quashed—Petition allowed.

Kwality Ice Cream Company and Anr. v. *Union of India and Ors.* *30*

— Partition Suit—Partition suit by heirs of R-defendants set up an alleged will that bequeathed the suit property to her daughter-in law-Will disbelieved by trial court passed order dated 31.01.2011 decreeing the suit of the respondent Nos. 1

and 2/plaintiffs for partition of the suit property belonging to the mother of the parties, R—The trial Court passed a preliminary decree declaring all the legal heirs of R, including the plaintiffs, to be 1/8th co-owners in the suit property—Defendants/Appellants contend that suit property was used as a godown by a partnership business of the parties and therefore, had in any event, acquired rights by adverse possession and the suit was barred by time—Held:- A civil case is decided on balance of probabilities. Once the appellants failed to prove that there was any Will of the mother-R and also failed to prove the plea of adverse possession, which in any case is looked at with dis-favour by the Courts, the trial Court was justified in arriving at a finding decreeing the suit for partition—Also held that there was no clinching proof of claim of ownership by defendant—A party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner.

Kanak Lata Jain & Ors. v. *Sudhir Kumar Jain & Ors.* *176*

— Section 27—As per Section 27 once the limitation for claiming a relief/right with respect to an immovable property expired, the right in the property itself is lost—This provision of Section 27 of the Limitation Act, 1963 is a departure from the normal law of limitation, and as per which normal law of limitation on expiry of limitation, right is not lost but only the entitlement to approach the Court is lost—Once it was clear to the plaintiff/appellants that from the year 1960 ownership in the suit property was being claimed by defendant no.1/respondent no.1 the period of 12 years for the appellants/plaintiffs to have filed a suit for possession with respect to this property under

Article 65 commenced in 1960 itself—Once the limitation commenced in the year 1960, by the year 1972, the right to approach the Court by means of a suit for possession governed by Article 65 of the Limitation Act, 1963 was lost—Once the right is lost in the year 1972, the subject suit having been filed in the year 1975, the ownership of the defendant no.1/respondent no.1 becomes absolute by virtue of law of prescription contained in Section 27 of the Limitation Act, 1963—In view of the above, no. merit in the appeal, which is accordingly dismissed.

Mukhinder Singh (Deceased) Through LRs. & Ors. v. *Gurbux Singh & Ors.* *578*

MAHARASHTRA CONTROL OF ORGANIZED CRIME ACT, 1999—Sections 3(2) & 3(4)—Extradition Act, 1962—Section 21—Respondent was named as one of accused in FIR No. 88/2002, under Section 387/506/507/201/120-B IPC and Section 3(2), Section 3(4) of MCOCA, read with Section 120B IPC—Charge-sheet was laid against five accused persons, out of which four were sent to stand trial but Respondent was shown as absconder—Trial commenced against four accused persons, in the meanwhile, Respondent was located in Portugal—In pursuance of an existing Interpol notice and Red Corner Notice, extradition proceedings against him were initiated—Government of Portugal granted extradition subject to specific condition that Respondent would not be visited with punishment of death or imprisonment for a term more than 25 years—Said specific condition was solemnly assured by Government of India and accordingly, extradition of Respondent was granted by Government of Portugal in respect of 8 cases against him—Although competent authority granted sanction under Section 23 (2) of MCOCA to prosecute respondent and Supplementary chargesheet was also filed against him before the Designated Court—However, after filing

of charge sheet, Government of NCT of Delhi, reconsidered case of Respondent in view of extradition condition laid by Government of Portugal and solemn assurance given by Government of India—Hence, prosecution filed application under Section 321 of Code seeking permission from Designated Court to withdraw prosecution of Respondent for offences punishable under Section 3 (2) & 3(4) of MCOCA read with Section 120-B IPC as both these offences were not in line with conditions imposed in Extradition Order—Learned Designated Court dismissed application—Aggrieved, State preferred petition for setting aside order as well as quashing of framing of charges against Respondent—Held:- Power of seeking withdrawal of prosecution is essentially an executive function and Special Public Prosecutor, unlike a Judge, is supposed to receive a request seeking withdrawal of prosecution from Executive—It is after receipt of such request from Executive, Special Public Prosecutor is required to apply his mind and then decide as to whether case is fit to be withdrawn from prosecution and leason for withdrawal could be social, economic or even political—Withdrawal of prosecution must be bonafide for a public purpose and in interest of justice—Further, while undertaking such an exercise, Special Public Prosecutor is not required to sift the evidence, which has been gathered by prosecution as sought to be produced or is produced before the Court.

State of NCT of Delhi v. *ABU Salem Abdul Qayoom Ansari* *307*

MOTOR VEHICLES ACT, 1988—Compensation granted by MACT challenged before High Court—Plea taken, there should have been deduction of 50% as against 1/3rd taken by Tribunal as deceased left behind only a widow—In absence of evidence led by claimants with regards to future prospects, 50% increase could not have been given in minimum wages adopted

by Tribunal—Compensation awarded towards conventional heads is excessive—Per Contra plea taken, 50% of deduction is made in case of a bachelor—In case of a married person minimum deduction is one third—Held:- deceased died issueless—He did not leave behind his parents—Widow was only dependent—Deduction towards personal and living expenses has to be one half and not one third—Deceased would spend not less than 50% on himself—Tribunal erred in making deduction of only 1/3rd towards personal living expenses of deceased—Increase in minimum wages is not on account of promotion of a unskilled worker or on account of advancement in his career but same is due to increase in price index and cost of living—Minimum wages are revised not only to meet inflation but also to improve standard of living of lowest workers and to give benefit of growth in GDP—Where full compensation for loss of dependency is granted, only a notional sum is awarded towards non pecuniary damages i.e. loss of love and affection, loss of consortium and loss estate—There has to be uniformity in award under these heads irrespective of status of deceased of claimants—Compensation reduced.

Oriental Insurance Company Ltd. v.
Rajni Devi & Ors. *15*

— By these two cross Appeals, the parties impugn the judgment dated 19.01.2010 whereby a compensation of Rs. 1,03,68,744/- was awarded for the death of Atul Prashar, aged 37 years, who died in a motor accident, which took place on 18.01.2008, The MAC APP. No. 179/2010 has been filed by the legal representatives of the deceased i.e Neelam Prashar and others (hereinafter referred to as the "Claimants") whereas MAC. APP. No. 313/2010 has been preferred by the National Insurance Co. Ltd. (hereinafter referred to as "insurer") disputing the negligence on the part of the driver of Maruti

Esteem bearing Registration No. DL-2CAC-5813 and reduction of the amount of compensation awarded by the Motor Accident Claims Tribunal (the Tribunal)—It is urged for the Insurer that in order to prove negligence the Claimants examined PW- Dushyant Vasudev and PW-4 Ashish Aggarwal. The accident took place at about 6.30 AM. Both PW-2 & PW-4 were working in separate offices (though in the same vicinity) & their office would start at 9/ 9.30 AM. Thus, their presence at the time of the accident was highly improbable. If the testimony of these two witnesses is taken off the record, there is nothing to establish the negligence on the part of the driver of Maruti Esteem Car No.DL-2CAC-5813. It is well settled that in a claim petition negligence is required to be proved only on the test of preponderance of probabilities, The FIR in this case was registered on the basis of the statement of PW-2. The offending vehicle was seized from the spot. The driver of the Esteem car No. DL. 2CAC-5813 was not produced by the Insurer to rebut the testimony of PW-2 and PW-4-Pw-2 gave an explanation that he was called in the office because some guests were scheduled to come. In the absence of examination of the driver to rebut PW-2 and PW-4's testimonies, their presence at the spot at the time of accident cannot be doubted merely on the assumption that they could not have proceeded for the office early and that too, in the same vehicle. On the test of preponderance of probabilities, PW-2 and PW-4's testimonies that, the accident was caused on account of rash and negligent driving by the driver of Car No. DL 2CAC 5813, has to be accepted. It is held that the finding of fact reached by the Tribunal on this count cannot be faulted—It is well settled that for determination of loss of dependency, the amount paid to the deceased by his employer by way of perks should be included in the monthly income—The Tribunal fell into error in ignoring this amount of Rs. 1,250/- deduction towards income tax is

liable to be made as the net income of the deceased is the starting point for calculation of loss of dependency.

Neelam Prashar & Ors. v. *Mintoo Thakur & Ors. ... 528*

— Section 163A and 168—Second Schedule Clause 6(b)—Compensation—Accident took place on 04.11.2009—Parents of the claimants/respondent no. 1 to 3 died in the accident-Mother was a non-matriculate, Aged about 34 years Rendering gratuitous service to Husband and three children—Tribunal assessed the value of gratuitous service rendered by the deceased mother at Rs. 6000/- per month—Awarded compensation of Rs. 8,50,000/- Aggrieved, appellant/respondent Insurance Company preferred appeal seeking reduction of Compensation—Alleged assessment for gratuitous services @ Rs. 6000/- per month arbitrary—Held:- Addition of 25% in the salary of non matriculate, multiplier of 16 applicable, Total compensation Works out to be Rs. 9,95,040/-—No cross appeal—Compensation is less that what works out on the principles laid down—Appeal dismissed.

— MAC. APP. 563/2010

— Death of lady aged about 31 years—Taking care of five children—Doing tailoring work-value of gratuitous service taken @ Rs. 6000/- per month—Multiplier of 15 applied-compensation of Rs. 11,65,000/- awarded—Respondent/Insurance Company preferred appeal—Held-no evidence of educational qualification;—Taken to be a non matriculate; multiplier of 16 applicable—Total compensation reduced to Rs.10,35,040/-—Appeal disposed of with directions.

— MAC. APP. No. 753/2011

— Death of a lady about 40 years—Claimed to be earning Rs.4000/- per month from sewing work-compensation of Rs.

4,10,000/- awarded—Aggrieved claimants/appellant preferred appeal—Held:- No evidence of earnings or qualification-taken to be a non matriculate—Multiplier of 15 applicable—Overall compensation comes toRs.9,63,575/-—Appeal allowed-Compensation enhanced.

— MAC. APP. No. 772/2011

— Death of a lady-left behind her husband, four sons and a daughter—Tribunal valued gratuitous services @ Rs. 3000/-per month—Awarded compensation of Rs.6,41,00/- Aggrieved claimants/App. Preferred the appeal—Held:- No evidence of her educational qualification—Taken to be a non matriculate-Age of deceased taken to be between 35 to 40 years-Multiplier of 15 applicable—Total compensation comes to Rs. 13,56,250/-—Appeal allowed—Compensation enhanced.

— MAC. APP. No. 857/2011

— Death of lady aged about 40 years—Died on 19.05.2010—Left behind husband and five children out of which three were minors—Compensation of Rs. 4,68,300/- awarded by the Tribunal—Aggrieved claimants/app. Preferred appeal seeking enhancement of compensation—No cross appeal by Insurance Company—No evidence as to educational qualification—Held:-Taken to be a non matriculate—Multiplier of 15 applicable—Over all compensation comes to Rs. 13,56,250/-—Appeal allowed-Compensation enhanced.

— MAC. APP. No. 289/2010

— Accident took place on 17.11.2007—Death of a lady aged 31 years-Claimed to be working as computer editor earning Rs. 4600/- per month—Held:- Taken to be housewife-Gratuitous services rendered valued at Rs. 3000/- per month—Multiplier of 16 applied—Awarded compensation of Rs. 11,97,000/-

Aggrieved Insurance Company preferred appeal seeking reduction of compensation—Held:- Educational qualification considered to be as a matriculate—Aged 31 years—Multiplier of 16 applicable—Overall compensation Rs. 9,80,320/-—Appeal Allowed—compensation reduced.

Royal Sundaram Alliance Insurance Co Ltd. v. *Master Manmeet Singh & Ors.* *547*

— Section 3, 5, 149 (2) (a) (ii), 166 and 181—Code of Criminal Procedure, 1973—Section 173—Cross appeals filed by Insurance Company claiming recovery rights against owner of offending vehicle and cross objections filed by claimants for enhancement of compensation—Plea taken, driver did not possess a valid driving license on date of accident and Insurer was entitled to avoid liability—Per Contra Plea taken, insurer failed to establish breach of policy condition—Deceased was aged 50 years on date of accident—Claims Tribunal erred in taking deceased's age to be 68 years—Held—No effort was made by insurer to summon record from RTO with regard to renewed license produced by driver to show that license was not valid on date of accident—Investigation Officer not examined to rebut driver's contention that he had a valid driving license on date of accident which was seized by Investigating Officer-Mere filing of chargesheet under Section 3 of Act is not sufficient to hold that driver did not possess a valid driving license at time of accident—Since claimant's testimony that deceased was 50 years, was not challenged in cross examination and in view of contradictory documentary evidence, age favourable to claimants has to be considered for grant of compensation as provision of Section 166 is a piece of social legislation—Compensation enhanced.

National Insurance Company Ltd. v. *Ram Rati Devi & Ors.* *627*

— The accident dated 4th June, 2006 resulted in death of Om Prakash. The deceased was survived by his widow, mother and four children who filed the claim petition before the Claim Tribunal-The deceased was aged 27 years at the time of the accident and was working as a conductor on the offending bus bearing No. Dl-IP-5998. The claims Tribunal took the minimum wages of Rs. 3,271/- into consideration, deducted 1/4th towards personal expenses, applied the multiplier of 18, added Rs. 60,00/- towards loss of love and affection and Rs. 20,000/- towards funeral expenses. The total compensation awarded is Rs. 6,09,902/- The Claims Tribunal exonerated the insurance company and held the driver and owner liable to pay the award amount—The appellants are the owner and driver of the offending vehicle and have challenged the impugned award on the limited ground that the offending vehicle was validly insured and, therefore, respondent No.1 alone is liable to pay the entire award amount to the claimants—Learned counsel for the appellants submit that the deceased, employed as a conductor, was validly covered under the insurance policy and therefore, respondent No.1 alone is responsible to pay the insurance amount—The liability of the insurance company in respect of the Workmen's Compensation in respect of the driver and conductor of the offending vehicle under Section 147(1) of the Motor Vehicles Act is statutory and therefore, respondent No.1 would be liable to pay the Workmen's Compensation. The insurance policy of the offending vehicle has been placed on record as Annexure-F (colly.) with the appeal in which respondent No.1 has charged the premium for Workmen's Compensation to the employee. Under Section 147(1) of the Motor Vehicle Act, 1988, the insurance company is required to compulsorily cover the liability in respect of the death or bodily injury of the driver and conductor in the case of public service vehicle. The contention of Respondent No. 1 that they have charged

for premium for one employee is untenable in view of the statutory requirement of Section 147 (1) of the Motor Vehicle Act to cover the driver and the conductor. Even if the contention of respondent NO.1 that the policy covered one employee is accepted, the policy should be construed to cover the deceased. In that view of the matter, this Court is of the view that respondent No.1 is liable to pay Workmen's Compensation in respect of death of the deceased and the remaining amount of compensation is liable to be paid by the appellants.-The appeal is partly allowed to the extent that out of the award amount of Rs. 6,09,902/-, respondent No.1 shall be liable to pay Rs. 3,49,294/- along with interest @ 7.5% per annum from the date of filling of the claim petition till realization to respondent Nos. 2 to 7. The remaining amount of Rs. 2,60,608/- (Rs. 6,09,902/- Rs. 3,49,294) along with interest @ 7.5% per annum for the date of filing of the claim petition till realization shall be paid by the appellants.

Prashant Dutta & Anr. v. *National Insurance Co. Ltd. & Ors.* *671*

NARCOTICS AND PSYCHOTROPIC DRUGS ACT, 1985—Section 21—Appellant assailed his conviction under Section 21 (C) of Act on various grounds—According to appellant, learned Special Judge glossed over various irregularities carried out by Department in effecting alleged recovery of contraband from possession of appellant—Prosecution failed to prove conscious possession of contraband by appellant as entire process of recovery was jeopardized in absence of authentic witness to alleged recovery of contraband from possession of appellant—On other hand, it was urged on behalf of DRI, prosecution has proved recovery and seizure of 4.244 kg. of heroin having purity percentage 65.9% to 87.1% from possession of accused, therefore, he was appropriately convicted and sentenced—Held:- Though, Act lays down

stringent punishment for offence committed thereunder and as such, casts a heavy duty upon Courts to ensure that there remains no possibility of an innocent getting convicted, officers concerned with investigation of offences under Act must produce best and unimpeachable evidence to satisfy Courts that accused is guilty because no chance can be taken with liberty of a person—No doubt that drug tracking is a serious matter but investigations into such offences also have to be serious and not perfunctory.

James Eazy Franky v. *D.R.I.* *359*

PREVENTION OF CORRUPTION ACT, 1988—Section 13—Petitioner/State assailed judgment of acquittal passed by learned Special Judge whereby learned Special Judge had set aside judgment and order on sentence passed by learned ACMM-II, New Delhi—Petitioner urged, learned ASJ had completely ignored report of CFL as well as report of public analyst which were not contradictory in any manner and minor variation of two reports was not fatal to prosecution—According to Respondents once Director of CFL had examined sample and gave certificate then said certificate is final and conclusive evidence of facts—Held:- Presumption attached to certificates issued by Directorate of CFL is only in regard to what is stated in it, as to contents of sample actually examined by Director and nothing more—Even after this certificate, it is open to accused to show that sample sent for analysis could not have been taken to be representative sample of article of food from which it was taken.

State v. *Praveen Aggarwal* *213*

— Section 13—Indian Penal Code, 1860—Section 120B & 420—Petitioner Company charge sheeted along with other accused by CBI for alleged commission of offences under

Section 120-B, read with Section 420 IPC and Section 13 (2) read with Section 13(1)(d) of Act—Petitioner summoned through its CEO by diplomatic channels through Ministry of External Affairs, Interpol—Accordingly Embassy of India, Berne sent letter enclosing summons in original informing him about next date of hearing before Special Judge, Delhi—Petitioner though admitted service of summons, but urged service as not in compliance with Exchange of letters—Accordingly, Learned Special Judge issued fresh summons to petitioner as per Exchange of letters which was forwarded by Embassy of India at Berne to FOJ in Switzerland which further informed Indian Embassy that summons were issued—However, petitioner again admitted delivery of fresh summons but disputed validity of service and filed two applications before learned Special Judge—Learned Special Judge disposed of applications holding petitioner duly served and intentionally avoided appearance to delay trial—Orders challenged by petitioner urging, FOJ at Berne not competent authority to serve summons on petitioner and notification not issued as per Section 105 Cr.P.C.—Moreover, Letter of Exchange dated 20.02.1989 between India and Switzerland relates only to purpose of investigations—Held:- In case of summons to an accused issued by a court in India shall be served or executed at any place in any Country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such Country or place for service or execution of summons or warrants in relation to the criminal matters, may be sent in duplicate in such forms, directed to such Court, Judge or Magistrate and sent to such authority for transmission, as the Central Government may by notification specify in this behalf—Though serving or execution of summons at a place or country is mandatory, however, sending of such summons or warrants to such court, Judge or Magistrate and to such authority for transmission as may be notified is directory in nature—

Exchange of letters dated. 20.02.1989 is a binding treaty between India and Switzerland, even applicable for service of summons to compel the presence of a person who is accused of an offence for trial and for determining whether to place such person on trial—Summons served through FOJ, designated agency as per Swiss Federal laws amounted to valid service of summons.

Swiss Timing Ltd. v. *CBI & Anr.* *234*

— Section 27—Petitioner preferred petition seeking discharge in criminal case filed by CBI against him on ground sanction granted to prosecute against him, was not valid—He had moved application before learned Special Judge seeking discharge on ground of invalidity of sanction which was dismissed and thus, petitioner preferred petition under Section 482 of Code—On behalf of CBI, it was urged once charge was framed in warrant trial case, instituted either on complaint or on police report, trial court had no power under code to discharge accused—Trial Court could either acquit or convict accused unless it decided to proceed under Section 325 and 360 of Code, except where prosecution must fail for want of fundamental defect, such as want of sanction—Also, sanction order was perfectly authenticated and duly authorized, therefore, discharge could not be sought on ground of invalidity and that too, at stage when case was fixed for final arguments—Held:- Court is not to go into technicalities of sanctioning order—Justice cannot be at beck and call of technical infirmities—Court is only bound to see that sanctioning authority after careful consideration of material that is brought forth, has passed an order that shows application of mind.

Hawa Singh v. *CBI* *290*

PUBLIC PREMISES (EVICTION OF UNAUTHORIZED OCCUPANTS) ACT, 1971 (PP ACT)—Section 4—Whether a writ impugning the order of determination of perpetual lease is not maintainable for the reason of it being open to the affected person to impugn such determination in proceedings under the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (PP Act)—Brief Facts—Petitioner was granted perpetual lease of plot of land—Respondent DDA vide notice dated 10th May, 2000 to the petitioner averred, that the building over the said plot of land was being used for commercial purpose as Anukumpa banquet Hall—Construction was not as per the sanctioned plan—Mezzanine floor had been converted into a working hall-all this was in breach of the terms and conditions of the perpetual lease deed—Petitioner asked to stop and remove the breaches—Petitioner vide its reply dated 25th May, 2000 denied that any banquet hall was functioning on the property and stated that the electricity supply to the property had been disconnected because of the Central Pollution Control Board and the basement was lying closed on account of water seepage; the violations in the setbacks were stated to have been removed—DDA vide the said notice dated 21st November, 2005 determined the perpetual lease deed—Called upon the petitioner to remove itself from the plot of land and deliver possession thereof—Petitioner sent a representation denying any breach of the perpetual lease deed conditions—DDA was requested to withdraw the notice of determination of lease—The Estate Officer of the respondent DDA issued the notice dated 5th May, 2006 under Section 4 of the PP Act and whereafter this writ petition was filed—DDA in its counter affidavit reiterated its case of banquet hall being run on the property in contravention of the perpetual lease conditions—Held—The Division Bench of this Court in *Ambitious Gold Nib* undoubtedly held that the correctness or otherwise of the

allegations of the DDA on the basis of which the determination of the lease has been effected is to be decided by the Authority under the PP Act—It was further observed that whether the lessee had committed breach of terms of the lease deed or not and whether the determination of the lease was legal or not are matters to be adjudicated by the concerned authority under the PP Act and cannot be gone into in exercise of writ jurisdiction—Disputed questions of fact viz whether notices were served on the petitioner or not, whether the petitioner has used the premises as a Banquet Hall or not and whether the petitioner committed other breaches or not, cannot be adjudicated in writ jurisdiction—Petitioner has alternative suitable remedy before the Estate Officer—The petition thus, fails and is dismissed.

REGISTRATION ACT, 1908—Section 49—Delhi Rent control Act, 1958—Suit for possession and mesne profits—Premises let out to the appellant/respondent vide rent agreement dated 01.10.2006 for a period of three years by the husband of respondent/plaintiff—Tenancy terminated vide notice dated 31.03.2010 w.e.f. 30.04.2010—Failed to vacate the premises-Suit filed-Suit decreed for possession under order 12 Rule 6 vide judgment, dated 14.11.2011—Aggrieved by the judgment filed the present appeal—Alleged tenancy was for manufacturing purposes—Notice terminating the tenancy should have been for a period of six month-Held—Lease deed unregistered—Terms cannot be looked into—Purpose of letting is not collateral purpose-notice valid—Appeal dismissed.

REGULAR FIRST APPEAL (RFA)—Filed against judgment of the trial Court dated 23.05.2003 dismissing the suit for recovery of 4,46,027.65/- filed by the appellant/plaintiff against respondent No.1/defendant No.1. Respondent No.2/Oriental Insurance Company Limited/defendant No.2 was a proforma party—Held—The trial Court was fully justified in holding that there was no negligence of defendant No. 1/respondent No. 1 in having lost any of the packages which were given to the defendant No. 1/respondent no.1. The package which was given to it was of 47 kilograms (kgs.) as per Indian Airlines Consignment Note C/No: 09635970 dated 9.12.1986 and it is this consignment of 47 Kgs. as stated in Airlines Consignment Note C/No.: 09635970 which was delivered to the appellant/ plaintiff at Calcutta. Surely, if only 47 Kgs. were delivered to defendant No. 1/respondent No.1 there does not arise any question of any loss being caused by it of the difference of 100 Kgs. and 47 Kgs. At best, the liability of defendant No.1/ respondent No. 1 would be for taking short delivery, however, even that liability would not be there because to the knowledge of the appellant/plaintiff the main package had been broken open as is clear from the letter dated 6.10.1986 written to Sh. Mago at the Airport Cargo Terminal and at best the negligence of defendant No.1/ respondent No.1 would be of taking short delivery. However, that negligence in itself cannot fasten the defendant No.1/respondent No. 1 with liability because it is not as if the appellant/plaintiff was not aware within the limitation period that it was the International Airport Authority of India which had given short delivery and therefore, the suit could well have been filed against the International Airport Authority of India within the limitation period for the loss caused during the period the consignment was in the custody of the International Airport Authority of India. The liability, therefore, for having lost the goods, was of the International

Airport Authority of India and not of defendant No. 1/ respondent No. 1.

Union of India v. *COX & Kings (India) Ltd. Anr.... 158*

RIGHT OF CHILDREN TO FREE AND COMPULSORY EDUCATION ACT, 2009—Petitioner impugned Rule 10(3) Delhi RTE Rules and alternatively claimed that the Court should frame guidelines for exercise of powers under Rule 10(3) for extending the limits of "neighbourhood" as defined under the Act and the Rules—Although the Act uses the term "neighbourhood", but does not define the same-However, the definition is found in the Rules, which prescribe the limits of neighbourhood in respect of children of Classes-I to V as within walking distance of 1Km and in respect of Children of Classes-IV to VIII as within 3km—Private unaided schools are required to admit children belonging to EWS and disadvantaged groups in Class-I to the extent of 25% of strength and resident of within the limits of neighbourhood—While admitting general category children, the private unaided schools do not follow the prescribed limits of neighbourhood—However, the respondent issued order directing that all schools shall ensure that no child under EWS and disadvantaged groups is denied admission on neighbourhood basis, so long as the locality of the child's residence falls within the distance criteria devised by the schools for the general category—Challenged—Held, Petitioner has no cause of action as it should not matter to the School whether the children of EWS and disadvantaged groups are residing within 1km or more and the grievance, if any should be of the children for inability of government to provide schools within the neighbourhood—Further held, the paramount purpose is to provide access to education and distance to be travelled by the child is secondary—Directed, admission shall first be offered to eligible students of EWS

and disadvantaged groups residing within 1Km; in case vacancies remain unfilled, students residing within 3km shall be admitted; if still vacancies remain, students residing within 6km shall be admitted; and even thereafter if vacancies remain, students residing beyond 6km shall be considered.

Federation of Public Schools v. *Government of NCT of Delhi* *570*

RIGHT TO INFORMATION ACT, 2005—Section 20(1)—Delhi High Court Act, 1966—Section 10—Central Information Commission (CIC) imposed maximum penalty of Rs. 25,000/- on the respondent under section 20(1) of the Act for the delay of over 100 days in furnishing the information to the appellant—Chief Secretary, Govt. of Delhi was directed to recover the said amount from the salary of the respondent @ Rs. 5,000/- per month-Respondent preferred writ petition—Learned Single Judge allowed the writ petition—Reduced the penalty amount to Rs. 2,500/- recoverable from the salary of the respondent in ten equal monthly installments of Rs. 250/- per month—Reason—The question of penalty is essentially between the Court and the respondent and did not really concern the appellant who has been provided with information—Respondent took the charge of the post 14 days after the subject RTI application of the appellant had been filed—Appellant filed the Intra Court Appeal—Contention—Use of word 'shall' in section 20(1) is indicative of the imposition of penalty mandatory—Presence of information seeker is essential not only for computing the penalty but also for establishing the default of the information officer-Exclusion of the information seeker from penalty proceedings would dilute the sprit of the Act—The role of CIC is of an adjudicator—Held—A reading of Section 20 shows that while the opinion, as to a default having been committed by the Information Officer, is to be formed 'at the time of deciding

any complaint or appeal', the hearing to be given to such Information Officer, is to be held after the decision on the Complaint or the appeal. The proceedings before the CIC, of hearing the Information Officer qua whom opinion of having committed a default has been formed and of imposition of penalty, in the exercise of supervisory powers of CIC and not in the exercise of adjudicatory Powers.

Anand Bhushan v. *R.A. Haritash* *657*

— Section 20(1)—Central Information Commission (CIC) imposed maximum penalty of Rs. 25,000/- the respondent under section 20(1) of the Act for delay of over 100 days in furnishing the information to the appellant—Chief Secretary, Govt. of Delhi was directed to recover the said amount from the salary of the respondent @ Rs. 5,000/- per month Respondent preferred writ petition—Learned Single Judge allowed the writ petition—Reduced the penalty amount to Rs. 2,500/- recoverable from the salary of the respondent in ten equal monthly installments of Rs. 250/- per month—Reason—The question of penalty is essentially between the Court and the respondent and did not really concern the appellant who has been provided with information—Respondent took the charge of the post 14 days after the subject RTI application of the appellant had been filed—Appellant filed the Intra Court Appeal—Contention—Use of word 'shall' in section 20(1) is indicative of the imposition of penalty mandatory—Presence of information seeker is essential not for computing the penalty but also for establishing the default of the information officer—Exclusion of the information seeker from penalty proceedings would dilute the sprit of the Act—The role of the CIC is of an adjudicator—Held—Though Section 20(1) uses the word 'shall', before the words 'impose a penalty of Rs. Two hundred and fifty rupees but in juxtaposition with the words 'without reasonable cause, malafidely of knowingly or

obstructed'—The second proviso thereto further uses the words, 'reasonably and diligently'—The question which arises is when the imposition of penalty is dependent on such variables, can it be said to be mandatory or possible of calculation with mathematical precision—All the expressions used are relative in nature and there may be degrees of, without reasonable cause, malafide, knowing or reasonableness, diligence etc.—The very fact that imposition of penalty is made dependent on such variables is indicative of the direction vested in the authority imposing the punishment—Once it is held that the quantum of fine is discretionary, there can be no challenge to the judicial review under Article 226 of the Constitution, of exercise of such discretion, of course within the well recognized limits—If this Court finds discretion to have been not appropriately exercised by the CIC, this Court can, in exercise of its power vary the penalty—Appeal dismissed.

Anand Bhushan v. *R.A. Haritash* *657*

SCHEDULE CAST & SCHEDULE TRIBES (PREVENTION OF ATROCITIES) ACT, 1989—Section 3(1) (X)—Petition Against non framing of charges by the L.d ASJ—Accused must have knowledge or awareness that the victim belongs to Scheduled Caste or Scheduled Tribe in order to constitution offence under S. 3.(1)(x) 'Public view' in S.3(1)(x) implied within view of group of people of the place/locality/village not linked with the Complaint through kingship, business, commercial or any other vested interest—Public view means presence of one or more persons who are neutral or impartial, even though he may be known to the complainant to attract ingredients of offence. Petition dismissed.

Kanhaiya Paswan v. *State & Ors.* *509*

SPECIFIC RELIEF ACT, 1963—Section 22—Amendment of relief claimed in the plaint and decree—Decree Holders filed suit seeking relief for specific performance of agreement to sell dated 2.05.1988 against five judgment debtors including one Satbir and Vijaypal—Judgment debtors proceeded ex-parte—Suit decreed in favour of decree holders—In terms of the judgment and decree, sale deed dated 22.10.1991 was executed by the Registrar in favour of decree holders—Application filed by Satbir and Vijaypal for setting aside ex-parte judgment and decree, dismissed—Appeal preferred by them before Division Bench—Division Bench directed judgment debtors to not to transfer, alienate, part with or create any third party interest in the property pending appeal—By order dated 16.08.2011 appeal dismissed by Division Bench—Review petition filed after the dismissal of the appeal, was also dismissed—Decree holders filed application under Order XXI Rule 11(2) for execution of decree dated 15.11.1990—Prayer also made for the amendment of the plaint and decree by abundant caution as it was incumbant on judgment debtors anyway to put the decree holders in possession after the decree of specific performance—Submitted on behalf of the judgment debtors Satbir and Vijaypal inter-alia that it would amount to denovo trial—Held, it may not always be necessary for the plaintiff to specifically claim possession over the property as it is inherent in the relief of specific performance of the contract of sale—Words "at any stage of proceedings" in proviso to sub Section 2 of Section 22 includes execution proceedings—Relief for delivery of possession is just a formality—Executing Court is empowered to grant such relief even though no such prayer had been made in plaint or mentioned in decree—To meet, however, the objections raised by the judgment debtors, and cover conflicting views expressed by Courts, amendment allowed to include claim for

possession, under proviso to sub Section 2 of Section 22 of the Act.

Adarsh Kaur Gill v. *Mawasi & Ors.* *87*

TRADE MARKS ACT, 1999—Section 11, 23, 28, 31 and 134—Copyright Act, 1957—Section 62—Trade Marks Rule, 2002—Rule 37—Plaintiff registered trade mark owner of expression "SHRIRAM" for vast range of products since 1960—By interim order, defendants restrained from manufacturing or selling any produce by name of "SHRIRAM CARTAP" which is deceptively similar trademark of plaintiff—Case of defendants that they have got registration of trade mark from registry—Date of registration relates back to date of application—Plaintiff is entitled to continue with suit for passing off which is still maintainable but defendants are residing and carrying on their business outside jurisdiction of this court—Plaintiff under action of passing off can not take advantage of section 134(2) of Act in order to invoke territorial jurisdiction—Plaint is liable to be returned because of lack of territorial jurisdiction—Held—Defendants did not amend written statement after obtaining registration nor defendants have filed any application for return of plaint—Defendants in their written statement have not denied existence of territorial jurisdiction of this Court—On date of institution, this court had jurisdiction to entertain and try proceedings on basis of provisions under law—One fails to understand as to why defendants are now challenging jurisdiction on passing off when in written statement in cause of action, defendants admitted territorial jurisdiction—Registration has been secured by defendants which has been although applied prior but, was prosecuted and obtained pursuant to interim orders passed by this court in matter—Registrar of Trade Marks has not cited previously registered trade mark of plaintiff as a matter of conflicting mark in examination report and proceeded to grant

registration without citing plaintiff's prior registered mark and also perhaps not been informed about interim orders and seisin of dispute by this Court and granted registration contrary to Rule 37 of T M Rules—By ignoring mandatory provisions of Act and granting registration to defendants, it is clear that it is done with malafide intention, in order to defeat orders passed by court—It is a triable question whether registration of defendants is actually a valid one or is it just entry wrongly remaining on register, depending upon inference which court is going to draw by way of impact of subsequent events—Objection qua jurisdiction at this stage can not be sustained and same is dismissed.

DCM Shri Ram Consolidated v. *Sree Ram Agro Ltd. & Ors.* *119*

TRADE MARKS RULE, 2002—Rule 37—Plaintiff registered trade mark owner of expression "SHRIRAM" for vast range of products since 1960—By interim order, defendants restrained from manufacturing or selling any produce by name of "SHRIRAM CARTAP" which is deceptively similar trademark of plaintiff—Case of defendants that they have got registration of trade mark from registry—Date of registration relates back to date of application—Plaintiff is entitled to continue with suit for passing off which is still maintainable but defendants are residing and carrying on their business outside jurisdiction of this court—Plaintiff under action of passing off can not take advantage of section 134(2) of Act in order to invoke territorial jurisdiction—Plaint is liable to be returned because of lack of territorial jurisdiction—Held—Defendants did not amend written statement after obtaining registration nor defendants have filed any application for return of plaint—Defendants in their written statement have not denied existence of territorial jurisdiction of this Court—On

date of institution, this court had jurisdiction to entertain and try proceedings on basis of provisions under law—One fails to understand as to why defendants are now challenging jurisdiction on passing off when in written statement in cause of action, defendants admitted territorial jurisdiction—Registration has been secured by defendants which has been although applied prior but, was prosecuted and obtained pursuant to interim orders passed by this court in matter—Registrar of Trade Marks has not cited previously registered trade mark of plaintiff as a matter of conflicting mark in examination report and proceeded to grant registration without citing plaintiff's prior registered mark and also perhaps not been informed about interim orders and seisin of dispute by this Court and granted registration contrary to Rule 37 of T M Rules—By ignoring mandatory provisions of Act and granting registration to defendants, it is clear that it is done with malafide intention, in order to defeat orders passed by court—It is a triable question whether registration of defendants is actually a valid one or is it just entry wrongly remaining on register, depending upon inference which court is going to draw by way of impact of subsequent events—Objection qua jurisdiction at this stage can not be sustained and same is dismissed.

TRANSFER OF PROPERTY ACT, 1882—Section 106 & 116—Respondent/landlord wrote a letter 28.12.2010 after expiry of tenancy by efflux of time, to vacate the property—Appellant did not vacate; legal notice sent on 4.2.2011 terminating the tenancy—Appellant failed to vacate—Appellant bank had account of respondent in their branch—Started depositing rent in the account—Claimed by tenant that by acceptance of such deposit fresh tenancy came into existence—Landlord when

came to know of surreptitious and unilateral deposit of rent, wrote a letter dated 12.07.2011 that deposit of rent was without any instruction on their behalf and the deposit would be taken without prejudice to their right—Court observed any amount received after the termination of tenancy can surely be taken as charges towards use and occupation because after all the tenant had continued to use and occupy tenanted premises and was liable consequently to pay user charges—Fresh tenancy is a bilateral matter of contract coming into existence—Unless there is bilateral action and an agreement entered into to create fresh tenancy, mere acceptance of rent after termination of tenancy cannot create fresh tenancy—Appellant Bank Contended that since the appellant disputed all the aspect in the written statement, decree could not be passed by Trial Court under Order 12 Rule 6—Held—Contention to be misconceived as existence of relationship of landlord and tenant, the factum of premises not having protection of Delhi Rent Control Act, 1958, and fact of tenancy termination by service of a legal notice not disputed in the written statement—Fresh tenancy also not found to have been created—Appeal dismissed.

— Section 54—An ownership of a property is transferred by means of a registered sale deed as per Section 54—Every sale deed has an effect of divesting the transferor of the ownership of the property and the vesting of the ownership in the transferee—A Sale deed by which the ownership rights in an immovable property are transferred can be ignored only under two circumstances—First, it the sale deed is a nominal transaction or a paper transaction because the parties intended it to be so or secondly, if the document being the sale deed is void ab initio. It is in these two circumstances that it is not

necessary to have the sale deed set aside inasmuch as the sale cannot have he effect of transferring ownership—However, in all other cases where it is pleaded that deed is a voidable document because it ought not to have been executed or there is a fraudulent transfer of title by means of the particular sale deed or for any reason which makes the transfer voidable (and not void), it is necessary that a suit has to be filed for cancellation of such a sale deed within a period of three of years from the date a person comes to know of execution and existence of the sale deed which goes against the interest of such person-This is the mandate of Article 59 of the Limitation Act, 1963—In the facts of the present case, the Knowledge of the appellants/plaintiff and their predecessor in interest, Sardar Sohan Singh of the existence of the sale deed dated 03.12.1950, is actually from 1960 itself-On registration of the sale deed dated 3.12.1960, the appellants/plaintiffs and Sardar Sohan Singh in accordance with Section 3 of Transfer of property Act, 1882 were deemed to have notice of the fact that the sale deed was actually executed—Suit of the appellants/ plaintiffs, even if the present suit was one for cancellation of the sale deed dated 3.12.1960, would have become barred by 1963, or at best 1965/1966 even if we take the knowledge from the year 1963, as pleaded by the appellants/plaintiff. Once, there cannot be cancellation of the sale deed, the ownership of the defendant no.1/respondent no.1 become final and also the disentitlement of the appellants/plaintiff to the reliefs claimed in the suit of possession and mesne profits.

Mukhinder Singh (Deceased) Through LRs. & Ors. v. *Gurbux Singh & Ors.* *578*

— Section 106—Registration Act, 1908—Section 49—Delhi Rent control Act, 1958—Suit for possession and mesne profits—Premises let out to the appellant/respondent vide rent agreement dated 01.10.2006 for a period of three years by the husband

of respondent/plaintiff—Tenancy terminated vide notice dated 31.03.2010 w.e.f. 30.04.2010—Failed to vacate the premises-Suit filed-Suit decreed for possession under order 12 Rule 6 vide judgment, dated 14.11.2011—Aggrieved by the judgment filed the present appeal—Alleged tenancy was for manufacturing purposes—Notice terminating the tenancy should have been for a period of six month-Held—Lease deed unregistered—Terms cannot be looked into—Purpose of letting is not collateral purpose-notice valid—Appeal dismissed.

Sharvan Aggarwal v. *Kailash Rani*..... *459*