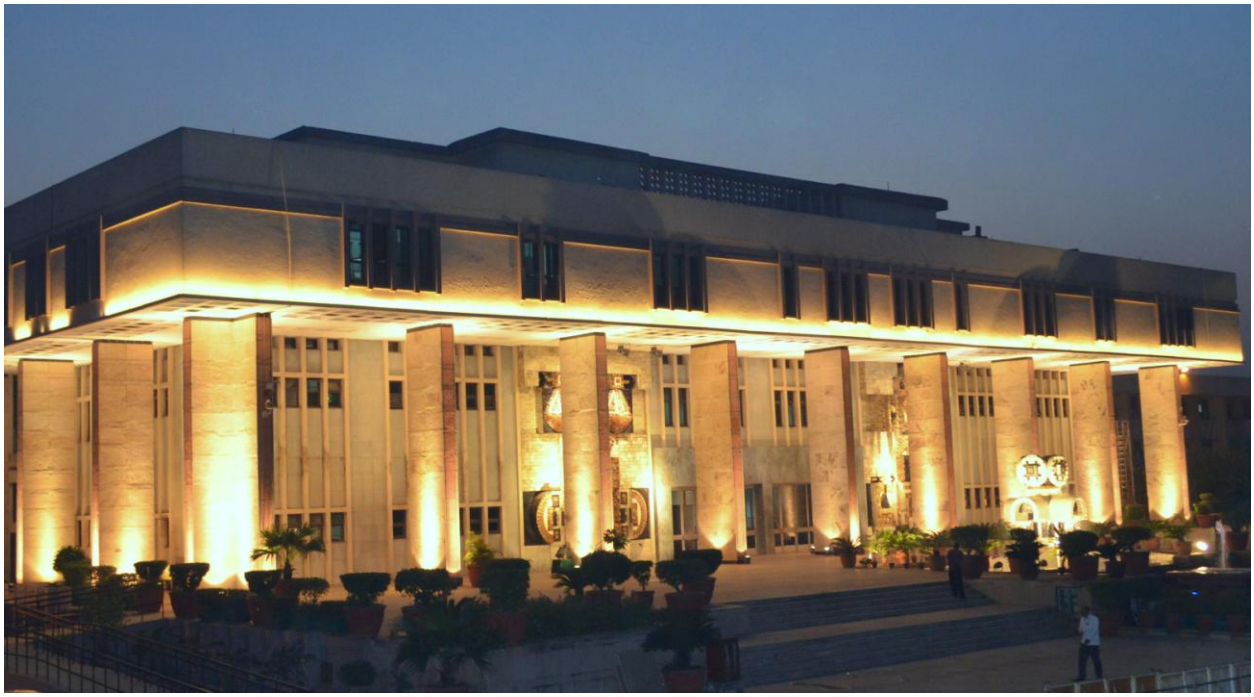
Contribution of the High Court of Delhi to the Development of Law in 2012 (First Half)



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Judges, High Court of Delhi

With the Assistance of a Team of Law Researchers

Prefatory Note

This is a compilation of summaries of decisions rendered by the judges of the Delhi High Court sitting as Single Benches, Division Benches and Full Benches for the period from 1st January till 30th June 2012.

Following the pattern adopted for 2011, the judges themselves have chosen the decisions penned by them which they felt have contributed to the development of law.

The summaries were prepared by law researchers under the supervision of the judges.

It is possible that in the period subsequent to their pronouncement some of the decisions may have been affirmed, overruled or modified in appeal.

We wish to thank the law researchers and interns who have contributed their efforts in bringing about this compilation. We welcome suggestions for its improvement.

LIST OF ABBREVIATIONS

AD	-	Apex Decisions
Arb.LR	-	Arbitration Law Reporter
CompLJ	-	Company Law Journal
CriLJ	-	Criminal Law Journal
CTR	-	Current Tax Reporter
D.B.	-	Division Bench
DE	-	Delhi
DLT	-	Delhi Law Times
DRJ	-	Delhi Reported Journal
F.B.	-	Full Bench
MANU	-	Manupatra
PTC	-	Patents and Trademarks Cases
TAC	-	Transport and Accident Cases
TAXMAN	-	TAXMAN (Taxation Manual)

SUBJECT INDEX

TABLE OF CASES

ARBITRATION

ARBITRATION

Section 8 of the Arbitration and Conciliation Act, 1996 - Bifurcation of the subject matter of an action brought before a judicial authority is not allowed

Celebi Delhi Cargo Terminal Management India Pvt. Ltd. v. Aryan Cargo Express Pvt. Ltd.

Citation: 187 (2012) DLT 54

Decided on: 20th January, 2012

Coram: **Reva Khetrapal,** J.

Facts: The application by the Defendant under Section 8 of the Arbitration and Conciliation Act, 1996 seeking reference of the dispute to arbitration, being predicated on Clauses 9.1 and 9.2 of the Cargo Handling Agreement executed between the parties, was resisted by the Plaintiff on the ground that the claim for charges for the services in respect of which the said agreement had been executed was not the subject matter of the suit. Further, even if the charges were presumed to be part of the subject matter of the suit it could not be separated and referred to arbitration.

Issue: Whether a part of the cause of action in a dispute in suit could be split for the purpose of referring it to arbitration?

Held: Bifurcation of causes of action should ordinarily not be resorted to as it would result in inevitable delays and mounting of cost of litigation, apart from preventable harassment to the parties and their witnesses. There was a possibility of conflict of judgments if only a part of the disputes was referred to the arbitral Tribunal and the Court retained the rest for adjudication. Hence, the prayer of the Defendant for reference of the dispute to arbitration was declined.

ARBITRATION

Arbitration Agreement between the parties is not a bar to the maintainability of proceedings before the Competition Commission of India.

Union of India v. Competition Commission of India

Citation: 2012 (128) DRJ 301

Decided on: 23rd February, 2012

Coram: **Vipin Sanghi,** J.

Facts: The writ petition was filed by the Petitioner challenging order of the Competition Commission of India (Commission) whereby the Petitioner's challenge to the Commission's jurisdiction to entertain complaint on the basis of the information of Respondent no. 2 under Section 19(1) of the Competition Act, 2002 (the Act) was rejected. The Commission had rejected the stand of the Petitioner that it was not an 'enterprise' within the definition of the said term as contained in Section 2(h) of the Act. The Petitioner had also raised an objection to the maintainability of proceedings before the Commission by contending that an arbitration agreement existed between Respondent no. 2 and the Petitioner and, consequently, the proceedings before the Commission could not proceed and were liable to be referred to arbitration under Section 8 of the Arbitration & Conciliation Act, 1996. This objection too had been rejected by the Commission.

Issues: (1) Whether the existence of an arbitration agreement is a bar to the maintainability of the information and the proceedings arising therefrom before the Commission.

(2) Whether the Petitioner is an 'enterprise' within the meaning of the expression as defined in Section 2(h) of the Act.

Held: Since, the Commission had been set up with a special focus to prevent practices having adverse effect on competition, it could not merely be concerned with the aspect of breach of contract or with regard to implementation of the contract i.e. its mandate was to ensure compliance of the Act. This provision is *para materia* with Section 3 of the Consumer Protection Act, 1986 which also states that the provisions of the Consumer Protection Act, 1986 shall be in addition to, and not in derogation of any other provisions of law for the time being in force.

Neither was the Petitioner, a department of the government nor had it contended that it was engaged in an activity relating to provision of services, therefore unless the Petitioner's activity could be classified as relatable to the sovereign functions of the government and thus it could not avoid being classified as an 'enterprise' under Section 2(h) of the Act. If it stood established that it was an 'enterprise' under Section 2(h) of the Act, then it was correct for the Commission to have exercised its jurisdiction as under Chapter 4 of the Act.

Since the Petitioner had entered into a Concession Agreement under its PPP policy, therefore, clearly the Respondent No. 2 was performing a commercial activity and rendering services for a charge, which, prior to the entering into the aforesaid agreement with the Petitioner, was being performed by the Petitioner. The Petitioner was also carrying out an activity, *viz.* running the railways, which also has a commercial angle and was capable of being carried out by entities other than the State, as was the case in various other developed countries. It was, therefore, not an inalienable function of the State. Therefore, the submission of the Petitioner that it was not covered by the definition of 'enterprise' was held to have no merit and was thus rejected. Accordingly, the petition was also dismissed.

ARBITRATION

Section 34(4) of the Arbitration and Conciliation Act, 1996- If Award granted by the Arbitrator is erroneous; Courts should not sit as a Court of appeal but quash the Award so that fresh arbitral proceedings can be instituted by the parties.

Cybernetics Network Pvt. Ltd. v. Bisquare Technologies Pvt. Ltd.

Citation: 2012 III AD (Delhi) 161

Decided on: 24th February, 2012

Coram: **S. Muralidhar,** J.

Facts: Amongst the three petitions filed under Section 34 of the Arbitration and Conciliation Act, 1996 (Act) one was filed by the Petitioner, being aggrieved to the extent that some of its claims were rejected in the Award otherwise passed in its favour by the sole Arbitrator whereas the other two petitions were filed against the rejection of the separate counter-claims filed by the Respondent-Bisquare and its Director Mr. Baoni.

CNPL and Bisquare entered into an MOU and a Technology Sale and Support Agreement (TSSA) whereby Bisquare agreed, subject to the terms and conditions set out in the TSSA, to sell outright to CNPL all intellectual property rights in the Set top Boxes (STBs) as also to provide technical assistance and upgrades as was sufficient to enable CNPL to commercially produce and market the STBs and thereby achieve its business objectives as set out in the TSSA. However, CNPL was compelled to invoke the arbitration clause for breach of terms of the MOU and the TSSA. CNPL claimed that the Respondents had deliberately concealed vital information and given it STB technology that was defective, not DVB compliant and commercially unviable. The grievance in this petition by CNPL was that despite the Arbitrator having granted an Award in its favour on the main issues, he declined to award it the refund of the sums paid by it to the Respondents towards share capital in Bisquare, technology transfer fee, technology assistance charges, and other facilities to set up the factory. Whereas the case of CNPL was that despite knowing that the Respondents failed to possess the requisite technology and knowhow for commercially developing the STBs that were DVB compliant, the Respondents made this the basis of the agreement and dishonestly and fraudulently induced CNPL into parting with money.

Issues: (1) Whether the Respondents made a false representation to the Petitioner about possessing the requisite technology thereby entitling the Petitioner to a refund.

(2) Whether this Court in exercise of its powers under Section 34(4) of the Act could itself decide the claims that had according to it been erroneously rejected by the Arbitrator.

Held: The very basis of the MOU and TSSA was that the Respondent held the technology required for commercially viable and DVB compliant STBs. However, during the arbitral proceedings, no evidence was adduced by the Respondent to show that it did possess at any time such technology as was represented by it and thus it could be concluded that it had made a false representation to CNPL. The Arbitrator had erred in observing that there was only some misrepresentation on the Respondent's part for it did possess some of the technology and thus there could not have been any wrongful inducement of the Petitioner, because such an observation by the Arbitrator was contrary to the express provisions in the contract and thus the Award to this extent was unsustainable in law.

The representation having been found out to be false, the denial of the refund by the Arbitrator was not justified and the Petitioner was held to be entitled to restitution as per Section 73 of the Indian Contract Act, 1872 since breach had already been established by the Arbitrator.

The Courts were required to adjourn proceedings to give the arbitral Tribunal time to take such action that would eliminate the ground for setting aside the Award. Relying on ***McDermott International Inc. v. Burn Standard Co. Ltd. [(2006) 11 SCC 181]***, wherein it was held that the Courts should rather just quash the Award giving the parties to begin the arbitral proceedings afresh rather than correct the errors of the Arbitrators, the Court did not have any special power to itself allow the claims that were erroneously rejected by the Arbitrator as it would then be acting as a Court of appeal. Thus, with regard to the claims that were erroneously rejected by the Award, the Petitioner was open to approach the Arbitrator who was to decide these claims and pass a fresh Award.

ARBITRATION

The Arbitrator must act and make his Award in accordance with the general law of the land and the agreement.

Union of India v. M/S Conbes India Pvt. Ltd.

Citation: 2012 (2) Arb.LR 191 (Delhi)

Decided on: 24th February, 2012

Coram: **Acting Chief Justice**, Sanjay Kishan Kaul, Rajiv Shakdher,JJ.

Facts: The intra-Court appeal was preferred by the Petitioner-Union of India challenging the orders passed by the Single Judge in the civil suit preferred by the Appellant which was a petition under Sections 14 & 17 of the Arbitration Act, 1940 (the Act, 1940) filed by the Respondent herein for making the Award passed by the Arbitrator as a rule of the Court. The Single Judge, while partly accepting the objections raised by the Appellant under Sections 30 & 33 of the Act, 1940, against the petition, had reduced the amount awarded under the Respondent's claim which was not disputed by either parties. The only controversy raised before the Court was pertaining to the Award of *pendente lite* interest by the Arbitrator.

Issue: Whether an Arbitrator had the power to award interest *pendente lite*, and if so on what principles.

Held: Relying on the Supreme Court decision in ***Secretary, Irrigation Department, Government of Orissa v. G.C. Roy [(1992) 1 SCC 508],*** wherein it was held that where the agreement between the parties did not prohibit grant of interest and where a party claimed interest and that dispute (along with the claim for principal amount or independently) was referred to the Arbitrator, he would have the power to award interest *pendente lite.*

The principle which clearly emerged from the reading of the aforesaid was that in a case where the agreement was silent about the award of interest, the discretion lay with the Arbitrator to award or not to award the interest. The Arbitrator was thus empowered to award the *pendente lite* interest though it would be in his discretion to exercise such a power and decide whether to award or not to award the interest in a given case. On the other hand, if the arbitration clause specifically prohibited grant of interest, then, the Arbitrator would be bound by such contractual provision and would have no power to grant the interest.

Clause 16(2) of the GCC clearly stipulated in no uncertain terms that the interest would not be payable and thus the clear answer was that the Arbitrator had no power to award *pendente lite*

interest. Thus, the award of *pendente lite* interest by the Arbitrator was not legally justified and liable to be set aside.

ARBITRATION

A valid arbitration agreement as known to law under Section 7 of the Arbitration and Conciliation Act, 1996 has to be necessarily proved under Section 47(1)(a) of the Act in order to enforce a foreign Award.

Marina World Shipping Corporation Ltd. v. Jindal Exports and Imports Private Ltd.

Citation: 2012 III AD (Delhi) 14

Decided on: 28th February, 2012

Coram: **S. Muralidhar,** J.

Facts: The petition was filed by the Petitioner-Marina under Sections 44 and 46 of the Arbitration & Conciliation Act, 1996 (Act) seeking to enforce a foreign arbitral Award whereby the Respondent-Jindal was directed to pay to Marina, demurrage earned by Marina under the terms of the Charter Party (C/P).

Jindal challenged the arbitration agreement alleged to have been contained in the exchange of letters or telex messages between the parties on the ground that Nederkoorn had forwarded an amended draft copy of the C/P to Marina including the alleged arbitration clause, without any notice to Jindal and without consulting or obtaining consent of Jindal. Jindal also challenged having any knowledge of Marina having signed the amended C/P or that it was expected to agree to the appointment of a sole Arbitrator from amongst the three persons named in a communication also between Nederkoorn and Portshire- a co-broker for Marina. Furthermore, Jindal, maintained that the rights and liabilities of the parties were to be governed only by the terms and conditions agreed in the original C/P that did not include any arbitration clause, it refused to accept the said amended C/P or sign it, and rather challenged it as illegal, invalid and not binding upon it. However, despite Jindal's challenge, the arbitral proceedings were carried out and an Award was granted allowing the claims of Marina and rejecting the counter-claims of Jindal. Thereafter, the foreign Award was made rule of the Court. The present execution petition was filed by Marina seeking execution of the said foreign Award wherein Jindal had maintained its objections regarding the arbitration agreement.

Issues: (1) Whether there was a valid arbitration agreement between the parties which could form the basis of enforcement of the foreign Award.

(2) Whether by submitting to the arbitral proceedings the Respondent waived its objection to the jurisdiction of the Arbitrator or the existence of the arbitration clause.

Held: Under Section 7 of the Arbitration & Conciliation Act, 1996, a dispute between the parties could not be referred to arbitration, in the absence of there being an arbitration agreement between them. Further, while Section 48(2)(a) of the Act stipulated that a Court could refuse to enforce an Award if it found that the subject matter of the dispute 'was not capable of settlement by arbitration under the law of India', Section 47(1) made it mandatory for a party applying for enforcement of a foreign Award to produce before the Court the original agreement for arbitration or a duly certified copy thereof.

There was an attempt by Marina to have an arbitration clause inserted in the C/P commenced much after the discharge of the cargo was completed. Moreover, the insertion was made while giving effect to the communication between Marina, Portshire and Nederkoorn. However, the above said exchange of correspondence, resulting in the addition of rider clauses and the disputed arbitration clause, did not involve Jindal at all and was not in consultation with or consent of Jindal. Marina also did not dispute that the Jindal had not returned the copy of the C/P along with signatures. Further, Marina also failed to show that Nederkoorn was anymore than a broker acting on behalf of Jindal for the limited purpose of the fixture of the vessel and could have acted as Jindal's agent for the purposes of agreeing to a binding arbitration agreement.

Since Marina had failed to prima facie demonstrate that there was an arbitration agreement between the parties, the requirement of Section 47(1)(a) of the Act could not be said to be satisfied and thus in the absence of an arbitration agreement between the parties, as envisaged in Section 7, there could have been no reference of the disputes to arbitration under the Indian law. The ground of refusal of enforcement of the foreign Award under Section 48(2)(a) of the Act, thus stood attracted. Consequently, the foreign Award could not be enforced under Section 44 read with Sections 47 and 48 of the Act. The petition was accordingly dismissed.

ARBITRATION

The proper law that should govern agreements is that system of law that has the closest and most real connection with the transaction, determination of which should occur at the first available opportunity.

National Building Construction Corporation Ltd. v. A.M. Rasool Construction and Engineering Services Pvt. Ltd.

Citation: 2012 IV AD (Delhi) 569

Decided on: 7th March, 2012

Coram: **S. Muralidhar,** J.

Facts: The petition was filed by the Petitioner-NBCC under Sections 30 & 33 of the Arbitration Act, 1940 (Act), raising objections against the Award of the sole Arbitrator wherein it was held that the arbitration clause was independent of all other clauses and arbitration would occur in India under Indian Laws. The Award also held the Petitioner responsible for the delays in construction as it did not hand over the site and the drawings on time to the Respondent A.M. Rasool Construction and Engineering Services (P) Ltd and that M/s AM Rasool and Company, a partnership firm, [referred to as Piece Rate Worker ('PRW')] was justified in mobilising labour until site was handed over to it by the Petitioner.

The dispute between the parties arose when out of the three sub-contracts i.e. construction of 100 4/G type houses, 12 4/G type houses and the construction of boundary wall of 20 classrooms, granted by NBCC to PRW, the said Company was not able to complete the construction of the 12 houses within the stipulated time. Whereas NBCC blamed PRW for the inordinate delay on account of latches, neglect and poor performance, PRW claimed that the delay was because NBCC delayed in handing over the site and drawings. Another bone of contention between the parties was as regards the change in constitution of AM Rasool& Company when 8 of its partners retired and A.M. Rasool Construction and Engineering Services (P) Ltd took over the assets and liabilities of PRW as its sole proprietor. Whereas PRW claims that NBCC was duly informed of this change, NBCC tried to claim that there was no privity of contract between them and the Respondent, a contention duly rejected by the sole Arbitrator as such an objection had never been raised before.

Issues: (1) Whether the Indian law on contracts was the proper law on contracts that would govern the agreement between the parties.

(2) Whether the Award passed by the sole Arbitrator was barred by limitation.

(3) Whether the delay in construction of the 12 houses was caused by the Petitioner and whether the Respondent rightly mobilized the labour on account of the delay.

Held: Relying on ***National Thermal Power Corporation Ltd. v. The Singer Co. [(1992) 3 SCC 551]***, wherein it was held that if the parties had neither expressly nor impliedly chosen a proper law for the contract, the Court was to determine the system of law with which the transaction "hads the closest and most real connection", even though the performance of the contract was in Libya, it could not amount to closest and most real connection since not only was the contract entered into in India and both the parties registered in India but also as according to Clause 14 of the contract between the parties, they had agreed to refer their disputes to an Indian Arbitrator. In the given circumstances, it was unlikely that the parties could have intended the Indian Arbitrator to apply the Libyan law of contract while deciding the disputes. Further, even if one of the parties i.e. NBCC, was interested in following the Libyan law, the burden was on it then, to prove what the Libyan law was. However, far from proving before the Arbitrator what the Libyan law was, the ground was not even urged by NBCC until at the argument stage of the arbitral proceedings. Also, since accepting NBCC's plea would mean that all the claims would have to be decided as according to the Libyan law i.e. the entire arbitral proceedings will have to be re-started, the plea of NBCC that the Award was liable to be set aside for not having been decided in accordance with the Libyan law, must fail.

Since the ground of PRW's claims being time-barred by limitation was not taken up by NBCC at the time it filed its objections to the Award and was only taken up after more than two years at the time of filing rejoinder, the statutory one month period allowed to a party to raise objections against an arbitral Award had elapsed, and taking the limitation ground at the stage of filing rejoinder would amount to taking an additional ground to challenge the Award after the period of limitation for filing the objections had expired, which could not be allowed by the Court. Hence, the plea of PRW's claim being time-barred by limitation was also rejected by the Court.

As regards the other individual objections raised by NBCC, since the Arbitrator had discussed the evidence pertaining to each objection in great length and detail; the Court was not required to re-examine the evidence and sit in appeal over such findings of the Arbitrator which were plausible and did not call for interference. Hence, the objections thus raised by NBCC were rejected and the Award was made rule of the Court.

ARBITRATION

The relevant date when Arbitrator entered upon reference shall be assumed to be the date when the Arbitrator first applied his mind to the dispute in a particular case.

M/s National Thermal Power Corporation v. M/s Techno Electric & Engineering Co. Ltd.

Citation: 2012 (189) DLT 733

Decided on: 2nd May, 2012

Coram: **Sanjay Kishan Kaul**, Rajiv Shakdher, JJ.

Facts: The appeal was filed by the Appellant against the order of the Single Judge setting aside the ex-parte Award granted by the Arbitrator in favour of the Appellant in relation to the settlement of disputes between the parties as according to the contract entered into between them. The Single Judge had set aside the Award on the ground that it was an ex-parte Award and on the basis of the objections raised by the Respondent under Sections 30 and 33 of the Arbitration Act, 1940 (said Act) highlighting the confusions pertaining to the Arbitrator appointed, nomination of the Arbitrator within the time prescribed, date on which the Arbitrator may be said to have entered into reference and whether the Award was made within the statutory time period of 4 months from such entering into reference or not.

Issues: (1) Whether the arbitral Award was granted without requisite jurisdiction being beyond the period of 4 months from the date of entering upon reference.

(2) Whether there was no misconduct of the Arbitrator in proceeding ex-parte against the Respondent as there could not have been any confusion as to who was the Arbitrator.

Held: Even though there were divergent views on the proposition as to when can an Arbitrator be said to have entered upon reference, the pre-dominant legal opinion of the Courts appeared to be that the Arbitrator is said to have entered upon reference when he had applied his mind to the facts of the case and not when he assumed the office of an Arbitrator or did any of the ministerial acts connected with his office.

Since, the Arbitrator himself recorded in the Award that he had entered into reference on 1st October, 1981; it was to be assumed that he must have applied his mind to the case on that date

and since the date of entering upon reference was 1st October, 1981, the Arbitrator ought to have passed the Award within 4 months from the said date. However, since the Award was made beyond a period of 4 months, the only recourse available then to the Appellant was under Section 28 of the said Act. The Appellant having not sought specific orders for extension of time under Section 28 of the said Act and curing the defect of the Award being published beyond 4 months, was considered to be fatal to the Appellant's case.

There was agreement with the view of the Single Judge that the possibility of confusion as regards to the Arbitrator appointed was definitely possible in the mind of the Respondent and therefore upheld the decision of the Single Judge to set aside the Award yet preserving the rights of the parties to get their dispute settled through a fresh round of arbitration.

ARBITRATION

The expression 'ready in all respects' in Clause 33 had to be interpreted in the context of readiness to 'discharge' and not to load.

The Great Eastern Shipping Company Ltd. v. Steel Authority of India Ltd.

Citation: 2012 IV AD (Delhi) 655

Decided on: 9th May, 2012

Coram: **S. Muralidhar,** J.

Facts: The petition was filed by the Petitioner challenging the Award passed by a three member arbitral Tribunal in the dispute between the Petitioner and Respondent No.1-SAIL arising out of a Charter Party whereby the Petitioner, as owner, undertook to transport 47000 Metric Tons ('MTs') of bulk coking coal in their vessel M.V. Jag Riddhi from Haypoint Australia to the ports of Visakhapatnam ('Vizag')/Paradip/Haldia in India. The Petitioner had invoked the arbitration clause post-discharge, claiming port demurrage/balance freight that the Charterer i.e. SAIL was required to refund to the Petitioner, Rs.13,47,917 being the sum of excess dispatch was deducted by it from freight. However, the Tribunal had rejected the Petitioner's claim for demurrage and balance freight on the ground that full discharging equipment was not ready when the Notice of Readiness (NOR) was tendered by the vessel, nor was it available for use at the time of berthing so therefore NOR tendered was not a valid notice.

Issue: Whether the NOR tendered in the present case was a bad notice on account of non-functionality of some equipments at the commencement of discharge.

Held: Relying on ***Compania De Naviera Nedelka S.A. v. Tradax International S.A. (The "Tres Flores") [(1973) 2 LLR 247]***, wherein it was held that before a ship could properly give notice that she was ready to load she must at that time be in fact ready to load and a NOR that the ship will be ready to load at some future time was a bad notice, the law as explained in ***Tres Flores***, was however required to be understood in the context of a ship where it was possible to inspect the actual readiness of the ship before loading commenced. Between dates when the NOR was given and the time that the ship berthed, there was no inspection done to show that the vessel was not ready to discharge cargo when NOR was issued.

Further, the expression 'ready in all respects' in Clause 33 had to be interpreted in the context of readiness to 'discharge' and not to load. Merely because some of the equipments were non-functional at the commencement of discharge did not necessarily mean that they were non-functional even at the time when the NOR was served. 50% of the cargo was able to be discharged and a pro rata discount had been given as regards lay time. Also, there was nothing placed on record before the Tribunal, by the Charterer, to show that on the date of the issuance of the NOR by the master of the vessel, none of the equipments on board were working, therefore, it was erroneous on the part of the Tribunal to have concluded that the NOR issued in this case was not valid.

Consequently, the Tribunal's conclusion that when the NOR was issued, the ship was not 'ready in all respects' was not based on any evidence but on a conjecture and suffered from a patent illegality. Also the Tribunal had erroneously observed that the Petitioner gave a *pro rata* reduction in lay time even prior to ship berthing at the port when in fact the time sheet showed to the contrary. The inescapable conclusion therefore was that the Award of the Tribunal was based on a misreading of the documents on record and hence, in the circumstances, the rejection by the Tribunal of the Petitioner's claim for demurrage and balance freight could not be sustained in law. The Award was, therefore, set aside.

ARBITRATION

Arbitration- Appointment of the Arbitrator- The post of the Projects Director did not stand abolished in the absence of a Projects Director since there was no persona designata and the Chairman cum Managing Director was fully empowered to exercise all powers vested in the Projects Director and the power to appoint an Arbitrator.

Reunion Engineering Co. Private Ltd. v. M/S. NBCC Limited

Citation: 2012 (3) Arb.LR 142 (Delhi)

Decided on: 16th May, 2012

Coram: Acting Chief Justice, **Sanjay Kishan Kaul**, Rajiv Shakdher, JJ.

Facts: The Appellant filed the petition challenging the order of the Single Judge, which dismissed the objection raised by the Appellant qua the appointment of the Arbitrator in the second round of arbitration between the parties, on the specific ground that the agreement between the parties envisaged arbitration 'either before the Projects Director, NBCC or before a person appointed by him' and thus the appointment of the Arbitrator by the Chairman-cum-Managing Director (CMD) in the absence of any person holding the post of the Projects Director, NBCC was not permissible.

Issue: Whether in the absence of an incumbent in the post of the Projects Director, the CMD of NBCC was empowered to exercise the powers of a Projects Director, (including the power to appoint an Arbitrator) by taking recourse to the said Office Order.

Held: What was in dispute was not that there was a *persona designate*, i.e., a named person, to be appointed as an Arbitrator but that there was only designation of an authority, who was to arbitrate itself or to refer the disputes to arbitration to a person to be so appointed. Thus, in other words, any person holding that particular post of the Projects Director would have been the designated authority required to arbitrate or appoint an Arbitrator in terms of Clause 36. Through an Office Order, the CMD had decided and directed that all the powers that were vested in the Projects Director (Overseas Projects) shall henceforth be exercised by the CMD himself. Further, in pursuance of the 124th Meeting of the Board of Directors of the Respondent, the CMD was authorised to depute any person including himself for the projects at Iraq and to any other place outside Iraq as were considered necessary by him for the beneficial execution of works in Iraq.

There was, thus, an absolute power conferred on the CMD and the CMD issued the Office Order in pursuance of such powers conferred on him by the resolution of the Board of the Respondent.

While further observing that the post of the Projects Director did not stand abolished but at the relevant stage of time no one was occupying the said post, the plea of the Appellant that such a situation would trigger the second part of Clause 36 i.e., that there was no arbitration agreement between the parties was rejected. In view of the Office Order, the CMD of the Respondent was empowered to exercise all powers of the Projects Director including the power to appoint an Arbitrator and thus the appointment of Shri. A.K. Palit was not defective in any manner. The reference was disposed of accordingly.

CIVIL LAW

CIVIL LAW

In international transactions, losses accrued as a result of currency exchange fluctuations cannot be restituted in the absence of a specific provision allowing conversion of currency.

PEC Limited v. Thai Maparn Trading Company Limited

Citation: 2012 II AD (Delhi) 446

Decided on: 23rd January, 2012

Coram: **S. Muralidhar**, J.

Facts: During the pendency of arbitral proceedings between the two parties with the GAFTA Arbitrators in London that was ultimately awarded in favour of PEC, another agreement was entered into for the supply of Thai long rice. The repatriation of monies payable under the L/C with the SBI to Thai Marpan, was stayed by an order of this Court for enforcement of the GAFTA arbitral Award whereby Thai Marpan was ordered to furnish security to satisfy the Award. However, this order was subsequently vacated, its basis having ceased to exist when the GAFTA Award was reversed in appeal by an order of the Supreme Court. The money was repatriated to Thai Marpan in US Dollar as a result of which, interest and the amount received was more than the bill of ladings due to the depreciation of the value of the US Dollar. Subsequently because, the US Dollar had suffered depreciation of value, conversion of the said payment in Thai Baht entailed financial loss by way of currency loss due to the foreign exchange fluctuation. Thus, Thai Marpan Company filed an application under Section 144 read with Section 151 of the CPC to pay Thai Marpan an amount of US$ 827,897.80 payable to them under a Letter of Credit (L/C) for the loss that occurred on account of fluctuations in foreign currency on the ground that it should be restituted to the position it would have been in, if this Court had not passed the order staying the repatriation of the monies.

Issues: (1) Whether the application under Section 144 was maintainable with respect to losses due to foreign exchange fluctuations.

(2) Whether the Respondent was entitled to restitution for the alleged loss suffered by it as a result of the fluctuation in the rate of foreign exchange.

Held: While rejecting the objections to the maintainability of the present application, it was observed that since the repatriation of monies payable to the Respondent-Thai Marpan did not take place until after the Supreme Court vacated the order of the Single Judge requiring Thai

Maparn to furnish security as well as the order of the Division Bench modifying it, one of the essential conditions for maintaining an application under Section 144 stood satisfied and the application was thus maintainable.

However, as pertaining to the question as to whether the Respondent was entitled to restitution for the alleged loss suffered by it as a result of the fluctuation in the rate of foreign exchange, the Court observed that in the instant case the contract between the parties was denominated only in US Dollar and there was no assurance that Thai Marpan would be paid in Thai Baht at the foreign exchange rate prevalent on a date five days after the production of the Bill of Ladings to SBI. There was also no assurance that the contract or any document incidental to the contract would be paid in a currency other than US Dollar, irrespective of what the prevalent exchange rate might have been. As also the Petitioner had fixed deposited an amount to cover the exchange rate fluctuation loss, the Court found it difficult to entertain the prayer of Thai Marparn for a direction to PEC to compensate Thai Maparn for the alleged loss in view of the fluctuation in the foreign currency. The application was accordingly dismissed.

CIVIL LAW

The Court is duty bound to see that if a party had been harmed by mistake of Court, he be restored to the position that he was occupying but for such mistake.

Amit Jain v. Harvinder Kaur

Citation: 187 (2012) DLT 146

Decided on: 30th January, 2012

Coram: **Gita Mittal**, J.

Facts: In the review petition, the Defendant, in the original suit, sought review and recall of the order dated 5th August, 2011 of this Court whereby an ad interim ex-parte injunction was granted to the Plaintiff against the Defendant restraining it from transferring, alienating, parting with possession or dealing with the suit property in any manner, until the final disposal of the suit.

The Plaintiff filed a suit for specific performance of contract as well as a decree for permanent prohibitory injunction against the Defendant pursuant to an agreement to sell executed between them for sale of the suit property by the Defendant to the Plaintiff. It was the Plaintiff's case that the Defendant, after taking part payment of the consideration, was trying to avoid fulfillment of her contractual obligation towards the Plaintiff under the agreement. The Court after a preliminary hearing of the plaint directed the parties to mediation as also kept the filing of the written statement in abeyance during the pendency of the mediation. However, while granting interim injunction to the Plaintiff, the Court overlooked its own earlier order specially interdicting the filing of the written statement by the Defendant and recorded that no written statement had been filed by the Defendant. The injunction thus granted to the Plaintiff on the ground of non-filing of the defence by the Defendant, became the subject matter of the present review petition.

Issue: Whether the non-filing of the written statement on part of the Defendant was justifiable and the injunction granted by the Court based on such non-filing thus erroneous.

Held: It was the bounden duty of this Court to see that if a party had been harmed by mistake of the Court, he should be restored to the position that he was occupying but for such mistake and

that it was trite that there was no higher principle for the guidance of the Court than the one that no act of the Court should harm any litigant.

Because the directions keeping the filing of the written statement in abeyance, completely escaped the notice of the Court while passing the order on 5th August, 2011 and because the same was also not pointed out by or on behalf of the Plaintiff either, it was the non-filing of the opposition to the suit and the application that weighed with the Court in passing the order allowing the Plaintiff's application and granting him an *ad interim* injunction against the Defendant. This was a clear case of mistake of the Court inasmuch as it had failed to appreciate its own directions while passing adverse orders against the Defendant whose actions were merely in keeping with the said directions.

The Plaintiff or his counsel had failed to disclose to the Court that mediation proceedings had been underway between the parties at the time as also it had failed to bring to the Court's notice, its own order directing the filing of the written statement of the Defendant in abeyance until the mediation concluded. The Plaintiff as well as his counsel, an officer of the Court, were duty bound to make an honest and complete disclosure while appearing before the Court and that the order of injunction would not have been passed had the factum with regard to the directions keeping the filing of the written statement in abeyance as well as the pendency of the mediation been brought to the notice of the Court.

Thus, the finding that the order granting interim injunction to the Plaintiff, suffered from errors apparent on the face of the record, the petition filed by the Defendant was allowed while recalling the order and directing the interim application filed by the Plaintiff to be listed for fresh directions.

CIVIL LAW

Mere testimony of defence witnesses in absence of any documentary evidence, could not be sufficient to establish the identity of a rightful Claimant.

Shahid Khalil v. Zahid Khalil

Citation: 2012 V AD (Delhi) 92

Decided on: 28th February, 2012

Coram: **A. K. Pathak**, J.

Facts: The joint ownership of Defendant Nos. 1 and 2 in the suit property, was challenged by the Plaintiff, on the ground that as per the registered sale deed, the suit property stood in the name of Shahid Khalil and Zahid Khalil and that he being Shahid Khalil mentioned in the sale deed, was the real joint Owner of the suit property alongwith Defendant No.1, Zahid Khalil and not Defendant No. 2.

The dispute between the parties arose when Defendant No. 2, i.e. Hamid Khalil, in order to grab the suit property, started asserting that he was also known as Shahid Khalil and that the suit property was purchased by their maternal grandmother, in the name of Defendant Nos. 1 and 2. Hence, the suit for declaration, partition, rendition of accounts & permanent injunction, as also for seeking partition of the suit property.

Issue: Whether the Plaintiff, having the *locus standi* to file the instant suit, was entitled to a declaration of joint ownership in the suit property and grant of prayer for partition thereon.

Held: As the suit property had been purchased in the name of Shahid Khalil and Zahid Khalil, the Plaintiff had the requisite *locus standi* to file the instant suit as his name was Shahid Khalil and according to him, the Defendant No. 2 had been falsely claiming himself to be 'Shahid Khalil'.

Furthermore, even though the Defendant No. 2 claimed in his affidavit that his maternal grandmother used to call him 'Shahid' and so had purchased the suit property jointly in his name mentioned as Shahid Khalil and Defendant No. 1, this stand stood completely demolished in

light of the admissions made in his cross-examination as also the lack of any document issued by any Government authority wherein his name may have been mentioned as ‘Shahid Khalil’.

Hence, the name of Defendant No. 2 was ‘Hamid Khalil’ and he was not known by the name of ‘Shahid Khalil’, which was the name of his step-brother, i.e., the Plaintiff. Since the sale deed was jointly in the name of ‘Shahid Khalil’ and ‘Zahid Khalil’, thus, it was held that Plaintiff and Defendant No. 1 were the joint Owners of the suit property and were hence entitled to an equal share. Accordingly, a preliminary decree for partition was also passed in respect of the suit property.

CIVIL LAW

'Issue estoppel' will operate in a case where the highest Court of this country has rendered its findings on a particular issue.

Union of India v. Videocon Industries Ltd.

Citation: 2012 (129) DRJ 396

Decided on: 5th March, 2012

Coram: **Reva Khetrapal**, J.

Facts: By way of the application in a suit for declaration and perpetual injunction instituted by the Plaintiff, an anti-suit injunction was sought by the Plaintiff restraining the Defendant from pursuing a claim filed in the High Court of Justice, Queen's Bench Division, Commercial Court, London, in relation to the issue and matter already finally determined by the Supreme Court of India by its judgment and order between the parties.

The dispute between the parties was pertaining to whether the seat of arbitration was at Kuala Lumpur, Malaysia being the contractual and jurisdictional venue as according to the arbitration clause in the agreement entered into between them or London, where the arbitral proceedings were temporarily shifted as also conducted due to an epidemic having arisen in Malaysia. Whereas, the Plaintiff's challenge to the partial Award passed by the arbitral Tribunal at London was dismissed by the Malaysian High Court and proceedings were directed to continue in London, the Defendant filed simultaneous proceedings in the Supreme Court of India and without informing it, in the London Court as well. Since the Supreme Court negated the contention of the Defendant that the seat of arbitration had shifted to London, the Plaintiff thus requested the Defendant to withdraw the proceedings before the London Court. However, the Defendant refused to agree with the Plaintiff's position that the decision of the Supreme Court of India had "finally and conclusively" decided the relevant issue pending before the English Court, its observations having been merely by obiter. Hence, being aggrieved therefrom, the suit was instituted by the Plaintiff.

Issue: Whether the decision of the highest Court of law in India be allowed to be re-examined by a Court of foreign jurisdiction.

Held: The Plaintiff had consistently contended that the English Courts did not have the jurisdiction to go into the issue of 'juridical seat of arbitration' and cannot assume jurisdiction

which it does not otherwise possess, merely because the Plaintiff participated in the Case Management Conference and filed witness statements in the English Court could not preclude the Plaintiff from filing the suit. In such circumstances, for the Defendant to contend that the Plaintiff voluntarily submitted to the jurisdiction of the English Court would be against the record of the English Court.

Further, as according to the Product Sharing Contract between the parties, the governing law of the arbitration was stipulated to be the Indian Law, according to which, there was no provision in the Arbitration and Conciliation Act, 1996 under which the arbitral Tribunal could change the juridical seat of arbitration which was Kuala Lumpur. Further, the Supreme Court in its judgment had clarified the governing law of the contract, the curial law and the distinction between the seat of arbitration and the venue of arbitration, only with the view that the arbitral proceedings were not stultified, delayed or abandoned, at the behest and with the consent of both the parties. Thus, to render such a judgment susceptible to examination by a Court of foreign jurisdiction with the attendant risk of its overturning the judgment would be against all settled principles of legal jurisprudence relating to international commercial arbitration, including principles governing the comity of nations, and would render otiose the judgment of the highest Court of this land.

Hence, *prima facie*, the initiation of proceedings by the Defendant at London during the pendency of the Special Leave Petition before the Supreme Court of India was unconscionable, vexatious and oppressive and an abuse of the process of law and the Plaintiff's case satisfied the tripartite test of *prima facie* case, balance of convenience and irreparable injury, and thus it was a proper case for the grant of a temporary injunction in favour of the Plaintiff and restraining the Defendant from pursuing its claim in the High Court of Justice, Queen's Bench Division, Commercial Court, London against the Plaintiff.

CIVIL LAW

Section 20, Code of Civil Procedure, 1908- In the absence of a clear cut waiver or the leave of the Court, the Court could not assume jurisdiction in the case where there are multiple Defendants residing outside the jurisdiction of the Court.

Unimers India Limited v. The IFCI Limited

Citation: 2012 (129) DRJ 608

Decided on: 13th April, 2012

Coram: **Manmohan Singh**, J.

Facts: The application was filed by the Defendant No. 3 under Order VII Rule 10 CPC, seeking return of plaint to the Plaintiff for presenting the suit in the proper Court having territorial jurisdiction, on the ground that the Court did not possess the requisite territorial jurisdiction.

Defendant No. 2, having its registered office and all its business at Mumbai, took over the debts of the Plaintiff from Defendant No. 1 by way of an instrument of assignment of debt through its Managing Director i.e. Defendant No. 3. However the Plaintiff, by way of the suit for mandatory injunction, sought a declaration that the purported transfer by way of the deed of assignment was null and void and therefore, the Defendant Nos. 2 and 3 be restrained from taking any action or asserting any rights by virtue of the said deed.

Issue: Whether this Court had jurisdiction to entertain the suit for mandatory injunction filed by the Plaintiff.

Held: An understanding of Section 20, CPC was that if a corporation had its principal office or *situs* or seat at one place and the cause of action arose at the subordinate office situated at another place, then the Court was to assume jurisdiction on the basis of the second part of the fiction, as mentioned in the explanation to the above said provision and the Court could not assume jurisdiction solely on the count that the place of suing was the place where the principal office was situated when there was a subordinate office which was situated at a different territory, where part of cause of action had arisen.

Further, the 'cause of action' as per the facts as purported under Section 20, CPC must essentially have a direct nexus with the complaint or the grievance as stated in the plaint and not

all other facts which may be unrelated to the complaint or grievance but were incidentally related to the case. Hence, merely because the principal office of the corporation existed in Delhi, it did not attract the explanation appended to Section 20 and therefore could not be said to have conferred jurisdiction to this Court.

Thus, the facts like the execution of the contract which actually occurred in Mumbai, the subordinate office of the Defendant No.1 which had executed the contract in fact may be so at the instructions of the Delhi office, was also situated in Mumbai, the payment was effected in Mumbai, the property against which the debentures were secured was situated in Mumbai, were all indicative of the material facts and that the cause of action or the material part of cause of action had therefore arisen in Mumbai. The mere fact of existence of seat of one of the Defendants would not confer any jurisdiction when the Defendant No.1 office was situated at the place where cause of action had arisen. Thus, the application filed by the Defendant no. 3 was allowed and the plaint was returned.

CIVIL LAW

Civil Courts have no jurisdiction to entertain suits raising pleas/objections against measures as taken under Section 13 of the SARFAESI Act.

Punjab National Bank v. Gurjeet Kaur

Citation: MANU/DE/2259/2012

Decision on: 16th April, 2012

Coram: **Indermeet Kaur**, J.

Facts: The petition was filed by the Defendant-PNB against the dismissal of its application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC) by the Trial Court. Under the aforesaid application, PNB had prayed that the suit filed by the Plaintiff-Mrs. Gurjeet Kaur, seeking an injunction against the notice issued by the Bank under the provisions of the SARFAESI Act, 2002 was not maintainable, on the ground that since the notice was issued under Section 13 of the SARFAESI Act, the suit could only be dealt with by the appropriate forum under the SARFAESI Act and not a civil court.

The Plaintiff had filed a suit praying for rendition of accounts and permanent injunction against PNB restraining it from taking possession of the property of the Plaintiff mortgaged against a loan availed by the Plaintiff's deceased husband from PNB.

A suit for rendition of accounts and permanent injunction had been filed by the Plaintiff against PNB. The Plaintiff availed a loan of Rs. 5 lacs from PNB; an equitable mortgage of the property i.e., property bearing No. 29/117-118, IIIrd Floor, West Patel Nagar, New Delhi had been created. It was contended by the Plaintiff that this loan was taken by her husband Mr. Jagjit Singh Grover and this property had not been mortgaged with the bank and that notice issued by PNB be not acted upon.

Issue: Whether a civil court has the jurisdiction to entertain a suit seeking injunction against a notice issued under the provisions of SARFAESI Act.

Held: Section 31(h) of the SARFAESI Act described 'debt' as an amount less than Rs. 1 lac and since the debt amount involved was clearly more than Rs. 5 lacs, it was understood to be outside the definition of 'debt' as under the provision. Relying on ***Mardia Chemicals Ltd. v. Union of India [(2004) 4 SCC 311],*** wherein it was held that civil courts would have no jurisdiction to entertain such pleas/objections that were raised against measures taken under Section 13 of the SARFAESI Act, such objections could then only be dealt with by a forum dealing with the

SARFAESI Act, i.e., the Debt Recovery Tribunal. Hence the suit by the Plaintiff was held to be not maintainable before a civil court and was thus rejected while PNB's petition was allowed.

CIVIL LAW

Pecuniary Jurisdiction- Valuation of suit by the Plaintiff for the purposes of court fee and jurisdiction must prevail.

All India O.B.C. Railway Employees Federation Indian Railways, New Delhi v. Vasudev Yadav

Citation: MANU/DE/2377/2012

Decided on: 18th April, 2012

Coram: **Sanjay Kishan Kaul**, Rajiv Shakdher, JJ.

Facts: The Plaintiff in a suit for permanent injunction challenged the order of the Single judge which concluded that the Plaintiff could not have arbitrarily valued the suit for the purposes of court fee and jurisdiction to bring its case within the jurisdiction of the High Court.

Issue: Whether the court could examine the correctness of the valuation of a suit by the Plaintiff.

Held: It was not open to the Single Judge to form his own opinion with regard to the valuation of the suit and require the Plaintiff to correct his valuation as being arbitrary or unreasonable. The Court could examine the correctness of the valuation given by the Plaintiff if and only when the plaint was shown to have been demonstrably undervalued. Since the undervaluation of the suit was not disputed, the valuation by the Plaintiff both for the purposes of court fee and jurisdiction had to be accepted. The order of the Single Judge was set aside.

CIVIL LAW

Before 'leave to defend' can be granted, the party interested in such grant, is required to satisfy the Court that it has a good defence to claim on merits.

Rinku Aggarwal v. Kanta Kumari

Citation: MANU/DE/2864/2012

Decided on: 27th April, 2012

Coram: **A. K. Pathak**, J.

Facts: Application was filed by the Defendant under Order XXXVII Rule 3(5) of the Code of Civil Procedure, 1908 (CPC) seeking 'leave to defend' the suit filed by the Plaintiff under Order XXXVII CPC against the Defendant for recovery of Rs. 21 lacs along with future interest @ 18% per annum plus costs, on the ground that the cheques in question were taken by the Plaintiff from the Defendant by exercising force and threat, inasmuch as, the cheques were issued towards security.

Issue: Whether the defence taken by the Defendant is plausible in wake of facts & circumstances of the case & whether Defendant is entitled to leave to defend.

Held: Before 'leave to defend' could be granted to the Defendant, she had to satisfy the Court that she had a good defence to claim on merits. Defendant was liable to raise triable issues indicating that she had a fair or *bona fide* or reasonable defence though it may not be positively a good defence. If the Court was of the opinion that the defence raised was frivolous, false or sham, it should refuse leave to defend altogether. Though no strait-jacket formula could be formulated on the issue, however, the Court could entertain a genuine doubt whether the defence was genuine or sham or whether, in other words it raised a triable issue or not. Such an opinion was to be formed by the Court from the pleadings and affidavit of the parties placed before it. Observing that the defence set up by the Defendant, was baseless, frivolous, moonshine therefore, the Defendant was held not entitled to leave to defend the suit.

CIVIL LAW

Order XII Rule 10- Substitution of a company that has taken over another company had to be brought on record during the pendency of a suit and not after the suit had abated.

General Electric Canada Inc. v. National Hydroelectric Power Corporation Limited

Citation: MANU/DE/1896/2012

Decided on: 30th April, 2012

Coram: **S. Muralidhar**, J.

Facts: A contract for the construction of a hydroelectric project over the Ravi river in Himachal Pradesh, was entered into between the Defendant-National Hydroelectric Power Corporation Limited (NHPCL) and three Canadian entities, SNC/ACRES, Marine Industries Ltd. (MIL) and Canadian General Electric Company Limited (CGECL). CGECL changed its name to General Electric Canada Inc. (GEC Inc.). Its assets were later made over to GE Canada vide a Partnership Contribution Agreement (PCA) and conveyance deed. MIL, having changed its name to MIL Group Inc. (MGI) was purchased and acquired by a company called GEC Alstom Electromecanique (GAE) in the year 1991. The Sales and Purchase Agreement (SPA) included, in the assets transferred, MGI's ongoing contracts such including the one with NHPCL.

Strangely MGI sought reference of the disputes to the ICC, Paris in 1994 jointly with GEC Inc. without disclosing either to the arbitral Tribunal or NHPCL, that its assets had been acquired by GAE and that it lacked the *locus standi* to maintain the reference. In 1996, GAE changed its name to GEC Alsthom Energies Inc. (GAEI) which also was not known to the NHPCL at the time. In 1998, GAEI along with another entity amalgamated into GEC Alsthom Canada Inc. (GACI) which in turn changed its name to Alstom Canada Inc. (ACI) in the same year. However, in 2006, vide an Activity Purchase Agreement (APA) the assets of the hydro power activities of ACI were purchased by Alstom Hydro Canada Inc. (AHCI) which later amalgamated into Alstom, the Applicant in the present case.

The application filed under Order XXII Rule 10, Code of Civil Procedure, 1908 (CPC) pertained to a dispute between the Applicants, Alstom and GE Canada (present successors-in-interest) and the Respondent NHPCL, wherein the Applicants claimed that the rights, titles etc. of the original entities had been assigned to them and therefore, their names should be brought on record. The

Respondents however claimed that inasmuch as the purported assignment and devolution of interests took place even before the commencement of the arbitral proceedings, and the said facts were not disclosed at any point in time till the filing of the appeal by NHPCL, the applications under Order XXII Rule 10 CPC were misconceived and an abuse of the process of law.

Issue: Whether the application was maintainable under Order XXII Rule 10, CPC.

Held: The procedure under Order XXII Rule 10 CPC was available only during the pendency of the suit. The remedy under Order XXII Rule 10 CPC could be invoked only till such time that the Award was made a rule of the Court. After that date, the suit could not be said to be 'pending' within the meaning of Order XXII Rule 10 CPC and stood abated. There was no question of entertaining an application under Order XXII Rule 10 CPC. The only option available to such party was to apply for setting aside of the abatement under Order XXII Rule 9(2) CPC accompanied by an application for condonation of delay.

MIL's rights and interests could not be said to be affected by merely changing its name to MGI, however the change was a significant and substantial one when by the SPA, GAE purchased its business including the Chamera project. However, such assignment of rights and interests could not have been made without the consent of NHPCL and was thus for the purposes of Order XXII Rule 10 CPC, not a valid assignment. Furthermore, since on the date of reference of disputes to the ICC, MGI had no right or interest in the disputes arising out of the original contract and the reference could have only been made by GAE; MGI could not have filed the suit against NHPCL. This was too glaring an omission on the part of GAE which did not emerge until applications were filed by the two Applicants and hence, could not be excused.

GE Canada had failed to substitute its predecessor-in-interest GEC Inc. while the arbitral proceedings were still pending. And since the application was filed after the claims/suit had abated, objections under Sections 30 and 33 of the Arbitration Act, 1940 were rejected and the Award was made rule of the Court, it was too late for them to substitute their name for the devolution of interest either.

Since, neither Applicants disclosed the fundamental changes in the constitution of the original parties to the contract, both the applications filed by Alstom and GE Canada were held to be misconceived and liable to be dismissed.

CIVIL LAW

If the personal property of a person was merged with ancestral property acquired by him, into a third property, the third property shall be considered to be a self-acquired property of the person.

Shikha Sharma v. Daljit Singh

Citation: 189 (2012) DLT 695

Decided on: 4th May, 2012

Coram: Pradeep Nandrajog, **Siddharth Mridul**, JJ.

Facts: The Appellants challenged the judgment and decree passed by the Single Judge in a suit for partition, rendition of accounts and permanent perpetual injunction while confining their claim to the Lajpat Nagar shop being the nucleus of the utilization of the ancestral fund, on the ground that the Trial Court had erred in holding that the deceased had carried out the construction from his own funds as it had overlooked the fact that the deceased was only 10 years old at the relevant time.

The dispute between the parties arose when the Respondents asserted rights in the properties of their deceased father through a Will executed by the father in 1972 whereas the Appellants challenged the Will on the ground that it was not the last legal and valid testament executed by their father as also alternatively pleading that even if the Will was executed, it would have operated only with respect to the personal share of their father in the joint family properties.

Issue: Whether the property in question could be said to have been allotted to the deceased in lieu of ancestral property or alternatively, did he blend his personal interests with the joint interests.

Held: Relying on ***Mara v. Nikko [AIR 1964 SC 1821]***, wherein it was held by the Apex Court that in Punjab, where there was a personal property of a person and he had acquired an ancestral property; both of which merged into a third property, the entirety of the third property was to be treated as the self-acquired property of the person concerned, it was held that in Punjab, where land comprised of both ancestral and non-ancestral portions and could not be reasonably separated, they were required to be regarded as non-ancestral.

The entire property of the deceased father was to be treated as a self-acquired property and therefore, the Appellants, who did not challenge the Will produced by the Respondents, were not entitled to any share in said property which had been bequeathed by the deceased in his Will. Hence, the Court agreed with the decision of the Single Judge in dismissing the suit and thus dismissed the appeal as well.

CIVIL LAW

The clause in UCP 600 only defines the status of the branches of a bank in different countries as 'separate entities' and is thus not in conflict with Section 20 (a) of Code of Civil Procedure, 1908.

Tata Motors Limited v. JSC VTB Bank Ltd.

Citation: 2012 (130) DRJ 142

Decided on: 8th May, 2012

Coram: **A.K. Pathak**, J.

Facts: The case involved disposal of applications filed by the Defendant under Order VII Rules 10 and 11 r/w Section 151 Code of Civil Procedure, 1908 (CPC), challenging the jurisdiction of the Court to entertain a suit filed by the Plaintiff under Order XXXVII, CPC for recovery of the amounts regarding unpaid "Letters of Credit" issued by the Defendant.

The payment was to be made by a Joint-Stock Company i.e. 'CJSC Amur', having its registered office in Russia, to the Plaintiff by way of irrevocable letters of credit, for the supply of truck chassis units to Russia. Accordingly, at the instance of CJSC Amur, the Defendant-Russian Bank opened irrevocable letters of credit in Russia. However, the letters of credit, on presentation by the 'advising bank' i.e. Standard Chartered Bank, Mumbai, were returned unpaid on flimsy grounds and despite service of legal notice, the amounts involved in the letters of credit remained unpaid. Hence, the suit was filed wherein taking aid of Section 20(a) of CPC, the ground for invoking the jurisdiction of the Court was that the Russian Bank had a sole branch at New Delhi.

Issue: Whether Delhi Courts have territorial jurisdiction to entertain and try the suit.

Held: Article 3 of the UCP 600, *inter alia*, provided that branches of a bank in different countries were considered to be separate banks; meaning thereby that the Defendant was an independent and separate bank and not a branch of the Russian bank. Further, the general provisions, definitions and articles as contained in UCP being binding upon all the parties thereto, the Plaintiff could not be allowed to contend that the Defendant was a branch of the Russian bank and not an independent entity. The Plaintiff's contention that if the 'cause of action' was necessary to invoke the jurisdiction of subordinate office, it would result in making

Section 20(a) CPC redundant, was rejected. Thus, the Defendant being a separate and independent bank and not being a branch of Russian bank in terms of UCP 600, jurisdiction was not attracted within the meaning of Section 20(a) CPC, since Plaintiff has had no dealing with the Defendant at any stage, neither letters of credit were opened by the Plaintiff nor any payment was to be made by it.

Hence, the Courts at Delhi did not have the requisite territorial jurisdiction to deal with the suits filed by the Plaintiff. Accordingly, the Plaintiff was advised to present the plaints in the Court of competent jurisdiction.

CIVIL LAW

Code of Civil Procedure- Order XXXIX Rule 3A, Rule 4- Court was only required to make an 'endeavour' to dispose of an application within 30 days.

Indian Pilots' Guild v. Air India Ltd.

Citation: MANU/DE/2682/2012

Decided on: 17th May, 2012

Coram: **Sanjay Kishan Kaul**, Rajiv Shakdher, JJ.

Facts: The appeal was filed by the Appellant-Pilots against the order of the Single Judge that granted an *ex-parte* interim injunction in favour of the Respondent-Airline, restraining the Appellant from continuing with its illegal strike or falsely reporting sick or staging demonstrations and disrupting flight schedules, causing inconvenience to passengers and huge financial losses to the Respondent, while posting the matter for hearing for after a period of more than a month. The Appellant challenged the order on three grounds i.e., an adverse order could not have been passed against the Appellant without putting it to notice, the jurisdiction *qua* industrial disputes lay only with the Labour Court under the Industrial Disputes Act, 1947 and the Single Judge could not have posted the matter again after more than thirty days since it being incumbent for the Court to decide an interlocutory application under Order XXXIX Rule 3A of the Code of Civil Procedure, 1908 (CPC) within 30 days.

The dispute between the parties was with regard to the illegal concerted actions of the Appellant including the failure to report for duty, being aggrieved of the action of the Respondent, reserving one-half of its training slots, on the new Boeing 787 aircrafts, for pilots earlier engaged with Indian Airlines, thereby compelling the Respondent to file a suit against the Appellant to restrain it from resorting to illegal strikes and to direct it to report to duty.

Issues: 1) Whether it was incumbent on the Court to dispose of an interim application of ex-parte injunction within 30 days.

2) Whether the adjudication of the present dispute by the Single Judge was without jurisdiction.

Held: It was not necessary that a Court issuing notice, after granting an *ex-parte* order in an interlocutory application, beyond a period of 30 days, would by itself make the order illegal and

that a Court of hearing was only required to make an 'endeavour' to dispose of the interlocutory application within a period of 30 days, more so, given the paucity of judges and inability of the Courts to accommodate the large number of urgent matters, coupled with the unwillingness of the lawyers to restrict their arguments to a confined period of time.

Had the matter been posted for any date before the expiry of 30 days, the date would have fallen within the period of vacations and thus the order could not be held to be erroneous on this ground. On the question of whether the Appellant could have moved the appeal without first moving an application under Order XXXIX Rule 4, CPC, it was opined that in no circumstances, could a litigant be allowed to approach the appellate Court by way of an appeal before exhausting the alternate remedy available to it under Order XXXIX Rule 4 CPC.

An order, even if it were without jurisdiction, could not be ignored by those towards whom it was directed and that no litigant could avail any discretionary remedy from the Court by willfully and flagrantly disobeying the orders of the Court. Since, the Appellant had continued to not report to work in spite of the order, it was not inclined to entertain the appeal with the liberty to the Single Judge to institute proceedings against the Appellant under the Contempt of Courts Act, 1971. The appeal was accordingly dismissed.

Where the seller received the sale consideration in pursuance of the agreement to sell and delivered the possession to the purchaser, the purchaser would have interest in the property within the meaning of Section 202 of the Indian Contract Act, 1882.

Hardip Kaur v. Kailash

Citation: 193 (2012) DLT 168

Decided on: 18th May, 2012

Coram: **J.R.Midha**, J.

Facts: The Appellant, having sold an immovable property to Defendant No.1 on the basis of an Agreement to sell, irrevocable General Power of Attorney, Receipt, Indemnity bond, Will and Affidavit, filed the appeal challenging the dismissal of her suit for possession and *mesne* profits, by the Trial Court, on the ground that 1) the cancellation of the Power of Attorney was not barred by Section 202 of the Indian Contract Act, 1872 having been executed without any consideration and 2) the agreement to sell did not create any interest in or charge on the suit property in view of Section 54 of the Transfer of Property Act, 1882.

The dispute between the parties arose when the Appellant, having sold the suit property to the Defendant No.1 and having handed over the vacant and peaceful possession after receiving the sale consideration in full, instituted a suit for possession and *mesne* profits on the ground that the Defendant No. 1 had illegally constructed a third floor and did not obtain a sale permission from the Appellant before selling off the property to Defendants Nos. 2 and 3 and also on the ground that the Appellant had cancelled the General Power of Attorney and Will. The suit was however dismissed by the Trial Court on the ground that the Appellant's suit was barred by Section 53A of the Transfer of Property Act and the Appellant was stopped from going back on the agreement to sell. The Trial Court also observed that the Plaintiff had no right to cancel any document such as the General Power of Attorney which was already agreed to be irrevocable between the parties.

Issues: (1) Whether the General Power of Attorney was irrevocable under Section 202 of the Indian Contract Act.

(2) Whether the possession of the purchaser was protected under Section 53A of the Transfer of Property Act.

Held: The Power of Attorneys executed for a consideration and which, created an interest not necessarily of ownership or title but an advantage, benefit or a legally enforceable right, in the property, could not be revoked or cancelled under Section 202 of the Contract Act. This was because the Power of Attorney had been conferred not for the benefit of the seller of the property but for the benefit of the agent representing the purchaser so as to facilitate the execution of the sale deed in favour of the purchaser. Therefore, even if an agreement to sell 'of itself' did not create any interest in the property under Section 54 of the Transfer of Property Act, the agreement along with the payment of the entire sale consideration, handing over of the possession, execution of the Receipt, Affidavit, Will, Indemnity Bond and irrevocable General Power of Attorney created "an interest in the property" for the purchaser, within the meaning of Section 202 of the Contract Act.

The General Power of Attorney satisfied all the conditions of irrevocability and hence the Plaintiff had no right to terminate the said Power of Attorney which was valid, legal and subsisting. The Defendants were held to be protected by Section 53A of the Transfer of Property Act thereby making the Plaintiff not entitled to the recovery of possession of the suit property.

The agreement "of itself" may not create any interest in the property but the words "an interest in property which forms the subject matter of the tenancy" in Section 202 of the Contract Act are of wider amplitude than the words "an interest in or charge on such property" in Section 54 of the Transfer of Property Act and in pursuance of the agreement to sell the purchaser would have interest in the property within the meaning of Section 202 of the Contract Act.

The Court further held that the purchaser had an interest in the immovable property for the purposes of Section 202 of the Contract Act, if not for the purposes of Transfer of Property Act and the Registration Act, 1908.

This Court dismissed the appeal holding the Power of Attorney to be irrevocable under Section 202 of the Contract Act and the purchaser's possession was protected under Section 53A of the Transfer of Property Act. The Court examined the entire law on the subject and laid down the following principles:

(i) The agreement to sell 'of itself' may not create any interest in the property under Section 54 of the Transfer of Property Act but the agreement along with the payment of the entire sale consideration, handing over of the possession, execution of the Receipt, Affidavit, Will, Indemnity Bond and irrevocable General Power of Attorney created "an interest in the property" within the meaning of Section 202 of the Contract Act.

(ii) The words "an interest in property which forms the subject matter of the agency" in Section 202 of the Contract Act are of wider amplitude than the words "an interest in or charge on such property" in Section 54 of the Transfer of Property Act. Where the seller has received the sale consideration in pursuance of the agreement to sell and has delivered the possession to the purchaser, the purchaser would have interest in the property within the meaning of Section 202 of the Contract Act.

(iii) The Power of Attorney has been conferred not for the benefit of the Plaintiff but for the benefit of the agent representing the purchaser and not as representing the principal and, therefore, it is irrevocable. The reason to appoint the son and nominee of the purchaser, obviously was that the attorney was regarded as a person interested in the purchaser rather than in the Plaintiff whose interest was opposed to that of the purchaser. It is only in law that the attorney became an agent of the Plaintiff. But this agency was only with a view to serve the purpose of the purchaser. His interest in this transaction was the same as that of the purchaser. It was, therefore, the interest of the attorney that the property which was the subject matter of the agency should be conveyed by the Plaintiff to the purchaser.

(iv) The Power of Attorney was granted only because an agreement to sell was entered in favour of the purchaser. The attorney no less than the purchaser was, therefore, interested in the subject matter of the agency, namely, the suit property. If the agency was to be terminated, prejudice would have been caused to the interest not only of the purchaser but also of the attorney.

(v) The Agreement to sell, General Power of Attorney, Receipt, Affidavit, Will and Indemnity Bond executed contemporaneously constitute one transaction and they have to be read and interpreted together as if they are one document. The true nature of the transaction between the parties was the agreement to transfer the suit property by the Plaintiff to Defendant No.1. There was no clause in any of the documents that the Plaintiff could claim back the possession of the suit property in any situation. Rather, the Plaintiff had agreed not to cancel/revoke any document and not to claim back the possession under any circumstances. The Plaintiff was, therefore, not entitled to recover the possession of the suit property.

(vi) The Plaintiff had argued that the purchaser and her attorney were two different persons in the eyes of law. This may be so. But their interests were identical. It could not be said that the attorney had no interest in the property which was the subject matter of the agency. The interest did not mean ownership or title in the immovable property. It meant an advantage or a benefit or a legally enforceable right. The Power of Attorney was executed only to facilitate the execution of the sale deed in favour of the purchaser and, therefore, the attorney was interested in the subject matter of the agency, namely, the suit property.

(vii) The object of giving validity to a Power of Attorney given for consideration even after death of the executants is to ensure that entitlement under such Power of Attorney remains because the same is not a regular or a routine Power of Attorney but the same had elements of a commercial transaction which could not be allowed to be frustrated on account of death of the executant of the Power of Attorney.

(viii) The purchaser would though not be the classical owner of the suit property as would an owner be under a duly registered sale deed, but surely he would have better rights/entitlement of possession of the suit property than the Plaintiff. A right to possession of an immovable property arises not only from a complete ownership right in the property but having a better title or a better entitlement/right to the possession of the property qua the person who is in actual physical possession thereof.

(ix) The General Power of Attorney dated 5th June, 1989 was irrevocable in view of Section 202 of the Contract Act. The Plaintiff, therefore, had no right to terminate the said General Power of Attorney. The General Power of Attorney was legal, valid and subsisting. The revocation of the General Power of Attorney by the Plaintiff was, therefore, of no consequence.

(x) The Defendants were protected by Section 53A of the Transfer of Property Act and, therefore, the Plaintiff was not entitled to the recovery of possession of the suit property.

(xi) The mere fact that the Defendants did not file a counter claim or suit for specific performance could not lead to a conclusion that they had given up all their rights in the suit property. It could, at best, be said that the Defendants had lost the opportunity of perfecting their title but it would not entitle the Plaintiff to claim possession.

CIVIL LAW

Principles relating to the decree for possession under Order XII Rule 6 of the Code of Civil Procedure in a suit filed by the landlord against the erstwhile tenant upon determination of lease by notice under Section 106 of the Transfer of Property Act, 1882

Sky Land International Private Limited v. Kavita P. Lalwani

Citation: MANU/DE/2203/2012

Decided on: 25th May, 2012

Coram: **J.R.Midha**, J.

Facts: The Trial Court passed a decree for possession under Order XII Rule 6 of the Code of Civil Procedure against an erstwhile tenant whose lease had expired by efflux of time and was also terminated by a notice of termination under Section 106 of the Transfer of Property Act. The relationship of landlord and tenant as well as the expiry of the registered lease deed by efflux of time was admitted. The erstwhile tenant challenged the decree for possession on the ground that the notice of termination was not received. The challenge was also made to the title of the landlord.

Issues: (1) Whether the tenant can be permitted to resist the decree for possession under Order XII Rule 6 of the Code of Civil Procedure on the ground that he will prove during the trial that he has not received the notice under Section 106 of the Transfer of Property Act.

(2) Whether the tenant can dispute the title of his landlord in view of estoppel under Section 116 of the Evidence Act.

(3) Whether the denial of the title of the landlord by the tenant amounts to forfeiture of lease under Section 111(g)(2) of the Transfer of Property Act.

(4) Whether the erstwhile tenant can be permitted to contest such suits by merely paying the agreed rent to the landlord.

Held: In such matters, the Trial Court may examine the erstwhile tenant on the first date of hearing under Order X of the Code of Civil Procedure or Section 165 of the Indian Evidence. Further, the erstwhile tenant should deposit the *ad-hoc* amount equivalent to market rent of the subject property to continue the possession during the pendency of the proceedings. On examination of the relevant judgments in this regard, the following principles laid down:-

(i) Upon expiry of the term of the lease or on termination of the monthly lease by a notice to quit, the lessee must vacate the property on his own and not wait for the lessor to bring a suit where he can raise all kinds of contests in order to profit from Court delays.

(ii) Expiry of lease by efflux of time results in the determination of the relationship between the lessor and the lessee and no notice of determination of the lease is required. Mere acceptance of rent by the landlord from the tenant in possession after the lease has been determined either by efflux of time or by notice to quit would not create a tenancy so as to confer on the erstwhile tenant the status of a tenant or a right to be in possession.

(iii) Notice of termination of lease under Section 106 of the Transfer of Property Act sent by registered post to the tenant is deemed to be served under Section 27 of the General Clauses Act, 1897 and Section 114 of the Indian Evidence Act, 1872.

(iv) The object of the termination notice under Section 106 of the Transfer of Property Act is to communicate the intention of the landlord that he wants the premises back and to give 15 days' time to vacate. Such notice is not a pleading but a mere communication of the intention of the recipient. Such notice is to be liberally construed as the tenant's only right is to get notice of 15 days to vacate. The tenant is under a statutory obligation to vacate the subject property on the expiry of 15 days of the notice.

(v) A suit for ejectment is different from a title suit for possession against a trespasser. In a suit for possession against a trespasser, title can be in dispute but in a suit for ejectment against an erstwhile tenant, ordinarily there is no dispute of title as the tenant is estopped from denying the landlord's title under Section 116 of the Indian Evidence Act. The dispute is generally on two counts; one, about the assent to continue after the expiry of the fixed term lease by efflux of time and second, about the valid termination in case of monthly lease. The tenant resisting the claim for possession has to plead with sufficiently detailed pleadings, particulars and documents why he must not be ejected and what right he has to continue in possession. There is really nothing else to be tried in such a suit. A suit of this nature can ordinarily be decided on first hearing itself either on the pleadings and the documents or, if need be, by examining the parties under Order X of the Code of Civil Procedure or Section 165 of the Indian Evidence Act.

(vi) A suit for ejectment of a lessee is not a type of a case where by forging a postal receipt and falsely claiming the issue of the notice to quit, the plaintiff would gain any particular advantage for he could have always served a notice and filed a suit three weeks later. On the other hand, by serving a self-serving denial, the defendant seeks to get an advantage of dragging the proceedings and continuing to enjoy the property without having to pay the current market rent. Having regard to the common course of natural events, human conduct and probabilities, if a notice which can be issued and served again without loss of opportunity, the probability that a person would file a fake proof of sending is nil. On the other hand, if a notice is of a type which had to be served prior to an event that has already occurred, and by its very nature cannot be

remedied by a fresh notice, there may be a possibility of it being faked such as a notice exercising the option to renew lease before its expiry. In that case, the Court will look at it differently.

(vii) The pleadings are the foundation of litigation and must set-forth sufficient factual details. Experience has shown that all kinds of pleadings are introduced and even false and fabricated documents are filed in civil cases because there is an inherent profit in continuation of possession. In a suit for ejectment, it is necessary for the defendant to plead specifically as to the basis on which he is claiming a right to continue in possession. A defendant has to show a subsisting right to continue as a lessee. No issue arises on vague pleadings. A vague denial of the receipt of a notice to quit is not sufficient to raise an issue. To rebut the presumption of service of a notice to quit, the defendant has to plead material particulars in the written statement such as where after receiving the plaint and the documents, the defendant has checked-up with the Post-Office and has obtained a certificate that the postal receipt filed by the plaintiff was forged and was not issued by the concerned Post Office.

(viii) A self-serving denial by the defendant and more so in these types of cases, cannot hold back the Court from exercising its jurisdiction to decree a suit under Order XII Rule 6 of the Code of Civil Procedure. Raising a plea of non-receipt of notice to quit and seeking an issue on it is obviously to drag on the litigation and keep on holding to the suit property without having to pay the current market rentals, is not sufficient to raise an issue and, therefore, liable to be rejected.

(ix) If such a plea of denial of notice is treated as sufficient to non-suit the plaintiff, the plaintiff will have serve a fresh notice to quit and then bring a fresh suit where again the defendant would deny the receipt of notice to seek an issue and trial. The process would go on repeating itself with another notice, in fact, repeat ad-infinitum and in this manner, the defendant will be able to effectively stay indefinitely till the plaintiff settles with him for a price. The Court cannot remain a silent spectator and allow the abuse of process of law. The eyes of the Courts are wide enough to see the truth and do justice so that the faith of the people in the institution of Courts is not lost.

(x) In view the amendment brought about to Section 106 of the Transfer of Property Act by Act 3 of 2003, no objection with regard to termination of tenancy is permitted on the ground that the legal notice did not validly terminate the tenancy by a notice ending with the expiry of the tenancy month, as long as a period of 15 days was otherwise given to the tenant to vacate the property. The intention of Legislature is therefore clear that technical objections should not be permitted to defeat the decree for possession of tenanted premises once the tenant has a period of 15 days for vacating the tenanted premises.

(xi) A suit for possession cannot be dismissed on the ground of invalidity of notice of termination because the tenant is only entitled to a reasonable time of 15 days to vacate the

property. Therefore, even if the notice of termination is held to be invalid, service of summons of the suit for possession can be taken as notice under Section 106 of the Transfer of Property Act read with Order VII Rule 7 of the Code of Civil Procedure but in that event the landlord would be entitled to mesne profits after the expiry of 15 days from the date of the receipt of summons and not from the date of notice of termination.

(xii) The purpose of Order XII Rule 6 CPC is to give the plaintiff a right to speedy judgment. The thrust of amendment of Order XII Rule 6 is that in an appropriate case a party on the admission of the other party can press for judgment as a matter of legal right. If a dishonest litigant is permitted to delay the judgment on the ground that he would show during the trial that he had not received the notice, the very purpose of the amendment would be frustrated.

(xiii) Under Section 116 of the Indian Evidence Act, the lessee is estopped from denying the title of the transferee landlord. Section 116 of the Indian Evidence Act provides that no tenant of immovable property shall, during the continuance of the tenancy, be permitted to deny the title of the landlord meaning thereby that so long as the tenant has not surrendered the possession, he cannot dispute the title of the landlord. Howsoever, defective the title of the landlord may be, a tenant is not permitted to dispute the same unless he has surrendered the possession of his landlord.

(xiv) A lease of a immovable property is determined by forfeiture in case the lessee renounces his character by setting up a title in a third person. The effect of such a disclaimer is that it brings to an end the relationship of landlord and tenant and such a tenant cannot continue in possession. Section 111(g)(2) of Transfer of Property Act, 1882 is based on public policy and the principle of estoppel.

(xv) There is a flood of litigation unnecessarily burdening the Courts only because obdurate tenants refuse to vacate the tenanted premises even after their tenancy period expires by efflux of time or the monthly tenancy has been brought to an end by service of a notice under Section 106 of Transfer of Property Act, 1882. It has become quite common for the tenants whose tenancy has been terminated to continue the occupation to drive the landlords to file suits for possession and mesne profits and thereafter raise false claims and defences to continue the possession of the premises. The motivation of the tenant to litigate with the landlord is that he wants to continue the occupation on payment of rent fixed years ago. The continuation of possession in such cases should therefore be permitted upon payment of market rent. In that case, inherent intent of the unscrupulous tenant to continue frivolous litigation would be reduced to a large extent.

(xvi) In all proceedings relating to possession of an immovable property against an erstwhile tenant, the Court should broadly take into consideration the prevailing market rentals in the locality for similar premises and fix adhoc amount which the person continuing in possession must pay or deposit as security. If such amount, as may be fixed by the Court, is not paid or deposited as security, the Court may remove the person and appoint a receiver of the property or

strike out the claim or defence. This is a very important exercise for balancing equities. The Courts must carry out this exercise with extreme care and caution while keeping pragmatic realities in mind. This is the requirement of equity and justice.

(xvii) In the last 40 years, a new creed of litigants have cropped up who 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.

(xviii) False claims and defences are serious problems with real estate litigation, predominantly because of ever escalating prices of the real estate. Litigation pertaining to valuable real estate properties is dragged on by unscrupulous litigants in the hope that the other party will tire out and ultimately would settle with them by paying a huge amount. This happens because of the enormous delay in adjudication of cases in our Courts. If pragmatic approach is adopted, then this problem can be minimized to a large extent.

(xix) Certain tenants, in this country, consider it an inherent right not to vacate the premises even after either expiry of tenancy period by efflux of time or after their tenancy is terminated by means of a notice under Section 106 of Transfer of Property Act, 1882. Such tenants feel that they ought to vacate the tenanted premises only when the Courts pass a decree for possession against them. The tenants who illegally continue to occupy the tenanted premises by raising frivolous defences should be appropriately burdened with penal costs.

(xx) Dishonest and unnecessary litigations are a huge strain on the judicial system. The Courts are continued to be flooded with litigation with false and incoherent pleas and tainted evidence led by the parties. The judicial system in the country is choked and such litigants are consuming courts‘ time for a wrong cause. Efforts are made by the parties to steal a march over their rivals by resorting to false and incoherent statements made before the Court.

(xxi) Truth should be the guiding star in the entire judicial process and it must be the endeavour of the court to ascertain the truth in every matter. Truth is the foundation of justice. Section 165 casts a duty on the Judge to discover truth to do complete justice and empowers him to summon and examine or recall and re-examine any such person if his evidence appears to be essential to the just decision of the case. The Judge has to play an active role to discover the truth. He is expected, and indeed it is his duty, to explore all avenues open to him in order to discover the truth and, to that end, question witnesses on points which the lawyers for the parties have either overlooked or left obscure or willfully avoided. The Court can also invoke Section 30 of the Code of Civil Procedure to ascertain the truth.

(xxii) Unless the Courts ensure that wrongdoers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations. In order

to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that the Courts' scarce and valuable time is consumed or more appropriately wasted in a large number of uncalled for cases. 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, ultimately they must suffer the costs. Despite settled legal positions, the obvious wrong doers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that the 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.

(xxiii) Imposition of actual, realistic or proper costs and or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. The cost should be equal to the benefits derived by the litigants, and the harm and deprivation suffered by the rightful person so as to check the frivolous litigations and prevent the people from reaping a rich harvest of illegal acts through Court. The costs imposed by the Courts must be the real costs equal to the deprivation suffered by the rightful person and also considering how long they have compelled the other side to contest and defend the litigation in various courts. In appropriate cases, the Courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings. The parties raise fanciful claims and contests because the Courts are reluctant to order prosecution.

This Court dismissed the appeal and imposed cost of `2,00,000/- for frivolous litigation.

COMPANY LAW

COMPANY LAW

Investigation under Section 11 C of the Securities and Exchange Board of India Act, 1992 is an inquisitorial and not an adjudicatory exercise.

DLF Ltd. v. Securities and Exchange Board of India

Citation: 186 (2012) DLT 145

Decided on: 3rd January, 2012

Coram: **Vipin Sanghi**, J.

Facts: The petition sought quashing of an order passed by the whole time member of the Securities and Exchange Board of India (SEBI), whereby the SEBI had been directed to investigate, into the allegations and complaints made by Respondent No. 2 against the Petitioner and Respondent No. 3, and to proceed in accordance with law, if any violations were found upon investigation. The ground of challenge was that the procedure adopted by SEBI was in violation of the principles of natural justice in as much as the Petitioner and Respondent No. 2 were heard separately without affording an opportunity to the Petitioner to meet the case of Respondent No. 2. Also SEBI had looked into a host of other documents which did not form part of the original complaints made by Respondent No. 2. Further, the act of ordering investigation under Section 11 C of the SEBI Act, 1992 (SEBI Act) seriously impinged upon the reputation and good name of the Petitioner and thus could not have been ordered lightly.

Issue: Whether the scope of enquiry under Section 11 C of the SEBI Act allowed SEBI to direct an investigation.

Held: The Petitioner did not have a right to hear the submissions of the Respondent No. 2, and it had only the right of making its own submissions before SEBI. The limited enquiry conducted by SEBI at this stage was merely to examine whether or not the facts disclosed the entertainment of a reasonable belief to cause an investigation under Section 11C of the SEBI Act, which was an inquisitorial and not an adjudicatory exercise conducted by SEBI.

There was no impediment cast on SEBI by the SEBI Act preventing it from looking into evidence that Respondent No. 2 may rely upon in support of its complaint earlier made while considering whether to order an investigation. SEBI, being the sole authority created by law to deal with complex issues which arose in the management and supervision of the securities

markets, any such restrictions, artificially introduced would denude SEBI of its powers and hamper its functioning.

The belief entertained by SEBI had a rational connection with the reasons given by it in the order. The Petitioner's defence was not substantiated. Hence the writ petition was dismissed with costs.

COMPANY LAW

Section 560(6) of the Companies Act, 1956- The Company Court has discretion to restore the Company's name to the register of Companies.

Siddhant Garg v. Registrar of Companies

Citation: 187 (2012) DLT 501

Decided on: 8th February, 2012

Coram: **Manmohan**, J.

Facts: The petition was filed under Section 560(6) of the Companies Act, 1956 (Act) seeking restoration of the name of the Respondent No. 2-Company in the register maintained by the Respondent No. 1-Registrar of Companies. It was stated in the petition that Petitioners had worked as consultants to the Respondent No. 2 Company but they were yet to receive their outstanding salaries. The Company's name had been struck off from the Register on the application of the ex-management under the Simplified Exit Scheme. The Petitioners alleged that the Respondent No. 2 Company had a foreign arbitral Award in the Petitioners' favour but the Respondent No. 2 Company was not taking appropriate steps for its enforcement. The Court also heard the foreign company on merits against which the arbitral Award was passed while deciding the petition.

Issue: Whether the Court could allow restoration of Company's name given the scope of Section 560 (6) of the Act.

Held: The discretion placed on the Court under Section 560(6) of the Act to restore a company must be exercised after looking at all the circumstances of the case. A petition under Section 560(6) needed to be allowed unless there were special circumstances against restoration and it should be the Court's endeavour to support revival of a company rather than otherwise.

The expression 'just' as used in Section 560(6) of the Act would mean that it was fair and reasonable from a commercial point of view. The concept of 'justness' was required to be examined not exclusively from the prospective of a creditor or a shareholder or a debtor, but from the prospective of the society as a whole. Once the Court was convinced that it was just to restore the company, then to refuse the relief because some third party may be inconvenienced by it would be harsh. If the Respondent No. 2 Company was restored, it would be in a position to

prosecute its execution petition for recovery of the foreign Award and if it was successful in its endeavour, then not only would the company revive, but also the society would gain as a defunct company would stand restored as a healthy company.

The Company Court has no jurisdiction to deal with a property wherein it is established that it does not belong to the company in liquidation.

M/S Engineering Udyog & General Kamgar Union (Regd.) v. Berry Sons India Ltd.

Citation: (2012) 3 Comp. LJ 435 (Delhi)

Decided on: 17th February, 2012

Coram: **Manmohan**, J.

Facts: An application was filed by the purchaser of suit property seeking release of the property from the Official Liquidator, another application was filed by the workmen of the Respondent Company for release to themselves a sum of Rs. 60 lacs from the sale proceeds of the suit property, by virtue of the compromise deed between them and the former Directors of the Company deposited with the Official Liquidator by the purchaser.

Issue: Whether the Court had jurisdiction when the property was not owned by the Company and whether it could enforce agreements relating to personal property.

Held: From the facts and report produced by the Official Liquidator, the property was not owned by the Company and therefore, the Court had no jurisdiction to deal with the said property or to impose any restrictions on its transfer. Further, the Court had no jurisdiction to enforce an alleged personal agreement between the former Directors and the workmen insofar as it pertained to the personal property of the Directors. However, the workmen were granted the liberty to file appropriate proceedings in accordance with law for enforcement of their rights arising out of their alleged compromise deed. The applications accordingly were disposed of.

COMPANY LAW

Sections 433 and 434 of the Companies Act, 1956 – In case of mutually exchanged transactions between the parties and their sister concerns, a consolidated account of all the four entities was required to be taken to ascertain whether any amount was due and payable.

M/s. Rajesh And Co. v. M/s. Ravissant Pvt. Ltd.

Citation: 2012 (187) DLT 713

Decided on: 24th February, 2012

Coram: **Manmohan**, J.

Facts: The petition was filed under Sections 433(e) read with Sections 434 and 439 of the Companies Act, 1956 stating that the Respondent Company was unable to discharge its admitted debt towards reconciliation of accounts for the fabric supplied by the Petitioner to the Respondent. The Petitioner also contended that the case set up by the Respondent in reply to the statutory winding up notice that the said amount though not denied, but was rather adjusted against the alleged claims of the Respondent's sister concern, was unauthorised, illegal and unsustainable in law.

Issues: (1) Whether there could be a consolidated reconciliation of accounts of the Petitioner and its sister concern and the Respondent and its sister concern, in consideration of the mutually exchanged transactions between them.

(2) Whether the issue of *inter-se* transactions between the parties i.e. the Petitioner and its sister concern on one hand and the Respondent and its sister concern on the other could be examined in the summary jurisdiction of the Company Court.

Held: Sufficient material was on record to *prima facie* hold that the Respondent Company and its sister concern were acting as one economic entity and therefore even though the Respondent had clearly admitted to the outstanding debt however it was successful in proving that two debit notes had been issued to the sister concern of the Respondent Company by the Petitioner.

Jurisdiction of Company Court was summary in nature and the issues of *inter-se* transactions between the parties and the veracity of the debit notes could not be examined as it involved

disputed questions of fact and would require evidence to be led. Consequently, the present petition was dismissed and the Civil Court was directed to decide the case on merits.

COMPANY LAW

Section 542, 543 of Companies Act, 1956- Power of the Court extends to preservation and protection of the rights and interests of the creditors and investors of the Companies in liquidation.

Rohan Mehta v. V.K. Sharma and Reserve Bank of India v. M/S JVG Finance Ltd.

Citation: MANU/DE/2655/2012

Decided on: 30th April, 2012

Coram: **Manmohan**, J.

Facts: Based on a report submitted by the Registrar of Companies, Delhi and Haryana, under Section 234 of the Companies Act, 1956 (Act), an investigation was ordered into the affairs of the Company under Section 235, to facilitate filing of misfeasance application against the ex-Director under Sections 542/543 of the Act. Pursuant to this investigation, the Serious Fraud Investigation Office (SFIO) submitted its report which the Court felt necessary to examine so as to gain clarity about the nature of disputes involved in this case.

Issue: Whether the Court on a *prima facie* view that the business of the Company had been carried out with the intent to defraud the creditors of the Company or for any other fraudulent purpose, could attach the personal properties of those persons who were parties to such fraudulent activities.

Held: Section 542(1) of the Act provided that if in the course of the winding up of a Company, it "appeared" that the business of the Company had been carried out with the "intent to defraud the creditors of the Company or for any other fraudulent purpose", then, on an application made by either the Official Liquidator or any creditor or any contributory, the Court could declare "such persons who were parties to such fraudulent activities, personally liable, without any limitation of liability, for all or any of the debts and liabilities of the Company".

There was sufficient *prima facie* evidence provided in the SFIO report to show that the ex-Director and other persons named in the SFIO report indulged in misappropriation of the funds of the Company in liquidation for personal benefit and to proceed under Section 542 of the Act for holding the ex-Director and other persons named in the SFIO report personally liable,

without any limitation of liability for all or any of the debts or other liabilities of the Company. Certain immediate interim directions/orders were required to be passed under Section 542(2) of the Act to preserve and protect the rights and interests of the creditors and investors of the Companies in liquidation.

Accordingly, the properties as well as bank accounts of all the group companies of JVG group and personal properties as well as bank accounts of the ex-Director and his family members and relatives, to the extent as mentioned in the SFIO report, were ordered to be attached.

CONSTITUTIONAL LAW

CONSTITUTIONAL LAW

There have to be valid reasons cited by a Government official to seek relaxation of Rules in his favour.

Pala Singh Tanck v. Union of India

Citation: 2012 III AD (Delhi) 119

Decided on: 11th January, 2012

Coram: **Sunil Gaur**, J.

Facts: The Petitioner challenged a communication issued by the Respondents assailing their refusal to regularise allotment of the Government accommodation which was in the name of the Petitioner by virtue of his employment with the Government as an Additional Statistical Advisor as also the resultant Eviction Order passed by the Estate Officer. The Petitioner challenged it being arbitrary and discriminatory, alleging that as opposed to the Petitioner's case, the Respondents had exercised their power of regularising the Government accommodation on re-posting of officers even beyond one year of the transfer in other cases by invoking their power of relaxation.

Since the Petitioner upon his re-posting back to Delhi had not joined within the permissible time of one year from the date of his being relieved from Delhi, therefore, for the period beyond eight months, Petitioner was charged licence fee of the accommodation in question at the market rent and was asked to vacate the Government accommodation forthwith.

Issue: Whether the refusal to regularise Petitioner's stay in the Government accommodation was arbitrary.

Held: According to the Office Memorandum on the subject, the mandate was that, allotment of Government accommodation could be regularised upon re-posting on payment of double of the normal licence fee within the permissible period of one year. But, for the period of over stay beyond one year, the concerned Government official became an unauthorised occupant and was thus liable to be evicted and to pay damages for the over stay i.e., licence fee at the market rent. However, the Government was empowered to relax any or all of such provisions of the Rules of allotment of Government accommodation in case of any officer or residence or class of officers or type of residences, for reasons recorded in writing.

The Petitioner while citing his children's education as a reason for extending his stay in the Government accommodation, sought parity with the case of another Government official whose

stay was extended on medical grounds. However, in the absence of any other reasons cited by the Petitioner, he could not be justified in raising the plea of discrimination or seeking parity with the other official inasmuch as no justifiable ground had been put forth by the Petitioner entitling him to seek the relaxation. And since Petitioner had failed to make out plausible ground for relaxing the relevant Allotment Rules of the year 2000 and the rules themselves were not under challenge, therefore refusal to regularise the Petitioner's over stay in the Government accommodation was held to be justified. Furthermore, for the reasons stated above, no patent or palpable error could be found with the order of the Appellate Authority holding that the plea of discrimination could not be gone into in proceedings under Public Premises (Eviction of Unauthorised Occupants) Act, 1971. The writ petition was accordingly dismissed.

Supreme Court has the power to lay down the rules about the entitlement of persons not only to act but also to plead before it.

Balraj Singh Malik v. Supreme Court of India

Citation: 2012 (128) DRJ 557

Decided on: 13th February, 2012

Coram: **Acting Chief Justice**, Rajiv Sahai Endlaw, JJ.

Facts: The Petitioner sought a declaration that Rules 2, 4 and 6(b) of Order IV of the Supreme Court Rules, 1966 ('1966 Rules') were null and void as they did not permit filing of cases by the Petitioner and other non-Advocates-on-Record (non-AOR) in the Supreme Court of India. The Petitioner challenged the creation of further classification of advocates into AOR and non-AOR and permitting only AOR to file cases in the Supreme Court. The Petitioner contended that at present the role played by an AOR was that of a mere name lender for filing cases without being responsible for the conduct of the case, thereby defeating the very purpose of the system. Thus, it was prayed that category of AOR be dispensed with.

Issues: (1) Whether right to practice under Section 30 of the Advocates Act, 1961 (1961 Act) was being denied by virtue of Rules 6 and 10 of Order IV of the 1966 Rules?

(2) Whether classification between Non-AOR Advocates and AOR created by the 1966 Rules was violative of Articles 14 and 19(1)(g) of the Constitution of India?

Held: Section 30 of the 1961 Act entitled every Advocate, as of right, to practise throughout the territories to which the 1961 Act extended. It specifically mentioned all Courts including the Supreme Court. Section 52, however, stated that nothing in the 1961 Act shall be deemed to affect the power of the Supreme Court to make rules under Article 145 of the Constitution. Reading these two provisions harmoniously, an inescapable conclusion was that the Supreme Court had the power to lay down the rules regarding the entitlement of persons not only to act but also to plead before it. It followed that amendment to Section 30 of the 1961 Act had not altered the earlier position. The 1961 Act did not affect (1) the power of the Supreme Court to frame rules by limiting the category of persons who could act or plead before it, (2) the rules framed in exercise of that power, (3) prescribing the eligibility conditions before an advocate could act or plead and (4) nomenclature of AOR being given to those who fulfilled those

conditions. The classification was based on an intelligible differentia with the objective of regulating the practice before the Supreme Court in the interest of the litigating public. Therefore, it could not be treated as discriminatory or violative of Article 14 of the Constitution. The practice of the AOR should be regulated to ensure that AORs play a constructive role in the justice delivery system.

CONSTITUTIONAL LAW

Section 16 of the Consumer Protection Act, 1986- There could be no reservation of posts, in favour of a woman, for being appointed as a member of the 'State Consumer Disputes Redressal Commission'.

Yashbeer Singh v. GNCT of Delhi

Citation: W.P.(C) No. 153 of 2011 & W.P.(C) No. 305 of 2011

Decided on: 13th February, 2012

Coram: **Vipin Sanghi**, J.

Facts: The writ petitions filed under Articles 226 and 227 of the Constitution of India, were preferred to assail an advertisement issued by Respondent No. 2 inviting applications from candidates for appointment as whole time members of the 'State Consumer Disputes Redressal Commission' in Delhi (State Commission), established under the Consumer Protection Act, 1986 (the Act). The advertisement was in relation to two posts, out of which one post had been reserved for "Member (Female – non-judicial)" and the second post had been reserved for "Member (judicial)", for the purpose of creation of a second bench of the State Commission.

The State Commission on the date of the issuance of the advertisement was composed of a President, a judicial member (in this case a female) and a non-judicial member (also a female) who retired.

Issue: Whether the advertisements in question, purporting to reserve seats for "Member (Female – non-judicial)" and "Member (judicial)", when the State Commission already consisted of a Female member and a President with judicial background, was in the contravention of the provisions of the Act.

Held: A perusal of Section 16 of the Act clearly shows that there was no reservation of posts, in favour of a woman, for being appointed as a member of the State Commission. All that Section 16(1)(b) provided was that, of the members appointed to a State Commission, at least one shall be a woman which in turn could not be understood to mean that a slot or a post of a member of the State Commission could be labled or classified as that reserved for a Member (Female). Section 16(1)(b) provided that while making appointments of members to the State Commission, if none of the existing members was a woman, the appointing Authority was required to give priority to a candidate who was a female, who otherwise fulfilled the criteria set out in Section 16(1)(b)(i), (ii) & (iii) of the Act. Since, the requirement of having at least one woman member

already stood fulfilled in the present case, the advertisement of one of the posts of member being reserved for Female-non-judicial candidate, appeared to be in the teeth of Section 16(1)(b) of the Act. Even though the Respondent No. 2 was not precluded from appointing a woman from amongst the Applicants, but the appointment was required to be based entirely on the Applicant's merit and could not have been swayed by the consideration that she was a woman. Thus, so far as the advertisement of one post for "Member (Female-non-judicial)" was concerned, the same was contrary to the provisions of the Act.

However, the advertisement for the post of "Member (judicial)" was held to be in consonance with the provisions of the Act. The Government was entitled to specifically appoint a person having judicial background so as to facilitate the creation of a bench of the State Commission and, therefore, the Petitioners could not be said to be aggrieved of an advertisement inviting applications from persons having a judicial background, particularly when the percentage of the persons having judicial background would not exceed 50%, even after the filling up of the advertised post.

The petitions were partly allowed and the advertisement in question issued by Respondent No. 2 for filling the post of Member (Female-non-judicial) was contrary to the provisions of the Act. However, the said advertisement to fill the post of a Member (judicial), i.e., to appoint a person having judicial background was in accordance with Section 16 of the Act and was upheld.

CONSTITUTIONAL LAW

Principle of 'forum non conveniens' makes it obligatory on the part of the Court to see the convenience of all the parties before it.

Vinod Kr. Bhora v. HDFC Standard Life Insurance Company Ltd.

Citation: 2012 (130) DRJ 200

Decided on: 17th February, 2012

Coram: **Acting Chief Justice**, Rajiv Sahai Endlaw, JJ.

Facts: In the writ petition filed by the Respondent No.1, the Appellant had taken preliminary objections to the maintainability of the writ petition on the ground that the Court did not have the territorial jurisdiction to entertain the petition. The said objection was however turned down by the Single Judge and the writ petition was decided on merits whereby orders of the Insurance Ombudsman had been set aside. The Appellant challenged the order both on jurisdiction as well as on merits, with the consent of the parties, only the issue of jurisdiction was decided.

The Appellant being a resident of Jodhpur, Rajasthan, had taken the Unit Linked Assurance Plan with the Respondent No.1 by submitting the proposal at its Jodhpur Office. Though the registered office of the Respondent No.1 was at New Delhi, it had its various offices in several parts of the country and one such branch office was situated at Jodhpur. The Appellant suffered heart ailment in Jodhpur and was also treated for this ailment at a hospital situated at Jodhpur. It was the Jodhpur branch with which the Appellant submitted its claim and which cancelled the policy. Thus, every part of action took place in Jodhpur.

Issue: Whether mere signing of the orders by the Insurance Ombudsman in Delhi conferred territorial jurisdiction upon this Court to entertain the writ petition, when the complaint was wholly heard and entertained in Rajasthan.

Held: Relying on a Full Bench judgment of this Court in ***New India Assurance Company Ltd. v. Union of India [161 (2009) DLT 55]*** , merely because the appellate authority which had passed the order, was situated in Delhi, this Court could not be said to automatically enjoy jurisdiction to entertain the writ petition. What was emphasized was that even if part of cause of action had arisen in the aforesaid form, namely, order of the appellate authority located in Delhi, the Court could still refuse to exercise jurisdiction under Articles 226 and 227 of the Constitution of India on the application of the concept of *'forum conveniens'* it was found that other Courts would be more convenient.

Further, each and every part of the cause of action had arisen in Rajasthan. Even the Respondent No.2 i.e. Insurance Ombudsman, who decided the matter against the writ petition filed, was appointed as Ombudsman of Rajasthan and Delhi and he was exercising his jurisdiction as Ombudsman of Rajasthan and not of Delhi. Thus, merely because he was an Ombudsman of Delhi as well, could not mean that the cases decided by him in the capacity of Ombudsman in Rajasthan would be appealable within the jurisdiction in Delhi. Further, even if he signed the Award in question while sitting in the Delhi Office; it could not constitute a cause of action in Delhi nor would it make Delhi Court as more convenient.

Hence, this Court did not have the requisite jurisdiction and on this ground itself, the appeal was allowed and the writ petition dismissed. However, liberty was granted to the Respondent No. 1 to approach the High Court of Rajasthan, being the competent Court of law to entertain a challenge to the Award of the Ombudsman.

CONSTITUTIONAL LAW

A viva-voce examination cannot acquire 100% weightage or be the sole determinative factor for appointment to a course.

Anvita Singh v. Union of India

Citation: 2012 III AD (Delhi) 133

Decided on: 28th February, 2012

Coram: **Acting Chief Justice**, Rajiv Sahai Endlaw, JJ.

Facts: By way of the writ petition, the petitioner challenged Sub Rule (3) of Rule 110 of the Patents Rules which mandates securing minimum 50% marks in viva voce examination and an aggregate of 60% in all the three written papers, on the ground that the part of the Rule which mandates securing 50% marks in viva voce was too high a prescription and gives arbitrary power to the interview board to fail a candidate even when he or she has done extraordinarily well in the written examination.

Issues: (1) Whether or not appointment as a patent agent falls in the category of admission in an educational institution or appointment to a post in service.

(2)Whether the aforesaid provision stipulating minimum 50% marks in the viva voce is discriminatory, arbitrary and violative of Articles 14, 16 and 19(1)(g) of the Constitution

Held: A patent agent is neither an admission to educational institution or appointment to a post. It is in the nature of self employment and the status of a 'professional' is attached to such a patent agent. Even though there was no doubt that theoretical knowledge was not sufficient and a patent agent was required to be tested on other parameters as well, such as ability to assist patent authorities in cases of registration of patents, manner of presentation, ability to create a relationship of trust with the clients etc, however, the interview process could not be the sole determinative factor for appointment to the course. The result of doing so, as in the present case, was that even if a particular candidate had done well in his next degree course (educational qualification) or had extra ordinary experience and had also performed well in two written qualifying examination, still even with one mark less than the minimum 50 per cent marks required in interview, he/she would be treated as disqualified. This was bound to result in some arbitrariness.

Prescribing minimum 50 per cent marks in the interview may not be appropriate more so when the rule mandated securing 60 per cent marks in aggregate in all the three papers i.e. two written and one viva voce test. This rule was therefore held arbitrary and violative of Article 14 of the Constitution and was thus liable to be struck down. It was, however, left to the rule making authority to give less weightage to the viva-voce by prescribing lesser minimum marks being not more than 25 per cent.

Restricting itself to the case of the petitioner only, the marks of viva voce were ignored altogether and because the petitioner had secured more than 60% marks, which were the qualifying marks, she had to be declared pass in the examination entitling her to get registered as a Patent Agent. Mandamus was thus issued to the respondents to register the petitioner as the patent agent and the writ petition was allowed accordingly.

Election- Reservation of Seats- State Election Commission is empowered to carry out the exercise of reservation of seats in municipal elections. The concerted exercise undertaken by it keeping in mind the increasing population cannot be faulted on any ground.

Vikas v. State Election Commission

Citation: 2012 (188) DLT 390

Decided on: 29th February, 2012

Coram: **Sanjay Kishan Kaul**, Rajiv Shakdher, JJ.

Facts: The writ petitions impugn the notification issued by the Government of National Capital Territory of Delhi (GNCTD) prescribing the manner for reservation of seats for SC and women (both general and SC) on the grounds that the method adopted was arbitrary and contrary to the one adopted in 2007 elections. The total percentage of population in the Assembly segment was the criteria adopted to decide in which Assembly segment the wards had to be reserved, which resulted in wards having higher percentage of SC population to be declared as General and vice versa. The other grievance was that the power to reserve seats vested with the Central/State Government and such power could not have been delegated as the State Election Commission (SEC) would not fall in the nomenclature of 'any other authority' in the Delhi Municipal Corporation Act, 1957 (DMC Act).

Issues: (1) Whether the notification was arbitrary and the methodology adopted by SEC illegal?

(2) Whether the power to reserve ought not to have been delegated to the SEC and whether it impinged on its independence?

Held: The manner adopted by the SEC in 2007 had received the imprimatur of the High Court could not have precluded the SEC from adopting any other formula as long as the test of reasonableness was satisfied and the twin criteria i.e., areas where there was greater population of SC should be reserved and each Assembly should not have more than two reserved wards, was achieved. The endeavour with the present method was observed to be gaining the maximum spread in respect of the SC population and remove any hidden distortions in reservation. Even though the constituencies had been arranged in a descending order on the basis of the SC population, this SC population for an Assembly segment was in turn based on the totaling of the

SC and the total population for each ward. Therefore, the ward remained the unit and the Assembly.

The words 'superintendence, direction and control' which emphasized the role of SEC were wide enough to include all powers necessary for smooth conduct of elections as it would be a well equipped body to carry out such an exercise. On a reading of Article 243K, 243ZA and 324 of the Constitution it was held to be clear that such power was available with the SEC even *de hors* the delegation. The DMC Act allowed the Government to sub delegate its power and there was no provision in the DMC Act which would imply that the SEC was excluded from the purview of the phrase 'other authority'. The notification did not prescribe the manner or the mode in which the power conferred was to be exercised and therefore, it could not be said to dilute the independence of the SEC. Hence, nothing wrong was found with the action of the SEC *qua* the mode and manner of reservations of seats for the SC and the women and thus, dismissed the writ petitions.

CONSTITUTIONAL LAW

Contempt of Courts Act, 1971- No conscious effort to disobey the Court - Court should not have been unduly touchy especially when the effect of order was effaced by pronouncements of the Appellate Courts.

Atul Kumar Rai v. M/s Koshika Telecom Limited

Citation: 2012 (188) DLT 693

Decided on: 17th April, 2012

Coram: **Sanjay Kishan Kaul**, Rajiv Shakdher, JJ.

Facts: Despite the opposite party expressing its disinclination to pursue the contempt application in view of certain subsequent orders, the Single Judge proceeded with it and convicted the parties of contumacious conduct and willful disobedience. Thereafter they were sentenced to heavy fine and simple imprisonment.

IFCI Ltd. ('IFCI') sold the assets hypothecated with it against an unpaid loan taken by the Respondent Company. When IFCI failed to deposit the proceeds from such sale with the Official Liquidator (OL) of the Respondent Company despite an order of the Company Judge directing it to do so, the OL initiated contempt proceedings against IFCI Ltd. Meanwhile IFCI filed an application before the Recovery Officer (RO) to be allowed to appropriate the sale proceeds. This was allowed subject to IFCI Ltd. giving an undertaking that if any claim was received in future, it will remit the amount to the OL. Subsequently, the order was upheld by the Debts Recovery Appellate Tribunal (DRAT). Therefore, the OL did not press the contempt petition. However, the Single Judge proceeded to issue notice. Despite the fact that an unconditional apology was tendered by all the Contemnors, the Single Judge did not find it to be a fit case for pardon and held them guilty of contempt on the ground that the dangerous trend of parties obtaining relief from subordinate authorities after it was declined by this Court, should not be encouraged.

Issue: On facts, where the contemnors parties had tendered unconditional apology should the Court have taken a strict view.

Held: On facts, no case of contempt was made out. To take action in such a case would 'certainly sound the death knell of what Dean Roscoe Pound called judicial justice and Rule of

law'. The contempt jurisdiction had to be exercised with care and caution by a Court and not with vindictiveness or to teach a lesson. The Contemnors had taken a fair stand that the appropriate remedy was to have filed an appeal against the order of the Single Judge but was not done not on account of any ill motive but because IFCI was of the *bona fide* view that as a creditor its rights were protected. Further, the order of the Division Bench could not be ignored as it did put a *quietus* to the issue. The punishment and fine imposed was much more than envisaged by the Contempt of Courts Act, 1971. The appeals were allowed and the order of the Single Judge set aside.

CONSTITUTIONAL LAW

The Courts have an inherent power to control and prevent frivolous and vexatious litigation and litigants.

Deepak Khosla v. Montreaux Resorts Pvt. Ltd.

Citation: MANU/DE/1772/2012

Decided on: 24th April, 2012

Coram: **Sanjiv Khanna**, R.V. Easwar, JJ.

Facts: The Single Judge directed that the Appellant, who appeared both in person and on behalf of co-litigants, would not appear in any Court either in person or as an attorney of a third party, as he did not have inherent right to appear and argue. The Appellant was directed to be medically examined to ascertain whether he was suffering from any mental disorder. An appeal was filed against the said order.

Issue: Whether the Court was competent, and was it permissible in law to direct/injunct a self-represented litigant or a *pro se* litigant from appearing in person or for co-Suitors. If yes, then under what circumstances.

Held: The power in question was not exercised by the Single Judge under the Contempt of Courts Act, 1971 or as a punishment imposed by the Court. It was in exercise of an inherent power of the Court and was different and distinct from the power to punish for contempt. Although the right of audience in Court was a potent and cherished one, it was subject to control and supervision of the Court and could be withdrawn if it was repeatedly and persistently misused and abused. A *pro se* litigant may be under a disadvantage as regards the art and skills of advocacy and rules of procedure. However, in respect of a quarrelsome, belligerent and combative litigant who was persistently found to indulge in intimidation, making gross imputations and casting aspersions causing breakdown or frequent adjournments of the judicial proceedings, the inherent power to control the proceedings in an appropriate manner was required to be exercised by the Court, though with caution, restraint and sparingly.

Vexatious and frivolous litigation is an abuse of the legal system and the Courts have an inherent power to control and prevent such litigation and injunct/sanction vexatious litigants. A catena of European judicial precedents recognised the inherent right of the Court to protect its process

from abuse. There was no violation of the right to access Courts as long the prohibitions imposed on self-represented litigants was not violative of the right of the litigant to access justice under Article 6 of the European Convention.

The hearing before the Court had to be conducted in an orderly and punctilious manner. Habitual refusal even after a warning to obey and abide by the basic fundamental canons or rules of appearance or audience, or when it amounts to willful or deliberate misconduct, could not and should not be tolerated. Otherwise the adjudicatory institution itself would suffer. Similarly, baseless, frivolous or vexatious filing put the machinery of justice under burden and put the opposite party to needless expense and delay. The judicial or Court time is precious and it is the duty of the parties also to ensure that judicial time is not diverted and spent on pointless, repetitive, frivolous or vexatious litigation and that the justice due to other litigants is not delayed. At the same time, the role of the judges is important as they have to ensure that there should be a fair hearing.

The power of the Court to regulate the right to appear and address arguments was distinct from the power of contempt. The last part of Clause 8 of the Letters Patent Act, 1865 was applicable only to High Courts and not to the District Courts. It merely permitted a Suitor to appear and act on his own behalf and on behalf of a co-Suitor. The said right in no way affected the inherent power of the Court to ensure that the Court proceedings were conducted in an orderly and proper manner and that frivolous, repetitive or vexatious litigations were not brought to Court and the Court's time was not wasted by a party acting in an obstructive manner to prevent continuation of the legal proceedings.

The plea of the Appellant that he was/is entitled to ignore the order as a nullity and void *ab initio* and in spite of the direction was/is entitled to appear or argue in person was negatived. The Appellant could not be a self adjudicator and claim that he was entitled to ignore the order. Self opinion or understanding could not and should not become a basis for ignoring an order or questioning the same in collateral or other proceedings.

Mental sickness sometimes could be confused with personality traits, such as an obsession with litigation or a blind conviction that one is always right. Since there were number of proceedings/cases pending both in the High Court and in District Courts, if the issue regarding whether or not the Appellant was entitled to appear as a self-represented litigant or for others, was taken up for consideration in different fora/Courts, it would lead to delay, confusion and wastage of judicial time apart from the possibility of conflicting orders. Therefore, the Court directed that the two directions given in the order be set aside and the Single Judge should examine other allegations made by the Respondents. The Single Judge issued a supplementary

show-cause notice to the Appellant and permitted him to be heard through an Advocate appointed by himself.

CONSTITUTIONAL LAW

Article 14 and Article 226 of the Constitution- Equality is the first principle of law and therefore, pensionary benefits cannot be denied to the employees who are in similarly situated conditions.

Union of India v. Federation of All India Central Govt. Canteen Employees Workers Association

Citation: MANU/DE/1898/2012

Decided on: 30th April, 2012

Coram: Acting Chief Justice, **Siddharth Mridul**, JJ.

Facts: The writ petition filed by Petitioner No. 1-Union of India challenged the order of the Central Administrative Tribunal (CAT), Principal Bench, New Delhi whereby it was directed that the Central Government Canteen Employees be given the benefit of the entire past service prior to the said employees being declared as Government servants for counting towards pensionary benefits.

The Respondents i.e., employees working in the Canteens of the Government of India were allowed to enjoy the full-fledged status of a Government employee pursuant to the decision of the Apex Court declaring the employees of statutory, non-statutory and non-statutory recognised Canteens as Railway employees and consequentially entitled to all the benefits of Railway employees. However, for the purpose of service and GPF benefits to the Canteen employees, past services were to be taken into account as *quasi* permanent to the extent their actual qualifying service fell short of the minimum service required. Subsequently, pursuant to the orders passed by the Railway Department recognizing entire past service of the Canteen employees for giving pensionary benefits, the employees working in the Canteens of the Government of India were also granted parity of status with the Railway Canteen employees, in the order of CAT.

Issue: Whether the employees belonging to different Government Departments claimed parity in emoluments under the principle of "equal work for equal pay" as envisaged by Article 14, Constitution of India.

Held: Rejecting the Petitioners' contention that the decision of the Railway Department for reckoning the entire past service rendered by their Canteen employees for availing pensionary benefits, was independent and no parity could be claimed by employees of Government Canteens on the basis of the same, fully supported the observations of the CAT recorded in the order to the effect that when a particular benefit was granted to the employees of one Department of the Government of India, the same could not be denied to the other similarly placed employees of other Departments under the Government of India. Equity was the first principle of justice and if parity was denied, it would amount to a violation of Articles 14 and 16 of the Constitution and be against the spirits of justice. Further, the employees of the Canteens of the Central Government Departments needed to be given the same benefit as had been given to the employees of the Railway Canteens for both being under the Central Government. Hence, the writ petition was consequently dismissed.

Making persons ineligible for furlough merely on the basis of the nature of crime committed by them, amounts to discrimination and arbitrariness and cannot be said to have any rational nexus.

Dinesh Kumar v. Govt. of NCT of Delhi

Citation: 2012 (129) DRJ 502

Decided on: 1st May, 2012

Coram: **Acting Chief Justice**, Rajiv Sahai Endlaw, JJ.

Facts: In all these writ petitions, challenge was to the constitutional validity of Clause 26.4 of the Parole/Furlough: Guidelines, 2010 (Guidelines), which stipulated that any prisoner who had been convicted for an offence of robbery, dacoity, arson, kidnapping, abduction, rape and extortion was not eligible for grant of furlough, provided for under Clause 24 of the Guidelines. The Petitioners challenged this clause on the ground that it was arbitrary and unreasonable and not based on any intelligible differentia and hence violative of Article 14 of the Constitution as also the fundamental right to life and liberty under Article 21 of the Constitution.

Issue: Whether the commission of a serious crime by itself be treated as an embargo to the grant of furlough, as was done vide Clause 26.4 of the Guidelines. Or it should be the propensity of such a convict to commit a crime again which had to be judged from some other standards like the good conduct of the prisoner in the prison.

Held: The purpose of the aforesaid Guidelines was to regulate applications for parole and furlough and to ensure that they were considered in a fair and transparent manner. Regarding Clause 26.4 of the Guidelines which stipulated the eligibility conditions for grant of furlough and excluded convicts of certain grave and serious offences, the Court opined that it may be farfetched and illogical to generalise the underlying presumption that the convict specified as ineligible under Clause 26.4, would have become a 'habitual offender' and was incapable of being reformed. Furthermore, if such a convict was rendered totally ineligible for furlough, it would negate the very purpose of grant of furlough *viz* affording him opportunity to maintain links with the society; solving personal and family problems; breathing fresh air for at least some time; and the opportunity of becoming a good citizen.

However, by no means was it suggested that convicts of the offences specified in Clause 26.4 were to be granted furlough. If this category was not excluded, at the most, they would become eligible for consideration. The Court held that the authorities may be extra cautious and have stricter standards in mind while granting a furlough to an inmate convicted of a serious crime and/or whose presence in the community could attract undue public attention, create unusual concern, or depreciate the seriousness of the offence. Reports from the counsellors, psychiatrists and other concerned officials of Jail who were closely monitoring him could also be obtained for this purpose. However, their exclusion *per se* making them ineligible at the outset even from consideration to obtain furlough was discriminatory and arbitrary and it could not have any rational nexus.

Clause 26.4 of the Guidelines in the present form did not stand judicial scrutiny and amounted to snatching the rights of the ineligible convicts to at least have their cases considered for grant of furlough. The provision was struck down as unconstitutional and infringing Article 14 as well as Article 21 of the Constitution. The appropriate authority was directed to make suitable amendments while redrafting Clause 26.4 of the Guidelines. However, having regard to the nature of offences specified therein, there may be strict and stringent conditions attached for consideration of cases of such convicts for grant of furlough.

The basis of the separate justice system for juveniles was that the adolescents were different from adults, less responsible for their transgressions and more amenable to rehabilitation.

Court on its own Motion v. Dept. of Women and Child Development

Citation: 2012 IV AD (Delhi) 641

Decided on: 11th May, 2012

Coram: **Acting Chief Justice**, Rajiv Sahai Endlaw, JJ.

Facts: In this letter petition, a very serious issue touching upon the rights of juvenile in conflict with law was raised. Relying upon information received under the Right to Information Act, 2005 it was contended that proper care was not taken by the police authorities at the time of arrest of an accused to find out whether the concerned person was a juvenile or adult, and irrespective of this fact, were lodged in Tihar Jail and subjected to the hardship of Adult Criminal Justice System. It was also contended that not only did the police authorities ignore proof of age of juveniles produced by their families but also that the juveniles were shifted to Observation Homes only when enquiry was conducted determining the age of the accused persons.

Issue: Whether there was a need for specific and imminent directions/guidelines to be issued to all the appropriate authorities, while dealing with juvenile offenders.

Held: Lodging of juveniles along with hardened adult criminals would result in drastic implications on the physical and mental well being of a juvenile offender and that the adult prison facilities were lacking the resources to address the psychological or social issues of a juvenile offender as part of his rehabilitation. Lodging of juveniles in the adult prison clearly amounted to violation of their fundamental right guaranteed under Article 21 of the Constitution of India; contrary to the provisions of The Juvenile Justice (Care and Protection of Children) Act, 2000 (JJ Act) apart from adverse psychological impact on these children. Also trying minors in adult Courts and sentencing them in adult prison was totally against the object and purpose of the JJ Act.

Hence the Court felt the need to issue specific and detailed directions to all the appropriate authorities for compliance so as to obviate the recurrence of the incarceration of children in

conflict with law, in the jails or their subjection to the Adult Criminal Justice System and also for proper verification of those lodged in Jail who appeared to be minors.

CRIMINAL LAW

CRIMINAL LAW

Section 67 of Narcotic Drugs and Psychotropic Substances Act, 1985- A retraction statement made on behalf of the Accused has to be brought to the notice of the Court as well as the detaining authority.

Idu Khan v. Union of India

Citation: 2012 II AD (Delhi) 741

Decided o**n**: 2nd January, 2012

Coram: Badar Durrez Ahmed, **Veena Birbal**, JJ.

Facts: The Petitioner prayed for quashing of the preventive detention order as well as subsequent orders rejecting the Petitioner's representations against the detention order. The Petitioner was arrested for holding a fake license and running a business of manufacture and sale of poppy straw and poppy powder. Notice was issued and confessional statements of four persons including the Petitioner were recorded in furtherance of which, the detaining authority passed the impugned order of detention under Section 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (PIT-NDPS Act). The Petitioner had moved an application when produced before the Special Judge, Bhind, for retraction of statement recorded under Section 67 of the NDPS Act, 1985 which was however not considered by the Respondents. The orders were challenged by the Petitioner in the petition on the ground that there was no other documentary evidence other than the confessional statement, to justify the detention order.

Issue: Whether the detention order passed by the Respondents was lawful.

Held: No mention of retraction of statement was made by the Petitioner except in the rejoinder affidavit wherein also there was no mention of when it was retracted. Even if it were assumed that the Petitioner made an application at the time of being produced before the Special Judge, Bhind, he failed to substantiate that the said application was brought to notice of the Respondents prior to the passing of the detention order. There was nothing on record to substantiate that the name of Petitioner was included in that application. Neither sponsoring authority nor detaining authority was ever made aware that purported retraction had been made. It could thus not be said that detaining authority had failed to consider alleged retraction of confessional statement of the Petitioner. The petition was dismissed.

CRIMINAL LAW

First Information Report for offence punishable under Section 174-A Indian Penal Code, 1860 is an independent cause of action and cannot be quashed.

Maneesh Goomer v. State

Citation: 2012 (1) JCC 465

Decided on: 4th January, 2012

Coram: **Mukta Gupta**, J.

Facts: The petition was filed by the Petitioner, having withdrawn an earlier petition, with additional grounds for seeking the quashing of a First Information Report (FIR) under Section 174-A, Indian Penal Code, 1860 (IPC), registered against him as a coercive measure to secure his presence, being Accused in a complaint case filed under Section 138 of the Negotiable Instruments Act, 1881 (N.I. Act). The Petitioner having settled the matter with the Complainant and the complaint having been withdrawn, the proclamation against him under Section 83 Code of Criminal Procedure, 1973 (CrPC) was recalled.

Issue: Could an FIR for an offence under section 174-A of the IPC be quashed when a complaint case under which such an FIR was registered stood settled.

Held: Whereas all other offences under chapter X of the CrPC were non-cognizable, offence punishable under Section 174-A IPC was a cognizable offence. Thus, the police officer on a complaint under Section 174-A IPC was competent to register an FIR and after investigation thereon file a charge-sheet before the Court of Magistrate who could then take cognizance of the same. Hence, an FIR registered for an offence punishable under Section 174-A IPC was an independent cause of action and merely because the complaint case under Section 138 N.I. Act was settled, there was no reason that the FIR be also quashed.

CRIMINAL LAW

Criminal proceedings under Section 340 of the Code of Criminal Procedure, 1973 – Preliminary enquiry and finding thereof with respect to the offence, is a condition precedent for initiating proceedings under Section 340 of the Code of Criminal Procedure.

S.B. Yadav v. State

Citation: 2012 I AD (Delhi) 941

Decided on: 9th January, 2012

Coram: **Suresh Kait**, J.

Facts: The instant appeal by the Appellant-Station House Officer (SHO), Jahangirpuri was filed under Section 341 of Code of Criminal Procedure, 1973 (CrPC) against the order passed by the Additional Sessions Judge (North West) Rohini Courts, Delhi, whereby, the Court formed an opinion that a complaint under Section 195 of the CrPC was to be filed against the Appellant for conspiring with the Complainant and other police officers to set up a false case against the accused persons and thereafter, a complaint was filed under Sections 193/195/211 read with Section 120B of the Indian Penal Code, 1860 (IPC) against the Appellant and others.

A case was registered and investigated by the Appellant-SHO against four accused persons pursuant to a complaint of theft at knife-point, by the Complainant. However, during his cross-examination, the Complainant admitted that he had deposed the aforesaid facts at the instance of the Appellant. The Trial Court ordered an inquiry into the matter from the Crime Branch of Delhi Police and pursuant to the report submitted thereto, ordered a complaint to be filed against the Appellant for offences under Sections 193/195/211 IPC, for indulging in a conspiracy along with the Complainant and other police persons against the accused persons.

Issue: Whether the Trial Court ought to have conducted a preliminary enquiry by issuing a show-cause notice before ordering for filing of a complaint under Section 195 IPC against the Appellant.

Held: The Trial Judge failed to observe the provisions under Section 278(2) of CrPC, which apparently, vitiated subsequent steps in the matter, for the reasons that at the time of examination of the Complainant in pre-lunch session, the Judge had used powers under Section 165 of the Evidence Act, 1872 while putting various Court questions to the witness, in order to discover or to seek proper proof of relevant facts, and thus there was no occasion for the Judge to again use

their powers under Section 311 of CrPC, being under obligation to form an opinion to the effect that re-examination of the Complainant, who was already examined on that day itself, was essential just for decision of the case, to exercise the power. Since no such opinion was formed by the Judge, therefore, re-examination of the Complainant again, was beyond her jurisdiction. Thus, the Judge committed an illegality, when she failed to adhere to the provision of Section 311 of CrPC.

The Judge also violated the provisions of CrPC when she ordered a further probe by the Crime Branch of Delhi Police. Chapter XVIII of CrPC provides procedure for trial before Court of Sessions but there was no provision, either in Chapter XVIII or elsewhere in CrPC, which may empower a Sessions Judge to order Crime Branch of Police to conduct an enquiry, submit its report and then use that report as an evidence and pronounce a verdict against the prosecution or the defence.

Hence, the non compliance of the basic attributes of evidence jurisprudence and trial proceedings, specifically non-compliance of Sections 278(2) and 311 CrPC, could not be the premise of proceedings under Section 340 CrPC and the Trial Court ought to have conducted a preliminary enquiry by issuing a show-cause notice, which it failed to do so. The appeal was thus allowed.

Testimony of a single witness in a criminal trial- when acceptable- The evidence must be free of any blemish or suspicion, must impress the Court as wholly truthful, and must appear to be natural and so convincing that the Court has no hesitation in recording a conviction solely on the basis of the testimony of a single witness.

Ashok Narang v. State

Citation: 2012 II AD (Delhi) 481

Decided on: 12th January, 2012

Coram: **Suresh Kait**, J.

Facts: The Appellant Accused challenged the judgment of the Trial Court finding him guilty and convicting him for the offence under Section 363 read with Section 34 Indian Penal Code, 1860 (IPC). The Appellant contended that his conviction was based solely on the uncorroborated testimony of the prosecutrix who was untrustworthy on account of materially contradictory statements given by her at various stages. Further, there was fabrication and manipulation of the medical evidence.

The case of the prosecution was that the Appellant along with the co-accused (since declared a proclaimed offender) had in furtherance of a common intention kidnapped the victim from the lawful guardianship of her parents. They then wrongfully confined the victim in a shop where they committed rape upon her. The Accused was charged with the offences punishable under Sections 363/342/376 read with Section 34 of IPC. The Court convicted the Appellant based on the testimony of the victim.

Issue: Whether the accused could be convicted on the basis of the evidence produced.

Held: The offence of rape is a heinous one which carries grave implications for the accused if convicted. Therefore, the degree of proof had to be of a high standard and not a mere possibility of committing the said offence. In other words, the prosecution was required to prove its case beyond reasonable doubt against the Accused in a criminal case and not merely dwell upon the shortcomings of the defence.

The human semen and blood group found in the semen was not established to be of the Accused. Also the prosecutrix was found to have given contradictory statements at different stages of the investigation and trial. There was a long distance between the phrase “may be true” and “must be true”. It was difficult to rely on the sole testimony of the victim of sexual assault to convict the Accused. The appeal was allowed.

CRIMINAL LAW

The words "subject to the Regulations" used in both Sections 59(d) and 95(1) of the Delhi Municipal Corporation Act, 1957, cannot be made redundant. They have to be given a plain and simple meaning .

G.S. Matharaoo v. CBI

Citation: 2012 II AD (Delhi)

Decided on: 25th January, 2012

Coram: **Mukta Gupta**, J.

Facts: The Petitioner questioned the competence of the authority that had granted sanction for his prosecution for offences under Section 13(2) read with Section 13(1)(e) of the Prevention of Corruption Act, 1988 (PC Act). He contended that the authority competent to remove him was the Municipal Corporation of Delhi (MCD). Thus, the initiation of proceedings by the Commissioner, MCD, was illegal and void *ab initio* and thus liable to be set aside.

Issues: (1) Whether this Court in a petition under Section 482 of the Code of Criminal Procedure, 1973 (CrPC) should decide on the competency of the sanctioning authority or leave it to be decided during trial.

(2) If it should, then whether the Commissioner, MCD was the authority competent to grant sanction for prosecution of the Petitioner in terms of Section 19 of the PC Act.

Held: There were no disputed questions of fact for which evidence was required to be adduced. The petition raised the issue of interpretation of the provisions of the Delhi Municipal Corporation Act, 1957 (DMC Act) and DMC Services (Control & Appeal) Regulations, 1959 (the Regulations). Since the issue of competence of the sanctioning authority went to the root of the matter, the Court in exercise of its power under Article 227 and Section 482 Cr PC was duty bound to decide it.

Under Section 59(d), DMC Act, the powers of the Commissioner for instituting disciplinary action was subject to Regulations, which provided, that for category A posts, MCD was the authority competent to impose penalty. This Regulation was not rescinded or amended till date.

Therefore, it was clear that MCD was the competent authority to grant sanction under Section 19 of the PC Act and not the Commissioner, MCD.

The order of the trial court taking cognizance was liable to be set aside. However, the CBI was granted the liberty to obtain sanction for the prosecution of the Petitioner from the competent authority and proceed in accordance with law. The petition was disposed of.

CRIMINAL LAW

Totality of evidence on record and its credibility eventually determine whether the prosecution has proved the charge against the Appellants or not.

Jamal Mirza v. State

Citation: 2012 II AD (Delhi) 366

Decided on: 27th January, 2012

Coram: S. Ravindra Bhat, **S.P. Garg**, JJ.

Facts: The appeal was directed against the order of conviction and sentence whereby the Appellants were held guilty for commission of offences under Section 396 read with 397 Indian Penal Code, 1860 (IPC) and challenge was on the ground of lack of any recoveries of jewellery or cash or weapons from the accused; material contradictions, inconsistencies and improvements in the statements of prosecution witnesses and lack of assistance by Consular Officers of their country, i.e., Bangladesh, contrary to provisions of the Vienna Convention on Consular Relations, 1963, which made it unsafe to record a conviction against the Appellants.

Issue: Whether the discrepancies in the testimony of prosecution witnesses and lack of assistance by the Consular Officers of Bangladesh towards the Appellants, made it unsafe to record a conviction against the Appellants.

Held: While appreciating the testimonies of witnesses, it was necessary that the Courts be realistic in their expectations from witnesses and go by what would be reasonable based on ordinary human conduct with ordinary human frailties of memory, the power to register events and recall the details. It was to be the totality of evidence on record and its credibility that should eventually determine whether the prosecution was able to prove the charge against the Appellants or not and slight discrepancies which did not shake the basic version of the witnesses should not be given undue weightage or importance to dislodge the prosecution's case.

Since the testimonies of all the witnesses established, beyond doubt, the presence and specific role of each of the accused at the time and place of occurrence and their participation in the commission of the offence and since no ill-will or ulterior motive could be imputed to the witnesses in their cross-examination or anything material be elicited to disbelieve the facts deposed by them, it was held that there was no illegality or irregularity in the findings recorded by the Trial Court basing conviction of the Appellants on the evidence as provided by the

prosecution witnesses as minor contradictions or discrepancies in the statements of prosecution witnesses were bound to occur since they were recorded after lapse of a long time.

Further, the plea of the Appellants that, they were not the perpetrators of the crime and were falsely implicated by the police just to solve the case, could not be believed as it could not be assumed that the police would engage in an inter-state conspiracy to falsely implicate the Appellants nor could the plea that there was a fatal irregularity in the trial of the Appellants on account of not being accorded the rights assigned to them under the Vienna Convention on Consular Relations, 1963, be accepted, as the safeguard provided for in the Convention, was to ensure that the foreign national who had been arrested or detained was not denied his basic human rights and afforded effective legal assistance in a criminal trial. Since, the Appellants were given due legal representation, the object of Article 36(1)(b) of the Convention was considered to be satisfied and the non-compliance with a procedural safeguard of notifying the consulate or embassy of the foreign national, that he was facing trial, could not in such an event lead to such prejudice as to vitiate the trial itself. The appeals were accordingly dismissed.

Section 468 Code of Criminal Procedure, 1973- The date of the complaint was the relevant date for the purpose of computing the period of limitation.

Surender Kumar Jain v. State

Citation: 2012 V AD (Delhi) 267

Decided on: 30th January, 2012

Coram: **M.L. Mehta**, J.

Facts: The petition was preferred assailing the order of the Additional Sessions Judge (ASJ) upholding the decision of the Metropolitan Magistrate (MM) whereby charges under Section 406 Indian Penal Code, 1860 (IPC) were framed against the Petitioner on the basis of the complaint filed by the Complainant under Sections 406/420 IPC alleging that a file of the Complainant containing sales tax forms had been misappropriated by the Petitioner. The Petitioner challenged the said framing of charges on the ground that the cognizance taken by the MM was beyond the period of limitation as the alleged offence took place in the year 1996 whereas the cognizance of the offence by the Court was taken in the year 2002 and therefore, the statutory limitation period being 3 years, the cognizance was bad in law. The petition under Section 482 of the Code of Criminal Procedure, 1973 (CrPC) was filed assailing the order of the ASJ that rejected the Petitioner's revision petition and upheld the order of the Trial Court.

Issues: (1) Whether a petition under Section 482 CrPC against the order of the ASJ was maintainable as it may amount to a second revision which was barred under Section 397(3) CrPC.

(2) Whether the relevant date for calculating the period of limitation under Section 468 CrPC, was the date of the complaint or the date on which the cognizance came to be taken by the Magistrate.

Held: The power of the High Court and that of the Court of Sessions, so far as a revision was concerned, were concurrent. The intention of the Legislature under Section 397(3) CrPC was definite, unambiguous and clear as it curtailed the chance of an unsuccessful revisionist in the Court of Sessions to be entertained for the second time by the High Court. Even though, the High Court did enjoy inherent power under Section 482 CrPC, to entertain petitions in cases where Section 397(3) CrPC laid a statutory bar on a second revision petition, the power was to be

exercised sparingly and with great caution, particularly, when the person approaching the High Court had already availed remedy of first revision in the Sessions Court. However, the case did not fall within the parameters of invoking inherent and extraordinary jurisdiction under Section 482 CrPC or under Article 227 of the Constitution of India.

Further, in an offence of criminal breach of trust, the offence commenced on the date the person was entrusted with the property, refused to return the property or misappropriated the property with which he was entrusted. Thus, for the purpose of computing the period of limitation, it was the date of the complaint which was material and not the date on which the cognizance came to be taken by the Magistrate or the process was issued against the Petitioner as the time utilized during investigation, examination of witnesses, taking cognizance and summoning the Accused, was beyond the control of the Complainant. Thus, the relevant date from which the period of limitation would be said to have commenced would be the day when the Petitioner refused to return the sales tax file to the Complainant and not the date when the file was entrusted to the Petitioner by the Complainant. Also, the cognizance of the offence was not time barred under Section 468 CrPC as the complaint was filed within the period of limitation i.e., 3 years.

Since it was at the stage of framing of charges and that both the Courts above had correctly appreciated the allegations against the Petitioner and formed a *prima facie* view of the framing of charges under section 406 IPC and because the case did not call for interference under Section 482 CrPC or Article 227 of the Constitution either, the petition was dismissed.

CRIMINAL LAW

Section 4(1) and 4(2) of the Prevention of Corruption Act, 1988- The Court competent to enquire and try the offence under Section 12 of the Prevention of Corruption Act would be the Court where the substantive offence took place.

Sanjay Tripathi v. CBI

Citation: 2012 (1) JCC 767

Decided on: 30th January, 2012

Coram: **Mukta Gupta**, J.

Facts: The petitions to challenge the common order passed by the Special Judge, CBI whereby he did not accept the closure report filed by the CBI and took cognizance of offences under Section 120B Indian Penal Code, 1860 (IPC) read with Section 12 of the Prevention of Corruption Act, 1988 (PC Act) and substantive offence under Section 12 PC Act against the Petitioners and M/s. Videocon Industries Limited through its Managing Director. The Petitioners lay the challenge on the ground that the Special Judge had taken cognizance of the offences punishable under PC Act without any grant of sanction by the competent authority. Section 11 PC Act was the fulcrum of the offence of which the abetment and conspiracy was alleged. In the absence of cognizance for offence under Section 11 PC Act, no cognizance for offences under Section 120B IPC read with Section 12 of PC Act could have been taken.

Issue: Whether the Court at Delhi had the jurisdiction to try the offence in terms of Section 4(2) of the PC Act.

Held: Since PC Act was a special enactment, the provision relating to jurisdiction of the Trial Court would be governed by the provision of the PC Act and not by the provisions of Code of Criminal Procedure, 1973 (CrPC). Relying on the Supreme Court judgment in ***CBI v. Braj Bhushan Prasad [(2001) 9 SCC 432]***, wherein it was held that in a case where a Court had jurisdiction to try the offences punishable under the PC Act on the basis of the place where such offence was committed, the allied offences such as conspiracy, attempt or abetment to commit that offence, were only to be linked with the main offence and to be tried at the place where the main offence was committed and not where such an abetment or attempt took place.

The Petitioners had not been charged for the substantive offence of conspiracy but with Section 120B IPC read with Section 12 PC Act and the substantive offence was the commission of offence under Section 12 PC Act. So, the Courts in Mumbai, where the offence took place i.e. where the cheques were issued, received and encashed, would be the competent authority to try this case. The Court thus directed the Special Judge to return the closure report to the CBI to be presented to the Court of competent jurisdiction at Mumbai.

CRIMINAL LAW

Section 353, Code of Criminal Procedure, 1973- The judgment having been pronounced, the trial comes to an end and the Trial Court becomes functus officio.

Rakesh Kanojia v. State Govt. of NCT of Delhi

Citation: 2012 IV AD (Delhi) 690

Decided on: 7th February, 2012

Coram: **Mukta Gupta**, J.

Facts: The petition was filed by the Petitioner being aggrieved by the order of the Additional Sessions Judge, summoning the Petitioner under Section 319 of the Code of Criminal Procedure, 1973 (CrPC) as an additional Accused after an order of conviction under Sections 307/498A/34, Indian Penal Code, 1860 (IPC) was already passed against the other family members of the Petitioner. The Petitioner challenged the order on the ground that once a judgment was dictated and pronounced, the trial had come to an end and thus the Court had no jurisdiction to summon an additional Accused under Section 319, CrPC.

Issue: Whether the Court should invoke its jurisdiction under Section 319 CrPC when the trial had already concluded and judgment was passed.

Held: According to Section 353 CrPC, pronouncement of judgment was a post culmination trial procedure i.e. the judgment having been pronounced, the trial was understood to have come to an end and the Trial Court became *functus officio* thereafter. Thus, even though the application under Section 319, CrPC was moved by the Public Prosecutor before the conclusion of the trial, there was no doubt that the order was passed after the pronouncement of judgment of conviction of the other family members of the Petitioner even though on the same day.

Hence, the Trial Court could not have passed the order on the application under Section 319 CrPC after pronouncing the judgment as it would mean re-commencing the entire proceedings from the very beginning and repeating all the stages of the trial again for the newly-added persons. Such an exercise should only be undertaken if the object sought to be achieved by such exercise was worth wasting the whole labour already undertaken. Consequently, the order summoning the Petitioner was quashed.

If premeditation or previous enmity between the Accused and the deceased is not established, the offence of causing such bodily injuries as were likely to cause death, shall come under the ambit of Exception 4, Section 300, Indian Penal Code, 1860.

Attro Devi v. State

Citation: 187 (2012) DLT 487

Decided on: 8th February, 2012

Coram: S. Ravindra Bhat, **S.P. Garg**, JJ.

Facts: The Appellant-Accused challenged the order of the Additional Sessions Judge convicting and sentencing her under Section 302 Indian Penal Code 1860 (IPC), on the ground that there was no worthwhile evidence or ulterior motive made out and that she had been falsely implicated by the brothers of the deceased with the intention of grabbing her property. Alternatively, it was contended that the Appellant had no motive and intention to set the deceased on fire and thus the offence was at best of culpable homicide not amounting to murder under Exception 4 to Section 300 IPC.

Issue: Whether the Appellant could claim the benefit of Exception 4 to Section 300 IPC.

Held: The Appellant had failed to give any plausible explanation how and under what circumstances the deceased had got burnt and that the dying declaration made by the deceased to all the witnesses was true, reliable and not the result of any tutoring. It was the Appellant who had set the deceased on fire at her house, as a result of which he had sustained burn injuries and expired subsequently. Once the prosecution had proved that the act committed by the Appellant had resulted in the death of a person, then to avail the benefit of the Exception 4 to Section 300, it was for the Appellant to prove that the act was committed without premeditation in a sudden fight upon a sudden quarrel and that she had not taken undue advantage or acted in a cruel and unusual manner.

The Appellant had succeeded in highlighting that there was no previous enmity and that the offence had been rather committed upon a sudden quarrel and sudden loss of self control. However, even if it could be assumed that the Appellant did not intend to cause death, she could

certainly be assumed to know that the act of pouring kerosene oil and setting the deceased on fire would result in causing such bodily injuries as were likely to cause death. Therefore, the Appellant's case could not be said to fall under Section 304 Part II IPC but under Section 304 Part I IPC. The conviction was converted accordingly and the Appellant sentenced to the period undergone.

Unless the contradictions in the narrations of witnesses are of material dimension, the same should not be rejected in entirety.

State (NCT of Delhi) v. Prakash

Citation: 2012 II AD (Delhi) 593

Decided on: 8th February, 2012

Coram: S. R. Bhat, **S.P. Garg**, JJ.

Facts: The first-appeal by the Respondent challenging his conviction under Sections 302/201/436 of Indian Penal Code, 1860 (IPC) was allowed on the ground that the Trial Court had not recorded the testimony of the child witness in accordance with law i.e. to the Court's satisfaction, which the witness understood that he was deposing in Court and also the consequences of his deposition was not recorded. Hence, the Trial Court was directed to take corrective measures.

Thereafter, upon reconsideration of the testimony of the child-witness, the Trial Court rejected it on the ground that it was not corroborated by any public witness and there were vital discrepancies and contradictions in it and thus acquitted the Respondent. Hence, the appeal was preferred by the State against the order of acquittal of the Respondent.

Issue: Whether the inconsistencies in the testimony of the child eye witness were so material so as to immediately result in rejection or not.

Held: Since a re-trial of the Respondent was directed by the Trial Court on the ground that the Court had omitted to record its satisfaction as regards the testimony of the child witness, the net result was that the eye-witness had to depose *de novo* about 9 years after the incident. Also, the witnesses' memory could not be expected to be perfect or razor sharp and some inconsistencies were bound to occur. Nevertheless, the deposition of the eye-witness had been consistent *vis-à-vis* the Respondent's role in the alleged offence. Hence, the testimonies could be considered as consistent as regards the crucial particulars and the contradictions as pointed out by the Respondent were not so serious or vital so as to disregard the testimony altogether.

Hence, the Trial Court had misread the evidence in holding that the testimony of the eye-witness could not be accepted because of its discrepancies and that other witnesses did not corroborate his presence. Thus, the findings of acquittal was unsustainable and thus set aside.

If the question of jurisdiction was not agitated at the earliest opportunity, the Court was then not duty bound to decide the same as and when it was raised.

Shoreline Infrastructure Developers Ltd. v. State.

Citation: 2012 III AD (Delhi) 456

Decided on: 22nd February, 2012

Coram: **Mukta Gupta**, J.

Facts: The Petitioners preferred the petition seeking a direction to the Trial Court to decide the Petitioners' application challenging its territorial jurisdiction to try the complaint filed under Section 138 of the Negotiable Instruments Act, 1881 (NI Act) on the ground that the issue of jurisdiction had to be decided in the first instance as and when it was taken.

Issues: (1) Whether the issue of the jurisdiction was to be raised in the first instance by the Accused or it could be urged even at a later stage.

(2) Whether, in case it was urged at a later stage, the Trial Court was duty bound to decide the same as the first issue as and when it was raised.

Held: There was no provision in the Code of Criminal Procedure, 1973 (CrPC) analogous to Section 21 of the Code of Civil Procedure, 1908 (CPC). Section 462, CrPC however provided that no finding, sentence or order of any criminal court could be set aside merely on the ground that the inquiry, trial or other proceedings took place in a wrong jurisdiction, thus, making it evident that the issue of territorial jurisdiction if not raised during trial would not vitiate the finding, sentence or order unless the Accused was able to show that it had occasioned a failure of justice or that prejudice had been caused to him.

Whereas in a case where the objection as to territorial jurisdiction was taken in the first instance, the Trial Court was expected to return the complaint to be presented to the Court of competent jurisdiction if it came to the conclusion that it lacked the requisite jurisdiction to try the same; where the Accused chose not to agitate this plea at the earliest opportunity, then the Court was not duty bound to decide the same as and when it was raised. The Court could defer the decision on the plea of jurisdiction till the end of the trial. It could not be held that the Petitioners filed the application taking plea of jurisdiction in the first instance. Hence, the plea having not been so

taken at first instance, the Trial Court was held to have committed no illegality while directing the question of jurisdiction to be decided at the final stage. Finding no merit, the petition was dismissed.

CRIMINAL LAW

In a case based on circumstantial evidence the circumstances from which an inference of guilt was sought to be drawn were to be cogently and firmly established.

Sheesh Pal v. State

Citation: 2012 III AD (Delhi) 1

Decided on: 24th February, 2012

Coram: Badar Durrez Ahmed,**Veena Birbal**, JJ.

Facts: The appeal was filed challenging the judgment and order of sentence passed by the Additional Sessions Judge by which the Appellant was convicted under Sections 363/302/201 Indian Penal Code, 1860 (IPC), on the ground that the evidence being either not proved or not believable, was not sufficient to base conviction of the Appellant on it.

Issue: Whether a conviction could be upheld on the basis of the circumstantial evidence produced.

Held: A case based on circumstantial evidence, the circumstances from which an inference of guilt was sought to be drawn were to be cogently and firmly established. The circumstances so proved were required to conclusively point towards the guilt of the Accused and it should form a chain so complete that there was no escape from the conclusion that the crime was committed by the Accused and none else. It was to be considered within all human probability and not in a fanciful manner.

It was noticed that the various witnesses had made different statements at different stages and there were several breaks in the chain of circumstances. Serious contradictions were found in the evidence of the witnesses as regards the allegations of kidnapping and were thus not worthy of being relied upon. Further the circumstantial evidence on record had also failed to conclusively point towards the guilt of the Appellant. The Appellant was thus entitled to the benefit of doubt and was acquitted of all charges and the judgment and order of sentence was set aside.

CRIMINAL LAW

Section 20 of the Unlawful Activities (Prevention) Act, 1967 – Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities cannot be incriminated merely on the basis of their membership.

Abdul Baki Mandal v. State

Citation: MANU/DE/1175/2012

Decided on: 27th February, 2012

Coram: **Suresh Kait**, J.

Facts: The Appellant was held guilty and convicted for the offence punishable under Section 20 of the Unlawful Activity (Prevention) Act, 1967 (Act). There was a 'Fidayeen' attack by militants at Ram Janam Bhumi Babri-Masjid site in Ayodhya in which five militants were gunned down by the security forces. One mobile phone was recovered from the possession of one of the deceased militants. According to the prosecution, to work out the conspiracy and outfits in the 'Fidayeen' attack, a team was constituted. From the technical surveillance, it was revealed that one Abdul Baki @ Raju, resident of West Bengal used to ferry the militants from Bangladesh to their safe at hideouts in Delhi and vice versa and that one Amir, resident of Assam was also instrumental in providing hideouts to the Jaish-e-Mohammad (JeM) militants in Delhi and adjoining areas. The accused was alleged to have made a disclosure statement in which he was supposed to have admitted that he was a member of JeM. Allegedly, three identity cards were recovered, one belonging to the Appellant which showed him to be a member of JeM. After investigation was completed, charge-sheet was filed and he was charged under sections 18, 19 and 20 of the said Act and convicted under Section 20.

Issue: Whether membership of a banned organization by itself was enough to convict an accused.

Held: Mere membership of a banned organization was not enough to incriminate a person, unless it was proved that he resorted to the acts of violence or incited people to imminent violence or acted, intending to create disorder or disturbance of public peace by resort to imminent violence. Admittedly, there was no prior criminal case against the Appellant.

If certain provisions of the law when construed in one way would make them consistent with the Constitution, and another would render them unconstitutional, the Court would lean in favour of the former. The provisions of the Act read along with the explanations made it clear that they were aimed at rendering penal only such activities as would be intended, or had a tendency, to create disorder or disturbance of public peace by resort to violence.

Noting that the Appellant had already undergone 6 ½ years out of the 7 awarded by the trial Court, the High Court acquitted the Appellant of all the charges and allowed his appeal.

The State is expected to exercise its power of remission keeping in view any such benefit to be construed liberally in favour of the convict.

Sikander Mohd. Sahfi v. State NCT of Delhi.

Citation: 2012 III AD (Delhi) 205

Decided on: 5th March, 2012

Coram: **Mukta Gupta**, J.

Facts: The Petitioner sought direction to Respondent No.1 to expeditiously place the case of the Petitioner before the Sentence Reviewing Board (SRB) with direction to dispose of the same within a fortnight.

A writ petition filed by the Petitioner for remission of sentence, was disposed of by the Court with directions to treat the writ petition as a representation and consider the case of the Petitioner for placing before the SRB. However, the Superintendent, Tihar Jail stated in response that since the Petitioner had been awarded life sentence for commission of a heinous crime such as multiple murders and was a convict whose death sentence had been commuted to life, he would be eligible for premature release only after 20 years of imprisonment with remission.

Issues:(1) Whether the Petitioner was a convict whose death sentence had been commuted.

(2) Whether the provisions of the Delhi Jail Manual as applicable in the year 1991 when the Petitioner was convicted or guidelines dated 5th March, 2004, which were subsequently revised on 16th July, 2004, would be applicable to the Petitioner.

Held: Finding of the Superintendent that the Petitioner was a convict whose death sentence had been commuted to life, was erroneous to the extent that the Petitioner's death sentence was never confirmed by the High Court and in the absence of such confirmation, no death sentence could have been awarded to the Petitioner.

The policy for remission applicable to the Petitioner would be ascertained as one which was in vogue on the date of his conviction i.e. Delhi Jail Manual. However, as noted by the Court, since the Petitioner completed his 14 years actual imprisonment in 2009 the policy in vogue, was the

guidelines as notified on 16th July, 2004. The guidelines that provided for an outer limit of imprisonment which was otherwise absent in the Delhi Jail Manual, were more beneficial to the Petitioner. Some of the factors to be considered while considering a case before the SRB, were the nature and gravity of the offence and misuse of concessions of bail or parole, the guidelines were more beneficial to the Petitioner. The Petitioner's case could be put up before the SRB upon completion of 20 years with remission and the Petitioner could be kept in prison for a maximum period of 25 years including remission.

The issuance of notification as under Section 105 of the Code of Criminal Procedure, 1973 was not a mandatory procedure and could not negate the binding nature of the exchange of letters between two countries.

Swiss Timing Ltd. v. CBI

Citation: 2012 III AD (Delhi) 521

Decided on: 5th March, 2012

Coram: **Mukta Gupta**, J.

Facts: The challenge in the petition was to the orders of the Special Judge, CBI Court, Patiala House whereby the Special Judge held that the purported service of summons upon the Petitioner was valid in law and consequently observed that the act of the Petitioner to deliberately avoid appearance before the Trial Court only to further delay the trial, would attract legal consequences. The order was a result of the Petitioner having refused to admit that the service of summons was legal and valid in accordance with law and that he had been legally served by the Trial Court.

Issue: Whether the exchange of letters between two countries constituted a binding treaty and related to the process of enquiry and trial to compel presence of an Accused before the Court and whether a notification under Section 105 Code of Criminal Procedure, 1973 (CrPC) was mandatory in nature.

Held: As per Section 105 CrPC, though the service or execution of summons at a place or country was mandatory, however, sending of such summons to Court, Judge or Magistrate and to such authorities for transmission as may be notified under this Section was only directory. Further, the reason for the second portion of Clause (ii) of Section 105(1) being directory in nature was that the Indian Government could not determine the authority, Court and Magistrate of another sovereign State. Also, the issuance of notification as provided for under Section 105 CrPC was not a mandatory procedure as the word used in Section 105(1)(ii) was "may" and thus the non-issuance of the notification could not render nugatory the binding nature of the exchange of letters between the two Countries.

Further, the exchange of letters was binding and that it related to not only mutual assistance with regards to matters pending investigation but also pending trial. Also, the expression "criminal proceedings" in the exchange of letters included trial of a person for an offence or a proceeding, to determine whether to place a person who was accused of an offence on trial for that offence. Further, the as per the agreement, assistance was required to be granted in accordance with law of the requested State in the investigation or prosecution of criminal offence including embezzlement, abuse of official powers or institution to obtain unlawful profits, bribery, etc. and also that such a request was to be transmitted through diplomatic channels. Thus, the petition was accordingly dismissed.

CRIMINAL LAW

Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007- Only where the school leaving certificate was found to be unreliable, should an ossification test be carried out to determine juvenility.

Deepak Kumar v. State

Citation: 2012 (2) JCC 914

Decided on: 12th March, 2012

Coram: **Mukta Gupta**, J.

Facts: The Petitioner challenged the order of the Additional Sessions Judge (ASJ) dismissing the application of the Petitioner seeking the benefit of juvenility under Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (JJ Rules). The ground of challenge was that in view of the school leaving certificate having been verified, the ASJ had erred in ordering an ossification test of the Petitioner.

Issue: Whether a proper enquiry could be said to have been conducted by the ASJ to determine the age of the Petitioner.

Held: Relying on the Supreme Court decision in ***Arnit Das v. State of Bihar [(2000) 5 SCC 488]***, wherein it was held that a hyper-technical approach could not be adopted while appreciating the evidence in favour of juvenility of an accused, even though the certificate of the Municipal Corporation of Delhi (MCD) produced by the Petitioner was liable to be rejected being incorrect, the School Leaving Certificate ought not to have been discarded without any valid reason being rendered or having summoned or examined the Headmaster or any other official of the school. The ASJ could have considered the ossification test only after the School Leaving Certificate was found to be unreliable as under Rule 12 of the JJ Rules. The order was set aside and the ASJ was directed to conduct a proper enquiry on the School Leaving Certificate. Only after finding the same to be unreliable, was the ASJ allowed to resort to the ossification test to determine the juvenility of the accused.

CRIMINAL LAW

Section 222 of the Code of Criminal Procedure, 1973- It is in the nature of a general provision which empowers the Court to convict for a minor offence even though charge had been framed for a major offence.

Sheela Devi v. State

Citation: MANU/DE/1062/2012

Decided on: 14th March, 2012

Coram: Pradeep Nandrajog, **Pratibha Rani**,JJ.

Facts: The Appellants challenged the judgment and order of sentence convicting them for having committed offences punishable under Sections 498A/302/34 Indian Penal Code, 1860 (IPC) on the basis of two dying declarations and testimony of various witnesses, on the ground of being completely innocent. This was primarily a case where there were multiple dying declarations.

Issue: If the Accused had been charged under Section 302 IPC and the said charge was not established by evidence, would it be possible to convict him under Section 306 IPC having regard to Section 222 of Code of Criminal Procedure, 1973 (CrPC).

Held: Even though the law regarding dying declarations was well settled by the Apex Court, however inconsistencies in multiple dying declarations may prove fatal to the case of the prosecution. The language used in the two dying declarations was not in consonance with the language used by the deceased and the truth had actually emerged from the personal diary maintained by the deceased. Holding the case to be of suicide rather than homicide, the chief question of law that thus arose was whether the Appellants were liable to be convicted for offence punishable under Section 306 of the IPC i.e. abetment of the commission of suicide by the deceased.

Relying on the Supreme Court judgment of ***Dalbir Singh v. State of U.P. [AIR 2004 SC 1990],*** wherein it was held that Section 222 CrPC was in the nature of a general provision which empowered the Court to convict an Accused for a minor offence even though charge had originally been framed for a major offence. In other words, in accordance with sub-section (2) of Section 222 CrPC, when a person was charged with an offence and facts were proved which

reduced it to a minor offence, he could be convicted of the minor offence, although he was not charged with it. While acquitting the brother-in-law entirely, mother-in-law and husband of the deceased were found guilty of having abetted her suicide and maintained their conviction under Section 498A/34 IPC.

Prosecution was required to establish an unbroken chain of circumstances leading to only one conclusion which was guilt and culpability of the accused person.

Ravinder Singh v. State (NCT) of Delhi

Citation: Crl. A. No. 394 of 2010

Decision on: 28th March, 2012

Coram: **Gita Mittal**, J.R. Midha, JJ.

Facts: The Appellant challenged the judgment of the Trial Court, whereby he was found to be guilty and convicted for commission of offences under Sections 302/201 of the Indian Penal Code, 1860 (IPC), on the ground that the prosecution had been unable to prove any of the allegations laid upon against the Appellant in a case of circumstantial evidence, where the prosecution was required to establish an unbroken chain of circumstances leading to only one conclusion which was guilt and culpability of the accused person and did not in any manner suggest or support the hypothesis of innocence of such person.

Issues: (1) Whether the whole trial could be said to be vitiated at the threshold, on account of the Accused being unrepresented by a counsel during his trial for a heinous crime.

(2) Whether, the last seen circumstance was so proximate to the time of the alleged offence so as to conclusively establish the culpability of the Appellant-accused.

Held: It could not be denied that Section 313 of the Code of Criminal Procedure, 1973 (CrPC) was an extremely important and salutory provision and by virtue of it, the law mandated that an opportunity was to be given to the Accused to personally explain any circumstance that appeared in the evidence against him by the Court. Also, the Supreme Court had repeatedly mandated that an Accused was entitled to an adequate and appropriate legal assistance at every stage of the trial. However, it was highlighted that the Accused had been put to a large number of such questions based on material which was completely inadmissible in evidence. The Appellant had the assistance of a counsel, when the evidence was being put to the Appellant, the counsel would have pointed out the impressibility of the questions and the statutory prohibitions to the Court and would have also guided the Appellant on the importance of the statement. Thus without the assistance of a counsel the inability of the accused person to understand the import of the statement which the Court was recording by itself per se would have resulted in prejudice to him

and would tantamount to unfairness of procedure and the trial which the Appellant had undergone.

It was observed that apart from the disclosure statement of the Accused, the prosecution case primarily rested on the evidence of the deceased allegedly being last seen alive in the Company of the Appellant. Relying on the Supreme Court decision in ***State of U.P. v. Satish [2005 SCC (Cri) 642]***, whereby it was held that the last seen theory came into play when the time gap between the point of time when the Accused and the deceased were seen last alive and when the deceased was found dead was so small that possibility of any person other than the Accused being the author of the crime became impossible, even though the deceased had been seen entering the alleged place of occurrence of offence i.e. school, in the Company of the Appellant, however the prosecution had failed to establish conclusively the time of death of the deceased or the ingress or egress if any that could have taken place at the other entrances/exits of the school. Thus if the evidence of the prosecution, that the deceased was last seen alive in the Company of the Appellant was accepted, there was no evidence to establish that the same was proximate to the time when he was murdered or that there was no intervention by any other person. There was also no evidence that the Appellant or the deceased were both in the school premises at the time of the murder or whether any other person entered or exited from the other gates. Thus there could be no conclusive evidence that could lead to the inevitable and only hypothesis that the Accused was only responsible for the murder and no other person.

In light of the above as well as other grounds raised in the appeal, the Court allowed the appeal and the judgment for the offence under Sections 302 and 201 IPC passed by the Additional Sessions Judge were set aside and quashed.

CRIMINAL LAW

Section 190, Code of Criminal Procedure, 1973 - The Magistrate only takes cognizance of an offence and not the offender at the stage of taking cognizance.

Bimal Barthwal v. State through CBI

Citation: 2012 V AD (Delhi) 436

Decided on: 29th March, 2012

Coram: **M.L. Mehta**, J.

Facts: The Petitioners challenged orders of the Metropolitan Magistrate (MM) summoning the Petitioners as accused, based on an application by the main accused in the case. It was contended that with cognizance of the offence having already been taken by the MM against the accused persons, a second cognizance qua the Petitioners without revelation of any new material evidence incriminating the Petitioners in the offence was bad in law.

Issue: Does a Magistrate have, at the pre-charge stage, the power to take cognizance against a person against whom incriminating material was available but who had been cited as a witness by the prosecution.

Held: Relying on the decision in ***Raghubans Dubey v. State of Bihar [AIR 1967 SC 1167]***, it was held that the MM was within his powers to issue summons against the Petitioners after taking note of their role in the alleged conspiracy. At the stage of summoning, the MM was not required to weigh the evidence meticulously but only to ascertain whether or not there was "sufficient ground for proceeding against the accused". The factum of the involvement of the Petitioners in the alleged conspiracy was sufficient for the MM to take cognizance and summon them. The petitions were dismissed.

The testimony of eye witnesses, when their presence is doubtful or when their conduct is highly unnatural, cannot be relied upon without independent corroboration.

Satnam Singh @ Harjeet Singh v. State

Citation: Criminal Appeal No. 398 of 1997

Decided on: 30th March, 2012

Coram: S. R. Bhat, **S.P. Garg**, JJ.

Facts: The appeal was directed against the order of conviction of the Appellant under Sections 302/307 Indian Penal Code, 1860 (IPC) and challenged the order on the ground that ocular testimonies of alleged eye witnesses could not be accepted because they were closely related to the deceased and their conduct was highly unnatural. Also the Accused had no ulterior motive to inflict injuries on the victim with whom he had no prior acquaintance.

Issue: Whether the testimonies of eye witnesses are reliable even without independent corroboration when their presence is doubtful or their conduct is highly unnatural.

Held: The Court must carefully examine the entire available record and the allegations directly attributed to the Accused before convicting him. Considering the testimonies of all the eye witnesses it was held that their conduct was highly unnatural, they omitted to intervene to save the victim or to inform the police or any of deceased's close relation about the incident and therefore, their testimonies deserved outright rejection.

Neither any other circumstantial evidence connecting the Accused with the crime nor the motive of the Accused to inflict the fatal stab blow to a person with whom he had no prior acquaintance was proved. The appeal was therefore allowed and his conviction was set aside.

Section 302 Indian Penal Code, 1860- The weapon used, size of the weapon, place where the assault took place, background facts leading to the assault, part of the body where the blow was given were held to be the relevant factors to be considered.

Seema v. State (NCT) of Delhi

Citation: 2012 IV AD (Delhi) 548

Decided on: 30th March, 2012

Coram: S. R. Bhat, **S.P. Garg**, JJ.

Facts: The appeal was directed against the order of conviction of the Appellants under Sections 302/307/34 of the Indian Penal Code, 1860 (IPC) challenging it on the ground of exclusion of independent witnesses, where all the material witnesses were interested witnesses being relatives of the deceased and that the Trial Court had erred in relying on their testimonies without caution and corroboration and without appreciating the vital improvements and contradictions in their testimonies. The Appellants also contended that even if taken at face-value, the offence did not attract prosecution under Section 302 IPC, the alleged stabbing having been taken place suddenly, without pre-meditation and in a fit of rage.

Issue: Whether the testimony of injured witnesses was reliable or not. whether a single blow ruled out the possibility of Section 302 IPC out rightly.

Held: The deposition of the injured witnesses should be relied upon unless there were strong grounds for rejection of their evidence such as major contradictions and discrepancies therein. If all the material witnesses were close relatives of the deceased, a closer scrutiny of their testimonies was required but the evidence of such witnesses could not be rejected *intoto* and could be considered if otherwise acceptable. Since there was no delay in registering the First Information Report (FIR), thereby excluding any possibility of fabrication or concoctation of a false story, specific roles had been assigned to each Accused in the commission of the crime, the genesis of altercation had been fully narrated and the testimonies of the witnesses stood un-shaken despite lengthy cross-examinations, therefore minor contradictions/improvements on trivial matters could not be held to render the witnesses' deposition as untrustworthy. Hence, the Trial Court was fully justified in wholly relying on the testimonies of the witnesses to convict the Appellant for the commission of offence under Sections 302/307 IPC.

However, upon a close scrutiny of the testimonies of the crucial eye-witnesses pertaining to the roles of other co-Accused, there were many improvements in them and each of their testimonies contradicted the other while assigning a role to the co-Accused in the alleged offence. Mere fact that the Accused were together at the time of the incident and ran away together could not be rendered as conclusive evidence of common intention in the absence of more positive evidence. Mere circumstance of a person being present on an unlawful occasion did not raise a presumption of that person's complicity in the offence then committed. Hence finding no cogent, reliable and trustworthy evidence against the co-Accused, they were held entitled to the benefit of doubt.

As to whether the act of inflicting only a single blow, could be covered under Section 302 IPC, it could not be said as a rule of universal application that if only one blow was given, Section 302 IPC stood ruled out. Number of injuries was held to be irrelevant in ascertaining the intention. The weapon used, size of the weapon, place where the assault took place, background facts leading to the assault and the part of the body where the blow was given were held to be the relevant factors to be considered instead. Since, the main-Accused had stabbed the deceased using a knife used for slaughtering pigs, his guilt under Section 302 IPC stood firmly established and the Court felt no reason to interfere with the findings of the Trial Court. However, conviction of the co-Accused with the aid of Section 34 IPC could not be sustained and were thus acquitted.

CRIMINAL LAW

Power under Section 482 of Code of Criminal Procedure, 1973 can be exercised 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.

Kashibatla Ramakrishna v. CBI

Citation: MANU/DE/1656/2012

Decided on: 16th April, 2012

Coram: **Suresh Kait**, J.

Facts: In the petition, the Petitioner had sought to quash the criminal case registered for the offences punishable under Section 120B read with Section 409/420 of Indian Penal Code, 1860 (IPC) and Section 13(2) and 13(1)(d) of the Prevention of Corruption Act, 1988 pending before the Additional Sessions Judge, against the Petitioner. It was alleged that the Petitioner being the Zonal Manager, of the New Delhi Zone of the United Bank of India, dishonestly and deceitfully recommended for enhancement of credit limit of the Company. However, the Petitioner challenged the said allegation on the ground that such recommendation was made on the basis of recommendation forwarded by the then Branch Manager, Janpath Branch to the Regional Manager, North India Region to the Petitioner. Further, it travelled from the Petitioner to many senior officers and finally to the Board of Directors.

Issue: Whether the Petitioner could be solely criminally prosecuted for a decision which was finally taken and approved by the Board of Directors.

Held: The record revealed that the Head Office had advised the Branch Manager, Janpath Branch to obtain requisite documents for credit enhancement proposal of the Company through a written communication, which was also endorsed to the Regional Manager and Zonal Manager. The Petitioner, who had assumed the charge of Zonal Manager hardly a month back, sent his recommendation based on the recommendation of the Regional Manager and Branch Manager, Janpath Branch.

The CBI had got the sanction for prosecution against the Petitioner only because the Petitioner was now retired from the bank and even then had taken 7 years in providing the legible

documents to the Petitioner. The standard of proof required to establish the guilt in a criminal case was far higher than that required to establish the guilt in departmental proceedings and that power of quashing of a criminal proceeding was to be exercised very sparingly and in the rarest of rare cases, however after examining the entire material witnesses, if the proceedings continued before the Trial Court against the Petitioner, it would be an abuse of process of Court which would result in injustice and would be against the promotion of justice. Further, even if the trial of the Petitioner was allowed to go on and evidence on record remained un-rebutted, even then, the Petitioner could not be held guilty and thus there would be no purpose to proceed with the trial against the Petitioner. Accordingly, the First Information Report (FIR) under Section 120B read with Section 409/420 IPC and Sections 13(2) and 13(1)(d) of the Prevention of Corruption Act, 1988 with the proceedings emanating against the Petitioner were thereby quashed.

The relevant date to infer prima facie vicarious liability under Section 141 of the Negotiable Instruments Act, 1881 for an offence under Section 138 of the Negotiable Instruments Act was the date of issue of the cheques which were subsequently dishonoured and not the date on which demand notice was issued for the same.

P.P. Marina v. State

Citation: 3 (2012) BC 302

Decided on: 20th April, 2012

Coram: **M.L. Mehta**, J.

Facts: The petition was filed by the Petitioners-Directors of the accused Company, seeking quashing of the criminal complaint as well as the summoning order under Section 138 of the Negotiable Instruments Act, 1881 (Act) along with all the proceedings arising therefrom, on the ground that since at the time of the commission of the alleged offence, the Petitioners had ceased to be Directors of the accused Company, therefore they could not be held vicariously liable for an offence committed by the accused Company.

The accused Company had issued cheques in favour of the complainant Company, equivalent to the payment made by the complainant Company on behalf of the accused Company towards external development charges, in pursuance of an Memorandum of Understanding (MOU) entered into between them for development of certain land in Haryana as also a subsequent share purchase agreement. However, upon being presented for encashment, the cheques returned as unpaid stating the reason as 'payment stopped by the Drawer'. In response to a demand notice sent by the complainant Company to the accused Company, the accused Company responded that the cheques had been handed over to the complainant Company as a mere security and not for the satisfaction of any debt or liability. A complaint was hence, filed in the Court of Metropolitan Magistrate (MM) under Section 138 of the Act and summons were issued to the Petitioners/Directors of the accused Company, holding them vicariously liable under Section 141 of the Act.

Issue: Whether the Petitioners/Directors of the accused Company could be held to be *prima facie* vicariously liable under the Act on the premise that they had ceased to be the Directors of the accused Company before the issue of the demand notice as the offence under Section 138 of the

Act was completed only on non-payment after the expiry of the statutory period in the demand notice.

Held: The Court observed that Section 141 of the Act created a legal fiction against the defaulting Company, so as to cover within its ambit all persons who may have consented, connived or anyway attributed to the commission of the offence. In other words, the offence was the result, whereas the transaction was the cause. Liability of a person/s arose on account of the conduct, act or omission on the part of the person/s and not merely on account of holding an office or position in a company. Therefore, in order to bring a case within Section 141 of the Act, the complaint was necessarily required to disclose the necessary "facts" which made the person/s liable.

The Petitioners could not seek protection from being vicariously prosecuted on the excuse that they had ceased to be the Directors of the Company at the time of commission of the offence. The relevant date to fasten such vicarious liability on the Directors was the date when the cheques were issued and since Petitioner Nos. 2 and 3 were Directors when the cheques were ordered to be stopped from encashment, it implied their knowledge of the offence committed by the accused Company. At the stage of summoning this was sufficient to bring them under the ambit of Section 138 of the Act and also it could be safely assumed that Petitioner Nos. 2 and 3 were active participants in the transaction and well aware of the issue of the dishonoured cheques which could be construed to show that they were responsible for the conduct of the business of the accused Company at the relevant time.

However, the case of Petitioner No. 1 was held to stand on a different footing as although the Petitioner No. 1 could be assumed to be privy to the transaction, he could not be assumed to be privy to the issue or dishonour of the cheques as the cheques were issued in August, 2010 and dishonoured in January, 2011 which was after more than a year of his ceasing to be a Director. The Petitioner No. 1 was thus held to be clearly covered under the proviso of Section 141 of the Act which gave immunity to a person not having knowledge of the offence. In view of the above, the summoning order only qua Petitioner No. 1 was quashed.

CRIMINAL LAW

One of the essential requirements for a confession of the co-Accused to be admissible under Section 30 of the Evidence Act, 1872 is that the two Accused should be tried jointly.

Krishan v. R.K. Virmani, Air Customs Officer

Citation: 2012 (192) ECR 356 (Delhi)

Decided on: 24th April, 2012

Coram: **Mukta Gupta**, J.

Facts: The petition was filed by the Petitioner seeking the setting aside of the order of the Additional Chief Metropolitan Magistrate (ACMM), whereby he had ordered framing of charges against the Petitioner under Section 135 A of the Customs Act, 1962 as also the consequential order for framing charge, on the ground that the statement of the Petitioner recorded under Section 108 of the Customs Act was exculpatory in nature and the statement of accomplice, Virender Singh Batra, recorded under Section 108 of the Customs Act could not be relied upon for the purpose of framing charges as he was not examined as a witness in terms of Section 244 of the Code of Criminal Procedure, 1973 (CrPC) in the complaint case and also that because Virender Singh Batra was not being tried jointly, his statement was not admissible under Section 30 of the Evidence Act, 1872.

Issue: Whether the statement of an accomplice made under Section 108 Customs Act be considered for the purpose of framing charges where he was neither jointly tried with the accused nor was his statement recorded under Section 244 CrPC.

Held: A statement recorded by a Customs Officer under Section 108 of the Customs Act was admissible in evidence and not hit by provisions of Article 20(3) of the Constitution or Section 25 of the Evidence Act. Further, such statement was presumed to be truthful as it was recorded under a proceeding which was judicial in nature and if upon such statement a prima facie case could be made out for framing the charge, the ACMM was well within his powers to order framing of charges. Thus, even though Virender Singh Batra was not called as a witness, his statement, recorded under Section 108 Customs Act, could definitely be looked at the stage of framing charges.

However, as regards the question as to whether the statement of Virender Singh Batra recorded under Section 108 Customs Act, duly proved by PW1 Subhash Narayan, was admissible even though he was not tried jointly with the Petitioner, the confession of the co-Accused was admissible under Section 30 of the Evidence Act only if the essential requirement of the two

accused being tried jointly, was satisfied. Since this requirement was not satisfied, the confession of the co-Accused could not be said to be admissible, and in the absence of any other evidence, no charge could be framed against the Petitioner for an offence under Section 135 A of the Customs Act. Hence, the order directing framing of charge and the consequent order framing charge against the Petitioner for an offence under Section 135 A Customs Act were set aside and the petition was disposed of accordingly.

CRIMINAL LAW

The inherent power of the Court under Section 482 of the Code of Criminal Procedure, 1973, to quash an order on charge or charge, should not be exercised to stifle a legitimate prosecution case.

Inder Singh Bist v. State

Citation: MANU/DE/3778/2012

Decided on: 27th April, 2012

Coram: **Pratibha Rani**, J.

Facts: The Petitioners challenged the orders passed by the Additional Sessions Judge (ASJ) charging the Petitioners with offences punishable under Sections 302/307/34 Indian Penal Code, 1860 (IPC) on the ground that since the co-accused were already acquitted by the Trial Court on the ground that the prosecution witnesses did not support the prosecution case, if the statements of the same witnesses were to be considered during the trial of the Petitioners, the case would ultimately result in acquittal. It was necessary that the order framing charge be quashed.

Issue: Whether it was necessary that if the co-accused were acquitted, the principal accused must also be acquitted on that basis as trial against them would amount to abuse of process of law.

Held: Merely because some of the accused stood acquitted in a trial separately held, the other accused were not entitled to the benefit of the acquittal order in all cases. If the evidence against the accused persons was separable and divisible and there were specific allegations and accusations against the accused persons, which did not feature in the trial of the co-accused, then the evidence would be a subject matter of trial. Moreover, when a party approached the Court for quashing of charge, the Court was not required to meticulously analyse the case and sift the entire evidence to judge the involved guilt of the Accused but was only required to consider the existence of a *prima facie* indication of the involvement of the accused.

Even though the power to discharge the accused was vested in the ASJ and there was nothing to prevent the ASJ from acquitting all the accused persons charge-sheeted by the police, yet, he had been satisfied that the Petitioners had to stand trial in view of the material available on record. There was no jurisdictional error or illegality committed by the ASJ. The petitions were dismissed.

For offences punishable under Sections 21 and 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985, the Suspect/Accused was entitled to bail, and if he or she was prepared to give, had to be granted bail, in terms of Section 436 of the Code of Criminal Procedure, 1973, without the necessity of his (or her) seeking it in the Court.

Minnie Khadim Ali Kuhn v. State NCT of Delhi

Citation: MANU/DE/2592/2012

Decided on: 8th May, 2012

Coram: **S. Ravindra Bhat**, S.P. Garg, JJ.

Facts: The Writ petition under Article 226 of the Constitution of India was filed by the Detenu's mother seeking a direction to quash her son's detention, on the ground that such detention of her son by the Respondents and refusal to grant bail, was unlawful.

The Petitioner's son was detained by the police alleging that his bag was found with 100 gms. of a black substance which was declared to be *charas* by the police without having conducted any testing of the substance. The Petitioner's son was arrested for an offence punishable under Sections 20 & 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) and refused bail despite having been arrested for a bailable offence. Further the Petitioner was not supplied a copy of the FIR for until a day after it was registered. The Petitioner pleaded that even though her son was granted bail by the Metropolitan Magistrate (MM), the present proceedings were required to be continued as release of the Detenu could not take away the illegality of the detention. It was prayed by the Petitioner that the Court should declare that whenever possession of a small quantity of *charas* under Sections 20 & 21 of the NDPS Act was alleged, the offence being bailable, the suspect was entitled to be enlarged on bail, by the police as in the case of any other petty offences.

Issue: Whether offences punishable under Sections 20 & 21 of the NDPS Act would be governed by the provisions of Section 37 of the NDPS Act, which imposed restrictions on the Court's power to grant bail, by imposing additional norms.

Held: Subsequent to amendments in the NDPS Act, 'small quantity' and 'commercial quantity' were defined and proportionate sentencing for possession of small, intermediate and commercial

quantities of offending material were introduced. Further, this policy and legislative change was also automatically reflected in the bail regime. Instead of the previous classification of offences which were punishable with less than five years, Parliament now restricted the category of offences where bail could be granted after applying additional norms to 'offences under Section 19 or Section 24 or Section 27 A and also for offences involving commercial quantity'. Thus, except in respect of offences specifically enumerated under Section 37, i.e. offences punishable under Sections 19, 24 and 27, and those cases involving commercial quantities, the normal law, i.e. the CrPC was applicable whenever the question of bail arose. Thus, if the offences were punishable, like in the case of possession of small quantities of the concerned substance or drug, under Sections 21 & 22, the Suspect or Accused was entitled to bail, and if he or she was prepared to give, has to be granted bail, in terms of Section 436 of CrPC, without the necessity of his (or her) seeking it in the Court.

The offence of possession of a small quantity (upto 100 gms.) of *charas*, under Section 21 of the NDPS Act, if proved, was punishable upto six months, and fine and cognizable by virtue of Section 37(1) of the NDPS Act. However, this class of offence was clearly bailable. Hence, only two packets were allegedly seized, one weighing 40 gms. and the other 60 gms., the total amount allegedly seized was 100 gms., which was a small quantity. Therefore, the Petitioner's son was entitled to be released, without him applying for bail in Court, once he had showed willingness to give bail, in terms of Section 436, CrPC. The Court therefore directed the Police Commissioner to issue necessary guidelines and instructions to all police officials bringing to their notice the effect of this judgment, so that they were suitably instructed in future cases, that wherever offences were bailable, they were to release the Suspects if bail was offered in terms of Section 436, CrPC, read with Item 3 of Part II to the First Schedule of the NDPS Act.

Permission of the High Court was not mandatory for proceeding with a complaint case disclosing commission of cognizable or non-cognizable offence, except for, if the complaint was against a Judicial Officer.

Minni v. High Court of Delhi

Citation: 2012 IV AD (Delhi) 685

Decided on: 11th May, 2012

Coram: S. Ravindra Bhat, **S.P. Garg**, JJ.

Facts: In the writ petition, the Petitioner challenged the order of the Additional Chief Metropolitan Magistrate-02, (North) Delhi whereby she was directed to obtain permission of the Court as a condition precedent to proceed with the complaint case filed by her against an officer of Delhi Judicial Service alleging commission of offences punishable under Sections 341/354/499/506 of Indian Penal Code, 1860.

The Trial Court had declined to proceed with the complaint case filed under Section 200 of the Code of Criminal Procedure, 1973 as it contained scandalous allegations against the Judicial Officer and the Petitioner had not obtained sanction/permission of the Court. Subsequently, the Court, on administrative side, declined to grant sanction for registering an FIR against the Judicial Officer observing that the allegations in the complaint case did not disclose commission of cognizable offences warranting registration of an FIR.

Issue: Whether the order was premature in light of the fact that the Trial Court had yet to form its opinion to direct registration of an FIR or rejection of the complaint.

Held: It was observed that the CrPC, does not mandate that to proceed with a complaint case disclosing commission of cognizable or non-cognizable offence, the permission of this Court was first required. The only bar to protect the independence of the judiciary was that there could be no registration of an FIR against a Judicial Officer without seeking the permission of the Chief Justice of this Court.

The Trial Court had not yet formed its opinion to direct registration of an FIR against the Judicial Officer or rejection of the complaint. Under Section 200 of the CrPC, on receiving the complaint,

the Magistrate was required to apply his mind with respect to the allegations, and then proceed at once to take cognizance or order it to be sent to the police station for being registered and for investigation. The Trial Court was yet to decide if it intended to proceed itself under Section 200 of the CrPC or wished to get the case investigated under Section 156(3) of the CrPC. If the Trial Court after seeking status report from the concerned police station ordered registration of an FIR under Section 156(3) of the CrPC, the Petitioner would be required to first seek permission of the Chief Justice of this Court. If the Trial Court investigated the matter itself, either at the initial stage or after getting the status report under Section 156(3) of the CrPC there would be no requirement of such permission. Thus, the matter was held to be still at an initial stage and it was premature to direct the Petitioner to approach this Court for permission/sanction.

Therefore, since no FIR had been ordered to be registered against the Judicial Officer, the order directing the Petitioner to obtain the permission/sanction of this Court could not be sustained and was thus held liable to be set aside. However, if at a later stage the Trial Court concluded that an FIR was required to be registered, then the order would be kept in abeyance till the Chief Justice of this Court granted the requisite permission.

CRIMINAL LAW

Criminal proceedings could not be vitiated ipso facto merely because cognizance was taken by the Magistrate without having the competence to take such a cognizance on account of the lack of territorial jurisdiction or lack of competence to deal with the subject.

Directorate of Revenue Intelligence v. Gurmej Singh

Citation: MANU/DE/3327/2012

Decided on: 2nd July, 2012

Coram: **V.K. Shali**, J.

Facts: The Petitioner-DRI challenged the order of the Additional Chief Metropolitan Magistrate (ACMM), New Delhi, whereby the accused persons had been discharged on account of lack of territorial jurisdiction. Liberty had been granted to the Complainant to file a complaint under Section 135(1)(b) of the Customs Act, 1962 ('CA'), before the concerned Court having the jurisdiction in accordance with law. The Respondents-Accused had been apprehended along with another Accused (driver) while carrying contraband gold i.e. 300 gold biscuits bearing foreign markings, in a white Maruti van. Since no proceedings could be conducted at the place of interception, the Accused along with the seized vehicle were escorted to Delhi by DRI Officials wherein their statements were recorded under Section 108 CA and a complaint was filed. However, at the stage of pre-charge evidence, the Respondents-Accused filed an application challenging the jurisdiction of the Delhi Court under Section 245(2) Cr PC, on the ground that since the vehicle was intercepted in Panipat, in Haryana, therefore the offence was complete in terms of Section 177 Cr PC in Haryana itself. The ACMM finding force in the said contention, notwithstanding that it was raised after 12 years, held that the Delhi Court did not have the requisite jurisdiction to hear the matter.

Issue: Whether a complaint could have been rejected after a lapse of 12 years on the ground of lack of jurisdiction and the accused discharged.

Held: The ACMM had fallen into a grave error in rejecting the complaint after a lapse of 12 years on the ground of lack of jurisdiction and discharging the Accused/Respondents while placing reliance on the decision in ***Kanwarjit Singh vs. Union of India [1994 (1) Crimes 255]***. Under Section 460 Cr PC, even if the ACMM in Delhi did not have the jurisdiction to take the cognizance but had actually taken the cognizance, the trial proceedings could not be vitiated on account of the lack of competence of the ACMM in taking the cognizance unless and until some serious prejudice was shown by the Accused/Respondents. Section 462 Cr PC stated that no

finding, sentence or order of any criminal court should be set aside merely on the ground that the inquiry, trial or other proceedings, in the course of which it was arrived at or passed, took place in a wrong sessions division, district, sub-division or other local area, unless it appeared that such error had in fact occasioned a failure of justice.

Thus, only if a failure of justice was shown by the Respondents-Accused to have resulted could the ACMM have discharged the Accused under Section 245 (2) Cr PC. There was an inordinate delay of 12 years in raising the objection. Additionally the Delhi Court had the requisite jurisdiction as the substantial action which constituted the offence of carrying the contraband was committed in Delhi; the vehicle was searched in Delhi; gold was seized in Delhi and the *panchnama* was prepared in Delhi. Thus the order was set aside and the matter was remanded to the ACMM.

CRIMINAL LAW

A criminal trial based on the same facts as the departmental proceedings cannot be pursued if the allegations against a party in the departmental proceedings fail to be proved, for want of higher degree of proof.

Dinesh Aggarwal v. DRI

Citation: 2012 VI AD (Delhi) 677

Decided on: 2nd July, 2012

Coram: **V.K. Shali**, J.

Facts: The Petitioners sought quashing of the criminal complaint filed under Sections 132 and 135(1)(a) of the Customs Act, 1962 against them on the ground that no misdeclaration had been made by the Petitioners as alleged by the Department and that all the documents required for the clearance of goods from the Customs, clearly showed that the goods declared were PC Sheets and cleared as such. The Petitioners also challenged the complaint on the basis of the Respondent-DRI's own admission that it did not suspect the Petitioners of misdeclaration of the description of the goods imported by them.

Pursuant to a raid conducted on the Petitioners, a show-cause notice had been issued to them for misdeclaring that the PC Sheets imported by them were made by extraction from scrap whereas they were prepared from fresh polymer of high resin. Further, the declared price of the finished product at the time of its import was less than the international/domestic price of the raw material. The Respondent, not being satisfied of the Petitioners' response to the notice, initiated departmental adjudication proceedings against the Petitioners and exonerated them after enquiry.

Issue: Whether a party who stood exonerated in departmental proceedings on the basis of certain facts could be criminally prosecuted by the Department on the same set of facts.

Held: The Respondent had not only failed to take timely actions against the order passed by CESTAT, but was also trying to hinder the expeditious disposal of the writ petition. As the legal position with regard to the adjudication of departmental proceedings and its consequences on the criminal trial were concerned, there was no automatic closure or quashing of the criminal complaint in case there was a favourable verdict in the departmental or the adjudicatory proceedings in favour of an Accused. However, in case the adjudicatory proceedings culminated

in an order in favour of the accused on merits and the criminal complaint was in sum and substance based on the same facts then, obviously it would be a gross abuse of the processes of law to continue with the criminal complaint.

Since, the factual matrix in the adjudication proceedings and in the criminal complaint were the same and if by preponderance of probability, the Department had not been able to prove the charge or the allegation against the Petitioners, it was unthinkable that they would have been able to muster evidence to prove the same charge before a criminal court by a higher degree of proof. Hence, disagreeing with the view taken by the Department, it was agreed that the Petitioners had been successful in making out a case inasmuch as having been exonerated in the departmental adjudicatory proceedings regarding both the allegations of misdeclaration and under-valuation, no purpose would be served to continue with the criminal trial. Accordingly, the criminal complaint under Sections 132 and 135(1)(a) of the Customs Act, and the consequent proceedings against the Petitioners were quashed and their writ petition was allowed.

A private complaint may not be entertained unless the complainant has produced prima facie evidence before the Court in the form of a credible opinion given by another competent doctor to support the rash or negligence act on the part of the accused doctor.

Meenakshi Jain v. State

Citation: MANU/DE/3010/2012

Decided on: 2nd July, 2012

Coram: **V.K. Shali**, J.

Facts: The petition was filed under Section 482, Code of Criminal Procedure, 1973 (CrPC) seeking a direction for quashing of the order of the Trial Court whereby the Delhi Medical Council was directed to expedite the hearing of the Petitioner's complaint and file the Action Taken Report, being illegal, arbitrary and against all principles of criminal justice and showing non-application of mind while also issuing directions to Respondent No. 1-State to act upon the complaint of the Petitioner and register a First Information Report (FIR) under Section 304-A Indian Penal Code, 1860 (IPC) against the Apollo Hospital and its doctors for forging and tampering with the record and causing the death of her father by medical negligence.

The Petitioner challenged the order on the ground that by virtue of the order, the Magistrate had directed the Delhi Medical Council to furnish its opinion which was in fact trying to fill up the lacuna and save the doctors who had already been held to be prima facie negligent in the performance of their duties by the Medical Board constituted by the Consumer Forum. According to the Petitioner, opinion of the Medical Board which had already held the Apollo doctors as guilty of medical negligence, ought to have been sufficient for the Magistrate to direct the registration of the FIR as also the Delhi Medical Council had no power to furnish a medical opinion in cases of negligence.

Issues: (1) Whether the Court could exercise its inherent powers to grant the right of being heard to the Applicants/Interveners.

(2) Whether the Petitioner could directly approach the High Court by way of a writ petition for getting the said FIR registered without exhausting the other remedies available.

(3) Whether the lower Court could have directed the Delhi Medical Board to expedite the complaint proceedings and file its opinion in the case at hand.

Held: The Court had the inherent powers to prevent an abuse of the process of law and the Applicants/Interveners-Delhi Medical Council were well within their right to assist the Court in presenting the clearer picture. If the right of hearing would not have been given to the Interveners/Applicants, it may have done incalculable damage inasmuch as, the FIR might have got registered against them. Furthermore, since it was not the Applicants/Interveners who had come to the Court, the contention of the Petitioner challenging the locus standi of the Applicants/Interveners to assist the Court was disallowed.

It was settled law that if a person felt aggrieved on account of non-registration of an FIR in respect of a cognizable offence in terms of Section 154(1) CrPC then the appropriate course of remedy was to approach the Superintendent of Police (SP) or Deputy Commissioner of Police (DCP) of the concerned area under Section 154(3) CrPC. If the FIR was still not registered, then the alternate remedy was to file an appropriate complaint under Section 200 CrPC which may be inquired into by the Magistrate under Section 200 and 202 CrPC and thereafter, pass an appropriate order either under Section 203 CrPC dismissing the complaint or under Section 204 CrPC issuing the process to the accused persons. However, it was not open to him to approach the High Court by way of a writ petition for getting the said FIR registered. Hence the prayer made by the Petitioner that a direction be given to the Respondent No.1 to register an FIR on the basis of a complaint filed by the Petitioner, against the accused doctors was not maintainable in law.

Even if that portion of the order which set out directions to the Delhi Medical Board to expedite the proceedings and file its opinion at the earliest, would have been set aside, it would not have brought any relief to the Petitioner because it only reiterated the earlier order of the Court directing the constitution of a medical board by the Delhi Medical Council and file its medical opinion, which was sine qua non for registration of the FIR. It was further observed that since the Petitioner herself had put the criminal justice machinery into motion, therefore just because she could not produce any prima facie evidence with regard to medical negligence, it was not open to her to have retracted her steps belatedly and then urge that the order directing the constitution of the Board of Delhi Medical Council to furnish a medical opinion be recalled because there was already an opinion furnished by the doctors of Maulana Azad Medical College. This was only a subsequent improvement by the Petitioner and since the Medical Board was constituted by a Consumer Forum and not by a criminal court and also that its opinion had been challenged by the Applicants/Interveners, it would be unsafe to have relied upon such an opinion. Hence, the

plea of the Petitioner in this regard was also rejected. The Petition was accordingly dismissed and the stay granted was vacated.

Unless 'dishonest intention' and 'dominion over property' are established, breach of trust cannot be said to amount to cheating.

Wolfgang Reim v. State

Citation: 2012 VI AD (Delhi) 568

Decided on: 2nd July, 2012

Coram: **V.K. Shali**, J.

Facts: Amongst the two petitions, while one was filed by five Petitioners-Accused, the other was filed by the sixth Accused person in the same First Information Report (FIR), seeking quashing of the complaint case and the order passed by the Metropolitan Magistrate (MM), New Delhi under Section 156(3) of the Code of Criminal Procedure (CrPC) on the basis of which FIR, under Sections 381/403/406/408/417/420/427/500 Indian Penal Code, 1860 (IPC) read with Section 120B IPC was registered and the consequent proceedings were being taken in pursuance to the same. The Petitioners-Accused challenged the order on the ground that the dispute between the parties was of a civil nature and a criminal colour was attempted to be given to the dispute in order to exert undue pressure on the Petitioners.

As per the Complainant-Company which was engaged in the business of manufacturing and sale of medical equipments and appliances for machines, by developing their own design, drawing, catalogues and brochures, the Petitioners-Accused had in pursuance to a criminal conspiracy, pilfered confidential information regarding a data bank of customers for installations throughout the country in terms of the prospective clients of the Complainant-Company, with the aid of ex-employees of the Complainant-Company. The Additional Chief Metropolitan Magistrate (ACMM) on the basis of an application under Section 156(3) CrPC directed registration of an FIR while observing that a matter of such nature could not be investigated or evidence could not be produced by the Complainant itself.

Issue: Whether access to confidential information could be considered to be cheating if the person so accused was in proximity or was holding a position to have normally had the access to such information.

Held: For an offence of breach of trust to be made out, there must be dominion over the property handed over to the accused persons by the Respondent/Complainant by way of entrustment.

Correspondingly, one of the main ingredients in an offence of cheating was that there required to be dishonest intention at the time of the commission of the offence. If there was no dishonest intention on the part of any of the party at the time when the transaction was entered into and merely because subsequently the transaction had fallen through, as there was a breach of contract, that could not be said to result in commission of an offence of cheating. Secondly for an offence of breach of trust, there required to be dominion over the property handed over to the accused persons by the Respondent/Complainant by way of entrustment.

The entire thrust of the Respondent No.2/Complainant's case in the FIR was that the Petitioners, who were the foreign directors or the employees of the Joint Venture Company, had committed the offence of breach of trust, cheating and a conspiracy by stealing designs, software and data of the Complainant-Joint Venture Company. However, since the Petitioners were established to be the directors and the employees of the company obviously, then it could be said that by virtue of their proximity or holding of a particular position in the Joint Venture Company they were to handle the said products and therefore it could not be said that they only enjoyed dominion over the property or that there was entrustment. Therefore, the two ingredients which were essential to be established in the case of criminal offence prima facie could not be said to be satisfied.

Further, at best there could have been a breach of contract or breach of agreement between the parties and that further no offences pertaining to theft, breach of trust, cheating, defamation or the criminal conspiracy could be said to be made out, even upon a superficial analysis of the FIR. Also, the Complainant had converted a civil dispute into a criminal dispute not just with a mala fide intention but had also indulged in gross abuse of the process of law. Hence, the invocation of Section 156(3) CrPC by the Complainant/Respondent in the instant case was a gross abuse of the processes of law and thus in exercise of the powers under Section 482 CrPC, the complaint and the consequent proceedings arising from it were quashed.

DIRECT AND INDIRECT TAXES

Assessee would be liable to pay interest under Section 220(2) of the Income Tax Act, 1961 only if he failed to pay the demand within the period stipulated in the notice and that the rectification order itself could not include interest under Section 220(2).

Girnar Investment Ltd. v. Commissioner of Income Tax

Citation: 2012 (340) ITR 529 (Delhi)

Decided on: 5th January, 2012

Coram: Sanjiv Khanna, **R.V. Easwar**, JJ.

Facts: The Petitioner sought quashing of the order passed by the Commissioner of Income Tax (CIT) under Section 220 (2A) of the Income Tax Act, 1961 as also seeking a direction to the CIT not to levy interest under Section 220(2) of the Income Tax Act for which period allegedly there was no demand outstanding and payable by the Petitioner. A further prayer was also made for issuance of a direction to the Respondents to refund the tax along with interest already recovered by them as interest under Section 220(2) as also for waiver of the interest charged under the above Section.

The Petitioner being a public limited company carrying on finance and investment business had filed an appeal requesting stay against the assessment order and demand notice served upon it and while it was pending, paid 50% of the tax demanded by the Assessment Officer (AO). While CIT (Appeals) (CIT A) disposed of the appeal against the assessment while also reducing the assessed income of the Petitioner, the Income Tax Appellate Tribunal (Tribunal) accepted Revenue's appeal and upheld the assessment order passed by the AO. The Assessee's appeal seeking waiver/reduction of the interest on the ground that it was under the bonafide and genuine belief that capital gains on bonus shares were not chargeable to tax, was also rejected by CIT.

Issue: Whether the Revenue was entitled to levy interest under Section 220(2) of the Income Tax Act for the period from November 1997 to July 2004 for which period allegedly there was no demand outstanding and payable by the Petitioner.

Held: The first notice of demand, issued after original assessment order could not be deemed to have been extinguished by virtue of the appeal having been filed before the CIT (A) or grant of conditional stay of the operation of the assessment pending disposal of the appeal or by virtue of subsequent reduction of the taxable income, for the reason that under the order of the Tribunal

which had attained finality between the parties, the original assessment had been restored with the result that the first demand notice which at the most lay in abeyance or suspension, stood revived and it would be apposite to have held that there was non-compliance with this notice of demand apparently beyond 35 days so as to attract the provisions of Section 220(2) of the Income Tax Act.

Thus Petitioner was held liable to pay interest under Section 220(2) of the Income Tax Act on the amount of tax due from it on the basis of the assessment order passed under Section 143(3) of the Income Tax Act for the entire period till the date on which it was actually paid. Further, while computing the interest, no notice shall be taken of the fact that by virtue of the order of the CIT (Appeals) there was a reduction of the tax liability from the date of the said order till the date on which the Tribunal restored the assessment order. However, no interest was liable to be charged from the Assessee on the interest allowed to him under Section 244A of the Income Tax Act. The Assessing Officer was thus directed to recalculate the interest accordingly and recover the same from the Assessee.

Deduction of lease equalisation charge from the leased rental income is not only founded on the accounting principle: 'only revenue income be offered to be taxed', but also satisfies the mandate of Section 211(2) of Companies Act, 1956, to represent the true and fair view of the accounts.

CIT v. Virtual Soft Systems Ltd.

Citation: 2012 II AD (Delhi) 582

Decided on: 7th February, 2012

Coram: Sanjay Kishan Kaul, **Rajiv Shakdher**, JJ.

Facts: The Revenue challenged a common judgment of the Income Tax Appellate Tribunal (ITAT) pertaining to five appeals on the ground that the ITAT having dealt with the issues on merits and having concluded that Assessee's contentions had to be sustained, did not examine the validity of the order passed in assessment year (AY) 1996-97 under Section 263 of the Income Tax Act, 1961 (I.T. Act) or, the validity of the re-assessment proceedings, in so far as, the remaining four assessment years were concerned.

The Assessee, a lessor, relying upon Guidance Note dated 20th September, 1995 issued by Institute of Chartered Accountants of India (ICAI), in respect for accounting for leases, had changed his accounting policy from the AY 1996-97 onwards, and consequently claimed deduction of lease equalisation charge from his leased rental income, in order to equalise the imbalance between lease rental and depreciation created over a period of time.

Issues: (1) Whether in determination of real income from leases recourse could be taken by the Assessee to the Guidance Note issued by ICAI?

(2) Whether an Assessee's leased rental income could be allowed to be reduced by taking recourse to lease equalisation charges?

Held: Sub-section (3) of Section 145 of I.T. Act empowered the Assessing Officer (AO) to disregard the books of accounts submitted by the Assessee only if he was not satisfied with the correctness or completeness of the accounts of the Assessee or, the method of accounting employed by the Assessee or on account of accounting standard (A.S.) notified under Sub-

section (2), not being particularly followed by the Assessee. However, as long as the method employed for accounting of income meets with the rudimentary principles of accountancy, one of which, included offering only revenue income for tax, fault could not be found with the Assessee debiting lease equalisation charges in the AYs in issue, in its profit and loss account as it represented true and fair view of the accounts; a statutory requirement under Section 211(2) of the Companies Act, 1956 (Companies Act). The rationale behind this was that the method employed by the Assessee over the full term of the lease period would result in the lease equalisation amount being reduced to a naught, as the debit and credits in the profit and loss account would square off with each other.

The method of accounting followed by the Assessee enabled it to determine the real income, which was offered for tax in the instant case. However, the AO disregarded, in substance, the method of accounting followed by the Assessee qua lease rentals without basing it on the grounds provided in Section 145 of the I.T. Act. Instead, he disallowed the deduction and added to the taxable income of the Assessee that which was not part of its income, but only an adjustment of the amount claimed as depreciation. The Court decided the questions of law in favour of the Assessee while rejecting the contention of the Revenue. The appeals were accordingly dismissed.

Section 6(1) read with Section 2(m)(iv) of the Delhi Entertainments and Betting Tax Act, 1996 authorised the levy of entertainment tax on all payments for admission to any entertainment provided the payment was connected with the entertainment and was required to be made by the person as a condition for attending the entertainment.

The Delhi Race Club Ltd.v. Government of NCT of Delhi

Citation: (2012) 48 VST 483 (Delhi)

Decided on: 8th February, 2012

Coram: Sanjiv Khanna, **R.V. Easwar**, JJ.

Facts: The writ petition was preferred praying for quashing of the assessment orders passed by the Respondent No. 3 raising the demand of entertainment tax @ 25% on the charges for entry of mobile phones as under Section 2(m)(iv) read with Section 6(1) of the Delhi Entertainments and Betting Tax Act, 1996 (the Act) and against the order passed by Respondent No. 2 in revision, rejecting the revision application filed by the Petitioner against the said demand as well as for quashing of the recovery notice and for passing such further order or orders as may be deemed fit and proper.

The Petitioner was collecting mobile phones entry fee from its patrons since financial year 2002-03 onwards without taking permission from the Commissioner as per section 8(1) of the Act. The Betting Tax Authorities under the Act coming to know of this, issued an order by the Commissioner of Entertainment, Betting and Luxury Tax, banning the entry of mobile phones in the betting ring of the Petitioner during venue betting and betting on Delhi races. However, an understanding was entered into between the Petitioner and the Betting Tax Authorities in the year 2005, wherein the entry of mobile phones into the Petitioner Club was allowed subject to the Petitioner paying 50% of the betting tax to the Authorities and the rest 50% in yearly instalments. However, the dispute between the parties arose again when the Respondent No. 3 issued a show-cause notice demanding payment of tax on the amount received by the Petitioner on account of payment of entry of mobile phones since the financial year 2002-2003 till 30th November, 2005.

Aggrieved by the assessment order, the Petitioner filed a revision petition before the Commissioner of Entertainments and Betting Tax, in the writ petition under Section 42 of the Act which was dismissed.

Issue: Whether entertainment tax could be levied on amounts collected by the Petitioner as entry fee for mobile phones under Sub-clause (iv) of Clause (m) of Section 2 read with Section 6(1) of the Act.

Held: A careful perusal of the charging Section 6(1) of the Act showed that the entertainment tax was to be levied and paid on all payments for admission to any entertainment. A careful perusal of the Sub-clause (iv) of Clause (m) of Section 2 of the Act showed that the payment made by visitors to the Petitioner Club as mobile entry fee charges was required to be connected with an entertainment, and if it was, then it was irrelevant as to how the payment was called or as to for what purpose it was made.

The further condition was that the payment was to be one which a person was required to make as a condition of attending the entertainment. This condition was also satisfied in the case of persons who wished to carry their mobile phones inside the Race Club i.e. if they wanted to attend the races carrying a mobile phone with them, they were obliged to make the payment for the entry of mobile phones and such a payment was deemed to be in addition to the payment made by them for their entry. Thus, since such payment was connected with the entertainment, namely, horse races conducted by the Petitioner and required to be made as a condition of attending the entertainment, the payment could be said to be covered by Sub-clause (iv) and hence taxable. The Assessee's appeal was to be untenable and liable to be rejected.

Section 68 of the Income Tax Act, 1961- Merely establishing the identities of the shareholders could not be understood to mean that there could be no addition in the hands of the company which received the share monies.

Commissioner of Income Tax v. Nova Promoters & Finlease (P) Ltd

Citation: (2012) 206 Taxman 207 (Delhi)

Decided on: 15th February, 2012

Coram: Sanjiv Khanna, **R.V. Easwar**, JJ.

Facts: The Commissioner of Income Tax (Appeals) (CIT A) challenged the order passed by the Income Tax Appellate Tribunal (Tribunal), which directed deletion of the additions to the Assessee's income made by the Assessing Officer ('AO') under Section 68 of the Act.

The Assessee had challenged the reopening of its assessment by the AO based on the information received from the Director of Income Tax (Investigation), New Delhi regarding 16 entry operators/accommodation providers having given accommodation entries to several persons including the Assessee. The AO concluded that the Assessee had failed to prove the genuineness of the transactions and invoked Section 68 of the Act to make an addition to the income of the Assessee. The CIT A in appeal concluded that the AO was not justified in making the additions to the Assessee's income and thus deleted them. This decision was upheld by the Tribunal.

Issues: Whether the Tribunal was right in confirming the deletion of the additions of Rs.1,18,50,000 and Rs.2,96,250 under Section 68 of the Act, on the ground that the identity and creditworthiness of the share-applicants as well as the genuineness of the transactions were proved.

Held: A delicate balance had to be maintained while walking the tightrope of Sections 68 and 69 of the Act. The burden of proof could seldom be discharged to the hilt by the assessed; if the AO harboured doubts about the legitimacy of any subscription he was empowered, nay duty bound, to carry out thorough investigations. In the present case, even though the Assessee had adduced documentary evidence to prove all the three ingredients of Section 68, the question before the Court could not have been resolved merely on the basis of the documentary evidence. The

evidence adduced had to be examined in depth and having regard to the test of human probabilities and normal course of human conduct. The AO was unable to discharge his duty as the Assessee continued to block an inquiry at every stage. The Tribunal erred in holding that the AO ought to have proved that the monies emanated from the coffers of the Assessee-Company and came back as share capital. Section 68 permitted the AO to add the credit appearing in the books of account of the Assessee if the latter offered no explanation regarding the nature and source of the credit or the explanation offered was not satisfactory. It placed no duty upon him to point to the source from which the money was received by the Assessee. The Tribunal ought to have seen that the modus operandi involved receipt by the entry providers of equivalent amount of cash from the Assessee. Hence, the Tribunal apart from adopting an erroneous legal approach also failed to keep in view the material that was relied upon by the AO. The CIT A also fell into the same error. The substantial questions of law were answered in favour of the Revenue.

Section 245D (5) of the Income Tax Act, 1961- The Settlement Commission must necessarily consider all materials brought on record before passing any order.

Commissioner of Income Tax v. M/s Godwin Steels Pvt. Ltd

Citation: 2012 VI AD (Delhi) 349

Decided on: 23rd February, 2012

Coram: Sanjiv Khanna, **R.V. Easwar**, JJ.

Facts: The Revenue prayed for issue of a writ of certiorari for quashing the order passed by the Income Tax Settlement Commission (ITSC) allowing the application of the Assessee/Respondent without any independent reasoning as mandated by Section 245D (4) of the Income Tax Act, 1961 (the Act). It was contended that the Assessee could not invoke the jurisdiction of the ITSC while continuing with its dishonest conduct.

The Assessee was found to have indulged in many large-scale sales outside its books of accounts and thus the returns filed by it subsequently were subjected to detailed scrutiny. The Assessing Officer issued a detailed questionnaire seeking information from the Assessee. However such information was not furnished by the Assessee despite having been given several opportunities. Instead the Assessee filed an application contending that the nature and extent of the business carried on outside the books of accounts was required to be established and sought settlement of its income, waiver of interest chargeable under Section 234B and 234C as well as penalties imposable under Section 271 of the Act, while also seeking immunity from prosecution for any offence under the Act, the Indian Penal Code etc. The Commissioner of Income Tax (CIT) filed a report before the ITSC under Rule 9 of the Settlement Commission (Procedure) Rules, 1997, thereafter, objecting the admission of such an application of the Assessee by the ITSC. However, the ITSC allowed the application.

Issue: Whether the decision making process followed by the ITSC was flawed. Should the ITSC have independently examined and applied its mind to the reports of the Officer assisting it in the light of the material/evidence collected by the CIT which formed the basis of the application under Rule 9 including CIT's written submissions.

Held: Section 245B (3) of the Act provided for appointment of members of the ITSC from amongst "persons of integrity and outstanding ability, having special knowledge of, and experience in, problems relating to direct taxes and business accounts". This requirement was obviously designed not only to take advantage of such knowledge, ability and experience but also to ensure that cases involving complexity of business accounts were properly unravelled and the significance of the accounts was properly appreciated and incorporated in the settlement. Section 245-I of the Act cast a duty upon the ITSC to thoroughly examine the evidence and material placed before it in order to ensure that unscrupulous Assessees did not take undue advantage of the finality of the order of settlement.

Having regard to the grave charges leveled against the Assessee in the report of the CIT, the ITSC ought to have itself examined independently the claim of the Assessee and the officers of the Income Tax Department that everything stood reconciled or explained by the Assessee. This important step in the decision making process did not appear to have been carried out by the ITSC despite an elaborate report of the CIT in contravention of Section 245D (5) of the Act. Moreover, no reasons were also given by the ITSC in support of its conclusions. The matter was remitted to the ITSC for a fresh consideration of the Assessee's application and CIT's report and a fresh order in accordance with law.

Amount received is income in the hands of the Assessee if he has dominion and right to it.

Commissioner of Income Tax Delhi v. D.T.T.D.C Ltd.

Citation: (2012) 251 CTR (Del) 268

Decided on: 20th March, 2012

Coram: **Sanjiv Khanna**, R.V. Easwar, JJ.

Facts: The Assessee-DTTDC, a Government Company under Section 617 of Companies Act, 1956, was engaged in providing tourism and transportation services/facilities and catering and running of liquor shops. Subsequently, in pursuance of a decision to expand its Articles of Association to include investments in transport infrastructure, shortage of funds was sought to be addressed by transferring retail trade in country liquor and 50 degree U P Rum to the Assessee. Returns were filed for assessment years (AY) 1990-91 and 1991-92. However it was noticed during the course of assessment proceedings that the Assessee had not treated two accounts i.e. Transport Infrastructure Utilization Fund (TIUF) and Other General Economic Services (OGES) as "income" or "receipts" and did not include them in the profit and loss account for the purposes of tax. The stand of the Assessee was that TIUF represented an amount which was mandated to be spent on construction of road infrastructure in Delhi while amount under OGES represented amount to be credited to Delhi administration. The Income Tax Appellate Tribunal (Tribunal) held that the amount deposited in TIUF was income of the Assessee and had to be included in the Profit and Loss Account as receipts were considered to be income/earnings. The Revenue questioned the decision.

Issues: (1) Whether the expenditure incurred by the Assessee on construction of flyovers and pedestrian facilities could be treated as revenue or a capital expenditure.

(2) Whether the amount deposited in the TIUF Fund stood diverted at source by way of overriding title to the Government of Delhi and therefore did not constitute taxable income in the Assessee's hands.

(3) Whether the amounts transferred to TIUF as also Delhi Administration–OGES were not application of income but diversion of income by over-riding title.

Held: Both the Commissioner of Income Tax (Appeals) (CIT A) and the Tribunal had correctly held that the expenditure incurred out of TIUF was revenue expenditure and not capital expenditure. The Assessee was obliged to get the flyovers and pedestrian facilities constructed at its expense and then transfer them to the Delhi Government. This had to be complied with to enable him to conduct business of sale of country liquor in Delhi. Thus, no enduring benefit or advantage could be said to have accrued to them nor did a capital or revenue earning asset come into existence for the Assessee and since it could not utilise infrastructure for its own business, it could be safely observed that the said expense was a revenue expense for the Assessee and not a capital expense and thus it had to be allowed under Section 37 of the Act.

Relying on the Supreme Court decision in ***CIT vs. Sitaldas Tirathdas [(1961) 41 ITR 367 (SC)]***, wherein it was held that an amount which by the nature of the obligation was diverted before it reached the Assessee, could not be said to be a part of the income of the Assessee and was thus deductible during assessment. However, where the income was required to be applied to discharge an obligation after such income had reached the Assessee, the same was not deductible. It was the obligation of the Assessee to construct flyovers and pedestrian facilities out of 95 paise from Re. 1 which the Assessee was entitled to retain and keep, whereas the balance 5 paise per bottle was to meet the administrative expenses including corporate expenses. Therefore, since the said 95 paise was not transferred or paid by the Assessee to the Delhi Administration, it could not be said that the Assessee had parted away or paid the said amount to any third party and in fact the amount remained with the Assessee. The Assessee could not plead diversion of income at source as in the present case and decided the issue in favour of the Revenue.

Till the date that part of the sale proceeds from the retail vending of country liquor, falling under the head OGES, were transferred to the Delhi Administration, the amount under OGES was retained by the Assessee. Since the transfer was effected after the end of FYs' 1990-91 and 1991-92, therefore the transfer made could not and would not affect the taxability of the sale proceeds which were retained and kept under the head 'OGES', i.e. that there could not be transfer of income by way of overriding title retrospectively. The mere fact that the amount was retained in the bank account of the Assessee under the head 'OGES' did not prove that it was the income of the Assessee. The aforesaid sale proceeds/receipts were not income earned and did not have the character of income earned by the Assessee over which it had dominion or right. Thus this issue was also decided in favour of the Revenue.

Organization for Economic Co-operation & Development guidelines on Transfer Pricing Regulations- Test of Commercial Expediency- Reasonableness of expenditure in business had to be judged from the point of view of the businessman and not of the Revenue.

CIT v. EKL Appliances Ltd.

Citation: (2012) 250 CTR (Del) 264

Decided on: 29th March, 2012

Coram: Sanjiv Khanna, **R.V.Easwar**, JJ.

Facts: The Assessee was a public limited company engaged in manufacturing of refrigerators, washing machines, etc. The Assessing Officer (AO), noticing international transactions entered into by the Assessee during the relevant previous years, invoked the provisions of Section 92 CA(3) of the Income Tax Act, 1961 (Act) and referred the question of determination of the Arms Length Price (ALP) to the Transfer Pricing Officer (TPO). Highlighting 13 types of international transactions entered into by the Assessee in the previous relevant year, the TPO order accepted all of them to be Arm's Length Transactions, except the payment of brand fee/royalty of Rs. 3,42,97,940 which was wholly disallowed on the sole ground that it was not necessary for the Assessee to incur the expenditure, in view of the continuous losses and that it had not been a productive expenditure, as the Assessee had not made any profits.

The Commissioner of Income Tax (Appeals) (CIT A) and in further appeal the Income Tax Appellate Tribunal (ITAT) deleted the additions made by the TPO on interpretation of Section 92CA of the Act and Rule 10B (1)(a) of the Income Tax Rules, 1962 and held that the brand fee/royalty payment could not be disallowed by the TPO while determining the ALP. Hence the present appeals by the CIT.

Issue: Whether the TPO was right in holding that the Assessee ought not to have entered into the agreement to pay royalty/brand fee, because it had been suffering losses continuously and making additions on that basis while determining the Arm's Length Price.

Held: Referring to Article 9 of the Model Convention and relying particularly on Para 1.36 of the Transfer Pricing Guidelines of the Organization for Economic Co-operation and Development, the Court observed that it was not for the revenue authorities to dictate to the

Assessee as to how he was to conduct his business. The only condition was that the expenditure should have been incurred 'wholly and exclusively' for the purpose of business. Rule 10B (1) (a) of the Income Tax Rules, did not authorise disallowance of any expenditure by the Revenue on the ground that they were not necessary, prudent or remunerative for the Assessee to have incurred. The TPO had no authority to disallow any part of the expenditure on the ground that the Assessee had suffered continuous losses. An expenditure in order to be eligible for deduction in computing the profits need not have been fruitful or remunerative. The ITAT did not commit any error. The appeals were accordingly dismissed.

Meaning of the categories of specific intangible assets in Section 32(1)(ii), Income Tax Act, 1961- All those assets that form part of the tool of trade of an Assessee facilitating smooth carrying on of the business.

Areva T & D India Ltd. v. The Deputy Commissioner of Income Tax

Citation: 2012 V AD (Delhi) 342

Decided on: 30th March, 2012

Coram: Acting Chief Justice, **Siddharth Mridul**, JJ.

Facts: The Assessees claimed depreciation under Section 32(1)(ii) of the Income Tax Act, 1961 (the Act) on an excess amount paid by the Assessees for acquisition of various business and commercial rights, categorized under a separate head, namely, "goodwill", comprising of valuable knowhow, employees, work orders, business information, business contracts etc., by virtue of a slump sale agreement dated 30th June, 2004. The Assessing Officer (AO) disallowed the claim of the Assessees holding that the depreciation under Section 32(1)(ii) was not available on goodwill as also on the ground that no evidence was produced by the Assessee to demonstrate that payment was in fact made towards acquiring of "business and commercial rights" which was entitled to depreciation under Section 32(1)(ii) of the Act. The said order was confirmed by the Commissioner of Income Tax (Appeals) (CIT A) and the Income Tax Appellate Tribunal (ITAT).

Issue: Whether the ITAT erred in law in holding that know-how, business contracts, business information, etc. acquired as part of the slump sale described as 'goodwill' were not entitled for depreciation under Section 32(1) (ii) of the Act.

Held: The Assessee acquired, as a going concern, the transmission and distribution business of the Transferor Company through a slump sale agreement, wherein the balance payment over and above the book value of net tangible assets was allocated by the Transferee towards acquisition of bundle of business and commercial rights, clearly defined in the slump sale agreement and compendiously termed as "goodwill" in the books of accounts. However the AO was not correct in holding that payment was made by the Assessee was for acquisition of "goodwill". Applying the principle of *ejusdem generis* for interpreting the expression "business or commercial rights of similar nature" specified in Section 32 (1) (ii) of the Act, it was held that such rights were not

required to answer the description of "knowhow, patents, trademarks, licenses or franchises" but were required to be of similar nature as the specified assets. The legislative intent behind providing "business and commercial right of similar nature" was to incorporate within its ambit such rights which did not find mention in the Section itself. The nature of "business and commercial rights" could not be restricted to only the aforesaid six categories of assets. The specified intangible assets acquired under slump sale agreement were in the nature of "business or commercial rights of similar nature" specified in Section 32(1)(ii) of the Act and were accordingly eligible for depreciation. The order was set aside.

A good/commodity was taxable under a specific head under Entry 41A of the Schedule III of the Value Added Tax Act, 2004 only if the entry and description of a good/commodity in Entry 41A and corresponding entry in Central Excise Tariff Act, 1985, were identical.

Ricoh India Limited v. Commissioner

Citation: 2012 V AD (Delhi) 733

Decided on: 4th May, 2012

Coram: **Sanjiv Khanna**, R.V. Easwar, JJ.

Facts: The appeal was preferred by the Appellant-, under Section 81 of the Delhi Value Added Tax Act, 2004 (VAT, Act) against the order passed by the Appellate Tribunal, Value Added Tax, New Delhi (Tribunal), whereby the Tribunal affirmed the order passed by the Commissioner, Department of Trade and Taxes, disposing of the application for advance ruling filed by the Appellant under Section 84 of the VAT, Act while holding that multi-functional printers/copiers/scanners and sales of spares and consumables of the above products, were taxable under the residuary head attracting VAT @ 12.5% and not taxable @ 4% as under Entry No. 41A of the Third Schedule to the VAT, Act.

Issue: Whether the multi-functional printers/machines and their spares and consumables, during the period 1st April, 2005 to 31st March, 2007, were taxable under Entry No. 41A of the Third Schedule to the VAT, Act or were taxable under the residuary head @ 12.5%.

Held: The Court while appreciating the various amendments having brought to Entry No. 41 and 41A, the four explanatory notes under Rules of Interpretation of the provisions of Central Excise Tariff Act, 1985, applicable to Entry No. 41 and the Central Excise Tariff Headings during the relevant period, observed that only if the entry and description of a good/commodity in Entry No. 41A and corresponding entry in Central Excise Tariff Act, were identical, it was to be interpreted as an entry in Central Excise Tariff Act and be taxable accordingly @ 4.5%, otherwise it would be said to fall under the residuary tax rate @ 12.5%.

Applying natural meaning to a ‘computer peripheral’ in absence of any definition under the VAT, Act, a multi-functional machine could be a computer peripheral, if its principal or sole purpose was to be attached and function as a computer ancillary. Relying on the Supreme Court

decision in ***Xerox India Ltd. v. Commissioner of Customs, Mumbai [2010 (260) ELT 161 (SC)]***, the Court opined that if the principal and predominant purpose of a multi-functional machine was to act as a computer printer or scanner or as an input or output device of the computer, it would qualify and fall under Entry No. 41A Clause XXIII, but, if the machine was designed and manufactured for some other primary purpose, then it would not be covered by Entry No. 41A Clause XXIII.

The multi-functional machines/printers were claimed to be treated as input or output units by the Appellant, however entry 'input and output units' in Entry No. 41A did not match with the corresponding entry in the Central Excise Tariff Act and therefore the multi-functional machines/printers could not be said to fall under any of the specific sub-headings and therefore Entry No. 41A could not be said to apply to the 'input and output units' falling under the sub-heading "others" in the Central Excise Tariff Act. Further, dealing with the question whether multi-functional machines/printers were an 'input and output unit' or not, the doctrine of dominant purpose would determine the said question and the onus was on the Appellant to show and establish the principal or dominant purpose as it was the manufacturer or trader of the machines in question in the present case. However, in the absence of factual details, the Court was not inclined to allow the application for advance ruling and thus the appeal was partly allowed to the extent of question of law only.

Section 11(1)(a) of the Income Tax Act, 1961- Income to the extent to which it is applied to the promotion of international welfare outside India shall not be denied the exemption.

Director of Income Tax (Exemption) v. National Association of Software and Services Companies

Citation: ITA Nos.17-20, 472, 477, 480, 519-520 of 2011

Decided on: 10th May, 2012

Coram: Sanjiv Khanna, **R.V. Easwar**, JJ.

Facts: The Revenue filed nine appeals under Section 260A of the Income Tax Act, 1961 (the Act) against the order of the Income Tax Appellate Tribunal (Tribunal) which had reversed the report of the Assessing Officer (AO) as well as the Commissioner of Income Tax (Appeals) (CIT A) confirming the computation of income as made by the AO, upon the reasoning that the payment of taxes under the Voluntary Disclosure of Income Scheme, 1997 (VDIS) as made by the Assessee, should be treated as application of income of the trust.

Issues: (1) Whether on a proper interpretation of Section 11(1)(a) of the Act, the payment of taxes under the VDIS amounted to application of income of the Assessee to charitable purposes in India.

(2) Whether on a proper interpretation of Section 11(1)(a) of the Act, the expenditure incurred by a Non Governmental Organization (NGO) outside India amounted to application of income to charitable purposes in India.

Held: It was true that payment of taxes was not allowable as a deduction in computing the profits of the business carried on by the Assessee, however such payment being representative of application of income and not expenditure incurred for the purposes of earning the income as also there being a specific bar on taxes being allowed as a deduction in Section 40(a)(ii) of the Act, as according to the judicial consensus, payments were to be deducted from the income of the trust for the purposes of arriving at the income available for application to charitable purposes. This was because the word 'income' as used in Section 11(1)(a) could not be statutorily assigned to the expression 'total income' as under Section 2(45) of the Act. Hence, the Tribunal was correct in holding that the payment of taxes under the VDIS was to be deducted

before arriving at the commercial income of the Assessee that was available for application to charitable purposes.

Further, while appreciating the difference between Section 11 of the new Income Tax Act and Section 4(3)(i) of the old repealed Act, it was observed that as according to the old Act, no difference was maintained between application of the income of the Assessee within or without the taxable territories, however, as according to the new Act, the application of income of the Assessee was to be within taxable territories. In other words, the income of the Assessee was to be applied within the taxable territories to religious or charitable purposes and if the income was applied outside the taxable territories, even though to religious or charitable purposes, the Assessee would not be said to secure the exemption from tax in respect of such income. Thus, the provisions clearly expressed the requirement that the income of the Assessee was to be applied in India to charitable or religious purposes, and thus the Tribunal had erred in deciding that the amount spent by the Assessee in Germany could be considered as application of the income of the Assessee in India for charitable purposes.

Hence, while the substantial question of law was answered in favour of the Assessee in so far as the payment of taxes under the VDIS was concerned, it was passed in favour of the Revenue so far as the expenditure incurred outside India (Germany) was concerned.

EDUCATION LAW

Candidates could not be made to suffer on account of a lapse on the part of the administrative authorities of educational institutions and in such event, the Court could direct the Institute to accommodate such a candidate whose admission had been wrongly denied.

Ruchika Duggal v. AIIMS

Citation: W.P. (C) 5517 of 2011 and CMs 11249 of 2011 and 19191 of 2011

Decided on: 12th January, 2012

Coram: **Hima Kohli**, J.

Facts: The Petitioner challenged the conduct of the Respondent No.1- AIIMS in cancelling the first round of counseling for the M.Sc. (Nursing) course and the consequent selection letters issued to successful candidates including the Petitioner and thereafter, in holding a re-counseling in which the Petitioner was denied a seat for the aforesaid course. Further, on the basis of the admission granted to her after the first round of counseling, the Petitioner had approached the University in which she had already secured admission for the same course, and got her admission therein cancelled and also received the fee refund.

Issue: Whether the Respondent No.1-AIIMS was justified in taking advantage of its own wrong and denying admission to the Petitioner.

Held: The Respondent No.1-AIIMS could not take advantage of its own wrong and was estopped from cancelling the admission of the Petitioner, who upon being admitted to the relevant course in AIIMS, irretrievably changed her position to her disadvantage by getting cancelled the admission already secured by her in the same course at another University. Respondent No.1-AIIMS was directed to accommodate the Petitioner in the course of M.Sc. (Nursing) (Psychiatry) during the relevant academic year, i.e., 2011. However, as all the seats were filled up, AIIMS was directed to create a supernumerary seat for the Petitioner for the aforesaid course only for the relevant academic year 2011, with further directions to AIIMS to help the Petitioner make up for the lost time by ensuring that she was given extra coaching to her to catch up with the rest of the students of her batch. Further, it was held that in the event AIIMS found it impractical to hold adequate classes for the Petitioner, then it was directed that the Petitioner shall be granted admission in the same course in the next academic session commencing in the year 2012.

Candidates could apply for grant of eligibility certificates upon completion of their medical course from a foreign University or at any point in time prior to their appearing in the Screening Test.

Pawan Kumar Gupta v. Medical Council of India

Citation: MANU/DE/1125/2012

Decided on: 10th February, 2012

Coram: **Hima Kohli**, J.

Facts: The Petitioners, being at the fag-end of their MBBS course, filed the writ petitions against the Respondent No. 1/ Medical Council of India (MCI), relating to a dispute between the parties, which arose when applications for grant of eligibility certificates for getting admission in a Graduate Medical Course submitted by the Petitioners to MCI, were rejected by MCI, on a common ground of non-inclusion of the institution in Beijing, China, wherein the Petitioners had taken admission, in the list of 30 medical institutions approved to enroll foreign students by the Ministry of Education, China, and forwarded by the Embassy of India at Beijing as per its letter dated 28th August, 2007.

Issue: Whether the Respondent No. 1 MCI could have rejected the request submitted by the Petitioners in the year 2007, for issuance of eligibility certificates to them under Section 13(4B) of the Indian Medical Council Act, 1956 upon application of the amended Screening Test Regulation Act, 2002, that came into force with effect from 25th September, 2009.

Held: MCI could not be permitted to canvass that the Petitioners were not entitled to issuance of eligibility certificates merely because they did not await for the issuance of such certificates by MCI before undertaking the MBBS Course in Beijing University in September 2007, the said certificate having said to gain significance only when a candidate proposed to appear in the Screening Test after completion of the MBBS course from a foreign medical institution. Therefore, the Petitioners were well within their right to apply to the MCI for grant of eligibility certificates upon completion of their medical course in April, 2012 or for that matter, at any point in time prior to their appearing in the Screening Test.

Moreover, rejection letters issued by MCI predicated upon a communication addressed by the Embassy of India at Beijing to the Ministry of Health, could not be accepted as a sufficient ground to disentitle the Petitioners of an eligibility certificate, because such a communication could not be treated as a substitute or override the extant Rules and Regulations, i.e. Screening Test Regulations, 2002 and the Eligibility Certificate Regulations, 2002 which dispensed with the requirement of inclusion of the name of the foreign institution awarding medical degree in the directory published by the World Health Organization post amendment of the Screening Test Regulation Act. Thus MCI could not have rejected the Petitioners' applications on the ground that the foreign institution in question did not feature in the list of 30 medical institutions approved to enroll foreign students by the Ministry of China, Beijing, either.

Hence, the writ petitions were allowed and the communications issued by MCI to the Petitioners, rejecting their applications for grant of eligibility certificates, were set aside and quashed.

The 13 Point Roster system ought to be maintained as a running account and be operated on a year to year basis and not on an annual basis, so as to ensure that the percentage of reserved seats for SC/ST/OBC's got translated into reality.

Sana-Ur-Rehman v. University of Delhi and Adnan Mastan v. University of Delhi.

Citation: MANU/DE/0977/2012

Decided on: 16th March, 2012

Coram: **Hima Kohli**, J.

Facts: The Petitioners sought issuance of directions to the Respondent No.1-University of Delhi to admit them to the Mahir-E-Tib (MD) Unani Course in the academic session 2010-11.

Reservation of seats for SC/ST/OBC, as settled by the Government of India and forwarded to the University, was to be by applying the 13-point roster system. Whereas initially, both the Petitioners had applied under the OBC category, but, just before the counseling, the Petitioner in the first petition- Dr. Sana withdrew his claim under the OBC category being unsure of whether he belonged to the non-creamy layer or not. On declaration of results, Dr. Sana was thus placed at Rank No.7 in the merit list and Rank No.4 in the OBC category, while the Petitioner-Dr. Adnan was placed at Rank No.8 in the merit list and Rank No.5 in the OBC category. Since, there were five seats in the general category and since Dr. Sana was placed seventh in the merit list while Dr. Adnan was placed fifth in the OBC category the latter claimed that he was a successful candidate in the OBC category and entitled to allotment of one remaining seat out of three seats that were available in the reserved category. However, having withdrawn his claim under the OBC category and being unable to secure a seat in the general category, Dr. Sana filed the present writ petition claiming that he did not fall under the non creamy layer and that he was entitled to the one remaining OBC seat. He also contended that the Respondent No.1-Delhi University had adopted an arbitrary and illegal procedure of carrying forward two seats of Moalejat course allotted in the previous year, and thereafter, had wrongly applied the 13 point roster system which had caused variation in disciplines as also the reservations.

Issue: Whether the 13 point roster system ought to have been operated on an annual basis i.e., independently for each year, or should it be maintained as a running account on a year to year basis.

Held: The 13 point roster system ought to be maintained as a running account and be operated on a year to year basis as the purpose of adopting such a system was to ensure that the percentage of seats reserved for SC/ST/OBC actually got translated into reality by making such allocations. It was also emphasized that seats falling under reservation were to be filled up from amongst the members of the reserved category alone and candidates belonging to the general category could not be considered for the reserved seats, nor could be permitted to jump the queue by insisting that the 13 point roster system be operated independently each year so that the first three seats in every academic year got automatically allocated to candidates falling in the unreserved category. Therefore, while dismissing Dr. Sana's petition, it was held that Dr. Adnan, who was placed at Rank No.5 in the OBC category, would be entitled to the one OBC seat lying vacant and the Respondents would admit him in the discipline of Molejat in the MD Unani course, Delhi University with the discretion to consider giving admission to Dr. Sana in the MD Unani course by giving him extra coaching to come at par with the rest of the class or if it was not possible, to accommodate him in the next academic year.

INTELLECTUAL PROPERTY RIGHTS

INTELLECTUAL PROPERTY RIGHTS

Act of importation of the goods bearing the mark of the registered proprietor without the importer being a registered proprietor or permissive right holder is statutorily engrafted infringement under Section 29 of the Trade Marks Act, 1999.

Samsung Electronics Company Limited v. Kapil Wadhwa

Citation: 2012 (49) PTC 571 (Del)

Decided on: 17th February, 2012

Coram: **Manmohan Singh**, J.

Facts: The Plaintiffs raised their complaint against the infringement of their trademark 'SAMSUNG' by the Defendants, by preferring a suit for infringement and passing off. Along with the same, they also preferred an application under Order XXXIX Rules 1 and 2, Code of Civil Procedure, 1908 (CPC) which was allowed by this Court and the Defendants were restrained from directly or indirectly dealing in the grey market ink cartridges/toners, or any other products of the Plaintiffs under the mark 'SAMSUNG'. The Defendants, opposing this interim order filed the present application under Order XXXIX Rule 4 CPC seeking vacation of the interim order. Thus in the present case, both applications were heard and adjudicated upon.

The main grievance of the Plaintiffs was the problem of parallel importation being carried out by the Defendant Nos. 1 and 2 which was depriving the Plaintiffs to carry out their legitimate business under the mark 'SAMSUNG'. The Defendants without any authorisation or permission from the Plaintiffs, were selling Samsung products at the price much below than the prices at which the products of the Plaintiffs were ordinarily sold in the market.

Issues: (1) Whether the provisions of the Trade Marks Act, 1999 provided for the import of goods as an infringement and if so whether it could be said to include genuine products emanating from the proprietor from international market although it may not be with the consent of the proprietor.

(2) Whether the Defendants were entitled to protection under the exception provided under Section 30(3) of the Trade Marks Act.

Held: On a conjoint reading of Section 29(1) along with Section 29(6) of the Trade Marks Act, it became amply clear that for the purposes of Section 29, a person would be said to be using a registered trade mark if in particular, if he imported or exported the goods under the mark which meant that the act of importing or exporting goods under the mark was treated to be as use of a registered trademark for the purposes of Section 29, and therefore, importation was in clear and explicit terms of Section 29(6)(c) read with Section 29(1) of the Trade Marks Act, an infringement of the trademark. Thus if a person who neither being a registered proprietor nor a person using by way of permitted use, used in the course of trade, a mark which was identical to the trademark in relation to the goods in respect of which the mark was registered in such a manner so as to render, but use of the mark likely to be taken being use of a trademark, then the said act was an infringement under Section 29(1) of the Trade Marks Act.

Once Section 29(1) and Section 29(6) were read conjointly, it became unambiguous in view of explicit terms of Section 29(6) (which clearly equated the export or import with the use for the purposes of entire Section 29), that the act of importation amounted to the infringement, if the said importer was not a registered proprietor or permissive right holder. Further, the permissive right was a right which must emanate from the registered proprietor by way of permitted use in the manner prescribed under the Trade Marks Act and could not be said to be an implied one on the basis of a proprietor's throwing the goods in the market. Thus the first issue was answered in the affirmative i.e., the imports of genuine product was an infringement in the context of UK Law as well as the Indian law.

Considering the applicability of Section 30(3) of the Trade Marks Act, the Court observed that whereas the rights of the proprietor of the registered trademark were provided under Section 29 and other section relating to other remedies, Section 30 or for that matter Section 30(3) just operated as an exception by putting limits to the rights conferred upon the registered proprietor and could not be equated with the one giving some additional right to some other person to import the genuine goods from the international market.

Since the Plaintiffs in the present case were able to show a *prima facie* case of infringement of the registered trademark in view of Section 29(1) read with Section 29(6), and since the Defendants were not able to establish any plausible defence to such an infringement, the imports of the goods under the mark were held to be amounting to infringement of the trademark. Observing that the ingredients for permanent and mandatory injunction were satisfied in favour of the Plaintiffs, the Plaintiffs' applications were allowed while that of the Defendants were dismissed as also the Defendants were restrained from using the mark 'SAMSUNG' in any manner in respect of promotional activities including on website.

Section 29 of the Trade Marks Act, 1999- Use of a registered mark, by any other person, for similar trade, amounts to infringement.

Indicus Netlabs (P) Ltd. v. Raftaar Media Pvt. Ltd.

Citation: 190 (2012) DLT 337

Decided on: 27th February, 2012

Coram: **A. K. Pathak**, J.

Facts: The Plaintiff filed a suit for permanent and mandatory injunction against the Defendant for infringement of trade mark, passing off, rendition of accounts and damages on the ground that the Defendant adopted the Plaintiff's registered trademark 'RAFTAAR' in respect of broadcasting and airing news programs on television channels in relation to activities which were similar to that of the Plaintiff, in order to cause confusion and deception in the mind of the public at large as also to encash on the reputation and goodwill of the Plaintiff. The Plaintiff also alleged that the Defendant had applied for the registration of trademark 'RAFTAAR' under class 41 of the Trade Marks Act, 1999.

Issue: Whether the adoption of trademark 'RAFTAAR' by the Defendant amounted to deceptive use, inasmuch as, it would amount to infringement of the Plaintiff's trademark.

Held: The Plaintiff by way of the evidence had clearly succeeded in proving that it was engaged in providing info-entertainment news, views, etc. through its registered website 'Raftaar.com' and that the Defendant adopted the mark "RAFTAAR" of the Plaintiff for its news channel, so as to cause confusion and deception in the mind of the public at large as also to ride on the reputation and goodwill of the Plaintiff. Hence the use of the trademark "RAFTAAR" by the Defendant was held to amount to infringement under Section 29 of The Trade Marks Act. The suit was therefore, decreed in favour of the Plaintiff along with the costs of proceedings.

Truthfulness or falsity in the claim is a potent factor in the grant or refusal of relief.

LT Foods Ltd. v. Sunstar Overseas Ltd. and Sachdeva & Sons Rice Mills Ltd v. L.T.Foods Ltd.

Citation: 2012 (50) PTC 27 (Del)

Decided on: 30th March, 2012

Coram: **Manmohan Singh**, J.

Facts: By a common order, three interim applications filed by the parties in the three cross suits claiming their ownership rights in relation to the trade mark "HERITAGE" in respect of rice, were decided. Admittedly, in all the three cases, the parties were claiming to be the prior user of the mark 'HERITAGE' in respect of rice and sought injunction against each other.

However, even though the Defendants claimed to be the prior users of the said trademark and also that the word "HERITAGE" was an essential feature of their trade mark, they failed to file any such documents i.e. original/carbon copies of the invoices relied upon, that could establish them as the actual users of the marks on the invoices, despite having been granted the opportunities to file originals time and again.

Issue: Whether the Defendants were entitled to grant of injunction against the Plaintiffs, being prior users of the impugned trademark.

Held: Taking note of the fact that the Defendants had filed false affidavits and improper documents before the Court and had raised false and frivolous objections and argued their case on the basis of forged and fabricated documents, the application filed by the Defendants was dismissed.

The law in respect of adverse presumption was well settled that the party who was found to be withholding a document or evidence from the Court knowingly that the said document would operate to his disadvantage, the Court could draw an adverse inference against such a party, in view of the clear applicability of the maxim *omniapraesumuntur contra spoliatorem*. The Court was not required to assist the party whose case was founded on the falsehood, and the equitable reliefs like injunction which were discretionary could not be granted to such a party. Any party who was found to take recourse of fraud, deflected the course of judicial proceedings or did

anything with oblique motive, such person was required to be dealt with properly in order to maintain the faith of people in the system of administration of justice.

The Defendants had failed to make out any case against the Plaintiffs for grant of injunction, thus the application filed by the Defendants was dismissed and consequently, the Plaintiffs' applications were allowed injuncting the Defendants from using the impugned trademark.

The suit for infringement of registered design could not be maintained against another registered proprietor and the passing off right was not available alongside the purely statutory right under the Design Act, 2000.

M/S Micolube India Limited v. Rakesh Kumar Trading As Saurabh Industries

Citation: 2012 (50) PTC 161(Del)

Decided on: 30th March, 2012

Coram: **Manmohan Singh**, J.

Facts: Two applications were filed before the Additional District Judge, New Delhi, while one was filed by the Plaintiff under Order XXXIX, Rules 1 and 2 read with Section 151 of the Code of Civil Procedure, 1908 (CPC) seeking ad interim injunction against the Defendants restraining them from dealing with the products of the Plaintiff, the other was filed by the Defendant No.3 for vacation of ex-parte order/ challenging the validity of registered design of the Plaintiff under Section 19(d) of the Design Act, 2000 (the Act). Since, in view of Section 22 (4) of the Act, the Additional District Judge thus lost its jurisdiction, the matter was transferred to this Court.

The Plaintiff had filed a suit for infringement of designs, passing off, etc. against the Defendants on the ground that the design, which had been applied to the containers having a novel shape, configuration, pattern, was distinct, owned by and exclusively associated with the Plaintiff. The Defendants being also in the same trade, on the other hand, challenged the design of the Plaintiff on the grounds that it was not new and original and thus liable to be cancelled under Section 19 of the Act.

Issue: Whether the suit for passing off, infringement or piracy of the registered design was maintainable, when both the Plaintiff as well as the Defendants, were registered proprietors of the designs.

Held: While discussing the nature and scope of the Act, the Act was purposefully made as a statutory protection for the industrial designs like shape and configuration of the "article" which passed the tests of novelty and originality provided by the Act. Further, a conjoint reading of the various provisions of the Act revealed that infringement/piracy could only be of a registered design and the said remedy was available during the existence of the said copyright as mentioned

under Section 11 of the Act. Subsequently, there was no remedy either in the form of 'passing off' or on the basis of equity available as a legally enforceable right dehors a remedy available in the Act. In other words, the remedies prescribed under the Act were purely statutory in nature and there was no room for common law or equitable consideration when it came to examining the remedies prescribed under the Act.

The Plaintiff's action of infringement against the Defendants was maintainable only if it was established that the Plaintiff was a registered owner of the design and the Defendants were not. It was manifest that the scheme of Section 21 (1) of the Act itself revealed that the rights which were conferred upon the design right holder were not to be used or exercised by "any person" other than a registered proprietor as provided under Section 22(1) of the Act. However, on the plain reading of Section 22 as well as considering the purely statutory nature of the proceedings under the Act, it became clear that no suit for infringement was maintainable against another registered proprietor of the design as "any person" under Section 22 had to be other than the registered proprietor.

While the Trademarks Act, 1999 provided the shape of an article as a trademark as well as passing off as a remedy, the Act, wherein the rights and remedies were purely statutory in nature, no concept of passing off was available for pressing into service. In such a situation, a party electing one of the remedies was then stopped from going back later and urging to avail to other. In other words, a person having registered his design under the Act which was for the limited period of time for 15 years in total could not be allowed to urge inconsistently to state that his rights should still be protected even if his design right fails due to pre-publication or otherwise due to exhaustion, on the premise that, the common law right of passing off was existing under the Trade Marks Act.

The suit for infringement of registered design could not be maintained against another registered proprietor and the passing off right was not available alongside the purely statutory right under the Act. However, as a matter of judicial proprietary and in view of judicially inconsistent opinion existing in the field of law, the matter was referred for the consideration of a larger Bench of this Court:

a. Whether the suit for infringement of registered Design is maintainable against another registered proprietor of the design under the Design Act, 2000?

b. Whether there can be an availability of remedy of passing off in absence of express saving or preservation of the common law by the Design Act, 2000 and more so when the rights and remedies under the Act are statutory in nature?

c. Whether the conception of passing off as available under the Trade Marks can be joined with the action under the Design Act when the same is mutually inconsistent with that of remedy under the Design Act, 2000?

Communication of a sound recording to the public by the owner of the recording in no way encroaches upon the right of the owner of the underlying literary and musical works to perform said underlying works in the public.

Indian Performing Right Society Ltd. v. Aditya Pandey and Indian Performing Right Society Ltd v. Cri Events Pvt. Ltd.

Citation: 2012 (50) PTC 460 (Delhi)

Decided on: 8th May, 2012

Coram: **Pradeep Nandrajog**, S.P. Garg, JJ.

Facts: The appeal was filed against the order of the Single Judge whereby it was concluded that once a licence was obtained from the owner or someone authorised to give it, in respect of a sound recording, for communicating it to the public, including by broadcasting, a separate authorisation or licence was not necessary from the copyright owner or author of the musical and/or literary work.

Issues: (1) Whether the communication to the public, included by way of broadcasting of a sound recording also amounted to a communication to the public of literary and musical works embodied in the sound recording under the Copyright Act, 1957 post the Copyright (Amendment) Act, 1994.

(2) If yes, whether a separate licence in respect of such literary and musical works could be asserted by the owner of copyright in such works in addition to the licence secured from the copyright holder in the sound recording.

Held: Relying on the Supreme Court decision in ***Entertainment Network (India) Limited v. Super Cassette Industries Limited [(2008) 13 SCC 30]***, whereby it had emerged that from Sections 13 and 14 of the Copyright Act, the rights of an owner of a sound recording were, in no way, inferior to those of an owner of copyright in the original literary or musical works. The subtle distinction between the rights of owners of literary and musical works on one hand and sound recording on the other had to be seen in the backdrop of the definition of the expression "performance" as defined under Section 2(q) of the Copyright Act as it was originally enacted and definitions of various expressions under the Copyright (Amendment) Act viz. "broadcast",

"communication to the public", "performance" and "performer" contained in Sections 2(dd), (ff), (q) and (qq) of the Copyright Act respectively.

A combined reading of the definition of the said expressions, when seen in the light of difference in the definition of the expression "performance" under the Copyright Act and the Copyright (Amendment) Act, brought out that the Copyright Act drew a distinction when communication to the public was by way of live performance and when it was by way of diffusion. Thus, whereas the owner of copyright in literary and musical works enjoyed the right to communicate the said works to the public by way of live performance, the owner of copyright in sound recording did not enjoy a similar right to communicate the sound recording to the public by way of live performance. Hence, the communication of a sound recording to the public by the owner of the recording in no way encroached upon the right of the owner of the underlying literary and musical works to perform the said underlying works in the public, as correctly held by the Single Judge. The appeals and cross-objections were accordingly dismissed.

LABOUR LAW

LABOUR LAW

Section 2(s) of Industrial Disputes Act, 1947- 'Workman' can be used to define a person employed in an industry but not a person employed in a hospital i.e. a doctor.

Management of Multan Sewa Samiti Charitable Eye Hospital v. P.O. Labour Court-II

Citation: 2012 V AD (Delhi) 279

Decided on: 24th February, 2012

Coram: **Sanjiv Khanna**, J.

Facts: The writ petition was filed by the Petitioner under Articles 226 and 227 of the Constitution challenging the Award passed by the Labour Court whereby it was held that the Respondent No. 3 was entitled to reinstatement in service with continuity and full back wages, being a 'workman' as per Section 2(s) of the Industrial Disputes Act, 1947 (Act) and his service having been terminated illegally and unjustifiably by the Petitioner-Society.

Respondent No. 3 had challenged his termination from the position of Junior Surgeon in the hospital run by the Petitioner-Society without being tendered the retrenchment compensation and notice pay along with the notice served upon him terminating his services.

Issue: Whether the Respondent No. 3 was entitled to come under the purview of 'workman' as defined under Section 2(s) of the Act or not.

Held: Relying on a catena of judgments, there was a distinction between a person employed in a hospital and a person employed in an industry and that not every time that a doctor was employed in an institution; he/she became a workman. Nature and character of the relationship between the employee and the employer had to be examined and ascertained to decide whether a doctor was a workman or not. Further, whereas 'occupation' was a principal activity that earned a regular wage or salary for a person, a 'profession' was an occupation that required extensive training and the study and mastery of specialised knowledge and usually had a professional association, ethical code and process of certification or licensing.

Respondent No. 3 was a professional and it could not be said that he was engaged/employed for doing technical work. He did use his professional skills and knowledge for diagnosing the diseases and treating the patients but this could not be said to fall within the ambit and scope of Section 2(s) of the Act. Accordingly, the writ petition was allowed and the Award passed by the

Labour Court was quashed and set aside for want of jurisdiction.

Members of the unions could use legitimate means to achieve their legitimate demands but they cannot use illegal or illegitimate means to achieve any of their demands whether legitimate or illegitimate.

M/S G4S Security Services (India) Pvt. Ltd. v. G4S Krantikari Karamchari Union

Citation: 2012 IV AD (Delhi) 249

Decided on: 29th March, 2012

Coram: **A. K. Pathak**, J.

Facts: Plaintiff, a private limited company and engaged in the business of providing security and other services to its clients, filed a suit for permanent injunction, praying that the Defendant, its office bearers, members, agents, supporters, workers etc. be restrained from shouting slogans, holding dharnas, demonstrations, meetings, creating nuisance, obstruction, using abusive language, picketing, intimidating etc. within the radius of 100 meters from the gates/boundary wall of the registered office/Delhi region office of the Plaintiff, its Corporate office and the residences of its Regional President and Regional Managing Director and also from blocking the ingress and egress of the Plaintiff's employees, officers, staff, workers, visitors and vehicles in any manner to the aforesaid premises.

Issue: Whether labour unions could be granted allowance to use illegal or illegitimate means to achieve any of their demands, legitimate or illegitimate.

Held: While the employees and unions of workers had a right to demonstrate for the purpose of achieving their legitimate demands, however they did not have any right to use abusive language or commit violence or prevent ingress and egress of other employees, officers or visitors of such organization. Keeping in mind the fact that tempers run high when demonstrations of such nature are organized by workers' union, the employees and officers who may be willing to work, as also the visitors may be targeted and manhandled in order to prevent them from entering in the premises of such an organization and it may also become difficult to control the mob which may even make the property of the employer a target during such demonstrations/dharnas. Thus, the Plaintiff was justified in being apprehensive of breach of peace and law and order in case such demonstrations, dharnas, etc. were allowed to be held in the vicinity of the premises of the

organization where the workers were employed and unless such unlawful activities were curbed, personal safety of employees, officers and visitors ran the risk of getting jeopardized. The Plaintiff was held to be entitled to a decree of permanent injunction as prayed for.

LAW OF CONTRACT

Section 20 of the Specific Relief Act, 1963 preserves judicial discretion of Court as to decreeing specific performance and requires meticulous consideration of all facts and circumstances of the case before ordering enforcement.

Kamal K. Oswal v. Kailash Kanwar

Citation: MANU/DE/0206/2012

Decided on: 16th January, 2012

Coram: Pradeep Nandrajog, **Pratibha Rani**, JJ.

Facts: The appeals were filed by both the parties i.e. the Plaintiff and the Defendant, being aggrieved of the judgment in a suit for specific performance filed by the Plaintiff, wherein it was held that since neither of the parties were wholly responsible for the failure of execution of contractual obligations, the Defendant may be directed to sell the suit property to the Plaintiff subject to the condition of payment of interest @ 30% from the date of order till the date of execution of the sale, by the Plaintiff to the Defendant.

The Plaintiff challenged the said order on the ground that not only did the Single Judge impose a liability that was hugely disproportionate to the actual value of the property but that he also failed to notice that the Defendant had continued to enjoy the property throughout the time period for which the Plaintiff had been directed to pay interest. Whereas the Defendant challenged the said order on the ground that the Single Judge erred in attributing any fault to the Defendant since he could not be blamed for the appropriate authority, Income Tax having refused to grant necessary permissions, ordering for the peremptory sale of the suit property.

Issue: Whether the facts and circumstances of the case required awarding of decree of specific performance.

Held: Specific performance ought not to have been granted in view of the inequitable position in which the Defendant had been placed & hardships faced due to the order of peremptory sale as order by the appropriate Authority, Income Tax. Specific relief does require consideration of various principles before ordering for enforcement. Section 20 of the Specific Relief Act, 1963 preserved judicial discretion of the Court as to decreeing specific performance & required meticulous consideration of all the facts & circumstances of the case before ordering enforcement. It was not to be ordered just because it was lawful to do so. Hence, the earnest

money with interest should have been ordered to be paid instead of compelling enforcement of the agreement. The findings of the Single Judge ordering for specific performance was set aside.

If the lessee carries out any alterations or modifications in the leased out property, he would have to pay the penalty imposed.

Lala Sohan Lal Gupta v. M/S T.R. Enterprises

Citation: MANU/DE/0350/2012

Decided on: 6th February, 2012

Coram: Pradeep Nandrajog, **Pratibha Rani**, JJ.

Facts: The appeal was filed by the Appellants, challenging the order of the Single Judge dismissing the suit filed by them seeking permanent injunction and damages against the Respondents, on the ground that the Single Judge had erred in observing that since the Appellants could not prove that certain unauthorised changes in the property had been made by the Respondents, the Respondents could not be said to have caused any damage resulting from such changes to the property for which they could be made liable to pay any damages to the Appellants.

The dispute between the parties arose when upon receiving several notices from the New Delhi Municipal Council (NDMC) regarding unauthorised construction of mezzanine floor in the suit property; the Appellants filed a suit for permanent injunction seeking restraint orders against the Respondents barring them from carrying out any construction or making any alteration or addition in the property.

Issue: Whether the mezzanine floor in the suit premises existed at the time of execution of lease deed or was it unauthorisedly constructed by the Respondents after the execution of the lease deed.

Held: Section 91 and Section 92 of the Evidence Act, 1872 supplemen each other and Section 91 would be inoperative without the aid of Section 92 and vice versa, however, the two Sections differed in some material applications. Section 91 was applicable to all documents, whether they were dispositive or otherwise, Section 92 was only applicable to documents which could be described as dispositive. Section 91 applied to documents, which were bilateral as also unilateral, Section 92 applied only to bilateral documents. Both the Sections were based on 'Best Evidence Rule' and as per proviso 6 to Section 92 of the Evidence Act a fact may be proved which showed

in what manner the language of a document was related to existing facts.

The lease deed conveyed interest as 'that the lessors within named hereby lease out to the lessee the Premises No.M-132, situated on the Second Floor of the Building known as 'Ram Kishan Dass Sita Ram Building' on Plot No.M-3, Connaught Place, New Delhi.' The lease deed did not say that the second floor of the building was let out and instead used the expression with reference to the premises, as situated on the second floor. The expression 'comprised' and 'situated' were different and the use of the word 'situated' made the language ambiguous for the reason that 'situated' on the second floor may be a *mezzanine* within. The covenants of the lease deed revealed that in fact it was a transfer of interest in the property under the garb of lease deed and in such circumstances the parties were hardly expected to be honest about mentioning vital details such as actual rent payable, extent of unauthorised construction, etc.

Upon consideration and perusal of all the material documents as well as testimony of witnesses examined by the parties even though the Appellants had relied on the witness accounts of their *chowkidar* (Appellants admitted in their cross-examination that they first came to know of the unauthorised construction through their *chowkidar*, contrary to an earlier statement that they had first come to know of the construction through the NDMC notices), other tenants of the same building, and a letter written by the earlier occupant/tenant to prove that the mezzanine floor had been constructed after the execution of the lease deed, however they failed to have these persons named or examined as witnesses during the trial. A doubt was also raised as regards to the absence of any steps being taken to inspect the premises or taking any photographs of the illegal construction by the Appellants. Rejecting the testimonies of the witnesses examined and the documents relied upon such as the three NDMC notices on the ground that they did not aspire confidence, it could not be substantially proved by the Appellants that the Respondents had made alterations or additions as also that the said Respondents had caused any damage to the suit premises for which they could be made liable to pay damages. The appeal was thereby dismissed.

Force Majeure and frustration of a contract is not available for fluctuation of prices in a market where such fluctuation is usual and should be accounted for.

Peak Chemical Corporation Inc. v. National Aluminium Co. Ltd.

Citation: 2012 II AD (Delhi) 304

Decided on: 7th February, 2012

Coram: **S. Muralidhar**, J.

Facts: Amongst the two petitions filed under Section 34 of the Arbitration and Conciliation Act, 1996 (Act) ,while one petition was filed by the Petitioner-PEAK challenging the whole of the impugned Award passed by the sole Arbitrator, the other petition was filed by the Respondent-NALCO, being aggrieved to the extent that the Arbitrator held that NALCO was obliged to invite PEAK to participate in the risk purchase to mitigate the damage allegedly suffered by NALCO, in the Award otherwise passed in its favour.

The dispute between the parties arose when PEAK having offered to supply Caustic Soda in response to a concluded contract for 10,000 DMT of caustic soda with NALCO, failed to supply a further order for 25,000 DMT caustic soda on the ground that the latter order was not made pursuant to a concluded contract and also because the market availability of caustic soda at the global level had fallen very steeply causing a price rise by nearly 1000%. The present petition by PEAK was filed against the Award of the sole Arbitrator holding both orders to be part of a single concluded contract for 35,000 DMT caustic soda and also rejecting the PEAK's plea of force majeure and frustration of contract on account of the exponential rise in prices of caustic soda.

Issues: (1) Whether the delay in pronouncement of the Award is sufficient for setting aside the impugned Award.

(2) Whether there was a concluded contract with regard to the 25000 DMT of Caustic Soda.

(3) Whether the contract was frustrated due to the exponential rise in prices or whether any force majeure conditions in terms of the contract were in existence discharging the Respondent from its contractual obligations.

(4) Whether the Petitioner had breached the contract and whether in this regard the Respondent

qualified for risk purchase relief.

Held: The petition filed by NALCO was *prima facie* found to be time-barred on account of being re-filed after a delay of more than 6 months and no sufficient or satisfactory reasons were appended to such delay either. A litigant ought not to take for granted that any delay in re-filing of the petition after curing the defects, shall be condoned and hence rejecting NALCO's application for condonation of delay, NALCO's petition was also dismissed accordingly.

Considering the grounds taken by the sole Arbitrator to reject PEAK's claim, the Court observed that since the impugned Award had set out a comprehensive analysis of the facts and evidence and detailed and issue-wise reasons for the observations, the plea of a fresh arbitration by PEAK on the ground of delay in pronouncing the Award could not be accepted as justified considering the time and money already spent in the proceedings. Also rejecting PEAK's plea that the essential elements of a concluded contract in relation to the supply of the additional quantity of 25,000 DMT caustic soda lye were absent, the Court held that the rejection of such a plea by the Arbitrator and the finding that there existed a concluded contract between the parties for the supply of an additional 25,000 DMT of caustic soda, did not require the Court's interference.

The Court also rejected PEAK's plea that the Arbitrator had erred in rejecting its plea of *Force Majeure* and Doctrine of Frustration. For PEAK to avail the defence of force majeure, the Petitioner had to prove that events subsequent to the contract resulted directly in it being unable to make the supplies covered by the contract. And also, for the plea of frustration to succeed, in terms of Section 56 of the Indian Contract Act, 1872, impossibility to perform a contract was required to be established and a mere increase in prices of the commodity contracted to be supplied could not be sufficient to satisfy the condition of impossibility of performing a contract. Since the increase in the spot prices of caustic soda was not an unusual development and buyers and sellers in the caustic soda market were usually prepared for these fluctuations, it was clear that caustic soda was certainly available in the market, only, at a higher price. Since there was no evidence adduced before the Arbitrator regarding the measures adopted by PEAK to ensure that the supplies promised by it, at the time of accepting NALCO's order, were effectively covered by firm contracts with original suppliers, the Court held that the sole Arbitrator had rightly rejected PEAK's pleas based on the doctrine of force majeure and frustration based on correct appreciation of the evidence on record.

However, the Arbitrator held that even though there was breach of contract by PEAK, NALCO was entitled to risk purchase relief with regard to the 25,000 DMT supply only and not with regard to the 10,000 DMT as NALCO had breached the risk purchase procedure with respect to the tender of 10,000 DMT, having not invited PEAK to participate. The Court held this finding by the Arbitrator also to be of merit and found no illegality, much less a patent one, vitiating the Arbitrator's Award. Therefore Peak's petition was also dismissed by the Court finding no merit in its contentions.

Quantum of damages and compensation- The professional would be entitled to the damages and compensation for the fee which would have been paid to him, had he performed his functions as an architect and not been prevented by the employer.

K.K. Cooperative Group Housing Society Ltd. v. Goel Associates

Citation: 2012 (1) Arb.LR 367 (Delhi)

Decided on: 21st February, 2012

Coram: **Sanjay Kishan Kaul**, Rajiv Shakdher, JJ.

Facts: The appeal, being the third round of scrutiny of disputes between the Appellant Society and the Respondent, challenged the order of the Single Judge modifying the order of the sole Arbitrator and granting the Respondent an Award of 40% of the fee as stipulated under the agreement entered into between the parties, on the ground that there was no binding arbitration agreement *inter se* the parties, the constitution of the arbitral Tribunal was improper and the quantification of the compensation was errant.

Issue: Whether the Respondent was entitled to his fee by way of compensation and damages since the Respondent had been prevented by the Appellant from performing the work.

Held: The Court took note of the plea extended on behalf of the Appellant that the Respondent was not entitled to any amount since no work had been performed by him. On the other hand, the Court took the view that the architect would be entitled to reasonable remuneration for the work performed and also to damages for the loss of remuneration which he had been prevented from earning until the work was finished. While further examining the aforesaid issue, it was explained, that in the case of improper dispensation of services by a professional, damages should be the amount that he would have earned from the services had he not been prevented from continuing to act whereas in regards to the aspect of mitigation of damages since a professional had a freer hand in performing the services, he may not have to devote his time exclusively to the contract and, thus, this aspect would not go in mitigation of damages.

The continuous readiness and willingness on the part of the Plaintiff is a condition precedent to grant the relief of specific performance.

Sanjay Gupta v. Ram Prasad

Citation: 2012 IV AD (Delhi) 727

Decided on: 24th April, 2012

Coram: **A. K. Pathak**, J.

Facts: The suit filed for specific performance of an agreement to sell, entered into between Plaintiff and the Defendant for sale of agricultural land belonging to the Defendant, on the ground that the Defendant failed to get the sale deed executed or hand over vacant possession of the property to the Plaintiff even though the Plaintiff was ready and willing to perform his part of the contract. The Defendant, however alleged that being an aged and illiterate person, he was not made aware of the contents of the said agreement, prepared by the Plaintiff, before appending his signatures thereon and since the Plaintiff had failed to obtain requisite sale permissions from the appropriate/competent Authorities, within the stipulated time, he was estopped from claiming any relief because of his own conduct. The Defendant also denied that the Plaintiff was always ready and willing to perform his part of the contract by paying the balance sale consideration. Since the Plaintiff did not step into the witness box for his cross-examination, his affidavit in examination-in-chief could not be read and it had to be taken that the Plaintiff did not lead any evidence in support of his case.

Issue: Whether the Plaintiff was entitled to a decree for specific performance having been ready and willing to perform his part of the contract.

Held: Before relief of specific performance could be granted, which otherwise was a discretionary relief, the Plaintiff had to prove that he was ready and willing to perform his part of the contract, more particularly, by offering the balance sale consideration. If the Plaintiff failed to either aver or prove the same, he would fail. To adjudge whether the Plaintiff was ready and willing to perform his part of the contract, the Court would have to take into consideration the conduct of the Plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he was to pay to the Defendant must of necessity be proved to be available right from the date of the execution till date of the decree.

The Plaintiff neither stepped in the witness box, to depose that, he had contacted the Defendant on many occasions and offered to pay the balance sale consideration nor any evidence was led to show that he was having balance sale consideration ready with him and had offered the same to the Defendant. In the absence of any evidence having been adduced by the Plaintiff that he was ready and willing to perform his part of the contract, the Plaintiff was held not entitled to a decree of specific performance merely because existence of agreement to sell was not in dispute.

LAW OF EVIDENCE

The sanctioning Authority was only required to take a prima facie view whether there was sufficient material against the Accused on record to grant sanction or not.

Ravinder Kumar Chandolia v. Central Bureau of Investigation

Citation: 2012 (3) Crimes 230

Decided on: 6th February, 2012

Coram: **M.L. Mehta**, J.

Facts: The petition challenged the order of the Special Judge, CBI whereby the Trial Court dismissed the application of the Petitioner for dropping of proceedings, on the ground that the sanction order under Section 19 of Prevention of Corruption Act, 1988 (PC Act) showed non application of mind as the sanctioning Authority had not considered the role of the Applicant, documents, statement of witnesses etc. Secondly, no sanction under Section 197 of the Code of Criminal Procedure, 1973 (CrPC) was obtained for prosecution of the Petitioner and thirdly, the investigation was bad as it was without permission under Section 6A of the Delhi Special Police Establishment Act, 1946.

CBI had filed a charge sheet against twelve accused persons including the Petitioner, a public servant of the Joint Secretary level i.e. P.S. to Minister of Communication & Information Technology (MOC&IT) and an active participant in the alleged criminal conspiracy hatched by A. Raja, MOC&IT, for having participated in the conspiracy along with A. Raja to wrongly benefit and ensure better prospects to A. Raja's favoured companies by manipulating the processing of applications for new UAS licences in Department of Telecommunications (DOT) and accommodating applications of such companies into the consideration zone for all circles applied for, despite inadequate availability of spectrum in many circles including Delhi ahead of the other companies standing in queue for these UAS licences.

Issue: Whether there was lack of application of mind by the competent Authority while issuing the Sanction Order.

Held: The Sanction Order was only an administrative decision and the competent Authority was at liberty to consider all the relevant documents, which formed the crux of the allegations but was not required to consider each and every document himself. The sanctioning Authority was only required to take a *prima facie* view whether there was sufficient material against the

Accused on record to grant sanction or not. The order of sanction apparently disclosed that the competent Authority had considered the evidence and other material placed before it. Thus, even though it might be desirable that the facts should have been referred to in the Sanction Order itself, but if they did not appear on the face of it, the of prosecution could establish the same by adducing the evidence that those facts were placed before the sanctioning authority.

Pertaining to the second ground of challenge, the Court held that in sum and substance, not every offence committed by a Public servant while being actually engaged in the performance of his official duties, required sanction for prosecution under Section 197(1) CrPC. However, if the act complained of was directly connected with his official duty, so that it could be claimed to have been done by virtue of his office, then the sanction would necessarily be required. In other words, if the offence was entirely unconnected with the official duty, there could be no protection but, if it was committed within the scope of the official duty or in excess of it, then the protection was certainly available.

Applying the test of the *dictum* of the law in the instant case, it could be noted that there was sufficient material against the Petitioner to demonstrate that acts complained of were not part of his duty as a Public Servant. Hence, no sanction under Section 197 CrPC was required in the instant case as the alleged acts of the Petitioner did not fall within the scope of his official duties. There was also *prima facie* incriminating material against the Petitioner and the sanctioning Authority had granted sanction of prosecution under Section 19 of PC Act after due application of mind. Thus, finding no merit in the appeal, it was accordingly dismissed.

The concerned Judge trying the case is the best person to appreciate and consider all relevant factors in determining question then and there or to defer it for determination at a later date.

Asif Balwa v. CBI

Citation: 2012 Cri LJ 2042

Decided on: 6th February, 2012

Coram: **M.L. Mehta, J.**

Facts: The order of the Special Judge, CBI holding that the objections raised by the defence counsel during evidence shall be decided at the time of final arguments and not as and when they were raised was challenged by the accused, against whom an First Information Report (FIR) was registered for offences under the Prevention of Corruption Act, 1988 (PC Act). During the examination of a witness, the defence counsel objected to the exhibition of certain documents which were allegedly not proved in accordance with law. The Special Judge then passed the impugned order.

Issue: Whether the objections raised during evidence with regard to the mode of proof/ admissibility of the documents were to be adjudicated as and when they were raised or at a later stage.

Held: Where the documents were voluminous, as in the present matter, the Trial Court may not rule on the objections then and there. Furthermore, in addition to the nature of evidence and the conduct of the parties, the nature of the objections which were raised also had a bearing on the time of the decision on the objections. Every case had to be dealt with on its own facts and requirements depending upon the nature of evidence, the conduct of the parties and also the nature of questions/objections. The exercise to determine the admissibility/mode of proof of certain documents should not constitute a trial within a trial and cause undue delay in the final hearing and the decision of the matter.

In the present case, the documents sought to be produced by the prosecution were voluminous. Considering the manner in which the evidence of the witnesses was being recorded and the objections were being raised by the defence counsel as regards the mode of proof of certain documents, the Trial Court was justified in posting the objections to be decided at a later date. Unless the refusal to determine such an issue was ostensibly perverse and would defeat the ends

of justice, this Court in exercise of its inherent or supervisory powers under Section 482 Code of Criminal Procedure, 1973 or Article 227 of the Constitution of India was not required to interfere with the discretion of the concerned Court.

In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the Accused.

Riaz Ali v. State (Govt. of NCT) Delhi

Citation: 2012 V AD (Delhi) 308

Decision on: 22nd February, 2012

Coram: **Gita Mittal,** J.R. Midha, JJ.

Facts: The Appellant challenged the judgment and order of sentence of the Trial Court whereby he was held guilty and convicted under Sections 364/302 Indian Penal Code, 1860 (IPC), on the ground that there were material contradictions in the testimonies of the prosecution witnesses, thus, rendering the evidence unworthy of credence.

Issue: Whether prosecution failed to establish the unbroken convincing chain which was to be proved by it which would lead to the only conclusion of guilt and culpability of the Appellant and which completely ruled out the hypothesis of innocence of the Appellant.

Held: The case at hand rested purely on circumstantial evidence and there was no direct evidence with regard to any aspect of the matter. Relying on the decision in ***Hanumant v. State of Madhya Pradesh [1953 Cri.LJ 129]***, wherein it was held that in cases where the evidence was of a circumstantial nature, the circumstances from which the conclusion of guilt was to be drawn were, in the first instance, required to be fully established and all the facts so established were necessary to be consistent only with the hypothesis of the guilt of the Accused. Again, the circumstances should have been of a conclusive nature, tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there was to be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the Accused and it was to be such as to show that within all human probability the act must have been done by the Accused.

However, the prosecution could not prove a single circumstance leading to the murder of the child beyond reasonable doubt. There was no evidence as to the manner in which the body of the deceased reached the public place from where it was recovered, while the last seen evidence was clearly separated both by time as well as place from the commission of the offence. Further, the

time gap between the deceased being last seen alive with the Appellant and the proximate time of offence as well as the distance which had been covered during that period rendered it difficult to clinchingly fasten guilt for the offence of murder on the Accused. Also, no motive was attributed to the Appellant which led to the kidnapping or murder of the child.

Thus, the prosecution had miserably failed to prove the chain of evidence by which the Court could clearly and unequivocally reach to a conclusion which pointed only to the guilt of the Appellant with regard to the commission of the crime. Hence, the appeal was allowed and the order was set aside and quashed.

Onus lies on the Accused to rebut the presumption of Section 113B of the Indian Evidence Act, 1872 relatable to Section 304 Indian Penal Code, 1860.

State, Government of National Capital Territory of Delhi, New Delhi v. Puran Chand

Citation: 2012 IVAD (Delhi) 81

Decided on: 11th April, 2012

Coram: **M.L. Mehta**, J.

Facts: The revision petition was preferred by the State under Section 397 Code of Criminal Procedure, 1973 (CrPC) read with Section 482 CrPC, challenging the order passed by the Additional Sessions Judge, whereby even though a prima facie case was made out against the accused persons under Section 498A Indian Penal Code, 1860 (IPC), the accused persons/Respondents were discharged of the offences under Sections 304B/34 IPC, on the ground that the Trial Court had failed to appreciate the facts and evidence on record and had also erred in observing that there were no allegations of any cruelty or harassment of the deceased soon before her death.

Issue: Whether on the basis of material on record, a prima facie case against the accused persons under Section 304B IPC was made out or not.

Held: According to well settled principles of law, where the death of a woman was caused by any burns or bodily injury or occurred otherwise than under normal circumstances within 7 years of marriage and it was shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative for or in connection with any demand of dowry, such death shall be called dowry death and punishable under Section 304B IPC. The legislature in its wisdom had used the word "shall" thus, making a mandatory application on the part of the Court to presume that death had been committed by the person who had subjected her to cruelty or harassment in connection with or demand of dowry. Therefore, onus lies on the Accused to rebut the presumption of Section 113B of the Indian Evidence Act, 1872 relatable to Section 304 IPC.

The deceased had died under abnormal circumstances as specific allegations were made against the husband and in-laws of the deceased that she was subjected to cruelty which led her to taking the extreme step. Almost identical statements of a number of relatives of the deceased recorded

under Section 161 CrPC clearly showed that the deceased had been ill-treated for no other reason but demand for dowry. At the time of framing of charges, the Trial Court only had to see whether on the basis of material on record, a *prima facie* case against the accused persons under Section 304B IPC was made out or not and was not required to examine the possibility of conviction of the accused persons. All the requirements of Section 113B of the Indian Evidence Act were established by the prosecution beyond any reasonable doubt to draw a presumption against the accused persons to invoke Section 304B IPC. It was also correctly averred by the State that the Trial Court had erred not appreciating the statements on record to judge whether the provisions of Section 113B of the Indian Evidence Act were required to be invoked or not. Therefore, the order of the Trial Court was modified to the extent that while maintaining the charge under Section 498A against the accused persons, they were also to be charged under Section 304B IPC.

Section 222 Code of Criminal Procedure, 1973 - When a person is charged for a major offence, but not found guilty thereunder, he may be convicted for an attempt to commit such an offence.

Jameel v. State

Citation: 2012 IV AD (Delhi) 127

Decided on: 16th April, 2012

Coram: **Suresh Kait**, J.

Facts: The appeal was against the order of conviction and sentence of the Appellant-Accused under Section 376, Indian Penal Code, 1860 (IPC) on the ground that the Trial Court failed to appreciate the discrepancies and the need for corroboration of the testimony of the prosecutrix and had thus erred in relying solely on the testimony of the unsound prosecutrix while convicting the Appellant for the offence of rape.

Issue: Whether the Accused was entitled to the benefit of doubt based on the inconsistencies in the testimony of the prosecutrix.

Held: Section 376 IPC being a very serious offence, the prosecution was required to prove its case beyond reasonable doubt to establish the guilt of the accused. Wherein the prosecutrix appeared to be of unsound mind and inconsistent with her statements, benefit of doubt could be granted to the Appellant. Hence the Court opined that the Appellant could not be held guilty for the offences punishable under Section 376, IPC. However, since the prosecutrix was consistent in deposing that she was called to the Appellant's house by the Appellant who then opened her *salwar* and pressed her breast, the guilt of the Appellant stood established for a lesser offence of attempt to rape.

Hence, applying the principle under Section 222, Code of Criminal Procedure, 1973 (CrPC), wherein any person charged for an offence could be convicted for attempt to commit such offence, the Court modified the judgment and order of sentence convicting the Appellant for the offences punishable under Section 376 read with Section 511, IPC.

LAW OF RENT CONTROL

LAW OF RENT CONTROL

An overt assertion and not mere long term possession of property is necessary for acquiring ownership though adverse possession.

Poonam Sharma v. M/S Prem Nath Anand Buildcon Pvt. Ltd.

Citation: 2012 III AD (Delhi) 334

Decided on: 11th January, 2012

Coram: **P.K. Bhasin**,J.

Facts: The appeal was at the instance of one of the two unsuccessful Defendants against the order of the Trial Court that rejected the plea of adverse possession taken by the Appellant-Defendant in a suit for possession and damages/*mesne* profits for unauthorised use and occupation of a portion of the suit property filed against her and her mother-in-law and passed a decree of possession in favour of the Plaintiffs and against the Appellant-Defendant.

Issue: Whether mere possession even for a period of more than 12 years was enough to confer ownership to that person by adverse possession.

Held: Mere possession of the suit property by a licensee after revocation of the licence, even if it were for a period more than twelve years, would not confer ownership to that person by adverse possession, unless at some particular point that person had claimed title for himself while denying title to the true owner. Permissive possession however long could not by itself become hostile but rather required an overt act indicating an assertion of the title. The Appellant-Defendant had simply pleaded that her deceased husband remained in possession of the suit property even after he had been asked to vacate the suit property and she too had after his death also refused to surrender possession. She did not prove on any particular instance that she had claimed title hostile to the Plaintiffs through an overt act. Therefore the Trial Court was justified in coming to the conclusion that the suit was not time barred and the Appellant-Defendant had not acquired ownership through adverse possession. The appeal was thus dismissed.

Section 14(1)(e) Delhi Rent Control Act, 1958- An accommodation which was useless or which was of no consequence was not specifically required to be averred in the eviction petition.

Sushil Mittal v. Arun Kumar

Citation: MANU/DE/1789/2012

Decision on: 1st February, 2012

Coram: **Indermeet Kaur**, J.

Facts: The appeal was filed by the Respondent-Tenant challenging the judgment and decree wherein a pending eviction petition filed by the Petitioner-Landlord seeking eviction of his Tenant under Section 14(1)(e) of the Delhi Rent Control Act, 1958 (DRCA) had been decreed and the triable issues sought to be raised in the application for leave to defend filed by the Tenant had been declined, on the ground that there having been concealment of facts by the Petitioner-Landlord, that itself gave rise to a triable issue.

Issue: Whether there was concealment of any material facts thereby giving rise to a triable issue.

Held: No concealment of any material fact by the Landlord was made out inasmuch as the Petitioner-Landlord did not specifically aver in the eviction petition, to an accommodation which was otherwise useless or of no consequence i.e. *kolki* forming a part of the *mezzanine* floor or the inadequate space on the ground floor. Also, these spaces could not in any manner be said to be alternate accommodations which could serve the purpose of the Landlord i.e., either for storage or sale or for office space. Thus, the Landlord could not be held guilty of any concealment.

Further, the triable issues as sought to be raised in the petition could not be granted in a routine manner, the order decreeing the petition of the Landlord and dismissing the application of the Tenant seeking leave to defend did not suffer from any infirmity. Hence, the petition was dismissed.

Section 14(1)(b) Delhi Rent Control Act, 1958- Sub-tenancy- A legal heir Tenant inherits both the rights and obligations of the original Tenant.

Maheshwar Dayal v. Shanti Devi

Citation: 2012 (128) DRJ 334

Decided on: 6thFebruary, 2012

Coram: **Indermeet Kaur**, J.

Facts: The petition was filed by the Landlord Maheshwar Dayal (through legal representatives), challenging the judgment passed by the Additional Rent Control Tribunal (ARCT), on the ground that the ARCT had wrongly endorsed the finding of the Additional Rent Controller (ARC) who had in turn dismissed the eviction petition filed by the Landlord seeking eviction of the Tenant-Shanti Devi (legal heir of the original Tenant) under Section 14(1)(b) of the Delhi Rent Control Act, 1958 (DRCA).

However, whereas the ARC reasoned that even though Mohan Lal was the Tenant in the premises, his son Anand Parkash was carrying business in the said premises from the very beginning and the Landlord being aware of the same could not claim eviction on the ground of parting with possession/subletting/assignment by the Tenant, the reasoning of the ARCT was that even though the ground of sub-letting stood confirmed in favour of the Landlord however, after the death of the Tenant-Mohan Lal, his son Anand Parkash inherited this tenancy from his father and hence could not be evicted from the suit property. This decision of the ARCT was under challenge.

Issue: Whether eviction of a legal heir Tenant could be sought on the ground of sub-letting by a deceased Tenant who had taken such rented premises for the business purpose of such a legal heir.

Held: It was admitted by the Landlord himself that although tenancy was in the name of Mohan Lal but right from the inception Mohan Lal had taken the premises for the business purpose of his son Anand Parkash, and therefore when the original Tenant i.e. Mohan Lal, had died during the pendency of the eviction petition, his son had inherited the tenancy and was thus entitled to the protective umbrella of the DRCA i.e., the alleged sub-Tenant had become a Tenant in his own right within the meaning of Section 2(l) of the DRCA and thus grounds of sub-letting under

Section 14(1)(b) which although stood established initially had to be given a go-bye because of this supervening event and now he could not be a sub-Tenant.

Further, rejecting the Petitioner's claim also on the ground that the eviction petition was filed much beyond the reasonable time as prescribed under the Limitation Act, 1963 i.e., 12 years, the judgment was held to suffer from no infirmity and hence the Landlord's petition was dismissed.

Order XII Rule 6 Code of Civil Procedure, 1908 confers a wide discretion upon the Court to decree any suit to the extent of admissions made.

Gajender Kumar Loond v. Samant Barara

Citation: 187 (2012) DLT 403

Decided on: 9th February, 2012

Coram: **Reva Khetrapal**, J.

Facts: By way of the present application under Order XII Rule 6 of the Code of Civil Procedure, 1908 (CPC) the Plaintiff urged that the written statement filed by the Defendant contained admissions regarding the execution of the registered lease deed by the Plaintiff and the Defendant being inducted in the demised premises pursuant to the said document. The Defendant had also, at the very threshold, admitted the fact that he had taken on lease the suit property at the monthly rent stipulated in the agreement. Further, the Defendant in his written statement did not raise any dispute with regard to the execution or admissibility of the said lease agreement. Therefore the said lease agreement was legally binding on both the parties and only the contents of the document needed to be read. Since there was no triable issue left to be adjudicated the suit deserved to be decreed.

Issue: Whether the facts on record were sufficient to justify the passing of a decree on the admissions of the Defendant.

Held: The power under Order XII Rule 6 of the CPC could be exercised by the Court on an examination of the pleadings and other materials appearing on the record and upon determining such admissions, as a whole, to be clear and unambiguous. The Defendant, in his written statement, admitted all the averments made by the Plaintiff but was using the plea of electricity disconnection by the BSES for a short span of time as a bulwark to avoid the payment of his rental dues to the Plaintiff. Such a course of prevarication could not be allowed to cloud the entitlement of the Plaintiff to a decree on admissions.

The Plaintiff was entitled to a decree on admissions. The Defendant was thus directed to pay the entire arrears of rent.

Once the condition as stipulated in Clause (h) of Section 14(1) of the Delhi Rent Control Act, 1958 had been fulfilled, the Tenant was disentitled to its protection thereafter.

Modi Spinning & Weaving Mills Co. Ltd. v. Krishna Wanti (Since Deceased) and Modi Spinning & Weaving Mills Co Ltd.v.Tejinder Singh

Citation: MANU/DE/1105/2012

Decision on: 23rd February, 2012

Coram: **Indermeet Kaur**,J.

Facts: Two petitions pertaining to two different portions of the suit premises were filed separately by the tenants being M/s. Modi Spinning and Weaving Mills Co. Ltd. arrayed as Respondent No.2 and a division of the Company i.e. M/s. Modi Overseas arrayed as Respondent No.1, under Section 14(1)(b)(h) and (j) of the Delhi Rent Control Act, 1958 (DRCA), challenging the order of the Additional Rent Control Tribunal (RCT) having endorsed the findings of the learned RCT that the Landlord was entitled to a decree of eviction under Section 14(1)(h) of the DRCA.

Issue: Whether the Landlord was entitled to a decree of eviction under Section 14(1)(h) DRCA.

Held: If the ingredients of Section 14(1)(h) of the DRCA were fulfilled once, the Tenant would lose his protection under the said provision, even if he had given up that accommodation or lost it for one reason or another. Since, the Respondents (Tenants) had been allotted two alternative suitable accommodations and the possession, thereafter even though they were not in possession of the alternate accommodations on the date of the filing of the eviction petition, this fact was immaterial and the protective umbrella of Section 14(1)(h) of the DRCA was held to have been lost to such Tenants. Hence the petitions were dismissed on merits.

If the Lessee permits or allows the leased premises to be used in contravention of the lease agreement, the Lessee was liable to be penalized.

Delhi Development Authority v. Mohd. Mursaleen

Citation: 2012 III AD (Delhi) 115

Decided on: 27th February, 2012

Coram: Acting Chief Justice**, Siddharth Mridul**, JJ.

Facts: The case of the Delhi Development Authority (DDA) was that the premises in question were to be used only for residential purposes and that the Respondent lessee was bound by that condition. The Respondent's tenant, however, used it for commercial purposes. After evicting the tenant the Respondent applied to DDA for conversion of the property from leasehold to freehold. DDA levied charges for restoration of the lease and misuse charges under Clause II (13) of the lease deed. The Respondent's petition seeking a direction to the Appellant to process Respondent's application for conversion and quash the demand for payment of misuse charges was allowed by the Single Judge by orders dated 9th May, 2005 and 24th May, 2007 of the learned Single Judge holding that the Respondent could not be fastened with the liability on account of misuse of the premises by his tenant and thus was not liable to pay any misuse charges.. The DDA then appealed.

Issue: Whether the Owner was liable for misuse charges when it was the tenant who misused the residential premises for commercial purposes.

Held: The use of the plot allotted to the Respondent was only for residence. The storage in the basement had to be in keeping with the residential purpose. Giving on lease a portion of the building for storage amounted to use for a commercial purpose and was not permitted without the consent of the DDA. Since the Respondent Lessee allowed such a misuse he rendered himself liable to pay the misuse charges. The impugned order was held to be unsustainable and thus set aside.

The requirement of a landlord to live in his own house cannot be dismissed for lack of bona fides merely only because he was residing elsewhere before.

Anil Kumar Sharma v. Ram Kishan Dass

Citation: 2012 (188) DLT 10

Decided on: 27th February, 2012

Coram: **P.K. Bhasin**, J.

Facts: The landlord challenged an order passed by the learned Additional Rent Controller ('ARC') dismissing his petition under Section 25B (8) of the Delhi Rent Control Act, 1958 (DCRA) against the tenant on the ground that of bona fide need.

Issue: Whether the requirement of the landlord ceased with the passing of an eviction order in another case filed by his father against his own tenant.

Held: The ARC's order was not in accordance with law. The Petitioner could very well decide to live in his own house and not to continue to stay with his parents. The tenant could not tell the landlord to stay with his parents. The order of the ARC was set aside.

A tenant is required to raise triable issues for grant of leave to defend in an eviction case filed by a landlord.

Anuradha Mithal v. Alok Kumar Jain

Citation: 2012 (1) RCR (Rent) 336

Decided on: 1st March, 2012

Coram: **P.K. Bhasin**, J.

Facts: The landlady in her petition under Section 25 B(8) of the Delhi Rent Control Act, 1958 ('DRCA') challenged the order passed by the learned Additional Rent Controller ('ARC') allowing the tenant's application seeking leave to defend the eviction petition under Section 14(1)(e) of the DRCA. The ground was that the learned ARC erred in not allowing the eviction petition to be disposed of in summary mode.

Issue: Whether the tenant was able to raise triable issues disentitling the landlady from securing an eviction order against him summarily.

Held: The preliminary objection of the tenant that the landlady could not maintain a petition under Section 25B (8) of the DRCA was rejected. On merits, it was held that the learned ARC had erred in observing that factors such as business of the landlady's husband being settled in Meerut or one of the daughters being married in Chandigarh absolved the bona fide wish of the landlady to reside in her own property. The tenant had no business to tell the landlady that her daughters should continue to stay in their grandparents' house. An eviction order in favour of the landlady was passed.

In the absence of a specific provision in the statute, it could not be held that a landlord was entitled to market rent from a protected tenant.

Atma Ram Properties (P.) Ltd. v. M/S Escorts Ltd.

Citation: 2012 (129) DRJ 229

Decided on: 16th March, 2012

Coram: **Manmohan Singh**, J.

Facts: The Defendants tenants applied under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC), seeking rejection of the plaint filed by the landlord in an eviction case, on the ground that the suit was barred under Section 50 of the Delhi Rent Control Act, 1958 (DRC Act) which vested exclusive jurisdiction in the Rent Controller. Further it was contended that the landlord was entitled to only a 10% increase in the rent and that too only after every three years.

The Plaintiff landlord filed one suit against M/s. Escorts Ltd. for recovery of arrears of rent stating that the actual rent was far less than the market rate. The second suit was for recovery of arrears of rent against M/s. Embassy Restaurant on the same grounds. The Plaintiff contended that since Sections 4, 6 and 9 of the DRC Act had been struck down as unconstitutional there was no statutory bar to recovering rent at the prevailing market rate.

Issue: Whether the suits for recovery filed by the Plaintiff claiming rent at the market rate from protected tenants were barred by Section 50 of the DRC Act read with Sections 6-A, 7, 8 and 14 thereof.

Held: The tenants' applications were allowed and both the plaints were rejected. Any suit seeking to recover arrears of rent at market rate would be barred by Section 50 of the DRC Act read with Section 9 CPC. Till such time the DRC Act held the field, the defendant tenants would continue to remain 'protected'. Section 6A of the DRC Act left no scope for increase in the rent except under the condition prescribed therein and that too up to 10% increase every three years.

When summons are sent by a registered post, the 'acknowledgement' should be signed by the tenant or by his agent.

A. P. Jain v. Rajesh Gupta

Citation: RC. Rev. 223 of 2010

Decided on: 30th March, 2012

Coram: **Indermeet Kaur**, J.

Facts: The Petitioner landlord challenged the order of the Rent Controller allowing the Respondent tenant's application under Section 25B (7) of the Delhi Rent Control Act, 1958 (DRCA) read with Order XXXVII Rule 4 and Order IX Rule 13 of the Code of Civil Procedure, 1908 (Code) and setting aside the ex-parte judgment in favour of the Petitioner, on the ground that even though service by ordinary post could be ignored, but if the service was also effected through registered A.D., then presumption of service under Section 27 of the General Clauses Act, 1897 should have been drawn in favour of the Petitioner.

Issue: Whether the service of summons was effected in the proper mode.

Held: The Court while observing that the learned Trial Court had rightly returned a finding that the service had not been effected in the proper mode, held that this exercise of discretion in favour of the tenant could not be said to be arbitrary. The Court opined that not only strict compliance of the procedure contained in Section 25B of the DRCA was required to be met with but also the stringent conditions contained in the abovesaid provision, being a complete code in itself. This was, because, in the absence of a valid service, the tenant would have lost a valuable right i.e., a right to defend his case whereas the landlord would automatically get a decree in his favour.

In the present case, the initials on the A.D. Card were neither decipherable nor admittedly signed by the tenant or his agent and moreover the address at which the service was to be effected was also the address given of the landlord in the eviction petition. The petition was dismissed.

A Respondent-Tenant could not straightaway file a written statement to contest an eviction petition filed against it under Section 14(1)(e) of the Delhi Rent Control Act, 1958 without seeking the Rent Controller's permission to do so.

Manoj Kumar Bhatt v. Raj Kumari

Citation: MANU/DE/1626/2012

Decided on: 13th April, 2012

Coram: **P.K. Bhasin**, J.

Facts: The Additional Rent Controller (the Controller) had rejected the eviction petition filed by the Petitioners-Landlords against the Respondents-Tenants as not maintainable under Section 14(1)(e) of the Delhi Rent Control Act, 1958 (the Rent Act) in view of the bar under Section 14(6) of the Rent Act, but decided to proceed with the eviction petition on other grounds invoked by the Petitioners-Landlords. The revision petition was filed under Section 25B(8) of the Rent Act against the order dismissing their petition under Section 14(1)(e).

Issue: Whether in absence of a leave to contest for summons under Schedule III of the Rent Act, an eviction order must be passed and whether the Controller could restrict the eviction petition to Section 14(1)(e) of the Rent Act.

Held: The Controller was within his powers to limit the eviction petition of the Landlords to Section 14(1)(e) of the Rent Act, but once having ordered issuance of summons under Schedule III to the Rent Act, he could not have taken on record any written statement from the Respondents-Tenants' side. Such a course of action was not permissible as in an eviction petition under Section 14(1)(e) of the Rent Act, the Respondents-Tenants' only right was to seek permission from the Controller to contest the eviction petition on the grounds they wanted to contest it. But without seeking the permission of the Controller the Tenants could not have decided for themselves that the eviction petition as framed could not be proceeded with only under Section 14(1)(e) and consequently they could file the written statement straightway.

The Controller should have taken up the eviction petition for considering whether because of the failure of the Respondents-Tenants to seek leave to contest, the eviction order deserved to be passed straightway or for any other reason the same could not be passed. Admittedly, the eviction petition on the ground of bona fide requirement had been filed by the Petitioners within

a period of 5 years from the date of purchase of the property in question by then the same was obviously not maintainable in view of the bar contained under Section 14(6) of the Rent Act. Therefore, the Controller was fully justified in dismissing the eviction petition however with the liberty to the Petitioner to seek eviction of the Respondents-Tenants on other grounds initially taken up in their eviction petition.

LIMITATION LAW

Article 74 of the Schedule to the Limitation Act, 1963- If a Magistrate dismissed the complaint as disclosing no offence, it was merely an unsuccessful attempt to set the criminal law in motion, and there was no damage to the Plaintiff.

Schenker India Pvt Ltd. v. Sirpur Paper Mills Ltd.

Citation: 186 (2012) DLT 429

Decided on: 3rd January, 2012

Coram: Sanjay Kishan Kaul**, Rajiv Shakdher**,JJ.

Facts: The appeal was preferred against the judgment of the Single Judge whereby the suit filed by the Appellant-Plaintiff praying for permanent injunction and damages, was dismissed. The Single Judge by the judgment had dismissed the suit broadly on two grounds i.e., first, that the suit was barred by limitation having been filed beyond the prescribed period of limitation and secondly, that the delay in re-filing the suit of nearly 204 days, did not deserve to be condoned, in the facts and circumstances of the case.

The Respondent had engaged the service of the Appellant, a freight transporter, for the transporting of heavy duty machinery from Germany. The disputes between the parties arose when difficulties in the execution of this transaction resulted in allegations of breach of obligations from both parties against each other. A suit for injunction was filed by the Respondent against the Appellant as also a criminal complaint with the Additional Chief Metropolitan Magistrate (ACMM). However, since upon a preliminary investigation by the police, no cognizable offence was made out against the Appellant, the complaint was dismissed with the liberty to the Respondent to file a protest petition. However no such protest petition was filed by the Respondent. The Single Judge, having taken into account, the above said facts and having adverted to Article 74 of the Schedule to the Limitation Act, 1963 (Limitation Act), concluded that the suit of the Appellant was beyond the prescribed period of limitation and the delay in re-filing the suit was not entitled to be condoned. Hence the present appeal.

Issues: (1) Whether the provisions of Article 74 of the Schedule to the Limitation Act, were at all, applicable.

(2) Whether in terms of Article 74 of the schedule to the Limitation Act, "prosecution" if at all got triggered. And consequently, whether Article 74 would have at all got attracted in the instant

case.

Held: Article 74 of the Schedule to the Limitation Act would only apply if necessary averments were made in the plaint and finding that no such averment to the effect that the action was founded on malicious prosecution, was made in the plaint, the Court held that there was no occasion to refer to Article 74. As regards the question as to whether Article 74 would at all be attracted, what was required to be seen was if 'prosecution' if at all got triggered. Since, no summons had been issued to the Appellant based on the complaint filed by the Respondent under Section 156(3) of the Code of Criminal Procedure, 1973 (CrPC), the prosecution in terms of Article 74 could not be said to have been commenced and hence the said Article had no applicability in the present case. Similarly Article 79 which speaks of an action for compensation *vis*-a-*vis* 'illegal, irregular or excessive distress' was also held to have no application in the absence of relevant pleadings in that regard.

If a magistrate dismissed the complaint as disclosing no offence, it was merely an unsuccessful attempt to set the criminal law in motion, and there was no damage to the Plaintiff.

The net result of the aforesaid observations was that the limitation would have to be calculated from the date on which the complaint was filed and calculating it from such a date, the suit was held to have been instituted on a date, way beyond the period of limitation.

Hence, even though the conclusion of the Single Judge was required to be sustained, albeit for different reasons. The appeal was accordingly dismissed and the judgment sustained.

Mere plea in the written statement of lack of jurisdiction could not be made the basis for finding that continuation of the proceedings before the Court without jurisdiction, displayed lack of due diligence and good faith.

Tilak Raj Singh v. Union of India

Citation: 187 (2012) DLT 693

Decided on: 21st February, 2012

Coram: Sanjay Kishan Kaul**,Rajiv Shakdher**,JJ.

Facts: The appeal was preferred by the Appellant who being aggrieved by the judgment passed by the Single Judge, whereby his application under Section 14 of the Limitation Act, 1963 (the said Act), was dismissed and the suit was held as being barred by limitation, and accordingly, resulted in the rejection of the plaint under Order VII Rule 11(d) of the Code of Civil Procedure, 1908 (CPC). The Appellant challenged this finding of the Court on the ground that the Court had erred in not excluding the time spent by the Appellant in adjudicating his claim before the learned Civil Court, Meerut and the learned Railway Claims Tribunal.

The Appellant had originally filed a suit before the Civil Judge, Meerut, in the year 1990, being aggrieved of the ex-gratia compensation of only Rs. 5000 being sanctioned to him by the Respondent-Railways for sustaining grievous injury while trying to disembark from a train in 1987. However, after a period of 12 long years, the Meerut Court had returned his plaint to present it before a 'Court of competent jurisdiction'. In 2005, the Appellant had approached the Railway Claims Tribunal along with an application for condonation of delay. The Railway Claims Tribunal had condoned the delay by a reasoned order, however, it had come to a conclusion that the Appellant had met an 'untoward incident' within the meaning of Section 124A of the Railways Act, 1989, which provision came into force with effect from 1st August, 1994 and therefore would not include the present accident which had occurred on 20th October, 1987 and had accordingly directed return of photocopy of documents for presentation in the 'competent civil court'in2008. The Civil Court however, declined to accept the case sent on transfer by the Railway Claims Tribunal on the ground that such an order could have only been passed by the High Court or the Supreme Court. Thereafter, the Appellant filed a civil suit in this Court, wherein his application under Section 14 of the said Act, seeking exclusion of time for proceeding bona fide in Court without jurisdiction was dismissed. Hence, the present appeal.

Issue: Whether the delay caused in the adjudication of the Appellant's claim could be attributed to the lack of diligence and good faith on the part of the Appellant himself.

Held: The findings of the Single Judge were completely flawed inasmuch as it rejected the Appellant's plea for exclusion of time spent before the Civil Court, Meerut on the ground that, the Appellant ought not to have continued with the said proceedings once an objection was taken with regard to jurisdiction by the Respondent. The Appellant was entitled to test its stand, by seeking a definitive finding on the issue of jurisdiction from the Meerut Court. A mere plea in the written statement of lack of jurisdiction could not have been made the basis for coming to a conclusion that continuation of the proceedings before the Meerut Court displayed lack of due diligence and good faith. Also, The Single Judge had failed to appreciate crucial aspects of the case such as that the Appellant had proceeded to approach the Railway Claims Tribunal and the Civil Court at Meerut, only in good faith. Thus, the Appellant fulfilled the twin criteria of due diligence and good faith, as encapsulated in Section 14 of the said Act. The judgment was unsustainable and thus, set aside.

MATRIMONIAL LAW

Even though, the deserted spouse must establish on record that sufficient efforts were made by him to bring the deserting spouse to the matrimonial home but the deserting spouse also cannot be expected to sit back at the parental home for no justifiable grounds and not return back to the matrimonial home.

Kamlesh Kumari v. Mehtab Singh

Citation: 186 (2012) DLT 332

Decided on: 16th January, 2012

Coram: **Kailash Gambhir**, J.

Facts: The appeal was filed under Section 28 of the Hindu Marriage Act, 1955 by the Appellant-Wife challenging the judgment of the Trial Court whereby the divorce petition filed by the Respondent-Husband under Section 13(1)(ia) and (ib) of the Hindu Marriage Act was allowed by the Trial Court and the marriage between the parties was dissolved, on the ground that the Respondent-Husband could not be allowed to take advantage of his own wrongs.

The marriage which was solemnized between the parties turned ruinous within 24 hours as per the Respondent and 5 days as per the Appellant. According to the Appellant, she was sent back to her parent's home by the Respondent-Husband and his family, for not bringing sufficient dowry and was never brought back by the Respondent to his house and was forced to reside with her parents from the 5th day of her marriage.

However, as per the Respondent-Husband, the Appellant did not return back with him when she was taken by him to her parental house and neither were any reasons advanced either by her or her parents for not sending her back with him to the matrimonial home.

Issues: (1) Whether the Appellant had left the matrimonial home with an intention to permanently bring cohabitation to an end and;

(2) Whether there was a reasonable cause on the part of the Appellant to leave the matrimonial home due to the conduct of the Respondent.

Held: To claim a decree on the ground of desertion as envisaged in Section 13(1)(ib) of the Hindu Marriage Act the ingredients that were required to be proved, so far as the deserting

spouse was concerned were, (i) factum of separation, (ii) the intention to bring cohabitation permanently to an end i.e., *animus deserendi*, and so far as the deserted spouse was concerned, (i) absence of consent and (ii) the absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. It was also a settled legal position that desertion would be said to have commenced when the *factum* of desertion and the *animus deserendi* co-existed. However, it was not necessary that these two conditions should commence at the same time as the *de facto* separation may commence earlier in point of time without the necessary animus and the necessary *animus* may arise later in point of time and then coincide with the factum of separation. Desertion i.e. the intentional and permanent forsaking of one spouse by the other without the other's consent, and without reasonable cause, was held to have no straitjacket formula and in each case an inference had to be drawn from the facts of the case.

Further, even though it was true that the deserted spouse must establish on record that sufficient efforts were made by him to bring the deserting spouse to the matrimonial home but it was equally true that the deserting spouse could not be expected to sit back at the parental home for no justifiable grounds and not to return back to the matrimonial home. The Appellant had failed to make any efforts to go back to her matrimonial home; neither had her parents made any efforts to send her back. Neither in the written statement nor in the evidence, the Appellant was able to show making any such efforts to return back to the matrimonial home while on the other hand, the Respondent had proved on record due efforts made by him to bring back the Appellant to the matrimonial home. The appeal was thus dismissed.

MATRIMONIAL LAW

Sections 13(1)(ia) and 28 of the Hindu Marriage Act, 1955- There could be no restitution of marital ties for party guilty of cruelty.

Rajeev Chadha v. Shama Chadha Nee Shama Kapoor and Rajeev Chadha v. Shama Kapoor

Citation: 2012 (130) DRJ 20

Decided on: 21st March, 2012

Coram: **Kailash Gambhir**, J.

Facts: Two appeals were filed by the Appellant-Husband under Section 28 of the Hindu Marriage Act, 1955, challenging the judgment and decree passed by the learned Additional District Judge (ADJ), Delhi whereby the petition filed by the Appellant under Section 9 of the Hindu Marriage Act seeking restitution of conjugal rights was dismissed and the petition filed by the Respondent wife under Section 13(1)(ia) of the Hindu Marriage Act was decreed in favour of the Respondent-Wife.

The Appellant-Husband had invited matrimonial alliance through a newspaper advertisement seeking a working wife in response to which the bio data of the Respondent-Wife was received and consequently the marriage between the parties was solemnized. The Respondent-Wife besides citing other instances of neglect by the Appellant claimed that the marriage between the parties was not consummated which caused her mental cruelty while the grievance raised by the Appellant-Husband on the other hand was that the Respondent-Wife duped him by falsely projecting herself to be a working woman and due to which after marriage he refused to have any relationship with her till the time she produced the requisite certificates.

Issue: Whether the acts surmised and proved amounted to "cruelty" under the Hindu Marriage Act for dissolution of marriage or whether plea for restitution of conjugal rights must be allowed.

Held: Cruelty as a ground for divorce as envisaged in Section 13(1)(ia) of the Hindu Marriage Act was not defined in the Hindu Marriage Act and rightly so as it was not capable of any precise definition. The Apex Court had thus through judicial pronouncements given a broad interpretation to the said term and the Court entertaining the petition for divorce on the said ground was required to determine that whether the conduct complained of was "grave and weighty" so as to come to the conclusion that the Petitioner-Spouse could not be expected to live

with the other Spouse. 'Cruelty' should be much more than ordinary wear and tear of married life and it must be of the type so as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such an extent due to the conduct of the other Spouse that it would be impossible for them to live together without mental agony, torture or distress.

The conduct complained by the Respondent-Wife was the refusal of the Appellant-Husband to have sexual intercourse with her. It was necessary to be mindful of the fact that a normal and healthy sexual relationship was the one of the basic ingredients of a happy and harmonious marriage. It was a case of deliberate avoidance by the Appellant to maintain distance from his wife by not establishing any kind of physical relationship. The conduct of the Appellant was certainly atrocious and cruel towards the Respondent as to put such an unreasonable condition, i.e., first production of the requisite certificates of qualification and then to establish a physical relationship. Further, the Court could not find that the conduct of the Respondent-Wife was anything that would compel the Appellant-Husband to take such a harsh and insensitive decision and denying relief to the Respondent-Wife on this ground would perpetuate the wrong committed by the Appellant-Husband. Thus while observing that the Appellant's application claiming restitution of the marital ties under Section 9 of the Hindu Marriage Act was unsustainable in light of the fact that he himself was guilty of causing cruelty to the wife, the Court upheld the Trial Court's judgment while dismissing the Husband's appeal.

MATRIMONIAL LAW

Sections 13(i)(a) and 28 of the Hindu Marriage Act, 1955- The conduct complained of should be grave and weighty and touch a pitch of severity to satisfy the conscience of the Court that the parties cannot live together with each other anymore without mental agony, distress and torture.

Shashi Bala v. Rajiv Arora

Citation: 2012 V AD (Delhi) 493

Decided on: 21st March, 2012

Coram: **Kailash Gambhir**, J.

Facts: The appeal was filed under Section 28 of the Hindu Marriage Act, 1955, by the Appellant-Wife challenging the order of the Trial Court whereby a decree of divorce in favour of the Respondent-Husband under Section 13(i)(a) of the Hindu Marriage Act was granted and the Counter-claim filed by the Appellant seeking a decree for restitution of conjugal rights under Section 9 of the Hindu Marriage Act was dismissed.

The Husband's case was that the Wife did not participate in the traditional ceremonies of *dudmundari* and *chuda* ceremony and refused to have sexual intercourse. Even when he had sexual intercourse for the first time after one week of marriage the Wife was unresponsive and such conduct of the Wife caused mental cruelty to the Husband. The Husband also alleged that in a period of 5 months he had sexual intercourse only for 10-15 times which caused him cruelty. The Trial Court granted divorce in favour of the Husband on the ground of cruelty.

Issue: Whether refusal of sexual intercourse would amount to cruelty entitling the grant of divorce.

Held: The grievance of the Respondent was the lack of a normal sexual relationship with the Appellant, although it was difficult to lay down as to how many times any healthy couple should have sexual intercourse in a particular period of time, it being not a mechanical but a mutual act, however, there could not be any two ways about the fact that marriage without sex would be an insipid relation. However, even though a normal and healthy couple was expected to indulge into regular sexual relationship but exceptions to this were possible depending much upon various factors such as nature of job, stress levels, social and educational background, mood patterns,

physical well being etc. Indisputably, there had to be a healthy sexual relationship between a normal couple, but what was normal could not be put down in black and white. Thus, the determining factor to ascertain the factum of cruelty, was not the number of times that a couple was to have sexual intercourse but the act of denying sexual intercourse by one partner to another that would amount to cruelty.

However, since what happened in the four walls of the matrimonial home could only be established through the creditworthiness of the testimonies of the parties themselves. Consequently, the absence of proper rebuttal or failure of not putting one's case forward would certainly lead to acceptance of testimony of that witness whose deposition remained unchallenged. The testimony of the Respondent that the Appellant was never responsive and was like a dead wood when he had sexual intercourse with her remained unrebutted. The Respondent had also successfully proved on record that the Appellant did not participate in the customary rituals of *dud-mundri* and *chudha* ceremony, which caused grave mental cruelty to the Respondent. Undeniably, these customary ceremonies were part of the marriage ceremony and refusal of the same that too in the presence of the family members of the Husband was held be an act of cruelty on the part of the Wife. The Appellant had also failed to lead any evidence to prove any demand of dowry made by the Respondent or his family members. The Appellant had also filed criminal complaints against the Respondent and his family members but later withdrew the same. Even though it was the right of the victim to complain of the conduct of the offending spouse, but frivolous and vexatious complaints led to cause mental torture and harassment to the Respondent and his family members. Thus, taking into account the conduct of the Appellant in totality, the same amounted to causing mental cruelty to the Respondent. Hence, the appeal by the Appellant-Wife was dismissed.

MATRIMONIAL LAW

The essence of the expression 'living separately' under Section 13B(1) of the Hindu Marriage Act, 1955 was the relationship of husband and wife and not 'the same roof'.

Pradeep Pant v. Govt. of NCT of Delhi

Citation: 2012 (129) DRJ 674

Decided on: 27th April, 2012

Coram: **Veena Birbal**, J.

Facts: The petition was filed by the Appellants, against the decision of the Principal Judge, Family Court, New Delhi in a petition filed by the husband and wife under Section 13B(1) of the Hindu Marriage Act, 1955 (the Act), wherein without recording the statements of the parties, their petition was rejected on the ground that since the parties were living under the same roof, they had failed to show that there had been cessation of cohabitation between them for the last one year and the fact that the Husband had intended to bear the household expenses of the Wife and the Child in addition to a lump sum payment of maintenance and permanent alimony, it showed his intention to perform marital obligations and not sever the marriage.

Issue: Whether a petition under Section 13B(1) required specific averment towards non-cohabitation of parties.

Held: Even if the parties were living under the same roof due to certain forced circumstances but were not cohabiting and had no intention to live as husband and wife, then as such their being under one roof did not amount to living as husband and wife. Considering the material on record, no inference could have been drawn by the Principal Judge, Family Court that they had not severed their relationship of husband and wife as had been done in the present case. Since there were specific affidavits of non-cohabitation of the parties on the Court record as well as there were duly verified averments in the petition that they were not living together as husband and wife and since they had also settled all their claims as was stated in the joint petition, the petition could be said to have fulfilled all the requirements of Section 13B(1) of the Act.

In view of the same, the order could not be legally sustained and was thus held liable to be set aside. The Principal Judge, Family Court was directed to take up the petition of the parties and record their statement on oath and pass appropriate orders on it in accordance with law.

The period of living separately for one year under Section 13B(1) of the Hindu Marriage Act, 1955 was mandatory not directory and could not be waived under Section 14 of the Hindu Marriage Act.

Sunny v. Sujata

Citation: 2012 IV AD (Delhi) 732

Decided on: 27th April, 2012

Coram: **Veena Birbal**, J.

Facts: The appeal was filed by the parties challenging the order of the Additional District Judge (ADJ), Delhi wherein, the application filed by the parties under Section 14 of the Hindu Marriage Act, 1955 (the Act) along with a joint petition under Section 13B(1) of the Act for dissolution of their marriage and decree of divorce by mutual consent, praying that the stipulated separation period of one year be waived, was dismissed.

Issue: Whether the period of one year for living separately under Section 13B(1) of the Act could be waived by the Court under Section 14.

Held: A plain reading of Section 13B(1) of the Act made it clear that one of the conditions required to be satisfied before the presentation of petition for divorce by mutual consent, was living separately for a period of one year or more. Further, the prescribed statutory period of one year required to be maintained by the parties for filing a petition under Section 13B of the Act was independent of the provisions contained in Section 14 of the Act. Section 13B when read was a complete Code in itself and, therefore, for filing a petition under Section 13B of the Act, the parties could not be allowed to invoke Section 14 seeking waiver of the statutory period of one year from separation for filing a petition under Section 13B of the Act. Hence, the period of one year for living separately under Section 13B(1) of the Act was not directory but mandatory and it could not be condoned by the Court under Section 14 of the Act. Therefore, noticing no illegality in the impugned order, the appeal was dismissed.

A party who gives an undertaking to the Court as part of a settlement and has derived benefits thereunder cannot be allowed to resile from the undertaking without the consequences flowing from the Contempt of Courts Act, 1971.

Avneesh Sood v. Tithi Sood

Citation: MANU/DE/2419/2012

Decided on: 30th April, 2012

Coram: **Vipin Sanghi**, J.

Facts: The Petitioner-Husband filed a petition under Sections 2, 10 and 12 of the Contempt of Courts Act, 1971 against the Respondent-Wife after she withdrew from her undertaking given to the matrimonial court at the time of filing of the petition for divorce by mutual consent. It was agreed between the parties that the husband would pay Rs. 1.5 crores to the wife at the time of filing of the first motion of the petition for divorce by mutual consent. The balance sum of Rs. 5 crores was to be paid at the second motion. The wife also agreed to make a statement before the Court in support of the divorce petition. The Court, acting on the statements of the parties, accepted the first motion petition and bound the parties to the agreed terms and conditions. Despite more than four months expiring after the date on which the second motion petition should have been presented, the wife neither signed the second motion petition nor came forward to make a statement before the matrimonial court.

Issue: Whether an undertaking given by a party to the Court to remain bound by her agreement to obtain divorce by mutual consent was not enforceable because of the statutory provision contained in Section 13B of the Hindu Marriage Act, 1955 (which grants a cooling off period to both the husband and wife to rethink their initial decision to agree to divorce by mutual consent).

Held: The law gave both the spouses the right to opt out of the divorce proceedings. Though the wife could not be compelled to give her consent to the second motion petition, if she had given an undertaking to the Court that she would consent to such petition as a part of a settlement whereunder she had derived benefits and advantage then she could not be allowed to simply walk out of the said agreement and undertaking given to the Court without the consequences flowing from the Contempt of Courts Act, 1971. It was further observed that if a party was permitted to resile from an undertaking given to the Court, in pursuance of an agreement arrived

at between the parties without any penal consequences it would completely destroy the sanctity attached to such solemn undertakings and would encourage dishonesty and disrespect for the judicial process. It would also undermine the majesty and authority of the Courts and instill doubts in the minds of the litigating public with regard to the efficacy of the judicial process. "Civil Contempt" meant willful disobedience of any judgment, decree, direction, order, writ or other process of the Court or willful breach of an undertaking given to a Court. The wife was held guilty of committing contempt of Court and was subjected to costs of Rs. 1 lakh. Further, she was also directed to show cause as to why she should not be punished for contempt of Court.

A Muslim girl, upon attaining the age of puberty, may enter into the contract of marriage without the consent of her parents.

Tahra Begum v. State of Delhi

Citation: MANU/DE/2154/2012

Decided on: 9th May, 2012

Coram: **S. Ravindra Bhat**, S.P. Garg, JJ**.**

Facts: The Writ of *habeas corpus* was filed by the mother of a 15-year old Muslim girl seeking for production of her daughter, alleging that she had been kidnapped, contrary to the girl's statement before the Court that she had left her maternal home voluntarily and was married and living as husband and wife with the boy, the alleged Kidnapper. She also stated that she did not wish to go back to her parents and wanted to continue residing with her husband.

Issue: Whether a minor Muslim girl, who had attained the age of puberty and who married without the consent of her parents, could be directed by the Court to return to her parental home.

Held: The Court observed that under both Mohammedan law ("option of puberty" or *khiyar-ul-bulugh* principle) and secular law (Prohibition of Child Marriage Act, 2006), the principle to be followed was that the marriage of a minor was not void *ab initio* but voidable at the option of the contracting party, who was a child at the time of marriage. The Court thus opined that a Muslim girl who had attained the age of puberty i.e., 15 years, could marry under the Mohammedan law and such a marriage would not be a void marriage, however, she would have the option of treating the marriage as voidable, at the time of her attaining the age of majority, i.e., 18 years.

Relying on a catena of judgments and also taking into consideration, the express choice of the girl to reside with her husband, the Court held that she was entitled to be allowed to exercise her option and live with her husband in the matrimonial home.

Where the Domestic Incident Report had not been prepared, or was not submitted to the Magistrate, he was under no obligation to call for the same for consideration as a precondition to exercising his power, and making such orders as the justice and the facts of the case may warrant.

Shambhu Prasad Singh v. Manjari

Citation: 190 (2012) DLT 647

Decided on: 17th May, 2012

Coram: **S. RavindraBhat**, S.P. Garg, JJ.

Facts: The matter sought to answer a reference requiring resolution of a conflict between the decision of two learned Single Judges of this Court on the question whether a Magistrate could act straightaway on a complaint made by an aggrieved person, under the Protection of Women from Domestic Violence Act, 2005 (D.V. Act).

The Petitioner challenged the order passed by the learned Metropolitan Magistrate (MM) in complaint case titled as 'Manjari v. Shambhu Prasad Singh' issuing notice to the Petitioner, on a complaint under Section 12 of the D.V. Act, without calling for a report from the Protection Officer as also the order of the Learned Additional Sessions Judge whereby the Petitioner's appeal against the said order was dismissed. The Petitioner challenged the said orders on the ground that no notice could have been issued to the Petitioner/Husband of the Complainant without calling for the Domestic Inspection Report (DIR) from the Protection Officer as mandated under Section 12 of the D.V. Act.

Issue: Whether calling for and considering the report of the Protection Officer under the D.V. Act was mandatory before the Court could issue notice to the Respondent in an application under Section 12 of the D.V. Act.

Held: The basic objective in enacting the D.V. Act was to secure various rights to a woman living in matrimony or in a relationship akin to matrimony, or any domestic relationship. Thus the D.V. Act being a beneficial statute, it was the duty of the Court to adopt an approach which furthered the parliamentary intention rather than confining it. The Court was also empowered to grant ex-parte relief and ensure its compliance, including by directing the police authorities to

implement the order and if such an order was violated by the Respondent, including female relatives of the Husband or the male partner, such action would constitute a punishable offence, which could be tried in a summary manner under Section 31 of the D.V. Act.

Section 12(1) did not mandate that an application seeking relief under the D.V. Act was required to be accompanied with the DIR or even that it should be moved by a Protection officer. Even Rule 6, which stipulated the form and manner of making an application to the Magistrate did not require that the DIR must accompany an application for relief made under Section 12 and it was only the proviso to Section 12(1) which mandated that the Magistrate shall consider the DIR "received by him from the Protection Officer or the service provider". Thus, in other words, there really was no imposition of the obligation to call for the DIR, upon the Magistrate.

The scheme of the D.V. Act also made it clear that the Magistrate could initiate proceedings without a DIR. Also, since an *ex-parte* interim order may be granted immediately upon institution of the complaint, it was likely that the Protection officer's DIR may not be prepared by then. If this could be done without considering the DIR, then certainly notice to the Respondent must also be allowed to be served without first considering the DIR. Therefore, in its conclusion the Court answered the question in the negative and decreed that a Magistrate, when petitioned under Section 12(1), was not obliged to call for and consider the DIR before issuing notice to the Respondent. However, if the DIR was already submitted, then that should be considered, in view of the proviso to Section 12(1). Thus, the judgment of the Additional Sessions Judge as well as the concerned MM, who had issued notice under Section 12 without calling for a report from the Protection Officer, were affirmed and the petition was dismissed being bereft of merit.

MISCELLANEOUS

MISCELLANEOUS

Section 27(4) of the Customs Act, 1962- If refund becomes payable consequent upon a judgment, decree, order or direction of an appellate Authority, one year/six months have to be computed from the date of the judgment, decree, order or direction.

Em Pee Syndichem Pvt. Ltd. v. Union of India

Citation: 2012 (279) ELT 340

Decided on: 7th February, 2012

Coram: **Sanjiv Khanna**, R.V. Easwar, JJ**.**

Facts: The Petitioner, having been granted the permission to re-export an import consignment of industrial synthetic diamond powder imported from Ireland, after 22 months, challenged the denial of re-imbursement of 98% of the custom-duty paid by it to the Customs, for the import consignment, wrongly sent to it due to the fault and negligence of the Exporter's Consolidator.

While the Assistant Commissioner of Customs informed the Petitioner that the Petitioner's application for condonation of delay could not be entertained since it was beyond his competence, he also informed that the letter dated 15th March, 2008, raising objections against the refund claim, was to be treated as an appealable order. The Petitioner filed an application to with the Central Board of Excise and Customs (CBEC) for extension of time for re-export beyond two years under proviso to Section 74 of the Customs Act, 1962 ('Act'). It also filed an appeal before the Commissioner (Appeals) against the order dated 15th March, 2008.

Issue: Whether the Petitioner's claim for re-imbursement was barred by limitation.

Held: If Section 74 of the Act were to apply to the case of the Assesse, the Revenue would not have had the authority to assess and demand duty from the Assesse on imported goods. Further contention of the Revenue that refund under Section 27 was barred by time was also untenable. For Section 27 to apply duty should have been paid pursuant to an order of assessment, which was not so in this case. Further, the fourth proviso to Section 27 states that if refund becomes payable consequent to a judgment, decree, order or direction of an appellate Authority, the period of one year/six months has to be computed from the date of such judgment, decree, order or direction.

In the instant case, it was only after the order of re-export was made and the goods were re-

exported, that the Petitioner could have asked for refund. The prayer for re-export was made immediately. The order of the Chief Commissioner of Customs, Delhi Zone, rejecting the request for extension of time and the penalty imposed on the Petitioner was quashed

MISCELLANEOUS

Provisions of a Statute have to be read in harmony with each other to determine the correct legal stand in a dispute.

S.K. Sarawagi & Co. Pvt. Ltd. v. Union of India.

Citation: 2012 (128) DRJ 467

Decided on: 9th February, 2012

Coram: **Sunil Gaur**,J.

Facts: In the writ petition, the Petitioner challenged the order of the Mines Tribunal/Revisional Authority constituted by the Central Government that negated the right of the Petitioner to obtain the mining lease of the subject land and upheld the order of the State Government of Andhra Pradesh recommending grant of mining lease to Respondent No.3.

Pursuant to a Notification issued by the State Government of Andhra Pradesh making the Manganese Ore Buarius available to public for grant of mining lease, the Petitioner sought the mining lease in April, 2007 whereas the Respondent No.3's application for the same was found to be pending since 1991. Since, the area applied for grant of mining lease by the Petitioner was found to be overlapping with the area already applied for by Respondent No.3, the Respondent No.2-State recommended the Respondent No.3's application for grant of mining lease, having priority under Sub-section 2 of Section 11 of The Mines and Minerals (Development and Regulation) Act, 1957. The Mines Tribunal dismissed the Petitioner's revision petition upholding the decision of the State of Andhra Pradesh. Hence, the present writ.

Issue: Whether the grant of mining lease to Respondent No.3 in respect of the subject areas de-reserved by virtue of exercise of power under Rule 59(1) of the Mineral Concession Rules, 1960would be governed by the proviso to Sub-section 2 of Section 11 of The Mines and Minerals (Development and Regulation) Actor the same would fall for consideration under Sub-section 4 of Section 11 of the aforesaid enactment.

Held: Relying on the decision in ***Sandur Manganese and Iron Ores Ltd. vs. State of Karnataka and Ors. [(2010) 13 SCC 1]***, wherein it was held that Section 11(4) was consistent with Rules 59 and 60 since it provided for consideration only of applications made pursuant to a notification whereas the consideration of applications made prior to the notification, as required by the first proviso to Section 11(2), was clearly inconsistent with Rules 59 and 60, the Court held that a

harmonious reading of Section 11 with Rules 59 and 60, therefore, mandated an interpretation under which notifications would be issued under Section 11(4) in the case of categories of areas covered by Rule 59(1).

The subject area was de-reserved while exercising powers under Rule 59 of Mineral Concession Rules, 1960 and the Notification issued by the concerned State Government had made the subject area available for grant of mining lease after expiry of thirty days from the date of publication of this Notification and so clearly, in view of the aforesaid Rule 60 of Mineral Concession Rules, 1960, the Respondent No.3's application of 3rd September, 1991 i.e., of period prior to the coming into force the Notification, was clearly pre-mature and the same could not have been granted priority by relying upon Sub-section 2 of Section 11 of The Mines and Minerals (Development and Regulation) Act.

The order though rightly rejected Petitioner's application for grant of mining lease but erroneously upheld the order of 5th September, 2009 of the State Government of Andhra Pradesh recommending the case of Respondent No.3 to the Central Government for grant of mining lease. In fact, the grant of such recommendation for grant of mining lease was otherwise also rendered unsustainable as it did not take note of Sub-section 5 of section 11 of The Mines and Minerals (Development and Regulation) Act. Hence, it was found that not only was the Petitioner's application clearly defective but also the Respondent No.3's application was pre-mature. In such a scenario, the Court, while observing that the only option left open with the Respondents was to invite fresh applications, disposed of the present petition while setting aside the order to the extent that it upheld the order recommending grant of mining lease to Respondent No.3, however with the liberty to the Respondents to promptly invite fresh applications for the said Grant.

A person could not claim that non issuance of the passport with incorrect/false information was infringing his fundamental right of locomotion or to travel abroad.

Teesta Chattoraj v. Union of India

Citation: II (2012) DMC 25

Decided on: 30th March, 2012

Coram: **Vipin Sanghi**, J.

Facts: The writ petition under Article 226 of the Constitution of India had been preferred by the Petitioner, a minor through her mother and natural guardian. The Petitioner sought issuance of a writ of certiorari quashing the letter issued by the Respondent, i.e., the Regional Passport Officer (RPO), New Delhi, whereby the Petitioner's request for issuance of a passport had been declined. The Petitioner also sought a writ of mandamus directing the Respondent RPO to issue a passport in favour of the Petitioner on the basis of the information supplied by the Petitioner in her passport application form.

The Petitioner's biological parents had obtained divorce when the Petitioner was about two years old. It was mutually agreed between the parents that, the Petitioner's mother would not claim or demand maintenance and/or alimony for the minor child at present or in future from the Petitioner's biological father. The Petitioner's biological father gave up all his rights and claims as regards the Petitioner child. Thereafter, the Petitioner's mother re-married and by a registered adoption deed, she gave the Petitioner child in adoption to her new husband. The Petitioner applied for a passport, through her mother, to the Respondent Authority. The Respondent vide the letter rejected the Petitioner's application on the ground that the Petitioners biological name, as per her birth certificate, had not been mentioned in the passport application form, and that the adoption deed was not in accordance with the Hindu Adoption and Maintenance Act, 1956 (HAMA).

Issue: Whether the Passport authority was required to limit itself to the grounds of rejection of passport contained in Section 6(1) & 6(2) of the Passports Act, 1967.

Held: An application for seeking issuance of a passport was required to be made under Section 5(1) and on receipt of an application, the passport Authority was required to make its enquiry and thereafter, pass an order. Therefore, if the details and particulars mentioned in a passport

application by an Applicant were found to be incorrect or deficient upon a scrutiny of the application and the documents produced in support of it, the passport Authority was not obliged to issue a passport, merely because such a case may not be covered by the grounds contained in Section 6(1) or 6(2) of the Passports Act. Section 6(1) and 6(2) of the Passports Act only provided for another test of the veracity of the application for issuance of a passport if it was found to be complete and truthful in all other respects. Since a passport was not only a travel document, but also an identity document and the identity of a person was determined by his parentage, therefore if, during the course of the enquiry under Section 5 of the Passport Act, it came to the notice of the passport Authority that the documents provided by the Applicant did not support the claims made by the Applicant in his application for issuance of a passport, he would not only be entitled, but would be duty bound to raise the issue with the Applicant. Therefore, the Petitioner was necessarily required to show the legal adoption of the Applicant, bound to give the name of his/her natural parents and could not choose to provide the name of the adopted parent(s) in his/her application form.

Further, the Petitioner's adoption could not be said to have been made in accordance with the provisions of Chapter II of the HAMA, and was thus, void. Hence, the petition was dismissed, leaving it open to the Petitioner to comply with the objections raised by the RPO and to resubmit her application with the correct details, inter alia, with regard to her parentage.

The driving force behind an organ transplant has to be a sense of love, affection and gratitude for the recipient and not commercial gain, for it to be permissible.

Parveen Begum v. Appellate Authority

Citation: 189 (2012) DLT 427

Decided on: 15th May, 2012

Coram: **Vipin Sanghi**, J.

Facts: The Petitioners sought a writ of *certiorari* for quashing of the order of the Respondent No.1-Director General of Health Services (Appellate Authority) whereby the Petitioners' appeal against the rejection of the proposed kidney transplant by Respondent No.2-Authorisation Committee for Human Organ Transplant, Sir Ganga Ram Hospital, was rejected on the ground that there was no substantial proof of association between the Donor and the Recipient as also there was an income disparity between the two. The challenge by the Petitioners was on the ground that the Authorisation Committee as well as the Appellate Authority completely misdirected themselves in focusing on the question as to why one of the near relatives of Petitioner No.1 was not coming forward to donate one of his/her kidneys while conducting the enquiry. The Petitioners also sought a writ of mandamus seeking a direction to the Respondents to accord approval to the Petitioners for effecting transplant of kidney from Petitioner No.2 to Petitioner No.1.

Issue: Whether the mere occasion of a near relative being unwilling to donate his/her organ/tissue to the Recipient, could be a ground to either raise a suspicion of a commercial transaction between the distant Relative-Donor and the Recipient, or to reject the case altogether.

Held: While appreciating the statutory provisions and the scheme of the transplantation of Human Organ & Tissues Act, 1994 (the Act) it was observed that the Act did not seek to prohibit, but only regulate the transplant of organs and tissues from cadavers and living human beings. What was prohibited was the commercial transaction in the giving and taking of organs and tissues, however, donations offered out of love and affection, even amongst those who were not near relatives or totally unrelated, was permitted. Therefore, a Donor, who was not a near relative of the Recipient could by reasons of "affection, or attachment towards the Recipient or for any other special reasons" authorise the removal of his/her human organ or tissue or both for transplantation in a Recipient for therapeutic reasons and the only caveat was that in such

circumstances prior approval, before removal and transplantation, was required of the Authorisation Committee. However, the function of the Authorisation Committee was limited only to cases where the Donor and the Recipient were not nearly related and to ensure that no payment of money or monies was made by the recipient to the Donor in lieu of a commercial transaction entered into between them.

The parties had shown to the Authorisation Committee their long period of acquaintance, degree of association and reciprocity of feelings as they were distantly related through various documents, photographs, etc. Furthermore, none of the interviewers had expressed any doubt or dissatisfaction with regard to the claim of the Petitioners that they were related in the manner as claimed by them. Thus, the Court held that the mere existence of disparity in the income of the Donor and the Recipient by itself could not have been a reason to reject the Petitioners' case by raising a suspicion that there would necessarily be a commercial transaction in relation to the giving and taking of the kidney.

Hence, in light of the above, the decision of the Authorisation Committee as well as the Appellate Authority, were wholly unsustainable and, accordingly, they were liable to be quashed.

MISCELLANEOUS

A vacancy identified for physically challenged person could not be filled by a general category candidate.

Rajendra Wanchoo v. Chief Commissioner for Persons with Disabilities

Citation: MANU/DE/2611/2012

Decided on: 16th May, 2012

Coram: **Suresh Kait**, J.

Facts: The Petitioner challenged the authority of Respondent No.3 to appoint Respondent No.4 and sought the issuance of a writ of *Quo Warranto*, directing the Respondents to quash and set aside the said appointment as well as a writ of mandamus directing the Respondent No.3 to provide all consequential reliefs to the Petitioner such as payment of retrospective benefits and dues starting from the date of unlawful appointment of Respondent No.4.

As according to the Petitioner, despite an office order issued by the Ministry of Social Justice and Empowerment and a report of the Expert Committee identifying/reviewing the posts in Group A, B, C & D to be reserved for persons with disabilities in different Ministries/Departments and Public Sector Undertakings, the Respondent No.3 had failed to reserve the post of Deputy General Manager (DGM) for persons with disability and filled the post with Respondent No.4 belonging to the general category, ignoring the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (Act) and the reservation.

Issue: The main issue was that whether the arbitrariness or the cleverness of the Respondents, be let gone because much water had already flown or that the proper message was required to be conveyed that if any Department was found to act in such an arbitrary fashion, its decision would be rolled back.

Held: While appreciating the facts of the case, the Court observed that instead of giving complete effect to the departmental circular dated 26th September 2003 for filling up the post of DGM and identifying the vacancy for physically challenged persons as notified under the Act, the Respondents had only considered Respondent No.4 and failed to consider the Petitioner, for the said post and had subsequently absorbed only Respondent No.4. The Respondents were required to identify the post of DGM and keep reserved for the persons with disability. If the

Petitioner was to be considered, in that eventuality, then this post would have been ultimately filled up by the Petitioner, instead of Respondent No.4. Therefore, since they clandestinely filled the post and ignored the Act and reservation, even though the cadre of DGM was identified way back in the year 1999 and also included in the list, the Court held the claim of the Petitioner to be valid and thus directed Respondent No.3 to appoint the Petitioner against the vacancy of general category or against person with disability (OH) and the petition was allowed in the above terms.

An ancient monument so declared by the Central Government, whose upkeep was the responsibility of the Government, was a public premise.

Mange Ram Bhardwaj v. Union of India

Citation: MANU/DE/2124/2012

Decided on: 21st May, 2012

Coram: **Sunil Gaur**,J.

Facts: The writ petition challenged the proceedings under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, wherein the Petitioner's eviction by the Estate Officer from the land within *Purana Qila*, a centrally protected monument at Mathura Road in New Delhi, was upheld in appeal by an order. The Petitioner challenged it on the ground that though *Purana Qila* had been declared to be an ancient monument but the *Mandir* in question in *Purana Qila* had not been so declared, and neither had the Archaeological Department resorted to compulsory acquisition of the *Mandir* as an ancient monument. Moreover, since the *Mandir* did not belong to the Central Government therefore the provisions of Public Premises(Eviction of Unauthorised Occupants) Act, could not be evoked to evict the Petitioner, who by virtue of being the *Pujari* had the right to remain on the subject land and to perform the Puja and to take care of the *Mandir* and thus, the eviction of the Petitioner from the subject land by illegally resorting to proceedings under the Public Premises (Eviction of Unauthorised Occupants) Act, was per sebad in law and so the eviction of the Petitioner from the subject land/*Mandir* deserved to be quashed.

Issue: Whether a structure, being part and parcel of a centrally protected monument, could be deemed to be a private property in the absence of being also expressly declared as a protected monument under the Ancient Monument Reservation Act, 1904.

Held: The Petitioner ought to have raised facts and led evidence with respect thereto, at the time of eviction proceedings before the Estate Officer. The Petitioner's contention that a portion of an ancient monument could be said to be a private property was rejected. Not only was the compulsory acquisition of an ancient structure for religious purposes prohibited under Sub-section 2 of Section 10 of the Ancient Monuments and Archaeological Sites and Remains Act, 1958, but also that any premises belonging to the Central Government would be the public premises including an ancient monument so declared by the Central Government.

Thus, having come to the conclusion that the ancient site, *Purana Qila*, a centrally protected monument fell within the definition of the Public Premises (Eviction of Unauthorised Occupants) Act, the Court dismissed the petition and vacated the interim order while upholding the order. However, the Petitioner was given the liberty to offer puja at the *Mandir* on the subject land, during the permissible timings of access to the protected monument in question.

MOTOR ACCIDENT COMPENSATION LAW

In case of a death of a housewife in a motor vehicle accident, the compensation for her gratuitous services must be computed according to her qualification and not her skills.

Royal Sundaram Alliance Insurance Co. Ltd. v. Master Manmeet Singh

Citation: 2012 ACJ 721

Decided On: 30th January, 2012

Coram: **G.P. Mittal**, J.

Facts: In the first appeal out of a total of six appeals, the Appellant- sought reduction of compensation awarded in favour of the Respondents (Claimants) by the Motor Accident Claims Tribunal, for the death of their mother, a housewife. The Appellant challenged the said order on the ground that the Claims Tribunal arbitrarily took the value of gratuitous services rendered by the deceased as Rs. 6,000 per month which was against the law laid down by the Supreme Court.

Issue: Whether it would be correct to determine the income of a housewife as according to the skill/income of her spouse.

Held: The Court, referring to the decisions in ***Lata Wadhwa v. State of Bihar [(2001) 8 SCC 197]*** and ***Arun Kumar Agrawal v. National Insurance Company Limited [(2010) 9 SCC 218]***, illustrated that, if Clause 6(b) of the Second Schedule to the Motor Vehicles Act, 1988 (M.V. Act) (under Section 163A), was followed, according to which the income of the non-earning spouse was deemed to be 1/3rd of the earning spouse then there would be wide disparity in the award of compensation to Claimants belonging to different income groups even though the services rendered by a home-maker remained the same. Observing that the Supreme Court lamented the concept of assuming the income of the housewife to be that of a skilled or an unskilled worker in ***Arun Kumar Agrawal's*** **case** (*supra*), the Court observed that, to bring about some uniformity, the appropriate way to grant compensation to a housewife must be according to her qualification and not according to her skill. Hence taking everything into consideration, the value of the gratuitous services rendered by a housewife be based on the following principles:

(i) The Minimum wages of a Graduate where she was a Graduate.

(ii) The Minimum wages of a Matriculate where she was a Matriculate.

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

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

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

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

(vii) There shall be no deduction towards the personal and living expenses.

(viii) An attempt had 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 was alive, may be awarded.

(ix) Since a home-maker was not working and thus not earning, no amount should be awarded towards loss of estate.

Consequently, finding no error in the award of compensation by the Claims Tribunal the first appeal was dismissed.

As regards to the other appeals the Court modified the amounts awarded by the Claims Tribunal due to lack of evidence adduced by the Claimants in all appeals and the appeals were allowed in those terms.

Section 149(2)(a)(ii) of the Motor Vehicles Act, 1988- Even in cases of willful breach of the terms of the insurance policy, by the Insured, the Insurer would still have to compensate the third parties and subsequently recover the same from the Insured.

Oriental Insurance Co. Ltd. v. Rakesh Kumar

Citation: 2012 ACJ 1268

Decision on: 29thFebruary, 2012

Coram: **G.P. Mittal**, J.

Facts: In this set of appeals it was contended on behalf of the Insurance Companies that, once a willful breach was established, the Insurer could avoid the liability to pay, even to third parties. On the other hand, the Claimants and Owners urged that irrespective of the breach of the terms of policy, the Insurance Companies could not avoid their liability as far as the third party liability was concerned and where the breach was not willful, the Insured was not liable at all and the Insurer was under an obligation to satisfy the judgments and Awards.

Issue: Whether in case of a wilful or intentional breach of the terms of the policy by the Insured in terms of Section 149(2)(a)(ii) of the Motor Vehicles Act, 1988 (the Act), would the Insurer still be liable to satisfy the award of compensation in favour of third parties and avail the right to recover the same from the Insured or whether Insurer would not be so liable, leaving the third parties to enforce the Award against the Insured/Owner and driver of the offending vehicle.

Held: While observing that there was some conflict in the Supreme Court decisions on the subject, the Court held that amongst all the two Judge Bench cases which took a contrary view to the principle that, the Insurance Company was statutorily liable to pay the compensation at the first instance and then to recover the same from the Driver/Owner**, *Malla Prakasarao v. Malla Janaki [(2004) 3 SCC 343]***, was the only three Judges Bench decision of the Supreme Court. However, the Supreme Court distinguished it in ***National Insurance Company Limited v. Swaran Singh (2004) 3 SCC 297*** holding that the Supreme Court did not have an occasion to consider the general terms and conditions of the contract of Insurance vis-à-vis the liability of the Insurer under the Act in the ***Malla Janaki* case** (*supra*). Therefore, since ***Sohan Lal Passi v. P. Sesh Reddy [(1996) 5 SCC 21]*** and ***Swaran Singh's* case** *(supra)* were three bench decisions, the principle laid down in these cases was held to prevail over the other decisions.

Therefore, the Court observed that taking into consideration, the precedents and also the intention behind the Motor Vehicles Act, it was the statutory liability of the Insurance Companies to pay the compensation at the first instance and then recover the same from the Owner/Driver, even in the cases where there was willful breach of the policy.

While awarding the loss of dependency to the Claimants no addition to the income of the deceased could be given on account of 'inflation and indexation'.

Dhaneshwari v. Tejeshwar Singh

Citation: MANU/DE/1050/2012

Decided On: 19th March, 2012

Coram: **G.P. Mittal**, J.

Facts: The Insurance Companies/Owners challenged the grant of 50% addition in the minimum wages of the deceased towards inflation and indexation, for computing the loss of dependency on the ground that minimum wages got doubled within a span of 7 to 10 years on account of inflation.

Issue: Whether, in view of the Division Bench judgment of this Court in ***Delhi Transport Corporation v. Kumari Lalita 22 (1982) DLT 170 (DB)*** and ***Rattan Lal Mehta v. Rajinder Kapoor II (1996) ACC 1 (DB)***, an increase towards inflation could be granted, particularly when the loss of dependency was to be assessed according to the minimum wages.

Held: Reliance was placed on various High Court precedents and the Division Bench judgment of ***Rattan Lal Mehta's case*** *(supra)*, to examine if any increase in the compensation could be granted towards inflation and increase to the income of the deceased must be made only if there was evidence with regard to the same. Through illustrative tables, the various effects were demonstrated, which the rising rate of interestand inflation had, in diminishing the compensation. Lord Diplock's judgment in ***Mallet v. Mc Monagle, 1970 AC 166***,dealt with the concept of 'Real interest Rate', did not completely apply to the Indian scenario, as generally there wasn't much of a difference in bank interest rate and the inflation rate and on a few occasions (in India), the inflation rate was higher than the interest rate.

The Court was bound by the dictum laid down by the division bench in ***Rattan Lal Mehta's*** **case** (*supra*) that the 'multiplier method takes care of inflation'. Although, in the Indian context the multiplier method did not completely take care of the inflation. Therefore, no increase could be granted to the income of the deceased, towards future inflation and indexation. The appeal was accordingly allowed.

The potential income of a person pursuing a professional course should be taken into consideration while awarding loss of dependency.

Meenu Tognatta v. National Insurance Co. Ltd.

Citation: MANU/DE/3207/2012

Decision on: 20th April, 2012

Coram: **G.P. Mittal**, J.

Facts: The Appellants challenged the grant of compensation by the Claims Tribunal to the deceased Disha Tognatta and Chhavi Aggarwal on the basis of their potential income, on the ground that the Claims Tribunal had erred in not taking into consideration the future prospects of the deceased and in not applying the appropriate multiplier based on the ages of the mothers of the deceased at the time of the accident.

Issue: Whether the deceased were entitled to be granted 50% increase towards future prospects, being students of a professional course.

Held: The Court relying on the various precedents of this Court, and also, on the Division Bench decision of the Andhra Pradesh High Court in ***B. Ramulamma v. Venkatesh, Bus Union, Rep. by A.M. Velu Mudaliyar 2011 ACJ 1702***, held that, in a case, where the academic record of deceased was excellent and additionally, the course pursued by the deceased was also very much in demand, it would be completely reasonable for the Court to take into consideration the salary of an entry level employee, which was fixed by the Government for a person with the said qualification. The salary of both the deceased was taken to be Rs.18,000 and accordingly the compensation was granted. In such a case future prospects could be granted, after considering the institution in which the deceased were studying, the academic merit of the deceased and the course which the deceased were pursuing. The Court after considering the future career prospects of the deceased, the appropriate multiplier to be applied as according to the age of the mother of the deceased on the date of the accident and adding other notional sums towards loss of love and affection, loss to estate and funeral expenses, enhanced the loss of dependency of the deceased from Rs. 8,85,000 to Rs. 23,13,000 in the case of Disha Tognatta and to Rs.21,06,000 in the case of Chhavi Aggarwal.

The appeals were allowed in the above terms.

Power of the appellate Court allows enhancement of the compensation under Order XLI Rule 33 of the Code of Civil Procedure, 1908 in the absence of cross-objections, if considered to be justifiable.

National Insurance Co. Ltd. v. Komal

Citation: MANU/DE/2870/2012

Decided on: 27th April, 2012

Coram: **J.R. Midha**, J.

Facts: The Claims Tribunal awarded Rs.5,84,000 to the legal representatives of a deceased businessman aged 23 years, who died in a motor accident. The Insurance Company had filed the appeal seeking reduction of the award amount. However, this Court finding the compensation awarded to be on the lower side, enhanced it to Rs.6,88,000. The Insurance Company challenged the jurisdiction of this Court in enhancing the award amount in the absence of any cross-objections filed by the Claimants.

Issue: Whether the appellate Court had the power to enhance compensation in the absence of cross-objections.

Held: Under Order XLI Rule 33 of the Code of Civil Procedure, 1908 (CPC) the appellate Court had the power to enhance the compensation even in the absence of any cross-objections filed by the Claimants. The object of this provision was to do complete justice between the parties. It was also observed that Section 168 of the Motor Vehicles Act, 1988 empowered the Court to award such compensation as appeared to be just which had been interpreted to mean just in accordance with law and it could be more than the amount claimed by the Claimants. The provisions of the Motor Vehicles Act were clearly a beneficial legislation and hence were required to be interpreted in a way to enable the Court to assess just compensation. Consequently, examining the relevant judgments the Court dismissed the appeal and enhanced the compensation from Rs.5,84,000 to Rs.6,88,000.

Section 163A of the Motor Vehicles Act, 1988-The Insurer is liable to pay compensation if the nexus between the death due to accident and the use of a motor vehicle stands established.

National Insurance Co. Ltd. v. Munesh Devi

Citation: 2012 (189) DLT 725

Decided on: 4th May, 2012

Coram: **J.R. Midha**, J.

Facts: The deceased, a driver of a tanker, had parked the vehicle and climbed over it to check the inside condition of the tanker when he came in contact with an over-head electric wire and died on the spot. The Claims Tribunal awarded Rs.4,65,800 as compensation to the legal representatives of the deceased. The Appellant challenged the award of the Claims Tribunal on the ground that the Appellant was not liable to pay any compensation since the deceased had not died because of an accident arising of use of the insured vehicle.

Issue: Whether the deceased died due to the accident arising out of use of the motor vehicle and was entitled to compensation under Section 163A of the Motor Vehicles Act, 1988.

Held: Relying on a catena of judgments, the Court observed that since Motor Vehicles Act was a beneficial legislation enacted with a view to confer a benefit of expeditious payment of a limited amount, the same had to be given a particular interpretation. The Court thus opined that in motor accident claims, what was required to be ascertained was whether the events leading up to the death of the driver were a direct consequence of the use of the insured motor vehicle. If the nexus was established the Insurer would be liable to pay compensation to the Claimants.

Since the death occurred due to the accident arising out of the use of the motor vehicle, therefore, the Claimants were entitled to compensation under Section 163A of the Motor Vehicles Act.

Section 163A of the Motor Vehicles Act, 1988- A Claimant has the option/right to claim compensation from any or all of the Owners/Insurers of the vehicles involved in a motor accident claim.

New India Assurance Co. Ltd. v. Vivek Thakur

Citation: MANU/DE/2637/2012

Date of Decision: 11th May, 2012

Coram: **G.P. Mittal**, J.

Facts: The Appellant, being an Insurance Company, challenged the order of the Claims Tribunal, whereby a grant of compensation was made in favour of the Respondents under Section 163A of the Motor Vehicles Act, 1988 on the ground that on account of there being no negligence on the part of the driver whose vehicle was insured with the Appellant, the Claims Tribunal had erred in fastening the entire liability on the Appellant.

Issue: Whether compensation could be claimed from Insurance Company, without proving any negligence on the part of the Owner of the insured vehicle involved in a accident claim.

Held: Relying on the Division Bench judgment of the Kerala High Court in ***United India Insurance Company Ltd. v. Ratheesh MANU/KE/1687/2011***, held that, a Claimant choosing a remedy under Section 163A of the Motor Vehicles Act was entitled to sue, recover or claim compensation from the Owner/Insurer of any or all the vehicles involved in the accident without having to plead or establish that the death or permanent disablement so caused was due to any negligence orwrongful act on the part of the owner of the vehicle or vehicles concerned.

Since Section 163A was introduced as a social measure, the statutory concern was only that the victims must be compensated and to ensure that, the option must be and was conceded to the Claimant. If the primary accent under Section 163A was to provide a social security scheme, then the option was to be given to the target group of the beneficent provision to stake the claim against any of the Owners/Insurers who were made liable under Section 163A. Moreover, since the liability under Section 163A was joint and separable, either or both (or any or all) who had been saddled with the liability under Section 163A could be proceeded against by a Claimant at his option under Section 163A of the Motor Vehicles Act.

Since the Claimants had claimed compensation from the Owner of both the vehicles and since either or both of them could be made liable to pay the compensation jointly or severally or equally, the Appellant was under an obligation to satisfy the award but with a right to recover 50% from the Owner of the TSR vehicle. The appeal was allowed in the above terms.

Order XLI Rule 33 of the Code of Civil Procedure, 1908 empowers the appellate Court to grant relief to a person who had neither appealed nor filed any cross-objections.

The New India Assurance Co. Ltd. v. Bal Kishan Pawar

Citation: Mac. App. No. 246 of 2009

Decided on: 31st May, 2012

Coram: **J.R. Midha**, J.

Facts: The Appellant challenged the Award of the Claims Tribunal whereby the income of a 17 year old deceased was assumed to be Rs.5,000 and a total compensation of Rs.5,75,000 was awarded to the Claimants/Respondents No.1 and 2, seeking reduction of the award amount as well as recovery rights against Respondent No.3.

Issue: Whether the income of Rs.5,000 per month assumed by the Claims Tribunal was fair and reasonable or whether this Court could enhance the Award amount in the absence of cross-objections by the Claimants.

Held: Section 168 of the Motor Vehicles Act, 1988 empowered the Court to award such compensation as appeared to be just in accordance with law and thus could even be more than the amount claimed by the Claimants. Furthermore, the appellate Court also had the power to enhance the compensation in the absence of any cross-objections by the Claimants as under Order XLI Rule 33 of the Code of Civil Procedure, 1908 (CPC). Since the provisions of the Motor Vehicles Act were clearly a beneficial legislation, the object of this provision was to do complete justice between the parties.

Hence, considering that the deceased was a very bright student and was ambitious to join the defence services for which he had already applied, the income of the deceased was presumed to be Rs.15,000 per month following the judgment of the Supreme Court in ***Municipal Corporation of Delhi v. Association of Victims of Uphaar Tragedy [AIR 2012 SC 100]***.

The appeal was partly allowed however the total compensation was enhanced from Rs.5,75,000 to Rs.13,05,000.

PROPERTY LAW

Partition of a property by way of oral agreement between the parties was nothing more than an arrangement of convenience and not an agreement of partition of property.

Narinder Nath Seth v. Lata

Citation: 2012 (128) DRJ 507

Decided on: 8th February, 2012

Coram: **Reva Khetrapal**, J.

Facts: The abovementioned suit was filed by the Plaintiffs for partition of a property 'A' and also of a Shop 'B', i.e., properties left by late Shri Lachmi Narain Seth, the predecessor-in-interest of the Plaintiffs and the Defendants, who died intestate in the year 1967. It was the case of the Plaintiffs that the Defendant No.7, daughter of the predecessor-in-interest, and after her demise her legal representatives had no claim to any right, title or interest of any nature in the suit properties and thus the suit properties should be divided in the ratio of one-third to each son represented by his respective branch of family.

The Defendants on the other hand alleged that the partition of the suit properties could not be carried out, on the ground that the properties stood already partitioned by the predecessor-in-interest during his lifetime about 32 years back amongst his legal heirs by way of a family settlement and that the present suit was an abuse of the process of law being for re-partition of the properties left by the deceased predecessor-in-interest. Besides the aforesaid pleas raised, it was also the case of Defendant Nos. 1 to 5 that another property 'C' was also liable to be partitioned between the parties, but had deliberately not been mentioned and included by the Plaintiffs in the present suit.

Issues: (1) Whether there was a family partition and settlement between the parties about 32 years before or not.

(2) Whether late Sh. Lachmi Narain Seth left behind other properties than those mentioned in the plaint, if so, whether they were liable to be partitioned or not.

(3) Whether the Plaintiffs were entitled to partition of the properties mentioned in the suit.

(4) Whether the parties had acted upon the family settlement, if any, and whether the parties were in possession of their respective shares.

Held: The contention of Defendant Nos.1 to 5 that there was a family settlement, which had been acted upon by the parties and which was evidenced from the fact that they were living in their demarcated portions of the property was found to be devoid of merit. The Court opined that merely because the parties had lived together in their individual portions of the property for the last several decades did not mean that a partition of the property had been effected and had no significance so far as the suit for partition was concerned. More so, when the so-called division was wholly inequitable as two branches of the family were living on the ground floor and the entire first floor and the portion above it was in the sole occupation of the third branch of the family, who was also in occupation of the shop owned by the family, being shop 'B'.

Issue Nos.1 and 4 were accordingly decided against Defendant Nos.1 to 5 and Issue No.3 was decided in favour of the Plaintiffs by holding that the Plaintiffs were entitled to partition of the properties mentioned in the suit.

As regards to Issue No.2, the Court held that the onus of proving this issue was upon Defendant Nos.1 to 6, who miserably failed to discharge the same. The entire case of Defendant Nos.1 to 5, fell to the ground on account of the admission made by Defence Witness (DW) 1 that his father had relinquished his rights in property 'C'. Issue No.2 was thus decided in favour of the Plaintiffs and against Defendant Nos.1 to 6. As a necessary corollary, the only two properties which were liable to be partitioned between the parties were property 'A' and Shop 'B'.

Resultantly, a preliminary decree of partition was passed holding that one-third share of the aforesaid properties was liable to devolve upon Plaintiff Nos.1 to 4, one-third share upon Defendant Nos.1 to 5 and one-third share to Defendant Nos.6(a) to (d).

An act or transaction is good unless declared to be void.

Jai Pal. v. Randhir Singh

Citation: MANU/DE/1136/2012

Decided on: 22nd February, 2012

Coram: **Sunil Gaur**, J.

Facts: The order of 23rd February, 2011 of the Financial Commissioner, Delhi refusing to condone extra-ordinary delay of fifty one years in filing of an appeal under Section 64 of the Delhi Land Revenue Act, 1954against mutation order of 23rd February, 1958 passed by the concerned Tehsildar, was assailed in this petition. The Petitioners contended that the concerned Collector had rightly cancelled the aforesaid mutation order as the Respondents herein were not the legal heirs of Late Shri Ramji Lal in terms of Section 50 of the Delhi Land Reforms Act, 1954. Petitioner contended that provisions of Hindu Succession Act, 1956 were not applicable and Delhi Land Reforms Act, 1954 governed the succession in respect of agricultural lands. Thus, the Collector's order had rightly set aside the mutation in question which was against the law and the impugned order upsetting the order of the Collector was bad in law and deserved to be quashed.

Issue: Whether void orders could be challenged anytime irrespective of bar of limitation.

Held: What distinguished an order that was void from another that was voidable essentially lay in whether the order in question was outside the jurisdiction of the authority making the same. On the other hand, if it was an order that was within the jurisdiction of the authority making the same but the order suffered from an error or irregularity that fell within the jurisdictional sphere of the authority making the order, it was voidable. Thus, in the instant case, even if it was taken that the mutation order was contrary to the provisions of Delhi Land Reforms Act, still, it was a voidable order and not a void order and so, the appeal had to be filed within the period of limitation of thirty days, as mandated by Section 67 of Delhi Land Revenue Act. Even if it was taken that the Respondents' appeal against the Collector's order was not maintainable, still it could be treated as a revision and thus this so-called technicality could not be a ground to upset the impugned order.

The order of the appellate Authority treating the impugned mutation order as null and void, was

clearly in contravention to Rule 142 of the Delhi Land Revenue Rules, 1962, as it failed to appreciate a delay of fifty one years in filing of an application under Section 5 of the Limitation Act, 1963 by the Petitioners, while observing that the Petitioners were not required to file such an application. Since the Petitioners had decidedly remained silent through all the subsequent mutation orders without any proper explanation, they could not now be heard to say that there was no period of limitation for challenging the void order, as it ran counter to afore-referred Rule 142 of the Delhi Land Revenue Rules. The petition was dismissed.

A person asserting acquisition of title by adverse possession had to give full particulars of the real owner, date on which he entered into possession as well as the date from which he started asserting a title to the property which was adverse to the real owner.

Institute of Human Behaviour & Allied Sciences v. Govt. of NCT of Delhi

Citation: MANU/DE/0803/2012

Decided on: 5th March, 2012

Coram: **Gita Mittal**, J.

Facts: the Plaintiff-Institute of Human Behaviour & Allied Sciences (IHBAS), claimed to have a right over the suit land in lieu of the Supreme Court's direction in 1983 that the erstwhile Hospital for Mental Diseases, Shahdara be converted into a premiere institute looking after all aspects of mental health of the citizens, and in furtherance of the notification issued by the Delhi Development Authority (DDA) for disposal of this land to the Delhi Administration/CPWD for construction of a hospital for Mental Diseases at Shahdara.

The dispute arose when in challenge to such claim by the IHBAS, Defendants Nos. 4 and 5- Het Ram and Kewali Ram, claimed that they had an adverse possession over the suit land in furtherance of their possession over this land since past 50 years for cultivation purposes. A spate of litigation was being fought over this piece of immovable property by the Defendant Nos. 4 and 5 from the year 1965 to 2006 and IHBAS alleged that they engaged in fraud and misrepresentation.

Issue: Whether mere occupation of another's property or unnoticed use of such land by a neighbour or a trespasser could amount to adverse possession of suit property.

Held: A person, who based his title of the suit property on adverse possession, was required to show that his title was hostile to the real owner and amounted to denial of the owner's title to the property claimed. However, mere occupation of another's property or unnoticed use of such land by a neighbour or a trespasser not in the nature of a substantial act of possession could not tantamount to dispossession of the land from the owner or create either any title or a right to remain in possession. It was only the settled or effective possession of a person without title which could entitle him to protect his possession even as against the true owner. To have the

advantage of lawful possession of the suit property, admittedly and unquestionably held to be a 'plot of land', the Claimants were required to show their settled and peaceful possession over the suit property, even if they did not show their title.

However, the two private Defendants had not litigated against the real owner at any point of time, and despite full knowledge, they had deliberately not impleaded the necessary parties in the suits in 1998 and, the decree dated 8th April, 1999 was not passed against the correct and necessary party. Further, they had concealed important facts such as boundaries of the plot over which they claimed possession and even failed to prove and establish cultivation over such land. Defendant Nos. 4 & 5 had also failed to disclose any date on which they entered into possession; the person/authority to whom they paid the rent; the particulars of the real owner, or when, if at all, they asserted title as owners of the land or exclusive possession thereof.

Defendants no. 4 & 5 had failed to show that they were in settled, exclusive, continuous, open and hostile possession of the suit land or any portion thereof or had ever asserted title of the property to support a finding that they had acquired title by adverse possession. A casual, unnoticed user of an open piece of land or intrusion thereon too could not be considered as exclusive possession of the land conferring any right over the land in the person using it. The Plaintiff had made out a prima facie case in his favour, for grant of an ad interim injunction and restrained the Defendants from interfering in the possession of the suit property as well as from creating any third party interest by sale, loss or damage, trespassing, demolition, additions, alterations, constructions and erections on the suit property or executing any document in respect of the suit land in favour of Defendant No.4 and legal heirs of Defendant No. 5 or any other third party.

Question of status of the Petitioners in the subject land could be invoked and examined only under the provisions of the Delhi Land Reforms Act, 1954 and not in proceedings under the Delhi Land Revenue Act, 1954.

Kesarwati v. Financial Commissioner, Delhi

Citation: MANU/DE/2589/2012

Decided on: 7th May, 2012

Coram: **Sunil Gaur**, J.

Facts: The writ petitions challenge the order of the Financial Commissioner, Delhi, whereby the Petitioners' appeal under Sections 64 and 65 of the Delhi Land Revenue Act, 1954,against the Collector's order declaring mutation of agricultural land in favour of the Petitioners as null and void, was dismissed. They challenged the said order on the ground that there was no justification in having condoned the delay of about 7 years in challenging the mutation order by the Respondents and that the mutation order could not have been set aside merely because the Respondents were not put to notice, as they were aware that proceedings under Section 81 of the Delhi Land Reforms Act, 1954, against the Petitioners were dropped and the appeal against the said order was already pending.

Issues: (1) Whether the question of status of the Petitioners in the subject land could be gone into, in the proceedings under the Delhi Land Revenue Act.

(2) Whether the mutation order could be set aside merely because the Respondents were not put to notice, as they were aware that the proceedings under Section 81 of the Delhi Land Reforms Act, against the Petitioners were dropped.

Held: The questions pertaining to who or how many persons constituted the *Kumharan* community or what *Bhumidari* rights conferred upon the *Kumharan* community could be transferred to third parties, could not be the subject matter of the proceedings under the Delhi Land Revenue Act and therefore submissions advanced on this aspect could not be adverted to and could only be considered in appropriate proceedings. The findings of the order, i.e., purpose of reservation of subject land, restrictions on its sale, in proceedings under the Delhi Land Revenue Act were unwarranted and rendered the order unsustainable in law.

The concurrent finding in the order pertaining to the Respondents having not been put to notice of the proceedings, could not be upset merely because the proceedings under Section 81 of the Delhi Land Reforms Act against the Petitioners were dropped way back in the year 2000 and more so when appeal against the order dropping the proceedings was stated to be still pending. Hence, the order setting aside the mutation, in question, was upheld but the direction contained therein to revert back the subject land to the *Gaon Sabha* was quashed being without jurisdiction and the petitions were disposed of while being partly allowed.

A Will derives its validity from the fact that its maker executed it in a sound state of mind and in the presence of two attesting witnesses and not until at least one of the attesting witnesses had been called for the purpose of proving the said document.

Parmeshwar Prasad (Since Deceased) Lord Northbrook v. State

Citation: MANU/DE/2953/2012

Decided on: 3rd July, 2012

Coram: **V.K. Shali**, J.

Facts: A probate petition was filed by the Petitioners under Section 276 of the Indian Succession Act, 1925, for grant of probation on the basis of a Will of the deceased Testator read alongwith a Codicil. However, since Petitioners 1, 2 and 3 died during the pendency of the matter, Lord Northbrook, the only surviving Executor of the Will was substituted as the Petitioner in the present case. Also, even though objections against the grant of the said probate to the Petitioner, were raised however they were subsequently withdrawn and as on date, the State of Rajasthan was the main contesting party to the grant of probate, having allegedly taken possession of most of the properties of the deceased Testator under the Rajasthan Escheat Regulation Act, 1956.

The deceased Testator, being a childless widower, had bequeathed his property in favour of a Trust i.e. Khetri Trust, for charitable purposes and benefit to the public.

Issue: Whether the Will dated 30th October 1985 and Codicil dated 7th November, 1985, purported to have been executed by the deceased Testator, were duly proved in accordance with law and whether they were executed by the deceased Testator by his own independent will in the presence of two attesting witnesses so as to bequeath all his movable and immovable properties in favour of the Khetri Trust.

Held: The Court while allowing two out of the three applications filed for impleadment of Trustrees of Khetri Trust as a party and amendment of the schedule of the properties, opined that the third application seeking permission to rent out one of the properties bequeathed by the deceased Testator so that income was generated for the benefit of the Trust, was kept in abeyance until the outcome of the main probate petition.

As regards the main petition for grant of probate, it was necessary to establish the genuineness of

the Will which was possible only if it was established that the said Will was the last Will of the deceased Testator. One of the attesting witnesses had been called for the purpose of proving the said document and the fact that the Will was signed by the deceased Testator himself, the deceased Testator was of sound mind at the time of signing and all three persons i.e. the deceased Testator and two attesting witnesses had put their signatures on the will in the presence of each other and simultaneously.

Appreciating the evidence on record and the testimonies of witnesses, it was observed that, one, it was doubtful that the Will of the deceased Testator had been signed by the deceased along with the attesting witnesses at the same date or place or even simultaneously, and second, the onus to establish the proof of execution of the Will of the deceased Testator in a sound state of mind being on the Petitioner, the Petitioner failed miserably to establish by any cogent, reliable, credible evidence to the satisfaction of a prudent man or the Court that the Will in question was made by the deceased Testator bequeathing his movable or immovable properties to a Trust, in a sound state of mind.

Even though the Will made a reference to bequeathing of the movable and immovable properties by the deceased Testator as reflected in the wealth-tax and income-tax return to the Trust, neither of those details were furnished by way of attaching the wealth-tax or income-tax return nor were the details of the properties mentioned in the Will itself, therefore in other words, it lacked particulars and was fraught with improbabilities. The Will became void in terms of Section 89 of the Indian Succession Act for want of particulars of the movable and immovable properties. Therefore in light of the above it had become highly unsafe to assume that the Will had been purported to have been executed by the deceased Testator or that it was proved in accordance with law. Accordingly the petition was dismissed, and since the petition was dismissed, the question of devolution of the properties could not be said to arise. Thus the third application filed by the Petitioner seeking permission to rent out one of the properties bequeathed by the deceased Testator so that income was generated for the benefit of the Trust, was also dismissed as having become infructuous.

RIGHT TO INFORMATION

RIGHT TO INFORMATION

The law requires suo moto disclosure by the public authority 'while' formulating important policies and not 'after' formulating them.

Union of India v. G. Krishnan

Citation: MANU/DE/2128/2012

Decided on: 17th May, 2012

Coram: **Vipin Sanghi**, J.

Facts: In the petition, the Petitioner-Union of India, challenged the order passed by the Central Information Commission (CIC), whereby the second appeal preferred by the Respondent, Sh. G. Krishnan was allowed, and a direction was issued to the Petitioner to provide an attested copy of the summary of the Western Ghats Ecology Expert Panel (WGEEP) Report and the Report on the Athirappilly Hydro Electric Project, Kerala to the Respondent before the stipulated date. It had further been directed that the WGEEP Report be placed on the website of the Ministry of Environment and Forest (MOEF). A further direction was also issued to the MOEF to publish all reports of commissions, special committees or panels within 30 days of receiving the same, unless it was felt that any part of such report was exempted under the provisions of Section 8(1) and Section 9 of the Right to Information Act, 2005 (RTI Act).

Issue: Whether the WGEEP Report was required to be disclosed to the public and civil rights' groups before the related policies were formulated under Section 4(1)(c) of the RTI Act.

Held: It was not the Petitioner's contention that the WGEEP report was not the final document prepared by the panel headed by Prof. Madhav Gadgil in relation to the Western Ghats Ecology and Athirappilly Hydro Electric Project, Kerala. And so far as the said panel was concerned, they had tendered their Report to the MOEF. Thus, it was for the MOEF, in consultation with the affected States, to act on the said Report. It was for the MOEF and the affected States to either accept/reject, wholly or partially, or with conditions/qualifications/modifications the said Report, by taking into account the interests of all stakeholders, and by taking into account the relevant laws, including those applicable in relation to the protection of environment and ecology and if there were found to be any shortcomings or deficiencies in the said Report, the said factor would go in the decision making process of the MOEF but it could not be said that such shortcomings would render the Report as not final.

Further, contrary to how the consultative and participatory process with the civil rights' groups should have been, the Petitioner appeared to try and withhold the WGEEP Report so as to curb the civil groups' participation in the debate that was required to take place before the policy was formulated. There was no reason for the Petitioner to entertain the apprehension that the disclosure of the said Report, at the present stage, would impede the decision making process and also adversely affect the scientific or economic interests of the States.

Hence, the scientific, strategic and economic interests of the States could not be at cross purposes with the requirement to protect the environment in accordance with the Environment Protection Act, 1986, which was a legislation framed to protect the larger public interest and for promotion of public good. Policies framed with the sole object of advancing the scientific and economic interests of the States, but in breach of the States' obligations under the Environment Protection Act, and other such like legislations, would be vulnerable to challenge and may eventually not serve the purpose for which such a policy was framed. Therefore, while formulating its policies, the State was held to be obliged to take into account all the relevant laws and the statutory obligations which it was obliged to fulfill, lest the policy of the States became one sided and imbalanced. The petition was accordingly dismissed.

SERVICE LAW

SERVICE LAW

Disciplinary proceedings against officials, who were identically situated but were differently punished, could not be justified in law.

Municipal Corporation of Delhi v. B. B. Bajaj

Citation: MANU/DE/1693/2012

Decided On: 13th January, 2012

Coram: Anil Kumar**, Veena Birbal**, JJ.

Facts: The petition was filed by the Petitioner-Municipal Corporation of Delhi (MCD) under Articles 226 and 227 of the Constitution of India, challenging the order passed by the Central Administrative Tribunal whereby the Petitioner was directed to reinstate the Respondent in service with all consequential benefits and 50% of back wages.

The Respondent being on the post of UDC, was assigned the duties of Licensing Inspector. Subsequent to the fire incident at Uphaar Cinemas, an administrative enquiry was held, pursuant to which disciplinary proceedings including a departmental inquiry against the Respondent was initiated wherein he was ultimately dismissed from the service. Even though his appeal against such dismissal was dismissed by the appellate Authority i.e. the Commissioner, MCD, the Central Administrative Tribunal allowed the Respondent's appeal against the orders passed by the disciplinary as well as appellate Authority, on the ground that issuing a show cause notice after proposal of imposing penalty of dismissal showed pre-determination of issues as also that there had been discrimination since the non-inspection by the Respondent was seriously viewed while others with similar charges were let off with minor penalties. Thus, the Central Administrative Tribunal directed MCD to reinstate the Respondent in service with all consequential benefits but with 50% back wages, which was the order in the writ petition.

Issue: Whether the order of the Central Administrative Tribunal was legally justified in reversing the order of the disciplinary as well as the appellate Authority.

Held: Since MCD failed to satisfy its obligation of furnishing the delinquent employee with a copy of the inquiry report with an opportunity to make a representation against the findings arrived at by the Inquiry Officer, it had caused serious prejudice to the Respondent and thus the order of the disciplinary Authority was unsustainable on this ground itself.

The order of the appellate Authority could also not be considered in accordance with law as it dismissed the Respondent's appeal merely on the ground that no new ground/fact had been furnished by the charged Officer to show that fresh consideration of the matter was required. The appellate Authority was not bound by the findings recorded by the Inquiry Officer or even the disciplinary Authority and was actually required to have looked into the contentions raised by the Respondent and thereafter decide as to whether the charges leveled against the Respondent got established during the inquiry proceedings and the punishment imposed on the Respondent was justified. Hence both the said orders were held to be unsustainable and liable to be set aside and the order of the Central Administrative Tribunal required no interference being justified in its findings of facts. The writ petition was therefore dismissed.

SERVICE LAW

A termination simplicitor under Clause 10 of the terms and conditions of appointment of Respondent was not a violation thereof, nor was in violation of principles of natural justice.

Shriram Pistons & Rings Ltd v. T.S. Mokha

Citation: MANU/DE/0386/2012

Decided on: 25th January, 2012

Coram: Pradeep Nandrajog**, Pratibha Rani**, JJ.

Facts: The Appellants challenged the judgment and decree passed by the Single Judge, in a suit filed by the Respondent, challenging the validity and legality of termination of his service and sought a declaration that termination of his employment was unconstitutional, illegal, mala fide& without authority as also sought relief for damages for Rs 4 lakhs with full back wages & benefit. The Appellants challenged the verdict of the Single Judge on the ground since it was a private company and not a government one, and since the Respondent was serving the company in managerial capacity, provisions of the Industrial Dispute Act, 1947 were not applicable to him.

Issue: Whether the termination of service was valid and legal in light of the law applicable to private companies, substantial shares whereof, were held by financial institutions.

Held: The Appellants by no means could be termed as instrumentality of the State or 'authority' nor termination invoking Clause 10 of the appointment letter of the Respondent, could be declared as void. A company incorporated under the Companies Act, 1956 was not a creation of Statute, and thus since such company could not be treated as a statutory body, none of the beneficiary or employees of such a company could be deemed to enjoy the statutory status or protection of Article 311 of the Constitution.

In case of private employees, a contract of personal services could not ordinarily be specifically enforced. An Employer could not be forced to take an employee when there was complete loss of faith between the two as could be inferred from the facts of the present case. The claim of damages i.e. salary, by the Respondent till he would have attained the age of superannuation could not be sustained because if a contract expressly provided that it was termination upon serving a particular period of notice e.g. three months notice, the damages would ordinarily be wages for that period. He could not claim compensation in respect of the injuries to his feelings by such termination or the problems faced in finding another job.

Thus finding that the Single Judge had not only ignored but also misinterpreted and misapplied the law as enunciated by the Apex Court and this Court on the issue of validity and legality of the termination of the Respondent by a private company, the Court set aside the judgment and the appeal by the Appellants was allowed.

It was not open to the Court to interfere with the findings of fact recorded in departmental inquiries unless it was shown that those findings were based on 'no evidence' or were clearly perverse.

UOI v. S R Tewari

Citation: MANU/DE/0345/2012

Decided on: 1st February, 2012

Coram: Badar Durrez Ahmed**, V.K. Jain**, JJ.

Facts: The present writ petition was filed against the order of the Central Administrative Tribunal, Principal Bench, New Delhi (the Tribunal) whereby the order dismissing Respondent No. 1 from service, was set aside and he was reinstated in service with consequential benefits.

Respondent No.1 was an officer of Andhra Pradesh Cadre of Indian Police Service. A charge memo containing eight charges was issued to him, followed by a Departmental Enquiry. The Inquiry Officer held that Charges No. III, IV and VI were partly proved and the others were not proved. The disciplinary Authority, however, disagreed with the report of the Inquiry Officer on Charges I to V, and held that Charges I to IV were fully proved and Charge V was partly proved. The Tribunal set aside the order dismissing Respondent No.1 and reinstated him. Hence, the writ.

Issues: (1) Whether the Tribunal was empowered to interfere with the findings recorded in a Departmental Inquiry.

(2) Whether the Tribunal was correct in setting aside the order of the disciplinary Authority.

Held: As regards the issue pertaining to the powers of the Tribunal to interfere with the finding recorded in a Departmental Inquiry it was limited since the Tribunal could not conduct itself as an appellate Authority and could not reassess the evidence, nor could it interfere on the ground that another view was possible on the basis of the material available on record. Only if there was 'no evidence' or the findings were clearly perverse that the Tribunal was justified in its interference.

On merits, the order passed by the Tribunal, to the extent that it held that none of the charges against the Respondent No.1 were proved or partly proved, was held to be unsustainable. However, since the order passed by the disciplinary Authority imposing penalty of dismissal

from service upon Respondent No.1, was based on the premise that Charges I, II, III and IV were fully proved and Charges V & VI were partly proved, it could not be allowed to stand. With respect to Charge IV and Charge VI of the charge-sheet, the findings of the disciplinary Authority could not be said to have been passed on 'no evidence' or were otherwise perverse inasmuch as no reasonable person acting on the basis of the material disclosed during the course of the inquiry could have taken such a view. Hence, while setting aside the order passed by the Tribunal, the disciplinary Authority was directed to pass a fresh order on the question of penalty, taking Charge No. IV as proved and Charge VI as partly proved.

SERVICE LAW

Rule 48(A) of the CCS Pension Rules, 1972- The decision of the Employer in rejecting the request of the Appellant for withdrawal could not be termed as arbitrary or irrelevant, if it was based on cogent proof and relevant service records.

D.V. Bhandari v. Union of India

Citation: MANU/DE/0924/2012

Decided on: 27th February, 2012

Coram: Acting Chief Justice**, Siddharth Mridul**, JJ.

Facts: The present appeal was filed by the Appellant, challenging the order of the learned Single Judge whereby the writ petition filed by him against his Employer-Indian Institute of Technology (IIT) for declining his request for withdrawal of his notice seeking voluntary retirement, was dismissed. The Appellant sought to challenge the order on the ground that the learned Single Judge gave the decision on an erroneous interpretation of the judgment of the Supreme Court in ***Balram Gupta v. Union of India AIR 1987 SC 2354***, wherein, according to the Appellant, it was held that a Government servant or public employee had a right to withdraw the request for resignation or voluntary retirement before the notice period ended even if the Employer had accepted the notice.

According to the factual matrix of the case, the Appellant had sought and submitted notice for voluntary retirement to his IIT, in terms of Rule 48(A) of the CCS Pension Rules, 1972 which was subsequently approved and it was stated that he would be relieved of his duties with effect from 1st August, 1993. However, in the meantime, the Appellant withdrew the said notice which according to him he had submitted due to acute depression. However, IIT rejected the request for withdrawal in light of the Appellant's record of service performance and an enquiry report that established that the Appellant's negligence/dereliction of duty had facilitated 8 cases of embezzlement. The Appellant's writ petition seeking quashing of the order issued by IIT, declining his withdrawal application was also dismissed. Hence, the present appeal.

Issue: Whether the appointing Authority had the power to reject the request for withdrawal of notice of voluntary retirement by way of a considered decision in this respect.

Held: Relying on the decision of Supreme Court in ***Balram Gupta's* case** *(supra)* wherein it was

held that although the approval of IIT could not be the mere ipse dixit of the approving Authority and that the approving Authority was required to act reasonably and rationally, however, IIT could on germane and relevant consideration refuse to grant approval for the withdrawal of the resignation or voluntary retirement. It was further held that a Government servant could not withdraw his application for voluntary retirement at his sweet will and approval of the Employer, was required for the same. Thus, in the present case, the Court observed that it could not be that once the employee had sought withdrawal of his resignation or voluntary retirement, after its acceptance by the Employer, but before the expiry of the notice period, the Employer would have no discretion either of accepting or rejecting the request for withdrawal.

The Appellant's service record showed that his confidential reports were unsatisfactory; IIT was also finding it difficult to exercise discipline; an adverse remark had been communicated; the preliminary report had indicted the Appellant. In view of the aforesaid and having regard to the fact that the Appellant would be entitled to pension and pensionary benefits IIT decided that it was in the fitness of things that the Appellant's withdrawal of the notice of retirement was not acceptable. In this regard the Court agreed with the finding of the learned Single Judge that the reasons based on which IIT decided to reject the request of the Appellant for withdrawal of notice seeking voluntary retirement was based on cogent and relevant considerations and not on the ipse dixit of the Employer. Thus finding no cogent material to suggest that the action of IIT in rejecting the Appellant's application for withdrawal of resignation was mala fide, the Court dismissed the appeal for lack of merits.

Vacancies must be filled as per existing rules, unless the competent Authority made a decision to amend the rules and fill all vacancies according to the amended rules.

Dr. Sahadeva Singh v. Union of India

Citation: MANU/DE/0655/2012

Decided on: 28th February, 2012

Coram: Badar Durrez Ahmed**, V.K. Jain,** JJ.

Facts: The Central Administrative Tribunal dismissed the Petitioner's application seeking promotion on the reasoning that though an employee had a right to be considered for promotion, he had no right to demand promotion. The Petitioner challenged the order on the ground that since the Recruitment Rules did not stipulate any particular date for holding Departmental Promotion Committee (DPC) for promotion to the post of Deputy Commissioner (Crops), it was mandatory for the Respondents to follow the time table prescribed in the Model Calendar issued by DoPT. He could not have been deprived of his legitimate right for being considered to the promotion of the aforesaid post merely on the account of delay on the part of the Respondents in convening the DPC.

Issues: (1) Whether any decision was taken by the rule making authority to amend the rules and;

(2) Whether a decision was taken by the competent Authority to fill up the existing vacancies, in accordance with the proposed amended rules.

Held: Since instructions had been issued by the Government for making promotions in terms of a particular calendar, in the absence of any rules to the contrary, the OMs issued by DoPT on the subject, from time to time, including the OM suggesting the Model Calendar for DPCs, became applicable. Therefore, it was obligatory for the Respondents to adhere to the time schedule laid down therein. The OMs supplemented the Recruitment Rules and, therefore, having a binding force, were meant for compliance and not for being ignored in an arbitrary manner. If no explanation was given by the Department for not convening the DPC within the time stipulated in the Model Calendar or the explanation given by the Department was not found acceptable, then there would be no justification for making the employees suffer merely on account of inaction or delay on the part of the Department for not convening the DPC and postponing their promotion till the DPC actually met. The writ petition was allowed, directing the Respondents to

treat the Petitioner promoted as Deputy Commissioner (Crops) against one of the two vacancies which had arisen in 2004 and carried forward to the year 2005.

Order for dismissal could not have retrospective effect unless regulations provided for it. If such order was made without enabling regulations, the order would not be per se illegal, but it would operate prospectively.

Delhi Development Authority v. S.C. Gautam

Citation: 189 (2012) DLT 322

Decided on: 12th March, 2012

Coram: Badar Durrez Ahmed**, V.K. Jain,** JJ.

Facts: The Respondent, an employee of the Delhi Development Authority (DDA), was convicted under Sections 7 and 13(1) (d) of the Prevention of Corruption Act, 1988 and was sentenced to rigorous imprisonment for three years. His services were terminated by the Commissioner (Personnel), DDA. The Respondent's petition challenging the termination was disposed of by the Central Administrative Tribunal (CAT) directing the Lieutenant Governor/Chairman DDA to decide the competence of the authority empowered to impose penalty on the Respondent. The Chairman held that the Commissioner (Personnel) was not competent to pass the order and directed the Vice-Chairman to pass appropriate orders. The Vice-Chairman in turn, imposed a penalty of removal of service which in appeal by the Respondent was confirmed by the Chairman. On further challenge by the Respondent, the CAT set aside the orders holding that there had been no application of mind while determining whether the Respondent was unfit to serve in DDA as also the proportionality of the penalty imposed. The DDA then challenged the order of the CAT.

Issues: (1) Whether there was no application of mind by the Vice-Chairman and whether order terminating services could be retrospective?

(2) If the order could not be retrospective, whether the Respondent was entitled to full wages until termination?

Held: The Vice-Chairman had applied his mind to all the facts on the fitness of the Respondent to serve in the DDA, As far as application of mind on proportionality of the penalty was concerned, since removal from service was the minimum penalty which ought to be awarded to the Respondent, it was not necessary for the disciplinary Authority to indicate the reasons therefor. Further, an order of dismissal could not be given retrospective effect unless the rules or regulations specifically provided for it. Such order would not be per se illegal but would operate

prospectively. On the third issue, since Rule 10(2)(b) of Central Civil Services (Classification, Control and Appeal) Rules, 1965 provided that a Government servant would be deemed to have been placed under suspension by an order of appointing Authority with effect from the date of his conviction, therefore considering that the Respondent stood convicted, he was deemed to be suspended, and was thus entitled only to subsistence allowance and not full wages.

SERVICE LAW

Section 4(6) of Payment of Gratuity Act, 1972 only referred to the offence/misconduct committed by an employee and not to the context of punishment provided therein, for passing of an order for recovery of gratuity.

Mashkoor Ahmed v. Union of India

Citation: MANU/DE/1820/2012

Decided on: 20th April, 2012

Coram: **Acting Chief Justice,** Rajiv Sahai Endlaw, JJ**.**

Facts: Through the appeal, the Appellant, being the Ex-Chairman-cum-Managing Director (CMD) of National Small Industries Corporation Ltd. (NSIC), challenged the decision of the Single Judge of this Court in a writ petition also filed by the Appellant against the orders of the disciplinary Authority instituted by NSIC. The dispute arose when the disciplinary Authority imposed punishment of forfeiture of 50% gratuity due and 50% of leave encashments against the Appellant, being already retired from service, for showing favour to one firm and sanctioning credit facilities to it without observing the laid down procedure and guidelines and thereby causing huge losses to NSIC.

Issue: Whether an order imposing punishment of forfeiture of 50% of gratuity due and 50% of leave encashment was valid, only if the services of an employee were terminated, as under Section 4(6) of the Payment of Gratuity Act, 1972.

Held: A careful reading of Rule 5(x) of the NSIC (Control and Appeal) Rules, 1968 (NSIC Rules), demonstrated that reference to Section 4(6) of the Payment of Gratuity Act was entailed in a situation where the employee was found to be guilty of an offence/misconduct mentioned in that provision. Thus, Section 4(6) of the Payment of Gratuity Act was brought into picture only for the purpose of referring to the offence/misconduct and not in the context of punishment provided therein. Thus, an order of recovery of gratuity could be passed, if the misconduct was of the nature mentioned in the said provision, or when a pecuniary loss had been caused to the company by the misconduct or negligence of the employee. The word ‘or’ was held to be disjunctive and while considering the pecuniary losses, it was considered not necessary to refer to Section 4(6) of the Payment of Gratuity Act.

Therefore, once it was found that the offence/misconduct was such which was stipulated in

Section 4(6) of the Payment of Gratuity Act or because of such misconduct or negligence, loss was suffered by NSIC, recovery of gratuity of the employee could be ordered whether such misconduct/guilt had resulted in termination of services of an employee or not.

Hence, while concluding in agreement with the decision of the Single Judge, the reasons cited by the Single Judge for coming to the said conclusion were not legally appropriate and that only the aforesaid analysis of the provisions was correct.

SERVICE LAW

Seniority lists must be prepared in accordance with the principle of "continuous length of service" and thus a retrospective seniority could not exist when a position was not previously available.

Vinod Goel v. High Court of Delhi

Citation: MANU/DE/1994/2012

Decided on: 9th May, 2012

Coram: Badar Durrez Ahmed**, V.K. Jain,** JJ.

Facts: This writ petition was filed by the Petitioner being aggrieved of the decision of the Full Court placing him below Respondents 2 and 3 as well as Respondents 4 to 17 in the seniority list of the members of the Delhi Higher Judicial Service (DHJS), on the basis of the principle of continuous length of service even though the Petitioner had been placed above the Respondent Nos. 2 and 3 in the merit list while being recommended for appointment in the DHJS as also the recommendation pertaining to the Petitioner was made much before Respondent Nos. 4 to 17 were recommended.

Even though pursuant to the resolution passed by the Full Court with respect to direct appointments from the Bar to 9 vacant posts in the DHJS, the Petitioner was recommended along with Respondent Nos. 2 and 3 to be appointed against the said posts, however while Respondent Nos. 2 and 3 assumed charge on 21st April, 1997 and 14 members of the Delhi Judicial Service (DJS) (Respondent Nos. 4 to 17) were also appointed in the DHJS with effect from 20th November, 1997, the Petitioner who was subsequently adjusted against the vacancy released consequent to withdrawal of recommendation made in respect of one of the general candidates, assumed charge only on 31st December, 1997. Pursuant to the objections raised against a draft seniority list and the decision in ***B.S. Mathur. Union of India [(2008) 10 SCC 271]***, the Petitioner was recommended to be placed below Respondents 2 to 17 on the principle of continuous length of service. Since the objections raised against such recommendations and review of the order accepting the said recommendations, were dismissed, the Petitioner preferred the writ petition.

Issue: Whether seniority should be fixed strictly in accordance with principle of 'continuous length of service' irrespective of whether the officers were direct recruits or promotee officers.

Held: The Petitioner sought to claim seniority on the basis of a vacancy that came to exist in the future, however the same could not be allowed as there was no rule or principle of law that gave retrospective effect to release of a vacancy. The Petitioner had no right, to even be considered against a general vacancy at any time prior to 22nd November, 1997 i.e. when the general vacancy got released on withdrawal of the recommendation in respect of one of the general category candidates and his name was recommended against the said general vacancy.

Further, the Petitioner was a party to the decision of the Supreme Court in ***B.S. Mathur's*** **case** *(supra)* wherein the Supreme Court, had clearly held that the principle of "continuous length of service" was required to be applied to determine the inter se seniority of officers of DHJS appointed/promoted upto the year 2006, irrespective of whether they were direct recruits or promotee officers, any departure from this principle would have been contrary to the dictum of the highest Court of law and it was therefore, not open to him to claim seniority from a date prior to his joining the service, since that would be contrary to the principle approved by the Supreme Court in the said case. Further, if the Petitioner was allowed to be placed above Respondents 2 and 3, it would result in his becoming senior to Respondents 4 to 17 who were promoted to DHJS in their own right against clear vacancies available in their quota and who had joined service even prior to this Court resolving to offer appointment to the Petitioner and further result in utter violation of the principle approved in the case of ***B.S. Mathur's*** *(supra)*.

The seniority of the Petitioner had been fixed strictly in accordance with the principle of "continuous length of service" approved by Supreme Court in the case of ***B.S. Mathur's*** *(supra)*. Thus, the writ petition is dismissed.

SERVICE LAW

SC/ST candidates appointed by promotion on their own merit were to be adjusted against unreserved posts.

A.K. Gautam v. Union of India

Citation: MANU/DE/2046/2012

Decided On: 14th May, 2012

Coram: Badar Durrez Ahmed**, V.K. Jain,** JJ.

Facts: The Petitioner being a Group 'C' Inspector in Central Excise and Customs, challenged an order passed by the learned Central Administrative Tribunal, Principal Bench, New Delhi ('Tribunal') which accepted the contention of the private Respondents that the SC/ST officers promoted/appointed on the basis of their merit and seniority and not on the basis of reservation should be adjusted against the general posts and the Applicants be appointed against the reserved posts.

Issues: (1) Whether SC/ST candidates promoted to a higher post on their own merit were to be adjusted against general category posts or against reserved posts, in cases where the promotions were made on the basis of seniority-cum-merit, or was this benefit available only in the case of direct recruitments?

(2) Whether SC/ST candidates, having merit equal to the general category candidates and possessing the prescribed benchmark of "Good", could be said to have been promoted on the basis of their own merit, in a selection based on the norm of seniority-cum-merit?

Held: The general category candidates as well as reserved category candidates were subjected to the same standard for promotion to the post of Superintendent (Group 'B') in Central Excise and Customs and it was not the case of the Petitioner that while making promotions to the post of Superintendent (Group 'B') amongst reserved category candidates, any relaxation was granted in age, experience, qualification etc. or that any extended zone of consideration was applied in promotion of those, whom the Tribunal had directed to be considered for appointment against general vacancies. Further, since from a combined reading of all the OMs issued, it was evident that the OM, clarifying that SC/ST candidates appointed by promotion on their own merit would be adjusted against unreserved slots applied not only to direct appointments but also to

promotions, including the promotions on the basis of seniority-cum-merit (non-selection method). Hence, the OMs issued by DoP&T envisaged that the SC/ST candidates, promoted on the basis of standards equal to those prescribed for general category candidates were to be considered to have been promoted on their own merit and seniority and not owing to reservation.

On the second issue, the Court while observing that the rules for promotion for the feeder cadre of Inspectors in Central Excise and Customs to Superintendent Grade B were identical to the rules for promotion from cadre of Inspector in Central Excise to Superintendent Grade B in Central Excise, opined that the benchmark prescribed being 'good', those, who had achieved the prescribed benchmark were to be rated fit and those who were declared fit were to be promoted in order of their seniority. Since the present case was not one of further promotion of those SC/ST candidates, who had already obtained 'accelerated promotion' in the feeder cadre it could not be accepted that obtaining early confirmation by a reserved category candidate amounted to obtaining promotion on the basis of relaxed standards.

It was also held that the Petitioner ought to have challenged the earlier confirmation granted to those reserved category candidates who were junior to him in the feeder cadre of Inspectors at the time when the confirmation leading to their becoming senior to him in that cadre was granted. By not challenging their early confirmation, the Petitioner was understood to have accepted the seniority granted to them by the department and having done so, by not challenging the same before an appropriate forum, the Petitioner could not now be allowed to rake up that issue. Thus finding no legal infirmity in the impugned order, the writ petition was held to be devoid of merit and was thereby dismissed.

SERVICE LAW

An inquiry conducted without giving an opportunity to the delinquent to cross-examine the witness or to produce the witnesses in his defence would not conform to the basic principles of natural justice.

Dr. B.N. Ray v Ramjas College

Citation: 2012 (130) DRJ 277

Decided on: 21st May, 2012

Coram: Badar Durrez Ahmed**, V.K. Jain,** JJ**.**

Facts: The Petitioner was a teacher at the Respondent Ramjas College affiliated to the University of Delhi ('University'). He was dismissed from service pursuant to complaints made to the College Complaints Committee ('the Committee'), constituted under Ordinance XV-D of the University, by four male students alleging sexual harassment at the hands of the Petitioner. However, even though charges based upon the complaints of the students were served upon the Petitioner, the Committee did not provide him with the copies of their complaints upon a request from the students.

The Petitioner sought a writ declaring the inquiry procedure contemplated under the Ordinance of the University, to which the Respondent College was affiliated, as violative of Article 14 of the Constitution of India since it was unfair and arbitrary. The petition also sought a declaration that the composition of the College Complaints Committee ('the Committee') as well as the manner in which it conducted the inquiry was contrary to law. The Petitioner further sought quashing of the findings of the Committee and the recommendation made by it for dismissal of the Petitioner.

Issues: (1) Whether Ordinance XV-D applied only to the cases of sexual harassment of females and therefore the Petitioner could not have been held under the provisions of the said Ordinance?

(2) Whether the composition of the Sub-committee was bad on account of the Chairperson being inferior in rank to the Petitioner and on account of inclusion of the representatives of the students and of non-teaching members of the staff as their members?

(3)Whether principles of natural justice were violated with respect to procedure of cross-

examination?

Held: The language of the said Ordinance made it clear that it applied to all complaints of sexual harassment made by "a member of the University" against any other "member of the University". Since, 'member of the University' was defined to include students as well as teaching staff and 'student' could be a male or a female, the Ordinance could not be said to be restricted to the complaints made by a female member of the University only. Hence, there was no escape from the conclusion that a complaint of sexual harassment made by a male student against a teacher, including a Vice-Principal of a college affiliated to University of Delhi, could be inquired into, under the said Ordinance of the University.

As regards the second issue, the Court observed that the Committee was a broad based committee having representation from all categories, including teaching staff, non-teaching staff and students, and wherein at least two outsiders were required to be members of the Committee and one outsider was necessarily required to be a member of the Sub-committee which inquired into the complaint once a prima facie case of sexual harassment was found by the Committee. Keeping this in mind and the fact that the University was an autonomous body having its own rules and regulations, the Petitioner being a teacher in the said university could not be considered to be a Government servant and hence instructions of the Government pertaining to its own employees, stipulating that the Inquiry Officer should be higher in rank to the charged Officer, did not apply to the case of the Petitioner. Therefore, it could not be said that fundamental right of the Petitioner, guaranteed under Article 14 of the Constitution, was violated on account of the Chairperson and/or members of the Committee/Sub-committee being inferior in rank to the Petitioner or because of the inclusion of students or representatives of students or non-teaching employees in the said Committee.

Pertaining to the third issue, the Court, while observing that the procedure adopted by the Committee with respect to the witnesses of the Petitioner was that he was asked to give the names of the witnesses he wanted the Sub-committee to examine and thereafter, those witnesses were examined by the Sub-committee, not by the Petitioner, held that the inquiry conducted without giving an opportunity to the delinquent to cross-examine the witness and without giving him an opportunity to produce the witnesses in his defence would not conform to the basic principles of natural justice and a procedure which did not contain even those minimum safeguards for the delinquent could not be said to be a fair and reasonable procedure for conducting an inquiry. Taking note of the decision in ***Bidyug Chakraborty (Prof.) v. Delhi University & Ors. [2009 VI AD (Delhi) 1]***, the Court opined that since the University had already disclosed the identity of the witnesses to the Petitioner, no useful purpose could be said to be fulfilled by asking the Petitioner to have submitted a questionnaire, to be answered by the witnesses in writing.

Hence the Court held that the findings recorded and recommendations made by the Enquiry Committee/Sub-Committee were thus liable to be quashed and the Petitioner was to be supplied with copies of all previous complaints and statements of witnesses while the inquiry in the matter was to begin again from the stage of cross-examination of the witnesses, however it was directed that the Petitioner would not be present during such cross-examination

SERVICE LAW

Employees appointed on an ad-hoc basis had no vested right to be regularized or automatically selected for future vacancies.

NHRC v. Sheenu Saxena

Citation: MANU/DE/2471/2012

Decided on: 1st June, 2012

Coram: Badar Durrez Ahmed**, V.K. Jain,** JJ**.**

Facts: Through the writ petition, the Petitioner No.1-National Human Right Commission (NHRC) assailed the order passed by the Tribunal which stayed the operation of the communication whereby it was informed that the Respondents' ad-hoc tenure had not been extended and also directed the Petitioners to extend the tenure of the Respondents appointed on an ad-hoc basis and also to consider them for existing vacancies, on the ground that since the Respondents were appointed on an ad-hoc basis, no right was conferred upon them and they could be terminated at any time.

Issue: Whether appointment on an ad-hoc basis conferred rights and legitimate expectation for regularising of employment.

Held: The appointment letters of the Respondents clearly stated that their appointment was purely on an ad-hoc basis and was liable to be terminated at any time, without giving reasons as also that the appointment would not confer any right of regularisation. Thus, the doctrine of legitimate expectation could not be said to be applicable. The doctrine of hostile discrimination was also held to not apply as the Respondents could not claim regularisation merely because some other persons, who were placed in the same panel in which the Respondents were placed, were wrongly regularised. There could be no equality in illegality.

Thus, no vested right for regularisation or regular appointment had accrued to the Respondents on account of their ad-hoc appointment to these posts and that it would be an improper exercise of jurisdiction by the Court, if it were to direct regularisation of the Respondents at the cost of vast number of persons, who were entitled to apply for those posts. The writ petition was thus allowed and the order of the Tribunal was set aside.

SICK INDUSTRIAL COMPANIES (SPECIAL PROVISIONS) ACT, 1985

SICK INDUSTRIAL COMPANIES (SPECIAL PROVISIONS) ACT, 1985

Embargo under Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 came into operation only when the claims were duly shown and disclosed in a scheme before the Board of Industrial and Financial Reconstruction.

M/S. Haryana Steel & Alloys Ltd. v. M/S. Transport Corporation of India

Citation: MANU/DE/1743/2012

Decided on: 16th April, 2012

Coram: **Kailash Gambhir**, J.

Facts: The present appeal was filed by the Appellant under Section 96 of the Code of Civil Procedure, 1908 (CPC), challenging the judgment passed by the Additional District Judge, whereby the suit for recovery of transportation charges, accrued by the Respondent on account of transporting the Appellant's material to various destinations, filed under Order XXXVII of CPC, was decreed in favour of the Respondent and against the Appellant. The Appellant challenged the said order on the ground that the suit filed by the Respondent was barred by Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) as no permission of the Board for Industrial & Financial Reconstruction was sought by the Respondent before filing the suit under Section 22(1) of SICA.

Issue: Whether recovery suit was barred by provisions of Section 22 of SICA in light of the fact that no prior permission of the BIFR was sought.

Held: The bare reading of Section 22 of the SICA, clearly showed that a suit for recovery was barred where an inquiry under Section 16 was pending as also where an appeal under Section 25 relating to an industrial company was pending, except with the consent of the BIFR or the appellate authority. Thus clearly the language of the provision itself took in its sweep, filing of an appeal under Section 25 as well as suspension of the legal proceedings against a company where consent of the Board or the appellate authority was not obtained before filing the suit.

The finding of the Court to the effect that an appeal against the order of rejection of reference could not be accepted and was liable to attract Section 22 of the SICA, was *ex-facie* unfounded, perverse and illegal. The finding of the Trial Court was liable to be set aside to this extent.

There was another embargo placed on the filing of a suit for recovery against a company when

the proceedings were pending under the SICA, which was the necessity of the inclusion of the dues payable by the company to the Appellant in the scheme formulated before the BIFR. It was manifest that no material was placed on record by the Appellant to show that the amount in respect of which the Respondent laid its claim in the said recovery suit was reflected in the scheme laid before the BIFR. Having failed to place any such material on record, the bar or embargo envisaged under Section 22 of SICA would not apply as the Appellant could not be allowed to take the advantage of the said provision merely because an inquiry under Section 16 was pending before the BIFR or an appeal under Section 25 against the order of BIFR was pending before the Appellate Authority for Industrial & Financial Reconstruction (AAIFR). The appeal was dismissed.

SICK INDUSTRIAL COMPANIES (SPECIAL PROVISIONS) ACT, 1985

Recovery proceedings initiated by Bank against Guarantors before the Debt Recovery Tribunal were not in the nature of a suit and therefore, not hit by Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985.

Inderjeet Arya v. ICICI Bank Ltd.

Citation: W.P. (C) No. 7253 of 2011

Decided on: 2nd May, 2012

Coram: Sanjay Kishan Kaul**, Rajiv Shakdher,** JJ.

Facts: The writ petition was against the two orders of the Debt Recovery Tribunal (DRT). Whereas in one order the DRT had directed sine die adjournment of proceedings qua the principal debtor, it did not extend the same direction qua the petitioners. In the subsequent order, the petitioners' application for clarification/modification/review of the DRT's earlier order was held time-barred. The order of the Debt Recovery Appellate Tribunal (DRAT) upholding the DRT's subsequent order was also challenged.

The Petitioners, apprehending institution of recovery proceedings under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDDB Act), sought registration of a reference under Section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) with the Board for Industrial and Financial Reconstruction (BIFR) followed by an application before the DRT, seeking a sine die adjournment in view of Section 22(1) of SICA. However, the DRT granted sine die adjournment qua the Company only.

Issues: (1) Whether the review petition filed by the Guarantors was really time-barred.

(2) Whether protection under Section 22(1) of SICA should be accorded to a Guarantor qua an action filed by a Bank under the RDDB Act.

Held: Section 24 of the RDDB Act which provided that the provisions of the Limitation Act, 1963 shall as far as may be applied to an application made to a Tribunal, undoubtedly, adverted to the application filed by a bank/financial institution to seek recovery of its debt and not interlocutory applications, such as, one for review. It was perhaps the legislature's intention to apply the provisions of the Limitation Act to a limited extent and "as far as may be" to the original action for recovery of debt and which would not translate, in the provisions of Section 5

of the Limitation Act being made applicable to an application for review of an order passed in an original application (OA). Further, since the Petitioners had not filed an application for condonation of delay under Section 5 of the Limitation Act, there was no cogent reason to interfere with the finding of the DRAT to this extent.

As regards the second issue, in order to determine whether the recovery proceedings initiated against the Guarantors were hit by Section 22(1) of SICA or not, it was necessary to find out whether the DRT proceedings were in the nature of a suit or not. If the proceedings were not then as contended by the Respondent, Section 22(1) would be inapplicable. Only subsequent to the amendment to Section 22(1) in 1994, there was a limited protection accorded by the legislature to the Guarantors. However, the legislature had consciously used two different terms i.e. 'proceedings' and 'suit'. The term "proceedings" was given a wider interpretation by the Supreme Court with regard to the wider object of the SICA being to revive a sick institution.

Since there was no corresponding reason for widening the scope of the word 'suit' so as to cover proceedings against the Guarantor of an industrial company, the term, "suit" was held to apply only to proceedings in a Civil Court and not actions for recovery proceedings filed by banks and financial institutions before a Tribunal, such as, the DRT. The writ petition was accordingly dismissed.