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**(Containing cases determined by the High Court of Delhi)**

# VOLUME-4, PART-II

**(CONTAINS GENERAL INDEX)**



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**ADMINISTRATIVE LAW**—Petitioner applied for allotment of flat under IVth Registration Scheme on New Pattern, 1979 mentioning her address at "SB"—Later on, Petitioner intimated to DDA her correspondence address of Haryana—Petitioner was successful in draw of lots held by DDA—However, Demand-cum-Allotment Letter admittedly was sent on old address of Petitioner which was received undelivered—Since no response received from petitioner, allotment was cancelled—petitioner preferred writ petition praying for issuance of a mandamus to DDA to allot her flat in lieu of cancelled one at cost prevailing at time of original allotment—Held—Onus of proving that letter of petitioner informing change of address was not received by it was upon DDA which DDA has miserably failed to prove—petitioner has discharged initial onus placed upon her of proving that she had intimated DDA about her change of address by placing on record a letter showing diary registration number and seal of DDA and onus thereupon shifted to Respondents to prove that no such intimation was received—Petitioner is not custodial of records of DDA and therefore, she cannot be asked to produce same—It is now for Respondents to produce relevant entry in diary register, for which adverse inference is liable to be drawn against respondents in case they fail to produce same— respondents had a duty to search in files of petitioner for any other address for correspondence after receiving report that no such person was residing at earlier address of petitioner—It failed to do so and that too in circumstances when a long time had expired between date of registration of petitioner and date of issuance of demand—cum—Allotment letter—"Wrong Address Policy" of DDA is applicable in case of petitioner and as she had approached DDA within 2 years from date of allotment, she is clearly entitled to allotment of a flat at old cost, prevalent at time when her priority matured and allotment letter was issued, and no interest





is liable to be charged —Direction issued to DDA to allot and issue a Demand—cum—Allotment Letter for LIG flat of same size and in same locality as flat which was allotted to Petitioner earlier and preferably of same flat unless it has been allotted to any other person at cost prevailing at relevant time.

*Pushpa Khatkar* v. *D.D.A. & Anr.* ..... *2968*

**ARMY ACT, 1950**—Section 63—Section 80/82—Summary Trial—Conviction—Brief Facts—Petitioner was enrolled as a Sepoy on 10.3.2003 and posted with 22nd Batallion Rajputana Rifles—Unblemished service record—In March, 2012, Petitioner sent to Jaipur on temporary duty for an official attachment—Received a message of minor daughter's sickness—Petitioner's case is that he requested the Adm Commandant of Station Headquarter Cell, Jaipur for two days casual leave from 08 to 09 May, 2012—Having been granted such leave, Petitioner proceeded to his home town; took his daughter to a nearby hospital for treatment and thereafter returned to Station Headquarter, Jaipur Cell within time—On completion of the temporary duty, Petitioner was sent back to his parent unit on 12th May 2012.—Petitioner's parent unit objected to his having taken casual leave from the Administration Commandant, Station Head Quarters and not from Capt. Gaurav Tewari who was deputed as Admn. Officer of the Station Cell at Jaipur—Consequently, Petitioner subjected to a summary trial under Section 80/82 of the Army Act, 1950 on the aforenoticed charge—Petitioner entered a plea of guilty Respondents have recorded that the Petitioner returned a plea of guilty and was thereafter sentenced to 7 day rigorous imprisonment—Hence the present petition—Petitioner contended that he could not have disputed that he had taken casual leave but it was his categorical stand that the casual leave and had been duly sanctioned by the Station Commandant, who was the competent authority to have granted the station leave—Contended that looked from any angle, seven days rigorous imprisonment which would vest the petitioner with a red ink entry in his record is unduly and completely disproportionate to the nature of the offence for which the petitioner was charged. Held—Petitioner was

charged with unauthorised absence from duty—Respondents are unable to dispute the correctness of the petitioner's statement that he had sought the permission before proceeding on two days casual leave with the authority of Station head quarter at Jaipur—Petitioner has submitted that he was tense on account of sickness of his minor daughter—He had taken sanction of leave from the Station Commandant—Undisputedly, the Station Commandant was the highest authority in the Station Headquarter—Petitioner could not have been summarily tried and punished in the proceedings—No statutory provision, law or regulation which prescribes that despite the sanction by the Station Headquarter, the Petitioner was required to obtain as sanction of the same from the Adm Officer has been pointed out—Station Commandant was an officer of the rank of Colonel while the Admn. Officer was an officer of the rank of Captain—Petitioner acted as per directives of the senior most officer in the Station—Charge against the Petitioner was unwarranted and the punishment against the petitioner was unduly harsh—Proceedings of the summary trial, order of conviction and punishment dated were arbitrary and illegal and are thereby set aside and quashed—Punishment shall not operate against the Petitioner for any purpose—Writ Petition is allowed accordingly.

*Satish Kumar* v. *Union of India & Ors.* ..... *3253*

**CODE OF CIVIL PROCEDURE, 1908**—Order 1 Rule 10—Writ petition filed challenging action of MTNL to evict petitioner from store—During pendency of instant petition, property of MTNL transferred to proposed Respondent-BSNL which had taken over property of MTNL—BSNL directed petitioner to deposit license fee which petitioner deposited—Application filed to implead BSNL yet to be disposed of—Ld DB remanded matter on a misrepresentation that BSNL was impleadment as it is a necessary party, since property in question belongs to BSNL— Per contra, MTNL relied on communication stating that area of occupation under MTNL and BSNL respectively shall continue to be so occupied for time being and MTNL may defend case against Petitioner—Held—Since BSNL has



not yet been impleaded a party, response of BSNL on aforesaid communication could not be ascertained—This letter does not obviate necessity of impleading BSNL as a party which is necessary for purpose of determining ownership rights of MTNL / BSNL— Application allowed— Amended memo of parties taken on record.

*Jankalyan Telecom Coop. Store* v. *M.T.N.L. & Ors.* ..... *3069*

— S. 37—Defendant claimed Leave to defend on the ground that goods supplied were defective—Held defendant paid part amount and it follows that defendant was receiving the goods and has been making payment in part indicating that no defect was there in goods—The two letters written by defendant do not stipulate rejection of goods rather they indicate that defendant utilised the goods and later on their customer's complained to defendants about quality of packing—Nothing to show defendant rejected goods within reasonable time—Defendants utilised goods namely packing material for packing rice and exporting it abroad—Action of defendant contrary to Section 42 of Sales of Goods Act. Suit based on 20 invoices and merely because a mention is made to a statement of account in the plant would not make the suit based on statement of accounts. Order 37 CPC applies to a suit even on the basis of invoices—Invoices contained full details regarding the quantity and rate of goods—Invoices tantamount to binding contract between parties.

*Bijender Chauhan @ Bijender Kumar* v. *Financial Eyes (India) Ltd.* ..... *3234*

**COMPANIES ACT, 1956**—Section 433 (e) read with Section 434 (1)(a)—Brief Facts—M/s. Pacquick Industries Ltd., the "Company", had borrowed a sum of 11 crores (approximately) from M/s. Pradeshya Industrial and Investment Corporation of UP Ltd., Lucknow, "PICUP", for the purpose of its business—Company had obtained the loan by mortgage of the property at B-54, Sector-57, Noida, U.P. along with the plant and machinery- Title deeds relating to the

property were handed over to PICUP - Soon the Company ran into rough weather and was unable to re-pay the amount to PICUP - Company had also borrowed a sum of 62,53,375/ - from Pioneer Multifilms of Delhi, the Petitioner - Company was unable to re-pay the aforesaid amount also due to falling business - Petitioner filed Company Petition No.194/2006 for winding up of the Company under Section 433(e) read with Section 434 (1)(a) of the Companies Act, 1956 - In order to help the Company tide over its financial difficulties and revive its business, a one-time settlement ("OTS", for short) was entered into between PICUP and the Company under which the debt to PICUP was settled at 2,29,85,000/- Understanding was that on payment of the aforesaid sum, PICUP would return the title deeds to the Company and the Company would strive to revive its business - A joint application under Order 23, Rule 3 of the CPC was filed in C.A. No.10/2011 recording a settlement arrived at between petitioner and the company—Brief terms of the settlement were that Petitioner will pay the amount of 2,29,85,000/- to PICUP and when the company obtains the title deeds from PICUP, the property would be sold to petitioner - PICUP was impleaded as a party to the proceedings - OTS amount was already paid by petitioner to PICUP on 10.01.2011—On 07.03.2011 M/s. PICUP is directed to release the original title deeds of documents, property and machinery to the petitioner within a period of two weeks - Court directed that keeping in view the terms of the settlement between the parties, PICUP on direction, deposited the title deeds of the property in question with the Registrar of Court - Company Application No.906/2011 is an application filed by PICUP asking this Court to issue directions that the title deeds to the property shall not be handed over to Petitioner - Company Application No. 13/2012 is also filed by PICUP seeking return of the title deeds deposited with this Court - Company Application No. 2437/2012 is filed by one Raj Kumar Arora seeking to purchase the property for 3.25 crores or in the alternative to permit an auction of the property, since according to him the property has been wholly undervalued and was sought to be sold to petitioner only at 2,29,85,000/-.



— Held—Petitioner paid the amount of 2,29,85,000/- and there is ample documentary evidence on record to prove the same and once the amount has been paid to PICUP in terms of the OTS, and when subsequently the OTS is cancelled, it is idle on the part of PICUP to seek return of the title documents and also seek to hold on to the monies-PICUP cannot at the same breath contend that the OTS has been cancelled and also refuse to return the monies to petitioner-petitioner, is not the borrower from PICUP and what he did was only to discharge the amount due to PICUP by the Company-Terms of settlement between the Company and Petitioner were known to PICUP since PICUP impleaded as party to the proceedings by an order-If PICUP wants to get back the title deeds from the Registrar of this Court, it can do so only on paying the amount of 2,29,85,000/- to petitioner-After impleadment, PICUP cannot say that any fraud was sought to be played upon it by the Company and petitioner-PICUP, having consented to the impleadment, cannot now turn around and say that it was not aware of the proposed sale of the property in favour of petitioner-PICUP cannot retain the monies which it received from Petitioner—PICUP cannot take a contradictory stand that it would cancel the OTS and also not return the monies to petitioner-Technically and legally speaking, Petitioner was not the debtor; but the monies came from him and this was within the Knowledge of PICUP-PICUP was also aware of the source of the monies by being party to the settlement arrived at between Darshan Khurana and the Company-With such awareness, PICUP cannot sat that it is entitled to the return of the title deeds and is also entitled to retain the monies paid by Petitioner on account of the debt due by the Company-PICUP should return the amount of 2,29,85,000/- to petitioner within three weeks-Once the amount is paid as directed, PICUP will be entitled to get back the title deeds from the Registrar of this Court.

*Pioneer Multifilms* v. *Pacquick Industries Ltd.* ..... *3180*

— Section 433(e) read with Section 434 (1)(a) - Brief Facts—Respondent company deducted income tax of 74,184/- but the net amount after deduction was never paid to the

Petitioner-Total amount originally payable to petitioner was 32,67,975/- out of which a sum of 28,29,058/- was paid on 20.03.2009 -Balance amount payable is 3,64,773/- Though this amount was not paid, the respondent company deducted income tax of 74,184/- from the same which according to the petitioner amounted to the acknowledgement of the liability of the respondent company -Petitioner's wife was carrying on a business under the name and style of M/s. Innovations which entered into a settlement with a company called Focus Brands Trading (India) Pvt. Ltd.- ("Focus", for short) according to which as against the total amount of 69,74,721/- due by Focus, the matter was settled on payment of 25,00,000/- in Company Petition No. 326/2010, but this has nothing to do with the transactions between the present petitioner and the respondent company - Petition filed by M/s. Servel Industries through its proprietor Puneet Soni, under Section 433(e) read with Section 434 of the Companies Act, 1956 for the winding up of the company by name M/s Alcobrew Distillers (India) Pvt. Ltd. -Respondent company took the objection that the claim of the petitioner stood settled vide order of this Court passed on 16.05.2011 in Company Petition No. 326/2010 -Short question for consideration is whether the claim of the petitioner against the respondent company stood settled as contended on its behalf -It is contended that the objection taken by the respondent company to the effect that nothing was due by it to the petitioner is untenable -Reliance is placed on the order of this Court (Manmohan, J.) passed on 20.05.2011 in Company Petition No.326/2010 recording the Memorandum of Settlement between Innovations and Focus and it is pointed out that this settlement did not bind the present petitioner -It is further pointed out that even the respondent company was not party to the Memorandum of Settlement and, therefore, no reliance can be placed upon the same to contend that the petitioner's claim also stood settled -As against this, it is contended on behalf of the respondent that it had an agreement with Focus, which was marketing international brands of liquor, under which it acted as bottlers for Focus.



— Held—It is true that in the Memorandum of Settlement dated 20.05.2011 arrived at between the petitioner (Servel Industries) and his wife (M/s. Innovations) on the one hand and Focus on the other, that a total outstanding of 69,74,721/- was settled at 25 lakhs—This amount consisted of the principal sum of 55,57,721/- and interest of 14,17,000/- It prima facie appears that the Memorandum of Settlement was entered into only with reference to the amount payable by Focus -It refers to the fact that M/s. Innovations filed Company Petition No.326/2010 before this Court for winding up of Focus on the ground that it was unable to pay the aforesaid amount to it—There is no reference in the Memorandum of Settlement to the agreement dated 25.01.2007 entered into between the Focus and the respondent-company, clause 5.7 of which made Focus responsible for all consequences arising out of non-payment of dues by the respondent company to the suppliers -Further, the order of this Court passed on 20.05.2011 in Company petition No.326/2010 refers only to "respondent's debt to the petitioner", which means the amount owed by Focus to Innovations—In the order passed on 16.05.2011 in Company Petition No. 326/2010, it was made clear that "in terms of the said settlement, respondent shall pay a sum of 25 lakhs in full and final settlement of the amount due and payable not only to the petitioner but also to M/s. Servel Industries Ltd.," -Thus it is more that clear that under the MoS dated 20.05.2011, it is only the amount due by Focus, both to the present petitioner and M/s. innovations, that was sought to be settled—There is no mention in the orders of this Court in Company Petition No. 326/2010 about the amount due by the respondent-company -If this factual position alone is taken note of, it would appear that the respondent-company has to fail in its contention—In the light of the statement made by the petitioner in he e-mail dated 29.03.2010, the petitioner cannot be permitted now to say, after the settlement has been arrived at, that the amount of 3,64,773/- due from the respondent-company was not part of the settlement -To permit him to do so would be contrary to the tenor of the Memorandum of settlement and the entire events leading up

to it and would also amount to not giving due weight to the agreement dated 25.01.2007 entered into between the respondent and Focus, particularly clause 5.7 thereof - Company petition is dismissed the with no order as to costs.

*Servel Industries* v. *Alcobrew Distilleries (India) Pvt. Ltd.* ..... *3191*

— Section 433(e) read with Section 434 (1) (a)—Brief Facts—Company was incorporated in 2002 to carry on the multimedia centre where training was to be imparted to students and to carry on the software development—A franchise agreement was entered into by the company with Maya Academy of Advanced Cinematics for period of five years in this behalf—Initially the petitioner and the second respondent were the only shareholders of the Company whose share capital was Rs. One lakh only—Taruna Ummati was inducted as a shareholder and she and the petitioner held 30% share each—Respondent No. 2 held the balance 40% shares in the Company—Soon there were allegations of mismanagement levelled by the second respondent, who was stationed in Chandigarh, against the petitioner herein, who was managing the Company's affairs in Delhi and disputes arose—Franchise agreement was terminated in 2005—Second respondent filed a petition under sections 397-398 of the Act in the Company Law Board ('CLB') which directed that the petitioner would manage the affairs of the Company together with respondent No.2—An appeal against the order of the CLB is said to be pending before this Court—Despite the order of the CLB the disputes continued and the board meeting could not be conducted—Annual returns of the Company, the profit and loss accounts and the balance sheets could not be filed with the Registrar of Companies ('ROC') —There was thus a stalemate—In the above background, respondent No.2 filed Company Petition No. 182/2010 before this court under clauses (e) and (f) of section 433 for the winding up of the Company—This petition was, however, permitted to be withdrawn with liberty to file appropriate recovery proceedings vide order of the learned single judge (Manmohan, J.,) dated 20-9-2011—It is contended



in support of the present petition that it is just and equitable that the Company be wound up—It is contended that respondent No.2 herself had earlier sought winding up of the Company on the same grounds and therefore there cannot be any objection from her to the present winding-up petition—Moreover, it is contended, the substratum of the Company is lost and hence it is just and equitable that it is wound up—It is also pointed out that the business of the Company has been suspended for more than a year and therefore clause (c) of section 433 applies; and that the company has not filed its annual return, balance sheets and profit and loss accounts for five consecutive years with the ROC and therefore clause (g) of section 433 applies.

— Held—Petition for winding-up is not opposed on behalf of the respondents—Business of the Company has been suspended for more than one year and so clause (c) of section 433 of the Act applies; the annual accounts and annual returns have not been filed since the year 2007 which attracts clause (g) of Section 433—It is just and equitable that the Company be wound up—Its share capital is small and is held by only three persons—It is more akin to a partnership concern—There are allegations against each other by the two directors and the business has ceased—There is a stalemate—In fact, the substratum of the Company seems to have been lost—Moreover, the Company is becoming debt-ridden due to the burden of maintaining of its office—On date the Company owes an outstanding debt of Rs. 50,00,000 towards ICICI Bank which the Company is unable to pay—There are other proceedings against the petitioner stated to be pending—Clause (f) of section 433 is also attracted—Petition is, therefore, admitted—Official Liquidator attached to this Court is appointed as the Provisional Liquidator ("PL") of the respondent—OL is directed to take over all the assets, books of accounts and records of the respondent forthwith—OL shall also prepare a complete inventory of all the assets of the respondent before sealing the premises in which they are kept—Company and its directors/servants/agents etc. are

restrained from selling, transferring, mortgaging, alienating, creating any charge, or parting with possession of any of its immovable assets.

*Hardeep Gill* v. *Pumpkin Studio Pvt. Ltd. & Anr.. 3246*

**CONSTITUTION OF INDIA, 1950**—Article 226—227—Writ Petition—Service Law—Promotion—Medical 'Shape' Certificate—Central Police Organization (CPO)—Central Industrial Security Force (CISF)—Petitioner appointed as Sub—Inspector (Fire)—Promoted to Inspector on 28.07.1997 placed at SI. No. 18 on the seniority list of Inspectors—R2 and R4 placed at SI. No. 20 and 22—List containing name of Inspectors in the zone of consideration forwarded to Commandant CISF—Vide letter directed a Medical "Shape" Certificate valid as on 01.01.2012 in respect of candidates be forwarded immediately—Assistant Commandant of Petitioner's unit wrote to petitioner on 9.3.2012 to submit the Medical "Shape" Certificate on or before 15.03.2012—Petitioner relieved for medical on 13.03.2012—Medical examination conducted at named hospital before forwarded by Assistant Commandant on 19.03.2012 case of petitioner not considered for promotion other promoted on 11.12.2012—Petitioner preferred writ petition—Contended respondent arbitrarily did not consider his case of promotion and considered juniors in seniority list—Respondent contended circular issued by department that Medical "Shape" Certificate as on 01.01.2012 not before DPC—DPC met nearly 9 months later—Court observed-petitioner made aware of medical examination in March, 2012 his candidature overlooked for want of medical certificate as on 01.01.2012—Held—The rigid adherence to such time frame not mandated in law—undermines the objective for which created—The objective of medical certificate on record to ensure the concerned authority recommending promotion certified that the official fulfills the health parameter-interpretation placed on relevant circular and guideline unjustified directed respondents to consider case of promotion—Writ petition allowed.

*Beg Raj Indoria* v. *Union of India & Ors. ..... 2955*



— Article 226-227—Writ petition—Service Law-pensionary benefit—death—disability attributable to operation—aggravated case—classification of residual head—petition working in Indian Army-posted at Battalic Sector in June, 1999 during 'Operation Vijay' at Kargil—awarded Operation Vijay Medal—Operation Vijay Star on 23.10.2000—while on duty during operation moving from Battalic to Leh—Jeep met with an accident—sustained injury attributable to military service in operation high altitude area—injury left him with 100% permanent disability—discharged from service on 19.03.2005—given terminal benefit and 100% disability pension in addition to other admissible retrial benefit—Petitioner's claim for grant of war injury pension recommended by unit—Adjutant General twice accept his request—recommended his case—however—after several reminders—rejected—ground did not incur disability during war or war like operation in terms of applicable guideline—circular was on account of accident while on duty—he was given disability pension for it—petitioner filed O.A. before Arm Force Tribunal—rejected—preferred writ petition—relied upon Central Government Ministry of Defence letter no.1(2)/97/I/D (Penc) dated 31.01.2001 for war injury pension—Contended—claim fall in the relevant category of para 4.1—was on his way as per order given by superior in an operation which had been notified by Central Government as 'Operation Rakshak—III' during which armed forces engaged in flushing out the enemy forces after the Kargil War—Contested—Contended—classification of petitioner's injury as accidental could not be found fault with—unlike in the war like situation the petitioner traveling in his jeep—therefore the authority could not be asked to pay war injury pension—court Observed—petition deployed in Kargil—was a transport commandor-asked to report for briefing—The "Operation Rakshak—III" was on—no doubt that injury classifiable falling into category E(j) i.e during operation specifically notified by the government from time to time—Held—Residual head of classification to be read as to broad objective of the policy i.e. those who imperil themselves either directly or indirectly

— Article 226—Premises of Petitioner burnt in riots of 1984 and before same could be reconstructed, whole area was taken over by MCD and DDA for construction of flyover—Survey conducted by DDA & MCD on persons doing business therefrom for allotment of alternative sites to them under Alternative Allotment Scheme—Petitioner had shifted to his native place in H.P. after riots and made several representations with documentary proof of running of business from site to DDA for inclusion of his name in list of evictees for allotment of alternative site—DDA order a fresh survey to be conducted which reported that existence and running of business of petitioner from site in question prior to eviction of traders stood established—Case of petitioner and two other cases approved by VC for alternative sites—However, LG declined to give allotment to Petitioner—On recommendation of Lok Adalat, matter submitted for reconsideration to LG who once again rejected case—Order challenged before HC—Plea taken, when survey list of 579 persons had already been extended and persons not mentioned therein also allotment plots, there was no justification for denying same relief to Petitioner—Per contra plea taken, name of Petitioner did not figure either in survey list conducted by Planning Department of DDA or in list of units furnished by four local trader's associations—Cases of two other persons who were alloted alternative sites had produced substantive proof of their respective establishments but documents of Petitioner had failed to establish that Petitioner was running a business from said premises—Writ petition is barred by delay and laches—Held—LG and Permanent Lok Adalat had held that two cases where alternative sites were provided were similar to case of Petitioner—As regards objection regarding insufficiency of documents furnished by Petitioner, due application of mind on part of statutory authority is imperative and as a matter of



fact statutory is estopped from urging reasons which do not form part of order and relying upon grounds de hors order—It is for this reason that production of records by state or statutory authority to justify its action by production of records or otherwise and not by assigning reasons and grounds in affidavits and Additional Affidavits filed by them before Court—Reasons set out in Counter Affidavit and Additional Affidavit of Respondent which find no mention in orders of LG are de-hors record cannot be allowed to be pressed into service by Respondent at this stage—Petitioner throughout was following up matter with DDA and Permanent Lok Adalat on whose recommendations matter was placed before LG for reconsideration—Writ cannot be said to be inordinately delayed—A writ of certiorari quashing action of DDA is issued and a writ of mandamus directing DDA to forthwith allot and give possession of a suitable alternative industrial plot to Petitioner measuring 200 sq. yds. in lieu of his premises in Zakhira Chowk, Delhi.



**CUSTOMS ACT, 1962**—Section 110(2) and 124—Hazardous Waste (Management, Handling and Trans-boundary) Rules, 2008—Chapter-IV—Seizure of imported photocopiers machines challenged in writ by Petitioner—Plea taken, since no shown cause notice has been issued to petitioners within one year of date of seizures, goods are to be returned to petitioners unconditionally—Per contra plea taken, goods can only be released provided petitioners have permission from Ministry of Environment and Forest—Held—Section 110(2) specifically mandates that when any goods are seized under Sub-Section (1) and no notice in respect thereof is given under clause (a) of Section 124 within six months or within the further extended period of six months (totaling one year) of seizure of goods, goods shall be returned to person from whose possession they were seized—Circular issued by Central Board of Excise and Customs would apply at stage of clearance of goods—Goods in present case had already been cleared and that too much prior to issuance of circular—

— Petitioner applied to DDA for substitution of her name in place of her deceased husband / lessee of plot in question—DDA demanded Rs. 6,51,020 towards 50% unearned increase—DB of this court set aside demand—Hon'ble SC recorded that both sides had arrived at a consensus that petitioner would pay a sum of Rs. 3,73,745/- to DDA towards unearned increase—Plot mutated in name of Petitioner after DDA received aforesaid amount from Petitioner—Petitioner requested for extension of time for construction of plot and for waiver of composition fee stating that she was liable to pay composition fee from date of mutation only on ground that matter had remained undecided / subjudice for a long period of time—Respondents demanded Rs. 42,83,618/- towards composition fee- Petitioner preferred present writ petition challenging demand of composition fee—Plea of DDA, possession was handed over to Petitioner but Petitioner failed to construct plot in question—Composition fee policy of DDA provided different contingencies where exemption can be given for payment of composite fee—It does not cover contingency of pending litigation—Held— Indubitably Vice-Chairman has power to condone delay without composition where there are internecine disputes amongst legal heirs of original allottee and to direct DDA to take account of period spent in litigation—It is only when mutation is effected by DDA after resolution of pending litigation that it would be possible for legal heirs to pursue there application for extension of time to carry out construction— Present case stands even on better footing in that litigation was pending between DDA and petitioner in respect of a demand raised by DDA for mutating plot in name of Petitioner—Till mutation was effected, Petitioner could not have pursued his application for extension of time for construction—There is nothing in sub clause (iv) of Clause 1.4 of Circular of DDA dated 31.10.1995 to show that application of said sub-clause is restricted to delays in mutation of plot to legal heirs of original allottee and not to transferees of a plot-Delays in mutation would be equally applicable to legal heirs of original allotee and those who have stepped into shoes of allottee as a result of transfer, sale etc. - To hold



otherwise would be inequitable and unfair for it would mean that while period of litigation between legal heirs of original allottees is to be excluded for purpose of calculation of composition fee, transferees of original allottee are to be kept deprived of such benefit and must bear brunt of delay in mutation, even if it is for no fault of theirs—Litigation between Petitioner and DDA was not a frivolous one- Demand raised by DDA on account of composition fee quashed and DDA directed to recalculate composition fee for period after mutation of plot in favour of Petitioner and to issued a fresh demand thereafter within a period of eight weeks from today.

*Vijaya C. Gursahaney* v. *Delhi Development Authority & Anr.* ..... *3006*

— Tail End Policy and Policy of missing Priority of DDA—'AS' booked MIG flat under New Pattern Registration Scheme, 1979—After his death, DDA transferred mutation in favour his wife—She was alloted a flat at Rohini but she opted for allotment of flat as per tail end policy of DDA by paying cancellation / tail end charges—On her death, petitioner applied for mutation and transfer of registration against acknowledgment receipt—Tail end personal hearings, no MIG flat allotted to her—Writ petition filed by petitioner for writ of mandamus directing DDA to allot her a MIG flat under policy of missing priority framed by DDA—DDA admitted case of petitioner in toto but took plea that there was inordinate delay on part of petitioner in approaching Court and if at all petitioner is held entitled to allotment of a MIG flat, same has to be at old cost prevalent at time of original allotment plus 12% simple interest w.e.f. date of original allotment till date of issue of fresh Demand-cum-Allotment Letter—Held—Petitioner had herself approached DDA to complain that her name had not been included in tail end priority draw—Thus, petitioner cannot be said to be at fault as she approached DDA in less than four years with request to allot to her a flat at cost of draw held earlier—Contention of DDA that Petitioner is liable to pay interest @ 12% per annum for intervening period was repelled by Division Bench in *Basu Dev Gupta's*

case as it disproved circular relied upon by DDA as it contradicts mandamus issued by Id. Single Judge in *Raj Kumar Malhotra's* case which has been approved by Devision Bench as well as Supreme Court—Mandamus issued to DDA to allot a MIG flat to Petitioner by issuing fresh Demand-cum-Allotment Letter to Petitioner at same cost at which demand was raised on other for flats allotted at draw of lots held on 31.03.2004.

*Ravinder Kaur* v. *Delhi Development Authority* ..... *3073*

— Double Allotment—DDA alloted a flat to Petitioner which was already alloted in favour of another person—Demand letter demanding cost of flat issued to Petitioner—Petitioner informed DDA that flat alloted in his favour was already under occupation of another person—Since Petitioner did not receive any response, he did not deem it fit to deposit cost of flat allotted to him—Petitioner made a spate representations to DDA to make a fresh allotment against his registration number, but to no avail—Writ petition filed before HC against DDA for its inaction in not allotting a fresh MIG flat to him in lieu of wrong allotment made—Plea taken by DDA, Petitioner did not deposit confirmation amount and it was assumed that he had no desire to take flat / allotment and writ was liable to be dismissed for delay and laches—Held—Before expiry of stipulated date for depositing cost of flat, Petitioner had sent a representation to DDA that flat in question was already occupied by someone else, who was in possession of necessary documents from DDA—Admittedly, no response was sent by DDA to communication of Petitioner—Petitioner was not expected to deposit amount demanded by DDA knowing fully well that he had been illegally granted double allotment of flat in question and said flat was occupied by another person who professed to have valid documents issued by DDA in his possession—Petitioner was victim of double allotment due to error / fraud of officials of DDA—Respondent can't be allowed to reap benefit of its own wrong by now pressing into service pleas such as those of delay and laches, closure of scheme etc.—Writ of mandamus issued directing



DDA to allot and handover to Petitioner possession of a MIG flat at original cost in lieu of earlier flat allotment of which had earlier been made in his favour.

*C.P. Inasu* v. *DDA* ..... *3083*

**DELHI DEVELOPMENT AUTHORITY (DISPOSAL OF DEVELOPED NAZUL LAND) RULES, 1981**— Rule 17-DDA cancelled allotment of plot of Petitioner No.1 at Rohini as she had purchased property at Naraina Vihar (NV)— Order challenged before HC— Plea taken, property at NV is a joint family property where her undivided share is only 26 sq. mtrs.—As her share in property at NV was less than 67sq.mtrs., bar against allotment of Nazul land by DDA to her was not applicable— Per contra Plea taken, Petitioner's reliance upon Nazul Rules was misplaced as said Rules came into existence after floating of Rohini Residential scheme, 1981— Property at NV having been purchased in a single name cannot be a jointly owned property— petitioner had filed a false affidavit affirming that neither she nor her husband owned any leasehold or freehold residential flat / plot in Delhi—Held-Nazul Rules would be applicable to all such cases where allotment has been made after Rules have come into force—Petitioner No.1 had no source of income— Property at NV was purchased by joint family— Indubitably undivided share of Petitioner in said property comes to 26 sq. mtrs.— Since land owned by petitioner was less than 67 sq. mtrs., bar against allotment of Nazul land enshrined in rule 17 of Nazul Rules would not apply— A writ of mandamus issued directing Respondents not to dispossess Petitioners of plot in question at Rohini or interfere in any manner whatsoever with enjoyment and possession of said plot presently in possession of petitioners.

*Mohinder Kaur Bajaj & Ors.* v. *D.D.A and Anr.* ... *2977*

— Father of Petitioner No. 1 migrated from Pakistan and squatted upon property at Jhandewalan—In pursuance of Gadgil Assurance Scheme, DDA declared father of Petitioner No. 1 eligible to allotment under category ‘A’ upto 200 sq.

yards to be regularised in his favour subject to Payment of damages—Petitioners pursued case for a alternative allotment with DDA but no plot was allotted—DDA noted in its records that plot at Jhandewalan cannot be allotted to Petitioners as said plot falls in road widening of Jhandewalan Road, case of Petitioners for allotment of alternative plot in same zone at Shanker Road was put up for consideration—In Permanent Lok Adalat, but Respondents did not allot same—After Vice-Chairman made scathing remarks on record, Commissioner (LD) submitted for approval of Competent Authority allotment of plot at Rajendra Nagar in favour of Petitioner—Decision approved by Vice-Chairman and communicated by Respondent Authority to Petitioners—Respondent Authority thereafter recalled its allotment of Rajendra Nagar Plot and sought to carve out a completely undeveloped plot in Ashok Nagar—Order challenged before HC—Plea taken, cancellation was arbitrary as a valuable right which had crystallized in favour of Petitioners was sought to be taken away without giving Petitioners opportunity of being hear—Plot now sought to be allotted is totally uninhabitable and there is no development—Per contra, plea taken by DDA, plot at Rajendra Nagar which is a developed plot in residential scheme can't be allotted to Petitioners—In past, such a developed land in residential scheme has never been allotted under Gadgil Assurance Scheme and it may set bad precedent—Said plot has huge market value and as such it can be allotted only through auction/tender mode as per Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981—In commercial matters, Courts should not risk their judgments for judgments of bodies to which that task is assigned—Nothings and/or decisions recorded in official files by officers of Government at different levels and even ministers do not become decisions of Government unless same are sanctified and acted upon by issuing order in name of President or Governor, as case may be, and is communicated to affected persons—Held—Predecessor-in-interest of Petitioners was refused allotment of site occupied by him at Jhandewalan as said site was required by Government of purpose of road widening—Petitioners were therefore entitled to allotment of



developed land—Rajendra Nagar plot is not on Nazul Land covered under the Nazul Rules—Present case being under Assurance Scheme extended by Government of India to migrants from West Pakistan cannot be called a "commercial matter"—Object and idea behind this scheme was to rehabilitate refugees from West Pakistan and earning of profit as in a commercial transaction was not purpose—Malafides are writ large in decision of Respondent Authority in arbitrarily cancelling allotment already made to Petitioners with approval of VC and allot them instead uninhabitable plot with no approach road and other facilities and that too after issuance of letter of allotment in their favour—Where notings have fructified into order and said order has been communicated to concerned party, it is no longer open to concerned statutory body to review/overturn its decision—In instant case, order of allotment has been communicated to Petitioners and Petitioners informed of same, thereby affecting rights of Petitioners which have crystallized as a result of said order—It was, therefore, no longer open to DDA to review its earlier decision and that too arbitrarily and illegally—Writ of certiorari issued quashing impugned letter with a direction to DDA to handover Petitioners Possession of Plot at Rajendra Nagar originally alloted to Petitioner in lieu of plot at Jhandewalan on completion of necessary formalities within three months from today.

*Surjeet Singh and Anr.* v. *Delhi Development Authority & Anr.* ..... *3015*

**DELHI SALES TAX ACT, 1975**—Section 21 (3)—Section 27 (1)—Under the Delhi Sales Tax Act, 1975 quarterly returns are required to be filed unless by specific direction those returns are required to be filed monthly—Petitioner did not file any return in respect of the year 1980-81—petitioner had also not deposited any tax during the currency of that year—Section 23 (5) of the said Act deals with the situation where a dealer fails to furnish returns in respect of any period by the prescribed date, in such eventuality, the Commissioner is mandated to, after giving the dealer a reasonable opportunity of being heard, make a best judgment assessment—

Consequently, after due notice and opportunity to the petitioner, a best judgment assessment was made on 26.03.1985 by the assessing authority whereby the petitioner was directed to pay a sum of 52,39,763.23 under the said Act and by a separate order of the same date, the petitioner was required to pay a sum of 5,92,469/- under the Central Sales Tax Act, 1956— However, in neither case was any interest levied by the assessing authority under section 27(1) of the said Act— Thereafter, on 01.10.1985, a show— cause notice was issued by the Assistant Commissioner seeking suo moto revision of the assessment orders under section 46 of the said Act— Thereafter, the Assistant Commissioner passed an order on 03.09.1986 giving directions to the Sales Tax Officer to issue the necessary demand notice and challans in terms of the said order, which included computation of interest for each of the four quarters of 1980—81 both under the local Act as well as under the central Act— Being aggrieved by the said order dated 03.09.1986 the petitioner preferred an appeal before the Sales Tax Appellate Tribunal—Tribunal decided appeal by an order dated 31.07.1989 in favour of the petitioner/ dealer by quashing the order passed by the Assistant Commissioner on 03.09.1986 and restoring the ex-parte orders of the Sales Tax Officer (assessing authority) which created the additional demand of 52,39,769/— under the local Act and 5,92,466.68 under the central Act— Thereafter, the revenue filed a review application before the Tribunal which was disposed of by the order dated 13.02.1994 reviewing its earlier order dated 31.07.1989, inter alia, on the point of interest—Tribunal took the view that the issue of interest under section 27(1) of the said Act had not been considered by the Tribunal in the first round and as it ought to have considered the same, a review was in order—Thereafter, the Tribunal considered the matter on merits and decided that interest was chargeable from the petitioner under section 27(1) of the said Act. The Tribunal reviewed its order, dismissed the appeal filed by the petitioner in so far as the question of interest was concerned and directed the petitioner to pay the interest as determined by the Assistant Commissioner by virtue of his order dated



03.09.1986—The writ petition has been filed by the petitioner being aggrieved by the said order passed by the Tribunal on 13.02.1994. Held— From an examination of the Constitution Bench decision of the Supreme Court in the case of *State of Rajasthan v. Ghasilal:* AIR 1965 SC 1454, the decision in *Associated Cement Company Ltd. V. CTO:* (1981) 4 SCC 578, Constitution Bench decision in the case of *J. K. Synthetics Ltd. V. CTO:* (1994) 4 SCC 276 and *Maruti Wire Industries Pvt. Ltd. v. STO & ORS.:* (2001) 3 SCC 735, it is apparent that the expression "tax due" as appearing in section 27(1) of the said Act would have to be read in relation to the provisions of section 21(3) thereof— Section 21(3) of the said Act has clear reference to the furnishing of a return Moreover, it has reference to the full amount of tax due from a dealer under the Act “according to such return”—Tax which is said to be due under section 27(1) of the said Act must be the tax which is due “according to a return”—It is obvious that if no return is filed then there could be no tax due within the meaning of section 27(1) of the said Act read with section 21(3) thereof— Tax which is ultimately assessed is the tax which becomes due on assessment and if this tax so assessed is not paid even after the demand is raised then the dealer would be deemed to be in default and would be liable to pay interest can be levied on such a dealer, who has not filed a return under section 27(1) of the said—Impugned order dated 13.02.1994 is not in accord with the Constitution Bench decisions of the Supreme Court— Consequently, the impugned order, to the extent it requires the petitioner to pay interest under section 27(1) of the said Act, is set—aside —Sales tax department shall give consequential relief to the petitioner in respect of the amount deposited towards interest on an application being made by the petitioner within four weeks—Writ petition is allowed to the aforesaid extent.

*Pure Drinks (New Delhi) Limited* v. *The Member, Sales Tax Tribunal & Ors.* ..... *3035*

— Quarterly returns are required to be filed unless by specific direction those returns are required to be filed monthly—

Petitioner did not file any return in respect of the year 1980-81—petitioner had also not deposited any tax during the currency of that year—Section 23 (5) of the said Act deals with the situation where a dealer fails to furnish returns in respect of any period by the prescribed date, in such eventuality, the Commissioner is mandated to, after giving the dealer a reasonable opportunity of being heard, make a best judgment assessment—Consequently, after due notice and opportunity to the petitioner, a best judgment assessment was made on 26.03.1985 by the assessing authority whereby the petitioner was directed to pay a sum of 52,39,763.23 under the said Act and by a separate order of the same date, the petitioner was required to pay a sum of 5,92,469/- under the Central Sales Tax Act, 1956—However, in neither case was any interest levied by the assessing authority under section 27(1) of the said Act—Thereafter, on 01.10.1985, a show—cause notice was issued by the Assistant Commissioner seeking suo moto revision of the assessment orders under section 46 of the said Act—Thereafter, the Assistant Commissioner passed an order on 03.09.1986 giving directions to the Sales Tax Officer to issue the necessary demand notice and challans in terms of the said order, which included computation of interest for each of the four quarters of 1980—81 both under the local Act as well as under the central Act— Being aggrieved by the said order dated 03.09.1986 the petitioner preferred an appeal before the Sales Tax Appellate Tribunal—Tribunal decided appeal by an order dated 31.07.1989 in favour of the petitioner/ dealer by quashing the order passed by the Assistant Commissioner on 03.09.1986 and restoring the ex-parte orders of the Sales Tax Officer (assessing authority) which created the additional demand of 52,39,769/— under the local Act and 5,92,466.68 under the central Act— Thereafter, the revenue filed a review application before the Tribunal which was disposed of by the order dated 13.02.1994 reviewing its earlier order dated 31.07.1989, inter alia, on the point of interest—Tribunal took the view that the issue of interest under section 27(1) of the said Act had not been considered by the Tribunal in the first round and as it



ought to have considered the same, a review was in order—Thereafter, the Tribunal considered the matter on merits and decided that interest was chargeable from the petitioner under section 27(1) of the said Act. The Tribunal reviewed its order, dismissed the appeal filed by the petitioner in so far as the question of interest was concerned and directed the petitioner to pay the interest as determined by the Assistant Commissioner by virtue of his order dated 03.09.1986—The writ petition has been filed by the petitioner being aggrieved by the said order passed by the Tribunal on 13.02.1994. Held— From an examination of the Constitution Bench decision of the Supreme Court in the case of *State of Rajasthan v. Ghasilal:* AIR 1965 SC 1454, the decision in *Associated Cement Company Ltd. V. CTO:* (1981) 4 SCC 578, Constitution Bench decision in the case of *J. K. Synthetics Ltd. V. CTO:* (1994) 4 SCC 276 and *Maruti Wire Industries Pvt. Ltd. v. STO & ORS.:* (2001) 3 SCC 735, it is apparent that the expression "tax due" as appearing in section 27(1) of the said Act would have to be read in relation to the provisions of section 21(3) thereof— Section 21(3) of the said Act has clear reference to the furnishing of a return Moreover, it has reference to the full amount of tax due from a dealer under the Act “according to such return”—Tax which is said to be due under section 27(1) of the said Act must be the tax which is due “according to a return”—It is obvious that if no return is filed then there could be no tax due within the meaning of section 27(1) of the said Act read with section 21(3) thereof—Tax which is ultimately assessed is the tax which becomes due on assessment and if this tax so assessed is not paid even after the demand is raised then the dealer would be deemed to be in default and would be liable to pay interest can be levied on such a dealer, who has not filed a return under section 27(1) of the said—Impugned order dated 13.02.1994 is not in accord with the Constitution Bench decisions of the Supreme Court— Consequently, the impugned order, to the extent it requires the petitioner to pay interest under section 27(1) of the said Act, is set—aside —Sales tax department shall give consequential relief to the petitioner in respect of

Only way in which notice under Section 148 of said Act beyond period of four years could be justified would be if there was failure on part of assessee to disclose fully and truly all material facts necessary for his assessment—It is not sufficient that income chargeable to tax has escaped assessment but it further be shown that this has escaped as a result of failure on part of assessee to disclose fully and truly all material facts necessary for his assessment—Neither notice nor order discloses that there has been a failure on part of assessee to fully and truly discloses all material facts necessary for assessment or what material facts has not been disclosed by assessee—Impugned notice set aside.



— Section 148—Explanation 3 to Section 153—Initiation of reassessment proceedings—Assessments are sought to be reopened on the ground that the Income Tax Appellate Tribunal, Hyderabad had passed a consolidated order dated 13.01.2010 pertaining to assessment years 1999-2000 to 2006-2007 and held that the interest income was not taxable in the hands of the Co-operative Electrical Supply Society Ltd., Siricilla but, was taxable in the hands of the petitioner—Petitioner had advanced loans to the said Co-operative Electrical Supply Society Ltd. Which created a special corpus fund—The said society earned interest on the special fund but did not disclose it in its returns of incomes on the ground that the money, as mentioned in the purported reasons, actually belonged to the petitioner and that any income earned thereon was on behalf of the petitioner—Tribunal agreed with the submissions of the said Co-operative Electrical Supply Society Ltd. and held that the said interest income was not taxable in the hands of the society but ought to be taxed in the hands of the petitioner—Notices u\s 148 of the Income Tax Act, 1961 were issued to the petitioners seeking to tax the interest income as it had escaped assessment—Hence the present petition challenging the Notices—petitioner contended that though the Tribunal had returned a finding that the said interest



income was not taxable in the hands of the said society, there was no specific or clear finding that the same should be taxable in the hands of the Petitioner—That all the notices under Section 148 had been issued beyond the period of six years stipulated in Section 149 of the said Act and the bar of limitation prescribed in Section 149 would be applicable unless the revenue was able to establish that the present cases fell within Section 150 of the said Act read with Explanation 3 to Section 153. Held—before a notice under Section 148 can be issued beyond the time limits prescribed under Section 149, the ingredients of Explanation 3 to Section 153 have to be satisfied—Those ingredients require that there must be a finding that income which is excluded from the total income of one person must be held to be income of another person—The second ingredient being that before such a finding is recorded, such other person should be given an opportunity of being heard—In the present case, when the Tribunal held in favour of the said society by concluding that the interest income was not taxable in its hands and held against the petitioner by concluding that the said interest income ought to have been taxed in the hands of the petitioner, an opportunity of hearing ought to have been given to the petitioner—No opportunity of hearing was given to the petitioner prior to the passing of the order dated 13.01.2010 by the Income Tax Appellate Tribunal, Hyderabad in the cases of the said society—As such, one essential ingredient of Explanation 3 was missing and, therefore, the deeming clause would not get triggered—Section 150 would not apply and, therefore, the bar of limitation prescribed by Section 149 is not lifted—In view of the fact that the deeming provision provided in Explanation 3 to Section 153 does not get attracted in the present case because an opportunity of hearing had not been given to the petitioner, the provisions of Section 150 would also not be attracted—In such a situation, the normal provisions of limitation prescribed under Section 149 of the said Act would apply—Those provisions restrict the time period for reopening to a maximum of six years from the end of the relevant assessment year—In the present writ petitions, the notices under Section 148 have all been issued beyond the

said period of six years—Therefore, the said notices are time barred—Consequently, the writ petitions are allowed—Impugned notices under Section 148 of the said Act are set aside and so, too, are all the proceedings pursuant thereto, including the assessment orders that have been passed.

*Rural Electrification Corporation Ltd.* v. *Commissioner of Income Tax-(LTU) and Anr.* ..... *3091*

— Section 43 (1), 143 (3), 147 and 148—Petitioner challenged notices and proceedings initiated pursuant thereto for reopening concluded assessments for assessement year (AY), 2001-02 and 2002-03—Plea taken, action of Assessing Officer (AO) in seeking reassessment for reasons as supplied indicate that assessments were sought to be reopened only on a mere change of opinion as all relevant facts were within knowledge of AO during first round of assessment and were subject matter of inquiry in initial assessment proceedings—Held—It is apparent that conclusion drawn by AO that cost of fixed assets of Petitioner company has been met by Government is based on capital structure as was recorded in various documents including OM dated 30.09.2000 issued by Ministry of Telecommunication, GOI—Whereas earlier AO had not thought it fit to conclude that cost of fixed assets were required to be reduced to extent of reserves during first round of assessment, reasons as recorded disclose that this was sought to be done by reopening assessment—This in our view represents a clear change in opinion without there being any further 'tangible material' to warrant same—A mere change of opinion cannot be a reason for reassessing income under Section 147 of Act—Following aforesaid view, notices under Section 148 of Act and all proceedings initiated pursuant thereto are illegal and are liable to be quashed—Reasons as furnished by AO for reopening assessments could not possibly give rise to any belief that income of Petitioner had escaped assessment and proceedings initiated on basis of such reasons are liable to be quashed.

*Bharat Sanchar Nigam Ltd.* v. *Deputy Commissioner of Income* ..... *3125*



— Section 41(1), Limitation Act 1963 Section 18—Whether there is a cessation of liability if assessee continued to acknowledge credit balances/amount receivable in the balance sheet in respect of a number of creditors, lying unclaimed for several years—Assessing officer added balance liabilities to the income u/s 41(1) due to no likehood of creditor claiming the same in the near future—On challenge to the CIT (Appeals) assessee contended that due to continuation of acknowledgment or credit balance, there can be no cessation of liabilities to pay the creditors—Held: In order to attract the provisions of section 41 (1) of the Act, there should have been an irrevocable cessation of liability without any possibility of the same being revived. The cessation of liability may occur either by the reason of the liability becoming unenforceable in law by the creditor coupled with the debtor declaring his intention not to honour his liability, or by a contract between parties or by discharge of the debt. It is necessary that the benefit derived by an assesse results from cessation or remission of a trading liability. Held— the enforcement of a debt being barred by limitation does not ipso facto lead to the conclusion that there is cessation or remission of liability. Reflecting an amount successively over the years as outstanding in the balance sheet by a company amounts to acknowledging the debt for purposes of section 18 of the limitation act as the period of limitation would stand extended upon such acknowledgment of debt.

*The Commissioner of Income Tax Delhi-II* v. *Jain Exports Pvt. Ltd.* ..... *3156*

**LIMITATION ACT, 1963—**Section 18—Whether there is a cessation of liability if assessee continued to acknowledge credit balances/amount receivable in the balance sheet in respect of a number of creditors, lying unclaimed for several years—Assessing officer added balance liabilities to the income u/s 41(1) due to no likehood of creditor claiming the same in the near future—On challenge to the CIT (Appeals) assessee contended that due to continuation of acknowledgment or credit balance, there can be no cessation of liabilities to pay

the creditors—Held: In order to attract the provisions of section 41 (1) of the Act, there should have been an irrevocable cessation of liability without any possibility of the same being revived. The cessation of liability may occur either by the reason of the liability becoming unenforceable in law by the creditor coupled with the debtor declaring his intention not to honour his liability, or by a contract between parties or by discharge of the debt. It is necessary that the benefit derived by an assesse results from cessation or remission of a trading liability. Held— the enforcement of a debt being barred by limitation does not ipso facto lead to the conclusion that there is cessation or remission of liability. Reflecting an amount successively over the years as outstanding in the balance sheet by a company amounts to acknowledging the debt for purposes of section 18 of the limitation act as the period of limitation would stand extended upon such acknowledgment of debt.

*The Commissioner of Income Tax Delhi-II* v. *Jain Exports Pvt. Ltd.* ..... *3156*

**PARTITION**—Suit for partition and possession of Property & declaration—Suit filed by three children of Rajkumari claiming that Rajkumari was married to Pran Nath and that the three plaintiffs were born out of the said wedlock—Defendants denied that there was any marriage between Rajkumari and Pran Nath and instead claimed the defendant no.1 was married to Pran Nath and defendants no. 2 to 4 were children of Pran Nath. Held that plaintiffs failed to prove the marriage between Rajkumari and Pran Nath. Held that a presumption in favour of marriage does not arise merely on the ground of cohabitation but it must be cohabitation with 'habit' and 'repute'.

— Section 16 held that Section 16 (1) applies only in a case in which marriage is infact proved, which may otherwise be null & void as per Section 11 of the Act—Benefit of Section 16(1) is not available to the plaintiffs in absence of proof of marriage between Pran Nath & Raj Kumar.



— Indian Evidence Act—Section 112—Admittedly, Raj Kumari was married to one Krishan Lal Batra and he was alive—Held that even Section 112 comes in the way of relief to plaintiffs as there was a presumption of plaintiffs being legitimate children of Krishna Lal Batra and Raj Kumari.

*Sachin and Ors.* v. *Krishna Kumari Nangia and Ors.* ..... *3204*

**SERVICE LAW**—Premature discharge—Cancellation of No Objection Certificate Brief Facts—Petitioner joined the Remount Veterinary Corps of the Indian Army, part of the Army, 10.11.1986; he served there for more than 24 years—Respondent published a notice calling for applications to the civilian post at EBS Babugarh, sometime in March-April 2011—Petitioner applied for the post—As a serving military personnel, he had to obtain an NOC from the Indian Army—His application for this purpose was granted and NOC was issued on 21.04.2011—His application for the post was accepted called to participate in the recruitment process appeared in the written test on 20.07.2011 called for interview on 27.07.2011 before the declaration of results, apparently on 28.07.2011- the six member Selection Board, which considered the various applications, drew a final merit list of candidates in terms of which the petitioner secured the maximum marks i.e, 82.70—At the time of consideration and preparation of the merit list, the NOC issued to the petitioner was followed and was taken into consideration—Significantly and for no apparent reason, on the same date (i.e. on 28.07.2011), an order was issued withdrawing/cancelling the NOC issued to the petitioner on 21.04.2011—The results for the recruitment process of Godown Overseer were not declared for quite some time—Petitioner addressed representations seeking restoration of NOC—Respondents, by a communication dated 08.09.2011, withdrew the cancellation order—Dated 28.07.2011 and restored the NOC issued to the Petitioner—Petitioner was promoted to the rank of Nb./Ris, with effect from 01.11.2011—Respondents again issued an order cancelling the NOC granted to the Petitioner, stating that since there was an alteration of circumstances, and the

Petitioner's tenure stood extended in the service by two years, the NOC and discharge were no longer permissible—In the communication dated 11.06.2012, the respondents stated that the petitioner had willingly accepted the promotion and consequently the NOC had to be withdrawn—Hence present petition against various orders of the respondents by which, even though he ranked first in the merit in the recruitment process for the civilian post of Godown Overseer the third respondent, Director General Remount Veterinary Services, denied appointment to him—He is also aggrieved by the cancellation of the NOC issued by the first two respondents on the one hand and his premature discharge from the army without processing his case for appointment to the said post of Godown Overseer. Held—Contention of Respondents that once the petitioner willingly accepted the promotion, it amounted to a waiver of his candidature for the civil post under consideration is meritless—Waiver means abandonment of a right—For there to be a valid waiver, it is essential that there be an "intentional and voluntary relinquishment of a known right or such conduct as warrants the inference of the relinquishment of such right"—There can be no waiver unless the person purportedly waiving is aware about his right (which is being waived) and with full knowledge of such right, he intentionally abandons it—(Ref.: *Provash Chandra Dalui and Anr. v. Biswanath Banerjee and Anr.* AIR 1989 SC 1834; *Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh and Ors.,* AIR 1979 SC 621)—Results of the selection process for the civil post, in which the petitioner ranked first, were not announced until August 2012—Thus, he cannot be said to have had any knowledge about his entitlement (upon standing first in the selection process) to the civil post—Consequently, his acceptance of the promotion cannot amount to waiver of his claim to the civilian post, to which he had been selected, but not appointed—Moreover, the lack of knowledge on part of the petitioner was due to the non-declaration of the results—He cannot be the sufferer due to this—Furthermore, the entire sequence of facts has resulted in a Kafkaesque situation whereby the petitioner is without employment, even after being promoted (an event



which resulted in the impugned cancellation of his candidature) and at the same time not being appointed to the civilian post, despite being the most meritorious—Having regard to the overall conspectus of circumstances, Petitioner's appointment could have been sustained only upon rejection of the petitioner's candidature, which has been held illegal—The writ petition succeeds—Respondents directed to process the petitioner's candidature for appointment to the civilian post of Godown Overseer at the Equine Breeding Stud (EBS), Babugarh, and issue the appointment letter within six weeks.



— Denial of promotion—Adverse remarks in Annual Confidential Reports—Brief facts—Petitioner joined the Indo Tibetan Border Police (ITBP) in the year 1995 as an Assistant Commandant and thereafter, on 1st July, 2004 was promoted as Deputy Commandant—On 23rd July, 2007, Memorandum communicating the three adverse remarks given to him in his Annual Confidential Report for the period w.e.f. 4th June, 2005 to 31st March, 2006—Petitioner made a general representation on 9th August, 2007 against the adverse remarks which was rejected vide an order dated 22nd January, 2008 passed by the respondents—Department of Personnel and Training of the Government of India issued an Office Memorandum dated 13th April, 2010 directing the respondents to give copies of all the below bench mark ACRs to the concerned—Pursuant to the Directives by Department of Personnel and Training of the Government of India, the petitioner was supplied with three of his ACRs including the ACR for the period w.e.f. 4th June, 2005 to 31st March, 2006—ACR recorded by the Initiating authority is placed for the first review by Reviewing Officer and a second consideration is accorded to it by the Senior Reviewing Officer—Petitioner's ACR for the period w.e.f. 4th June, 2005 to 31st March, 2006 was upgraded by Reviewing Officer from "average" to "good"—Petitioner made a second representation dated 30th August, 2010 praying for upgradation of his ACR to "very good" and for expunction

of adverse remarks on the basis of the comments of the Reviewing Officer—Representation of the petitioner was rejected informing him that after duly taking into consideration the representation of the petitioner and all the relevant facts and evidence on record, the department had come to the conclusion that there was not merit in the representation calling for revision of his grading from "good" to "very good" and had rejected the same being devoid of merit—Hence the present Writ petition. Held—Respondents had fully accepted and endorsed the upgradation of the petitioner's ACR to "good" and thus accepted the comments of the Reviewing Officer as well as the Counter—Signing Officer—Despite the above position and the pendency of the Petitioner's representation, the respondent proceeded to hold a Departmental Committee for promotion of officers to the post of Second-in-Command—Reviewing Officer had expunged the adverse remark against Petitioner and stated that the Officer was very good and deserved promotion—Respondents were treating the petitioner's ACR w.e.f. 4th June, 2005 to 31st March, 2006 as a "good ACR" without any adverse remarks—There is merit in the petitioner's contention that the ACR w.e.f. 4th June, 2005 to 31st March, 2006 could not have been treated as an adverse ACR or as an ACR containing adverse remarks as the same has been directed to be expunged by the Reviewing Officer—Respondents were endorsing the previous erroneous stand which had been taken by them on 22nd January, 2008 without considering the intervening circumstances and ignoring the review of the petitioner's ACR by the Reviewing Officer which had been confirmed by the Counter-Signing Officer and has been duly accepted by the respondents—Petitioner was finally promoted on 12th April, 2012 as Second-in-Command—However, as a result of the Respondent's above noticed action, the petitioner stood superseded by 44 junior officers despite his meeting the bench mark as his ACR had been upgraded from "average" to "good" as well as the remarks of the Reviewing Officer therein to the effect that the petitioner was having good technical and practical knowledge and that there was nothing to show poor



performance by him—Therefore, the denial of the promotion to the petitioner was illegal and unjustified and as the petitioner was entitled to a favourable consideration in the DPC leading to the passing of the order dated 12th May, 2012 for the first time in which he was superseded only on account of respondents erroneously treating the ACR for the period w.e.f. 4th June, 2005 to 31st March, 2005 as adverse—Petitioner deserves to be given the financial benefits and accordingly, if he is found fit to be promoted by the Review DPC w.e.f. 12th May, 2011 he shall be entitled to the consequential financial benefits—Petitioner shall also be entitled to costs of the present proceedings @ Rs. 20,000/-.

*B.N. Sanawan* v. *UOI & Anr.* ..... *3169*

**SPECIFIC PERFORMANCE**—Suit for Specific Performance of Agreement to Sell dated 28.09.2006—Whether plaintiff was ready and willing to perform his part of contract—Readiness and willingness has to be judged with regard to the conduct of parties and attending circumstances—It depends on fact & circumstances of each case—One would normally expect that if the plaintiff is willing, he would unequivocally inform the defendants that he has requisite funds to complete the transaction and other processes, purchase of stamp papers etc. would be completed—If defendant is evasive plaintiff expected to vigorously follow up and chase the defendant atleast around the time of completion—In this case plaintiff at the most met the defendant only once in early 2007 whereas the transaction was to be completed within three months—No written correspondence before 2.04.2008—Whole transaction managed by one Mr. R and plaintiff never contacted the defendants or Mr. R to complete transaction—Plaintiff was not possessed of sufficient funds to complete the transaction—Held no cogent evidence to show that plaintiff was willing to perform his part of contract.

*Sangit Agrawal* v. *Praveen Anand & Anr.* ..... *3218*

**ILR (2013) IV DELHI 2919**
**W.P. (C)**

**MADHU GUPTA ….PETITIONER**

**VERSUS**

**DIRECTOR OF INCOME-TAX (INVESTIGATION) AND OTHERS ….RESPONDENTS**

**(BADAR DURREZ AHMED & V.K. JAIN, JJ.)**

**W.P. (C) NO. : 1417/2011 DATE OF DECISION: 11.01.2013**

**Income Tax Act, 1961—Section 132 and 153A—Revenue received information that DS Group was involved in sales which were not accounted for in books and undisclosed accounts of DS Groups were being kept at residence of Petitioner—Satisfaction note for purposes of conducting a search was recorded—Based on search note, search was authorized on DS Group and residence premises of Petitioner—Warrant of authorization was issued in name of Petitioner—Writ filed seeking a declaration that warrant of search issued against Petitioner was without authority of law—Plea taken, although warrant of authorization is in name of Petitioner, there could not have been any reason to believe that preconditions stipulated in clause (a), (b) and (c) of Section 132 (1) of Act had been satisfied—Per contra plea taken, reason to believe was in respect of DS Group, once that was satisfied, search could be conducted in any building, place etc. where officer authorized had 'reason to suspect' that books of accounts, other documents etc. were kept—Held—Warrant of authorization under Section 132 (1) had been issued in name of Petitioner—Information and reason to believe were to be formed in connection with Petitioner and not DS Group—Had**



**warrant of authorization been issued in name of DS Group and in course of searches conducted by authorized office premises of Petitioner had also been searched, then position might have been different—Warrant of authorization was in name of Petitioner and it was absolutely necessary that precondition set out in Section 132 (1) ought to have been fulfilled—Since these conditions had not been satisfied, warrant of authorization would have to be quashed.**

**Important Issue Involved:** When warrant of authorization under Section 132 (1) of the Income Tax Act, 1961 is issued in name of Petitioner, it is absolutely necessary that the preconditions set out in Section 132 (1) of the Income Tax Act ought to have been fulfilled.

**[Ar Bh]**

**APPEARANCES:**

**FOR THE PETITIONER** : Mr. Dr. Rakesh Gupta with Mr. Ashwani Taneja and Mr. Rani Kiyala.

**FOR THE RESPONDENTS** : Ms. Suruchi Aggarwal.

**CASES REFERRED TO:**

1. *S.R. Batliboi & Co.* vs. *Director of Income-tax (Investigation):* (2009) 315 ITR 137.
2. *Suresh Chand Agarwal* vs. *Director General of Income-tax (Investigation) & Others:* (2004) 269 ITR 22 (All).
3. *Smt. Kavita Agarwal & Another* vs. *Director of Income-tax (Investigation) & Others:* (2003) 264 ITR 472 (All).
4. *Dr Sushil Rastogi* vs. *Director of Investigations, Income Tax Department & Others:* (2003) 260 ITR 249 (All).
5. *Smt. Kavita Agarwal* vs. *Director of Income Tax (Investigation):* [2003] 264 ITR 472.
6. *L.R. Gupta & Others* vs. *Union of India & Others:* (1992) 194 ITR 32 (Del).

7. *Narayan R. Bandekar & Another:* vs. *Income-tax Officer & Others:* (1989) 177 ITR 207 (Bom).

8. *Dr. Nand Lal Tahiliani* vs. *Commissioner of Income-tax & Others:* (1988) 170 ITR 592 (All).

9. *H.L. Sibal* vs. *CIT:* 1975 CTR (P&H) 302.

10. *H.L. Sibal* vs. *Commissioner of Income-tax & Others:* (1975) 101 ITR 112 (P&H).

11. *Income Tax Officer* vs. *Seth Brothers:* (1969) 74 ITR 836 (SC).

12. *N.K. Textiles Mills* vs. *CIT* [1966] 61 ITR 58.

13. *Commissioner of Commercial Taxes* vs. *Ramkishan Shrikishan Jhaver:* [1967] 66 ITR 664 (SC).

**RESULT:** Allowed.

**BADAR DURREZ AHMED, J.**

**1.** In this writ petition, the petitioner has prayed for the following reliefs:

"(I) To declare the authorization of income-tax search u/s 132 of the Income Tax Act, 1961 as illegal in the case of the petitioner.

(II) To direct the concerned authority of the income tax department to vacate prohibitory order passed u/s 132(3) of the Income Tax Act, 1961 with respect to three bank lockers of the petitioner.

(III) To direct the concerned authority of income tax department to release the papers / documents seized from the residence of the petitioner.

(IV) To pass any other order or direction as this Hon'ble court may deem fit and proper on the facts and circumstances of the instant case in order to grant necessary relief to the petitioner."

**2.** Essentially, what the petitioner is seeking is a declaration that the warrant of search issued against the petitioner under Section 132 of the Income-tax Act, 1961 (herein after referred to as 'the said Act') was without the authority of law and, therefore, all proceedings pursuant to



the search conducted at the residential premises of the petitioner at C-18, Sector-26, Noida, U.P. and pertaining to the petitioner ought to be declared as being illegal and the jewellery, articles and documents in lockers belonging to the petitioner be released to her unconditionally and the prohibitory orders in respect thereof be vacated.

**3.** From the affidavit filed on behalf of the respondent / revenue, it appears that an information had been received by the Deputy Director of the Income-tax (Investigation), Unit-IV (3), New Delhi from the Director General Central Excise Investigation, Delhi (DGCEI) in 2009 with regard to alleged unearthing of unaccounted sales and production as well as alleged clandestine removal / clearing of the products of M/s Dharampal Satyapal Group from their units at Noida, Gauhati and Agartala. The products comprised of various brands of *paan masala, gutkha,* such as Rajni Gandha and Tulsi. It is further revealed in the said affidavit on behalf of the revenue that a show cause notice had been issued by the DGCEI to the said M/s Dharampal Satyapal Group (DS Group) for evasion of Central Excise Duty. It is further indicated in the affidavit that on the basis of "information" received, "secret discreet inquiries" were carried out by the said Director of Income-tax and it was allegedly revealed that the DS Group was involved in sales which were not accounted for in the books and that such unaccounted income was being invested in agricultural and immovable properties and other assets in the names of group concerns of DS Group. The affidavit further reveals that during "discreet inquiries" the said Deputy Director of Income-tax allegedly got information that the undisclosed accounts of DS Groups were being kept at the residence of Smt. Madhu Gupta, widow of Late Shri R.N. Goela residing at C-18, Sector 26, Noida, U.P. It is further indicated in the affidavit that the said Deputy Director of Income-tax recorded a satisfaction note for the purposes of conducting a search under Section 132 (1) of the said Act on the DS Group.

The satisfaction note, *inter alia,* indicated as under:

> "That the above facts indicate that the assessee group is in the possession of unaccounted income in the form of money, bullion, jewellery and other valuables / articles or things / papers related to the undisclosed / benami properties. These are likely to be found at the residence and business premises of the group members, their associates and family members. Keeping in view

of the above facts, I am of belief that even if notices u/s 142 (1) of the Act or summons u/s 131 of the Act are issued to the above assesses, they will not produce the documents which will be useful for determining the taxability under IT Act, 1961. Therefore, warrant of authorization u/s 132 of the IT Act may be issued to search the following premises."

(underlining added)

**4.** In the said affidavit, it is further alleged that Smt. Madhu Goela, the petitioner herein, who uses the name Madhu Gupta, is the widow of Late Shri R.N. Goela, who was one of the major share-holders in the DS Group of Companies till his death in the year 2006. He was also a director in the said Group of Companies till his death. It is alleged in the affidavit that, while inquiring into the allegations against the DS Group, the said Deputy Director of Income-tax had received information that in view of the close relationship of the petitioner with the promoters of DS Group, accounts containing details of undisclosed sales and incomes, etc. were "likely to be kept" at the residence of the petitioner at C-18, Sector 26, Noida, U.P. It is further indicated in the said affidavit that the following was mentioned in the satisfaction note prior to the conduct of the search on the residence of the petitioner:

"She is the wife of deceased director and according to information her house is used to keep accounts which are unaccounted."

**5.** The said affidavit further indicates that, based on the satisfaction note prepared by the said Deputy Director of Income-tax, the Additional Director of Income-tax (Investigation), Unit-IV recommended search under Section 132(1) on the DS Group. The Director of Income-tax (Investigation)-II, New Delhi discussed the matter with the said Deputy Director of Income-tax as also the said Additional Director of Income-tax (Investigation) and accorded satisfaction that there were strong reasons to believe that DS Group of companies were engaged in unaccounted production of paan masala and other products resulting in generation of unaccounted income which was not fully being disclosed in the income-tax returns. Consequently, the Director of Income-tax (Investigation)-II, Delhi authorized the search under Section 132(1) of the said Act and after such authorization, the said Deputy Director of Income-tax carried out the search on the DS Group on 21.01.2011. The search was also carried out on the residential premises of the petitioner.



**6.** From the above, it is clear that the warrant of authorization which preceded the search at the residential premises of the petitioner was issued in the name of the petitioner – Smt. Madhu Gupta / Goela. This is also apparent from the copy of the panchnama which is to be found at page 56 of the paper book. The second point that is to be noted is that the allegation was that the petitioner was the wife of a deceased director and that there was information that her house was being used to keep the accounts of DS Group which were unaccounted.

**7.** The search on the premises of the petitioner has been challenged by the petitioner on the ground that, although the warrant of authorization is in the name of the petitioner, there could not have been any reason to believe that the pre-conditions stipulated in clauses (a), (b) and (c) of Section 132(1) of the said Act had been satisfied. In fact, the exact nature of the information is also not disclosed and, therefore, the search could not be founded on mere surmises and conjectures. At this juncture, we may point out that though the learned counsel for the petitioner submitted that a search under Section 132 entails serious consequences insofar as the person searched is concerned inasmuch as the department, by virtue of Section 153A of the said Act, can re-open the assessments of six years, the learned counsel for the revenue had conceded, on instructions, and this is recorded in our order dated 22.02.2012, that the department shall not be proceeding against the petitioner under Section 153A. Thus, the scope of the petition is with regard to the lifting of the prohibitory orders and the release of the goods / articles to the petitioner. It was first contended by the learned counsel for the petitioner that the mere fact that the revenue had conceded that they would not be proceeding against the petitioner under Section 153A itself meant that the initiation of the search was bad. However, the revenue has raised certain arguments which need to be considered.

**8.** The learned counsel for the petitioner had placed reliance for his submissions on the following decisions:

1) **Suresh Chand Agarwal v. Director General of Income-tax (Investigation) & Others:** (2004) 269 ITR 22 (All);

2) **S.R. Batliboi & Co. v. Director of Income-tax (Investigation):** (2009) 315 ITR 137;

3) **Dr Sushil Rastogi v. Director of Investigations, Income Tax Department & Others:** (2003) 260 ITR

249 (All);

4) **Dr Nand Lal Tahiliani v. Commissioner of Income-tax & Others:** (1988) 170 ITR 592 (All);

5) **Narayan R. Bandekar & Another: v. Income-tax Officer & Others:** (1989) 177 ITR 207 (Bom);

6) **Smt. Kavita Agarwal & Another v. Director of Income-tax (Investigation) & Others:** (2003) 264 ITR 472 (All);

7) **L.R. Gupta & Others v. Union of India & Others:** (1992) 194 ITR 32 (Del);

8) **H.L. Sibal v. Commissioner of Income-tax & Others:** (1975) 101 ITR 112 (P&H).

**9.** The contentions of the petitioner were that the opinion or the belief amounting to a reason to believe, as indicated in Section 132(1) of the said Act, must clearly show that the belief falls under clauses (a), (b), or (c) of Section 132(1) and that no search could be ordered except for any of the reasons contained in clauses (a), (b) or (c) of Section 132(1). Furthermore, it was contended that the satisfaction note ought to show the application of mind and formation of the opinion by the officer ordering the search and that if the reasons recorded do not fall under clauses (a), (b) or (c), then the authorization under Section 132(1) would be bad and would be liable to be quashed. It was further contended that where the authorizing authority is challenged in a judicial review, he would have to prove the basis for his belief. Furthermore, the information on the basis of which a belief is formed must be something more than a mere rumour or a gossip or a hunch. There must be some material which can be regarded as information which must exist on the file on the basis of which the authorizing officer could be said to have a reason to believe that an action under Section 132(1) is called for on the basis of any of the conditions mentioned in clauses (a), (b) or (c) of Section 132(1). Furthermore, it was contended that the information has not only to be authentic, but must be capable of giving rise to the inference that the person was in possession of the undisclosed accounts which would not normally be disclosed. It was submitted that before any action is taken under Section 132(1) of the said Act, the competent authority must do so only after a serious application of mind on the material before him. It was also contended that the facts, which constitute an information,



should be such on the basis of which a reasonable and prudent man could come to the requisite belief or conclusion as required under Section 132(1) of the said Act. The belief must not be based on mere suspicion. He further contended that it would be open in the course of judicial review for the court to examine whether there was, in fact, information in the possession of the authorizing authority and whether there was a rational connection between information and the belief entertained by him. It was further contended that the information has to be of a fairly reliable character because unless the information is of such a character, it could not furnish a reliable basis for entertaining the belief that any of the circumstances mentioned in Section 132(1) existed. The information must have a relevant bearing on the formation of the belief and must not be extraneous or irrelevant. It was contended that in the present case, there is no information revealed by the revenue at all. Merely stating that some information had been received is not sufficient. There must be tangible evidence on the file. Secondly, the information must be such that it is reliable and on the basis of which a reasonable and prudent man would come to the conclusion that one of the conditions mentioned in Section 132(1) has been satisfied and, therefore, a search was warranted. It was submitted by the learned counsel for the petitioner that no such condition existed and, in fact, neither clause (a) nor clause (b) nor clause (c) of Section 132 (1) was satisfied in the present case.

**10.** The learned counsel for the revenue, however, contended that the reason to believe was in respect of the DS Group and clauses (a), (b) and (c) were satisfied insofar as a search was warranted on the DS group. According to the learned counsel for the revenue, the facts on the file clearly indicate that there was enough reason for the competent authority to believe that the condition stipulated in clauses (a), (b) and (c) of Section 132(1) existed insofar as the DS Group was concerned. Once that was satisfied, the provisions of Section 132(1) (i) clearly permitted the search to be carried out in any building, place, etc. where the officer authorized had "reason to suspect" that the books of accounts, other documents, etc. were kept. It was contended by the learned counsel for the revenue that as there was 'reason to believe' insofar as the DS Group was concerned, the authorized officer could conduct a search at any place which included the residential premises of the petitioner at C-18, Sector 26, Noida, U.P. as also the three bank lockers belonging to her. For conducting a search under Section 132(1)(i), the authorized officer

had only to have a 'reason to suspect' as distinct and different from a 'reason to believe' as appearing in Section 132(1). It was contended that the reason to suspect for entering any premises could not be equated with the reason to believe, which was necessary for directing any search of any tax payer. It was submitted that the search of the DS Group was based on several allegations, which according to the revenue, were found to be, prima facie, correct and once that satisfaction was reached, the authorized officer only needed to have a reason to suspect that some books, assets or other documents or evidence would be found at the residence of the petitioner. It is accepted that the search in the case of DS Group was legal and had been validly authorized. The only issue that requires to be seen is that whether there was any reason to suspect to enter and search the residence of the petitioner. According to the learned counsel, there was sufficient reason to suspect and this was enough for the issuance of a warrant to enter and search the residence of the petitioner. She submitted that no independent search of the petitioner was directed to be conducted and, therefore, the first requirement of Section 132(1) of the existence of a reason to believe consequent upon information in possession was not required to be satisfied. Therefore, it was submitted that the case law presented by the learned counsel for the petitioner as also the propositions advanced by him relating to proper authorization of the search based on information in possession were not at all applicable to the facts of the present case.

**11.** The provisions of Section 132(1), to the extent relevant, are set out hereinbelow:

> **"132. Search and seizure.** – (1) Where the Director General or Director or the Chief Commissioner or Commissioner or Additional Director or Additional Commissioner or Joint Director or Joint Commissioner in consequence of information in his possession, has reason to believe that -
>
> (a) any person to whom a summons under sub-section (1) of section 37 of the Indian Income-tax Act, 1922 (11 of 1922), or under sub-section (1) of section 131 of this Act, or a notice under sub-section (4) of section 22 of the Indian Income-tax Act, 1922, or under sub-section (1) of section 142 of this Act was issued to produce, or cause to be produced, any books of account or other documents



> has omitted or failed to produce, or cause to be produced, such books of account or other documents as required by such summons or notice, or
>
> (b) any person to whom a summons or notice as aforesaid has been or might be issued will not, or would not, produce or cause to be produced, any books of account or other documents which will be useful for, or relevant to, any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act, or
>
> (c) any person is in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been, or would not be, disclosed for the purposes of the Indian Income-tax Act, 1922 (11 of 1922), or this Act (hereinafter in this section referred to as the undisclosed income or property),
>
> then, -
>
> (A) the Director General or Director or the Chief Commissioner or Commissioner, as the case may be, may authorise any Additional Director or Additional Commissioner or Joint Director, Joint Commissioner, Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income-tax Officer, or
>
> (B) such Additional Director or Additional Commissioner or Joint Director, or Joint Commissioner, as the case may be, may authorise any Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income-tax Officer,
>
> (the officer so authorised in all cases being hereinafter referred to as the authorised officer) to –
>
> (i) enter and search any [building, place, vessel, vehicle or aircraft where he has reason to suspect that such books of account, other documents, money, bullion, jewellery or other valuable article or thing are kept;

(ii) break open the lock of any door, box, locker, safe, almirah or other receptacle for exercising the powers conferred by clause (i) where the keys thereof are not available;

(iia) search any person who has got out of, or is about to get into, or is in, the building, place, vessel, vehicle or aircraft, if the authorised officer has reason to suspect that such person has secreted about his person any such books of account, other documents, money, bullion, jewellery or other valuable article or thing;

(iib) require any person who is found to be in possession or control of any books of account or other documents maintained in the form of electronic record as defined in clause (t) of subsection (1) of section 2 of the Information Technology Act, 2000 (21 of 2000), to afford the authorised officer the necessary facility to inspect such books of account or other documents;

(iii) seize any such books of account, other documents, money, bullion, jewellery or other valuable article or thing found as a result of such search:

**Provided** that bullion, jewellery or other valuable article or thing, being stock-in-trade of the business, found as a result of such search shall not be seized but the authorised officer shall make a note or inventory of such stock-in-trade of the business;

(iv) place marks of identification on any books of account or other documents or make or cause to be made extracts or copies therefrom;

(v) make a note or an inventory of any such money, bullion, jewellery or other valuable article or thing:"

**12.** It is apparent that there are several parts to the said provision of search and seizure. In the first part, certain persons have been named, who would be competent to authorize other officers of the Income-tax Department to carry out searches. The first authority or warrant of authorization can only be issued by the named persons, namely, the Director General or Director or the Chief Commissioner or Commissioner or an Additional Director or Additional Commissioner or Joint Director or Joint Commissioner. Such warrant of authorization can only be issued



by such a person in consonance of information in his possession and after he has formed a reason to believe that the conditions stipulated in clauses (a), (b) and (c) existed.

**13.** The information must be credible information and there must be a nexus between the information and the belief. Furthermore, in our view, the information must not be in the nature of some surmise or conjecture, but it must have some tangible backing. Until and unless information is of this quality, it would be difficult to formulate a belief because the belief itself is not just an *ipse dixit*, but is based on reason and that is why the expression used is "reason to believe" and not simply 'believes".

**14.** We shall now examine the decisions cited by the learned counsel for the petitioner. In **H.L. Sibal** (supra), the Punjab & Haryana High Court observed as under:

> "30. ... The word "information" has been defined in the Shorter Oxford Dictionary as "that of which one is apprised or told". The word "reason" has been defined as "a statement of fact employed as an argument to justify or condemn some act". On the other hand, the word "conclusion" is defined as "a judgment arrived at by reasoning; an inference, deduction, etc.". In other words, when the information received or the basic facts are harnessed in support of an argument, the resultant effect assumes the shape of a reason and when a number of reasons are considered in relation to each other, the final result of this consideration assumes the shape of a conclusion. A necessary concomitant of this approach is that the facts constituting the information must be relevant to the enquiry. They must be such from which a reasonable and prudent man can come to the requisite belief or conclusion. If either of the afore-mentioned elements is missing, the action of the authority shall be regarded as lying outside the ambit and scope of the Act. Such an action would be liable to be struck down on the basis of what is commonly known as "legal malice"."

**15.** In **Dr Nand Lal Tahiliani** (supra), the Allahabad High Court observed as under:

"5. ... The expression is "reason to believe that the income has not been disclosed and not probably it may not have been disclosed". It is not left to guessing. It carries with it the impress of certainty. The dwelling house of a person is his fortress. "Every householder, the good or the bad, the guilty or the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house. "Ransacking of the house and the act of taking away the property is an inroad on the citizens' right of privacy": one of the values of civilization. Any unwarranted intrusion on it cannot be countenanced. Reasonable belief exists if the information is not only trustworthy but reasonable and sufficient in itself to warrant the conclusion that the provisions of Section 132 were being violated. Because, if the exercise of power is bad or unlawful in inception, then it is not validated or nor does it change character from its success. It would not, therefore, be asking too much from the authorities to comply with the basic requirements of the section before they are permitted to invade the secrecy of one's home."

**16.** In **Narayan R. Bandekar** (supra), the High Court of Bombay observed as under:

"3. ... A plain reading of sub-section (1) of section 132 makes it clear that the powers can be exercised in consequence of information in the possession of the Director of Inspection or the Commissioner of Income Tax and from such information of the Commissioner has reason to believe that (a) any person, in spite of issue of summons, has failed to produce the books of account or other documents, (b) any person is likely to fail to produce the books if so called upon, and (c) any person is in possession of any money, bullion, jewellery or other valuable articles and which are not accounted for and which represent undisclosed income. It hardly requires to be stated that the power conferred upon the Commissioner under section 132 is of a drastic nature and the exercise of power can only be after serious application of mind to the information in the possession of the Commissioner and from which a reasonable person would come to the conclusion that the conditions prerequisite for the exercise of power existed."



**17.** In **L.R. Gupta & Others** (supra), the Delhi High Court held as under:

"17. A search which is conducted under Section 132 is a serious invasion into the privacy of a citizen. Section 132(1) has to be strictly construed and the formation of the opinion or reason to believe by the authorising officer must be apparent from the note recorded by him. The opinion or the belief so recorded must clearly show whether the belief falls under sub-Clause (a), (b) or (e) of Section 13:(l). No search can be ordered except for any of the reasons contained in sub-Clauses (a) (b), or (e). The satisfaction note should itself show the application of mind and the formation of the opinion by the officer ordering the search. If the reasons which are recorded do not fall under Clauses (a), (b) or (e) then an authorisation under Section 132(1) will have to be quashed. As observed by the Supreme Court in **Income Tax Officer v. Seth Brothers:** (1969) 74 ITR 836 (SC):

'Since by the exercise of the power a serious invasion is made upon the rights, privacy and freedom of the tax payer, the power must be exercised strictly in accordance with the law and only for the purposes for which the law authorises it to be exercised. If the action of the officer issuing the authorisation or of the designated officer is challenged, the officer concerned must satisfy the Court about the regularity of his action. If the action is maliciously taken or poer under the Section is exercised for a collateral purpose, it is liable to be struck down by the Court. If the conditions for exercise of the power are not satisfied the proceeding is liable to be quashed'."

**18.** In **Dr Sushil Rastogi** (supra), the decisions in **Dr Nand Lal** (supra) as also in **L.R. Gupta** (supra), were followed. The same is the position with **Smt. Kavita Agarwal** (supra) wherein, while considering the said decisions in **Dr Nand Lal** (supra) and **L.R. Gupta** (supra), a Division Bench of the High Court of Allahabad observed as under:"

5. On the facts of the case we are of the opinion that this writ petition deserves to be allowed. The law is well settled that a warrant of search and seizure under Section 132(1) can only be issued on the basis of some material or information on which the Commissioner/Director has reason to believe that any person is

in possession of money, jewellery or other valuable articles representing wholly or partly income or property which has not been or would not be disclosed, under the IT Act. In the present case the respondents have not disclosed what was the material or information on the basis of which the Director/Commissioner entertained the belief that the lockers contained valuable jewellery or other articles representing undisclosed income. It is well settled that the satisfaction of the authorities under Section 132 must be on the basis of relevant material or information. The word used in Section 132(1) are "reason to believe" and not "reason to suspect". In the counter-affidavit it has been specifically stated in para. 18 that the authorized officer had reason to suspect and not reason to believe."

**19.** In **Suresh Chand Agarwal** (supra), the High Court of Allahabad held as under:

"12. As regards the allegations in paragraphs 11, 12, 13, 14 and 15 of the counter affidavit to the effect that the assessee could not give a satisfactory explanation regarding certain assets or documents found during the search, this court held in the case of **Smt. Kavita Agarwal v. Director of Income Tax (Investigation):** [2003] 264 ITR 472 that the material on the basis of which the reason to believe of the Commissioner/Director is said to exist must be such material which was brought to the knowledge of the said authority prior to the search. In other words, the authorities cannot rely on material found during the search for taking the plea that this was the basis of the reason to believe, unless such material was brought to the knowledge of the authority who signs the warrant of authorisation before or at the time when he signs it. To take a contrary view would mean that the Commissioner/Director can issue a warrant of authorisation under Section 132(1) without considering any material, and thereafter the Income Tax authorities can indulge in a fishing enquiry to uncover some undisclosed asset. No such view can be countenanced by this court as it would give unbridled and arbitrary powers to the Income Tax authorities to harass the citizens.

13. For the reasons given above, the writ petition is allowed and



the impugned warrant of authorisation is quashed and the entire search and seizure is declared illegal. The respondents are directed to release the cash, articles and documents seized from the petitioner or his wife from their residence as well as the bank locker forthwith."

**20.** Finally, in **S.R. Batliboi and Company** (supra), the Delhi High Court held as under:

"9. It would be perilous and fatal to lose sight of the reality that the powers of the Search and Seizure are very wide and thus the legislature has provided a safeguard that the Assessing Officer should have reasons to believe that a person against whom proceedings under Section 132 are to be initiated is in possession of assets which have not been or would not be disclosed. Secondly, the authorized officer is also required to apply his mind as to whether the assets found in the Search have been disclosed or not, and if no undisclosed asset is found no action can be taken under Section 132(1)(iii) or (3). An arbitrary seizure cannot be maintainable even where the authority has seized documents with ulterior motives.

xxxx xxxx xxxx xxxx xxxx

12. Over two score years ago the Division Bench of this Court had opined in **N.K. Textiles Mills v. CIT** [1966] 61 ITR 58 propounded that it was necessary and essential for these officers to take into custody only such books as were considered relevant to or useful for the proceedings in question. It was not open to them to indiscriminately, arbitrarily and without any regard for relevancy or usefulness, seize all the books and documents which were lying in the premises, and, if they did so, the seizure would be beyond the scope of the authorization. Our learned Brothers have designedly used the words proceeding in question, in order to clarify that material that may possibly be of relevance to the affairs of a third party, unconnected with the raided assessee and beyond the contemplation of the search and seizure exercise, should not be retained. All remaining doubts will be dispelled on a perusal of **H.L. Sibal v. CIT:** 1975 CTR (P&H) 302 in which the Division Bench has, inter alia, analysed **Commissioner of Commercial Taxes v. Ramkishan Shrikishan Jhaver:** [1967]

66 ITR 664 (SC) into four concomitants (1) The authorized officer must have reasonable grounds for believing that anything necessary for the purpose of recovery of tax may be found in any place within his jurisdiction; (2) he must be of the opinion that such thing cannot be otherwise got at without undue delay; (3)he must record in writing the grounds of his belief; and (4) he must specify in such writing, so far as possible, the thing for which search is to be made. Where material or document or assets belong to a third party, totally unconcerned with the person who is raided, none of these conditions are fulfilled. In Sibal the belongings of a house-guest of Shri Sibal were searched and some money found therein was seized. The Court had concluded that the authorization for the search of the house-guest was prepared after the planned search of Shri Sibal. The warrants were quashed partly for this reason."

**21.** These are the principles of law which have been set down by several judicial pronouncements. In the present case, we find that the so-called information is undisclosed and what exactly that information was, is also not known. At one place in the affidavit of Deputy Director of Income-tax, it has been mentioned that he got information that there was a "likelihood" of the documents belonging to the DS Group being found at the residence of the petitioner. That by itself would amount only to a surmise and conjecture and not to solid information and since the search on the premises of the petitioner was founded on this so-called information, the search would have to be held to be arbitrary. It may also be pointed out that when the search was conducted on 21.01.2011, no documents belonging to the DS Group were, in fact, found at the premises of the petitioner.

**22.** With regard to the argument raised by the learned counsel for the respondent that there was no need for the competent authority to have any reason to believe and a mere reason to suspect would be sufficient, we may point out that the answer is provided by the fact that the warrant of authorization was not in the name of the DS Group but was in the name of the petitioner. In other words, the warrant of authorization under Section 132(1) had been issued in the name of the petitioner and, therefore, the information and the reason to believe were to be formed in connection with the petitioner and not the DS Group. None of the clauses (a), (b) or (c) mentioned in Section 132(1) stood



satisfied in the present case and, therefore, the warrant of authorization was without any authority of law insofar as the petitioner was concerned. Had the warrant of authorization been issued in the name of the DS Group and in the course of the searches conducted by the authorized officer, the premises of the petitioner had also been searched, then the position might have been different. But, in the present case, that is not what has happened. The warrant of authorization was in the name of the petitioner and, therefore, it was absolutely necessary that the pre-conditions set out in Section 132(1) ought to have been fulfilled. Since those pre-conditions had not been satisfied, the warrant of authorisation would have to be quashed. Once that is the position, the consequence would be that all proceedings pursuant to the search conducted on 21.01.2011 at the premises of the petitioner would be illegal and, therefore, the prohibitory orders would also be liable to be quashed. It is ordered accordingly. The jewellery / other articles / documents are to be unconditionally released to the petitioner. The writ petition is allowed as above. There shall be no order as to costs.

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**ILR (2013) IV DELHI 2936**
**W.P. (C)**

**SHIVALIK BIMETAL CONTROLS LTD. ….PETITIONER**

**VERSUS**

**INCOME TAX OFFICER ….RESPONDENT**

**(BADAR DURREZ AHMED & R.V. EASWAR, JJ.)**

**W.P. (C) NO. : 7087/2012 DATE OF DECISION: 24.01.2013**

**Income Tax Act, 1961—Section 139, 147 and 148—Respondent issued notice whereby assessment of income of Petitioner for Assessment Year (AY), 2005—06 was sought to be reopened—Objections filed by Petitioner were rejected—Order/Notice challenged**

**before HC—Plea taken, this is a case where conditions stipulated in proviso to Section 147 of Act would have to be satisfied because notice has been issued after a period of four years from end of relevant AY—Conditions stipulated in proviso are not satisfied and therefore said notice is bad in law—Per contra plea taken, it was a case of escapement of income as indicated in notice itself—Held—Notice is bad in law as same had been issued beyond a period of four years from end of relevant AY without satisfying condition precedent therefor—Proviso to Section 147 of Act imposes injunction on revenue authorities prohibiting them from taking in any action beyond said period of four years unless (i) any income chargeable to tax has escaped assessment for such AY (ii) by reason of failure on part of assessee (a) to file a return u/s 139 of said Act or in response to a notice issued under Sub-Section (1) or Section 147 or Section 148 of said Act or (b) to disclose fully or truly all material facts necessary for assessment for that AY—It is not case of revenue that assessee had failed to file return under any of provisions—Only way in which notice under Section 148 of said Act beyond period of four years could be justified would be if there was failure on part of assessee to disclose fully and truly all material facts necessary for his assessment—It is not sufficient that income chargeable to tax has escaped assessment but it further be shown that this has escaped as a result of failure on part of assessee to disclose fully and truly all material facts necessary for his assessment—Neither notice nor order discloses that there has been a failure on part of assessee to fully and truly discloses all material facts necessary for assessment or what material facts has not been disclosed by assessee—Impugned notice set aside.**



**Important Issue Involved:** For reopening assessment beyond a period of four years from the end of the relevant assessment year, it is not sufficient that the income chargeable to tax has escaped assessment but it must further be shown that this has escaped as a result of failure on the part of assessee to disclose fully and truly all material facts necessary for his assessment.

**[Ar Bh]**

**APPEARANCES:**

| | | |
|---|---|---|
| **FOR THE PETITIONER** | **:** | Mr. Prakash Chand Yadav, Advocate. |
| **FOR THE RESPONDENT** | **:** | Mr. Sanjeev Rajpal, Sr. Standing Counsel. |

**RESULT:** Allowed.

**BADAR DURREZ AHMED, J. (ORAL)**

**1.** This writ petition is directed against the notice dated 28.03.2012 under section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act') whereby the assessment for assessment year 2005-06 is sought to be reopened. The petitioner on receipt of the said notice filed its objections on 08.05.2012. But, those objections were rejected by an order dated 24.08.2012.

**2.** The purported reasons for issuance of the impugned notice under section 148 of the said Act read as under:-

> "Assessment u/s 143(3) was completed on 19.04.2007 on total income of Rs. 5,64,85,110/- u/s 115JB as against the normal income of Rs. 3,16,410/-. It has been noticed that while completing the assessment, disallowance u/s 80-IC could not be made as the conditions as laid down in that section are not fulfilled. This resulted in under assessment of the income to the tune of Rs. 1,32,50,439/-.
>
> Section u/s 147 reads as under:
>
> > "Section 147....
> >
> > Explanation 2 for the purposes of this section, the following shall also be deemed to be cases where income chargeable

to tax has escaped assessment namely:

(a) .....

(b) .....

(c) where the assessment has been made, but

i) income chargeable to tax has been under assessed; or

ii) such income has been assessed at too low a rate or

iii) such income has been made the subject of excessive relief under this Act; or

iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed:"

In view of explanation 2 (c)(i) & (iv) to section 147, as quoted above, I have reason to believe that taxable income to the tune of Rs. 1,32,50,439/- has escaped assessment. Therefore it is proposed to issue notice u/s 148 of the IT Act, 1961 in order to tax the above said escaped income. In view of the above, as per provisions of section 151, it is requested to kindly accord approval for issuance of notice u/s 148 in this case for the assessment year 2005-06."

**3.** The learned counsel for the petitioner submits that this is a case where the conditions stipulated in the proviso to section 147 of the said Act would have to be satisfied because the notice has been issued after a period of four years from the end of the relevant assessment year. He further submitted that the conditions stipulated in the proviso are not satisfied and, therefore, the said notice is bad in law.

**4.** The learned counsel for the respondent/ revenue sought to support the issuance of the notice under section 148 of the said Act on the ground that it was a case of escapement of income as indicated in the notice itself. He also sought to rely on Explanation 2 in section 147 of the said Act.

**5.** We have considered the arguments advanced by the counsel for parties and we agree with the submission made by the learned counsel for the appellant that the said notice is bad in law as the same has been issued beyond a period of four years from the end of the relevant assessment year without satisfying the condition precedent therefor. The proviso to section 147 of the said Act imposes an injunction on the



revenue authorities prohibiting them from taking any action beyond the said period of four years unless (i) any income chargeable to tax has escaped assessment for such assessment year, (ii) by reason of the failure on the part of the assessee (a) to file a return under section 139 of the said Act or in response to a notice issued under sub-section (1) or section 147 or section 148 of the said Act or (b) to disclose fully or truly all material facts necessary for the assessment for that assessment year. In this matter it is not the case of the revenue that the assessee had failed to file the return under any of the provisions. Therefore, the only way in which the notice under section 148 of the said Act beyond the period of four years, could be justified would be if there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. It is not sufficient that the income chargeable to tax has escaped assessment but it must further be shown that this has escaped as a result of failure on the part of assessee to disclose fully and truly all material facts necessary for his assessment.

**6.** In the present case, the impugned reasons behind the notice dated 28.03.2012, which we have extracted above, does not even carry a whisper that there has been a failure on the part of the assessee to fully and truly disclose all material facts necessary for the assessment. Even the order rejecting the objections does not indicate as to what material fact has not been disclosed by the assessee.

**7.** In these circumstances the impugned notice dated 28.03.2012 cannot be sustained in law. The same is set aside and so, too, all proceedings pursuant thereto. The writ petition is allowed as above. There shall be no order as to costs.

**ILR (2013) IV DELHI 2941**
**W.P. (C)**

**VIPIN CHANANA ….PETITIONER**

**VERSUS**

**DIRECTORATE OF REVENUE INTELLIGENCE ….RESPONDENT**

**(BADAR DURREZ AHMED & R.V. EASWAR, JJ.)**

**W.P. (C) NO. : 7738/2012 DATE OF DECISION: 05.02.2013**

**Customs Act, 1962—Section 110(2) and 124—Hazardous Waste (Management, Handling and Trans-boundary) Rules, 2008—Chapter-IV—Seizure of imported photocopiers machines challenged in writ by Petitioner—Plea taken, since no shown cause notice has been issued to petitioners within one year of date of seizures, goods are to be returned to petitioners unconditionally—Per contra plea taken, goods can only be released provided petitioners have permission from Ministry of Environment and Forest—Held—Section 110(2) specifically mandates that when any goods are seized under Sub-Section (1) and no notice in respect thereof is given under clause (a) of Section 124 within six months or within the further extended period of six months (totaling one year) of seizure of goods, goods shall be returned to person from whose possession they were seized—Circular issued by Central Board of Excise and Customs would apply at stage of clearance of goods—Goods in present case had already been cleared and that too much prior to issuance of circular—Respondents directed to return goods to petitioners unconditionally.**



**Important Issue Involved:** Section 110 (2) of the Customs Act, 1962 specifically mandates that when any goods were seized under Sub-Section (1) and no notice in respect thereof is given under clause (a) of Section 124 within six months or within the extended period of six months (totalling one year) of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized.

**[Ar Bh]**

**APPEARANCES:**

**FOR THE PETITIONER** : Mr. Pradeep Jain, Advocate.

**FOR THE RESPONDENTS** : Mr. Satish Aggarwal, Advocate.

**CASE REFERRED TO:**

1. *Jatin Ahuja* vs. *Union of India and Ors.* WP(C) 2952/2012, decided on 04.09.2012.

**RESULT:** Allowed.

**BADAR DURREZ AHMED, J. (ORAL)**

**1.** These writ petitions raise identical issues therefore they are disposed of by a common order. The petitioners in both the cases have imported photocopiers machines. After clearance, the said photocopier machines were stored in their respective godowns. At that point of time seizures were made on 06.09.2010 and 16.09.2010 insofar as the petitioner (Vipin Chanana) is concerned. As regards Sanjeev Goel the seizures were made on 11.09.2010 and 05.10.10.

**2.** The simple point urged on behalf of the petitioners is that since no show cause notice has been issued to the petitioners within one year of the date of seizures, the goods are to be returned to the petitioners unconditionally by virtue of the provisions of section 110(2) of the Customs Act, 1962.

**3.** The counter affidavits that have been filed on behalf of the respondents admit the position that no show cause notice has been issued till date which makes it clear that no show cause notice was issued within one year of the said seizures. As such, section 110(2) of the said Act would come into play. Section 110(2) specifically mandates that

when any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of section 124 within six months or within the further extended period of six months (totaling one year) of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized.

**4.** This point has been considered by a Division Bench of this court in the case of **Jatin Ahuja v Union of India and Ors.** WP(C) 2952/2012, decided on 04.09.2012, wherein this court observed as under:

> "9. It can be gathered from the above discussion that the provision of Section 110(2) insofar as the prescription of a time limit for holding seized goods, is deemed mandatory; the consequence of not issuing a show cause notice within the period or extended period specified is clearly spelt out to be that the *"goods shall be returned to the person from whose possession they were seized"* (apparent from a combined reading of Section 110(2) and its proviso). The corollary is not that the Customs authorities lose jurisdiction to issue show cause notice."

**5.** Consequently the decision in Jatin Ahuja (supra) would apply to the present cases on all fours.

**6.** Mr Satish Aggarwal, appearing on behalf of the respondent, however, submitted that there was another aspect of the matter which needed consideration. He drew our attention to paragraphs 17/18 of the counter affidavits filed in the matters. In those paragraphs the plea has been raised that the goods can only be released provided the petitioners fulfill the requirements specified in chapter IV of the Hazardous Waste (Management, Handling and Trans-boundary) Rules, 2008 and the circular No. 27/2011 issued by the Central Board of Excise and Customs dated 04.07.2011 which clarifies that a permission from the Ministry of Environment and Forest would be required. However, on going through the circular dated 04.07.2012, which has been issued by the Central Board of Excise & Customs, it is apparent from the first paragraph itself that it would apply at the stage of clearance of the goods. The exact expression used is that a clarification was sought as to whether the used computers required for re-use need permission from the Ministry of Environment and Forest "before clearance". The goods in the present cases had already been cleared and that, too, much prior to 04.07.2011when the said circular was issued. In fact, the goods had



been seized in September/October 2010, whereas the circular was issued much later on 04.07.2012. Therefore, the said circular would not apply to the facts of the present case, the goods having been cleared much prior to the issuance of the circular.

**7.** Consequently, we direct that the goods in question be returned to the petitioners unconditionally. Of course it is open to the respondent to issue show cause notices to the petitioners and to proceed in accordance with law.

**8.** The writ petitions are allowed to the aforesaid extent.

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**ILR (2013) IV DELHI 2944**
**W.P. (C)**

**DR. RABINDRA NATH TRIPATHY ….PETITIONER**

**VERSUS**

**UNION OF INDIA & ORS. ….RESPONDENTS**

**(S. RAVINDRA BHAT & SUDERSHAN KUMAR MISRA, JJ.)**

**W.P. (C) NO. : 1076/1998 DATE OF DECISION: 11.02.2013**

**Constitution of India, 1950—Article 226—227—Writ Petition—Service Law—Promotion—Seniority-cum-fitness—Annual Confidential Report—Central Police Organization (CPO)—Central Reserve Police Force (CRPF)—Petitioner joined CRPF in 1971 as Jr. Medical Officer—General Duty Officer (Grade-II)-denied promotion to Grade-I-preferred writ petition to J&K High Court—Allowed W.P.—directed promotion and pay scale *w.e.f* the date his juniors promoted 20.03.1987—The Central Government directed restructuring the medical cadre of CPO in pursuance to Tikku Committee Report—The Central Government intended to grant**

**benefit of pay scale admissible otherwise to CMO on the basis of seniority-cum-fitness without linkage to vacancies—eligibility criteria prescribed for the promotion medical officer with 6 years regular service as SMO—10 years total service including atleast 2 years service as SMO—The petitioner claimed promotion or being treated as CMO and being entitled to benefit of pay scale applicable to the post denied promotion by DPC considered the cases of eligible candidate w.e.f. 01.12.1991 ground—ACRs contained 'average' grading on that day petitioner contended denial of promotion and promotion to junior to him in the cadre of SMO—arbitrary benefit claimed not regular promotion under the recruitment rule but benefit from stagnation relied upon the instruction of 1994—promotion not linked to the vacancies beneficial intention of the policy maker rendered ineffective wrongly interpreted the condition upon minimum number of ACR being 'Good'—Respondent Contested—Contended—Though the adverse remark unfit for promotion from 1.4.1987 to 31.03.1988 expunged on the representation but grading found below benchmark—Court observed on petitioner's representation-expunction of adverse remark *'not fit to be retained in the service and also not fit for promotion'* for the concerned year-accepted on 15.01.1991 effect of the same in the opinion of concerned authority not fit for promotion to be expunged—no doubt overall ACR for that year 'not good'- yet it cannot be said that for earning stagnation benefit his average grading could justify denial of that benefit as on 01.12.1991 when juniors to him extended the benefit of CMO post—Held—Denial of CMO grade to Petitioner in terms of 06.07.1994 letter cannot be understood to have ruled a broad proposition that average grading in ACRs would entitle all personnel whenever seniority-cum-fitness-prescribed as guiding principle-depend on several factors-nature of post-**



**clarity of rules-zone of consideration etc.-directed-grant him benefit w.e.f. 1.12.1991—Further directed-to consider the claim of promotion on the basis of letter 6.7.1994-pay pension and consequential increase in terminal benefit shall be fixed afresh-writ petition partly allowed.**

The basic document, i.e. the letter of 6-7-1994, no doubt talks of "promotion" to the position of CMO; yet Para 3 makes it clear that it is not based on or linked with availability of vacancies. The overall intention of the policy makers was apparently to relieve stagnation amongst officers. The eligibility prescribed appears to be that even Medical Officers with 10 years service (of which at least 2 years have to be as SMOs) can be considered; or else, SMOs with 6 years' service can be considered. The petitioner had 20 years' service; 16 of those were as GDMO-Gr-II and 4 years, as SMO. He was clearly eligible. Significantly, the respondents do not urge that the Recruitment Rules required that the candidate should possess five "Good" gradings, or even that the post of CMO is a Selection post, or that promotions are based on merit. In any case, the present case pertains to grant of promotion on the basis of minimum eligibility. The letter of 6-7-1994 itself is silent about the criterion to be adopted by the authorities. They however, urge that some of the principles prescribed in a memorandum issued by the DOPT dated 10-04-1989 apply to the facts of the present case. **(Para 8)**

In the present case, the petitioner's representation for expunction of the adverse remark for the concerned year, especially the remark *"You are not fit to be retained in service and also not fit for promotion"* was accepted on 15-1-1991. The effect of this was that the concerned authority's opinion that he was not fit for promotion, stood expunged. No doubt his overall ACR for that year was not "Good". Yet, it cannot be said that for earning what clearly was a stagnation benefit, and not a regular line, vacancy based promotion (for which possibly the competent authority had

prescribed a higher standard)- as the "promotion" benefit conferred by the letter dated 6-7-1994 undeniably was- his "Average" grading could have been a barrier, justifying denial of that benefit as on 1-12-1991, when officials junior to him were extended the benefit of CMO's post. This Court, even while holding that the denial of the CMO grade to the petitioner in terms of the 6-7-1994 letter, cannot be understood to have ruled a broad proposition that "Average" gradings in ACRs would entitle all personnel for promotion whenever seniority cum fitness is prescribed as the guiding principle. Much would depend on several factors, such as nature of the post, the clarity of the rules, whether promotion to the post also requires consideration from among a specific zone of consideration, etc. All that the court finds in this case, based on an appreciation of circumstances, is that denial of the benefit of "promotion" to the petitioner as on 1-12-1991, was unjustified. The respondents are directed to grant him the said benefit w.e.f 1-12-1991. The respondents are also directed to consider the Petitioner's claim for further promotion or benefit of any higher scale based on the letter dated 6-7-1994, or any other guideline or recruitment rule, as if he had been granted the grade of CMO with effect from 1-12-1991. The petitioner's pay, pension and consequential increase in terminal benefits, (if any) shall be fixed afresh, in the light of the above discussion, within four weeks. Arrears if any shall be given to the petitioner within eight weeks from today. His case for any further promotion too, shall be considered and decision communicated to him, within six weeks from today.

**(Para 11)**

**Important Issue Involved:** (a) It cannot be broad proposition that 'average' grading in ACR would entitle to all personnel promotion wherever seniority-cum-fitness is criteria (b) The guiding principle for promotion would depend on nature of post, clarity of recruitment rules and specific zones of consideration etc.



**[Gu Si]**

**APPEARANCES:**

**FOR THE PETITIONER** : Sh. Shekhar Kumar, Advocate.

**FOR THE RESPONDENT** : Ms. Barkha Babbar, Advocate.

**CASES REFERRED TO:**

1. *Haryana State Warehousing Corporation* vs. *Jagat Ram* 2011 (3) SCC 422.
2. *Union of India* vs. *Amit Shankar & Ors.* 2011 (IX) AD (Del) 752.
3. *Bhagwandas Tiwari and Ors.* vs. *Dewas Shajapur Kshetriya Gramin Bank and Ors.* AIR 2007 SC 994.
4. *Union of India* vs. *Lt. General Rajendra Singh Kadyan* 2000 (6) SCC 698.
5. *State of Mysore and Anr.* vs. *Syed Mahmood and Ors.* AIR 1968 SC 1113.

**RESULT:** Writ Petition partly allowed.

**S. RAVINDRA BHAT, J. (OPEN COURT)**

**1.** The writ petition seeks a directions to set aside the orders dated 27.07.1995 and 15.07.1997 of the respondents, whereby the demand for grant of (the then existing) pay-scale of Rs.3700-5000/- per month applicable to the post of Chief Medical Officer (CMO), was denied to the petitioner, by the respondents.

**2.** The brief facts are that the Petitioner joined the services of Central Reserve Police Force (CRPF) in 1971, as a Junior Medical Officer (then known as General Duty Officer Grade-II (GDO Gr-II). Promotion from that post is to the post and rank of General Duty Officer Grade-I (GDO Gr-I). The petitioner was previously aggrieved by the fact that his juniors were granted promotion while he was passed-over and denied that benefit. He then approached the Jammu and Kashmir High Court, which allowed his claim and directed that the promotion and pay-scale be permitted to him with effect from the date his juniors were so promoted, i.e. 20.03.1987. In this background, the Central Government (Ministry of Home Affairs), by letter dated 06.07.1994, directed

restructuring of Medical Cadre of Central Police Organizations (CPOs), pursuant to the recommendations of the Tikku Committee. Para 3 of that letter, which is relevant for the controversy in question in the present case, reads as follows:

> "3. From 1.12.91 MO Gr.I (SMO) in the scale of Rs.3000-4500 shall be considered for promotion as Chief Medical Officer (CMO) in the scale of Rs.3700-5000 on the basis of seniority-cum-fitness without linkage to vacancies. Medical Officer with 6 years of regular service as Senior Medical Officer or 10 years of total regular service including at least 2 years as SMO shall be eligible for promotion.
>
> 4. The strength of selection Gr. (Rs. 4500-5700) shall be 15% of the total number of Senior duty posts and CMO with 2 years of service will be eligible for appointment in this grade against available vacancies. This would be effective from 1-4-88."

**3.** It is evident that the intention of the Central Government was to grant the benefit of pay-scale admissible otherwise to the CMOs, to those who were deemed eligible on the basis of Para 3; on the basis of seniority-cum-fitness without linkage to vacancies. The eligibility prescribed for these was that a Medical Officer with 6 years of regular service as Senior Medical Officer or 10 years of total regular service, including at least 2 years, as Senior Medical Officer was eligible for promotion. The petitioner's claim for promotion or being treated as CMO and, therefore, being entitled to the benefit of pay-scales applicable to that post were, however, denied by the Departmental Promotion Committee (DPC), which considered the cases of eligible candidates, with effect from 01.12.1991. The ground on which this was done by the respondents, was that his Annual Confidential Report (ACR) contained "Average" grading, as on that date. However, with effect from 1-4-1993, he was cleared for grant of the benefit of pay-scale as CMO. Aggrieved, he made several representations to the respondents; these were rejected. Consequently, he has approached this court.

**4.** Mr. Shekhar Kumar, learned counsel for the petitioner, argues that the denial of promotion to the petitioner on the one hand, and its grant to those junior to him, in the cadre of SMO is arbitrary. He submits that the benefit claimed is not regular promotion under the recruitment rules, but the benefit of relief from stagnation. To support this submission,



he relies on Para 3 of the letter dated 6-7-1994, which states that promotion is not linked to vacancies. Learned counsel argues that the beneficial intention of the policy makers to grant relief to officers whose careers were stagnating was rendered ineffective by the respondents, who interpreted the promotion conditional upon the incumbent possessing a minimum number of ACRs that were "Good". It was contended that the question of judging merit, or even comparative merit of candidates and officials, would justifiably arise when promotion is based on assessment of relative merit and performance. However, here the guidelines prescribe the guiding principle to be, "seniority cum fitness", which meant that seniority was the guiding principle, and the officer could be rejected only if he was unfit. Learned counsel relied on the decisions of the Supreme Court reported as **Union of India v Lt. General Rajendra Singh Kadyan** 2000 (6) SCC 698, especially the following observations:

> "Selection implies the right of rejection depending upon the criteria prescribed. Selection for promotion is based on different criteria depending upon the nature of the post and requirements of the service. Such criteria fall into three categories, namely,
>
> 1. Seniority cum fitness,
>
> 2. Seniority cum merit,
>
> 3. Merit cum suitability with due regard to seniority.
>
> 12. Wherever fitness is stipulated as the basis of selection, it is regarded as a non-selection post to be filled on the basis of seniority subject to rejection of the unfit. Fitness means fitness in all respects. "Seniority cum merit" postulates the requirement of certain minimum merit or satisfying a benchmark previously fixed. Subject to fulfilling this requirement the promotion is based on seniority. There is no requirement of assessment of comparative merit both in the case of seniority cum fitness and seniority cum merit. Merit cum suitability with due regard to seniority as prescribed in the case of promotion to All India Services necessarily involves assessment of comparative merit of all eligible candidates, and selecting the best out of them."

Learned counsel also relied on a Division Bench ruling of this Court, reported as **Union of India v Amit Shankar & Ors.** 2011 (IX) AD (Del) 752, in support of the proposition that the seniority cum fitness

criteria always means seniority is the guiding principle, subject to the candidate not being unfit (to hold the post).

**5.** According to Ms. Barkha Babbar for the Respondents, the petitioner's claim for promotion in terms of the 6-7-1994 memorandum was considered for 1-12-1991 but he did not fulfil the eligibility criteria, i.e seniority cum fitness (the non-selection method), as he did not possess "Good" grading in the ACR for a part of the relevant period. The petitioner had represented against that grading; the appeal was accepted in part; however his ACR could not be treated as "Good" and was "Average", which was below the bench mark prescribed by the Departmental Promotion Committee (DPC). It was submitted that even though the adverse remark "unfit for promotion" for the period 1-4-1987 to 31-3-1988 had been expunged after consideration of the petitioner's representation, yet his grading for that year was below the bench mark required for the five years in question, i.e Good. As a result, the respondents acted within their rights in considering his case for the post, w.e.f 1-4-1993 and not 1-12-1991. The respondents rely on a memorandum of 10-4-1989, issued by the Department of Personnel and Training (DOPT), especially para 2.1.4 thereof.

**6.** At the threshold, it would be essential to extract some of the conditions spelt out in the DOPT memorandum of 10-4-1989. They are as follows:

> "2.1.4. Government also desires to clear the misconception about "Average" performance. While "Average" may not be taken as adverse remark in respect of an officer, at the same time, it cannot be regarded as complimentary to the officer, as "Average" performance should be regarded as routine and undistinguished. It is only performance that is above average and performance that is really noteworthy which should entitle an officer to recognition and suitable rewards in the matter of promotion.
>
> ..... ..... .....
>
> 2.2.2 In the case of each officer, an overall grading should be given. The grading shall be one among (i) Outstanding (ii) Very Good (iii) Good (iv) Average (v) Unfit.
>
> ..... ..... .....



> 2.2.3. Before making the overall grading after considering the CRs for the relevant years, the DPC should take into account whether the officer has been awarded any major or minor penalty or whether any displeasure of any superior officer or authority has been conveyed to him as reflected in the ACRs. The DPC should also have regard to the remarks against the column on integrity.
>
> ..... ..... .....
>
> 3. NON SELECTION METHOD:
>
> Where the promotions are to be made on "non-Selection" basis according to Recruitment Rules, the DPC need not make a comparative assessment of the records of officers and it should categorise the officers as 'fit' or 'not yet fit' for promotion on the basis of the assessment of their record of service. While considering an officer 'fit' guidelines in para 2.1.4 should be borne in mind. The Officers categorized as 'fit' should be place in the panel in the order of their seniority in the grade from which promotions are to be made."

**7.** In this case, for the relevant period, i.e 1987-88, the petitioner had been communicated with an adverse remark. His represented successfully, and the remark that he was unfit for promotion, was expunged. The issue therefore is whether in such circumstances, the DPC could have yet insisted that he did not possess the minimum benchmark.

**8.** The basic document, i.e. the letter of 6-7-1994, no doubt talks of "promotion" to the position of CMO; yet Para 3 makes it clear that it is not based on or linked with availability of vacancies. The overall intention of the policy makers was apparently to relieve stagnation amongst officers. The eligibility prescribed appears to be that even Medical Officers with 10 years service (of which at least 2 years have to be as SMOs) can be considered; or else, SMOs with 6 years' service can be considered. The petitioner had 20 years' service; 16 of those were as GDMO-Gr-II and 4 years, as SMO. He was clearly eligible. Significantly, the respondents do not urge that the Recruitment Rules required that the candidate should possess five "Good" gradings, or even that the post of CMO is a Selection post, or that promotions are based on merit. In any case, the present

case pertains to grant of promotion on the basis of minimum eligibility. The letter of 6-7-1994 itself is silent about the criterion to be adopted by the authorities. They however, urge that some of the principles prescribed in a memorandum issued by the DOPT dated 10-04-1989 apply to the facts of the present case.

**9.** A close analysis of the said Memorandum of 10-4-1989 reveals that while Para 2.1.4 no doubt says that an "Average" grading is uncomplimentary and that ""Average" performance should be regarded as routine and undistinguished" and further that performance which is "noteworthy" which has to be taken into account, it does not altogether forbid consideration of those who secure "Average" grading. This is for the simple reason that Para 2.2.2 says that there are five possible gradings; the last two being "Average" and "Unfit". Para 3 provides that while filling non-Selection posts, "the DPC need not make a comparative assessment of the records of officers and it should categorise the officers as 'fit' or 'not yet fit' for promotion on the basis of the assessment of their record of service. While considering an officer 'fit' guidelines in para 2.1.4 should be borne in mind."

**10.** Apart from **Kadyan's** case (supra), the Supreme Court had occasion to deal with the content of what constitutes "seniority cum fitness" in several decisions. In **State of Mysore and Anr. v. Syed Mahmood and Ors.** AIR 1968 SC 1113, it ruled that in such cases a senior can be overlooked only when he is found unfit for the higher post. In other words, the criterion means that seniority of the official becomes a decisive factor, subject to fitness of the candidate to discharge the duties of the post. Similar observations were made in **Haryana State Warehousing Corporation v Jagat Ram** 2011 (3) SCC 422 and **Bhagwandas Tiwari and Ors. v. Dewas Shajapur Kshetriya Gramin Bank and Ors.** AIR 2007 SC 994. This Court's decision in **Amit Shankar's** case (supra) is clear that where promotion is based on the seniority cum fitness criteria, *"....the promotion is to be made on the basis of seniority and only an "unfit" peron is to be excluded."*

**11.** In the present case, the petitioner's representation for expunction of the adverse remark for the concerned year, especially the remark *"You are not fit to be retained in service and also not fit for promotion"* was accepted on 15-1-1991. The effect of this was that the concerned authority's opinion that he was not fit for promotion, stood expunged.



No doubt his overall ACR for that year was not "Good". Yet, it cannot be said that for earning what clearly was a stagnation benefit, and not a regular line, vacancy based promotion (for which possibly the competent authority had prescribed a higher standard)- as the "promotion" benefit conferred by the letter dated 6-7-1994 undeniably was- his "Average" grading could have been a barrier, justifying denial of that benefit as on 1-12-1991, when officials junior to him were extended the benefit of CMO's post. This Court, even while holding that the denial of the CMO grade to the petitioner in terms of the 6-7-1994 letter, cannot be understood to have ruled a broad proposition that "Average" gradings in ACRs would entitle all personnel for promotion whenever seniority cum fitness is prescribed as the guiding principle. Much would depend on several factors, such as nature of the post, the clarity of the rules, whether promotion to the post also requires consideration from among a specific zone of consideration, etc. All that the court finds in this case, based on an appreciation of circumstances, is that denial of the benefit of "promotion" to the petitioner as on 1-12-1991, was unjustified. The respondents are directed to grant him the said benefit w.e.f 1-12-1991. The respondents are also directed to consider the Petitioner's claim for further promotion or benefit of any higher scale based on the letter dated 6-7-1994, or any other guideline or recruitment rule, as if he had been granted the grade of CMO with effect from 1-12-1991. The petitioner's pay, pension and consequential increase in terminal benefits, (if any) shall be fixed afresh, in the light of the above discussion, within four weeks. Arrears if any shall be given to the petitioner within eight weeks from today. His case for any further promotion too, shall be considered and decision communicated to him, within six weeks from today.

**12.** In the light of the above discussion, the writ Petition has to, and is accordingly allowed in the light of the above directions. There shall be no order as to costs.

**ILR (2013) IV DELHI 2955**
**W.P. (C)**

**BEG RAJ INDORIA ….APPELLANT**

**VERSUS**

**UNION OF INDIA & ORS. ….RESPONDENTS**

**(S. RAVINDRA BHAT & SUDERSHAN KUMAR MISRA, JJ.)**

**W.P. (C) NO. : 327/2013 DATE OF DECISION: 14.02.2013**

**Constitution of India, 1950—Article 226—227—Writ Petition—Service Law—Promotion—Medical 'Shape' Certificate—Central Police Organization (CPO)—Central Industrial Security Force (CISF)—Petitioner appointed as Sub—Inspector (Fire)—Promoted to Inspector on 28.07.1997 placed at Sl. No. 18 on the seniority list of Inspectors—R2 and R4 placed at Sl. No. 20 and 22—List containing name of Inspectors in the zone of consideration forwarded to Commandant CISF—Vide letter directed a Medical "Shape" Certificate valid as on 01.01.2012 in respect of candidates be forwarded immediately—Assistant Commandant of Petitioner's unit wrote to petitioner on 9.3.2012 to submit the Medical "Shape" Certificate on or before 15.03.2012—Petitioner relieved for medical on 13.03.2012—Medical examination conducted at named hospital before forwarded by Assistant Commandant on 19.03.2012 case of petitioner not considered for promotion other promoted on 11.12.2012—Petitioner preferred writ petition—Contended respondent arbitrarily did not consider his case of promotion and considered juniors in seniority list—Respondent contended circular issued by department that Medical "Shape" Certificate as on 01.01.2012 not before DPC—DPC met nearly 9 months later—Court observed-petitioner made aware of medical examination in March, 2012 his candidature overlooked for want of medical certificate as on 01.01.2012—Held—The rigid adherence to such time frame not mandated in law—undermines the objective for which created—The objective of medical certificate on record to ensure the concerned authority recommending promotion certified that the official fulfills the health parameter-interpretation placed on relevant circular and guideline unjustified directed respondents to consider case of promotion—Writ petition allowed.**



In the present case, the petitioner was made aware of the obligation to get himself medically examined only in March, 2012 and permitted to go to the nearby authorized medical Institution in terms of the Notification dated 1.4.2010. He could get the certificate, but only to be told that in the selection process held nearly nine months later, his candidature was overlooked because the relevant date for the purposes of the medical certificate was as on 1.1.2012. The rigid adherence to such time frames which are otherwise not mandated in law, in fact, in the opinion of the Court, undermines the objective for which they are created in the first instance. The objective of ensuring that a medical certificate is on the record is to ensure that the concerned authority recommending promotion is satisfied that the official fulfills the health parameters. One of the startling results which would ensue is that a candidate found fit as on 1.1.2012 – who is recommended for promotion on the basis of such a certificate -may develop a later serious health condition that may, in fact, disqualify her/him to hold the promotional post, yet irrespective of such intervening circumstances, the promotion committee or the competent authority would be duty bound to ignore that intervening fact and recommend the case for promotion, leading to highly anomalous results. Similarly, it passes one's comprehension if the medical certificate issued on a later date would not pass muster and would be ignored on the rationale that the official was not fit as on the cutoff date (in this case as 1.1.2012). In other words, the objective of imposing the

requirement of placing a medical certificate on record is for the authority to be satisfied that besides other parameters, the official recommended by it for promotion is physically and medically fit to hold it. The interpretation placed upon the relevant Circulars and guidelines, to overlook the petitioner's case for promotion, was unjustified. This Court is satisfied that since the petitioner's Unit Head recommended that he get himself examined medically only in March, 2012 and not on an earlier date, he cannot be faulted and deprived of his legitimate right to be considered. The primary obligation to ensure that these tests are done on an annual basis and periodically is with the Unit Head in terms of the Circular dated 28.1.2009. The petitioner's candidature for promotion to the post of AC (Fire) was, therefore, arbitrarily rejected. **(Para 11)**

**Important Issue Involved:** (a) Rigid adherence to time frame not mandated in law, undermines the objective for which they are created (b) non-consideration the case for promotion for want of medical certificate as on particular date is unreasonable.

**[Gu Si]**

**APPEARANCES:**

**FOR THE APPELLANT** : Mr. J.M. Bari with Ms. Meenakshi Bari, Advocates.

**FOR THE RESPONDENTS** : Mr. Amit Pal Singh, Advocate with Mr. Satyendra Kumar Jha, Assistant Commandant/CISF.

**RESULT:** Writ Petition allowed.

**S. RAVINDRA BHAT (OPEN COURT)**

**1.** In this proceeding, under Article 226 of the Constitution of India, a direction is sought to quash the order dated 11.12.2012 issued by the Assistant Inspector General, CISF (Headquarters) and further direct the respondents to promote the petitioner as Assistant Commandant (Fire)



(hereafter called as AC) in the Central Industrial Security Force (CISF).

**2.** The brief facts are that the petitioner who was appointed as Sub-Inspector (Fire) on 9.11.1991 and confirmed to that post on 13.11.1993. He was later promoted as Inspector (Fire) on 28.7.1997. It is urged that in terms of the updated seniority list of Inspectors (Fire) as on 31.12.2011, the petitioner was placed at Sl. No.18. Others -impleaded as private respondent nos.2 and 4 were placed at Sl. No.20 and 22. The officers at the intervening positions had opted for voluntarily retirement. It is urged that during 2011-12, the petitioner was posted at CISF Unit Anpara Thermal Power Project in U.P. On 24.02.2012, apparently, a list containing names of Inspectors in the zone of consideration, (according to their seniority) was forwarded to all senior Commandants/Commandants. The CISF also, by this letter directed that the medical "SHAPE" certificate valid as on 1.1.2012 in respect of the candidates should be forwarded immediately. In view of this letter, the Assistant Commandant of the Anpara CISF Unit wrote to the petitioner on 9.3.2012 asking him to submit his "SHAPE certificate" on or before 15.3.2012. The petitioner was actually relieved around 13.3.2012 for medical examination; the Chief Medical Officer, CAPF composite hospital at Allahabad was issued a letter requesting that the annual medical examination (SHAPE) in respect of the petitioner be conducted. The medical examination report (SHAPE) 2012 was duly forwarded in original by the Assistant Commandant of the petitioner's Unit on 19.3.2012.

**3.** In these circumstances, on 11.12.2012, an order was issued promoting eight officers. This did not include the petitioner. He had, in the meanwhile, represented to the Director General, CISF stating that in 2010 he was given direction by the competent authorities to carry out annual medical examination at the CAPF composite hospital and also issued a movement to carry out that order at the CAPF composite hospital, Allahabad. However, in 2011, he was not given any such order and, therefore, he resorted to medical examination at some other Unit. It is argued that the respondent's omission to consider the petitioner's candidature, and in proceeding to promote officers junior to him, is arbitrary and unjustified.

**4.** This Court had issued notice on 28.1.2013 and required the respondents to produce the relevant records and also indicate the reasons for rejection of the petitioner's candidature. Today, counsel for the

respondents produced an order dated 11.2.2013 issued by the Deputy Inspector General/Pers, rejecting the petitioner's representation. Beside reciting certain other details – not relevant for the purposes of the present order – this order rejects the petitioner's representation stating as follows:

> "NO.E-31016/31/BRI/PERS.II/2013/273 Dated: 11 Feb. 2013
>
> XXX XXX XXX
>
> 5. AND WHEREAS, the officer had conducted his Annual Medical Examination for the year 2011 from the Project Hospital of ATPP Anpara which was not acceptable in view of instructions issued vide letter dated 01.04.2010. Since SHAPE certificate duly conducted by CAPF/CISF hospital of the Inspector/Fire for the year 2011 was not available, his name was excluded from the eligibility list for the vacancy year 2012 in view of the instructions contained in DoP&T OM dated 14 August 2003."

**5.** Learned counsel argues that the respondents arbitrarily did not consider the petitioner's case for promotion even while proceeding to consider that of others – juniors in the seniority list. It was submitted on the basis of the direction/Circular issued to all Sector IGs and Zonal Heads as well as the Units by the Director General on 28.01.2009 that the controlling officer of the Unit was primarily responsible for getting the AME/Medical Board done in time and the medical examination should be spread throughout the year to facilitate examination of all personnel. Such being the case, the lapse, if any, of the Unit Head in ensuring that the medical certification was done in time, i.e., as on 31.12.2011, cannot adversely affect the petitioner. It was submitted that in the facts and circumstances of the case, he was asked, for the first time, to get the (Annual Medical Examination-hereafter "AME") done pursuant to the existing instructions in a composite hospital and permitted to move there only on 13.3.2012. The certificate of that Institution was duly issued and even forwarded to the concerned authorities. The DPC/competent authority which considered the cases of all eligible officers rejected his case even though the consideration took place in December, 2012. It was submitted that even if the certificate was dated 19.3.2012, the fact remains that the petitioner had been certified as medically fit for the higher post. It was not as if he was unfit as on 1.1.2012.



**6.** Learned counsel submitted that even if the medical certification was that a candidate was fit as on 1.1.2012, the authorities were bound to take into consideration later developments and be satisfied that, as on the date the official joined the duties, or at least when the consideration of his case took place, he was fit. In other words, if there were to be a considerable time lag between the date of the certificate and the date when the cases were taken up for judging suitability, there could be likelihood that a candidate or official who was fit at the earlier point of time might actually not be so later. This, argued the petitioner, would lead to anomalous consequences. Counsel highlighted that the approach and order of the CISF in rejecting his otherwise eligible candidature in the present case was arbitrary and needs to be interfered with. 7. Learned counsel for the respondents relied upon the Circular dated 17.9.1998, which, inter alia, states as follows:

> "September 17, 1998
>
> SUBJECT: Eligibility of officers to be considered for promotion by DPC – Fixing of Crucial Date of
>
> The undersigned is directed to say that where the Recruitment/Service Rules lay down promotion as one of the methods of recruitment, some period of service in the feeder grade is generally prescribed as one of the conditions of eligibility for the purpose of promotion. Vide the Department of Personnel and Training Office Memorandum No.22011/7/86-Estt (D) dated July 19, 1989, the crucial date for determining the eligibility of officers for promotion has been prescribed as under:
>
> (i) 1st July of the year in cases where ACRs are written calendar year-wise. 1st
>
> (ii) October of the year where ACRs are written financial year-wise.
>
> 2. The matter has been reconsidered by the Government and in supersession of the existing instructions it has now been decided that the crucial date for determining eligibility of officers for promotion in case of financial year-based vacancy year would fall on January 1 immediately preceding such vacancy year and in the case of calendar year-based vacancy year, the first day of

the vacancy year, i.e., January 1 itself would be taken as the crucial date irrespective of whether the ACRs are written financial year-wise or calendar year-wise. For the sake of illustration, for the panel year 2000-2001 (financial year), which covers the period from April 1, 2000 to March, 31, 2001, and the panel year 2000 (calendar year), which covers the period from January 1, 2000 to December 31, 2000, the crucial date for the purpose of eligibility of the officer would be January 1, 2000 irrespective of whether ACRs are written financial year-wise or calendar year-wise.

3. The crucial date indicated above is in keeping with para 9 of the Department of Personnel and Training Office Memorandum No.22011/9/98-Estt (D) dated September 8, 1998 which prescribes a Model Calendar for DPCs. In accordance with paragraphs 10 and 11 of the said Office Memorandum, these instructions will come into force in respect of vacancy years commencing from January 1/April 1, 1999 and will, accordingly, be applicable to all such subsequent vacancy years."

4. These instructions shall be applicable to all services/posts. The Recruitment/Service Rules may, therefore, be amended accordingly. All Ministries/Departments are requested to bring these instructions to the notice of all concerned, including Attached/Subordinate Offices, for guidance and compliance."

**8.** Counsel submitted that in matters pertaining to judging suitability on the basis of medical fitness, the Circular/notice of the Director General, CISF dated 1.4.2010 was binding. The effect of this was that the DPC/ competent authority which recommends officials for promotion has to necessarily be presented with the entire material including the Vigilance clearance and the medical fitness certificates as on the first date of the year in which the panel of promotion was to be prepared. This, according to the 1st Circulars, was the of January of the relevant year. In the present circumstances, the panel was to be prepared on the basis of the dossiers and records of all candidates and their eligibility assessed as on 1.1.2012. Since the petitioner could not produce any medical certificate as on 1.1.2012 but produced one of March, 2012 irrespective of whether the consideration took place in the middle or at the end of the year, he was ineligible and could not be considered for promotion. It was submitted



that medical fitness is one of the crucial conditions for promotion in a paramilitary force such as the CISF. Having regard to these factors, the denial by the CISF of the petitioner's case for promotion was neither arbitrary nor justified. The said circular reads as follows:

"Dated:The 01 April, 2010

To,

All Sector IGs including Trg. Sector, NISA Hyderabad
All Zonal/Plant DIGs including Trg. Centres
Director/Medical, CISF Hqrs., New Delhi
All Units headed by Sr. Commandant/Commandant
Dy. Commandant/Assistant Commandant

Subject:- HEALTH CARE SYSTEM IN CENTRAL PARA MILITARY FORCES – INSTRUCTIONS FOR MEDICAL EXAMINATION AND CLASSIFICATION OF PERSONNEL OF CPMFS.

In partial modification of this Directorate letter No.E-32012/2005/ SHAPE/Pers.II/145 dated 28/01/2009 regarding revised instructions issued for Health Care System, it has been decided that Annual Medical Examination of all Inspectors (Exe/Min/Fire/ Steno) of CISF shall be carried out by two doctors at the nearby CISF/CPF Hospitals only and not at PSU Hospitals.

2. In this regard, I am directed to forward the letter of ADG/ Med CPMFs New Delhi, sent vide U.O. No.I-06/ADG (Med)/ CPFs/AME/2010/222 dated 18/3/2010 to this Directorate with copies to all Director/Medical in which directions have been issued for arranging medical examination of Inspectors in CISF on receipt of requires from CISF authorities.

3. This order will be effective with immediate effect."

**8.** The question which this Court has to decide is whether the petitioner was unfairly or arbitrarily overlooked for promotion to the post of AC (Fire). The respondents primarily rely upon two Notifications – dated 17.9.1998 and 1.4.2010. The earlier 1998 Notification issued by the Government states that the crucial date for determining eligibility of officers for promotion in 1st the case of financial year based vacancies

year would be January immediately preceding such vacancy year and in the case of calendar based vacancy year, the first date of the vacancy year, i.e., 1st January itself would be taken as a date *"irrespective of the ACRs which are written financial year wise or calendar year wise"*. This Circular, however, does not deal with the crucial date on which the medical certificate has to be furnished; nor does it postulate that the medical certificates as on the date of the year of the panel relevant for the consideration alone to the exclusion of the other certificates would be taken into consideration. The respondents, submission broadly appears to be that medical fitness being a crucial ingredient in the suitability parameters of an officer of the CISF, the cutoff date indicated to judge eligibility would automatically apply in respect of the certificates issued. The second Notification, i.e., of 1.4.2010 nowhere mentions about the date or dates as on which the medical certificates are to be furnished. It, however, importantly states that AME of all Inspectors of the CISF should be carried out by two Doctors at the nearby CISF/CPF hospitals and not at PSU hospitals. Now, these two, in the opinion of the Court, do not by themselves assist in a proper determination of the dispute. What is important is the DG, CISF's Circular/directions dated 28.1.2009 which specifically deal with the question of healthcare system. The said Circular/directions first cites two earlier instructions of the MHA, Central Government dated 31.7.2007 and 29.10.2008 and thereafter provides for various eventualities. The said Circular reads as follows:

"Dated: 28/01/2009

To,

All Sector IGs including Director NISA Hyderabad
All Zonal/Plant DIGs including Trg Centres
All Units headed by Sr. Commandant/Commandant
Dy. Commdt/Asstt. Commandant

SUB: **HEALTH CARE SYSTEM IN CENTRAL "PARA MILITARY FORCES – INSTRUCTIONS FOR MEDICAL EXAMINATION AND CLASSIFICATION OF PERSONNEL OF CPMFS.**

A copy of instructions for medical examination and classification of personnel of CPMFs received vide MHA UO No.I-45024/3/2004-Pers.II dated 31/07/2007 & 29/10/2008 and UO No.I-45024/1/2008/Pers.II dated 29/10/2008 are forwarded herewith for



information and necessary action.

2. Above instructions issued by MHA will be effective in CISF w.e.f the year 2009. However, keeping in view the immediate medical set up available in CISF the following instructions are issued for strict compliance in addition to MHA's instructions:

i) It will be the responsibility of the Controlling Officer/Unit Incharge to get the AME/Medical Board done in time.

ii) The medical examination can be spread throughout the year to facilitate medical examination of all personnel posted in a Unit in phases. A proper monitoring mechanism to ensure personnel undergo AME at the appointed time will be created at the Unit level.

iii) The medical examination for all NGOs will be conducted by the Medical Officer of the Unit concerned and in case of PSU by Authorized Medical Officer (AMO) of PSU. In case of PSUs, the respective CISF Unit Incharge will ensure that SHAPE medical categorization system is properly followed by PSU AMOs, while conducting medical examination of CISF personnel. In the event of non-availability of MO/AMO, the case should be sent to nearby CISF/CPF Hospital. In case of further clarification, Director (Medical), CISF may be approached.

iv) Annual Medical Examination of all GOs will be conducted by two doctors at the nearby CISF/CPF Hospitals only and not at PSU Hospitals.

v) A copy of Annual Medical (AME) report under SHAPE system will be kept in the personal file of the individual (GOs/NGOs) and year wise entry be made in the Service Book. A copy of AME Report in respect of GOs (Commandant and above) will also be sent to the CISF Directorate (Pers Branch) for record through concerned IGs.

vi) In the case of Gazetted Officers, the DPC for promotion are held under the aegis of UPSC. As per the instructions of DOP&T, only those officers who are found in SHAPE-I category will be considered eligible for promotion.

vii) DG, CISF will have full powers to constitute a Review Medical Board either on justified request/appeal of a Lower Medical Category (LMC) Force personnel or in respect of any personnel of the Force, in case the DG is satisfied that the medical category of the personnel shown in the Annual Medical Examination is contrary to his/her general health during the preceding years.

viii) If there is any deterioration in the medical categorization of an empanelled Officer after the DPC and before his actual promotion, the promotion will be withheld.

ix) Persons on deputation/foreign service etc. should also present themselves for medical examination at the appropriated time for determining their SHAPE-I Medical Category at any CISF/CPMF establishment. Persons on deputation with CPOs including NSG/SPG will get their AME done in thire respective organizations or at any CISF/ CPMF Hospital as per the CISF proforma and guidelines.

In the absence of CISF MO/AMO PSU at a particular station, the medical examination conducted by any other CPMF Hospital is valid."

**9.** It would be apparent from a joint reading of the above Circulars dated 28.1.2009 and 1.4.2010 that whilst the AME of every non-gazetted officer has to be carried out as part of the routine exercise, the primary responsibility of ensuring timeliness in that regard rests with the concerned Unit Head (as is apparent from paragraph 2 (i) of the 2009 Circular). It provides that the "medical examination can be spread throughout the year" to facilitate medical examination of all personnel posted in a Unit in phases. The later Circular/directions of 1.4.2010 only states that the AME certificates of PSUs would not be accepted and the medical examination has to be conducted by two Doctors at the nearby CISF/ CPF hospitals. Facially, therefore, none of the instructions relied upon by the respondents mandate an ironclad rule that medical certificates obtained during the year of the operation of the panel but before the date of consideration, cannot be taken into account. None of the instructions also spell out in inflexible terms that a later medical certificate – which otherwise describes or certifies the fitness of the official and fulfills the



requirement of being issued by the institution mentioned in the 1.4.2010 Circular-cannot entertained at all.

**10.** The respondents relied upon the CISF Assistant Commandant (Fire) Group 'A' Fire Cadre Post Recruitment Rules, 2012. These Rules, framed under Section 22 of the CISF Act, spell out the cadre strength in respect to the post and also mention that it is a selection post. The essential qualifications are prescribed; 95% of the cadre is to be filled by promotion. The rules are silent with regard to the medical fitness eligibility condition or even the date or dates with effect from which they would be considered. However, there can be no gain saying that medical fitness, to hold the post, would be a relevant criterion in a paramilitary force such as the CISF. Nevertheless, the respondents, insistence that the certificate relied upon by the petitioner had to be overlooked, in the opinion of this Court, is not only illogical but arbitrary. While exigencies of service may warrant insistence that all dossiers/documents should be available, yet the fact remains that if in a case such as the present one, the medical certificate is made available on a later date, the non-consideration of the candidate on that ground alone is unreasonable.

**11.** In the present case, the petitioner was made aware of the obligation to get himself medically examined only in March, 2012 and permitted to go to the nearby authorized medical Institution in terms of the Notification dated 1.4.2010. He could get the certificate, but only to be told that in the selection process held nearly nine months later, his candidature was overlooked because the relevant date for the purposes of the medical certificate was as on 1.1.2012. The rigid adherence to such time frames which are otherwise not mandated in law, in fact, in the opinion of the Court, undermines the objective for which they are created in the first instance. The objective of ensuring that a medical certificate is on the record is to ensure that the concerned authority recommending promotion is satisfied that the official fulfills the health parameters. One of the startling results which would ensue is that a candidate found fit as on 1.1.2012 – who is recommended for promotion on the basis of such a certificate -may develop a later serious health condition that may, in fact, disqualify her/him to hold the promotional post, yet irrespective of such intervening circumstances, the promotion committee or the competent authority would be duty bound to ignore that intervening fact and recommend the case for promotion, leading to highly anomalous results. Similarly, it passes one's comprehension if the medical

certificate issued on a later date would not pass muster and would be ignored on the rationale that the official was not fit as on the cutoff date (in this case as 1.1.2012). In other words, the objective of imposing the requirement of placing a medical certificate on record is for the authority to be satisfied that besides other parameters, the official recommended by it for promotion is physically and medically fit to hold it. The interpretation placed upon the relevant Circulars and guidelines, to overlook the petitioner's case for promotion, was unjustified. This Court is satisfied that since the petitioner's Unit Head recommended that he get himself examined medically only in March, 2012 and not on an earlier date, he cannot be faulted and deprived of his legitimate right to be considered. The primary obligation to ensure that these tests are done on an annual basis and periodically is with the Unit Head in terms of the Circular dated 28.1.2009. The petitioner's candidature for promotion to the post of AC (Fire) was, therefore, arbitrarily rejected.

**12.** In view of the above findings, a direction is hereby given to the respondents to consider the petitioner's case for promotion to the post of AC (Fire) in terms similar to what was done in cases of his juniors as on the date of their consideration and if found fit, pass such consequential orders. The entire process shall be completed within four weeks from today. The results thereof shall be communicated to the petitioner directly.

**13.** The Petition is allowed in the above terms. No costs.

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**ILR (2013) IV DELHI 2968**
**W.P. (C)**

**PUSHPA KHATKAR ....PETITIONER**

**VERSUS**

**D.D.A. & ANR. ....RESPONDENTS**

**(REVA KHETRAPAL, J.)**

**W.P. (C) NO. : 5542/2012 DATE OF DECISION: 15.02.2013**

**Administrative Law—Petitioner applied for allotment of flat under IVth Registration Scheme on New Pattern, 1979 mentioning her address at "SB"—Later on, Petitioner intimated to DDA her correspondence address of Haryana—Petitioner was successful in draw of lots held by DDA—However, Demand-cum-Allotment Letter admittedly was sent on old address of Petitioner which was received undelivered—Since no response received from petitioner, allotment was cancelled—petitioner preferred writ petition praying for issuance of a mandamus to DDA to allot her flat in lieu of cancelled one at cost prevailing at time of original allotment—Held—Onus of proving that letter of petitioner informing change of address was not received by it was upon DDA which DDA has miserably failed to prove—petitioner has discharged initial onus placed upon her of proving that she had intimated DDA about her change of address by placing on record a letter showing diary registration number and seal of DDA and onus thereupon shifted to Respondents to prove that no such intimation was received—Petitioner is not custodial of records of DDA and therefore, she cannot be asked to produce same—It is now for Respondents to produce relevant entry in diary register, for which adverse inference is liable to be drawn against respondents in case they fail to produce**

**same— respondents had a duty to search in files of petitioner for any other address for correspondence after receiving report that no such person was residing at earlier address of petitioner—It failed to do so and that too in circumstances when a long time had expired between date of registration of petitioner and date of issuance of demand—cum—Allotment letter—"Wrong Address Policy" of DDA is applicable in case of petitioner and as she had approached DDA within 2 years from date of allotment, she is clearly entitled to allotment of a flat at old cost, prevalent at time when her priority matured and allotment letter was issued, and no interest is liable to be charged — Direction issued to DDA to allot and issue a Demand—cum—Allotment Letter for LIG flat of same size and in same locality as flat which was allotted to Petitioner earlier and preferably of same flat unless it has been allotted to any other person at cost prevailing at relevant time.**

**Important Issue Involved:** Where a registrant has discharged the initial onus placed upon him of proving that he had intimated the DDA about his change of address by placing on record a copy of a letter showing daily register number and seal of DDA, the onus of proving that the said letter was not received by DDA shift upon DDA.

**[Ar Bh]**

**APPEARANCES:**

**FOR THE PETITIONER** : Mr. Ram Kawar, Advocate.

**FOR THE RESPONDENTS** : Mr. Tanmaya Mehta, Advocate for DDA.

**CASES REFERRED TO:**

1. *B.K. Mehta* vs. *DDA,* 145 (2007) DLT 244.
2. *Shri Balkishan Sharma* vs. *D.D.A. and Others,* 2003 (67) DRJ 265.



**RESULT:** Allowed.

**REVA KHETRAPAL, J.**

**1.** Rule. With the consent of the counsel for the parties, the present petition is set down for final hearing and disposal.

**2.** The Petitioner in the present writ petition had applied in the year 1979 for allotment of LIG flat under the IVth Registration Scheme on New Pattern, 1979 and was given LIG/Registration No.34799, vide deposit receipt serial No.102982, dated 9th October, 1979, from Book No.1030. She was assigned priority No.51102 in the Scheme. In the application form, the Petitioner had mentioned her residential address as: "WZ-1408, Rani Bagh, Shakur Basti, Delhi-110034", as is evident from the copy of the deposit receipt dated 9th October, 1979. On 20th January, 1986, the Petitioner on change of her aforesaid address intimated the DDA of her new correspondence address as: "Pushpa Khatkar, C/o J.P. Sheokand, 401/15, Mahaveer Park, Bahadurgarh (Haryana)." A copy of the intimation letter dated 20th January, 1986 bearing No.7787, signed, sealed and acknowledged by the Receipt Clerk of DDA has been annexed along with the present petition as *Annexure P-2*.

**3.** The Petitioner was successful in the draw of lots held by the DDA on 20th March, 2006. Intimation of such allotment was allegedly made to the Petitioner on 20th July, 2006. However, the Demand-cum-Allotment Letter (DAL) dated 20th July, 2006 was admittedly sent on the old address of the Petitioner, as mentioned in the application form, despite intimation by the Petitioner about the change in her correspondence address. The Demand-cum-Allotment Letter (DAL) was therefore received undelivered. Thereafter, according to the Respondents, the DAL was again sent through speed post, but the same was received back undelivered with the remarks "no such person". Since no response was received from the Petitioner, the allotment was cancelled as per terms and conditions of the Demand-cum-Allotment Letter.

**4.** The Petitioner being in the dark about the events leading to the cancellation of her allotment, approached the DDA. Her oral representations were made in person to DDA on 29th August, 2008 and again in October, 2008, 30th April, 2009, 11th June, 2009 and even afterwards, all of which went unheeded. The Petitioner thereupon moved an application under RTI Act dated 29th August, 2008 to know the status of the

allotment of flat to her. The Deputy Director (LIG)-H through letter dated 9th September, 2008 informed the PIO/Director (H)II of DDA, who then apprised the Petitioner by his letter dated 11th September, 2008 that *"in this case against her above Registration, allotment of LIG Flat No.934, Third Floor, Pocket DDA at Lok Nayak Puram was made to her on Cash Down Basis in the Draw held on 23/3/2006. Demand-cum-Allotment Letter was also issued to her in the Block End Dt.20-Jul-2006 at her available address through UTI Bank. DAL received back undelivered from the Bank with the remarks that 'No such co./C.nee at given address'. Thereafter, DAL was again sent through Speed Post but this time also returned undelivered from the Postal Authorities with the remarks that 'No Such Person'. Accordingly, Call letters, Show Cause Notices, but they were also received back undelivered. Allotment stood cancelled as per terms and conditions of the DAL."*

**5.** The Petitioner thereupon moved an appeal dated 22nd September, 2008 under the RTI Act seeking further information from the Commissioner(H) of DDA as to which was the available address on which Demand-cum-Allotment Letter was sent to her, which she followed up with a reminder letter dated 28th November, 2008, and was informed through letter dated 19th December, 2008 that the Demand-cum-Allotment Letter in respect of the flat allotted to her was sent to her at her old address of Rani Bagh, Shakur Basti, Delhi-34. On being so informed, the Petitioner made a representation dated 23rd January, 2009 to the Lieutenant Governor, Delhi. Pursuant to the said representation, the then Deputy Director LIG, Housing of DDA called upon the Petitioner for verification of the genuineness of the original documents through his letter dated 25th May, 2009. The Petitioner personally visited his office on 11th June, 2009 and submitted all the required documents and got the same verified with the originals. The Petitioner was then assured by the office of the Deputy Director LIG, Housing of DDA that a communication with regard to the allotment of LIG flat to the Petitioner would be sent within a period of one month. The Petitioner, however, did not receive any such communication despite a reminder sent by her on 31st August, 2009.

**6.** Ultimately, on 11th September, 2009, the Deputy Director (LIG)-H of the DDA informed the Petitioner with reference to her letter dated 31st August, 2009 that her request for allotment of LIG flat, under Wrong Address Policy, had been put up before the Committee, which had examined the same and taken the view that the case needed to be



checked thoroughly again, particularly the genuineness of the receipt of change in address and that the same was under process; that the final outcome of the same would be intimated to her. Thereupon, the Petitioner informed the Deputy Director (LIG)-H of the DDA, through a letter dated 20th December, 2009, that she had personally visited his office on 11th June, 2009 and got verified all the relevant documents with the originals including the receipt of address change letter and requested to get the matter expedited. The Assistant Director (LIG)-H of the DDA thereafter required the Petitioner to furnish further documentary evidence. The Petitioner also made further applications on 5th October, 2011 and 15th March, 2012 under the RTI Act to know the reasons for which her allotment had been cancelled. When all this went in vain, the Petitioner preferred the present writ petition praying for issuance of a mandamus to the DDA to allot her LIG flat, in lieu of the cancelled one at the cost prevailing at the time of the original allotment on 23rd March, 2006, without payment of interest thereon.

**7.** In the Counter-Affidavit filed on behalf of the DDA, the aforesaid facts have not been disputed and the only contention of the DDA is that the Demand-cum-Allotment Letter dated 20th July, 2006 was sent to the Petitioner at her residential as well as occupational address as mentioned in the application form through UTI Bank, but was received back undelivered. Thereafter, the DAL was again sent through speed post, but the same was received back undelivered with the remarks "No Such Person". The call letters and show cause notices were also returned back undelivered. Since no response was received from the Petitioner nor any amount was deposited in terms of the rules and regulations, the allotment was cancelled as per the terms and conditions of the Demand-cum-Allotment Letter. It is also stated in the Counter-Affidavit that since the 1979 Scheme has already been closed, the Petitioner is not entitled for any allotment, but is rather entitled for refund of registration money subject to furnishing of original documents.

**8.** As regards the reliance placed by the Petitioner upon a letter of 20th January, 1986 purporting to inform the DDA of the change of address and the case of the Petitioner being put up before the Committee for consideration under the Wrong Address Policy, it is submitted in the Counter-Affidavit that the diary register for the year 1986 is not traceable in the records of DDA and hence the said averment of the Petitioner is denied and the Petitioner is put to strict proof thereof.

**9.** It is submitted by the DDA that the Committee was of the view that the case needed to be checked thoroughly, particularly the genuineness of the receipt of change in address relied upon by the Petitioner. The records were checked and the diary register of the year 1986 was not found traceable in the concerned branch. In the absence of the diary register for the year 1986 being traceable, the Respondent could not confirm receipt of the letter dated 20th January, 1986.

**10.** So far as the claim of the Petitioner for allotment of a flat at the old cost is concerned, it is submitted that even assuming without conceding that the Petitioner is entitled for allotment, the allotment be made at the cost as per applicable policy. It is however not denied that under the Wrong Address Policy and Office Order dated 25th February, 2005, where demand letter is sent at the wrong/old address and the allottee approaches the DDA within a period of 4 years from the date of allotment, the flat is allotted at the old cost prevalent at the time when the priority of the allottee matured, without charging of any interest. Where however, the allottee approaches the DDA beyond the period of 4 years from the date of allotment, the allotment is made at the old cost along with simple interest at the rate of 12% per annum with effect from the date of original allotment letter till the date of issuance of fresh demand and allotment letter.

**11.** The Petitioner in the Rejoinder filed by her to the aforesaid Counter-Affidavit has reaffirmed and reiterated the assertions made by her in her petition and submitted that it stands admitted in the Counter-Affidavit that she is entitled to the allotment of LIG flat in lieu of the cancelled one and the lower of the two costs, - as between the cost at the time of the original allotment and the current cost, - ought to be charged.

**12.** I have heard learned counsel for the parties and perused letter dated 20th January, 1986 (*Annexure P-2* to the petition) informing the Respondents about the change in the Petitioner's correspondence address. On the margin of the said letter, there is a stamp of the DDA acknowledging the receipt of the said letter on 30th January, 1986. Clearly, therefore, the Respondent/DDA was at fault in sending the allotment letter at the Petitioner's old address of Rani Bagh, despite having receipt of information regarding change of address. The plea raised in the Counter-Affidavit that the Respondents' diary register for



the year 1986 is not traceable in the Branch and, therefore, the Petitioner is put to strict proof of the communication being relied upon by her, as the Respondent cannot confirm receipt of the letter dated 20th January, 1986 without the diary register for the year 1986, deserves outright rejection. A bare glance at the letter dated 20th January, 1986 shows that it bears the seal of the DDA, which fact has not been denied by the DDA in the Counter-Affidavit filed by it. The onus of proving that the said letter was not received by it was upon the DDA, which the DDA has miserably failed to discharge. The Petitioner has discharged the initial onus placed upon her of proving that she had intimated the DDA about her change of address by placing on record a copy of Annexure P-2 in the writ petition showing the diary register No.7787 and the seal of the Respondent/DDA, and the onus thereupon shifts to the Respondents to prove that no such intimation was received by it. The Petitioner is not the custodian of the records of the DDA and of the diary register of the DDA, and therefore, she cannot be asked to produce the same. It is now for the Respondents to produce the relevant entry in the diary register for the year 1986, for which adverse inference is liable to be drawn against the Respondents in case they fail to produce the same. The plea of the DDA that it has complied with its obligations by sending communications to all available addresses of the Petitioner is also of no avail to the DDA in the absence of proof of non-receipt of Annexure P-2 to the petition.

**13.** The law is well settled on the issue of sending intimation at wrong address due to fault of DDA inspite of correct address being available in the record. Reference in particular may be made in this context to the judgment of this Court rendered in **Shri Balkishan Sharma vs. D.D.A. and Others,** 2003 (67) DRJ 265. The facts in the said case were identical to the facts in the present case. While granting the relief prayed for by the Petitioner, it was observed as follows:-

> "6. ..... I have perused the letter dated 30th January, 1989. On the margin of the said letter, there is a stamp of respondent/DDA acknowledging the receipt of said letter on 24th February, 1989. The respondent/DDA was, thus, at fault in sending the allotment letter at the old address despite having receipt of information regarding change of address."

**14.** In the present case also, as noted above, there is a stamp of the Receipt Clerk of the Respondent/DDA acknowledging the receipt of

the letter of intimation of the new address of the Petitioner for correspondence. The Respondents notwithstanding the same issued the Demand-cum-Allotment Letter at the previous address only and thereafter proceeded to cancel the allotment even after the Demand-cum-Allotment Letter had been returned undelivered at the said address. The Respondents had a duty to search in the files of the Petitioner for any other address for correspondence after receiving the report that no such person was residing at the Delhi address of the Petitioner. It failed to do so and that too in circumstances when a long time had expired between the date of the registration of the Petitioner and the date of the issuance of the Demand-cum-Allotment Letter. As held by this Court in the case of **B.K. Mehta vs. DDA,** 145 (2007) DLT 244, a registrant cannot be expected to remain at the same address when the allotment was made after a long lapse of time, and the DDA has a statutory duty enjoined upon it to act fairly and reasonably and reasonableness mandates taking all adequate steps to ensure communication to the registrant of the allotment.

**15.** Reference may also be made to the policy of the DDA in this regard, which was framed pursuant to the decision of this Court dated 16th December, 2004 rendered in connected writ petitions, including W.P.(C) No.19095/2004. This policy which is contained in Office Order dated 25th February, 2005, and is commonly known as Wrong Address Policy of DDA mandates certain procedure required to be followed by the DDA in such cases as follows:-

> ".....1. In cases, wherein change of address was intimated by the registrant but erroneously not recorded by DDA and thereby demand letters were sent at wrong/old address and the allottee approaches DDA within a period of four years from the date of allotment, he/she shall be allotted flat at the old cost, prevalent at the time when the priority of allottee matured and the allotment letter issued, and no interest will be charged. The allotment will be made at old cost subject to following:
>
> (a) He should approach DDA within a period of four years from the date of issue of demand letter at the wrong address.
>
> (b) He should have proof of having submitted a request for change of address to DDA duly signed by the allottee himself/herself i.e. proof of receipt at DDA counter.



> (c) He should have documentary proof of change of address viz. Ration Card/Election Card/Identity Card/Passport, etc. (duly attested by the Gazetted Officer)."

**16.** Having regard to the facts of the case, I am satisfied that the aforesaid policy of the DDA is applicable in the case of the Petitioner. The admitted position is that no Demand-cum-Allotment Letter was ever served upon the Petitioner, who thus had no information either of the allotment or of the fact that she was required to make any payment to the DDA. It is also the admitted position that the cancellation of the Demand-cum-Allotment Letter was also not communicated to the Petitioner. The Petitioner on coming to know of the cancellation through an RTI application made by her repeatedly approached the DDA, but no efforts were made by the DDA to rectify its mistake and thus the Petitioner was deprived of the use and enjoyment of a flat even though she had succeeded in the draw of lots in the year 2006 itself. The Petitioner approached the DDA in 2008, immediately on being informed on 11th September, 2008 about the cancellation of her allotment. Admittedly, under the Wrong Address Policy contained in Office Order dated 25th February, 2005, where demand letters are sent at the wrong/ old addresses and the allottee approaches the DDA within a period of 4 years from the date of allotment, the flat is allotted at the old cost prevalent at the time when the priority of the allotment matured, without charging of any interest. Even where the allottee approaches the DDA beyond the period of 4 years from the date of the allotment, the allotment under the policy has to be made at the old cost along with simple interest at the rate of 12% per annum from the date of original allotment letter till the issuance of fresh Demand-cum-Allotment Letter.

**17.** In the instant case, as noticed above, the Petitioner had approached the DDA within a period of around 2 years from the date of allotment and is clearly therefore entitled to the allotment of a flat at the old cost, prevalent at the time when her priority matured and the allotment letter was issued, and no interest is liable to be charged. Accordingly, a direction is issued to the DDA to allot and issue a Demand-cum-Allotment Letter for LIG flat of the same size and in the same locality as the flat which was allotted to the Petitioner in the year 2006, and preferably of the same flat unless it has been allotted to any other person. Such allotment shall be made at the cost prevailing at the relevant time, i.e., on 20th July, 2006 and as set out in the Demand-cum-Allotment Letter of

the said date. The said Demand-cum-Allotment Letter shall be issued by the Respondent latest within two months of the receipt of this order. On receipt of the Demand-cum-Allotment Letter, the Petitioner shall make payment of the demanded amount set out in the said letter within one month. The possession of the flat shall thereupon be handed over to the Petitioner immediately upon completion of all formalities by the Petitioner and latest within four weeks thereafter.

**18.** W.P.(C) 5542/2012 is allowed in the above terms.

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**ILR (2013) IV DELHI 2977**
**W.P. (C)**

**MOHINDER KAUR BAJAJ & ORS. ....PETITIONERS**

**VERSUS**

**D.D.A AND ANR. ....RESPONDENTS**

**(REVA KHETRAPAL, J.)**

**W.P. (C) NO. : 2791/2011 DATE OF DECISION: 19.02.2013**

**Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981— Rule 17- DDA cancelled allotment of plot of Petitioner No.1 at Rohini as she had purchased property at Naraina Vihar (NV)— Order challenged before HC— Plea taken, property at NV is a joint family property where her undivided share is only 26 sq. mtrs.—As her share in property at NV was less than 67sq.mtrs., bar against allotment of Nazul land by DDA to her was not applicable— Per contra Plea taken, Petitioner's reliance upon Nazul Rules was misplaced as said Rules came into existence after floating of Rohini Residential scheme, 1981— Property at NV having been purchased in a single name cannot be a jointly owned property— petitioner had filed a false affidavit affirming that neither she nor her husband owned any leasehold or freehold residential flat / plot in Delhi— Held-Nazul Rules would be applicable to all such cases where allotment has been made after Rules have come into force— Petitioner No.1 had no source of income— Property at NV was purchased by joint family— Indubitably undivided share of Petitioner in said property comes to 26 sq. mtrs.— Since land owned by petitioner was less than 67 sq. mtrs., bar against allotment of Nazul land enshrined in rule 17 of Nazul Rules would not apply— A writ of mandamus issued directing Respondents not to dispossess Petitioners of plot in question at Rohini or interfere in any manner whatsoever with enjoyment and possession of said plot presently in possession of petitioners.**

**Important Issue Involved:** Where land owned by a Registrant in Residential Scheme is less than 67 sq. mtrs., bar against allotment of Nazul land enshrined in Rule 17 of the DDA (Disposal of Nazul Land) Rule, 1981 would not apply.

**[Ar Bh]**

**APPEARANCES:**

**FOR THE PETITIONER** : Mr. Satinder G. Gulati, Advocate.

**FOR THE RESPONDENTS** : Ms. Shobhana Takiar, Advocate.

**CASES REFERRED TO:**

1. *Delhi Development Authority* vs. *Jitender Pal Bhardwaj,* (2010) 1 SCC 146.
2. *Delhi Development Authority* vs. *Arjun Lal Satija and Others,* (2007) 13 SCC 603.
3. *P'S. Sairam and Anr.* vs. *P'S. Rama Rao Pissey and Others,* (2004) 11 SCC 320.
4. *M.L. Aggarwal* vs. *Delhi Development Authority* 107 (2003)

DLT 611.

5. *Chandigarh Housing Board and Anr.* vs. *Narinder Kaur Makol,* (2000) 6 SCC 415.

6. *Puran Mal Gupta* vs. *Commissioner (Housing) Delhi Development Authority & Anr.,* 45 (1991) DLT 438.

7. *Mallappa Giri Mallappa Betgeri* vs. *R. Yellappagouda,* AIR 1959 SC 906.

8. *Bhagwati Prasad Sah and Others* vs. *Dulhin Rameshwari Kuer and Anr.,* 1951 SCR 603.

**RESULT:** Allowed.

**REVA KHETRAPAL, J.**

**1.** The present petition seeks to impugn Show Cause Notice dated 17.09.2009 and Final Show Cause Notice dated 04.11.2009, as also cancellation order dated 06.01.2011 and letter dated 25.03.2011 of the Respondent/DDA seeking to take back the physical possession of the Plot No.273, Pocket-III, Block-C, Sector-28, Rohini measuring 60 sq. mtrs. The Petitioners also seek mandamus to the Respondent/DDA not to dispossess and interfere in any manner whatsoever with the peaceful enjoyment and possession of the said plot of land presently in possession of the Petitioners.

**2.** Notice of the petition was issued to the Respondents and upon the Respondents accepting notice, the operation of the impugned notice dated 25.03.2011 was ordered to be kept in abeyance. This interim order was made absolute on December 15, 2012 and thus the dispossession of the Petitioner remains stayed till date.

**3.** Petitioner No.1 is the mother and Petitioner Nos.2 to 4 are the sons of the Petitioner No.1. In 1965, husband of the Petitioner No.1 and father of the other Petitioners, namely, Late Shri R'S. Bajaj took on rent a residential premises at Ramjas Road, Karol Bagh, New Delhi. While the Petitioners' family was living on rent, the DDA advertised Rohini Residential Scheme, 1981. Late Shri R'S. Bajaj was a registrant vide application No.113240 in the said Scheme for a plot measuring 90 sq. mtrs. and paid a sum of Rs. 5,000/- as earnest money vide receipt No.06952 dated 21.02.1981. The Respondent/DDA not having held a draw of lots even after a lapse of 14 years from the registration of Shri R'S. Bajaj, keeping



in view the needs of his expanding family, Shri R'S.Bajaj, who had superannuated from service with the MCD in the year 1995, entered into a sale transaction for the purchase of C-125, Naraina Vihar, New Delhi-28 measuring 125 sq. yards (104 sq. mtrs. approximately) as a joint family property. A registered Agreement to Sell was executed by the erstwhile owner of the said property in favour of the Petitioner No.1 (wife of Shri R'S. Bajaj), on 06.08.2001 and a registered General Power of Attorney was executed in favour of Shri K'S. Bajaj, Petitioner No.4 (one of the sons of Shri R'S. Bajaj). The said property was purchased for a total sale consideration of Rs. 7,08,000/- and the aforesaid payment was made by the family members through cheques, photocopies whereof have been placed on record which show the respective amounts contributed by the family members and the details thereof as follows:-

| ***Name*** | ***Mode of Payment*** | ***Amount (Rs.)*** |
|---|---|---|
| *Late Sh. R'S. Bajaj* | *Cheque* | *50,000/-* |
| *Sh. G'S. Bajaj* | *Cheques (two)* | *75,000/-* + *48,000/-* |
| *Sh. J'S. Bajaj* | *Cheque* | *21,000/-* |
| *Sh. K'S. Bajaj* | *Cheque* | *3,50,000/-* |
| *M/s. Bajaj Grafics (Proprietor Late Mr. R.S. Bajaj)* | *Cheque* | *27,000/-* |
| *M/s. Ripplex (Proprietorship firm of Sh. G'S. Bajaj)* | *Cheque* | *55,000/-* |
| *Smt. Mohinder Kaur Bajaj* | *Cash* | *72,000/-* |

**4.** The Petitioner's case is that all the aforementioned cheques were deposited in her (Petitioner No.1's) Saving Bank Account No'SB-38353, Punjab National Bank, Karol Bagh, New Delhi and the statement of account of her said bank account clearly reflects the encashment of the aforementioned cheques. The Petitioner thus contends that her contribution in the aforesaid property was to the extent of only a sum of Rs. 72,000/-, out of the total sale consideration of Rs. 7,08,000/-. In any event, she being a housewife had no source of income and after the acquisition of the aforesaid property, she filed her return of income under

Section 39(1) of the Income Tax Act, 1962 in Form No.2C for the Assessment Year 2002-03, declaring a gross income of Rs. 5,095.27.

**5.** The Petitioner's further case is that Shri R'S. Bajaj expired on 29.09.2002 and till the date of his death, the DDA did not allot any plot of land to him under the Scheme of 1981. It was on 11.06.2003 that the DDA issued a letter of allotment in the name of Late Shri R'S. Bajaj after a computerized draw held by them and Plot No.273, Pocket No.C-III, Sector-28, Rohini, measuring 60 sq. mtrs., Phase IV, Residential Scheme was allotted to him. The said letter though initially issued in the name of Late Shri R'S. Bajaj, but later on Petitioner No.1 informed the Deputy Director (LAB) regarding the death of Shri R'S. Bajaj and change of her residential address to C-125, Naraina Vihar, New Delhi. Pursuant to the said letter, the Respondent/DDA scrolled the name of Shri R'S. Bajaj on the said allotment letter and issued the same in the name of the Petitioner No.1 – Smt. Mohinder Kaur Bajaj. Petitioner No.1 again vide letter dated 25.11.2003 informed DDA regarding the change of her residential address to C-125, Naraina Vihar, New Delhi. Pursuant to the allotment letter issued to Petitioner No.1, she also paid a sum of Rs. 1,30,230/- vide a pay order to the DDA, vide challan bearing No.10918703 dated 25.11.2003 and an acknowledgment receipt was issued by DDA which has been placed on record. A further sum of Rs. 2,04,336/- was paid by Petitioner No.1 vide challan No.10918803 to DDA in respect of the plot in question and yet another sum of Rs. 61,401/- was paid vide challan No.10918903 to DDA. True copies of all the challans and acknowledgment receipts have been placed on record by the Petitioners.

**6.** By a letter dated 02.08.2004, the Petitioner No.1 was informed by the DDA regarding the mutation of plot in her favour on the basis of the documents submitted by her and other legal heirs, wherein she had been recognised as registrant in place of her deceased husband Shri R'S. Bajaj in the Rohini Residential Scheme. Thereafter, vide letter dated 14.10.2004, Petitioner No.1 was informed that possession of the plot in question would be handed over to her. On 28.10.2004, as evidenced from the endorsement made on the letter dated 14.10.2004, the possession of the plot in question was in fact handed over to the Petitioner No.1. On 10.02.2006, the DDA demanded an additional amount of Rs. 20,658/- as the difference in provisional rate and final rate of the plot in question, which too was paid by the Petitioners vide bank challan No.489505 dated 25.03.2009, acknowledgment of which was duly issued



by the DDA. By a notice dated 17.09.2009, the Respondent No.2 – Deputy Director (LAB), Rohini, however, called upon the Petitioner No.1 to show cause within 15 days from the date of the issue of the said notice, as to why the allotment of the plot in question be not cancelled, since Petitioner No.1 had purchased property No. C-125, Naraina Vihar, New Delhi and the Conveyance Deed thereof was executed on 20.11.2003 in her favour. The Petitioner No.1 replied to the notice dated 17.09.2009 vide her letter dated 1st October, 2009 through her son Gurinder Singh Bajaj, seeking extension of time by one month as she was on a religious tour.

**7.** Subsequently, by her letter dated 03.11.2009, Petitioner No.1 replied to the Show Cause Notice dated 17.09.2009 in detail, wherein she explained that the property at Naraina Vihar is a joint family property and out of the total area of 104 sq. mtrs. (approx.) of the said property, she has an undivided share in the said property only to the extent of 26 sq. mtrs., in view of the fact that the other members of her joint family comprised of her three sons. In her said letter, she also submitted that her share in the said property was far less than the limit prescribed under Rule 17 of Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981, being less than 67 sq. mtrs. and, therefore, the bar against allotment of Nazul land by DDA to her was not applicable. It was further submitted by her that the purchase price against the property at Naraina Vihar was paid by the joint family members since all her sons had been living together with her as a joint family since the purchase of the aforementioned property.

**8.** Notwithstanding the aforesaid reply sent by the Petitioner No.1, the Respondents issued a Final Show Cause Notice dated 04.11.2009, wherein without considering at all the reply submitted by the Petitioner No.1 dated 03.11.2009 (the receipt whereof had been duly acknowledged by the DDA), the respondents instead mentioned the reply dated 01.10.2009 whereunder the Petitioner had sought extension of time for giving reply to the Show Cause Notice dated 17.09.2009.

**9.** In response to the Final Show Cause Notice dated 04.11.2009, the Petitioner No.1 again submitted reply vide letter dated 10.11.2009, informing DDA that a reply letter dated 03.11.2009 had already been sent by her and attaching a copy of the said letter and acknowledgment thereof.

**10.** On 25th March, 2011, the Respondents issued a letter to the Petitioner No.1 requiring her to hand over the possession of the plot in question on 25.04.2011 on the ground that she had concealed the fact of ownership of plot No. C-125, Naraina Vihar in respect of which Conveyance Deed was executed on 20.11.2003 and had obtained allotment of plot No.273, Pocket III, Block C, Sector-23 in the Rohini Residential Scheme by making false statement/misrepresentation. It was asserted in the said letter that the allotment of the aforesaid plot had been cancelled by the Competent Authority on 06.01.2011 under the terms and conditions of allotment of the Rohini Residential Scheme. However, according to the Petitioners, till date no cancellation letter dated 06.01.2011 has been received by the Petitioners.

**11.** The grievance of the Petitioners is that the DDA without considering the facts explained by the Petitioner No.1 in her letter dated 03.11.2009 and by blatant misuse of power issued a Final Show Cause Notice without following the proper procedure required for issuance of the same and, therefore, the cancellation order passed by DDA is per se illegal. The Petitioner No.1 claims that she herself had informed the Respondent/DDA in regard to her change of address to C-125, Naraina Vihar, New Delhi and explained to the DDA that it was a joint family property and that she (Petitioner No.1) had only 1/4th share in the same after the death of her husband Shri R'S. Bajaj, being an undivided share of only 26 sq. mtrs., which is far less than the limit of 67 sq. mtrs. prescribed by Rule 17 of the DDA (Disposal of Developed Nazul Land) Rules, 1981.

**12.** In the counter-affidavit filed by the Respondent/DDA, the facts as set out hereinabove have not been controverted, but reliance has been placed by the DDA on the terms and conditions of the allotment, and in particular on Clause 1(ii) of the Scheme, which reads as under:-

> **"1. Eligibility:**
>
> (ii) The individual or his wife/her husband or any of his minor children do not own in full or in part on lease-hold or free-hold basis any residential plot of land or a house or have not been allotted on hire-purchase basis a residential flat in Delhi/New Delhi or Delhi Cantonment. If, however, individual share of the applicant in the jointly owned plot or land under the residential house is less than 65 sq. mtrs., an application for allotment of plot can be entertained. Persons who own a house or a plot allotted by the Delhi Development Authority on an area of even less than 65 sq. mtrs. shall not, however, be eligible for allotment."



**13.** It is submitted by the Respondent that at the time of allotment of the plot in Rohini, the Petitioner No.1 owned a residential plot on freehold basis bearing No. C-125, measuring 104 sq. mtrs., in Naraina Vihar, New Delhi. As such, with the approval of the Competent Authority, the allotment of the plot in Rohini had been cancelled on 06.01.2011 and the said cancellation was conveyed to the Petitioners vide letter dated 25th March, 2011. It is further submitted that the Petitioners' reliance upon the Nazul Rules was misplaced as the said Rules came into existence after the floating of the Rohini Residential Scheme, 1981. And also, the property having been purchased in a single name cannot be said to be a jointly owned property. The Petitioner had filed a false affidavit affirming that neither she nor her husband owned any leasehold or freehold residential flat/plot in Delhi.

**14.** Rebutting the contention of the Respondent/DDA that since the Nazul Rules came into existence after the floating of the Rohini Residential Scheme, 1981 the said Rules are of no assistance to the Petitioner, learned counsel for the Petitioner contended that the case of the Petitioner cannot be rejected on the ground that the Nazul Rules would not be applicable. He submitted that the matter was no longer res integra. A learned Single Judge of this Court (Hon'ble Mr. Justice Sanjay Kishan Kaul) in a decision reported in 107 (2003) DLT 611, **M.L. Aggarwal vs. Delhi Development Authority** had opined that the Nazul Rules would be applicable to all such cases where the allotment has been made after the Rules have come into force. In such a situation, it cannot be said that the Petitioner gave a false affidavit or gave a wrong declaration, the allotment in favour of the first Petitioner being less than 67 sq. mtrs., which was not a disqualification for the Petitioners to get the allotment of the plot in question from the DDA. Reference was made by him to the following observations made in the said judgments:-

> "17. In my considered view, the prospective application of the Nazul Rules cannot imply that the same would not be applicable to the present case in view of the fact that the rules did not exist when the scheme was propounded since they came into force about six months later. **The Nazul Rules are statutory and the**

**relevant date is the date of allotment**. Thus, the Nazul Rules would be applicable even in the present case.

18. Rule 17 itself prescribes as to the circumstances under which the disqualification has to take place. The proviso uses the expression "both owned" or "allotted". **Thus, in case the land owned or allotted is less than 67 sq. mtrs., the disqualification is not to apply. The allotment made in favour of the wife of the petitioner is admittedly much less than this, being about 32 sq. mtrs..."**

**15.** It may be mentioned at this juncture that the aforesaid decision was unsuccessfully challenged before the Division Bench which rejected the said challenge and an appeal to the Supreme Court, being Civil Appeal No.4362 of 2007 titled **"Delhi Development Authority vs. M.L. Aggarwal"** met with the same fate. The Supreme Court upheld the finding of the High Court that the allotment would be covered by Rule 17 of the Nazul Rules as on the date of draw of lots the aforesaid Rules had become operative.

**16.** Reference was next made by Petitioners' counsel to the decision of the Hon'ble Supreme Court in **Delhi Development Authority vs. Jitender Pal Bhardwaj,** (2010) 1 SCC 146. In the said case, the Supreme Court affirming the judgment of this Court and dismissing the Special Leave Petition filed by DDA, made the following apposite observations:

"9. Though the intention of Development Authorities in general is to allot plots to the houseless, the policy and scheme has to be given effect with reference to the specific wording of the eligibility provision. If DDA wanted to bar everyone owning a plot/house/flat from securing an allotment, it could have made its intention clear by simply providing that "anyone owning or holding a long-term lease, any plot/house/flat in Delhi/New Delhi/Delhi Cantonment area, will be ineligible for allotment under this Scheme". But DDA chose to make the eligibility clause subject to an exemption. If it chose to exempt certain categories, such exemption has to be given effect to. When the term of exemption is specific and unambiguous, it is not possible to restrict its applicability or read into it, a meaning other than the plain and normal meaning, on the assumption that the general object of the Scheme was different from what is spelt out in the term....."



**17.** Learned counsel next contended that it is trite that so far as immovable property alleged to be owned by the joint family is concerned, in case the same stands in the name of an individual member, there would be a presumption that the same belongs to the joint family, provided it is proved that the joint family had sufficient nucleus at the time of its acquisition. It was so held by the Supreme Court in **P'S. Sairam and Anr. vs. P'S. Rama Rao Pissey and Others,** (2004) 11 SCC 320; and the aforesaid legal position is now well settled. He also contended that the legal position with regard to burden of proof in the context of separation in a joint family is equally well settled. The Supreme Court as far back as in the year 1951 had held in the case of **Bhagwati Prasad Sah and Others vs. Dulhin Rameshwari Kuer and Anr.,** 1951 SCR 603 that:

".....The general principle undoubtedly is that a Hindu family is presumed to be joint unless the contrary is proved, but where it is admitted that one of the coparceners did separate himself from the other members of the joint family ....., there is no presumption that the rest of the coparceners continued to be joint."

**18.** Learned counsel for the Petitioner also relied upon the judgment rendered by this Court in the case of **Puran Mal Gupta vs. Commissioner (Housing) Delhi Development Authority & Anr.,** 45 (1991) DLT 438. In the said case, while setting aside the cancellation of the allotment made by the Respondent in favour of the Petitioner, a learned Single Judge of this Court relied upon an earlier decision rendered by the Division Bench in **D.M. Samanatra vs. DDA, Civil Writ No.1424/88** decided on December 16, 1988, wherein it was observed:

".....No doubt, the petitioner is the independent owner of that portion, but the land or the plot on which the said building was constructed cannot be said to be independently owned by him. He was the joint owner so far as the land or plot under the said residential house. The petitioner, in our view, squarely falls in the eligibility clause (c) referred to above."

**19.** Reliance was also placed upon the case of **Mallappa Giri Mallappa Betgeri vs. R. Yellappagouda,** AIR 1959 SC 906, wherein the Supreme Court held that where the Appellant, a Manager of the joint family, acquired certain properties in his own name for a consideration and there was sufficient nucleus of joint family properties out of which

the said property might have been acquired and the Appellant had no source of income, a presumption arose that the properties were the properties of the joint family and unless the said presumption was rebutted, it must prevail.

**20.** In the instant case, there is no denying the fact that the Petitioner No.1 had no source of income. It is also stands established from the record that the property bearing No. C-125, Naraina Vihar, New Delhi was purchased by the joint family for a total sale consideration of Rs. 7,08,000/-, out of which the Petitioner No.1 contributed only a sum of Rs. 72,000/- and the remaining amount was contributed by the other members of the joint family, namely, her three sons. All the aforesaid payments were made by the family members through cheques deposited in the Saving Bank Account of the Petitioner, and the Bank Account Statement of the Petitioner placed on record clearly reflects the encashment of the 7 cheques totalling Rs. 7,08,000/-, including the cheque of the Petitioner of Rs. 72,000/-. Thus, indubitably the undivided share of the Petitioner comes to 1/4th in the said property, i.e., 26 sq. mtrs. only in the property at C-125, Naraina Vihar. Since the land owned by the Petitioner was less than 67 sq. mtrs., therefore, the bar against allotment of Nazul land enshrined in Rule 17 of the Nazul Rules would not apply.

**21.** A look now at Rule 17 of Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981, which reads as follows:

> **"General restriction to allotment for residential purposes** - Notwithstanding anything contained in these rules, no plot of Nazul land shall be allotted for residential purposes, to an individual other than an individual referred to in clause (i) of rule 6, who or whose wife or husband or any of his or her dependent children, whether minor or not, or any of his or her dependent parents or dependent minor brothers or sisters, ordinarily residing with such individual, own in full or in part, on lease-hold or free-hold basis, any residential land or, house or who has been allotted on hire-purchase basis any residential land or house in the Union territory of Delhi:-
>
> PROVIDED that where, on the date of allotment of Nazul land,
>
> (a) the other land owned by or allotted to such individual is less than 67 square metres, or
>
> (b) the house owned by such individual is on a plot of land which measures less than 67 square metres, or
>
> (c) the share of such individual in any such other land or house measures less than 67 square metres, he may be allotted a plot of Nazul land in accordance with the provisions of these rules."



**22.** A bare glance at the aforesaid Rule is sufficient to show that the case of the Petitioners falls within the four corners of Proviso (a) to the said Rule. Thus, it cannot be said that the Petitioner filed a false affidavit, since the allotment in her favour was of less than 26 sq. mtrs., which was not a disqualification for the allotment of the plot in question on the date of the allotment. The necessary corollary is that the cancellation of the plot of land allotted to the Petitioner No.1 by the DDA on the ground of concealment and misrepresentation is wholly unwarranted. To be noted, that it was the Petitioner herself who volunteered to disclose about the allotment to the DDA.

**23.** The contention of the DDA that the Nazul Rules would not be applicable has been already dealt with hereinabove and stands negated by this Court in the case of M.L. Aggarwal (Supra) referred to hereinabove. The reliance placed by learned counsel for the Respondent/DDA on the judgment of the Hon'ble Supreme Court in **Chandigarh Housing Board and Anr. vs. Narinder Kaur Makol,** (2000) 6 SCC 415 is also wholly misplaced as the eligibility for allotment by the Chandigarh Housing Board/ Development Authority as set out in its regulations was altogether different. Similarly, the case of **Delhi Development Authority vs. Arjun Lal Satija and Others,** (2007) 13 SCC 603 relied upon by the counsel for the DDA is wholly distinguishable on facts. As noted by the Hon'ble Supreme Court, nowhere was it the stand of the Appellant in the said case that the land in question was Nazul land; therefore, the question of applying Rule 17 did not arise. In the instant case, it is not denied by the Respondent/DDA that the land in question is Nazul land and the only plea taken is that since the Nazul Rules came into existence after the floating of the Rohini Residential Scheme, 1981, the same are not applicable. The aforesaid contention, it is stated at the risk of repetition, has been negated in the case of **M.L. Aggarwal** (supra) both by the learned Single Judge and by the Division Bench, and the view of the High Court has been affirmed by the Supreme Court.

**24.** A writ of mandamus is, therefore, issued directing the Respondents not to dispossess the Petitioners of Plot No.273, Pocket-III, Block-C, Sector-28, Rohini measuring 60 sq. mtrs. or interfere in any manner whatsoever with the enjoyment and possession of the said plot presently in possession of the Petitioners.

**25.** W.P.(C) 2791/2011 stands disposed of.

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**ILR (2013) IV DELHI 2989**
**W.P. (C)**

**MAJOR ARVIND KUMAR SUHAG ....PETITIONER**

**VERSUS**

**UNION OF INDIA AND ORS. ....RESPONDENTS**

**(S. RAVINDRA BHAT & SUDERSHAN KUMAR MISRA, JJ.)**

**W.P. (C) NO. : 4488/2012 DATE OF DECISION: 21.02.2013**

**Constitution of India, 1950—Article 226-227—Writ petition—Service Law-pensionary benefit—death—disability attributable to operation—aggravated case—classification of residual head—petition working in Indian Army-posted at Battalic Sector in June, 1999 during 'Operation Vijay' at Kargil—awarded Operation Vijay Medal—Operation Vijay Star on 23.10.2000—while on duty during operation moving from Battalic to Leh—Jeep met with an accident—sustained injury attributable to military service in operation high altitude area—injury left him with 100% permanent disability—discharged from service on 19.03.2005—given terminal benefit and 100% disability pension in addition to other admissible retrial benefit—Petitioner's claim for grant of war injury pension recommended by unit—Adjutant General twice accept his request—**



**recommended his case—however—after several reminders—rejected—ground did not incur disability during war or war like operation in terms of applicable guideline—circular was on account of accident while on duty—he was given disability pension for it—petitioner filed O.A. before Arm Force Tribunal—rejected—preferred writ petition—relied upon Central Government Ministry of Defence letter no.1(2)/97/I/D (Penc) dated 31.01.2001 for war injury pension—Contended—claim fall in the relevant category of para 4.1—was on his way as per order given by superior in an operation which had been notified by Central Government as 'Operation Rakshak—III' during which armed forces engaged in flushing out the enemy forces after the Kargil War—Contested—Contended—classification of petitioner's injury as accidental could not be found fault with—unlike in the war like situation the petitioner traveling in his jeep—therefore the authority could not be asked to pay war injury pension—court Observed—petition deployed in Kargil—was a transport commandor-asked to report for briefing—The "Operation Rakshak—III" was on—no doubt that injury classifiable falling into category E(j) i.e during operation specifically notified by the government from time to time—Held—Residual head of classification to be read as to broad objective of the policy i.e. those who imperil themselves either directly or indirectly in the line of fire during the operation would be covered under this head—Writ petition allowed with cost.**

It is apparent from the above materials that the petitioner was deployed in Kargil and, according to his unit's communication dated 6-7-2007, was the Transport commander. He was asked to report for briefing. This was evidently when OPERATION RAKSHAK – III was on. Whilst in transit, his jeep met with an accident, and he suffered serious head injury, besides other injuries. There seems to

be no doubt in this Court's mind that the injuries were classifiable as falling under category E (j) i.e during *"Operations specially notified by the Government from time to time."* **(Para 11)**

In parting, this Court cannot resist observing that when individuals place their lives on peril in the line of duty, the sacrifices that they are called upon to make cannot ever be lost sight of through a process of abstract rationalisation as appears to have prevailed with the respondents and with the Tribunal. This case amply demonstrates how seven years after the conflict – in the thick of which the petitioner was deployed after having participated in the Kargil operation – his injuries were casually classified as those ordinarily suffered whilst proceeding on duty in a government vehicle. He, like any other personnel, operated under extremely trying circumstances unimaginable to those not acquainted with such situations. The cavalier manner in which his claim for war injury pension was rejected by the respondents, who failed to give any explanation except adopt a textual interpretation of Clauses (C) and (E), is deplorable. In these circumstances, the petitioner deserves to succeed.

**(Para 14)**

**Important Issue Involved:** (a) The classification of residual head i.e. operation specifically notified by the government from time to time has to be read alongwith broad objective of the policy. Restricting the category to actual operation i.e. injury during military combat or as a result of explosion of mines etc. would be narrow interpretation.

**[Gu Si]**

**APPEARANCES:**

**FOR THE PETITIONERS** : Mr. Rajesh Jain, Advocate.

**FOR THE RESPONDENT** : None.

**RESULT:** Writ Petition allowed.



**S. RAVINDRA BHAT, J.**

" When you go home Tell them, for their Today, we gave our Tomorrow"

**1.** The petitioner seeks appropriate directions, in these proceedings, to the respondents, to grant him war injury pension, in accordance with the extant guidelines and circulars on the subject.

**2.** The facts, which are not in controversy, are that the petitioner was working in the Indian Army from 7-6-1997, when he received his permanent commission. In June, 1999, he was posted to 402 Lt. AD Regt, at Batalik sector during "Operation Vijay" at Kargil. As an active participant, he was later awarded Operation Vijay Medal and Operation Vijay Star. On 23-10-2000, whilst on duty, during operational move from Batalik to Leh, his jeep met with an accident. He was unconscious and was moved to the Military hospital. The Court of Inquiry instituted into the incident found that this injury was attributable to military service in Operational/ high altitude area. The injury left him with a permanent (100%) disability. After unsuccessful attempts at treatment, he was discharged from service with effect from 19-3-2005. He was, however, given terminal benefits and 100% disability pension, in addition to the other admissible retiral benefits.

**3.** The petitioner's claim for grant of war injury pension was recommended by his unit, by letters dated 6th July, 2007. His complaint is that even though the Adjutant General's office twice accepted his request, recommending his case for war injury pension, ultimately, after several reminders, the respondents finally rejected it, on the plea that he did not incur disability during war or war like operation, in terms of the applicable guidelines and circulars but that his disability was on account of an accident whilst on duty, for which he was given disability pension.

**4.** The petitioner relies, in support of his claim for war pension, upon Para 10 of the Central Government, Ministry of Defence's Letter No.1(2)/97/I/D (Pen-C), dated 31-01-2001, for war injury pension payable to Armed Forces Personnel who are invalidated out of service on account of disability sustained under circumstances enumerated in the relevant category of Para 4.1 of that Letter. The relevant part of the letter reads as follows -

**"PART II- PENSIONARY BENEFITS ON DEATH/ DISABILITY IN ATTRIBUTABLE /AGGRAVATED CASES**

4.1 For determining the pensionary benefits for death or disability under different circumstances due to attributable/aggravated causes, the cases will be broadly categorised as follows: -

**Category A**

Death or disability due to natural causes neither attributable to nor aggravated by military service as determined by the competent medical authorities. Examples would be ailments of nature of constitutional diseases as assessed by medical authorities, chronic ailments like heart and renal diseases, prolonged illness, accidents while not on duty.

**Category B**

Death or disability due to causes which are accepted as attributable to or aggravated by military service as determined by the competent medical authorities. Diseases contracted because of continued exposure to a hostile work environment, subject to extreme weather conditions or occupational hazards resulting in death or disability would be examples.

**Category C**

Death or disability due to accidents in the performance of duties such as:-

(i) Accidents while travelling on duty in Government Vehicles or public/private transport.

(ii) Accidents during air journeys

(iii) Mishaps at sea while on duty.

(iv) Electrocution while on duty, etc.

(v) Accidents during participation in organised sports events/adventure activities/ expeditions/training.

**Category D**

Death or disability due to acts of violence/attack by terrorists, anti social elements, etc. whether on duty other than operational duty or even when not on duty. Bomb blasts in public places or



transport, indiscriminate shooting incidents in public, etc. would be covered under this category, besides death/disability occurring while employed in the aid of civil power in dealing with natural calamities.

**Category E**

Death or disability arising as a result of :-

(a) Enemy action in international war.

(b) Action during deployment with a peace keeping mission abroad.

(c) Border skirmishes.

(d) During laying or clearance of mines including enemy mines as also minesweeping operations.

(e) On account of accidental explosions of mines while laying operationally oriented mine –field or lifting or negotiating minefield laid by the enemy or own forces in operational areas near international borders or the line of control.

(f) War like situations, including cases which are attributable to/ aggravated by:-

(i) Extremist acts, exploding mines etc. while on way to an operational area.

(ii) Battle inoculation training exercises or demonstration with live ammunition.

(iii) Kidnapping by extremists while on operational duty.

(g) An act of violence/attack by extremists, anti-social elements etc.

(h) Action against extremists, antisocial elements, etc. Death/ disability while employed in the aid of civil power in quelling agitation, riots or revolt by demonstrators will be covered under this category.

(j) Operations specially notified by the Government from time to time."

**5.** It is contended that the petitioner's claim for war injury pension

squarely falls in Category E (f), (i) as well as Category E (j). In this regard, it is submitted that the petitioner was on his way as per orders given by his superior officers, in an operation which had been notified by the Central Government, i.e "OPERATION RAKSHAK–(III), during which the armed forces were continuously engaged in flushing out the enemy forces after the Kargil war. Counsel also relied on letters written by the Commanding Officer of the unit to which the petitioner belonged, outlining this fact and further stating that the injury incurred was classifiable as a battle injury. This was endorsed on two separate occasions by the Adjutant General's office, i.e on 10-9-2007 and 3-10-2007, and a certificate was even issued in that regard. His claim for war injury pension was rejected, by Army authorities, by letter dated 12-9-2008. He, therefore, approached the Armed Forces Tribunal, by filing application (OA 635/2010) which was rejected by its order dated 3-4-2012.

**6.** Ms. Jyoti Singh, Learned senior counsel appearing for the petitioner, relies on the letters dated 6-7-2007, issued by the petitioner's unit and his commanding officer, to say that the injuries suffered were battle injuries, as they were during OPERATION RAKSHAK, and therefore, clearly classifiable in category E (j) as "Operations specially notified by the Government from time to time." In this regard, it is submitted that the records clearly reveal that the Adjutant General's determination that the injury was in an operational area, was after taking into account the concerned records; there was no reversal of that determination; the certificate that the injury was a battle injury, dated 1-10-2007 was not withdrawn or cancelled. In these circumstances, the request "sanction" by the Pay and Accounts office, through letter dated 11-10-2007, 17-12-2007 and 28-1-2008 could not have been the occasion for a review of the matter, and rejection of the claim. It was contended that documents sourced later, in the form of a letter issued by Ministry of Defence to the Northern Command of the Indian Army, 20th December, 2001 delineating that the area where the petitioner had been deployed, and in fact where his unit was stationed, had been declared as part of Operation Rakshak. It was argued that in overlooking these material circumstances, and proceeding to accept the contentions of the respondents that the injuries received by the petitioner were on account of accident in high altitude and classifiable under Para 4.1 (C) of the letter/notification of 2001, the Tribunal erred in law.



**7.** Ms. Barkha Babbar, learned counsel for the respondents, relied on the impugned order of the Tribunal and urged that the classification of the petitioner's injuries as accidental could not be found fault with. It was submitted that though the record revealed that the Adjutant General's office initially concurred with the unit's interpretation that the petitioner's injuries were battle or war related and therefore classifiable as such, on later scrutiny, the respondents were of the opinion that since they were closer in description to Para 4.1 (C) they had to be treated as such. It was argued that unlike in a war like situation, the petitioner was travelling in his jeep in the course of his duties, in the Kargil sector, when it unfortunately met with an accident. Though the injuries were serious and resulted in his discharge and further led to impairment throughout his life, the authorities could not be asked to pay war injury pension, when clearly his case did not qualify for that relief. She therefore urged that the petition should be dismissed as without merit.

**8.** The Tribunal's reasoning leading to the rejection of the petitioner's application is as follows:

> "8. We have bestowed our best of consideration made by the petitioner. In fact, plain reading of the Army notification dated 28.5.1985 and the Govt. notification dated 31.1.2001, indicates that the injury received by the petitioner while travelling from Batalik to Leh does not fall under the category of a war casualty. In fact a close reading of Category "E" clearly entitles person receiving an injury where there is a war like situation and the injury is attributable or aggravated by military service, or when a person falls victim to Extremists Acts, exploding of mines, while on the way to an operational area, during battle inoculation or training exercises or demonstration with live ammunition or kidnapping by extremists while on operational duty etc. and the case of the petitioner does not fall in any of these categories. May be he was in the operational area, but the petitioner is not victim of any of the situations mentioned in the sub-clause "f" of Category 'E'. Neither does he fall in the category case of Operations specially notified by the Government from time to time. Meaning thereby that when certain operations are undertaken, like clearing of extremists from a particular area, then that particular area is notified and any one falls victim or any other contingency arises then such death or injury could be attributable

to that operation. In normal case the petitioner falls in category 'C', which clearly says that accident while travelling on duty in govt. Vehicle or public/private transport. Therefore, this contingency in which petitioner received the injury falls specifically in Category 'C' sub-clause (a). It may be that Leh and Batalik are on the Indo-Pak border but contingency which has been contemplated in the Category 'E' does not cover this vehicular accident."

**9.** Before a discussion on the merits of the case, it would be necessary to extract the relevant correspondence. In response to queries regarding classification of the petitioner's injuries, his unit (402 Lt. AD Regt, at Batalik sector) addressed four letters to the Army Headquarters, on 6-7-2007. Two of these were in response to the Additional Directorate General of Manpower, Headquarter's letter dated 30th May, 2007. The first letter stated that:

"402 Lt. AD Regt,(Comp) as part of 611 (I) AD Bde was loc at Leh with Tps dply in 14 Corps Z. The tps of the unit were deply in OP RAKSHAK (J&K) (8 Mtn Div and 2 Inf Div) and OP MEGHDOOT (102 Inf Bde) post OP VIJAY from the period Sep 1999 to 2001..."

The second letter, also of the same date, (i.e. 06.07.2007) and by the Officiating Adjutant of 402 Lt. AD Regt, on behalf of the Commanding Officer, elaborate more facts, such as *"....2..(a) The officer was stationed at Kargil as part of Tps dply of this unit as the Air Def Artillery Tp. Cdr....(c) The name of the operation as notified by the Govt of India is OP RAKSHAK-III (J&K)....(e) The offr was mov from his operational deployment to the Regimental Headquarters locaed at Leh as brought out in the Injury Report and Court of Inquiry..."*

**10.** The third letter of 6-7-2007 – by the Major, DAAG, on behalf of the Colonel at the Headquarters, 8th Military Division, stated that *"it is evident that the accident of IC- 56932Y Maj Arvind Kumar Suhag took place in the qualifying area for declaring the accident as "Battle Accident" as per Paras 5 and 7 of SAO 8/8/85."* These letters and other materials were considered by the Additional Directorate General of Manpower (Policy and Planning) Adjutant General's Branch, Integrated HQ, Ministry of Defence; by letter dated 3-10-2007, the pension unit at Allahabad was told that:



"4. Based on documents held, the casualty of the above named officer (i.e the petitioner here) has been classified as **Battle Casualty** vide letter No. 12812/AG/OW/OPR/ MP 5 (D) dated 10th Sep 2007 (photocopy attached).

5. In view of the above classification, you are requested to grant War Injury pension to the above named retd officer and corrigendum PPO may please be released at the earliest."

On 1-10-2007, the Petitioner was issued a certificate which stated that he was invalidated out of service with effect from 19-3-2005 due to SEVERE HEAD INJURY AND FRACTURE RIBS (LT) SEVERE,

"on bona fide military duty in Kargil (OP RAKSHAK (J&K).

2. The officer's disability has been assessed by the Invalidating Medical Board for 100% for life and the casualty has been classified as **Battle Casualty** vide letter No. 12812/AG/OW/ OPR/ MP 5 (D) dated 10th Sep 2007"

**11.** It is apparent from the above materials that the petitioner was deployed in Kargil and, according to his unit's communication dated 6-7-2007, was the Transport commander. He was asked to report for briefing. This was evidently when OPERATION RAKSHAK – III was on. Whilst in transit, his jeep met with an accident, and he suffered serious head injury, besides other injuries. There seems to be no doubt in this Court's mind that the injuries were classifiable as falling under category E (j) i.e during *"Operations specially notified by the Government from time to time."*

**12.** What persuaded the Tribunal to hold otherwise is that the petitioner's injuries were not incurred during actual operations. In doing so, the Tribunal restricted the eventualities in category-E(j) to actual operations, i.e. injuries incurred during military combat or such like situations or as a result of explosion of mines etc. This would appear from its observation that only if someone is victim to extremism or any other contingency as a result of injury, would it be attributable to operation. With great respect, such a narrow interpretation of what is otherwise a widely phrased condition, is unwarranted. This would necessarily imply that those who are on the way – like the petitioner, in an operation-notified area and are intrinsically connected with the success of such operations cannot ever receive war-injury pension even though their aid

and assistance is essential and perhaps crucial for its success. The classification of the residual head, i.e. "operations specially notified by the government from time to time" has to be read along with the broad objective of the policy, i.e. - those who imperil themselves – either directly or indirectly – and are in the line of fire during the operations, would be covered if the injuries occur in that area or in the notified area of operation. This is also apparent from the situations covered in Clause(g) and (h) which nowhere deal with battle or war. In fact, clause (h) even covers injuries and death which occurs while personnel are "employed" in the aid of civil power in quelling agitation, riots or revolt by demonstrators" This means that if someone is travelling in the thick of such unrest and the accident results in death or injury, his next of kin would be entitled to war-pension whereas those who actually suffer similar injuries in an area where operations are notified, would not be entitled to such war injury pension.

**13.** The materials on record would demonstrate that when the reference – based on the petitioner's representations, (made in 2005), were received, the authorities enquired into the matter closely. During this enquiry, the views of the concerned Military Command HQs as well as the response of the petitioner's units were sought. Uniformly, all of them indicated that the injuries occurred in the area notified as "Operation Rakshak-III" in J&K. This was considered by the concerned Branch, i.e. Additional Directorate (Manpower) of the Adjutant General's Branch which accepted the classification as "Battle Injury" on 10.09.2007 and thereafter issued letter on 03.10.2007. The petitioner was even issued certificate on 01.10.2007 stating that his injuries were during a notified operation and that they were classifiable as "Battle injuries". That in fact was the end of the enquiry and nothing further should have happened except release of the amounts. Instead, the respondents, particularly the Pension Office, appears to have construed three requests made by the Pay and Accounts Office in October-November 2007 and 28.01.2008 requesting for sanction (for release of amounts) as a reason for entirely reviewing the matter. Even as on date, there is nothing forthcoming from the records or in the reply filed by the respondents before the Tribunal (which has been filed during the present proceedings) – to show what persuaded the respondents to reverse the Additional Directorate (Adjutant General's) determinations based upon actual assessment of the area of operation where the petitioner was deployed. It seems that the military bureaucracy in this case or



someone within it felt that since injuries were described more specifically as "accidents while travelling on duty in government vehicles" – in category (C) of the letter/policy dated 31.01.2011, the petitioner was disentitled to war injury pension. The Tribunal's bland acceptance of these decisions has regrettably resulted in denial of justice to the petitioner. This Court is, therefore, of the opinion that the impugned order of the Tribunal cannot be sustained. The petitioner's claim for grant of war injury pension in terms of Clause 4.1(E)(j) has to succeed.

**14.** In parting, this Court cannot resist observing that when individuals place their lives on peril in the line of duty, the sacrifices that they are called upon to make cannot ever be lost sight of through a process of abstract rationalisation as appears to have prevailed with the respondents and with the Tribunal. This case amply demonstrates how seven years after the conflict – in the thick of which the petitioner was deployed after having participated in the Kargil operation – his injuries were casually classified as those ordinarily suffered whilst proceeding on duty in a government vehicle. He, like any other personnel, operated under extremely trying circumstances unimaginable to those not acquainted with such situations. The cavalier manner in which his claim for war injury pension was rejected by the respondents, who failed to give any explanation except adopt a textual interpretation of Clauses (C) and (E), is deplorable. In these circumstances, the petitioner deserves to succeed.

**15.** The respondents are hereby directed to forthwith process the petitioner's case for war injury pension in terms of the aforesaid letter dated 31-1-2001, Clause 4.1(E) and pay the differential admissible to him in accordance with the prevailing guidelines and circulars within six weeks from today. This differential shall also carry 12% interest per annum from the date of the recommendation by the Additional Directorate Adjutant General's office, i.e. from 01.10.2007 till the date of payment. The petitioner shall also be entitled to the costs, quantified at Rs.50,000/-, to be paid within the same period. The writ petition is allowed in the above terms.

**ILR (2013) IV DELHI 3001**
**W.P.(C)**

**MADHU ARORA ALIAS HONY MONGA ....PETITIONER**

**VERSUS**

**DELHI DEVELOPMENT AUTHORITY ....RESPONDENT**

**(REVA KHETRAPAL, J.)**

**W.P. (C) NO. : 343/2012 DATE OF DECISION: 26.02.2013**

**Delhi Development Authority—New Pattern Registration Scheme, 1979—Trail End Policy of DDA—Petitioner booked LIG flat in year, 1979 under NPRS, 1979—Petitioner made several representations to DDA to know status of allotment and attended several public hearings—On moving RTI application, Petitioner came was mentioned as Jony Monga instead of Hony Monga and demand letter was received back by DDA undelivered—Petitioner filed writ petition before HC for allotment of flat—Plea of DDA, present petition not maintainable and liable to be dismissed on ground of delay and laches— Case of Petitioner is not covered under wrong address policy because Petitioner had been sent demand letter at correct address and this is sufficient to Presume that communication would have been delivered at address of Petitioner—Held—Demand letter was not address to registrant i.e. Petitioner and was received back undelivered by DDA—Petitioner can't be deprived of allotment to which she is entitled on account of lapse of DDA—Respondent has admittedly received back communication and hence is estopped from contending that there is a presumption of service—Objection raised by Respondent that petition is barred by laches is also lacking in merit, Petitioner was in constant touch with department and was told her file was misplaced, cannot be faulted for sitting over matter—Writ of Mandamus issued to Respondent directing respondent to hold a mini draw within a period of four weeks from today and make allotment of LIG flat to petitioner, in same area if possible— Petitioner shall make payment in terms of Demand-cum-Allotment letter issued to petitioner earlier.**



**Important Issue Involved:** (A) It would be both unreasonable and unfair to expect registrants to keep track of public notice issued by the DDA for years together and rely upon such public notices to deprive bonafide registrants who have been waiting for several decades for allotment of flats.

(B) After DDA has received back demand-cum-allotment letter undelivered, it is estopped from contending that there is a presumption of service.

(C) When petitioner was in constand touch with the department and was told that her file was misplaced, cannot be faulted for sitting over the matter and her petition cannot be barred by laches.

**[Ar Bh]**

**APPEARANCES:**

**FOR THE PETITIONER** : Mr. Nanda Kinra, Advocate.

**FOR THE RESPONDENT** : Ms. Shobhana Takiar, Advocate.

**RESULT:** Allowed.

**REVA KHETRAPAL, J.**

**1.** Rule.

**2.** With the consent of the parties, the Writ Petition was taken up for final hearing and disposal.

**3.** The facts leading to the filing of the present Writ Petition are that the Petitioner had booked an LIG flat in the year 1979 vide registration No.61175 in the New Pattern Registration Scheme, 1979 (for short 'NPRS Scheme'). From the year 1996 onwards, the Petitioner made several representations to the Delhi Development Authority to know the status of the allotment and attended several public hearings. Eventually, the Petitioner was informed that the record/file relating to her case were missing from 1996 and could not be traced out. On 13.11.2009, the Petitioner on moving an RTI application came to know that she was allotted a flat in the year 1991, being flat No.39, Pocket 3, Ground Floor, Sector 15, Block-G, at Rohini with block dates 09.01.1991 – 13.01.1991, but in the said demand letter her name was mentioned as Jony Monga instead of Hony Monga and hence the demand letter was received back by the DDA undelivered. It may be mentioned at this juncture that the Petitioner subsequently changed her name from Hony Monga to Madhu Arora upon being married to one Shri Ashok Arora.

**4.** On further enquiry from DDA, the Petitioner was informed that at every stage the Petitioner's name in the computer file had been shown as Jony Monga.

**5.** It is not disputed by the DDA that the name written on the demand-cum-allotment letter dated 9th/13th January, 1991 was incorrect. Admittedly also, the demand cum allotment letter was not received by the Petitioner and it was returned back to the DDA undelivered with the report that no such person was residing at the given address. That the DDA did not bother to send the communication again after checking and verifying the name and address of the Petitioner is also not in dispute. It is also admitted that in the computer record inadvertently against the name of Kr. Hony Monga the name Kr. Jony Monga has been fed, though it is stated that the priority number, registration number and postal address of the allottee are correct as per record.

**6.** The DDA contends that the present petition is not maintainable and liable to be dismissed on the ground of delay and laches. It is submitted that a show cause notice was issued, dated 08.04.1991, to the Petitioner but no response was received, therefore, the allotment was cancelled with the request to deposit a sum of Rs. 4,058/- on account of cancellation charges within 60 days so that her name would be considered at the tail end of the priority list for allotment of flat. It is



stated that as per the policy of the Respondent, the flats under tail end policy are to be allotted only in those cases where the registrants have at least deposited cancellation charges upto 31st December, 1993. The present case is not covered by the aforesaid policy of the Respondent. Finally, it is stated that the case of the Petitioner is not covered under wrong address policy because the Petitioner had been sent the demand letter at the correct address and this is sufficient to presume that the communication would have been delivered at the address of the Petitioner.

**7.** The short question which arises is whether the DDA was justified in cancelling the allotment in the facts and circumstances of the case. I think not. Counsel for the DDA has opposed this petition primarily on the ground that the demand-cum-allotment letter was sent at the correct address. However, there is no denying the fact that the demand letter was not addressed to the registrant, i.e., the Petitioner, and was received back undelivered by the DDA. Counsel for the DDA has not disputed, as indeed she could not have, that the demand-cum-allotment letter was sent under the wrong name. This fact is also borne out from the records. The Petitioner, therefore, cannot be deprived of an allotment to which she is entitled on account of the lapse of DDA. The contention of the DDA that there is a presumption of service, the communication having been delivered at the address of the addressee is also of no avail to the DDA. The Respondent/DDA has admittedly received back the communication and hence is estopped from contending that there is a presumption of service.

**8.** The other objection raised by the Respondent/DDA that the petition is barred by laches is also of lacking in merit. This Court has time and again noted that applicants under the NPRS 1979 have waited for two or more decades for their allotment to mature, and in such circumstances, the Petitioner in the instant case, who was in constant touch with the department and was told that her file was misplaced, cannot be faulted for sitting over the matter. As per the policy of the Respondent, the Respondent ought to have included the name of the Petitioner in the tail end priority cases. This too the Respondent failed to do.

**9.** In view of the aforesaid, this Court is satisfied that the Petitioner is entitled to the relief prayed for. The Petitioner cannot be deprived of her right of allotment for which she has waited since 1979, merely on

account of the fault of the DDA in sending the demand-cum-allotment letter in the wrong name. The contention of the Respondent that a public notice was issued by the DDA to which also the Petitioner did not respond and, therefore, the Petitioner is not entitled to the allotment of a flat is without merit. It has been held time and again reiterated by this Court that it would be both unreasonable and unfair to expect registrants to keep track of public notices issued by the DDA for years together and rely upon such public notices to deprive bonafide registrants who have been waiting for several decades for allotment of flats.

**10.** Resultantly, a Writ of Mandamus is issued to the Respondent directing the Respondent/DDA to hold a mini draw within a period of four weeks from today and make allotment of an LIG flat to the Petitioner, in the same area if possible. The Petitioner shall be allotted a flat in terms of the policy of the DDA dated 25th February, 2005. Upon the Petitioner making payment in terms of the demand-cum-allotment letter dated 9th/13th January, 1991 issued to the Petitioner, the Petitioner shall be handed over the possession of the flat within four weeks thereafter.

**11.** The Writ Petition is disposed of in the above terms. Compliance shall be made by the Respondent as expeditiously as possible and latest within the aforesaid period.

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**ILR (2013) IV DELHI 3006**
**W.P.(C)**

**VIJAYA C. GURSAHANEY ....PETITIONER**

**VERSUS**

**DELHI DEVELOPMENT AUTHORITY & ANR. ....RESPONDENTS**

**(REVA KHETRAPAL, J.)**

**W.P. (C) NO. : 563/2012 DATE OF DECISION: 05.03.2013**

**Delhi Development Authority—Petitioner applied to DDA for substitution of her name in place of her deceased husband / lessee of plot in question—DDA demanded Rs. 6,51,020 towards 50% unearned increase—DB of this court set aside demand—Hon'ble SC recorded that both sides had arrived at a consensus that petitioner would pay a sum of Rs. 3,73,745/- to DDA towards unearned increase—Plot mutated in name of Petitioner after DDA received aforesaid amount from Petitioner—Petitioner requested for extension of time for construction of plot and for waiver of composition fee stating that she was liable to pay composition fee from date of mutation only on ground that matter had remained undecided / subjudice for a long period of time—Respondents demanded Rs. 42,83,618/- towards composition fee- Petitioner preferred present writ petition challenging demand of composition fee—Plea of DDA, possession was handed over to Petitioner but Petitioner failed to construct plot in question—Composition fee policy of DDA provided different contingencies where exemption can be given for payment of composite fee—It does not cover contingency of pending litigation—Held—Indubitably Vice-Chairman has power to condone delay without composition where there are internecine disputes amongst legal heirs of original allottee and**

**to direct DDA to take account of period spent in litigation— It is only when mutation is effected by DDA after resolution of pending litigation that it would be possible for legal heirs to pursue there application for extension of time to carry out construction— Present case stands even on better footing in that litigation was pending between DDA and petitioner in respect of a demand raised by DDA for mutating plot in name of Petitioner—Till mutation was effected, Petitioner could not have pursued his application for extension of time for construction—There is nothing in sub clause (iv) of Clause 1.4 of Circular of DDA dated 31.10.1995 to show that application of said sub-clause is restricted to delays in mutation of plot to legal heirs of original allottee and not to transferees of a plot- Delays in mutation would be equally applicable to legal heirs of original allotee and those who have stepped into shoes of allottee as a result of transfer, sale etc. - To hold otherwise would be inequitable and unfair for it would mean that while period of litigation between legal heirs of original allottees is to be excluded for purpose of calculation of composition fee, transferees of original allottee are to be kept deprived of such benefit and must bear brunt of delay in mutation, even if it is for no fault of theirs— Litigation between Petitioner and DDA was not a frivolous one- Demand raised by DDA on account of composition fee quashed and DDA directed to recalculate composition fee for period after mutation of plot in favour of Petitioner and to issued a fresh demand thereafter within a period of eight weeks from today.**



**Important Issue Involved:** The Vide-Chairman has the power to condone the delay without composition where there are internecine disputes amongst the legal heirs of the original allottee and to direct to DDA to take account of the period spent in litigation. There is nothing in sub clause (iv) of Clause 1.4 of the Circular of DDA dated 31.10.1995 to show that the application of the said sub clause is restricted to delays in mutation of the plot to the legal heirs of the original allottee and not to the transferees of a plot.

**[Ar Bh]**

**APPEARANCES:**

**FOR THE PETITIONERS** : Mr. Vipin Kumar Gupta, Advocate.

**FOR THE RESPONDENTS** : Ms. Shobhana Takiar, Advocate.

**CASES REFERRED TO:**

1. *DDA* vs. *Sudhir Chandra Aggarwal and Anr.,* 120 (2005) DLT 76 (DB).
2. *Rajasthan Housing Board and Others* vs. *Krishna Kumari,* (2005) 13 SCC 151.
3. *Gursharan Singh* vs. *New Delhi Municipal Committee* [(1996) 2 SCC 459].

**RESULT:** Allowed.

**REVA KHETRAPAL, J.**

**1.** The Petitioner in the present Writ Petition impugns the demand of the Delhi Development Authority claiming composition fee for enlargement of time for construction of plot bearing No.D-3, Community Centre, Naraina, New Delhi-110028.

**2.** The aforesaid plot of land was purchased by one Ram Dhan Bhandula (since deceased) in the public auction held by the Delhi Development Authority (hereinafter referred to as "the DDA") on 25.05.1969. A perpetual lease deed of the plot was executed between Ram Dhan and the President of India on 17.02.1972. On 18.09.1978, Ram Dhan died without raising any construction on the said plot. The Petitioner herein – Mrs. Vijaya C. Gursahaney, on 26.10.1977, on the

strength of a will executed in her favour by late Ram Dhan applied for grant of Letters of Administration to the District Judge, Delhi. Letters of Administration were granted in her favour by the District Judge on 07.05.1980 and thereafter the Petitioner applied to DDA for substitution of her name in place of deceased Ram Dhan. DDA issued a show cause notice for non-construction of the plot within the specified time. The Petitioner vide her reply dated 11.12.1982 requested DDA for mutation of her name in place of Ram Dhan, whereupon by a communication dated 12.08.1985, DDA asked the Petitioner to pay 50% unearned increase as per the terms and conditions of the perpetual lease deed. By its subsequent letter dated 19.06.1992, DDA asked the Petitioner to pay Rs. 6,51,020 towards 50% unearned increase. By another letter dated 17.09.1992, DDA again demanded payment of the aforesaid amount, stating therein that non-payment would result in cancellation of the lease.

**3.** Aggrieved by the aforesaid two letters, the Petitioner filed a Writ Petition before this Court, being W.P.(C) No.3696/92 challenging the impugned demand for 50% unearned increase. A Division Bench of this Court in its judgment dated 10.05.1994 found that the decision of the Respondents requiring the Petitioner to pay unearned increase was not legal and their communications dated 19th June, 1992 and 17th September, 1992 were required to be set aside. The Respondents filed SLP, being SLP No.34/95. The Hon'ble Supreme Court set aside the judgment passed by the Division Bench vide their order dated 26.08.2003, thereby directing the Petitioner to deposit 50% unearned increase. As regards the quantum of unearned increase, however, the Supreme Court recorded that both sides had arrived at a consensus that the Petitioner would pay a sum of Rs. 3,73,745/- to DDA towards 50% unearned increase. The Petitioner deposited a sum of Rs. 3,73,745/- towards unearned increase and the Respondents after receiving the aforesaid amount from the Petitioner mutated the plot in question in the name of the Petitioner vide their letter dated 10.02.2004.

**4.** The Petitioner requested the Respondents for extension of time for the construction of the aforesaid plot in December, 2006 and sent letters dated 26.12.2006, 05.01.2007, 05.07.2007, 26.08.2007 and 20.09.2007 for waiver of the composition fee, stating that she was liable to pay composition fee from the date of mutation only on the ground that the matter had remained undecided/subjudice for a long period of time. In March, 2008, the Petitioner requested the Member Secretary, Delhi



Legal Services Authority to refer the dispute qua the composition fee with the Respondents to the Permanent Lok Adalat. In the meanwhile, the Respondents claimed a sum of Rs. 5,19,70,160/- from the Petitioner vide their letter dated 17.12.2007 as composition fee for non-construction of the plot in question. This demand was subsequently revised by the Respondents vide letter dated 27.09.2010 and the Petitioner directed to deposit Rs. 42,83,618/- on account of composition fee within 30 days from the date of the issue of the letter. The Petitioner thereupon addressed a letter to the Respondents dated 12.10.2010 to reconsider the case of the Petitioner for waiver of the composition fee in view of the pending litigation between the parties. In the meanwhile, the Petitioner received a communication from the Member Secretary, Delhi Legal Aid not to deposit a sum of Rs. 42,83,618/- till the re-calculation of the composition fee, which it was stated was being re-calculated by the Respondents qua the aforesaid plot pursuant to the order of the Member Secretary dated 20.12.2010. The Respondents, however, again sent the demand for deposit of Rs. 42,83,618/- vide their letter dated May 16, 2011. Aggrieved therefrom, the Petitioner has preferred the present Writ Petition.

**5.** Counter-Affidavit was filed by the Respondent/DDA contesting the Writ Petition and stating therein that possession was handed over to the Petitioner on 18.07.1970 but the Petitioner failed to construct the plot in question. It is submitted that the composition fee policy of DDA circulated vide Circular dated 31.10.1995 in para 1.4 provided different contingencies where exemption can be given for payment of composition fee. It does not cover contingency of pending litigation. Pertinently, it is stated that the cases where litigation was involved directly or indirectly on account of allotment of plot with DDA or any other agency is covered. However, in the present case, litigation was not on account of allotment, it was on account of non-payment of UEI (Unearned Increase), which was ultimately paid before the Hon'ble Supreme Court by the Petitioner. It is stated that this contingency is not covered under the guidelines for condonation of delay in construction and, therefore, no benefit of litigation is available to the Petitioner as per the existing policy of DDA.

**6.** I have heard the learned counsel for the parties and perused the Circular dated 08.04.2010. Vide the said Circular, the DDA reviewed the policy decision of 50% increase in the rates of composition fee of terminal year in the cases where extension is to be granted beyond 25 years and approved a cap of 50% of the current market value of the plot in

question of the relevant year. Other terms and conditions contained in its earlier Circular dated 04.01.2007 were to remain the same. Learned counsel for DDA submitted that the demand for Rs. 5,19,70,160/- was raised by DDA pursuant to the Circular dated 04.01.2007, which was subsequently modified on the coming into force of the Circular dated 08.10.2010 to Rs. 42,83,618/- only.

**7.** Learned counsel for the DDA in the course of her submissions contended that no benefit of litigation is available to the Petitioner as per the existing policy of the Respondents. Reference in particular was made by her to Circular No.F.No.AO(Proj)Misc./Composition/Pt I/36 dated 31.10.1995 containing the guidelines for calculation of composition fee for delay in construction for the years 1995-96 to 1999-2000 and the exemption clause contained therein being Clause 1.4, which reads as under:-

> **"1.4 EXEMPTIONS:** The exemption from the levy of annual composition fee in the policy will be available as follows:
>
> (i) Where construction is not possible because the plot has been cancelled by DDA – actual period of cancellation of plot.
>
> (ii) Where construction is not possible because of the specific orders of non-construction of a statutory authority e.g. Registrar, Courts etc. – actual period of operation of such orders.
>
> (iii) Where size of the plot attracts the provisions of ULCR Act, 1976 and exemption has been applied to the competent authority but is pending – maximum exemption of 3 years.
>
> (iv) **Death of the allottee and subsequent delays in mutation,** sickness of the allottee from chronic and uncurable disease which results in physical disablement to construct house – 3 years maximum.
>
> (v) Where due to exigencies of service condition, lessee is out of country after allotment of plot – maximum period of 5 years.
>
> (vi) Where the lessee/sub-lessee has been transferred outside Delhi. This facility would be available to all Central/Delhi Admn./ All India Service/the Public Sector Undertakings officials posted in Delhi including defense Personnel – maximum period of 5 years.



> (vii) The exemption given in
>
> (vi) above is also extended to lessee/sub-lessee who are house wives and whose husband could claim benefit as per (vi) above had they themselves been lessee or sub-lessee.
>
> The benefit of the above clauses will not be cumulative i.e. the maximum benefit that can be availed in a case, where all the above factors are present would be 3 years in the case of allottees following under categories (iii) and (iv) above and 5 years in the case of category (v), (vi) and (vii). First 3 or 5 years as the case may be shall be considered for exemption.
>
> An allottee would be entitled to exemption as provided above subject to his furnishing documentary evidence."

**8.** Relying upon a judgment of the Supreme Court in **Rajasthan Housing Board and Others vs. Krishna Kumari,** (2005) 13 SCC 151, learned counsel contended that the maxim actus curiae neminem gravabit was squarely attracted to the present case. The relevant portion of the said judgment for the facility of reference is reproduced hereunder:-

> 5. This Court in a number of decisions has repeatedly emphasised that in view of the legal maxim "actus curiae neminem gravabit" which means that an act of court shall prejudice no man, has held that the claimants/allottees who have obtained stay will not be justified in seeking waiver of claim of interest over the arrears which remain unpaid because of the stay granted by the court. In **Gursharan Singh v. New Delhi Municipal Committee** [(1996) 2 SCC 459] this Court observed in para 13 as follows: (SCC p. 466)
>
> "13. In view of the legal maxim 'actus curiae neminem gravabit' which means that an act of court shall prejudice no man, NDMC is justified in making a claim for interest over the arrears which have remained unpaid for more than 12 years because of the interim orders passed by this Court."

**9.** The short question which arises for consideration in the present case is whether the period of litigation between the Petitioner and the DDA from 1992 to 2003 can be excluded for the purposes of payment of composition fee. A query was put to the counsel for the parties as to

whether the matter was governed by any decision of this Court or of the Hon'ble Supreme Court, to which both counsel stated that no precedent in this regard was within their notice. However, it cannot be disputed and indeed in the Counter-Affidavit filed by the DDA it has not been disputed that sub-clause (iv) of clause 1.4 of the Circular of the DDA dated 31.10.1995 covers those cases where upon the death of the original allottee, there is litigation amongst the legal heirs of the original allottee. A case in point is the judgment of the Division Bench in **DDA vs. Sudhir Chandra Aggarwal and Anr.,** 120 (2005) DLT 76 (DB), where the Court after examining clause 1.4 of the Circular of DDA unequivocally held that the discretionary power of the Vice-Chairman, DDA, who was required to take an administrative decision with regard to the condonation of delay in the construction of a building with or without composition, as the circumstances of the case warrant, was not circumscribed by sub-clause (iv) of clause 1.4 reproduced hereinabove, the only caveat being that the facts must be such as would entitle the Vice-Chairman, DDA to exercise such a power. In the said case, the original allottee Shri Chandra Bhan Aggarwal expired on 30.06.1973 and as a result of disputes between his legal heirs it was not possible to carry out the construction. In the circumstances, this Court held as follows:-

> "9. In view of pendency of the proceedings, one person could not have made an application to DDA and / or all the persons too could not have made an application as there were certain disputes pending between the legal heirs of late Shri Chandra Bhan Aggarwal. The parties were before the Court and after the mutation attained finality, the question was for mutation and the application thereof was allowed only on 29.04.2002. These facts were required to be taken into consideration and, in our view, considering these aspects, learned Single Judge has disposed of the matter and the said decision requires no interference.
>
> 10. Learned senior counsel for the appellant / DDA further submitted that the discretion, which was exercised by the Vice-Chairman, DDA was final and the Court cannot substitute its own finding in case where the discretion is vested in the authority. It may be noted that if the authority has failed to exercise its discretion under misconception that clause 1.4 limits the power to grant maximum period of 3 years, it cannot be said that Court is not required to interfere with the same. Thus, the very basis



> of the exercise of the power is erroneous. It is not that this Court sits as an appellate authority over such an administrative decision, but if on an incorrect interpretation of the clauses being clause 2.1 and clause 1.4, the decision is taken by the administrative authority, then learned Single Judge was right in interfering with the same and issuing necessary directions.
>
> 11. We find no merits in the appeal. Hence, the appeal and the application are dismissed."

**10.** In view of the aforesaid law laid down by this Court, indubitably the Vice-Chairman has the power to condone the delay without composition where there are internecine disputes amongst the legal heirs of the original allottee and to direct the DDA to take account of the period spent in litigation. The logic behind this is simple. It is only when mutation is effected by the DDA after resolution of the pending litigation that it would be possible for the legal heirs to pursue their application for extension of time to carry out the construction. The present case, in my considered opinion, stands on an even better footing, in that the litigation was pending between the DDA and the Petitioner in respect of a demand raised by the DDA for mutating the plot in the name of the Petitioner. There is no gainsaying that till the mutation was effected, the Petitioner could not have pursued his application for extension of time for construction.

**11.** I am fortified in coming to the aforesaid conclusion from sub-clause (iv) of Clause 1.4, which provides for exemption in the case of *"death of the allottee and subsequent delays in mutation ....."*. There is nothing in the said sub-clause to show that the application of the said sub-clause is restricted to delays in mutation of the plot to the legal heirs of the original allottee and not to the transferees of a plot. Delays in mutation would in my view be equally applicable to legal heirs of the original allottee and those who have stepped into the shoes of the allottee as a result of transfer, sale etc. To hold otherwise would be inequitable and unfair for it would mean that while the period of litigation between the legal heirs of the original allottees is to be excluded for the purpose of calculation of composition fee, the transferees of the original allottee are to be kept deprived of such benefit and must bear the brunt of the delay in mutation, even if it is for no fault of theirs.

**12.** Yet another aspect of the matter is that in the instant case, it

cannot be said that the litigation between the Petitioner and the DDA was a frivolous one. A Division Bench of this Court held in favour of the Petitioner, rejecting the DDA's claim for unearned income of Rs. 6,57,020/- and imposing costs upon the DDA. On appeal, the Supreme Court though held in favour of the DDA, yet, the Petitioner was required to deposit only a sum of Rs. 3,73,745/- instead of the sum of Rs. 6,51,020/- which was the initial demand of the DDA for unearned increase.

**13.** In view of the aforesaid, the demand raised by the DDA for the amount of Rs. 42,83,618/- on account of composition fee is quashed and the DDA is directed to re-calculate the composition fee for the period after the mutation of the plot in favour of the Petitioner and to issue a fresh demand thereafter. The re-calculation shall be done by the DDA and the fresh demand letter issued to the Petitioner within a period of eight weeks from today.

**14.** Writ Petition stands disposed of in the above terms.

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**ILR (2013) IV DELHI 3015**
**W.P. (C)**

**SURJEET SINGH AND ANR. ....PETITIONERS**

**VERSUS**

**DELHI DEVELOPMENT AUTHORITY & ANR. ....RESPONDENTS**

**(REVA KHETRAPAL, J.)**

**W.P. (C) NO. : 5885/2012 DATE OF DECISION: 07.03.2013**
**CM NO. : 12120/2012**

**Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981—Father of Petitioner No. 1 migrated from Pakistan and squatted upon property at Jhandewalan—In pursuance of Gadgil Assurance Scheme, DDA declared father of Petitioner No. 1**



**eligible to allotment under category 'A' upto 200 sq. yards to be regularised in his favour subject to Payment of damages—Petitioners pursued case for a alternative allotment with DDA but no plot was allotted—DDA noted in its records that plot at Jhandewalan cannot be allotted to Petitioners as said plot falls in road widening of Jhandewalan Road, case of Petitioners for allotment of alternative plot in same zone at Shanker Road was put up for consideration—In Permanent Lok Adalat, but Respondents did not allot same—After Vice-Chairman made scathing remarks on record, Commissioner (LD) submitted for approval of Competent Authority allotment of plot at Rajendra Nagar in favour of Petitioner—Decision approved by Vice-Chairman and communicated by Respondent Authority to Petitioners—Respondent Authority thereafter recalled its allotment of Rajendra Nagar Plot and sought to carve out a completely undeveloped plot in Ashok Nagar—Order challenged before HC—Plea taken, cancellation was arbitrary as a valuable right which had crystallized in favour of Petitioners was sought to be taken away without giving Petitioners opportunity of being hear—Plot now sought to be allotted is totally uninhabitable and there is no development—Per contra, plea taken by DDA, plot at Rajendra Nagar which is a developed plot in residential scheme can't be allotted to Petitioners—In past, such a developed land in residential scheme has never been allotted under Gadgil Assurance Scheme and it may set bad precedent—Said plot has huge market value and as such it can be allotted only through auction/tender mode as per Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981—In commercial matters, Courts should not risk their judgments for judgments of bodies to which that task is assigned—Nothings and/or decisions recorded in official files by officers of Government at different levels and even ministers do not become decisions of**

**Government unless same are sanctified and acted upon by issuing order in name of President or Governor, as case may be, and is communicated to affected persons—Held—Predecessor-in-interest of Petitioners was refused allotment of site occupied by him at Jhandewalan as said site was required by Government of purpose of road widening—Petitioners were therefore entitled to allotment of developed land—Rajendra Nagar plot is not on Nazul Land covered under the Nazul Rules—Present case being under Assurance Scheme extended by Government of India to migrants from West Pakistan cannot be called a "commercial matter"—Object and idea behind this scheme was to rehabilitate refugees from West Pakistan and earning of profit as in a commercial transaction was not purpose—Malafides are writ large in decision of Respondent Authority in arbitrarily cancelling allotment already made to Petitioners with approval of VC and allot them instead uninhabitable plot with no approach road and other facilities and that too after issuance of letter of allotment in their favour—Where notings have fructified into order and said order has been communicated to concerned party, it is no longer open to concerned statutory body to review/overturn its decision—In instant case, order of allotment has been communicated to Petitioners and Petitioners informed of same, thereby affecting rights of Petitioners which have crystallized as a result of said order—It was, therefore, no longer open to DDA to review its earlier decision and that too arbitrarily and illegally—Writ of certiorari issued quashing impugned letter with a direction to DDA to handover Petitioners Possession of Plot at Rajendra Nagar originally alloted to Petitioner in lieu of plot at Jhandewalan on completion of necessary formalities within three months from today.**



**Important Issue Involved:** (A) Where the notings have fructified into an order and the said order has been communicated to the concerned party, it is no longer open to the concerned statutory body to review/overturn its decision.

(B) Malafides on the part of even an independent autonomous statutory body engaged in commercial transactions alone would vitiate the decision taken by it even in a commercial matter.

**[Ar Bh]**

**APPEARANCES:**

**FOR THE PETITIONERS** : Mr. Anil Sapra, Sr. Advocate with Mr. Sandeep Sharma and Ms. Kanika Singh, Advocates.

**FOR THE RESPONDENTS** : Ms. Shobhana Takiar, Advocates for the Respondent Nos. 1 and 2.

**CASES REFERRED TO:**

1. *Shanti Sports Club & Anr.* vs. *Union of India & Ors.,* AIR 2010 SC 433.
2. *Karnataka State Industrial Investment & Development Corpn. Ltd.* vs. *Cavalet India Ltd. and Others,* (2005) 4 SCC 456.
3. *U.P. Financial Corpn.* vs. *Naini Oxygen & Acetylene Gas Ltd.,* (1995) 2 SCC 754.

**RESULT:** Allowed.

**REVA KHETRAPAL, J.**

**1.** The prayer in the present writ petition is for issuance of a writ of certiorari or any other appropriate writ to the Respondents to quash the impugned letter dated 06.08.2012 whereby the decision to withdraw plot No.R-536, Rajendra Nagar was communicated to the Petitioners and the issuance of a writ in the nature of mandamus to the Respondents directing the Respondents to allot the said plot, i.e., plot No. R-536,

Rajendra Nagar to the Petitioners in lieu of T-514, Upper Ridge Road, Jhandewalan, Karol Bagh, New Delhi.

**2.** The facts leading to the filing of the present writ petition may be delineated as follows. The father of the Petitioner No.1, namely, Shri Harbans Singh was a refugee, who after the partition of India in 1947, migrated from Pakistan and squatted upon property bearing No. T-514, measuring 239 sq. yards in Jhandewalan, Karol Bagh sometime in 1948. The Government of India formulated a policy for the rehabilitation of the refugees from Pakistan popularly known as the Gadgil Assurance Scheme. In pursuance of the said Scheme, the Respondent No.1, Delhi Development Authority, vide its resolution No.266 dated 16.10.1970 formed a Committee to scrutinize the claims of refugees/squatters, like the Petitioner No.1's father, covered under the Gadgil Assurance Scheme. In March, 1981, Shri Harbans Singh appeared before the Committee and submitted all requisite documents to establish his claim. After scrutiny of the claim of Shri Harbans Singh, the Committee of the Respondent/DDA was pleased to recommend the case of Shri Harbans Singh and he was declared eligible to allotment under category 'A' upto the extent of 200 sq. yards to be regularized in his favour subject to payment of damages with effect from 01.05.1952. The said recommendation was approved by the Vice-Chairman of the Respondent No.1/DDA. Shri Harbans Singh paid the damages and submitted the clearance certificate as required under the Scheme and requested for execution of Lease Deed in his favour. The case was accordingly taken up and referred to the Planning Department of the Respondent/DDA for their clearance.

**3.** In the meantime, Shri Harbans Singh expired on 27.09.1989. S/ Shri Gurbax Singh, Surjeet Singh and Satpal Singh, being the real sons of the deceased allottee, represented for mutation of the allotment of plot No. T-514, Jhandewalan Road in their favour. The mutation was carried out in their names and communicated to them vide letter dated 30th September, 1993, stating that:

> "The eligibility for allotment/regularization of plot against T-514, Upper Ridge Road, Jhandewalan, New Delhi under category 'A' has been transferred in your names.
>
> Allotment-cum-demand letter in your names will follow."

**4.** Subsequently, one of the co-allottees, Shri Gurbax Singh also



expired on 03.12.1993 and in his place mutation of his 1/3rd share was done in the name of his legal representatives. Shri Satpal Singh also passed away on 06.11.2010 and now the Petitioners are entitled to allotment in category 'A' in respect of plot No. T-514, Jhandewalan, Karol Bagh.

**5.** It is stated that since 1989, the Petitioners have been pursuing the case for alternative allotment with the Respondent Authority and have written numerous letters and made various representations in respect of the same. However, despite holding the father of Petitioner No.1 entitled to allotment of an alternative plot of 200 sq. yards in 1981 itself, no plot was allotted to the father of the Petitioner No.1 and thereafter to his legal representatives by the Respondent No.1.

**6.** After repeatedly visiting the offices of the Respondent No.1 for over two decades, the Petitioners in 1999 once again requested the Vice-Chairman of the Respondent No.1 for allotment of an alternative plot. It emerges from the record of the DDA that on 22nd March, 2001, after noting that the plot No. T-514, Jhandewalan Road could not be allotted to the Petitioners as the said plot falls in the road widening of Jhandewalan Road, the case of the Petitioners for allotment of an alternative plot measuring 200 sq. yards in the same zone at Shanker Road was put up for consideration As it was found by the Planning Department of the Respondent Authority that the Petitioners could not be rehabilitated in the same area as the squatting site, the Vice-Chairman of the Respondent Authority approved the proposal for providing alternative allotment of 200 sq. yards to the Petitioners in the same vicinity or same zone on 25.05.2001. However, despite the aforesaid approval of the Vice-Chairman and several notings on the Respondent No.1's file regarding alternative allotment, the Respondent No.1 Authority failed/neglected to act upon its assurances. The Petitioners were constrained to move the Permanent Lok Adalat of the Respondent No.1, and on 04.11.2003, the Director (Lands), DDA made a statement before the Permanent Lok Adalat that if the Petitioners have knowledge of a vacant plot in the same area or zone, the same may be communicated to the DDA for consideration. The Petitioners accordingly intimated the DDA about the availability of plot bearing No. R-536, New Rajendra Nagar, New Delhi, but on one pretext or the other the Respondents did not allot the same. The Permanent Lok Adalat in its orders dated 08.11.2005, 05.12.2006 and 06.03.2007, inter alia, noted that the matter required the urgent attention of the Vice-Chairman of the Respondent No.1 and had been horribly delayed with the

Respondent No.1 changing its stand every time.

**7.** It transpired that in the meanwhile a committee constituted by the Lieutenant Governor met on 16.01.2006 when it was decided to allot to the Petitioners an undeveloped plot measuring 128.80 sq. mtrs., by carving out the plot on the land available between plot No.T-2353 and T-2355. It is noteworthy that in the noting of the Deputy Director dated 16th February, 2006, the following pertinent facts have been recorded:-

> "5. This case which is pending before the Lok Adalat came up for hearing on 14.2.05. The Hon'ble Lok Adalat has directed that as it is a long pending case where a decision is to be taken by DDA, the same may be finalized at the earliest. The complainant has also stated that if his case is not finalized at the earliest he would have no option but to approach the appropriate civil Court. The Learned P.O., Permanent Lok Adalat also preferred to call the Commr. (Plg.) on 14.2.06 to apprise the Lok Adalat about his proposed (sic. proposal) to allot 200 sq. yds. plot to Sh. Surjeet Singh but he could not be called being at Vikas Minar. The PO, Permanent Lok Adalat furious over the delay in this case directed that if the issue is not decided by DDA immediately he shall be constrained to refer the matter to the Hon'ble High Court."

**8.** In a subsequent meeting held on 30.03.2006, it was proposed that half portion of a vacant plot adjoining plot No.T-2286 be given to the Petitioners by sub-dividing the said plot, which was measuring 330.60 sq. mtrs. This finds mention in the noting of the Deputy Director/OSB dated 04.04.2006 and a communication to this effect was sent to the Petitioners by the Respondent/DDA by letter dated 24.04.2006. This plot sought to be allotted was an undivided plot, with no sewerage and other civic amenities, carved out of half portion of plot No.T-2286, Ashok Nagar. Significantly, this fact is reflected in the DDA records and in particular in the noting dated 21.06.2006 (Page-95/N), wherein it is noted that *"the sewer line and the water line has been laid as per local enquiry but not functional."* This despite the fact that the clear mandate of Resolution No.266 dated 16.10.1970 was that the displaced person will be allotted a plot **in a developed area**.

**9.** Both the aforesaid options were discussed at the meeting held on 16.01.2007. As regards the request for allotment of plot No. R-536, New



Rajendra Nagar, it was observed *"that for the rehabilitation of the affected persons the prime concern should be to relocate in the nearby area. Also the request for allotment did not find favour due to the reason that the applicant would be put to undue hardship as the New Rajendra Nagar is relatively far from the area of stay i.e. Jhandewalan."*

**10.** By a communication dated 09.04.2007, the Deputy Director (OSB) communicated to the Petitioners that it had been decided to give him an option to choose one of the aforesaid plots in lieu of plot No.T-514, Upper Ridge Road, Jhandewalan, New Delhi. The Petitioners were further informed that so far as their request for allotment of plot No.536, New Rajendra Nagar was concerned, the same had not found favour due to the reason that "that the applicant would be put to undue hardship as the New Rajindra Nagar is relatively far from the area of stay, i.e., Jhandewalan." 11. Thus, the attempt of the Respondent Authority to scuttle the legitimate claim of the Petitioners continued. The malafides of the DDA and its attempt to suggest absolutely uninhabitable plot in Ashok Nagar caused its own Vice-Chairman to note on 10.12.2011 as follows (page-145/N):-

> "Appropos my response at 138N. The file has come back to me with the same recommendation as at 138N. **I am sure that is no will to solve the issue both in Planning and Land Department**. I don't know how the planner are recommending carving out a plot of 200 sq meters on a 10 ft road? What is the conscious decision to be taken by the VC, when no alternatives are suggested in the note. The allotment of 200 sq. meter plot on a 10 ft road is inappropriate from the Planning point of view. A plot of 200 mtrs in the same zone, as per eligibility of the applicant be considered out of the available plots."

**12.** After the aforesaid scathing remarks made on record by its own Vice-Chairman, on 25.01.2012 the Respondent No.2, in her capacity as Commissioner (LD) of Respondent No.1, submitted for approval of the Competent Authority allotment of plot No. R-536, Rajendra Nagar measuring 196.75 sq. yards, after noting that the said plot was vacant and had not been allotted to anybody. The Respondent No.2 at page 153/N of the records made the following apposite observations:-

> "It was decided that a plot measuring 200 sq. yds. in the same zone as per eligibility of the applicant can be allotted. It is

unfortunate that despite clear orders of the Competent Authority, the matter was again referred by the Branch to Planning Wing and they have suggested some other plot in Ashok Nagar and informed that the plot can be carved out after obtaining consent of the applicant and ratification of Screening Committee.

**The present case is pending since last more than 10 years and shuttling between Planning and Land Disposal Wing.** It has already been decided that the applicant may be allotted a plot out of available vacant plots. Thus, to resolve this long pending issue, it would be appropriate to allot a plot out of available plots instead of repeating the same exercise again for carving out another plot and obtaining consent for the same.

Details of available plots are at page 130/N. Only one plot measuring 196.75 sq. yds. is available. Other plots are either smaller or bigger in size and cannot be allotted as his eligibility is only for allotting a plot measuring 200 sq. yds. The applicant has already given his consent for allotment of this plot.

**The file is submitted for approval of Competent Authority for allotment of plot No.R-536, Rajendra Nagar measuring 196.75 sq. yds. As per office report available at page 152/N, this plot is vacant and has not been allotted to anybody. D.L. will be send as per policy.**

Submitted for orders."

**13.** The aforesaid decision to allot the approved plot to the Petitioners was approved by the Vice-Chairman on 03.02.2012 and the same was communicated by the Respondent Authority to the Petitioners vide letter dated 09.02.2012, which reads as under:-

"It is to inform you that Competent Authority has approved the allotment of alternative plot bearing No.R-536, area measuring 196.75 sq. yds. situated at Rajendra Nagar, New Delhi in lieu of premises No.T-514, Upper Ridge Road, Jhandewallan, Karol Bagh, New Delhi-55. The demand letter will be issued shortly in due course as per Policy/Rules admissible."

**14.** After the receipt of the aforesaid letter, when once again nothing was heard from the Respondent Authority, the Petitioners wrote letters



dated 04.04.2012, 01.06.2012 and 16.06.2012 requesting the Respondent Authority to issue the demand letter qua the Rajendra Nagar plot and also got legal notice dated 07.06.2012 served upon the Respondent Authority. However, the Petitioners to their shock and dismay, on their visit to the Respondent No.1's office on 26.07.2012, were informed that the Respondent Authority had recalled its allotment of the Rajendra Nagar plot and was now seeking to carve out a completely undeveloped plot in Ashok Nagar, Faiz Road, behind Hyundai Showroom and allot the same to the Petitioners. On inspection of the DDA file on 25.01.2012, the Petitioners learnt that the Respondent No.2 had malafide noted as under on page-156/N:-

"May kindly see approval of VC at page 153/N for allotment of plot No. R-536, Rajindra Nagar, measuring 196.75 sq. yds. under the Gadgil Assurance Scheme.

Before sending the file to Finance Department for the purpose of costing, the undersigned went through the whole case again. It is submitted that as per Resolution No.266 dated 16.10.1970 of the Authority (99/Cor.), as far as possible steps to be taken to rehabilitate the persons in the same area where they were squatting. The undersigned inadvertently, may be in rush to settle the long pending case, recommended for allotment of plot No.R-536 at Rajendra Nagar. Since the plot No.R-536 at Rajendra Nagar is a developed plot in residential scheme, having huge market value; it can be allotted only through auction/tender mode as per Nazul Rules. Further, its allotment under Gadgil Assurance Scheme may not be covered within the Resolution No.266 dated 16.10.1970 of the Authority especially when there is a possibility of carving out a plot in the nearby area of Ashok Nagar where other persons of Gadgil Assurance Scheme were squatting. In the past, such a developed plot in residential scheme have been never allotted under Gadgil Assurance Scheme and it may set a bad precedent.

In the present case, though there was a better option suggested by the Planning Department at page 149/N to carve out a plot in nearby area at Ashok Nagar in accordance with the report of AE (Survey) at page 137/N. It is pertinent to mention here that Ashok Nagar is the nearby area where the applicant is squatting.

Also other persons covered under Gadgil Assurance Scheme were residing at Ashok Nagar as specifically mentioned in the Authority Resolution No.27/2001 dated 30.03.2001 (474/cor.).

In view of above, it is suggested that the decision to allot the Plot No.R-536 at Rajendra Nagar may kindly be reviewed and Planning Department may be asked to carve out the proposed plot at Ashok Nagar for this purpose."

**15.** Interestingly, the Vice-Chairman of the Respondent No.1 Authority, despite the aforesaid endorsement, on review upheld the allotment of the Rajendra Nagar plot, stating that there was no occasion for the officials of the Respondents to carve out an undeveloped plot in Ashok Nagar and allot the same to the Petitioners. The aforesaid note of the Vice-Chairman, being crucial for the decision of the case, is being reproduced in its entirety:-

"Perused the Resolution No.266 dated 16.10.1970 regarding rehabilitation of displaced persons under 'Gadgil Assurance' and the notes above. Guiding principles regarding allotment of alternate plots to evictees (who were displaced persons also) from public land for their rehabilitation have been laid down in this paper.

2. Para-6 of the Agenda note detailing the extract from the 7th Report of Parliamentary Committee on Government Assurances relevant to the issue, needs to be looked at, which says:-

".....In this connection, the Committee should like to impress upon Government that they should keep the human element involved in uprooting from the existing sites all those displaced persons who had once been uprooted at the time of partition of the country and it is with this end in view, the Committee suggest that if with slight modification the displaced persons could be accommodated in their existing places without any plan, there should be no hesitation on the part of Government for making such modifications in the Master Plan. Only in very extreme and unavoidable situations, the question of shifting the displaced persons from their existing places should be thought of by Government."

3. Further in Para-9 Sub Clause (iv), the Parliamentary Committee



on Government Assurances had recommended that ".....'Subject to this provision, alternative accommodation is to be provided on developed land, and as far as practicable, near the place of the business or employment of the displaced person. Government will have to be requested to allow the Delhi Development Authority to sell Nazul Land at 1952 rates rather than at market price as per Nazul Agreement."

4. Based on the above principles, it was resolved by the Authority that "As far as possible steps be taken to rehabilitate the persons in the same area where they were squatting. The cost of land which would be charged from such squatters may be worked out by the Finance Member."

5. On perusal of the above principles and the Resolution of the Authority, it can be concluded that the main intent of the entire exercise was to provide much needed relief to those displaced persons who had once been uprooted at the time of partition of the country and had faced further evictions from the public land they were squatting on. The Resolution was made way back in 1970 and this case has been lingering on for the one reason or the other without any alternative allotment even though the claimant was eligible. **Though efforts were made to allot plot nearer to his place of squatting but the same could not be finalized either due to the encroachment on the identified plot or the identified land being located on a narrow 10 feet wide road, not fit for planned habitation.**

On receiving a number of representations from the claimant, approval for allotment of a Plot No.R-536, Rajendra Nagar, New Delhi was given which was acceptable to the claimant, but the same is now being objected to on the ground that it is a developed plot in a residential scheme and not located in the area where the claimant was squatting. **But Clause (iv) of Para-9 of the Resolution does not restrict the allotment to the localities in which the displaced persons were squatting; it says that as far as possible steps be taken to allot land to rehabilitate persons in the same area; meaning thereby that in the event of special circumstances where the plot is not available in the same area, the claimant can be given residential plot**

**of size of his entitlement in other areas also. Since, the claimant in this case is entitled to a residential plot of maximum 200 sqm and no such habitable plot could be located in the area of his squatting during the last several years, I see no reason in cancelling the allotment which has been made to him in another locality after much wrangling."**

**16.** Notwithstanding the repeated decisions of the Vice-Chairman to the contrary and the allotment of the plot bearing No.R-536, Rajendra Nagar by the Vice-Chairman, the Respondent/DDA by letter dated 6th August, 2012 informed the Petitioners that the competent authority had decided to withdraw the earlier allotments of plot bearing No.R-536 measuring 196.75 sq. yards situated at Rajindra Nagar, New Delhi as communicated vide letter dated 09.02.2012 and has approved the allotment of an alternative plot measuring 200 sq. yards behind Hyundai Showroom at D.B. Gupta Road, Ashok Nagar along Faiz Road. The justification for the aforesaid action of the DDA, which according to the Petitioners was tainted by malafides, was given as follows:-

"The above decision is taken in view of that the re-allotted plot is in the neighbourhood & the site where the applicant was squatting. Further other persons covered under Gadgil Assurance Scheme are also residing in the same area at Ashok Nagar. Whereas the earlier Plot No. R-536, at Rajendra Nagar is a developed plot in Residential Scheme having huge market value. It can be allotted through auction/tender mode as per Rules. Further Plot No. R-536, Rajendra Nagar is far away from the area where the applicant was squatting and its allotment may set an unfair precedent under Gadgil Assurance Scheme.

The demand letter will be issued in due course as per policy and rules. This issues with prior approval of Vice-Chairman, DDA."

**17.** The Petitioners allege that the withdrawal of the earlier allotment of plot bearing No. R-536, Rajendra Nagar, New Delhi and subsequent allotment of the aforesaid plot is bad in law, illegal and arbitrary, malafide, unwarranted and wholly without jurisdiction and as such liable to be set aside.

**18.** In the Counter-Affidavit filed by it, the Respondent/DDA has



not disputed the aforesaid facts but has sought to justify its aforesaid action by submitting that since plot No. R-536, at Rajendra Nagar is a developed plot in a residential scheme, having huge market value, it can be allotted only through auction/tender mode as per Delhi Development Authority (Disposal of Developed Nazul Land), Rules 1981. It is further submitted that its allotment under Gadgil Assurance Scheme "may not" be covered within Resolution No.266 dated 16.01.1970 of the Authority especially when there is a possibility of carving out a plot in the nearby area of Ashok Nagar where other persons of Gadgil Assurance Scheme were squatting. Finally, it is stated that in the past such a developed land in residential scheme has never been allotted under Gadgil Assurance Scheme and it may set bad precedent. Hence, the Petition is not maintainable and liable to be dismissed.

**19.** In the course of hearing, Mr. Anil Sapra, learned senior counsel for the Petitioners contended that the action of the Respondent Authority in not proceeding with the allotment of the Rajendra Nagar plot and instead allotting a plot at Ashok Nagar along Faiz Road is wholly malafide. It was contended that even otherwise, the said cancellation was arbitrary as a valuable right which had crystallized in favour of the Petitioners was sought to be taken away without giving the Petitioners an opportunity of being heard. Even the scathing criticism of the Vice-Chairman on more than one occasion had not deterred the Respondent Nos.1 and 2, and the Vice-Chairman's note dated 16.03.2012 wherein he stated that the Resolution No.266 does not restrict the allotment of alternative plots to localities in which the displaced persons were squatting had been brushed aside by the Respondents.

**20.** Learned senior counsel also contended that the plot now sought to be allotted as per the impugned letter dated 06.08.2012 has been hurriedly carved out, so much so that it does not have any allotted number and is totally uninhabitable. A big-peepal tree is standing on the proposed plot which cannot be removed, there is absolutely no proper approach road, the site in question is abutting a running school; there is absolutely no development and no services are available and the entire area/cluster is meant for commercial/industrial use.

**21.** Ms. Shobhana Takiar on behalf of the DDA, on the other hand, sought to raise a four-fold contention:-

(i) Plot No. R-536 at Rajendra Nagar which is a developed

plot in residential scheme cannot be allotted to the Petitioners. Its allotment under the Gadgil Assurance Scheme **"may not"** be covered within Resolution No.266 dated 16.01.1970 of the Authority. In the past, such a developed land in residential scheme has never been allotted under the Gadgil Assurance Scheme and it may set bad precedent.

(ii) The said plot has huge market value, and as such it can be allotted only through auction/tender mode as per the Delhi Development Authority (Disposal of Developed Nazul Land), Rules 1981.

(iii) In commercial matters, the Courts should not risk their judgments for the judgments of the bodies to which that task is assigned. Reliance in this context was placed by her upon the judgment rendered by the Supreme Court in the case of **Karnataka State Industrial Investment & Development Corpn. Ltd. vs. Cavalet India Ltd. and Others,** (2005) 4 SCC 456.

(iv) Notings and/or decisions recorded in the official files by the officers of the Government at different levels and even the Ministers do not become decisions of the Government unless the same are sanctified and acted upon by issuing an order in the name of the President or Governor, as the case may be, and is communicated to the affected persons. The notings and/or decisions recorded in the file also do not confer any right or adversely affect the right of any person, and the same can neither be challenged in a Court of law nor made basis for seeking relief. A noting in a file is a noting simplicitor and nothing more.

**22.** Adverting to the first contention of Ms. Takiar that plot No. R-536, Rajendra Nagar is a developed plot and, therefore, cannot be allotted to the Petitioners and its allotment under the Gadgil Assurance Scheme **"may not"** be covered within Resolution No.266 dated 16.01.1970 of the Authority, the said contention, in my view, has to be noted to be rejected for the reason that in Resolution No.266, para 9(iv), it is specifically stated:-



"..... displaced person should be given option to purchase the site occupied by him. Subject to this provision, **alternative accommodation is to be provided on developed land,** and as far as practicable near the place of the business or employment of the displaced person. Government will have to be requested to allow the Delhi Development Authority to sell Nazul land at 1952 rates rather than at market price as per Nazul Agreement."

**23.** Undeniably, Harbans Singh, predecessor-in-interest of the Petitioners, was refused allotment of the site occupied by him at Jhandewalan as the said site was required by the Government for the purpose of road widening. In lieu thereof, Harbans Singh was, therefore, entitled to the allotment of developed land and it is wholly ununderstandable as to how the DDA can contend to the contrary. Be it noted that in the aforesaid Resolution, while considering the 4,589 applications received by the DDA, reference was made to the 7th report on Government Assurance [(iv) – Lok Sabha], which, being relevant, is reproduced hereunder:-

"..... in this connection, the committee should like to impress upon government that they should keep the human element involved in uprooting from the existing sites all those displaced persons who had once been uprooted at the time of partition of the country and it is with this end in view, the committee suggest that if with slight modification the displaced persons could be accommodated in their existing places without any way impinging on the general scheme of the Master Plan, these should be no hesitation on the part of Government for making such modification in the Master Plan. Only in very extreme and unavoidable situations, the question of shifting the displaced persons from their existing places should be thought of by government."

**24.** In the instant case, late Harbans Singh was not uprooted once but twice, i.e., first at the time of partition of the country and then from the existing site at Jhandewalan which was occupied by him on account of the Jhandewalan Road Widening Scheme. In these circumstances, the allotment of an uninhabitable alternative plot to him in the face of the clear mandate contained in Resolution No.266 that **"alternative accommodation is to be provided on developed land"** appears to be

wholly unjustified.

**25.** The next contention of Ms. Takiar that the said plot has huge market value, and as such it can be allotted only through auction/tender mode as per the Delhi Development Authority (Disposal of Developed Nazul Land), Rules 1981 is also untenable. In this regard, learned senior counsel for the Petitioners has drawn my attention to applications filed by the Petitioner under the Right to Information Act, 2005 dated 28.09.2012 and 30.11.2012 and replies thereto, placed on record on the Affidavit of the Petitioner. In its reply dated 05.12.2012 by way of information under the RTI Act, 2005, it is clearly stated that **market rate is not considered at the time of allotment/rehabilitation of squatter under Gadgil Assurance Scheme.** This is also borne out by the fact that in DDA Resolution No.266 it is clearly stated that Government will have to be requested "to allow Delhi Development Authority to sell Nazul land at 1952 rates rather than at market price as per Nazul Agreement".

**26.** The ancillary argument that in the past such a developed land in residential scheme has never been allotted under Gadgil Assurance Scheme and it may set bad precedent is also found by this Court to be without merit in the light of the information received by the Petitioners from the Delhi Development Authority on 05.12.2012, clearly stating that:-

(a) the Rajendra Nagar plot is on Ministry of Rehabilitation land which has been handed over by L&DO to DDA (and is not on Nazul land covered under the Nazul Rules), and

(b) there are 30 plots allotted in Dwarka to persons in lieu of their premises at Jhandewalan Extension under the Gadgil Assurance Scheme.

**27.** The next contention of Ms. Takiar that "in commercial matters" the Courts should not risk their judgments for the judgments of the bodies to which that task is assigned is, in my view, undeniable. However, the present case being under an Assurance Scheme extended by the Government of India to the migrants from West Pakistan cannot be called a "commercial matter". The object and the idea behind this Scheme was to rehabilitate the refugees from West Pakistan and the earning of profit as in a commercial transaction was not the purpose.



**28.** At this juncture, it is deemed expedient to refer to the judgment in the case of **Karnataka State Industrial Investment & Development Corpn. Ltd.** (supra) relied upon by the Respondent/DDA. The ratio of the said judgment is that judicial review of action of a Financial Corporation under Article 226 is not called for even if a wrong decision is taken by the Corporation **unless the same is malafide**. In the present case, the Petitioners have clearly and categorically alleged that the action of the Respondent/DDA smacks of malafides and have been at considerable pains to demonstrate the same. There is not a whisper of denial in the Counter-Affidavit with regard to the allegations of malafides. In such a situation, it cannot be said either that the present case relates to a commercial matter or that the decision taken by the Respondent/DDA is not open to challenge by judicial review.

**29.** In the aforesaid case reference is made to an earlier judgment rendered by the Hon.ble Supreme Court in the case of **U.P. Financial Corpn. vs. Naini Oxygen & Acetylene Gas Ltd.,** (1995) 2 SCC 754, wherein the following apposite observations were made:- (SCC, page-761, para 21)

> "21. However, we cannot lose sight of the fact that the Corporation is an independent autonomous statutory body ..... **Unless its action is mala fide,** even a wrong decision taken by it is not open to challenge. It is not for the courts or a third party to substitute its decision, however more prudent, commercial or business like it may be, for the decision of the Corporation. Hence, whatever the wisdom [or the lack of it] of the conduct of the Corporation, the same cannot be assailed for making the Corporation liable."

**30.** It is clear from the aforesaid that malafides on the part of even an independent autonomous statutory body engaged in commercial transactions alone would vitiate the decision taken by it even in a commercial matter. The present is not a commercial matter and the facts noted above leave no manner of doubt that malafides are writ large in the decision of the Respondent Authority in arbitrarily cancelling the allotment already made to the Petitioners with the approval of the Vice-Chairman and to allot to them instead an uninhabitable plot with no approach road and other facilities, and that too after the issuance of the letter of allotment in their favour.

**31.** As regards the fourth contention of Ms. Takiar that the Petitioners cannot be allowed to rely upon the notings and/or decisions recorded in the official files and the same do not confer any right on the Petitioners, a perusal of the law laid down in this regard by the Hon.ble Supreme Court in **Shanti Sports Club & Anr. vs. Union of India & Ors.,** AIR 2010 SC 433, relied upon by Ms.Takiar, would show that in the very same case it has been clarified that the said principle applies only to notings in the file **and not to orders passed on the basis thereof**. Indubitably, a noting or even a decision recorded in the file can always be reviewed/reversed/overturned and the Court cannot take cognizance of the earlier noting or decision for the exercise of judicial review, but there is a caveat which is of great significance. The caveat is that where the notings have fructified into an order and the said order has been communicated to the concerned party, it is no longer open to the concerned statutory body to review/overturn its decision. It is of the essence that the order has to be communicated to the person who would be affected by that order before the State and that person can be bound by that order. In the instant case, the order of allotment has been communicated to the Petitioners and the Petitioners informed of the same, thereby affecting the rights of the Petitioners which have crystallized as a result of the said order. It was, therefore, no longer open to the Respondent/DDA to review its earlier decision and that too arbitrarily and illegally. The decision in **Shanti Sports Club & Anr.** (supra) is, therefore, of no assistance to the Respondent/DDA.

**32.** Before parting with the case, it may be noted that it does not *behove* the Respondent, which is an instrumentality of the State, to act in the aforesaid arbitrary and malafide manner. The Respondent itself had held the Petitioner No.1's father eligible for allotment of an alternative plot of 200 sq. yards way back in 1981. Yet, the Petitioner No.1's father and after his death the Petitioners have been made to run from pillar to post on account of the inaction and apathy of the Respondent. In fact, the Respondents, failure to allot a plot has seen three generations struggle to get what they have been held entitled to in 1981 itself, viz., the Petitioner No.1's father (Shri Harbans Singh), then his sons (Petitioner No.1 and his brothers Shri Gurbax Singh and Shri Satpal Singh) and after the death of the Petitioner No.1's brothers, it is their legal heirs who are fighting to get the plot allotted. This, despite the fact that the plot in Rajendra Nagar was found to be available all through for allotment. The



Gadgil Assurance Scheme and the Resolution dated 16.10.1970, which ought to have been honoured by the Respondent in letter and spirit, have been given a complete go-bye and for 30 long years the persons entitled to the allotment have been kept hanging for their legitimate rights, so much so that the entire intent and objective of the aforesaid Scheme and Resolution stand altogether frustrated. The Scheme was indubitably meant to secure the rights of the displaced person by allotting to him an alternative plot in a developed area, but in the instant case the displaced person died without receiving the advantage which ought to have enured to him under the Scheme. Another aspect of the matter which needs to be mentioned is that despite several recommendations made by the Vice-Chairman of the Respondent Authority and the allotment order passed by him, allotting plot No.R-536, Rajendra Nagar to the legal representatives of the Petitioner No.1's father, the entire process was inexplicably reversed by the Commissioner (LD), DDA, an official who was admittedly lower in the hierarchy of officers to the Vice-Chairman. If at all, the Lieutenant Governor was the only authority who could have reversed the orders of the Vice-Chairman, DDA, but in this case the impropriety of the Vice-Chairman's orders being reversed by the Commissioner is glaringly evident from the records. The Vice-Chairman has in fact been reduced to a mere signing authority, and even his scathing criticism of the actions and inactions of those subordinate to him have been brazenly brushed aside. The fury of the Presiding Officer of the Lok Adalat at the unconscionable delay caused by the Respondent also finds mention in the Respondent's records, but that too went unheeded, and eventually the Lok Adalat was left with no option except to disassociate itself from the case.

**33.** In view of the aforesaid discussion, the petition succeeds and the Petitioners are held entitled to the relief prayed for by them. A writ of certiorari is issued quashing the impugned letter dated 06.08.2012 with a direction to the DDA to hand over to the Petitioners the possession of plot No.R-536, Rajendra Nagar originally allotted to the Petitioners in lieu of T-514, Upper Ridge Road, Jhandewalan, Karol Bagh, New Delhi on completion of the necessary formalities, latest within 3 months from today.

**34.** W.P.(C) 5885/2012 and CM No.12120/2012 stand disposed of in the aforesaid terms.

**ILR (2013) IV DELHI 3035**
**W.P. (C)**

**PURE DRINKS (NEW DELHI) LIMITED ....PETITIONER**

**VERSUS**

**THE MEMBER, SALES TAX TRIBUNAL & ORS. ....RESPONDENTS**

**(BADAR DURREZ AHMED & R.V. EASWAR, JJ.)**

**W.P. (C) NO. : 1638/1994 DATE OF DECISION: 21.03.2013**

**Delhi Sales Tax Act, 1975—Section 21 (3)—Section 27 (1)—Under the Delhi Sales Tax Act, 1975 quarterly returns are required to be filed unless by specific direction those returns are required to be filed monthly—Petitioner did not file any return in respect of the year 1980-81—petitioner had also not deposited any tax during the currency of that year—Section 23 (5) of the said Act deals with the situation where a dealer fails to furnish returns in respect of any period by the prescribed date, in such eventuality, the Commissioner is mandated to, after giving the dealer a reasonable opportunity of being heard, make a best judgment assessment—Consequently, after due notice and opportunity to the petitioner, a best judgment assessment was made on 26.03.1985 by the assessing authority whereby the petitioner was directed to pay a sum of 52,39,763.23 under the said Act and by a separate order of the same date, the petitioner was required to pay a sum of 5,92,469/- under the Central Sales Tax Act, 1956—However, in neither case was any interest levied by the assessing authority under section 27(1) of the said Act—Thereafter, on 01.10.1985, a show— cause notice was issued by the Assistant Commissioner seeking suo moto revision of the assessment orders under section 46 of the said Act—**



**Thereafter, the Assistant Commissioner passed an order on 03.09.1986 giving directions to the Sales Tax Officer to issue the necessary demand notice and challans in terms of the said order, which included computation of interest for each of the four quarters of 1980—81 both under the local Act as well as under the central Act— Being aggrieved by the said order dated 03.09.1986 the petitioner preferred an appeal before the Sales Tax Appellate Tribunal—Tribunal decided appeal by an order dated 31.07.1989 in favour of the petitioner/ dealer by quashing the order passed by the Assistant Commissioner on 03.09.1986 and restoring the ex-parte orders of the Sales Tax Officer (assessing authority) which created the additional demand of 52,39,769/— under the local Act and 5,92,466.68 under the central Act— Thereafter, the revenue filed a review application before the Tribunal which was disposed of by the order dated 13.02.1994 reviewing its earlier order dated 31.07.1989, inter alia, on the point of interest—Tribunal took the view that the issue of interest under section 27(1) of the said Act had not been considered by the Tribunal in the first round and as it ought to have considered the same, a review was in order—Thereafter, the Tribunal considered the matter on merits and decided that interest was chargeable from the petitioner under section 27(1) of the said Act. The Tribunal reviewed its order, dismissed the appeal filed by the petitioner in so far as the question of interest was concerned and directed the petitioner to pay the interest as determined by the Assistant Commissioner by virtue of his order dated 03.09.1986—The writ petition has been filed by the petitioner being aggrieved by the said order passed by the Tribunal on 13.02.1994. Held— From an examination of the Constitution Bench decision of the Supreme Court in the case of *State of Rajasthan v. Ghasilal:* AIR 1965 SC 1454, the decision in *Associated Cement Company Ltd. V. CTO:* (1981) 4**

**SCC 578, Constitution Bench decision in the case of *J. K. Synthetics Ltd. V. CTO:* (1994) 4 SCC 276 and *Maruti Wire Industries Pvt. Ltd. v. STO & ORS.:* (2001) 3 SCC 735, it is apparent that the expression "tax due" as appearing in section 27(1) of the said Act would have to be read in relation to the provisions of section 21(3) thereof— Section 21(3) of the said Act has clear reference to the furnishing of a return Moreover, it has reference to the full amount of tax due from a dealer under the Act "according to such return"—Tax which is said to be due under section 27(1) of the said Act must be the tax which is due "according to a return"—It is obvious that if no return is filed then there could be no tax due within the meaning of section 27(1) of the said Act read with section 21(3) thereof—Tax which is ultimately assessed is the tax which becomes due on assessment and if this tax so assessed is not paid even after the demand is raised then the dealer would be deemed to be in default and would be liable to pay interest can be levied on such a dealer, who has not filed a return under section 27(1) of the said—Impugned order dated 13.02.1994 is not in accord with the Constitution Bench decisions of the Supreme Court— Consequently, the impugned order, to the extent it requires the petitioner to pay interest under section 27(1) of the said Act, is set—aside —Sales tax department shall give consequential relief to the petitioner in respect of the amount deposited towards interest on an application being made by the petitioner within four weeks—Writ petition is allowed to the aforesaid extent.**

From an examination of the aforesaid decisions it is apparent that the expression "tax due" as appearing in section 27(1) of the said Act would have to be read in relation to the provisions of section 21(3) thereof. Section 21(3) of the said Act has clear reference to the furnishing of a return. Moreover, it has reference to the full amount of tax due from a dealer under the Act "according to such return". In other



words, the tax which is said to be due under section 27(1) of the said Act must be the tax which is due "according to a return". It is obvious that if no return is filed then there could be no tax due within the meaning of section 27(1) of the said Act read with section 21(3) thereof. The tax which is ultimately assessed is the tax which becomes due on assessment and if this tax so assessed is not paid even after the demand is raised then the dealer would be deemed to be in default and would be liable to pay interest under section 27(2) of the said Act. But till such tax is assessed no interest can be levied on such a dealer, who has not filed a return under section 27(1) of the said Act. **(Para 21)**

In view of the foregoing discussion, it is evident that the impugned order dated 13.02.1994 is not in accord with the Constitution Bench decisions of the Supreme Court. Consequently, the impugned order, to the extent it requires the petitioner to pay interest under section 27(1) of the said Act, is set-aside. The sales tax department shall give consequential relief to the petitioner in respect of the amount deposited towards interest on an application being made by the petitioner within four weeks. The writ petition is allowed to the aforesaid extent. There shall be no order as to costs. **(Para 22)**

**Important Issue Involved:** Delhi Sales Tax Act, 1975—Section 21(3)—Section 27 (1)—if no return is filed then there could be no tax due within the meaning of section 27(1) of the said Act read with section 21(3) thereof—Tax which is ultimately assessed is the tax which becomes due on assessment and if this tax so assessed id not paid even after the demand is raised then the dealer would be deemed to be in default and would be liable to pay interest under section 27(2) of the said Act—But till such tax is assessed no interest can be levied on such a dealer, who has not filed a return under section 27(1) of the said Act.

**[Sa Gh]**

**APPEARANCES:**

**FOR THE PETITIONER** : Mr. Rajesh Jain, Advocate.

**FOR THE RESPONDENT** : None.

**CASES REFERRED TO:**

1. *Maruti Wire Industries Pvt. Ltd.* vs. *STO & ORS.:* (2001) 3 SCC 735.
2. *J.K. Synthetics Ltd.* vs. *CTO:* (1994) 4 SCC 276.
3. *Associated Cement Company Ltd.* vs. *CTO:* (1981) 4 SCC 578.
4. *State of Rajasthan* vs. *Ghasilal:* AIR 1965 SC 1454.

**RESULT:** Writ Petition allowed.

**BADAR DURREZ AHMED, J. (ORAL)**

**1.** This is an old matter of 1994. It has been specifically listed today for hearing. Nobody is present on behalf of the respondent and that is why we have been constrained to hear this matter in the absence of the respondent.

**2.** This writ petition is directed against the order dated 13.02.1994 passed by the Sales Tax Appellate Tribunal. The point in issue relates to the chargeability of interest under section 27(1) of the Delhi Sales Tax Act, 1975 (hereinafter referred to as 'the said Act'). In the facts and circumstances of the present case, it is an admitted position that no return has been filed under the said Act in respect of the year 1980-1981. Admittedly, under the Delhi Sales Tax Act, 1975 quarterly returns are required to be filed unless by specific direction those returns are required to be filed monthly. However, we need not concern ourselves with this inasmuch as the fact remains that the petitioner did not file any return in respect of the year 1980-81. The petitioner had also not deposited any tax during the currency of that year.

**3.** Section 23(5) of the said Act deals with the situation where a dealer fails to furnish returns in respect of any period by the prescribed date. In such eventuality, the Commissioner is mandated to, after giving the dealer a reasonable opportunity of being heard, make a best judgment assessment. Consequently, after due notice and opportunity to the dealer (petitioner herein) a best judgment assessment was made on 26.03.1985



by the assessing authority whereby the petitioner was directed to pay a sum of Rs. 52,39,763.23 under the said Act and by a separate order of the same date, the petitioner was required to pay a sum of Rs. 5,92,469/- under the Central Sales Tax Act, 1956. However, in neither case was any interest levied by the assessing authority under section 27(1) of the said Act.

**4.** Thereafter, on 01.10.1985, a show-cause notice was issued by the Assistant Commissioner seeking suo moto revision of the assessment orders under section 46 of the said Act. Several points were mentioned in the said show-cause notice which included RD exemption, concessional rate of tax on submission of C-Forms as well as the question that no interest was charged under section 27(1) of the said Act by the assessing authority. Thereafter, the Assistant Commissioner passed an order on 03.09.1986 whereby the Assistant Commissioner gave directions to the Sales Tax Officer to issue the necessary demand notice and challans in terms of the said order, which included computation of interest for each of the four quarters of 1980-81 both under the local Act as well as under the central Act. The computation of interest was given as under:

| "Under the Local Act | Interest |
|---|---|
| Ist Qr. | Rs. 18,14,362.00 |
| IInd " | Rs. 11,43,682.00 |
| IIIrd " | Rs. 6,15,795.00 |
| IVth " | Rs. 5,05,817.00 |
| Under the Central Act | |
| Ist Qr. | Rs. 3,06,878.00 |
| IInd " | Rs. 95,308.00 |
| IIIrd " | Rs. 36,725.00 |
| IVth " | Rs. 33,096.00" |

**5.** Being aggrieved by the said order dated 03.09.1986 the petitioner preferred an appeal before the Sales Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal'). The Tribunal disposed of the said appeal

by an order dated 31.07.1989. The Tribunal considered three issues:-

"(a) The dealer has been under assessed;

(b) That the deduction has been wrongly allowed

(c) That the dealer has been assessed on yearly basis and not quarter-wise."

**6.** With regard to the first two issues the Tribunal concluded as under:

"8. Therefore it is clear in this case that the Revising Authority has trenched upon the powers of reassessment, which were given by section 24 of the Delhi Act, to the Sales Tax Officer. Therefore, the exercise of these powers by the Revising Authority u/s 46 of the Delhi Act is not only illegal but above of powers. Therefore, the decision of the Revising Authority, revising the orders of the Assessing Authority on the first two grounds, cannot be sustained and needs to be set aside."

**7.** The Tribunal also held that even in respect of the third issue the order of the Sales Tax Officer should not have and could not have been revised by the revising authority. As such, the said appeal was decided in favour of the petitioner/ dealer by quashing the order passed by the Assistant Commissioner on 03.09.1986 and restoring the ex-parte orders of the Sales Tax Officer (assessing authority) which created the additional demand of Rs.52,39,769/- under the local Act and Rs. 5,92,466.68 under the central Act.

**8.** Thereafter, the revenue filed a review application before the Tribunal which was disposed of by the order dated 13.02.1994. It is this order, which is impugned before us. By virtue of the order dated 13.02.1994, the Tribunal reviewed its earlier order dated 31.07.1989, *inter alia,* on the point of interest. The Tribunal took the view that the issue of interest under section 27(1) of the said Act had not been considered by the Tribunal in the first round and as it ought to have considered the same, a review was in order. Thereafter, the Tribunal considered the matter on merits and decided that interest was chargeable from the petitioner under section 27(1) of the said Act. The Tribunal reviewed its order, dismissed the appeal filed by the petitioner in so far as the question of interest was concerned and directed the petitioner to pay the interest as determined by the Assistant Commissioner by virtue



of his order dated 03.09.1986.

**9.** The writ petition has been filed by the petitioner being aggrieved by the said order passed by the Tribunal on 13.02.1994.

**10.** It was submitted by the learned counsel for the petitioner that since this was a case where the petitioner/ dealer had not filed any return whatsoever, there was no question of levy of interest under section 27(1) of the said Act. He submitted that the provision of interest under section 27(1) would only apply where the petitioner/ dealer failed to pay the "tax due" as required by section 21(3) of the said Act. He further pointed out that the expression "tax due" would have reference to section 21(3) of the said Act which required the registered dealer to furnish returns and pay the full amount of "tax due" from him under the said Act "according to such returns". Thus, according to the learned counsel for the petitioner, prior to an assessment, unless and until the dealer filed a return, there could not be any "tax due" because that would have relation to the amount of tax due "according to the return". Since, no return was filed, therefore, there could be no 'tax due' as used in section 27(1) of the said Act. The learned counsel for the petitioner also submitted that while it may seem incongruous that a person who files a return would be liable to pay interest and a person who does not file the return would not be liable to pay any interest under section 27(1) of the said Act, it must also be kept in mind that non-filing of the return attracts a penalty under section 55 of the said Act. Section 55 of the said Act stipulates that if a dealer fails to file any return without reasonable cause or to pay tax due according to the return as required by section 21(3) of the said Act, the Commissioner may, after giving the dealer an opportunity of being heard, direct the dealer to pay by way of penalty, in addition to the tax payable, a sum not exceeding twice that amount. Therefore, it was submitted by the learned counsel for the petitioner that the non-compliance with the requirement of filing of a return under section 21(3) of the said Act is adequately dealt with by the imposition of a penalty under section 55 of the said Act and the question of interest in that eventuality would not arise.

**11.** The learned counsel for the petitioner also submitted that apart from attracting penalty under section 55 of the said Act the non-filing of returns would also be treated as an offence under section 50 of the said Act, which could invite punishment with rigorous imprisonment that

could extend to six months or with fine or with both. The learned counsel, in making the aforesaid submission, drew our attention to the following provisions of the said Act, which are reproduced hereunder to the extent relevant: -

**"Section 21 - Periodical payment of tax and filing or returns-**

(1) Tax payable under this Act shall be paid in the manner hereinafter provided at such intervals as may be prescribed. (2) Every registered dealer and every other dealer who may be required so to do by the Commissioner by notice served in the prescribed manner shall furnish such returns of turnover by such dates and to such authority as may be prescribed. (3) Every registered dealer required to furnish returns under sub-section (2) shall pay into Government Treasury or the Reserve Bank of India or in such other manner as may be prescribed, the full amount of tax due from him under this Act according to such return and shall where such payment is made into a Government Treasury or the Reserve Bank Of India furnish alongwith the return a receipt from such Treasury of Bank showing the payment of such amount.

xxxxxxx xxxxxxxx xxxxxxxx

**Section 23- Assessment**

(1) xxxxxxx xxxxxxxx xxxxxxxx

(2) xxxxxxx xxxxxxxx xxxxxxxx

(3) xxxxxxx xxxxxxxx xxxxxxxx

(4) xxxxxxx xxxxxxxx xxxxxxxx

(5) If a dealer fails to furnish returns in respect of any period by the prescribed date, the Commissioner shall, after giving the dealer a reasonable opportunity of being heard, assess to the best of his judgment the amount of tax, if any, due from him.

xxxxxxx xxxxxxxx xxxxxxxx

**Section 27 – Interest**

(1) If any dealer fails to pay the tax due as required by sub-



section (3) of section 21, he shall, in addition to the tax (including any penalty) due, be liable of pay simple interest on the amount so due at one per cent per month from the date immediately following the last date for the submission of the return under sub-section (2) of the said section for a period of one month thereafter for so long as he continues to make default in such payment or till the date of completion of assessment under section 23 whichever is earlier.

(2) When a dealer or a person is in default or is deemed to be in default in making the payment of tax, he shall, in addition to the amounts payable under section 23 or section 24, be liable to pay simple interest on such amount at one per cent per month from the date of such default for a period of one month, and at one and a half per cent per month thereafter for so long as he continues to make default in the payment of the said amount.

xxxxxxx xxxxxxxx xxxxxxxx

**Section 55 – Imposition of penalty**

(1) If a dealer fails without reasonable cause to furnish any return by the prescribed date as required under sub-section (2) of section 21, or to pay the tax due according to the return as required by sub-section (3) of that section, the Commissioner may after giving the dealer an opportunity of being heard, direct that the dealer shall pay, by way of penalty, in addition to the amount of tax payable, a sum not exceeding twice that amount or where no tax is payable a sum not exceeding two thousand rupees.

(2) The penalties specified under sub-section (1) may be imposed by the Commissioner notwithstanding the fact that assessment proceedings have not been initiated against the dealer under section 23."

**12.** The learned counsel for the petitioner supported his arguments by referring to the Constitution Bench decision of the Supreme Court in the case of **State of Rajasthan v. Ghasilal:** AIR 1965 SC 1454. He also referred to the decision of the Supreme Court in **Associated Cement Company Ltd. v. CTO:** (1981) 4 SCC 578. In particular, he referred to the minority view of Bhagwati, J. (as his Lordship then was). Thereafter,

the learned counsel drew our attention to the Constitution Bench decision in the case of **J.K. Synthetics Ltd. v. CTO:** (1994) 4 SCC 276, wherein the majority view in **Associated Cement Company Ltd.** (supra) was overruled and the view taken by Bhagwati, J., that is, the minority view in **Associated Cement Company Ltd.** (supra) was upheld. Finally, the learned counsel referred to the Supreme Court decision in the case of **Maruti Wire Industries Pvt. Ltd. v. STO & ORS.:** (2001) 3 SCC 735.

**13.** In **Ghasilal** (supra) the Constitution Bench observed as under:-

> "10. In our opinion, there has been no breach of s. 16(1)(b) of the Act, and consequently, the orders imposing the penalties cannot be sustained. According to the terms of s. 16(1)(b), there must be a tax due and there must be a failure to pay the tax due within the time allowed. There was some discussion before us as to the meaning of the words 'time allowed' but we need not decide in this case whether the words 'time allowed' connote time allowed by an assessing authority or time allowed by a provision in the Rules or the Act, or all these things, as we are of the view that no tax was due within the terms of s. 16(1)(b) of the Act. Section 3, the charging section, read with s. 5, makes tax payable, i.e., creates a liability to pay the tax. That is the normal function of a charging section in a taxing statute. But till the tax payable is ascertained by the assessing authority under S. 10, or by the assessee under s. 7(2), no tax can be said to be due within s. 16(1)(b) of the Act, for till then there is only a liability to be assessed to tax."
>
> (underlining added)

**14.** The observations of the Constitution Bench were in respect of the provisions of Rajasthan Sales Tax Act, which are similar to the provisions of Delhi Sales Tax Act, 1975. The decision in **Ghasilal** (supra) has been summarized by the Supreme Court in **J. K. Synthetics Ltd.** (supra) as under: -

> "8. The decision rendered by the Constitution Bench of this Court in the case of Ghasilal turned on the following facts. The Act had come into force on 1-4-1955 while the rules framed thereunder were published in the Rajasthan Government Gazette



on 28-3-1955. Ghasilal challenged the making of assessments on his turnover for the year 1955-56 on the ground that the rules were invalid. The High Court in the writ petition filed by Ghasilal made an interim order on 9-1-1958 that Ghasilal will maintain proper accounts and file the prescribed returns and the Revenue will not assess him till further orders. During the pendency of the writ petition the rules were validated by Ordinance No.5 of 1959 (which later became an Act). Thereupon Ghasilal withdrew his writ petition. Thereafter on 4-12-1959, the Sales Tax Officer, Kota City Circle, sent him a show-cause notice asking him to deposit the tax due up to date within a week, failing which he threatened to take necessary action permissible in law. On receipt of the notice Ghasilal filed a return in respect of the 4th quarter ending on 22-10-1957 and deposited the tax of '11,808.37. On 25-4-1960, the Sales Tax Officer made an assessment in respect of the accounting period from 3-11-1956 to 22-10-1957 and imposed a penalty under Section 16(1)(b) of the Act on the ground that the assessee had not deposited the tax for the earlier quarters on the due dates and the tax for the 4th quarter was deposited after a lapse of two years. His appeal was dismissed by the Deputy Commissioner of Sales Tax who endorsed the view that the interim order of the High Court had not precluded the assessee from paying the tax and filing the returns. On the same line of reasoning penalty was also levied for the subsequent periods. Ghasilal challenged the levy of penalty by a writ petition and the High Court allowed the same. It may be noted that Section 7-AA was not on the statute book then and the penalty was levied under Section 16(1)(b) as it then stood which inter alia provided for imposition of penalty if the tax due was not paid within the time allowed. The submission made on behalf of Ghasilal was that there was no breach of Section 16(1)(b) inasmuch as no tax was due till the assessee filed his returns under Section 7(1) of the Act because the tax to be deposited as required by Section 7(2) was to be calculated on the basis of the return. There cannot be non-compliance of Section 7(2) unless a return is filed without depositing the tax due on the basis of the return. Hence, counsel contended, there was no violation of Section 7(2) and so long as the tax was not assessed and determined as required under Section 10, the liability for payment

of penalty did not arise. On the other hand the Revenue contended that the liability to pay tax had arisen under Sections 3 and 5 of the Act and the delay in complying with the demand notice entailed imposition of penalty. This Court held:

> "According to the terms of Section 16(1)(b), there must be a tax due and there must be a failure to pay the tax due within the time allowed. ...i.e., creates a liability to pay tax. That is the normal function of a charging section in a taxing statute. But till the tax payable is ascertained by the assessing authority under Section 10, or by the assessee under Section 7(2), no tax can be said to be due within Section 16(1)(b) of the Act, for till then there is only a liability to be assessed to tax"

The situation may be different after the introduction of Section 7-A. The contention based on the show-cause notice was brushed aside as one without substance as the learned counsel for the Revenue was unable to show any rule or section under which it was issued. On this line of reasoning this Court upheld the High Court decision and dismissed the appeal."

**15.** The minority view in **Associated Cement Company Ltd.** (supra) is clearly brought out by the observations contained in paragraph 10 thereof, which is to the following effect: -

> "10. Mr. Justice Venkataramiah has in his judgment classified registered dealers into the following five different categories:
>
> 1. A registered dealer who files his return showing a higher taxable turnover than the actual turnover which is ultimately found to be taxable at the time of regular assessment and who pays tax under Section 7(2) of the Act on the basis of the return.
>
> 2. A registered dealer who files a true and proper return and pays tax on the basis of such return within the time allowed.
>
> 3. A registered dealer who does not file any return at all as required by Section 7(1) and pays no tax under Section 7(2) of the Act.
>
> 4. A registered dealer who files a true return but does not



> pay the full amount of tax as required by Section 7(2) and
>
> 5. A registered dealer who files a return but wrongly claims either the whole or any part of the turnover as not taxable and pays under Section 7(2) of the Act that amount of tax, which according to him is payable, on the basis of the return.

The learned Judge has observed that if the construction contended for on behalf of the assessee were accepted, registered dealers falling within Categories 3, 4, and 5 would be outside the provision enacted in sub-section (2) of Section 7 read with Section 11-B, clause (a) and no interest would be payable by them under that provision and that would make clause (a) of Section 11-B "either unworkable or meaningless". I must, with the greatest respect, confess my inability to appreciate the line of reasoning which has prevailed with the learned Judge in making this observation. The learned Judge has proceeded on the basis that the registered dealers falling within all the three Categories, namely, 3, 4 and 5 are required by sub-section (2) of Section 7 to pay the tax chargeable under Section 3 of the State Act and if they do not pay the same within the time allowed, that is, at the time when the returns are filed or in case the returns are not filed within the prescribed time, then before the expiration of the date when they ought to have been filed they would be liable to pay interest under Section 11-B, clause (a). There is, in my opinion, a basic fallacy underlying this assumption, because it is clear from the language of sub-section (2) of Section 7 that it is only on the filing of the return that the liability to pay the tax due on the basis of the return arises. If no return is filed within the prescribed time, it would undoubtedly constitute a default attracting penalty under Section 16, sub-section (1), clause (n), but there would be no liability on the assessee to pay interest on the amount of the tax, because the liability to pay the "tax due on the basis of the return" under sub-section (2) of Section 7 can arise only when the return is filed. There is no liability on the assessee to pay any amount by way of tax until the return is filed or the assessment is made. This is clear from the decision of this Court in the *State of Rajasthan v. Ghasilal* where this Court held in so many terms at page 322 of the Report that since the assessee in that case did

not file returns till December 19, 1959 and January and March 1960, *"Section 7(2) could not be attracted till then"* (emphasis supplied). I fail to understand how in the face of these observations made by a Bench of five Judges of this Court, it can ever be held that Section 7, sub-section (2) is attracted even when no return has been filed. It is clear from the observations in this case – observations which we have set out here as also in an earlier paragraph – that until the assessee files a return or the assessment is made, no tax is payable by the assessee, because "till then there is only a liability to be assessed to tax". I must therefore regretfully express my inability to accept the conclusion reached by my learned brother Venkataramiah that a registered dealer falling within Category 3 who does not file any return at all as required by sub-section (1) of Section 7 would still be liable to pay the amount of tax and if he does not pay the same before the due date for filing the return has expired, he would be liable to pay interest under Section 11-B, clause (a). That would be plainly contrary to the decision in *State of Rajasthan v. Ghasilal* which, being a decision of five Judges of this Court, is binding upon us."

**16.** From the above extract, it is apparent that five different categories of cases have been examined. The third category being that of a registered dealer, who does not file any return as required under section 7(1) of the Rajasthan Sales Tax Act and pays no tax under section 7(2) of the Rajasthan Sales Tax Act, which are similar to the provisions of section 21(2) and 21(3) of the Delhi Sales Tax Act, 1975.

**17.** In **J.K. Synthetics Ltd.** (supra) the Supreme Court was considering as to whether the provisions with regard to levy of interest under section 11B of the Rajasthan Sales Tax Act (which is similar to section 27 of the Delhi Sales Tax Act, 1975) would have to be construed strictly or not. This question has been specifically raised in paragraph 9 in **J.K. Synthetics Ltd.** (supra) which reads as under:-

"9. Before we proceed further we must emphasise that penalty provisions in a statute have to be strictly construed and that is why we have pointed out earlier that the considerations which may weigh with the authority as well as the court in construing penal provisions would be different from those which would



weigh in construing a provision providing for payment of interest on unpaid amount of tax which ought to have been paid. Section 3, read with Section 5 of the Act, is the charging provision whereas the rest of the provisions provide the machinery for the levy and collection of the tax. In order to ensure prompt collection of the tax due certain penal provisions are made to deal with erring dealers and defaulters and these provisions being penal in nature would have to be construed strictly. But the machinery provisions need not be strictly construed. The machinery provisions must be so construed as would enable smooth and effective collection of the tax from the dealers liable to pay tax under the statute. Section 11-B provides for levy of interest on failure of the dealer to pay tax due under the Act and within the time allowed. Should this provision be strictly construed or should it receive a broad and liberal construction, is a question which we will have to consider in determining the sweep of the said provision. We will do so at the appropriate stage but for the present we may notice the thrust of this Court's decision in the case of Associated Cement Co. Ltd.?"

**18.** This question has been answered after examining the position in **Associated Cement Company Ltd.** (supra) in detail as also several other decisions of the Supreme Court. The Constitution Bench concluded that any provision made in a statute for charging and levying interest on delayed payment of tax must be construed as a substantive law and not as an adjectival law and, therefore, it arrived at the conclusion that the minority view in the case of **Associated Cement Company Ltd.** (supra) was the correct view. This would be clear from the observations of the Supreme Court as under:-

"16. It is well-known that when a statute levies a tax it does so by inserting a charging section by which a liability is created or fixed and then proceeds to provide the machinery to make the liability effective. It, therefore, provides the machinery for the assessment of the liability already fixed by the charging section, and then provides the mode for the recovery and collection of tax, including penal provisions meant to deal with defaulters. Provision is also made for charging interest on delayed payments, etc. Ordinarily the charging section which fixes the liability is strictly construed but that rule of strict construction is not

extended to the machinery provisions which are construed like any other statute. The machinery provisions must, no doubt, be so construed as would effectuate the object and purpose of the statute and not defeat the same. (See **Whitney v. IRC, CIT v. Mahaliram Ramjidas, India United Mills Ltd. v. Commissioner of Excess Profits Tax, Bombay** and **Gursahai Saigal v. CIT, Punjab**). But it must also be realised that provision by which the authority is empowered to levy and collect interest, even if construed as forming part of the machinery provisions, is substantive law for the simple reason that in the absence of contract or usage interest can be levied under law and it cannot be recovered by way of damages for wrongful detention of the amount. (See **Bengal Nagpur Railway Co. Ltd. v. Ruttanji Ramji** and **Union of India v. A.L. Rallia Ram**). Our attention was, however, drawn by Mr. Sen to two cases. Even in those cases, **C.I.T. v. M. Chandra Sekhar** and **Central Provinces Manganese Ore Co. Ltd. v. C.I.T.,** all that the Court pointed out was that provision for charging interest was, it seems, introduced in order to compensate for the loss occasioned to the Revenue due to delay. But then interest was charged on the strength of a statutory provision, may be its objective was to compensate the Revenue for delay in payment of tax. But regardless of the reason which impelled the legislature to provide for charging interest, the Court must give that meaning to it as is conveyed by the language used and the purpose to be achieved. Therefore, any provision made in a statute for charging or levying interest on delayed payment of tax must be construed as a substantive law and not adjectival law. So construed and applying the normal rule of interpretation of statutes, we find, as pointed out by us earlier and by Bhagwati, J. in the *Associated Cement Co.* case, that if the Revenue's contention is accepted it leads to conflicts and creates certain anomalies which could never have been intended by the legislature.

17. Let us look at the question from a slightly different angle. Section 7(1) enjoins on every dealer that he shall furnish prescribed returns for the prescribed period within the prescribed time to the assessing authority. By the proviso the time can be extended by not more than fifteen days. The requirement of Section 7(1)



is undoubtedly a statutory requirement. The prescribed return must be accompanied by a receipt evidencing the deposit of full amount of 'tax due' in the state Government on the basis of the return. That is the requirement of Section 7(2). Section 7(2A), no doubt, permits payment of tax at shorter intervals but the ultimate requirement is deposit of the full amount of 'tax due' shown in the return. When Section 11-B(a) uses the expression 'tax payable under Sub-sections (2) and (2A) of Section 7', that must be understood in the context of the aforesaid expressions employed in the two sub-sections. Therefore, the expression 'tax payable' under the said two sub-sections is the full amount of tax due and 'tax due' is that amount which becomes due ex-hypothesi on the turnover and taxable turnover 'shown in or based on the return'. The word 'payable' is a descriptive word, which ordinarily means 'that which must be paid or is due, or may be paid' but its correct meaning can only be determined if the context in which it is used is kept in view. The word has been frequently understood to mean that which may, can or should be paid and is held equivalent to 'due'. Therefore, the conjoint reading of Sections 7(1), (2) and (2A) and 11B of the Act leaves no room for doubt that the expression 'tax payable' in Section 11B can only mean the full amount of tax which becomes due under Sub-sections (2) and (2A), of the Act when assessed on the basis of the information regarding turnover and taxable turnover furnished or shown in the return. Therefore, so long as the assessee pays the tax which according to him is due on the basis of information supplied in the return filed by him, there would be no default on his part to meet his statutory obligation under Section 7 of the Act and, therefore, it would be difficult to hold that the 'tax payable' by him 'is not paid' to visit him with the liability to pay interest under Clause (a) of Section 11-B. It would be a different matter if the return is not approved by the authority but that is not the case here. It is difficult on the plain language of the section to hold that the law envisages the assessee to predicate the final assessment and expect him to pay the tax on that basis to avoid the liability to pay interest. That would be asking him to do the near impossible.

xxxxx xxxxx xxxxx

19. In the result we are of the view that the majority opinion expressed by Venkataramiah, J. in the *Associated Cement Company* case does not, with respect, state the law correctly and in our view the legal position was correctly stated by Bhagwati, J. in his minority judgment. We, therefore, overrule the majority view in that decision and affirm the minority view as laying down the correct law. We must make it clear to avoid any possibility of doubt in future that our view is based on the law as it stood before the amendments effected by Act 4 of 1979. Reference to the provisions of law after the amendments by Act 4 of 1979 are if at all for the limited purpose of comparison and we should not be understood to have expressed any view in regard to them."

(underlining added)

**19.** Finally, the decision of the Supreme Court in **Maruti Wire Industries Pvt. Ltd.** (supra) is also to be considered. In that case the Supreme Court was considering the provisions of section 23(3) of the Kerala General Sales Tax Act, 1963 (which is similar to section 27 of the Delhi Sales Tax Act, 1975). After setting out the provisions of section 23(3) of the Kerala General Sales Tax Act, 1963, the Supreme Court observed as under:-

"4. The present one is not a case where any amount of tax was collected by the appellant and then not deposited. It is an admitted position that the validity of impugned demand depends on the meaning to be assigned to the expression "if the tax or any other amount assessed as occurring in Section 23(3) of the Act. According to the appellant there was no order of assessment nor a return of turnover filed by way of self assessment in which case it should have been accompanied by proof of payment of tax as per self assessment and, therefore, the appellant was not required to pay tax unless and until a demand based on an order of assessment was raised against it. According to the respondent, an assessee held liable to payment of sales tax and not filing a return of turn-over, cannot be placed on a higher pedestal than an assessee who files a return and, therefore, a reasonable construction to be placed on sub-section 3 of Section 23 would be that an assessee not filing a return of turnover should be held



liable to pay penal interest with effect from a date on which he should have filed a return of turnover accompanied by payment of tax even if such return was not actually filed. The learned counsel for the appellant submitted in response that the scheme of the Act as it stood at the relevant time contemplates a different penal action against such default, i.e. penalty under Section 45A of the Act for failure to submit the return of turnover which penalty can be as high as an amount twice the amount of sales tax payable but liability to pay penal interest cannot be cast on the assessee for such failure when the Act does not specifically provide for levy of penal interest for failure to file return of turnover. We find merit in the appellant's plea. A legislative casus omissus cannot be supplied by judicial interpretative process."

**20.** The Supreme Court ultimately concluded as under:-

"7. The same issue which was dealt with by a three-Judges Bench of this court in the case of Associated Cement Co. Ltd. came up for the consideration of Constitution Bench in the case of **J.K. Synthetics Ltd.** (supra). This court overruled the majority opinion and approving the minority opinion in **Associated Cement Co.** case held that the provision by which the authority is empowered to levy and collect interest, even if construed as forming part of the machinery provisions, is a substantive law, not adjectival law, and interest cannot be recovered by way of damages for wrongful detention of the amount. This court further held that the "tax payable" or "tax due" is that amount which becomes due ex-hypothesi on the turnover and taxable turnover shown in or based on the return or as to which an order of assessment has been made.

8. In view of the law laid down by the Constitution Bench, we are clearly of the opinion that the liability of the assessee appellant to pay sales tax could have arisen either on return of turnover being filed by way of self-assessment or else on an order of assessment being made. No doubt Rule 27 (7-A) of the Kerala General Sales Tax Rules, 1963 casts an obligation on assessees to file a return of total turnover and taxable turnover accompanied by proof of payment of the amount of tax due within 20 days

of the previous quarter but such a return was not filed by the appellant. A failure to file return of taxable turnover may render the assessee liable for any other consequences or penal action as provided by law but cannot attract the liability for payment of penal interest under sub-section (3) of Section 23 of the Act on the parity of reasoning that if a return of turnover would have been filed on the due date then the tax as per return would have become due and payable on that date."

(underlining added)

**21.** From an examination of the aforesaid decisions it is apparent that the expression "tax due" as appearing in section 27(1) of the said Act would have to be read in relation to the provisions of section 21(3) thereof. Section 21(3) of the said Act has clear reference to the furnishing of a return. Moreover, it has reference to the full amount of tax due from a dealer under the Act "according to such return". In other words, the tax which is said to be due under section 27(1) of the said Act must be the tax which is due "according to a return". It is obvious that if no return is filed then there could be no tax due within the meaning of section 27(1) of the said Act read with section 21(3) thereof. The tax which is ultimately assessed is the tax which becomes due on assessment and if this tax so assessed is not paid even after the demand is raised then the dealer would be deemed to be in default and would be liable to pay interest under section 27(2) of the said Act. But till such tax is assessed no interest can be levied on such a dealer, who has not filed a return under section 27(1) of the said Act.

**22.** In view of the foregoing discussion, it is evident that the impugned order dated 13.02.1994 is not in accord with the Constitution Bench decisions of the Supreme Court. Consequently, the impugned order, to the extent it requires the petitioner to pay interest under section 27(1) of the said Act, is set-aside. The sales tax department shall give consequential relief to the petitioner in respect of the amount deposited towards interest on an application being made by the petitioner within four weeks. The writ petition is allowed to the aforesaid extent. There shall be no order as to costs.

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**ILR (2013) IV DELHI 3056**
**W.P. (C)**

**THAKUR TANKERS ....PETITIONER**

**VERSUS**

**D.D.A & ANR. ....RESPONDENTS**

**(REVA KHETRAPAL, J.)**

**W.P. (C) NO. : 4833/2004 DATE OF DECISION: 02.04.2013**

**Constitution of India, 1950—Article 226—Premises of Petitioner burnt in riots of 1984 and before same could be reconstructed, whole area was taken over by MCD and DDA for construction of flyover—Survey conducted by DDA & MCD on persons doing business therefrom for allotment of alternative sites to them under Alternative Allotment Scheme—Petitioner had shifted to his native place in H.P. after riots and made several representations with documentary proof of running of business from site to DDA for inclusion of his name in list of evictees for allotment of alternative site—DDA order a fresh survey to be conducted which reported that existence and running of business of petitioner from site in question prior to eviction of traders stood established—Case of petitioner and two other cases approved by VC for alternative sites—However, LG declined to give allotment to Petitioner—On recommendation of Lok Adalat, matter submitted for reconsideration to LG who once again rejected case—Order challenged before HC—Plea taken, when survey list of 579 persons had already been extended and persons not mentioned therein also allotment plots, there was no justification for denying same relief to Petitioner—Per contra plea taken, name of Petitioner did not figure either in survey list conducted by Planning Department of DDA or in list of units**

**furnished by four local trader's associations—Cases of two other persons who were alloted alternative sites had produced substantive proof of their respective establishments but documents of Petitioner had failed to establish that Petitioner was running a business from said premises—Writ petition is barred by delay and laches—Held—LG and Permanent Lok Adalat had held that two cases where alternative sites were provided were similar to case of Petitioner—As regards objection regarding insufficiency of documents furnished by Petitioner, due application of mind on part of statutory authority is imperative and as a matter of fact statutory is estopped from urging reasons which do not form part of order and relying upon grounds de hors order—It is for this reason that production of records by state or statutory authority to justify its action by production of records or otherwise and not by assigning reasons and grounds in affidavits and Additional Affidavits filed by them before Court—Reasons set out in Counter Affidavit and Additional Affidavit of Respondent which find no mention in orders of LG are de-hors record cannot be allowed to be pressed into service by Respondent at this stage—Petitioner throughout was following up matter with DDA and Permanent Lok Adalat on whose recommendations matter was placed before LG for reconsideration—Writ cannot be said to be inordinately delayed—A writ of certiorari quashing action of DDA is issued and a writ of mandamus directing DDA to forthwith allot and give possession of a suitable alternative industrial plot to Petitioner measuring 200 sq. yds. in lieu of his premises in Zakhira Chowk, Delhi.**

It is more than apparent from the record that the Lieutenant Governor rejected the case of the Petitioner for allotment of an alternative site only for the reason that the name of the Petitioner did not figure in the list of 579 units, whose names appeared in the survey list of 1984 and for no other reason



besides. It was specifically noted that though the cases of Shri Subey Singh and Smt. Jaspal Kaur are of a similar nature, adherence to the survey list of 1984 for giving alternative plots only to 579 units was required. The question which poses itself is: If a departure could be made in the cases of Shri Subey Singh and Smt. Jaspal Kaur whose names too did not figure in the survey list of 1984, why has the Respondent/DDA chosen to discriminate against the Petitioner? There is no satisfactory response from the side of the Respondent/DDA on the aspect that when the survey list of 579 persons had already been extended and the persons not mentioned therein also allotted plots, why was the case of the Petitioner singled out for adherence to the survey list of 579 persons. **(Para 17)**

**Important Issue Involved:** Due application of mind on the part of the statutory authority is imperative, and as a matter of fact the statutory authority is estopped from urging reasons which do not form part of the order and relying upon grounds de hors the order. It is for this reason that production of records by the state or the statutory authority, as the case may be, is deemed necessary by Courts of Law. It is for the state/statutory to justify its action by production of records or otherwise and not by assigning reasons and grounds in the Affidavits and Additional Affidavits filed by them before the Court.

**[Ar Bh]**

**APPEARANCES:**

**FOR THE PETITIONER** : Mr. R.K. Saini, Advocate.

**FOR THE RESPONDENTS** : Mr. Pawan Mathur, Advocate for the Respondent No. 1.

**CASES REFERRED TO:**

1. *Hindustan Petroleum Corpn. Ltd.* vs. *Darius Shapur Chennai and Others,* JT 2005 (8) SC 470.
2. *Bahadursinh Lakhubhai Gohil* vs. *Jagdishbhai M. Kamalia*

*and Others,* (2004) 2 SCC 65.

3. *State of M.P. and Others* vs. *Nandlal Jaiswal and Others,* AIR 1987 SC 251.

4. *Mohinder Singh Gill and Anr.* vs. *The Chief Election Commissioner, New Delhi and Others,* (1978) 1 SCC 405.

5. *Commissioner of Police, Bombay* vs. *Gordhandas Bhanji,* AIR 1952 SC 16.

**RESULT:** Allowed.

**REVA KHETRAPAL, J.**

**1.** Rule. With the consent of the parties, the matter is taken up for final hearing.

**2.** The facts in the aforementioned writ petition succinctly stated are that the Petitioner was carrying on business under the name and style of M/s. Thakur Tankers from a premises bearing No.2-B/1-E, Chara Mandi, Zakhira Chowk, Delhi, built on a plot of land measuring 200 sq. yds. The said premises of the Petitioner were burnt down in the riots of 1984 and before the same could be reconstructed by him, the whole area was taken over by the MCD and DDA for construction of a flyover in 1986. A survey was conducted by the MCD and DDA on the persons doing business therefrom for allotment of alternative sites to them under the policy formulated by the DDA, viz., Alternative Allotment Scheme to provide alternative allotment to all those evictees whose business premises were demolished for construction of a flyover so that they could carry on their business at the alternative site allotted to them. It is the Petitioner's case that unfortunately the Petitioner was not present at the site at the time of carrying out the survey by the authorities as his premises had earlier been burnt down and business stopped on account of 1984 riots forcing him to shift to his native place in Himachal Pradesh for survival. On coming to know of the scheme formulated by the DDA for allotment of alternative sites, he made a number of representations along with all relevant documentary proof regarding the existence and running of business from the site in Zakhira Chowk to the DDA and for inclusion of his name in the list of evictees for allotment of an alternative site. As a result of the various and continuous representations made by the Petitioner, sometime in the month of August, 2001, the DDA ordered a fresh survey to be conducted, in the course of which a report was given to the effect



that the existence and running of the business of the Petitioner from the site in question prior to the eviction of the traders from the Zakhira Chowk area stood established. Accordingly, in the month of January, 2002, the case of the Petitioner for allotment of alternative site was put up before the authorities and approved by the Vice Chairman, DDA. Two similar cases where the names could not be included in the survey list of 1984 for one reason or the other, were also put up before the authorities and approved by the Vice Chairman, DDA, the particulars whereof are as under:-

| Name | Premises | Alternative Plot Allotted |
|---|---|---|
| Subey Singh | Shop No.58, Chara Mandi, Zakhira | E-10, Mangolpuri, Phase II |
| Smt. Jaspal Kaur | New Delhi Madhya Pradesh Road Lines | BA-68, Mangolpuri, Phase II |

**3.** After the approval of the case of the Petitioner by the Vice Chairman, DDA, it was put up before the Lieutenant Governor, Delhi for orders regarding allotment. However, the Lieutenant Governor vide his order dated 08.04.2002 declined to give allotment to the Petitioner. The order of the Lieutenant Governor reads as under:-

> "I have gone through the facts of the case as well as the files of alternative allotment made to three other units in lieu of their premises at Zakhira Chowk. **Though the cases of Shri Subey Singh and Smt. Jaspal Kaur are of similar nature, we should adhere to the survey list of 1984** for giving alternative plots only to 579 units mentioned therein. I am therefore, not inclined to consider the case of Thakur Tankers for allotment, as proposed."

**4.** The Petitioner thereupon took his case to the Delhi Legal Services Authority, which, in turn, referred it to the Permanent Lok Adalat of DDA for settlement. The Permanent Lok Adalat of DDA directed the DDA to produce the files of those persons whose names did not figure in the survey list of December, 1984 and who were allotted plots. The Petitioner was also directed to submit documentary proof regarding his status/possession in the premises prior to December, 1984. On 14.10.2003, after perusal of the record submitted by the DDA and the documentary proof of the Petitioner's possession of the premises at Zakhira Chowk

submitted by the Petitioner, the Lok Adalat observed that the said documents clearly proved that the Petitioner was running his business of transporting chemicals and liquid in the name of M/s. Thakur Tankers at 2B/1E, Zakhira Chowk at least from 27.04.1979 onwards and the said premises of the Petitioner had been burnt down in the 1984 riots, on account of which the Petitioner had to shift to his native place in Himachal Pradesh with the result that his name could not be included in the survey concluded on 21.12.1984 in which 579 units were reported to be functioning from the area. It further noted that another survey was got conducted through the Joint Director (Survey) vide survey report dated 21.11.2001 and the existence of the Petitioner's unit was noted in the said survey report. It was further noted that admittedly two similarly situated persons, i.e., Smt. Jaspal Kaur and Shri Subey Singh, whose names were not found in the survey list of 21.12.1984, had been allotted plots after carrying out a fresh survey in their case, that the case of the Petitioner was in no way different from the case of Smt. Jaspal Kaur and that the non-allotment of the plot to the Petitioner amounted to discrimination by the DDA. The Petitioner has enclosed along with the writ petition a copy of the aforesaid order dated 14.10.2003 passed by the Lok Adalat recommending that the matter be again submitted to the Lieutenant Governor, Delhi/Chairman, DDA for reconsideration.

**5.** It emerges from the record that on 27.11.2003, the case of the Petitioner was again put up before the Lieutenant Governor, but by his order dated 29.12.2003 the Lieutenant Governor once again rejected the case apparently without reconsidering the same in the light of the observations of the Lok Adalat by merely stating as under:-

> "I reiterate my earlier decision taken on 8.4.2002 that allotment is to be made to only 579 units, whose names appear in the survey list and approved by the authority in 1984."

**6.** Aggrieved by the reiteration of the rejection order passed by the Lieutenant Governor, the Petitioner preferred the present writ petition principally on the ground that when the survey list of 579 persons had already been extended and persons not mentioned therein also allotted plots, there was no justification for declining the same relief to the Petitioner who was similarly placed and praying for the allotment of an alternative industrial plot as had been done in the case of other similarly situated persons who had been evicted/uprooted from their place of work



in Zakhira Chowk.

**7.** In the Counter-Affidavit and the Additional Affidavit filed on behalf of the Respondent/DDA as well as in the course of hearing, the relief sought for by the Petitioner was opposed primarily on three grounds:-

(i) The name of the Petitioner did not figure either in the survey list conducted by the Planning Department of DDA on 21.12.1984 in which names of 579 units out of 639 units were referred for alternative allotment or in the list of the units furnished by the four local traders' associations, namely, (a) Vishkarma Market, Amar Park, Zakhira (No.276), (b) Motor Works Association, Zakhira (No.142), (c) New Rohtak Road Motor Works and Traders (No.101) and (d) Zakhir Motor Body Builders (No.276). Hence, the Lieutenant Governor in the minutes recorded on 08.04.2002 turned down the request of the Petitioner and ordered that the survey list approved by the authority in 1984 should be adhered to vide which alternative plots were allotted to 579 units. Accordingly, a rejection letter was issued to the Petitioner on 01.08.2002, which rejection was reiterated on 29.12.2003.

(ii) The cases of Shri Subey Singh and Smt. Jaspal Kaur were distinguishable from the present case, inasmuch as in both the aforesaid cases the parties had produced substantive proof of the existence of their respective establishments. Per contra, the documents and certificates furnished by the Petitioner failed to establish that the Petitioner was running a business from premises No.2-B/1-E, Chara Mandi, Zakhira Chowk, Delhi measuring 200 sq. yds. including the certificate of the Traders and Body Builder Association, New Zakhira Traders Association and Indian Federation of Transport Operators, Northern Zone Branch.

(iii) As per the case of the Petitioner, he had made several representations to the DDA since the year 1986 after his office premises at Zakhira Chowk had been burnt down, inter alia, being representations dated 08.01.1986, 13.02.1986 and 3rd May, 1989. Therefore, the cause of

action arose in favour of the Petitioner on 03.05.1989 itself. The writ petition having been filed in the year 2004 is clearly barred by delay and laches.

**8.** As regards the first contention of the Respondent's counsel that the name of the Petitioner does not figure in the list of 579 units drawn up pursuant to the survey conducted on 21.12.1984, Mr. Saini, learned counsel for the Petitioner contends that the Petitioner's name admittedly finds mention in the survey report dated 21.12.2001 at page P-13/N, which records the fact that plot No.B-2/1-E belonging to Shri S.D. Raizada, proprietor of M/s. Thakur Tankers was demolished during the construction of Zakhira flyover. It had also been reported by the survey staff that the Petitioner's unit was engaged in the transport of liquid chemicals and repair of tankers, and electricity was being used by the unit from the common connection in the premises. Further, the Petitioner had furnished proof of physical possession at Zakhira Chowk by submitting the following documents, which clearly showed that the Petitioner was conducting his business from the aforesaid premises at Zakhira Chowk much prior to 21.12.1984 when the survey was conducted:-

(i) Shops Registration Certificate No.4168/7/II dated 27.02.1984 issued by Chief Inspector Shops and Establishment Delhi.

(ii) Verification Report of Vehicle No.DHG-2667 dated 27.04.1979 registered in the name of Sukhdarshan Raizada Prop. of M/s. Thakur Tankers issued from Transport Department Govt. of NCT of Delhi, on dated 28.07.2001.

(iii) Copy of Registration Certificate No.143221 of Vehicle No.DHG-2667 registered on 27.4.1979 at 2B/1E, Zakhira Chowk, Delhi.

**9.** Rebutting the second contention of Mr. Mathur that the cases of Shri Subey Singh and Smt. Jaspal Kaur were distinguishable, it was contended by Mr. Saini on behalf of the Petitioner that the DDA had allotted plots to Shri Subey Singh and Smt. Jaspal Kaur whose names did not figure in the survey list of 579 units, being Plot No. E-10, Mangol Puri Industrial Area, Phase-II, measuring 200 sq. mtr. and Plot No.B-68, Mangol Puri Industrial Area, Phase-II, measuring 200 sq. mtr. There was, therefore, no justification for refusing similar treatment to the Petitioner who was admittedly similarly placed. He emphatically urged



that the fact that the Petitioner was similarly placed is borne out by the order of the Lieutenant Governor dated 08.04.2002, wherein the Lieutenant Governor has opined that **the cases of Shri Subey Singh and Smt. Jaspal Kaur are of similar nature,** yet has refused to consider the case of the Petitioner Thakur Tankers for allotment, as proposed by the Vice Chairman, DDA.

**10.** This Court in order to satisfy itself had called for the records of the aforesaid two cases, i.e., the case of Shri Subey Singh and Smt. Jaspal Kaur, but despite repeated adjournments granted for the aforesaid purpose the case file of Shri Subey Singh was not produced by the Respondent/DDA and the records of Smt. Jaspal Kaur available with the DDA though produced, learned counsel for the DDA was not able to show as to how the case of Smt. Jaspal Kaur was in any manner distinguishable from the case of the Petitioner. On a specific query put to him by this Court, the learned counsel for the DDA could not refute the fact that the case of Smt. Jaspal Kaur was similar to the case of the Petitioner, that the Lieutenant Governor had himself recorded in the minutes dated 08.04.2002 that the cases of Shri Subey Singh and Smt. Jaspal Kaur were of a similar nature and that the Permanent Lok Adalat presided over by Shri S.M. Aggarwal, learned Additional District Judge had also returning a finding to the effect that the case of the Petitioner was at par with the cases of Shri Subey Singh and Smt. Jaspal Kaur. As a matter of fact, it was conceded by the DDA's representative before the Permanent Lok Adalat that the case of the Petitioner was in no way different from the case of Smt. Jaspal Kaur and Shri Subey Singh. The relevant part of the proceedings recorded by Judge S.M. Aggarwal on 14.10.2003 being apposite are reproduced hereunder:-

> "5. It has been conceded by Shri Azad that Smt. Jaspal Kaur whose husband was running his business of transport in the name and style of New Delhi Madhya Pradesh Road Lines was allotted Plot No.B-61 Mangolpuri Industrial Area Phase-II after the Hon'ble High Court of Delhi had directed the Director (Lands) to conduct investigation, passed in C.W.P. No.2946/91 and during investigation it was found that Smt. Jaspal Kaur's husband was engaged in the transport business although his name and name of his firm was not mentioned in the survey list of 21.12.84. Allotment was approved by the Vice Chairman on 1.1.96 and was thereafter confirmed by the Hon'ble High Court of Delhi on

4th January, 1996. The case of the petitioner is in no way different from the case of Smt. Jaspal Kaur.

6. Similarly, the learned Vice-Chairman, DDA had made allotment of alternative industrial plot in favour of Shri Sube Singh bearing No.9-10 measuring 200 sq. mtr. in the Mangolpuri Industrial Area Phase-II in lieu of his demolished premises in Chara Mandi, Jakhira although the name of Shri Sube Singh was also not found in the survey list of 21.12.84. Similarity of these cases of the petitioner was accepted by the department vis-a-vis the aforesaid two cases and proposal for allotment of industrial plot in favour of the petitioner was also made. However, the Hon'ble Lt. Governor, Delhi vide his minutes dated 8.4.02 at page 21/N has declined to approve allotment of industrial plot only on account of the fact that the name of the petitioner did not find mention in the survey list of December, 1984.

7. I am of the considered view that the non-allotment of the plot to the petitioner whose case is in no way different from the aforesaid two admitted cases amounts to discrimination which DDA, as a government agency is not expected to do. I would, therefore, recommend that the matter be again submitted to the Hon'ble Lt. Governor, Delhi for reconsideration as I feel that if the petitioner who has been deprived of same treatment should not be forced to approach the Hon'ble High Court of Delhi for seeking justice. Case to come up on 23.12.2003 awaiting approval of the competent authority."

**11.** From the aforesaid, in my considered opinion, there is no merit in the contention of the Respondent that there was a marked dissimilarity between the case of the Petitioner on the one hand and the cases of Shri Subey Singh and Smt. Jaspal Kaur on the other.

**12.** As regards the insufficiency of the documents furnished by the Petitioner, it is the submission of the Petitioner's counsel that when an order is passed by a statutory authority (the DDA in the instant case) the same must be supported by the reasons set out therein. I find merit in the said submission as in my considered opinion, due application of mind on the part of the statutory authority is imperative, and as a matter of fact the statutory authority is estopped from urging reasons which do not form part of the order and relying upon grounds de hors the order. It



is for this reason that production of records by the State or the statutory authority, as the case may be, is deemed necessary by Courts of Law. It is for the State/statutory authority to justify its action by production of records or otherwise and not by assigning reasons and grounds in the Affidavits and Additional Affidavits filed by them before the Court.

**13.** I am buttressed in coming to the aforesaid conclusion from the judgment of the Supreme Court in **Commissioner of Police, Bombay vs. Gordhandas Bhanji,** AIR 1952 SC 16, wherein it is stated:-

> "...We are clear that public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

**14.** The aforesaid law was reiterated by the Supreme Court time and again and still holds the field. In the case of **Mohinder Singh Gill and Anr. Vs. The Chief Election Commissioner, New Delhi and Others**, (1978) 1 SCC 405, the Court observed:-

> "The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in **Gordhandas Bhanji**."
>
> "Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with

reference to the language used in the order itself.

Orders are not like old wine becoming better as they grow older."

**15.** The aforesaid law was again reiterated in **Bahadursinh Lakhubhai Gohil vs. Jagdishbhai M. Kamalia and Others,** (2004) 2 SCC 65, wherein it was emphatically laid down that statutory authorities are bound to pass orders in writing and discretion of the Court must be exercised on the basis of such orders, fairly and non-arbitrarily.

**16.** In **Hindustan Petroleum Corpn. Ltd. vs. Darius Shapur Chennai and Others,** JT 2005 (8) SC 470, the following apposite observations were made with reference to the submission of the counsel for the Petitioner that the circumstances pointed out by the Respondent in the Counter-Affidavit, which were not mentioned in the order of the statutory authority, could not weigh with the Court while deciding a writ petition:-

> "Submission of Mr Chaudhari to the effect that the circumstances pointed out in the counter-affidavit filed in WPMP No. 27633 of 2003 should be held to be substitute for the reasons which the State must be held to have arrived at a decision, cannot be countenanced. When an order is passed by a statutory authority, the same must be supported either on the reasons stated therein or the grounds available therefor in the record. A statutory authority cannot be permitted to support its order relying on or on the basis of the statements made in the affidavit de'hors the order or for that matter de'hors the records."

**17.** In view of the aforesaid authoritative enunciation of the law, I am constrained to hold that the reasons set out in the Counter-Affidavit and Additional Affidavit of the Respondent which find no mention in the orders of the Lieutenant Governor dated 8th April, 2002 and 14.10.2003 and are de hors the record cannot be allowed to be pressed into service by the Respondent at this stage. It is more than apparent from the record that the Lieutenant Governor rejected the case of the Petitioner for allotment of an alternative site only for the reason that the name of the Petitioner did not figure in the list of 579 units, whose names appeared in the survey list of 1984 and for no other reason besides. It was specifically noted that though the cases of Shri Subey Singh and Smt. Jaspal Kaur



are of a similar nature, adherence to the survey list of 1984 for giving alternative plots only to 579 units was required. The question which poses itself is: If a departure could be made in the cases of Shri Subey Singh and Smt. Jaspal Kaur whose names too did not figure in the survey list of 1984, why has the Respondent/DDA chosen to discriminate against the Petitioner? There is no satisfactory response from the side of the Respondent/DDA on the aspect that when the survey list of 579 persons had already been extended and the persons not mentioned therein also allotted plots, why was the case of the Petitioner singled out for adherence to the survey list of 579 persons.

**18.** The third and last contention of the Respondent's counsel viz., that the petition is barred by delay and laches is also devoid of merit and the said contention is being noted for the sake of rejecting the same. It is clear from the records that the Petitioner throughout was following up the matter with the DDA and the Permanent Lok Adalat and on the Permanent Lok Adalat's recommendation the matter was placed before the Lieutenant Governor for reconsideration on 29.12.2003. The present writ petition was filed on 5th April, 2004 and hence cannot be said to be inordinately delayed. The reliance placed by the learned counsel for the Respondent/DDA on the judgment of the Supreme Court in **State of M.P. and Others vs. Nandlal Jaiswal and Others,** AIR 1987 SC 251 is also misplaced as in the said case, as noted by the Hon'ble Supreme Court, there was considerable delay on the part of the Petitioners in filing the writ petitions which could not be satisfactorily explained and in the intervening period third parties (Respondent Nos.5 to 11) had altered their position by incurring huge expenditure by acquiring land and had constructed distillery building, purchased plant and machinery and expended considerable time, money and energy towards setting up the distilleries. These circumstances were held to be sufficient to disentitle the Petitioners to the relief prayed for under Article 226 of the Constitution. However, while declining to grant relief to the Petitioners, the Supreme Court observed that:-

> "This rule of laches or delay is not a rigid rule which can be cast in a strait jacket formula, for there may be cases where despite delay and creation of third party rights the High Court may still in the exercise of its discretion interfere and grant relief to the petitioner."

**19.** The instant case is not one in which there can be said to be any inordinate delay nor any third party rights can be said to have intervened.

**20.** In the aforesaid facts and circumstances, a writ of certiorari quashing the action of the DDA in refusing allotment to the Petitioner, as has been done in the case of other similarly situated persons, is issued and a writ of mandamus directing the DDA to forthwith allot and give possession of a suitable alternative industrial plot to the Petitioner measuring 200 sq. yds. in lieu of premises bearing No. 2-B/1-E, Chara Mandi, Zakhira Chowk, Delhi. Since it is imperative that the Respondent make the allotment at the earliest, it is directed that the allotment shall be made latest within a period of three months from the date of this order and in any event not later than June 30, 2013. It is clarified that the aforesaid timeline shall be strictly adhered to by the Respondent/DDA and any deviation therefrom will be viewed seriously.

**21.** W.P.(C) 4833/2004 stands disposed of in the above terms.

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**ILR (2013) IV DELHI 3069**
**W.P. (C)**

**JANKALYAN TELECOM COOP. STORE ....PETITIONER**

**VERSUS**

**M.T.N.L. & ORS. ....RESPONDENTS**

**(REVA KHETRAPAL, J)**

**W.P. (C) NO. : 8169/2005 DATE OF DECISION: 05.04.2013**

**Code of Civil Procedure, 1908—Order 1 Rule 10—Writ petition filed challenging action of MTNL to evict petitioner from store—During pendency of instant petition, property of MTNL transferred to proposed Respondent-BSNL which had taken over property of MTNL—BSNL directed petitioner to deposit license fee which petitioner deposited—Application filed to implead BSNL yet to be disposed of—Ld DB remanded matter on a misrepresentation that BSNL was impleadment as it is a necessary party, since property in question belongs to BSNL— Per contra, MTNL relied on communication stating that area of occupation under MTNL and BSNL respectively shall continue to be so occupied for time being and MTNL may defend case against Petitioner—Held—Since BSNL has not yet been impleaded a party, response of BSNL on aforesaid communication could not be ascertained— This letter does not obviate necessity of impleading BSNL as a party which is necessary for purpose of determining ownership rights of MTNL / BSNL— Application allowed— Amended memo of parties taken on record.**

**Important Issue Involved:** When there is a dispute whether licensor of store in occupation of petitioner is BSNL or MTNL, both are necessary parties for the purpose of determining the ownership rights of the MTNL / BSNL.

**[Ar Bh]**

**APPEARANCES:**

**FOR THE PETITIONER** : Mr. Atul Bandhu, Advocate with Mr. Varun Kumar, Advocate.

**FOR THE RESPONDENTS** : Mr. V.K. Rao, Sr. Advocate with Mr. Vaibhav Kalra, Adv. for R-1. Mr. R'S. Rana, Adv. for R-3.

**RESULT:** Allowed.

**REVA KHETRAPAL, J.**

**1.** After hearing the matter upon remand and carefully scrutinizing the records, it appears that a misrepresentation was made before the learned Division Bench that on an application filed, BSNL was impleaded as Respondent in the Writ Petition. The record shows that though an

application was filed by the Petitioner for impleadment of BSNL as party – Respondent and reply to the said application was also filed by the BSNL stating therein that the Respondent – MTNL has no concern with the property in question, the said application is yet to be disposed of.

**2.** Learned Division Bench in paragraph 15 of the remand order has directed this Court to decide whether the subject property belongs to MTNL or BSNL for the reason that if the property does not belong to MTNL, "it (BSNL) would be nobody to evict the Store", that is, the Petitioner herein.

**3.** It is, thus, deemed expedient to first decide the application under Order I Rule 10 of the Code of Civil Procedure filed by the Petitioner for impleadment of BSNL as Respondent No.3 by passing formal orders on the said application.

**CM No.15628/2008**

1. In the aforesaid application, the Petitioner has averred that during the pendency of the instant Petition, the property of Respondent/MTNL was transferred to the proposed Respondent – BSNL, which has in effect taken over the property of MTNL. Further, the BSNL issued a letter to the Petitioner/Lessee, informing the Petitioner that Garage No.24 now belongs to the jurisdiction of BSNL. The Petitioner was further informed by the said letter that the rent of the occupation is Rs. 143/- only, and directed to deposit the said licence fee with the Accounts Officer (Cash) of BSNL. In pursuance of the directions aforesaid, the Petitioner has deposited the fees with the proposed Respondent – BSNL with effect from 22.09.2007, the receipts whereof have been placed on record.

2. The further submission of the Petitioner is that the BSNL has admitted the Petitioner as its lawful tenant/occupant and since MTNL has no jurisdiction over the property in question, the Petitioner cannot be evicted therefrom. The Petitioner also submits that in view of MTNL's denial that the property in question does not belong to BSNL, the Petitioner again wrote a letter, dated 31.10.08, to the BSNL to which reply was sent by the BSNL on 11.11.2008 stating that *"property belongs to BSNL as per the directions of MOC vide letter No.400-88/85-STC-III (at) dated 21.3.1986"*. Copies of aforesaid letters have been placed on record.



3. Notice of the aforesaid application was issued to the BSNL. The BSNL has filed reply stating that it has no objection to its impleadment as it is a necessary party, since the property in question belongs to BSNL with reference to Ministry of Communication letter No. 400-88/85-STG-III dated 21.03.1986. The rent of the said premises is already being paid to the BSNL, and hence, MTNL has no concern with the property in question.

4. No reply has been filed by the MTNL despite grant of time to do so. It may, however, be mentioned that in the course of hearing learned counsel for the MTNL relied upon a communication dated 14th January, 2011, which he states though was received by the BSNL prior to the remand order dated 21.12.2011 passed in the instant case, was not brought to the notice of the learned Division Bench. The said communication reads as follows:-

"No.42010-Estt
Government of India
Ministry of Communication & IT
Department of Telecommunication
(SR DIVISION)

New Delhi-1, Dated the 14 Jan. 2011

To

The Chairman cum Managing Director,
Bharat Sanchar Nigam Limited,
Building Section, Eastern Court, Janpath
New Delhi – 110001

Sub: On the matter of Jan Kalyan Telecom Cooperative Store Vs. MTNL before Hon'ble High Court of Delhi – reg

Sir,

I am directed to refer to your letter No. 6-13/2009-10/KW dated 28.12.2010 on the above subject and to say that in terms

of order No. 400-88/85-STG.III dated 21.3.1986 the area of occupation under MTNL and BSNL respectively shall continue to be so occupied for the time being and MTNL may defend the case against Jan Kalyan Store.

Yours faithfully,
Sd/-
(Dr. Vincent Barla)
Director (Staff Relations)"

**5.** Since, BSNL has not yet been impleaded as a Party, the response of the BSNL on the aforesaid communication could not be ascertained. In any event, in my view, this letter does not obviate the necessity of impleading BSNL as a party, which is necessary for the purpose of determining the ownership rights of the MTNL/BSNL.

**6.** For all the aforesaid reasons, the prayer in the present application for impleadment of BSNL as a necessary party is allowed. Amended Memo of Parties is taken on the record.

The application stands disposed of accordingly. List the Writ Petition for further directions on 13th May, 2013.

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**ILR (2013) IV DELHI 3073**
**W.P. (C)**

**RAVINDER KAUR ....PETITIONER**

**VERSUS**

**DELHI DEVELOPMENT AUTHORITY ....RESPONDENTS**

**(REVA KHETRAPAL, J.)**

**W.P. (C) NO. : 3570/2010 DATE OF DECISION: 05.04.2013**

**Delhi Development Authority, 1979—Tail End Policy and Policy of missing Priority of DDA—'AS' booked MIG flat under New Pattern Registration Scheme, 1979—After his death, DDA transferred mutation in favour his wife—She was alloted a flat at Rohini but she opted for allotment of flat as per tail end policy of DDA by paying cancellation / tail end charges—On her death, petitioner applied for mutation and transfer of registration against acknowledgment receipt—Tail end personal hearings, no MIG flat allotted to her—Writ petition filed by petitioner for writ of mandamus directing DDA to allot her a MIG flat under policy of missing priority framed by DDA—DDA admitted case of petitioner in toto but took plea that there was inordinate delay on part of petitioner in approaching Court and if at all petitioner is held entitled to allotment of a MIG flat, same has to be at old cost prevalent at time of original allotment plus 12% simple interest w.e.f. date of original allotment till date of issue of fresh Demand-cum-Allotment Letter—Held—Petitioner had herself approached DDA to complain that her name had not been included in tail end priority draw—Thus, petitioner cannot be said to be at fault as she approached DDA in less than four years with request to allot to her a flat at cost of draw held earlier—Contention of DDA that Petitioner is liable to pay interest @ 12% per annum for intervening period was repelled by Division Bench in *Basu Dev Gupta's* case as it disproved circular relied upon by DDA as it contradicts mandamus issued by ld. Single Judge in *Raj Kumar Malhotra's* case which has been approved by Devision Bench as well as Supreme Court—Mandamus issued to DDA to allot a MIG flat to Petitioner by issuing fresh Demand-cum-Allotment Letter to Petitioner at same cost at which demand was raised on other for flats allotted at draw of lots held on 31.03.2004.**

**Important Issue Involved:** (A) Where petitioner had applied for mutation before tail end priority draw and if her name is not included in draw of lots, clearly there was no justification for DDA for not including her name in draw.

(B) No interest would be charged on price of the flat when the DDA did not issue a Demand-cum-Allotment Letter to registrant when it was due.

**[Ar Bh]**

**APPEARANCES:**

**FOR THE PETITIONER** : Mr. Nanda Kinra, Advocate.

**FOR THE RESPONDENTS** : Ms. Madhumita Bhattacharjee, Advocate.

**CASES REFERRED TO:**

1. *Basu Dev Gupta* vs. *D.D.A.* LPA No.279/2008.
2. *Bhagirath Choudri (Deceased) through LR* vs. *DDA* W.P.(C) No.7077/2008.
3. *Harvinder Kaur* vs. *DDA* W.P.(C) No.8553/2008.
4. *Abhay Prakash Sinha* vs. *DDA,* W.P.(C) No.119/2007.
5. *Usha Saikia* vs. *DDA* W.P.(C) No.266/2007.
6. *Bhim Ram* vs. *DDA* W.P.(C) No.18837/2006.
7. *S.C. Sethi* vs. *DDA,* W.P.(C) No.11654/2006.
8. *Jai Prakash* vs. *DDA,* W.P.(C) No.20250/2005.

**RESULT:** Allowed.

**REVA KHETRAPAL, J.**

**1.** Rule. With the consent of the parties, the matter is set down for final hearing and disposal.

**2.** The prayer in this writ petition is for issuance of a writ of mandamus directing the Delhi Development Authority to allot to the Petitioner a MIG flat under the policy of missing priority framed by the



DDA dated 25.02.2005, and the policy instructions issued by the Vice-Chairman, DDA on 02.04.2004, and also in accordance with the DDA Circular dated 07.10.2008.

**3.** The essential facts of the case are not in dispute. In 1979, the registrant Amar Singh booked a MIG flat vide registration No.36 under the New Pattern Registration Scheme, 1979 and died on 04.09.1985. On 09.02.1989, Smt. Jai Kaur, wife of late Shri Amar Singh submitted an application for mutation and transfer of registration and submitted the requisite documents, pursuant to which on 13.07.1989, the DDA transferred the mutation to her vide their communication of the same date (*Annexure* P-4 to the petition). On 21.02.1990, Smt. Jai Kaur was allotted a flat at Rohini, being flat No.42, Sector 18, Block-A, Pocket-II, GRD Floor, Rohini vide allotment letter with block dates 14.02.1990 – 21.02.1990. Smt. Jai Kaur, however, opted for allotment of flat as per the tail end policy of the Delhi Development Authority prevalent in 1990 by paying the cancellation/tail end charges of ' 4,535/- vide challan No.0860921 dated 28.05.1990 (*Annexure* P-5 to the petition). Smt. Jai Kaur died on 06.12.2003 and the Petitioner being the wife of the pre-deceased son of Smt. Jai Kaur applied for mutation and transfer of registration on 11.02.2004, submitting the requisite documents, acknowledgment receipt whereof has been placed on record as Annexure P-6.

**4.** On 31.03.2004, the tail end draw was held but the name of the Petitioner was missing in the draw. On 02.04.2004, the Petitioner visited the office of the DDA and was informed about the instructions issued by the Vice-Chairman dated 02.04.2004 enclosed as Annexure P-7 to the writ petition and published in the newspapers, that the record of the DDA was not updated and all those who had paid the tail end charges will be allotted flats. Paragraph 2 of the said instructions provided for eligibility for allotment as under:-

> "2. The registrants to whom tail end priority has not been assigned but they have deposited the cancellation charges making them eligible for allotment of tail end priority and also allotment of the flat."

**5.** It would also be apposite to mention at this juncture that the aforesaid instructions of the Vice-Chairman, DDA dated 02.04.2004 took note of the fact that *"since there was no record of tail end priority of*

*registration scheme of 1979 and now 22 years have passed, thus if any registrant to whom tail end priority is to be assigned is left then nobody should be held responsible and subsequently their case can be considered in the next coming draw."*

**6.** No flat having been allotted to the Petitioner in the draw held on 31.03.2004, the Petitioner on 31.10.2007 submitted a representation to the DDA followed by another representation dated 04.08.2008 (Annexures P-8 and P-9 to the petition).

7. On 07.10.2008, pursuant to the Petitioner's representations, the DDA gave her a copy of the Circular dated 07.10.2008 issued by the Commissioner (Housing), being Circular No.F2(10)2001/Coord/H/ Pt.I/ 236 dated 07.10.2008. The said Circular being apposite, for the sake of ready reference, is reproduced hereunder:-

**"DELHI DEVELOPMENT AUTHORITY**
**HOUSING DEPARTMENT (COORD.)**

***NO.F2(10)2001/Coord/H/Pt.I/236 dated the 7/10/08***

**CIRCULAR**

The issue regarding allotment under the tail-end priority has recently been considered by the Hon'ble Single Judge and the Division Bench of the Delhi High Court in a number of cases.

The Department has considered the said judgment and it has been decided to adopt a uniform policy to avoid any confusion in such cases as per the decision henceforth, DDA shall charge the cost prevalent as on 31.07.2004, (four months after 31.3.2004, i.e., the date of draw along with 12% interest from 31.07.2004, till payment in terms of demand letter. The policy will cover the following type of cases:-

i) Registrants who have paid the cancellation charges within stipulated period from the date of the cancellation and have been included in the draw but demand letters have not been issued or who are eligible for the allotment under the tail end priority but have not been included in the draw of lots held on 31.3.2004.

ii) Those MIG registrants who have paid the cancellation charges within time and approached the DDA for allotment



of the flat under the tail-end priority within 30 days from the date of notification dated 5.2.2006, vide which DDA had requested all the allottees/registrants to contact DDA for allotment of the flat under MIG category of the New Pattern Scheme who had not been allotted the flat.

This issues with the approval of Vice-Chairman, DDA.

(Asma Manzar)
Commissioner (Housing)"

**8.** In 2009, the Petitioner in the course of personal hearing afforded to her by the DDA again requested for tail end allotment in accordance with the aforesaid Circular issued by the DDA, but no MIG flat was allotted to her. Hence, the present writ petition impugning the action of the DDA, which is stated to be contrary to its own missing priority policy dated 25.02.2005, the instructions issued by its Vice-Chairman dated 02.04.2004 and the Circular dated 07.10.2008.

**9.** In the Counter-Affidavit filed by it, the DDA has not denied that after the death of Shri Amar Singh, who was the original registrant, his wife Smt. Jai Kaur applied for mutation of the registration which was allowed vide letter dated 13.07.1989, that Smt. Jai Kaur was allotted MIG flat in the draw of lots held on 14.02.1989; that Demand-Cum-Allotment Letter was issued to her with block dates 14.02.1990 – 21.02.1990 and that Smt. Jai Kaur requested to cancel this allotment and deposited Rs. 4,535/- towards cancellation charges. Thus, the case of the Petitioner in toto has been admitted by the Respondent/DDA.

**10.** In the course of hearing, however, learned counsel for the DDA argued that the case of the Petitioner was not included in the tail end priority cases, that there was inordinate delay on the part of the Petitioner in approaching this Court, that the NPR Scheme had been closed and that allotment therefore cannot be made to the Petitioner. It was submitted that if at all the Petitioner is held entitled to the allotment of a MIG flat, the same has to be in terms of paragraph 2 of the policy of the DDA dated 25.02.2005, i.e., at the old cost prevalent at the time of original allotment plus 12% simple interest with effect from the date of the original allotment till the date of issue of fresh Demand-Cum-Allotment Letter.

**11.** To counter the aforesaid submissions of DDA's counsel, Mr. Kinra, the learned counsel for the Petitioner has drawn the attention of

this Court to the fact that cancellation charges were accepted and duly acknowledged by the DDA for tail end priority vide challan dated 28.05.1990. Mr. Kinra pointed out that the Petitioner vide her communication dated 31.10.2007 had made a grievance that her name had not been included in the tail end priority draw held on 31.03.2004 and categorically stated that *it was DDA's fault because she had earlier applied for mutation on 11.02.2004.* This communication is not denied by the DDA, as indeed it cannot be, in view of the acknowledgment of the DDA of the same date, i.e., 31.10.2007. This being so, clearly the DDA was not justified in not including the name of the Petitioner in the draw of lots held on 31.03.2004.

**12.** My attention has been drawn by learned counsel for the Petitioner to the case of **"Raj Kumar Malhotra vs. DDA"** being W.P.(C) No.5793/2005, which came to be decided by a learned Single Judge of this Court by judgment dated 18th October, 2005. The learned Single Judge held that mere failure to pay cancellation charges would not deprive an allottee of the right to be included in the tail end priority cases and to be allotted flat on that basis. This judgment of the learned Single Judge was affirmed by a Division Bench of this Court on 4th June, 2008 in LPA No.179/2008 entitled **"Delhi Development Authority vs. Abhay Prakash Sinha"** and the decision of the Division Bench was further affirmed by the Supreme Court by dismissal of SLP filed thereagainst.

**13.** Learned counsel for the Petitioner has sought to press into service a number of decisions of this Court including judgments rendered by this Court in W.P.(C) No.20250/2005 titled **"Jai Prakash vs. DDA",** W.P.(C) No.11654/2006 titled **"Subhash Chander Sethi vs. DDA",** W.P.(C) No.266/2007 titled **"Usha Saikia vs. DDA"** and W.P.(C) No.8553/2008 titled **"Harvinder Kaur vs. DDA"** to urge that the present case is squarely covered by the aforesaid precedents. Learned counsel for the Respondent, on the other hand, cited two judgments of this Court, being W.P.(C) No.18837/2006 titled **"Bhim Ram vs. DDA"** and W.P.(C) No.7077/2008 titled **"Bhagirath Choudri (Deceased) through LR vs. DDA"** to contend that the cost prevalent as on date ought to be paid by the Petitioner even assuming a flat was allotted to the Petitioner. Both the said cases, in my considered view, are not apposite to the present case. In **Bhim Ram** (supra), the learned Single Judge was dealing with a case where the Petitioner was a defaulter in payment of instalments. The Petitioner in the said case did not seek and pay any cancellation



charges and thus the said judgment is not applicable. In the case of **Bhagirath Choudri** (supra), a direction was issued to the Respondent/DDA to consider the Petitioner's case for the allotment of a MIG flat at the cost prevalent in or around September, 2008 because the Petitioner had not taken note of the advertisements of the Respondent/DDA regarding allotments to persons missing priority, which were regularly appearing in the newspapers every second or third year since the year 2004. In the present case, on the contrary, the Petitioner herself approached the DDA on 2nd April, 2004 to complain that her name had not been included in the tail end priority draw held on 31.03.2004. Though this fact is denied by the DDA in the Counter-Affidavit filed by it, there is on record the acknowledgment of the DDA of the cancellation charges paid by the Petitioner vide challan dated 28.05.1990. There is also on record the representation of the Petitioner dated 31.10.2007 and the acknowledgment of the DDA of the receipt of the said representation. Thus, the Petitioner cannot be said to be at fault as it approached DDA in less than four years with the request to allot to her a flat at the cost of the draw held on 31.03.2004.

**14.** The only other contention raised by the counsel for the DDA was that public notice had been issued. This aspect has been dealt with by a learned Single Judge of this Court in **"S.C. Sethi vs. DDA",** W.P.(C) No.11654/2006. Paragraph 9 of the said judgment reads as follows:-

> "9. The plea taken by the DDA cannot be accepted. The public notice issued by the DDA on 4.7.2003, was meant only to update the residential address in the records of the DDA. The said notice does not make it mandatory for all the applicants/registrants, whether or not there had been a change in their addresses given to the DDA, to update the address. In the circumstances, there was no obligation on the part of the Petitioner to update his address since there was no change in his address. Consequently, the DDA was not justified in not including the name of the Petitioner in the draw of lots held on 31.3.2004."

**15.** In **Abhay Prakash Sinha vs. DDA,** W.P.(C) No.119/2007, on the aspect of public notices, the following observations made by a learned Single Judge of this Court are apposite:-

> "10. Before this court, the sole reliance of the DDA is on the

public notices which have been issued. It is apparent from the public notices that the DDA was conscious of the fact that several persons who were legitimately entitled to consideration for allotment of the flats on tail end priority or other priorities, had been overlooked. Certainly, the petitioner cannot be faulted for the failure of the DDA to consider the petitioner for allotment of the flat on a mere premise that they have issued public notices.

11. So far as the impact of such public notices effecting the private rights of the persons is concerned, it is required to be borne in mind that the applicants have been made to wait for decades for allotment of the flats. In the instant case, the petitioner has been waiting since the year 1979. Certainly, the citizens cannot be expected to be following newspapers of every single day for over 25 years keeping track of public notices which may be issued by the DDA. Such a plea on behalf of the DDA is both unfair and unreasonable. The respondent cannot be permitted to so avoid the responsibility and liability to consider the petitioner for allotment of a flat in an appropriate draw of lots especially in the facts which have been noticed hereinabove.

12. My attention has been drawn to an order dated 20th March, 2007 passed in WP (C) No.11654/2006 entitled **Subhash Chander Sethi Vs. Delhi Development Authority,** wherein in similar circumstances, the court had rejected a plea taken by the DDA placing reliance on its public notices.

13. Another order dated 19th July, 2007 passed in WP (C) No.10570/2006 entitled Tajinder Kaur Vs. DDA has been placed before this court wherein the court has rejected the DDA's contention and reliance on the public notices which were issued by it to deprive the bona fide registrants who have been waiting for several decades, for allotment of the flats.

14. Mr. Kinra, learned counsel for the petitioner, also places reliance on an order dated 21st July, 2006 in Writ Petition (C) No.20250/2005 Jay Prakash Vs. DDA passed by this court."

**16.** This leaves me to consider the aspect of cost of the flat to be paid by the Petitioner and the contention of the DDA's counsel that the Petitioner is liable to pay interest at the rate of 12% per annum for the



intervening period. Suffice it to state that in a recent decision rendered by a Division Bench of this Court in LPA No.279/2008 titled **"Basu Dev Gupta vs. D.D.A.",** the Division Bench after referring to the decision of learned Single Judge in **Raj Kumar Malhotra** (supra) and the Division Bench in **Abhay Prakash Sinha** (supra), has repelled the contention of the counsel for the DDA to the effect that the DDA be permitted to charge interest at the rate of 12% per annum on the cost of the flat in view of the Circular dated 17th October, 2008 issued by the DDA. The Division Bench opined that it disapproved of this Circular insofar as it contradicts the mandamus issued by the learned Single Judge in **Raj Kumar Malhotra**, which has been approved both by the Division Bench as well as the Supreme Court. It held that no interest would be charged on the price of the flat for the reason that DDA did not issue a Demand-cum-Allotment Letter to the Appellant when it was due. It further held that the registration amount with interest accrued thereon would be adjusted while calculating the amount due from the Appellant.

**17.** In view of the aforesaid discussion, I have no hesitation in issuing a mandamus to the DDA to allot a MIG flat to the Petitioner by issuing fresh Demand-cum-Allotment Letter to the Petitioner at the same cost at which demand was raised on others for the flats allotted at the draw of lots held on 31.03.2004. The needful be done by the DDA latest within six weeks from today. On the Petitioner's making payment of the demand within the time stipulated in the Demand-cum-Allotment Letter, possession of the flat shall be handed over to the Petitioner within two weeks.

**18.** W.P.(C) 3570/2010 stands disposed of in the above terms.

**ILR (2013) IV DELHI 3083**
**W.P. (C)**

**C.P. INASU** **....PETITIONER**

**VERSUS**

**DDA** **....RESPONDENTS**

**(REVA KHETRAPAL, J.)**

**W.P. (C) NO. : 1789/2012** **DATE OF DECISION: 08.04.2013**

**Delhi Development Authority—Double Allotment—DDA alloted a flat to Petitioner which was already alloted in favour of another person—Demand letter demanding cost of flat issued to Petitioner—Petitioner informed DDA that flat alloted in his favour was already under occupation of another person—Since Petitioner did not receive any response, he did not deem it fit to deposit cost of flat allotted to him—Petitioner made a spate representations to DDA to make a fresh allotment against his registration number, but to no avail—Writ petition filed before HC against DDA for its inaction in not allotting a fresh MIG flat to him in lieu of wrong allotment made—Plea taken by DDA, Petitioner did not deposit confirmation amount and it was assumed that he had no desire to take flat / allotment and writ was liable to be dismissed for delay and laches—Held—Before expiry of stipulated date for depositing cost of flat, Petitioner had sent a representation to DDA that flat in question was already occupied by someone else, who was in possession of necessary documents from DDA—Admittedly, no response was sent by DDA to communication of Petitioner—Petitioner was not expected to deposit amount demanded by DDA knowing fully well that he had been illegally granted double allotment of flat in question and said flat was occupied by another person who professed to have valid documents issued by DDA in his possession—Petitioner was victim of double allotment due to error / fraud of officials of DDA—Respondent can't be allowed to reap benefit of its own wrong by now pressing into service pleas such as those of delay and laches, closure of scheme etc.—Writ of mandamus issued directing DDA to allot and handover to Petitioner possession of a MIG flat at original cost in lieu of earlier flat allotment of which had earlier been made in his favour.**



**Important Issue Involved:** (A) Allottee of a DDA flat is not expected to deposit the amount demanded by the DDA knowing fully well that he had been illegally granted double allotment of the flat in question and the said flat was occupied by another person who professed to have valid documents issue by the DDA in his possession.

(B) DDA cannot be allowed to reap the benefit of its own wrong by pressing into service pleas such as those of delay and laches, closure of the Scheme etc. to deny relief to a victim of double allotment due to error / fraud of its official.

**[Ar Bh]**

**APPEARANCES:**

**FOR THE PETITIONER** : Ms. Maninder Acharya, Senior Advocate with Mr. Yashish Chandra, Advocate.

**FOR THE RESPONDENT** : Ms. Manika Tripathy Pandey and Mr. Ashutosh Kaushik, Advocates.

**CASES REFERRED TO:**

1. *Smt. Brinda Ghosh* vs. *DDA* LPA No.484/2012.
2. *Naresh Kumar Kataria* vs. *DDA* LPA No.1094/2006.

**RESULT:** Allowed with cost of Rs. 20,000/-.

**REVA KHETRAPAL, J.**

**1.** The present writ petition is directed against the illegal and arbitrary action of the Respondent, Delhi Development Authority in allotting the flat No.B-5/9, Sarai Khalil under NPR Scheme, 1979 to the Petitioner despite being aware of the fact that the said flat already stood allotted in favour of one Mr. Satish Kumar Bhatia and against its inaction in not allotting a fresh MIG flat to the Petitioner in lieu of the wrong allotment made to him.

**2.** The Respondent in the year 1979 floated a residential scheme under the name of New Pattern Residential Scheme for allotment of flats, including MIG flats. The Petitioner applied for a MIG flat under the said Scheme and by depositing a sum of Rs. 4,500/- got himself registered under the Scheme vide challan dated 8th September, 1979 (Annexure P-1). On 18.03.1980, on receipt of the sum of Rs. 4,500/-, the Respondent issued a certificate of registration, thereby clearly certifying that the Petitioner stood registered at serial No.4489 (Annexure P-2). The Petitioner also got himself registered with the Respondent under a Scheme for priority allotment to the retired/retiring public servants. Copy of the receipt dated 10th March, 1997 acknowledging the receipt of the Petitioner's application is enclosed with the writ petition as Annexure P-3.

**3.** On 08.07.1997, after a long wait of 18 years, in a draw of lots held by the Respondent, the Petitioner was allotted a MIG flat, being flat No.B-5/9, Second Floor, Sarai Khalil, New Delhi. An allotment letter with block dates 25.09.1997 – 30.09.1997 was issued to the Petitioner informing him thereby that the aforementioned flat stood allotted to him as a result of the draw of lots held by the Respondent on 08.07.1997 (*Annexure* P-4 to the writ petition). On the same day, a demand letter demanding a sum of ' 5,81,683.75 towards the cost of the flat was issued to the Petitioner. The last date for intimating the confirmation of the acceptance of the allotment and for making the payment of the abovementioned sum towards the cost of the flat was fixed as 30th October, 1997 by way of the said letter (*Annexure* P-5).

**4.** On receipt of the allotment letter and the demand letter, the Petitioner immediately visited the Sarai Khalil area with the object of inspecting the flat allotted to him and was shocked to find that the said flat was occupied by one Mr. Satish Kumar Bhatia. The Petitioner was informed by the said occupant of the flat that he had been in occupation for the last two years and was also in possession of allotment letter, possession letter, etc. issued



by the Respondent in his favour. The Petitioner immediately vide his letter dated 17.10.1997 informed the Respondent that flat bearing No.B-5/9, Sarai Khalil allotted in his favour by the Respondent was already under the occupation of Mr. Satish Kumar Bhatia, who claimed himself to be a legal allottee of the flat (*Annexure* P-6). The aforesaid letter dated 17.10.1997 was sent by the Petitioner to the Respondent by registered post. Since, however, the Petitioner did not receive any response, the Petitioner did not deem it fit to deposit the cost of the flat allotted to him, more so when the Respondent neither made a fresh allotment in favour of the Petitioner nor assured him that the flat allotted to him will be restored to him.

**5.** Thereafter, the Petitioner submitted representations dated 13.12.1997 and 11.04.1998 (Annexure P-7 Colly.) and forwarded the copies of these representations also to the Chief Vigilance Officer of the Respondent calling upon him to investigate the matter. Eventually, the Petitioner received a letter dated 12.01.2010 from the Respondent informing him that the allotment file relating to flat No.B-5/9, Sarai Khalil was not traceable, however efforts were being made to trace it. The Petitioner was called upon by the said letter (*Annexure* P-8) to report to the office of the Respondent with all the original documents relating to the allotment of the flat in his favour against registration No.4489 on any working day. Immediately thereafter, the Petitioner forwarded the copies of his allotment letter and certificate of registration along with the covering letter dated 18.02.2010 to the Respondent, which along with the acknowledgment slips issued by the Respondent are annexed with the petition as *Annexure* P-9 Colly.

**6.** Thereafter, the Petitioner made a spate of representations to the Respondent requesting its officials to make a fresh allotment against his registration number, but to no avail including representations dated 24.10.2011, 29.12.2011, 09.01.2012 and 05.03.2012, which representations along with the acknowledgment slips issued by the Respondent have been placed on record as Annexure P-10 Colly. Till date, it is stated, the Petitioner has not received any response to the aforementioned representations made by him. The Petitioner has also come to know that in the vigilance enquiry conducted by the Respondent it has been established that double allotment of the flat was intentionally made by the officials of the Respondent and the Respondent in order to shield its guilty officials is not acting on the Petitioner's representations. The

Petitioner has also placed on record the allotment letter and possession letter issued by the Respondent in favour of Mr. Satish Kumar Bhatia (*Annexure* P-11 Colly.). Thus, the grievance of the Petitioner is that he has been made the victim of a double allotment, which he had brought to the notice of the Respondent's officials in 1997 itself, and gross injustice has been caused to him due to the failure of the Respondent to make a fresh allotment of MIG flat in his favour.

**7.** The Respondent – Delhi Development Authority in the Counter-Affidavit filed by it has not disputed the aforesaid facts except to state that the representation of the Petitioner dated 17.10.1997 was received by it in the public hearing held on 06.11.1997 and that the AD(MIG) at the said public hearing had directed the allottee to deposit the confirmation amount as evidenced from the noting Annexure R-1, viz., copy of the public hearing performa dated 06.11.1997. It is submitted that when the double allotment was noticed, the matter was examined in MIG Branch and the file pertaining to the allotment made to Mr. Satish Kumar Bhatia was called for and the Daftri returned the file with the non-availability report. Left with no other option, part file was reconstructed and the appropriate authority referred the matter to the Vigilance Department and even a Committee was constituted to sort out the issue. In paragraph 6 of the Counter-Affidavit, it is further submitted:-

> "But in absence of the file and without knowing the entire set of facts, the committee had no other option but to recommend the case of the petitioner for allotment of alternative flat in his favour."

**8.** It is further submitted by the Respondent that subsequently the file was located and the investigation re-opened by the Vigilance Department, the scenario of double allotment was brought on record, and it was noted that the possession letter and NOC for water and electricity connection issued to Mr. Satish Kumar Bhatia were without dispatch number and appeared to be forged. Insofar as the Petitioner is concerned, it is submitted that the Petitioner did not deposit the confirmation amount and it was assumed that he had no desire to take the flat/allotment. There was thus no double allotment made by the DDA. In fact, the flat was grabbed by mischief by one Mr. Satish Kumar Bhatia on the basis of forged possession letter.

**9.** In the course of hearing, the only ground sought to be urged on behalf of the Respondent/DDA was that the petition was liable to be



dismissed on the ground of delay and laches on the part of the Petitioner. Reliance was sought to be placed in this regard upon the judgments rendered in LPA No.1094/2006 titled **"Naresh Kumar Kataria vs. DDA"** and LPA No.484/2012 titled **"Smt. Brinda Ghosh vs. DDA"**. It was also sought to be urged albeit half-heartedly that the NPR Scheme was closed long time back in 2004 and a publication to this effect was also made by the DDA.

**10.** As regards the aspect of delay and laches sought to be pressed into service at this stage, suffice it to note that this plea was raised by the Respondent for the first time by filing an Additional Affidavit on October 10, 2012 and such plea significantly absent in the Counter-Affidavit filed by the Respondent dated July 19, 2012. Perhaps, what led the Respondent to file the Additional Affidavit were the judgments of this Court in **Naresh Kumar Kataria** (supra) dated 17th May, 2012 and **Smt. Brinda Ghosh** (supra) dated 11th July, 2012. The reliance placed by the Respondent on the aforesaid judgments is, in my considered opinion, entirely misplaced. **Naresh Kumar Kataria's** case (supra), it may be noted, was not a case of double allotment on account of the fault of the DDA officials, but was a case where the Appellant had applied for change of floor, but upon the same being not acceded to, chose to let go of the allotment; after two years, though the matter was re-agitated but it was not on the ground of change of floor, but on the ground of the cost/price demanded by the DDA being not correct. The belated representation of the Appellant after one and a half year of being served with the Demand-cum-Allotment Letter were held to be an afterthought. Similarly, the judgment rendered in the case of **Smt. Brinda Ghosh** (supra) is not apposite to the present case. In the said case, no steps were taken by the Appellant for almost 17 years after the demise of her father and for 6 years from the date of issuance of the Demand-cum-Allotment Letter and in such circumstances it was held that there was a persistent default and lack of due diligence on the part of the Appellant.

**11.** The present case is on an entirely different footing. Here, the Petitioner was registered in 1979 and the draw of lots was held 18 years later, in 1997. Demand-cum-Allotment Letter was issued to the Petitioner advising the Petitioner to deposit a sum of Rs. 5,81,683.75 on or before 30th October, 1997. Before the expiry of the stipulated date of 30th October, 1997, the Petitioner sent a representation to the DDA dated 17.10.1997 to the effect that he had visited the flat in question which

was already occupied by someone else, who was in possession of the necessary documents from DDA. In his aforesaid communication to the DDA, the Petitioner emphatically stated:-

> "The offer of allotment should not be cancelled under such circumstances which is beyond my control and DDA is responsible for such lapses."

**12.** The Respondent denies receipt of this letter which was sent by registered post till 06-11-1997, but has failed to substantiate its contention by producing its diary register for the relevant year. The Respondent states that it received this communication on 06.11.1997 and advised the Petitioner to deposit the confirmation amount of Rs. 20,000/-. Again, there is nothing on record to substantiate this contention of the Respondent, as admittedly no response was sent by the Respondent to the communication of the Petitioner dated 17.10.1997. There is also no explanation from the side of the Respondent as to why the subsequent representations sent by the Petitioner dated 13th December, 1997 and 11th August, 1998 were not responded to. It is the Respondent's own case that by a letter dated 12.01.2010 eventually the Petitioner was informed that the allotment file relating to the flat in question was not traceable and efforts were being made to trace out the same. It is also the Respondent's own case that a vigilance enquiry had been instituted with regard to the issuance of the allotment letter and possession letter issued by DDA officials in favour of Mr. Satish Kumar Bhatia in respect of the same flat. It is not understandable as to how the Petitioner was expected to deposit the amount demanded by the Respondent knowing fully well that he had been illegally granted double allotment of the flat in question and the said flat was occupied by another person who professed to have valid documents issued by the Respondent in his possession.

**13.** It is thus more than apparent that the Petitioner was the victim of double allotment due to the error/fraud of the officials of the Respondent/DDA. The Respondent cannot be allowed to reap the benefit of its own wrong by now pressing into service pleas such as those of delay and laches, closure of the Scheme, etc. What is even more damaging to the posture adopted by the Respondent is that the Respondent till date has not been able to take a final decision regarding the double allotment. The Respondent's stand that the relevant file had been misplaced evidently was with a view to thwart the Petitioner's representations made from



time to time for which the Petitioner has filed acknowledgment slips. The very same file was traced out for the purpose of Vigilance Enquiry subsequently, which Vigilance Enquiry for reasons best known to the Respondent is being endlessly dragged on.

**14.** In the aforesaid circumstances, this Court is of the considered opinion that the Petitioner is entitled to the relief prayed for by him, and it is in fact the Petitioner who ought to be recompensed for the delay caused by the Respondent from 1979 till date in the allotment of the flat. A writ of mandamus is accordingly issued directing the Respondent to allot and hand over to the Petitioner the possession of a MIG flat at the original cost of Rs. 5,81,683.75 in lieu of flat No.B-5/9, Second Floor, Sarai Khalil, New Delhi, allotment of which had earlier been made in his favour. Demand-cum-Allotment Letter shall be issued by the Respondent not later than four weeks from today and possession of the flat handed over to the Petitioner within four weeks from the date of his depositing the aforesaid amount. Needless to state that the flat shall be allotted to the Petitioner in the Sarai Khalil area and in case a vacant flat is not available in the said area, in any other commensurate area or zone.

**15.** W.P.(C) 1789/2012 is allowed in the aforesaid terms. The Petitioner shall be entitled to costs of Rs. 20,000/-.

**ILR (2013) IV DELHI 3091**
**W.P. (C)**

**RURAL ELECTRIFICATION CORPORATION LTD. ....PETITIONER**

**VERSUS**

**COMMISSIONER OF INCOME TAX-(LTU) AND ANR. ....RESPONDENTS**

**(BADAR DURREZ AHMED & VIBHU BAKHRU, JJ.)**

**W.P. (C) NO. : 7944/2011, 7945/2011, 7946 & 7947/2011 DATE OF DECISION: 23.04.2013**

**Income Tax Act, 1961—Section 148—Explanation 3 to Section 153—Initiation of reassessment proceedings—Assessments are sought to be reopened on the ground that the Income Tax Appellate Tribunal, Hyderabad had passed a consolidated order dated 13.01.2010 pertaining to assessment years 1999-2000 to 2006-2007 and held that the interest income was not taxable in the hands of the Co-operative Electrical Supply Society Ltd., Siricilla but, was taxable in the hands of the petitioner—Petitioner had advanced loans to the said Co-operative Electrical Supply Society Ltd. Which created a special corpus fund—The said society earned interest on the special fund but did not disclose it in its returns of incomes on the ground that the money, as mentioned in the purported reasons, actually belonged to the petitioner and that any income earned thereon was on behalf of the petitioner—Tribunal agreed with the submissions of the said Co-operative Electrical Supply Society Ltd. and held that the said interest income was not taxable in the hands of the society but ought to be taxed in the hands of the petitioner—Notices u\s 148 of the Income Tax Act,**



**1961 were issued to the petitioners seeking to tax the interest income as it had escaped assessment—Hence the present petition challenging the Notices—petitioner contended that though the Tribunal had returned a finding that the said interest income was not taxable in the hands of the said society, there was no specific or clear finding that the same should be taxable in the hands of the Petitioner—That all the notices under Section 148 had been issued beyond the period of six years stipulated in Section 149 of the said Act and the bar of limitation prescribed in Section 149 would be applicable unless the revenue was able to establish that the present cases fell within Section 150 of the said Act read with Explanation 3 to Section 153. Held—before a notice under Section 148 can be issued beyond the time limits prescribed under Section 149, the ingredients of Explanation 3 to Section 153 have to be satisfied—Those ingredients require that there must be a finding that income which is excluded from the total income of one person must be held to be income of another person—The second ingredient being that before such a finding is recorded, such other person should be given an opportunity of being heard—In the present case, when the Tribunal held in favour of the said society by concluding that the interest income was not taxable in its hands and held against the petitioner by concluding that the said interest income ought to have been taxed in the hands of the petitioner, an opportunity of hearing ought to have been given to the petitioner—No opportunity of hearing was given to the petitioner prior to the passing of the order dated 13.01.2010 by the Income Tax Appellate Tribunal, Hyderabad in the cases of the said society—As such, one essential ingredient of Explanation 3 was missing and, therefore, the deeming clause would not get triggered—Section 150 would not apply and, therefore, the bar of limitation prescribed by Section 149 is not lifted—In view of the**

**fact that the deeming provision provided in Explanation 3 to Section 153 does not get attracted in the present case because an opportunity of hearing had not been given to the petitioner, the provisions of Section 150 would also not be attracted—In such a situation, the normal provisions of limitation prescribed under Section 149 of the said Act would apply—Those provisions restrict the time period for reopening to a maximum of six years from the end of the relevant assessment year—In the present writ petitions, the notices under Section 148 have all been issued beyond the said period of six years—Therefore, the said notices are time barred—Consequently, the writ petitions are allowed—Impugned notices under Section 148 of the said Act are set aside and so, too, are all the proceedings pursuant thereto, including the assessment orders that have been passed.**

It is apparent from the said decision that before a notice under Section 148 can be issued beyond the time limits prescribed under Section 149, the ingredients of Explanation 3 to Section 153 have to be satisfied. Those ingredients require that there must be a finding that income which is excluded from the total income of one person must be held to be income of another person. The second ingredient being that before such a finding is recorded, such other person should be given an opportunity of being heard. In the context of the present case, when the Tribunal held in favour of the said society by concluding that the interest income was not taxable in its hands and held against the petitioner by concluding that the said interest income ought to have been taxed in the hands of the petitioner, an opportunity of hearing ought to have been given to the petitioner. The fact that such an opportunity was not given, has been recognized by the revenue in the order disposing of the objections dated 20.10.2011, where it has been observed that there was no need to have afforded an opportunity to the petitioner. Even in the counter affidavit,



the revenue has taken the stand that it was not at all necessary for the Income Tax Appellate Tribunal to have allowed an opportunity of hearing to the petitioner because that was in respect of the assessment proceedings pertaining to the said society. **(Para 14)**

From the above, it is clear that no opportunity of hearing was given to the petitioner prior to the passing of the order dated 13.01.2010 by the Income Tax Appellate Tribunal, Hyderabad in the cases of the said society. As such, one essential ingredient of Explanation 3 was missing and, therefore, the deeming clause would not get triggered. That being the position, Section 150 would not apply and, therefore, the bar of limitation prescribed by Section 149 is not lifted. **(Para 15)**

The learned counsel for the revenue submitted that an opportunity of hearing could not be given to the petitioner because at the stage when the Tribunal at Hyderabad was hearing the appeal pertaining to the said society, there was no way to ascertain as to whether the decision would go in favour of the said society or not. In particular, the learned counsel for the respondent / revenue submitted that the question as to whether the interest income could be taxed at the hands of the petitioner would only come to be decided after the Tribunal came to the conclusion that it was not to be taxed in the hands of the society and, till that stage, there was no question of granting any opportunity of hearing to the petitioner. Be that as it may, the specific condition for attracting the deeming provision of Explanation 3 to Section 153 requires that the person ought to be given an opportunity of being heard before an order is passed whereunder any income is excluded from the total income of one person and held to be the income of another person. It is not as if the revenue is being faulted or the Tribunal is being faulted for not granting an opportunity of hearing to the petitioner. The placing of a blame is not the issue. What is relevant is whether the petitioner had been given an opportunity of hearing before the Tribunal concluded that the interest

income was taxable in its hands and not in the hands of the society. It is obvious that this flows from the general principle that no prejudice should be caused to anybody without that person having been heard. **(Para 16)**

In view of the fact that the deeming provision provided in Explanation 3 to Section 153 does not get attracted in the present case because an opportunity of hearing had not been given to the petitioner, the provisions of Section 150 would also not be attracted. In such a situation, the normal provisions of limitation prescribed under Section 149 of the said Act would apply. Those provisions restrict the time period for reopening to a maximum of six years from the end of the relevant assessment year. In the present writ petitions, the notices under Section 148 have all been issued beyond the said period of six years. Therefore, we are of the view that the said notices are time barred. **(Para 17)**

Consequently, the writ petitions are allowed. The impugned notices under Section 148 of the said Act are set aside and so, too, are all the proceedings pursuant thereto, including the assessment orders that have been passed. There shall be no order as to costs. **(Para 18)**

**Important Issue Involved:** Income Tax Act, 1961—Explanation 3 to Section 153—Initiation of reassessment proceedings—Essential ingredient for applicability of Explanation 3 to Section 153 is that before a finding is recorded against the person, he should be given an opportunity of being heard—If this essential ingredient of Explanation 3 was missing, the deeming clause would not get triggered—Section 150 would not apply and, therefore, the bar of limitation prescribed by Section 149 is not lifted.

**[Sa Gh]**

**APPEARANCES:**

**FOR THE PETITIONER** : Mr. M.S. Syali, Sr. Advocate with Mr. Satyen Sethi, Mr. Mayank Nagi and Mr. Arta Trana Panda, Advocates.

**FOR THE RESPONDENT** : Mr. Kiran Babu, Sr. Standing Counsel.

**CASES REFERRED TO:**

1. *A.B. Parikh* vs. *Income Tax Officer:* 203 ITR 186 (GUJ).
2. *ITO* vs. *Murlidhar Bhagwan Das:* 52 ITR 335 (SC).

**RESULT:** Writ Petition Allowed.

**BADAR DURREZ AHMED, J. (ORAL)**

**1.** These writ petitions pertain to the assessment year 1999-2000, 2000-2001, 2001-2002 and 2002-2003. In these petitions the common issue relates to the initiation of reassessment proceedings by issuance of notices under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act'). All the four notices were issued on 23.03.2011.

**2.** The purported reasons for believing that income had escaped assessment have been disclosed as under:

**"11. Reasons for the belief that income has escaped assessment.**

1. In this case assessment under section 147/148 was completed on 17.2.2005 at an income of Rs.249,38,81,974/-. The assessee company is a public financial institution engaged in business of providing finance for rural electrifications.

2. Information was received from Addl. CIT, Karimnagar Range, Karimnagar vide his letter No. Addl. CIT/KNR/Appeals/2010-11 dated 1.11.2010 that the assessee company had advanced a loan to M/s. The Cooperative Electrical Supply Society Ltd., Siricilla. This Society has created a corpus of special fund amounting to Rs.10 crores. The society earned interest on this special fund but did not disclose it in its return for the reason that the money belonged to M/s. REC i.e. Assessee Company and any income earned was also on behalf of Assessee Company. The ITAT, Hyderabad in its consolidated order in ITA No. 1112 to 1115 &

1198 to 1199 of 2005, 1635 of 2008 and 570 of 2009 dated 13.01.2010 for assessment year 1999-00 to 2006-07 had held that this income was not taxable in the hands of the society but ought to be taxed in the hands of the assessee company. The ACIT-Cir-1, Karimnagar vide his letter No.F.No. CESS/ACIT/ Knr. has forwarded the details or such income at Rs. 73,50,000/- on account of interest on REC Bonds & Rs.9,80,877/ - on account of interest from commercial banks for the relevant assessment year.

3. Therefore, I have reasons to believe that income of Rs.83,30,877/- has escaped assessment within the meaning of section 147 which warrants issue of notice under section 148 r.w's. 150 of the Income tax Act, 1961."

**3.** We may point out at this stage that subsequent to the reasons being supplied to the petitioner, objections were filed and the same had been rejected by virtue of order dated 20.10.2011. Shortly thereafter these writ petitions were filed before this court. At the initial stage, this court had directed that the proceedings may go on pertaining to the said notices under Section 148 of the said Act and orders may also be passed but the same shall not be given effect to. Subsequently, the Assessing Officer had passed assessment orders in respect of each of the years. Although those orders were served on the petitioner, we had, by virtue of an order dated 01.02.2012, indicated that those orders would be of no effect.

**4.** Coming back to the purported reasons indicated by the Assessing Officer, which we have extracted above, we find that the assessments are sought to be reopened on the ground that the Income Tax Appellate Tribunal, Hyderabad had passed a consolidated order dated 13.01.2010 pertaining to assessment years 1999-2000 to 2006-2007 and held that the interest income was not taxable in the hands of the Co-operative Electrical Supply Society Ltd., Siricilla but, was taxable in the hands of the petitioner. As can be seen from the purported reasons, the petitioner had advanced loans to the said Co-operative Electrical Supply Society Ltd. which created a special corpus fund. The said society earned interest on the special fund but did not disclose it in its returns of incomes on the ground that the money, as mentioned in the purported reasons, actually belonged to the petitioner and that any income earned thereon was on behalf of the



petitioner. The Tribunal agreed with the submissions of the said Co-operative Electrical Supply Society Ltd. and held that the said interest income was not taxable in the hands of the society but ought to be taxed in the hands of the petitioner.

**5.** The learned counsel for the petitioner pointed out that though the Tribunal had returned a finding that the said interest income was not taxable in the hands of the said society, there was no specific or clear finding that the same should be taxed in the hands of the petitioner. The exact findings returned by the Tribunal are as under:-

"...Applying the aforesaid tests to the facts of the case before us, it is clear that there is no diversion of income by overriding title by M/s. REC in favour of the assessee-society. The income by way of interest, etc. has accrued to M/s. REC in its own right. The amount so collected was retained by M/s. REC and was available with it for use and application as per its directions. The income in this case never reached the assessee by Virtue of any overriding title. A reading of various clauses of the Revised Rules on the Constitution and Administration of Special Fund dated 30.1.1997 makes it clear that the first charge on the Special Fund Account shall be of M/s. REC and that it shall be the outstanding loan against the assessee and the assessee is merely a custodian of the amount in the Special Fund created as per instructions and rules framed by M/s. REC. In these facts of the case, we hold that there is no diversion of income at source by overriding title by M/s. REC in favour of the assessee society and the ownership of the special fund remains with M/s REC and therefore, the income from the special fund amount does not accrue to the assessee. In this view of the matter, we hold that the interest accrued on the special fund amount including the FDs made there from does not accrue to the assessee society and the assessee is accordingly not liable to pay tax thereon. Accordingly, the grounds of appeal taken by the assessee in its appeals are allowed."

It is, therefore, apparent that the Tribunal had come to the clear conclusion that the interest income was not to be taxed in the hands of the said society but was taxable in the hands of the petitioner. It is on this basis that the Assessing Officer issued the impugned notices under Section

148 seeking to reopen the assessments for the assessment years 1999-2000 to 2002-2003.

**6.** Mr. Syali, senior advocate, appearing on behalf of the petitioner submitted that all the notices under Section 148 had been issued beyond the period of six years stipulated in Section 149 of the said Act. He submitted that the bar of limitation prescribed in Section 149 would be applicable unless the revenue was able to establish that the present cases fell within Section 150 of the said Act read with Explanation 3 to Section 153.

**7.** The relevant provisions need to be referred to at this juncture. They are as under:-

> **"150. Provision for cases where assessment is in pursuance of an order on appeal, etc. –** (1) Notwithstanding anything contained in section 149, the notice under section 148 may be issued at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under this Act by way of appeal, reference or revision or by a Court in any proceeding under any other law.
>
> (2) The provisions of sub-section (1) shall not apply in any case where any such assessment, reassessment or recomputation as is referred to in that sub-section relates to an assessment year in respect of which an assessment, reassessment or recomputation could not have been made at the time the order which was the subject-matter of the appeal, reference or revision, as the case may be, was made by reason of any other provision limiting the time within which any action for assessment, reassessment or recomputation may be taken."
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> xxxx xxxx xxxx xxxx xxxx
>
> **"153. Time limit for completion of assessments and reassessments. –**
>
> xxxx xxxx xxxx xxxx xxxx
>
> (3) The provisions of sub-sections (1), (1A), (1B) and (2) shall not apply to the following classes of assessments, reassessments



> and recomputations which may, subject to the provisions of subsection (2A), be completed at any time -
>
> (i) xxxx xxxx xxxx xxxx
>
> (ii) where the assessment, reassessment or recomputation is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section 250, 254, 260, 262, 263, or 264 or in an order of any court in a proceeding otherwise than by way of appeal or reference under this Act;
>
> (iii) where, in the case of a firm, an assessment is made on a partner of the firm in consequence of an assessment made on the firm under section 147.
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> xxxx xxxx xxxx xxxx xxxx
>
> **Explanation 2.**- Where, by an order referred to in clause (ii) of sub-section (3), any income is excluded from the total income of the assessee for an assessment year, then, an assessment of such income for another assessment year shall, for the purposes of section 150 and this section, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order.
>
> **Explanation 3.** - Where, by an order referred to in clause (ii) of sub-section (3), any income is excluded from the total income of one person and held to be the income of another person, then, an assessment of such income on such other person shall, for the purposes of section 150 and this section, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order, provided such other person was given an opportunity of being heard before the said order was passed."
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> (underlining added)

**8.** After reading the said provisions, Mr Syali submitted that Section 150 could be invoked only if the reassessment was sought to be done as a consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under the said Act by way of appeal, reference or revision or by a Court in any proceeding

under any other law.

**9.** Referring to the specific provisions of Section 150(1) of the said Act, Mr Syali submitted that these provisions were in pari materia to the second proviso to Section 34(3) of the Income Tax Act, 1922 which had been interpreted by the Supreme Court in the case of **ITO Vs. Murlidhar Bhagwan Das:** 52 ITR 335 (SC). For the sake of convenience the provisions of Section 34(3) of the 1922 Act are reproduced below:

> "(3) No order of assessment or reassessment, other than an order of assessment under Section 23 to which clause (c) of sub-section (1) of Section 28 applies or an order of assessment or reassessment in cases falling within clause (a) of sub-section (1) or sub-section (1) of this section shall be made after the expiry of four years from the end of the year in which the income, profits or gains were first assessable:
>
> Provided that where a notice under clause (b) of sub-section (1) has been issued within the time therein limited, the assessment or reassessment to be made in pursuance of such notice may be made before the expiry of one year from the date of the service of the notice even if at the time of the assessment or re-assessment the four years aforesaid have already elapsed:
>
> Provided further that nothing contained in this section limiting the time within which any action may be taken or any order, assessment or reassessment may be made shall apply to a reassessment made under Section 27 or to an assessment or reassessment made on the assessee or any person in consequence of or to given effect to any finding or direction contained in an order under Section 31, Section 33, Section 33-A, Section 33-B, Section 66 or Section 66-A."
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> (underlining added)

The said decision was that of a Constitution Bench in which the Supreme Court took the view that the said proviso was applicable in respect of an order passed against the person whose assessment was sought to be reopened and only to such other persons who were intimately connected such as a partner or member of the HUF. The Supreme Court held as under:



> "We would, therefore, hold that the expression "any person" in the setting in which it appears must be confined to a person intimately connected in the aforesaid sense with the assessments of the year under appeal."

**10.** As mentioned above, an illustration of such a category of 'intimately connected' persons, the Supreme Court referred to a partner or partners of a firm and a member of a Hindu Undivided Family. The Supreme Court observed that in such cases though the persons may not have been parties by name to the appeal, their assessments would depend on the assessments of the partnership firm or the Hindu Undivided Family. It is obvious that it would not include the assessment of any other person who was not intimately connected with the person in whose case the order had been passed. The Supreme Court also held that the said proviso to Section 34(3) of the 1922 Act would not save the time limit prescribed under Section 34(1) of the 1922 Act in respect of an escaped assessment of a year other than that which was the subject-matter of the appeal or the revision, as the case may be.

**11.** When the Income Tax Act, 1961 was enacted, Section 153 did not contain the Explanations 2 and 3. Those explanations were introduced subsequently in 1964 after the Supreme Court decision in **Murlidhar Bhagwan Das** (supra). It is therefore, apparent that the two explanations were added so as to supersede the view taken by the Supreme Court in respect of the 1922 Act. Explanation 2 in Section 153 makes it clear that even where any income is excluded from the total income of the assessee from a particular assessment year, then an assessment of such income for another assessment year shall, for the purpose of Section 150 as also of Section 153, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order. In other words, a finding in respect of a different year can also be used for the purposes of invoking the provisions of Section 150 of the said Act, by virtue of the deeming provision contained in Explanation 2 in Section 153 of the said Act. This would otherwise not have been available in view of the decision of the Supreme Court in **Murlidhar Bhagwan Das** (Supra). Similarly, Explanation 3 stipulates that where, by an order inter-alia passed by the Tribunal in an appeal, any income is excluded from the total income of one person and held to be the income of another person, then, assessment of such income on such other person shall, for the purposes of Section 150 as also Section 153, be deemed to be one made in

consequence of or to give effect to any finding or direction contained in the said order. However, this deeming provision is subject to a proviso that such other person ought to be given an opportunity of being heard before such an order is passed.

**12.** Coming back to the factual matrix of the present case, Mr Syali submitted that the provisions of Section 150 read with Explanation 3 in section 153 would apply only if an opportunity of hearing had been given to the petitioner herein, before the Tribunal passed the order dated 13.01.2010 in the case of the said society wherein the Tribunal held that the interest income was not taxable in the hands of the said society but ought to have been taxed in the hands of the petitioner herein. Mr Syali submitted that this was a condition precedent before the deeming clause could be invoked and thereby the provisions of Section 150 could be attracted so as to lift the bar of limitation prescribed under Section 149 of the said Act.

**13.** Mr Syali placed reliance on the decision of the Gujarat High Court in the case of **A.B. Parikh vs. Income -tax Officer:** 203 ITR 186 (GUJ). In particular, he placed reliance on the following observations of the said High Court:

> "Section 149 lays down the time limits for issuance of notice under section 148. Section 150(1) forms an exception to it and provides that a notice under section 148 could be issued at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to, any finding or direction contained in an order in appeal, reference or revision under the Act. Similarly, section 153(3)(ii) using the same language as could be seen from the extract made above, provides that no time limit applies for completion of assessment which is made in consequence of, or to give effect to, any such finding or direction. Exclusion of time limit will depend on the same contingencies in both the cases. Explanations 2 and 3 to section 153 deem certain assessments to have been made in consequence of, or to give effect to, a finding or direction. We need not advert to Explanation 2, since it concerns the very assessee covered by the order in question. Explanation 3 referring to "another person" is relevant for our case, and the fiction enacted therein applies for the purposes of both section 150 and



> section 153. This is evident from the user therein of the set of expressions "for the purposes of section 150 and this section."
>
> There is no gainsaying that this specific reference gives no room for exclusion of the application of the fiction set forth in Explanation 3 to section 153 even in respect of section 150. The result is for the purpose of section 150, so as to enable the authority to issue the notice under section 148 at any time without being curtailed by the time limit prescribed under section 149, there must be satisfaction of the ingredients under Explanation 3 to section 153. The endeavour of Mr. M.R. Bhatt, learned counsel for the respondent, was to bring the matter within the ambit of Explanation 3 to section 153."
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> xxxx xxxx xxxx xxxx xxxx
>
> "We must point out that there is no discussion in the pronouncement of the implications of Explanation 3 to section 153. Even otherwise, we are unable to spell out any parity between the facts of the case dealt with by the High Court of Patna and the facts of the present case. There the parties were very much in the picture from the inception putting forth the stand with reference to status and, in that view, it was held that they were vitally interested in the firm in which they were partners and in that context Explanation 3 to section 153 would come to the rescue of the Revenue and against the assessee. Our analysis of the implications of the provisions of the Act relevant for the purpose of our case, as done above, has left us with no other alternative but to allow this special civil application. Since we have sustained the first point relating to bar of limitation and that has served the cause of the petitioner, we have not gone to the second point. Accordingly, we allow this special civil application and the impugned show cause notice as per annexure A is quashed. We make no order as to costs."

**14.** It is apparent from the said decision that before a notice under Section 148 can be issued beyond the time limits prescribed under Section 149, the ingredients of Explanation 3 to Section 153 have to be satisfied. Those ingredients require that there must be a finding that income which is excluded from the total income of one person must be held to be income of another person. The second ingredient being that before such

a finding is recorded, such other person should be given an opportunity of being heard. In the context of the present case, when the Tribunal held in favour of the said society by concluding that the interest income was not taxable in its hands and held against the petitioner by concluding that the said interest income ought to have been taxed in the hands of the petitioner, an opportunity of hearing ought to have been given to the petitioner. The fact that such an opportunity was not given, has been recognized by the revenue in the order disposing of the objections dated 20.10.2011, where it has been observed that there was no need to have afforded an opportunity to the petitioner. Even in the counter affidavit, the revenue has taken the stand that it was not at all necessary for the Income Tax Appellate Tribunal to have allowed an opportunity of hearing to the petitioner because that was in respect of the assessment proceedings pertaining to the said society.

**15.** From the above, it is clear that no opportunity of hearing was given to the petitioner prior to the passing of the order dated 13.01.2010 by the Income Tax Appellate Tribunal, Hyderabad in the cases of the said society. As such, one essential ingredient of Explanation 3 was missing and, therefore, the deeming clause would not get triggered. That being the position, Section 150 would not apply and, therefore, the bar of limitation prescribed by Section 149 is not lifted.

**16.** The learned counsel for the revenue submitted that an opportunity of hearing could not be given to the petitioner because at the stage when the Tribunal at Hyderabad was hearing the appeal pertaining to the said society, there was no way to ascertain as to whether the decision would go in favour of the said society or not. In particular, the learned counsel for the respondent / revenue submitted that the question as to whether the interest income could be taxed at the hands of the petitioner would only come to be decided after the Tribunal came to the conclusion that it was not to be taxed in the hands of the society and, till that stage, there was no question of granting any opportunity of hearing to the petitioner. Be that as it may, the specific condition for attracting the deeming provision of Explanation 3 to Section 153 requires that the person ought to be given an opportunity of being heard before an order is passed whereunder any income is excluded from the total income of one person and held to be the income of another person. It is not as if the revenue is being faulted or the Tribunal is being faulted for not granting an opportunity of hearing to the petitioner. The placing of a blame is not the



issue. What is relevant is whether the petitioner had been given an opportunity of hearing before the Tribunal concluded that the interest income was taxable in its hands and not in the hands of the society. It is obvious that this flows from the general principle that no prejudice should be caused to anybody without that person having been heard.

**17.** In view of the fact that the deeming provision provided in Explanation 3 to Section 153 does not get attracted in the present case because an opportunity of hearing had not been given to the petitioner, the provisions of Section 150 would also not be attracted. In such a situation, the normal provisions of limitation prescribed under Section 149 of the said Act would apply. Those provisions restrict the time period for reopening to a maximum of six years from the end of the relevant assessment year. In the present writ petitions, the notices under Section 148 have all been issued beyond the said period of six years. Therefore, we are of the view that the said notices are time barred.

**18.** Consequently, the writ petitions are allowed. The impugned notices under Section 148 of the said Act are set aside and so, too, are all the proceedings pursuant thereto, including the assessment orders that have been passed. There shall be no order as to costs.

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**ILR (2013) IV DELHI 3106**
**W.P. (C)**

**NB RIS RAVINDER KUMAR SINGH ....PETITIONER**

**VERSUS**

**UNION OF INDIA AND ORS. ....RESPONDENTS**

**(S. RAVINDRA BHAT & SUDERSHAN KUMAR MISRA, JJ.)**

**W.P. (C) NO. : 6311/2012 DATE OF DECISION: 25.04.2013**

**Service Law—Premature discharge—Cancellation of No Objection Certificate Brief Facts—Petitioner joined**

the Remount Veterinary Corps of the Indian Army, part of the Army, 10.11.1986; he served there for more than 24 years—Respondent published a notice calling for applications to the civilian post at EBS Babugarh, sometime in March-April 2011—Petitioner applied for the post—As a serving military personnel, he had to obtain an NOC from the Indian Army—His application for this purpose was granted and NOC was issued on 21.04.2011—His application for the post was accepted called to participate in the recruitment process appeared in the written test on 20.07.2011 called for interview on 27.07.2011 before the declaration of results, apparently on 28.07.2011- the six member Selection Board, which considered the various applications, drew a final merit list of candidates in terms of which the petitioner secured the maximum marks i.e, 82.70—At the time of consideration and preparation of the merit list, the NOC issued to the petitioner was followed and was taken into consideration—Significantly and for no apparent reason, on the same date (i.e. on 28.07.2011), an order was issued withdrawing/cancelling the NOC issued to the petitioner on 21.04.2011—The results for the recruitment process of Godown Overseer were not declared for quite some time—Petitioner addressed representations seeking restoration of NOC—Respondents, by a communication dated 08.09.2011, withdrew the cancellation order—Dated 28.07.2011 and restored the NOC issued to the Petitioner—Petitioner was promoted to the rank of Nb./Ris, with effect from 01.11.2011—Respondents again issued an order cancelling the NOC granted to the Petitioner, stating that since there was an alteration of circumstances, and the Petitioner's tenure stood extended in the service by two years, the NOC and discharge were no longer permissible—In the communication dated 11.06.2012, the respondents stated that the petitioner had willingly accepted the promotion and consequently



the NOC had to be withdrawn—Hence present petition against various orders of the respondents by which, even though he ranked first in the merit in the recruitment process for the civilian post of Godown Overseer the third respondent, Director General Remount Veterinary Services, denied appointment to him—He is also aggrieved by the cancellation of the NOC issued by the first two respondents on the one hand and his premature discharge from the army without processing his case for appointment to the said post of Godown Overseer. Held—Contention of Respondents that once the petitioner willingly accepted the promotion, it amounted to a waiver of his candidature for the civil post under consideration is meritless—Waiver means abandonment of a right—For there to be a valid waiver, it is essential that there be an "intentional and voluntary relinquishment of a known right or such conduct as warrants the inference of the relinquishment of such right"—There can be no waiver unless the person purportedly waiving is aware about his right (which is being waived) and with full knowledge of such right, he intentionally abandons it—(Ref.: *Provash Chandra Dalui and Anr. v. Biswanath Banerjee and Anr.* AIR 1989 SC 1834; *Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh and Ors.,* AIR 1979 SC 621)—Results of the selection process for the civil post, in which the petitioner ranked first, were not announced until August 2012—Thus, he cannot be said to have had any knowledge about his entitlement (upon standing first in the selection process) to the civil post—Consequently, his acceptance of the promotion cannot amount to waiver of his claim to the civilian post, to which he had been selected, but not appointed—Moreover, the lack of knowledge on part of the petitioner was due to the non-declaration of the results—He cannot be the sufferer due to this—Furthermore, the entire sequence of facts has resulted in a Kafkaesque situation whereby

**the petitioner is without employment, even after being promoted (an event which resulted in the impugned cancellation of his candidature) and at the same time not being appointed to the civilian post, despite being the most meritorious—Having regard to the overall conspectus of circumstances, Petitioner's appointment could have been sustained only upon rejection of the petitioner's candidature, which has been held illegal—The writ petition succeeds—Respondents directed to process the petitioner's candidature for appointment to the civilian post of Godown Overseer at the Equine Breeding Stud (EBS), Babugarh, and issue the appointment letter within six weeks.**

This Court also finds meritless the respondents, contention that once the petitioner willingly accepted the promotion it amounted to a waiver of his candidature for the civil post under consideration. Waiver means abandonment of a right. For there to be a valid waiver, it is essential that there be an "intentional and voluntary relinquishment of a known right or such conduct as warrants the inference of the relinquishment of such right". There can be no waiver unless the person purportedly waiving is aware about his right (which is being waived) and with full knowledge of such right, he intentionally abandons it. (Ref.: **Provash Chandra Dalui and Anr. v. Biswanath Banerjee and Anr.,** AIR 1989 SC 1834; **Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh and Ors.,** AIR 1979 SC 621). Here in this case, the results of the selection process for the civil post, in which the petitioner ranked first, were not announced until August 2012. Thus, he cannot be said to have had any knowledge about his entitlement (upon standing first in the selection process) to the civil post. Consequently, his acceptance of the promotion cannot amount to waiver of his claim to the civilian post, to which he had been selected, but not appointed. Moreover, the lack of knowledge on part of the petitioner was due to the non-declaration of the results. He cannot be the sufferer due to this. Furthermore, the entire sequence of facts has resulted in a Kafkaesque situation whereby the petitioner is without employment, even



after being promoted (an event which resulted in the impugned cancellation of his candidature) and at the same time not being appointed to the civilian post, despite being the most meritorious. This is clearly a result of the untenable and arbitrary interpretation placed by the respondents on AO 78/1979 and their assumption that he waived his right to be considered for the civilian post because he accepted the promotional post in November 2011. **(Para 20)**

Sh. Sanjay Kumar, the sixth respondent, was impleaded by application (C.M. 17433/2012) on 17.10.2012. In C.M. No. 16865/2012, the Court had directed that his appointment would be subject to the final outcome of these proceedings. Having regard to the overall conspectus of circumstances, the court is of opinion that his appointment could have been sustained only upon rejection of the petitioner's candidature, which has been held illegal by this Court. In the circumstances, the writ petition is entitled to succeed. The respondents are directed to process the petitioner's candidature for appointment to the civilian post of Godown Overseer at the Equine Breeding Stud (EBS), Babugarh, and issue the appointment letter within six weeks. The writ petition is allowed in the above terms. No costs.**(Para 21)**

**Important Issue Involved:** Premature discharge—Cancellation of No Objection Certificate—Waiver means abandonment of a right—For there to be a valid waiver, it is essential that there be an "intentional and voluntary relinquishment of a known right or such conduct as warrants the inference of the relinquishment of such right"—There can be no waiver unless the person purportedly waiving is aware about his right (which is being waived) and with full knowledge of such right, he intentionally abandons it.

**[Sa Gh]**

**APPEARANCES:**

**FOR THE PETITIONERS** : Sh. S.S. Pandey, Advocate.

**FOR THE RESPONDENT** : Sh. Saqib Advocate.

**CASES REFERRED TO:**

1. *Provash Chandra Dalui and Anr.* vs. *Biswanath Banerjee and Anr.,* AIR 1989 SC 1834.

2. *Motilal Padampat Sugar Mills Co. Ltd.* vs. *State of Uttar Pradesh and Ors.,* AIR 1979 SC 621).

**RESULT:** Writ Petition Allowed.

**S. RAVINDRA BHAT, J.**

**1.** The petitioner is aggrieved by various orders of the respondents by which, even though he ranked first in the merit in the recruitment process for the civilian post of Godown Overseer at the Equine Breeding Stud (EBS), Babugarh, the third respondent, Director General Remount Veterinary Services, denied appointment to him. He is also aggrieved by the cancellation of the 'No Objection Certificate' (NOC) issued by the first two respondents on the one hand and his premature discharge from the army without processing his case for appointment to the said post of Godown Overseer (hereafter "the civilian post").

**2.** The admitted facts are that the petitioner joined the Remount Veterinary Corps of the Indian Army, which is part of the Army and thus under the control of the first two respondents, on 10.11.1986; he served there for more than 24 years. The third respondent published a notice calling for application to the civilian post at EBS Babugarh, sometime in March-April 2011. The petitioner applied for the post. As a serving military personnel, he had to obtain an NOC from the Indian Army. His application for this purpose was granted and NOC was issued on 21.04.2011. His application for the post was accepted and he was called to participate in the recruitment process. He appeared in the written test on 20.07.2011; he was called for interview on 27.07.2011. Before the declaration of results, apparently on 28.07.2011, the six-member Selection Board, which considered the various applications, drew a final merit list of candidates in terms of which the petitioner secured the maximum marks, i.e. 82.70. This is clear from the files produced in the present case by the third respondent during the course of the proceedings. At the time of consideration and preparation of the merit list, the NOC issued to the petitioner was followed and was taken into consideration. Significantly and for no apparent reason, on the same date (i.e. on 28.07.2011), an order was issued withdrawing/cancelling the NOC issued to the petitioner on 21.04.2011. The results for the recruitment process of Godown Overseer were not declared for quite some time. When the petitioner became aware of the cancellation of the NOC – which was



essential for his discharge from the army, and a precondition for his joining the third respondent – he addressed representations seeking its restoration. The petitioner's representation in this regard, dated 18.08.2011, pertinently stated that:

> "2. I, the above named NCO applied for the post of Godown Overseer at EBS Babugarh have appeared in the examination for the same at EBS Babugarh from 27 to 29 July 2011.
>
> 3. I hereby give an undertaking that if selected for the post of Godown Overseer at EBS, Babugarh, I will put up my papers for premature discharge from the service forthwith. My promotion for the rank of Nb/Ris is due during the month of Nov 2011. If selected for the post of Godown Overseer I will forgo my promotion as well."

**3.** The respondents, by a communication dated 08.09.2011, withdrew the cancellation order – dated 28.07.2011 and restored the NOC issued to the petitioner. In the meanwhile, the petitioner was promoted to the rank of Nb./ Ris, with effect from 01.11.2011. In the circumstances, on 11.06.2012, the respondents again issued an order cancelling the NOC granted to the petitioner, stating that since there was an alteration of circumstances, and the Petitioner's tenure stood extended in the service by two years, the NOC and discharge were no longer permissible. In the communication dated 11.06.2012, the respondents stated that the petitioner had willingly accepted the promotion and consequently the NOC had to be withdrawn. The inter se communications between the respondents issued on 11.06.2012, inter alia, stated as follows:

> "3. The NCO was issued with NOC in terms of ibid AO but as he was promoted to the rank of Nb/Ris wef 01 Nov 2011 and willingly opted for two yrs extn of service, the JCO will now due for discharge in the rank wef 30 Nov 2014. The ibid NOC, therefore, is no longer valid due to change in terms of conditions consequent to his promotion and is hereby cancelled.
>
> 4. More so, on perusal of individual's undertaking at the time of his application for NOC it is seen that he had given undertaking that in case of his selection to the post of godown overseer at EBS, Babugarh, he will put up his papers for premature discharge. Since he was promoted before getting selected and no intimation of his selection or otherwise is available as on date, the conditions proposed by the application are now null and void."

**4.** The petitioner approached this Court by filing W.P.(C) 4325/

2012, aggrieved by the withdrawal of his NOC. The writ petition was dismissed on 23.07.2012; the Court was disinclined to interfere on the basis of its opinion that the promotion, to which the petitioner acquiesced, altered the circumstances and that in view of the existing policy, since the tenure stood extended, he could not claim the NOC and discharge from the army as a matter of right. The petitioner thereafter appears to have sought recourse to the Right to Information Act (RTI) with three applications. In response to all these, especially the letter dated 13.08.2012, it was stated that the result for the selection process in respect of the post of Godown Overseer has not yet been finalized. On 19.08.2012, the petitioner represented to the respondents, stating that in terms of AO 78/79, he could seek discharge in the event of selection to civil job and that this aspect had not been considered earlier. He also outlined the circumstances which compelled him to seek premature retirement. The relevant portions of his representation dated 19.08.2012 are extracted as follows:

> "3. Considering all the circumstances explained above I had taken "No Objection Certificate" to apply for a civil job as Godown Overseer in EBS, Babugarh, which would have brought some stability and would have facilitate to look after my family problems. However, the same was subsequently withdrawn on the ground that I had given my willingness to continue in service after my promotion to the rank of Nb. Ris.
>
> 4. In terms of para 4 of AO 78/79, I am entitled to seek discharge in the event of selection in a civil job. Hence, the case may be taken up to ascertain whether I was within the merit list for said post and in event of my name figuring in the merit list, I may be permitted to seek premature retirement before the expiry of my terms of engagement or service limit as I am in my last year of prescribed service limit.
>
> 5. I hope that you will be kind enough to consider my request favourably and sympathetically and allow me to premature discharge from service.
>
> 6. For this act of kindness my family and I will be ever grateful to you, sir."

**5.** Close on the heels of his representation, the petitioner moved an application, C.M. No.11714/2012, in the disposed of writ petition, W.P.(C) 4325/2012, seeking modification of the previous order to the extent that the dismissal of the writ petition should not come in the way of the



respondents considering his representations. This application was disposed of and the modification sought was granted by the order dated 13.09.2012, in the following terms:

> "2. As per pleadings in C.M. No. 11714/2012, with reference to Army Order 78/1979, it is brought to our notice that independent of the cause pleaded in the writ petition, another right is available to the petitioner to seek discharge through an alternative route which would be akin to a distinct cause of action. It is prayed that it may be clarified that the order dated July 23, 2012 dismissing the writ petition would not come in the way of the petitioner seeking discharge as per the Army Order 78/1979.
>
> 3. We dispose of the application observing that since the right pleaded in the writ petition was rested not on Army Order 78/1979 and thus this Court did not have an occasion to consider the right of the petitioner with respect to the Army Order in question, if the petitioner were to make a representation to the respondents with reference to Army Order 78/1979 seeking a right to be discharged the same would be considered and decided by the competent authority.
>
> 4. Needful would be done within three days of receipt of the representation."

**6.** After the disposal of the application, the petitioner addressed a representation to the army authorities for grant of premature retirement to enable him to take appointment in the civil post of Godown Overseer, on 14.09.2012. He also applied to the third respondent on 19.09.2012, requesting that an offer of appointment may be issued to enable him to join the post since, admittedly, he stood first in the merit list. Acting in terms of the request, the respondents issued a letter dated 21.09.2012 approving the petitioner's discharge on compassionate grounds; the representation to the army authorities had mentioned that the petitioner applied for the civilian post having regard to his family circumstances and invalidity of his mother who was suffering from certain illnesses. It also disclosed that the previous sequence of events which led to the issuance of NOC, its cancellation, non-declaration of result and his being promoted, the writ petition filed before this Court, its dismissal and later clarification by order dated 13.09.2012. On 21.09.2012, the petitioner's application for premature discharge was approved and the discharge order was issued. It is in these circumstances that he approached the Court seeking the reliefs claimed.

**7.** During the pendency of these proceedings, the petitioner moved an application for impleadment of one Sh. Sanjay Kumar as sixth respondent since, according to his knowledge, the said individual had been issued with an appointment letter. The application (C.M. 17433/2012) was allowed on 17.10.2012. In the accompanying application, C.M. No. 16865/2012, the Court had directed that the appointment of the third party would be subject to the final outcome of these proceedings.

**8.** It is argued on behalf of the petitioner that the action of the respondents cumulatively is indefensible and mala fide. Learned counsel submitted that no reason was given at any stage why the NOC issued on 21.04.2011 was cancelled on the day the results of the selection process were finalized, i.e. 28.07.2011. On that date, the selection board had assessed the petitioner to be the most meritorious candidate. As on that date, the NOC was valid. The NOC was, however, cancelled and till date, the respondents have not furnished any reason. It is submitted that even subsequently, on 08.09.2011, the NOC was restored, which meant that the respondents were duty-bound to process the appointment and issue the letter to him. Obviously, on account of complicity and mala fides of some of the officers of the respondents, who wished that the petitioner's candidature be kept out of the way and someone close to them was in fact appointed, the entire set of circumstances was manipulated. It was argued that when on 01.11.2011, the petitioner accepted his promotion, he was completely in the dark that he stood first in the merit list. Learned counsel highlighted that the representation of 18.08.2011 had categorically stated that in the event of a promotion, the petitioner would be willing to forego it if a premature discharge were granted to enable him to join the appointment in the civil post.

**9.** Learned counsel submitted that the later restoration of the NOC and its subsequent cancellation on 11.06.2012, were again without any justifiable reason. It was submitted that the application for NOC/discharge made subsequently on 19.08.2012 also recited the very same facts, i.e. family circumstances and the petitioner's desire to get the appointment to the civilian post. These found favour and the premature discharge was sanctioned on 21.09.2012. Yet, the third respondent, for reasons which cannot but be termed as mala fide, obdurately stuck to its position that the cancellation and subsequent restoration of NOC and his premature discharge was of no avail. Learned counsel submitted that whether the petitioner was promoted or not, the fact remained that he was not aware; nor was there any effort on the part of the respondents to make him aware; that he was entitled to be considered and appointed on account



of his ranking in the merit list. In these circumstances, the fact that he accepted the promotion on 01.11.2011 cannot be a bar for his insisting that he ought to be appointed to the civilian post. It was submitted that this is apparent from the letter dated 18.08.2011 where he stated clearly that he would forego his promotion if the NOC and discharge were given. Consequently, the NOC was issued on 08.09.2011. The action of the first two respondents in cancelling it on 11.06.2012 and that of the other respondents in rejecting the petitioner's candidature, are arbitrary and illegal.

**10.** Learned counsel submitted that the reasons cited by the army authorities, i.e. the provisions of Army Order 814/1973, are without justification and baseless. Learned counsel relied upon a subsequent order, i.e. Army Order 78/1979, especially para 5 which prescribed the service for retirement/discharge for the purpose of taking-up public employment. It was submitted that in the case of the petitioner, it was 24 years. service which he had in fact completed. Furthermore, argued the petitioner, without prejudice to this submission, the respondents could not bind him to the fact that promotion was given with effect from 01.11.2011. Relying upon the queries under the RTI Act made in July-August 2012, learned counsel submitted that as of November 2011, there was no final word that the results had been finalized to enable the petitioner to make an informed choice. In these circumstances, no principle of estoppel or waiver could apply to bind him to the extended tenure. Even otherwise, the respondents. acceptance of the premature retirement application completely altered the circumstances. The third respondent was under a duty to consider that the subsequent developments perfectly entitled the petitioner to appointment to the post for which he was selected. It was argued that the collective action of the respondents has resulted in a piquant situation where the petitioner has fallen between two stools, i.e. neither has he been appointed to the civilian post (which was the primary reason for his seeking discharge), nor has his employment in the Army continued. The reason for his seeking discharge was in order to secure civil appointment. The discharge has been granted and at the same time, civil appointment has been denied even though he is first in the order of merit.

**11.** All the respondents have filed a common affidavit through Lt. Col. Saumya Brata Panja. It is urged on their behalf that the Petitioner was not entitled to the NOC issued on 21st April 2011 since he was not in the last year of service before getting discharge from service. As a result, that 'No Objection Certificate' was cancelled by letter dated 28th

July 2011. The respondents also submit that the petitioner had furnished an undertaking that if he were selected for the post of Godown Overseer at Equine Breeding Stud, Babugarh, he will put up his papers for premature discharge forthwith. The petitioner had further stated that he is due for promotion to the rank of Naib Risaldar during the month of November 2011 and if he is selected for Godown Overseer at Equine Breeding Stud, Babugarh, he will forego his promotion to the rank of Naib Risaldar as well. It was stated that based upon that undertaking and declaration (of the petitioner), the validity of the No Objection Certificate was restored and the decision communicated to Equine Breeding Stud, Babugarh by Signal No. Q3166 dated 08th September 2011. In this background of circumstances, the Petitioner's promotion order to the rank of Naib Risaldar w.e.f. 01st Nov. 2011 was issued by Signal No. Q-3116 dated 30th Oct. 2011.

**12.** The respondents contended that according to the assumption certificate forwarded on 03rd November 2011, the petitioner assumed the rank of Naib Risaldar on 01st November 2011. It was submitted that upon his assuming the rank of Naib Risaldar, the terms and conditions of service applicable to the petitioner underwent a change in terms of Para 163 of Regulations for the Army Revised Edition (1987). This meant that the petitioner had opted for extension of his service by two years willingly through the assumption certificate. On promotion to the rank of Naib Risaldar and consequent to the change in terms and conditions of service, the validity of 'No Objection Certificate' which was restored, automatically stood cancelled mainly due to change of terms and conditions applicable to the rank of Naib Risaldar to which the petitioner was promoted. Consequently, the respondents contended that the cancellation of the NOC by order of 11th Jun 2012 was justified and valid.

**13.** The respondents do not deny that the petitioner filed a writ petition before this court, which was initially dismissed, and that subsequently he sought and was granted modification of that order, to enable him to represent on the basis of an Army Order of 1979. It is urged that the Board of Officers which was later convened on 14th August 2012 to look into the merit of the case and assess the eligibility of the petitioner afresh found the petitioner ineligible due to the altered circumstances. It was, however, not denied that premature discharge was granted to the petitioner by order of 21st September 2012, pursuant to the later order of the Court.

**14.** The respondents argued that on 09th October 2012 a Board of



Officers for selection to the post of Godown Overseer at Equine Breeding Stud, Babugarh, found the petitioner herein ineligible for consideration due to cancellation of the 'No-Objection Certificate' by the fourth respondent by letter dated 28th July 2011 during the recruitment process. As a result, the petitioner was not found eligible. It was further argued that during the same time when selection process was being carried out, the petitioner was promoted to Junior Commissioned Officer rank on 01st November 2011 and since he willingly opted for the post, which entailed two years extension of service, the 'No Objection Certificate', was no longer valid due to such change in terms of conditions and was thus cancelled. It is contended that in these circumstances, the offer of appointment was made to the sixth respondent, Sanjay Kumar S/o Shri Radhe Shyam Sharma.

**15.** The respondents argued that there is nothing arbitrary or unreasonable in their action in cancelling the no objection certificate. It was submitted that even though the petitioner had initially stated that he was willing to forgo promotion, in order to secure appointment to the civilian post, he actually opted for the higher post. Resultantly, there was a change in his retirement age; he became ineligible to be considered for appointment in terms of the existing instructions – which stated that only those with a years. service left before their due date of retirement/release could be furnished with no objection certificate. The cancellation of the no objection certificate meant that his candidature to the civilian post had to be rejected. It was argued lastly that the Army authorities cannot now be blamed or held to have acted unreasonably because of their subsequent acceptance of the petitioner's application for premature release, on 21-9-2012. It was submitted that no relief should be granted to the petitioner.

**16.** At the heart of the controversy, as may be seen from the above discussion, is whether the Petitioner's claim to the post was, at any stage, meritless and whether his subsequent promotion in November 2011 disqualified him to apply and consequently be considered for the civilian post of Godown overseer.

**17.** The undisputed facts are that when the petitioner applied for the civilian post, he was eligible to do so. The respondents gave a no-objection certificate, presumably on the understanding that by the time the process of recruitment ended and if the petitioner were offered appointment, he would be left with less than one years' service. That understanding or interpretation is reasonable and fair, because insistence that even on the

date of application the incumbent should have less than one years. service is arbitrary, as it is well known that the process of selection for appointments, particularly public appointments, spans over several months, and in cases, even a couple of years. Therefore, the issuance of the no objection certificate to enable the petitioner to apply to the post, in April, 2011 was reasonable, and in consonance with the rule. What followed thereafter is curious. On the day the interview marks were compiled, i.e. 28th July, 2011, and the petitioner was declared to be the first or the most meritorious candidate by the selection board (comprising of over five officers of the Army), the respondents chose to withdraw the no objection certificate issued in April, 2011. The petitioner was in a quandary. Significantly, the results of the selection process were not announced that day – they were not announced even a year later – till August 2012. Since this cancellation jeopardized his candidature, the petitioner represented to the authorities, who restored the no objection certificate, on 08-09-2011. At this stage, the status quo was restored. There was, therefore, no question of the petitioner being considered ineligible. If one keeps in mind the background that the results of the selection process had not been declared (and no reason has been given for this delay, in the affidavits filed in court), the petitioner's offer to forgo his promotion, in order to secure the civilian employment, made in his letter of 18th August, 2011, becomes significant. When he was offered promotion, the petitioner was completely in the dark about the fact that he stood first in the merit list, in the selection, and his appointment was a certainty. Undoubtedly, he reported for his posting in the promotional post. Yet, the fact remained that he was not given the due opportunity which he had sought, of forgoing it, because the respondents deliberately did not declare the results. The rest of the facts followed an uncanny pre-arranged sequence. Even up to June, 2012, the selection results were not declared; on 11th June, 2012, the petitioner's no objection certificate was cancelled; his candidature was cancelled. His request for forgoing promotion, and need for discharge, with the civilian post as a way out, was demonstrated by his application for discharge, which was found genuine and accepted with alacrity, on 21st September, 2012 by the Army. He stood released from the Force, only to be subsequently informed that his candidature could not be restored because he was no longer eligible, as his No Objection Certificate had been cancelled on 11th June, 2012.

**18.** Army Order 78 of 1979, which has been heavily relied on by the respondents to justify their action in saying that the petitioner was



ineligible, reads inter alia, as follows:

**"ADJUTANT GENERAL'S BRANCH**

**O-78/79 Application for Civil Appointments-JCOs/OR**

Category of JCOs/OR Eligible to Apply for Civil Appointments

1. JCOs/OR serving on regular engagement can, if they so desire, apply for civil appointments in Govt. undertakings/organisations and public or private sector under the following circumstances:

(a) Within one year of the date of retirement which includes the period of leave pending retirement.

(b) When placed in such a permanent low medical category as is unacceptable for further retention; within one year of completion of specified service. Those who have already completed the specified service, from the date of announcement of medical board proceedings to them.

(c) When placed in such a permanent low medical category which prevents detailing a person on promotion cadre/ course or debars him from further promotion in the Army, subject to the exigencies of service.

Procedure for Submission of Applications

2. The applications to the prospective employers will be routed through respective Os IC Records, duly recommended by OsC Units.

3. The applications for personnel will be forwarded to the civil authorities, provided the manpower situation in that Regt/Corps is satisfactory. A reference to this Headquarters for the purpose is not necessary. Where it is intended to retain a JCO/or under Rule 10, he will be accordingly informed by the concerned OIC Records. 'No objection certificate', where applicable, will be duly completed by OsIC Records.

4. Personnel who are selected for civil appointments before the expiry of their full terms of engagement or service limit, may, if they so desire, be allowed to proceed on discharge/retirement in order to enable them to join their new appointments during the last year of their colour service or retiring/prescribed service limits. The reasons for discharge to be entered in the discharge

Certificate in such cases will be: "At his own request having been permitted to take up civil appointment."

Service Limits

5. The service limits for retirement/discharge for the above purpose will be as under:

| On Pre 25 Jan 65 | Terms of Engagement | On Post 25 Jan 65 | Terms of Engagement |
|---|---|---|---|
| | | Under SA 9/S/65 but who did not opt for revised terms and conditions of service vide Govt. of India letter No. A/10099/Policy/ AG/PS 2(c)/2085 /S/D/A<br><br>G dated 16 Dec 76 and SAI 1/S/76. | Under SAI 9/S/65 XXXX modified vide Govt. of India letter No. A/110099/Policy/A G/PS 2(c)/2085/S/D/AG dated 16 Dec 76 and have opted new terms and conditions of service under SAI 1/S/76. |
| (a) Ris/Sub Maj | 32 years of service or on completion of 5 years tenure in the rank, whichever is earlier. | On completion of 32 years service or 50 years of age or 4 years tenure, whichever is earlier. | On completion of 32 years service or attaining the age of 52 years or 4 years tenure, whichever is earlier. |
| (b) Ris/Sub | 28 years | On completion of 28 years service or 50 years of age whichever is earlier | On completion of 28 years service or attaining age of 50 years. |
| (c) Nb Ris/Sub | 24 years | On completion of 24 years of service or 50 years of age whichever is earlier. | On completion of 24 years of service for those found unsuitable for retention and 26 years of service for those found suitable for retention or 50 years of age whichever is earlier. |
| (d) Dfv/Hav | 21 years or period of terms of engagement | On completion of 22 years of service. | On completion of 22 years of service for those found unsuitable for retention and 24 years of service for those found suitable for retention. |
| (e) L Div/Nk | 20 years or period of terms of engagement | On completion of 20 years of service. | On completion of 20 years of service for those found unsuitable for retention and 22 years for those found suitable for retention or 47 years of age whichever is earlier. |
| (f) Sowar/ Sepoy | Total period of colour service for which enrolled. | On completion of colour service for which engaged | 15 years of service or attainment of 40 years of age in respect of personnel belonging to trades as given in Annexure 'A' and 18 years of service or 46 years of age in respect of personnel belonging to trades as given in Annexure 'B' to SAI 1/S/76. |

These limits are equally applicable to the category of clerks also.

AO 814/73 is hereby cancelled."

**19.** As a plain reading of the above circular would reveal, it deals with the eligibility of certain category of army personnel wishing to seek

discharge from the Force, and seek civilian employment. In this context, there is a twin criteria: one, the personnel applying should do so *"Within one year of the date of retirement which includes the period of leave pending retirement"* [Para 1 (a)]. The second one, relevant for the present purpose, is Para 5, which sets the service periods, after which personnel holding various ranks can apply for such release. There is no dispute that the petitioner fulfilled the criteria. As discussed previously, Para 1 (a) – quoted above-has to be construed reasonably, especially in the context of public employment, where the selection process could take several months, if not years. To insist that the candidate wait for one year or less before retirement, even though the appointment itself might mature at a time when the incumbent is left with less than a year to retire, under these circumstances, would defeat the purpose of enabling the individual the chance of securing a civilian or public appointment of his choice. That the respondents construed this condition reasonably and in the manner indicated by the court, is evident from the first no objection certificate issued to the petitioner in April, 2011, which was later restored on 08-09-2011. The Army has no explanation why the certificate was cancelled on the very day the results for the post were compiled by the third respondent. It is also significant that though the post advertised in this case is a civilian post, the employer is the Army itself. The lack of any explanation on this aspect, as well as the lack of explanation why the results were not declared even a year later-in September 2012, when the petitioner sought replies to his queries under RTI in this regard, is extremely significant. Though the Court cannot return a finding of mala fides on the part of any particular officer, it is self-evident that this delay and the series of events helped some other candidate or candidates. In any case, there is no explanation at all on these two aspects – which renders the cancellation of the certificate, the delay in announcing the results, and cancellation of the petitioner's candidature itself arbitrary.

**20.** This Court also finds meritless the respondents' contention that once the petitioner willingly accepted the promotion it amounted to a waiver of his candidature for the civil post under consideration. Waiver means abandonment of a right. For there to be a valid waiver, it is essential that there be an "intentional and voluntary relinquishment of a known right or such conduct as warrants the inference of the relinquishment of such right". There can be no waiver unless the person purportedly waiving is aware about his right (which is being waived) and with full knowledge of such right, he intentionally abandons it. (Ref.: **Provash Chandra Dalui and Anr. v. Biswanath Banerjee and Anr.,** AIR 1989 SC 1834; **Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh and Ors.,** AIR 1979 SC 621). Here in this case, the results of the selection process for the civil post, in which the petitioner ranked first, were not announced until August 2012. Thus, he cannot be said to have had any knowledge about his entitlement (upon standing first in the selection process) to the civil post. Consequently, his acceptance of the promotion cannot amount to waiver of his claim to the civilian post, to which he had been selected, but not appointed. Moreover, the lack of knowledge on part of the petitioner was due to the non-declaration of the results. He cannot be the sufferer due to this. Furthermore, the entire sequence of facts has resulted in a Kafkaesque situation whereby the petitioner is without employment, even after being promoted (an event which resulted in the impugned cancellation of his candidature) and at the same time not being appointed to the civilian post, despite being the most meritorious. This is clearly a result of the untenable and arbitrary interpretation placed by the respondents on AO 78/1979 and their assumption that he waived his right to be considered for the civilian post because he accepted the promotional post in November 2011.



**21.** Sh. Sanjay Kumar, the sixth respondent, was impleaded by application (C.M. 17433/2012) on 17.10.2012. In C.M. No. 16865/2012, the Court had directed that his appointment would be subject to the final outcome of these proceedings. Having regard to the overall conspectus of circumstances, the court is of opinion that his appointment could have been sustained only upon rejection of the petitioner's candidature, which has been held illegal by this Court. In the circumstances, the writ petition is entitled to succeed. The respondents are directed to process the petitioner's candidature for appointment to the civilian post of Godown Overseer at the Equine Breeding Stud (EBS), Babugarh, and issue the appointment letter within six weeks. The writ petition is allowed in the above terms. No costs.

**ILR (2013) IV DELHI 3125**
**W.P. (C)**

**BHARAT SANCHAR NIGAM LTD. ....PETITIONER**

**VERSUS**

**DEPUTY COMMISSIONER OF INCOME ....RESPONDENT**

**(BADAR DURREZ AHMED & VIBHU BAKHRU, JJ.)**

**W.P. (C) NO. : 550/2007 DATE OF DECISION: 09.05.2013**

**Income Tax Act, 1961—Section 43 (1), 143 (3), 147 and 148—Petitioner challenged notices and proceedings initiated pursuant thereto for reopening concluded assessments for assessement year (AY), 2001-02 and 2002-03—Plea taken, action of Assessing Officer (AO) in seeking reassessment for reasons as supplied indicate that assessments were sought to be reopened only on a mere change of opinion as all relevant facts were within knowledge of AO during first round of assessment and were subject matter of inquiry in initial assessment proceedings—Held—It is apparent that conclusion drawn by AO that cost of fixed assets of Petitioner company has been met by Government is based on capital structure as was recorded in various documents including OM dated 30.09.2000 issued by Ministry of Telecommunication, GOI—Whereas earlier AO had not thought it fit to conclude that cost of fixed assets were required to be reduced to extent of reserves during first round of assessment, reasons as recorded disclose that this was sought to be done by reopening assessment—This in our view represents a clear change in opinion without there being any further 'tangible material' to warrant same—A mere change of opinion cannot be a reason for reassessing income under Section 147 of Act—Following aforesaid view, notices under Section 148 of Act and all proceedings initiated pursuant thereto are illegal and are liable to be quashed—Reasons as furnished by AO for reopening assessments could not possibly give rise to any belief that income of Petitioner had escaped assessment and proceedings initiated on basis of such reasons are liable to be quashed.**

**Important Issue Involved:** A mere change of opinion cannot be a reason for reassessing income under Section 147 of the Income Tax Act, 1961.

**[Ar Bh]**

**APPEARANCES:**

**FOR THE PETITIONER** : Mr. M.S. Syali, Sr. Advocate with Mr. Mayank Nagi and Ms. Husnal Syali, Advocate.

**FOR THE RESPONDENT** : Mr. Sanjeev Rajpal, Advocate.

**CASES REFERRED TO:**

1. *CIT* vs. *Usha International Ltd.:* (2012) 348 ITR 485 (Del.).
2. *CIT* vs. *Kelvinator of India Ltd.*: (2010) 320 ITR 561 (SC).
3. *M/s GKN Driveshafts (India) Ltd.* vs. *ITO*: (2003) 259 ITR 19 (SC).
4. *CIT* vs. *Kelvinator of India Ltd.*: 99 (2002) DLT 221.

**RESULT:** Allowed.

**VIBHU BAKHRU, J.**

**1.** These two writ petitions are filed by Bharat Sanchar Nigam Limited (BSNL) and seek to challenge the notices under Section 148 of the Income Tax Act (hereinafter also referred to as "the Act") and the proceedings initiated pursuant thereto, for reopening the concluded assessments for the assessment year 2001-02 and 2002-03. The petitioner has, in Writ Petition No. 550/2007 challenged the notice dated 23.11.2005 issued under Section 148 of the Act and the order dated 08.02.2006

passed by the Assessing Officer rejecting the objections raised by the petitioner against the reasons for issuance of the notice dated 23.11.2005. The Assessing officer had, by the notice dated 23.11.2005, initiated proceedings for reassessment of income for the period relevant to the assessment year 2001-02. The challenge in the Writ Petition No. 7707 of 2007 is with respect to the notice dated 12.3.2007 issued under Section 148 of the Act for initiating re-assessment proceedings in relation to the Assessment year 2002-03. As both the writ petitions raised similar issues, the same were taken up for hearing together and are being disposed off by this common order.

**2.** The petitioner is a Government Company and was incorporated on 15.09.2000 under the Companies Act, 1956. Prior to the incorporation of the petitioner company, the telecommunication services were being provided by Government of India, Ministry of Communication through its two departments, namely Department of Telecommunication Services (in short "DTS") and Department of Telecommunication Operation (in short "DTO"). The petitioner company was incorporated pursuant to the policy of the Government of India (National Telecom Policy 1999) to hive off its business of providing telecom services and operate the same through a corporate entity. The petitioner was constituted as a wholly owned Government of India enterprise for taking over the business of providing telecommunication services from DTO and DTS. The petitioner started functioning w.e.f. 01.10.2000. The terms of transfer of undertaking of telecom services from DTO and DTS to BSNL was recorded in an Office Memorandum dated 30.9.2000 and the relevant portion of the same is quoted below:

> "3. Government of India has decided to transfer all assets and liabilities (except certain assets which will be retained by Department of Telecommunications required for the units and offices under control of DoT, to be worked out later on), to Bharat Sanchar Nigam Limited w.e.f. 1st October, 2000. The transfer of assets and liabilities to the Company will be subject to the following terms and conditions:
>
> (i) The Company will carry out the duties and responsibilities regarding establishing, maintaining and working all types of telecommunication services in the country in accordance with and under the terms and conditions of the licence granted by the Central Government under the Indian Telegraph Act, 1885 and such other directions as may be given by the Central Government from time to time,
>
> (ii) The assets and liabilities of the Department of Telecommunications, Department of Telecom Services and Department of Telecom operations (the Government) will stand transferred to the Company, with effect from 1st October, 2000. The details of the assets will be worked out as per records available with the various Divisions and other units as on 30th September, 2000 after records and accounts are finalized up to this period.
>
> (iii) The assets and liabilities in respect of the business currently being carried out on account of the Government shall stand transferred to the Company on the book value thereof, which will be ascertained in the manner aforesaid. The book value of the assets comprising the business being transferred to the Company has been provisionally assessed as Rs 63,000 crores. The said sum of Rs 63,000 crores will be treated as the **provisional value** of the business being transferred to and taken over by the Company subject to finalization of the transfer value by 31.03.2001 in consultation with Ministry of Finance.
>
> (iv) The Assets are being transferred to the Company in consideration of Rs 5,000 crore equity (for which the Company will issue Five Hundred crores Equity Shares of face value of Rupees Ten each fully paid up having aggregate value of Rupees Five Thousand crores to the VENDOR or his nominees), Rs 1500 crores ways, and means advance and the balance as a mix of long term debt, free reserves and preference share capital. The accounting treatment of this mix shall be notified later.
>
> (v) The capital structure of Bharat Sanchar Nigam Limited will be finalized by the Ministry of Communications, Department of Telecommunications in consultation with Ministry of Finance and the Comptroller and Auditor General of India, if necessary.
>
> (vi) The Company, Bharat Sanchar Nigam Limited shall be

liable to make repayment of bonds raised by MTNL for DoT/DTS/DTO, which are now being transferred, to the Company.

(vii) The Company as the successor company shall be responsible for all assets and liabilities and for satisfactory execution of all agreements, contracts and obligations in force, which pertain the business being transferred to it.

(viii) The Company shall be solely responsible for honouring and performing all contracts/agreements and shall be liable for any defaults, delays or non-performance. The Company shall keep for all times the Government indemnified from all claims.

(ix) After finalization of assets and liabilities and assets to be retained by Dot regular transfer deed(s) will be executed subsequently in respect of transfer of business to the Company listing out specifically all the assets being transferred. These orders will come into force from 1st October, 2000."

**3.** A Memorandum of Understanding (MOU) was executed between the Government of India, Ministry of Telecommunications and BSNL on 30.09.2000 for the purpose of transferring assets and liabilities from the Ministry of Communications to the petitioner. In terms of the said MOU, the function of providing telecommunication services was taken over by the petitioner company and an agreement for transfer of business was also entered into between the Government of India, Ministry of Communication and BSNL. The said agreement for transfer of business, inter alia, recorded that "the business of providing telecom services and telecom network, inter-alia, comprising, management, control, operations and maintenance of communications network and services spread all over India, manufacturing, research and development and other facilities, some being also spread all over India, which business (hereinafter also referred to as "the Business"), recently entrusted to, and being currently carried on by DTO and DTS shall stand transferred to and vest in BSNL who has taken over or deemed to have taken over the same, as running concern, subject to the provisions and stipulations of this Agreement."

**4.** As per clause 6 of the agreement of transfer, the assets and liabilities in respect of the business currently carried on account of DTS



and DTO were transferred to the petitioner at book values, which were at the relevant time being ascertained. The agreement also recorded that the parties had agreed that the total book value of the assets comprising the business of the petitioner would be in excess of Rs 63,000 Crores and therefore the said sum would be taken as the provisional value of the business being transferred. Clause 7 of the agreement recorded the consideration at which the assets were being transferred as under :" 7. The Assets are being transferred to the Company in consideration of Rs 5,000 crore equity (for which the Company will issue Five hundred crores Equity Shares of face value of Rupees Ten each fully paid up having aggregate value of Rupees Five Thousand crores to the VENDOR or his nominees), Rs 1500 crores ways and means advance and the balance as a mix of long term debt free reserves and preference share capital. The accounting treatment of this mix shall be notified later."

**5.** The petitioner filed its return of income for the period 15.09.2000 to 31.03.2001, relevant to the assessment year 2001-02 on 26.03.2002 and declared a loss of Rs 58,46,31,20,000/-. The said return was taken up for scrutiny and the Assessing Officer framed an assessment under Section 143(3) of the Income Tax Act vide the assessment order dated 11.02.2004 assessing a net loss of Rs 39,53,78,45,000/-. However, the company was covered under the provisions of section 115JB of the Act and it declared taxable book profit at Rs 1801,28,11,000/- and paid tax on it as per section 115JB of the Act.

**6.** The Assessing Officer issued a notice dated 23.11.2005 under section 148 of the Act stating that he had reasons to believe that income of the petitioner had escaped assessment within the meaning of section 147 of the Act and called upon the petitioner to file its return of income for the said period. The petitioner requested for the reasons for reopening of the assessment under section 148 of the Act which were furnished by the Assessing Officer under the cover of his letter dated 22.12.2005. The reasons for issuance of notice under section 148 of the Act, as furnished by the Assessing Officer, referred to the capital structure of the petitioner company and the inference drawn by him was that the cost of assets was being met by the general reserve as reflected in the capital structure of the company. As per the Assessing Officer, a sum equal to the general reserve would be required to be reduced from the cost of the assets in terms of Explanation 10 of Section 43(1) of the Act. The Assessing Officer observed that the depreciation had been claimed by the

petitioner on the cost of the assets without reducing the proportionate amount of reserves therefrom and on this basis the Assessing Officer had formed a belief that the assessee had claimed excessive depreciation. The Assessing Officer indicated that the proportionate amount of reserves had to be reduced from the fixed assets to arrive at their actual cost on which depreciation would be allowable.

**7.** The petitioner filed its objections on 20.01.2006 to the reasons as furnished by the Assessing Officer in terms of the decision of the Supreme Court in the case of **M/s GKN Driveshafts (India) Ltd. v. ITO:** (2003) 259 ITR 19 (SC). The petitioner contended that all material facts had been placed before the Assessing Officer during the first round of assessment and various queries were raised by the Assessing Officer inter-alia with respect to the valuation of the assets as well as the depreciation claimed by the petitioner and thus there was no new fact which had been discovered subsequent to the assessment order which would warrant reopening of the concluded assessment. The petitioner objected to the proposition that reserves were required to be reduced from the value of the assets for purposes of computing depreciation. It was contended by the petitioner that this was only a change of opinion as to how depreciation was to be computed and thus it was impermissible for the Assessing Officer to initiate reassessment proceedings on this ground. The petitioner also contended that Explanation 10 to Section 43(1) of the Act had no application in the present case as the configuration of the capital structure of the company could not possibly lead to a conclusion that the reserves of the petitioner company represented cost of assets which had been met by the Government of India in the form of a subsidy, a grant or a reimbursement. The reserves were neither a subsidy nor a grant or reimbursement by the Government of India and, therefore, the premise on which the assessment was sought to be reopened was erroneous.

**8.** The objections raised by the petitioner were rejected by the Assessing Officer by an order dated 08.02.2006. The petitioner thus filed the present writ petition on 02.03.2006. However, the Writ Petition No. 550 of 2007 was not listed as the petitioner had sought approval from COD which had not been accorded at the material time. The COD granted its approval to proceed with the writ petition at its meeting held on 21.12.2006 which was communicated to the petitioner vide a letter dated 03.01.2007. In the meantime, the Assessing Officer completed the



reassessment proceedings for the year 2001-02 by his order dated 22.12.2006. The Assessing Officer recomputed the allowable depreciation at Rs 56,28,89,21,000/- against the amount of Rs 1,26,46,77,42,000/- as computed earlier. The excess depreciation of Rs 70,17,88,21,000/- has been added to the income of the petitioner for the relevant assessment year and the Assessing Officer has raised a demand for a sum of Rs 802,93,34,358/- by the notice of demand dated 22.12.2006. The present petition (i.e. Writ Petition No. 550 of 2007) was thereafter listed for hearing and by the order dated 01.03.2007 this Court directed that the date of filing of the petition be deemed to be 24.01.2007.

**9.** The issues raised in Writ Petition No.7707/2007 are identical and pertain to the subsequent period i.e., Assessment year 2002-03. The petitioner had filed its return of income for the relevant assessment year 2002-03 on 30.10.2002 declaring a loss of Rs 19,27,43,00,000. However, the audited balance sheet disclosed a profit of Rs 68,57,32,00,000 which was liable to tax under Section 115JB of the Act. The said return was taken up for scrutiny and the Assessing Officer framed the assessment under Section 143(3) of the Act vide the assessment order dated 28.02.2005.

**10.** The Assessing Officer issued notice dated 12.03.2007 of the Act for reopening the assessment for the period relevant to the Assessment Year 200203. At the request of the assessee, the Assessing Officer supplied the reasons for issuance of notice under Section 148 of the Act, under the cover of his letter dated 28.05.2007. The reasons furnished by the Assessing Officer for reopening the assessment are similar to the reasons as furnished by the Assessing Officer for initiating reassessment proceedings for the assessment year 2001-02 which are the subject matter of challenge in the Writ Petition No. 550/2007.

**11.** The learned counsel for the petitioner contended that the reassessment proceedings are illegal and without jurisdiction. It is contended that action of the Assessing Officer in seeking reassessment for the reasons as supplied indicate that the assessments were sought to be reopened only on a mere change of opinion as all relevant facts were within the knowledge of the Assessing Officer during the first round of assessment and were subject matter of inquiry in the initial assessment proceedings. The learned counsel for the petitioner has drawn our attention to Para 2 of Schedule T to the notes of accounts to the audited balance

sheet which had been submitted to the Assessing Officer. The notes clearly disclose the value of the assets as well as the capital structure of the company. The relevant paragraph of the notes to accounts is quoted below:-

"Assets and Liabilities taken over from DoT In pursuance of the Memorandum of Understanding dated 30th September 2000 executed between President of India and BSNL all assets and liabilities in respect of business carried out by DTS and DTO were transferred to the Company with effect from 1st October 2000 at a provisional value of Rs 630,000 Million. The value was subject to finalisation with Ministry of Finance by 31st March 2001, which has not yet been done. The assets and liabilities as on 1st October 2000 have been classified broadly under the following heads:

| Assets | (Rs. In Million) |
|---|---|
| —Fixed Assets | 501078.6 |
| —Capital Work-in-progress | 47900.9 |
| —Inventory | 18132.2 |
| —Sundry Debtors | 33103.8 |
| | 600215.5 |
| Liabilities | |
| —Customer Deposits (Excluding interest accrued thereon) | 38606.5 |
| —Net assets taken over by the Company | 571609 |
| —Contingent liabilities taken over by the Company | — |

The net assets (including liabilities) transferred to the Company as of 1st October 2000 are subject to confirmation by DoT as regards to ownership and the value.

The Capital structure for BSNL concurred in by Ministry of Finance and conveyed by Department of Telecommunications vide their UN. No. 1-2/2000-B (Pt.) dated 1 December 2001 as consideration for transferring the above stated assets and liabilities is as follows:



| | |
|---|---|
| —Equity | 50000 |
| —Non-cumulative preference Shares (9%) | 75000 |
| —15 Years Government Load (12%) | 75000 |
| —Loan from MTNL (Refer Note 101) | 30000 |
| —Reserves # | 331609 |
| | 571609 |

"

**12.** It has also been brought to our notice that during the assessment proceedings relevant to the assessment year 2001-02, the Assessing Officer issued a questionnaire dated 13.12.2002 seeking various explanations for the purpose of framing the assessment. Question nos. 5 and 6 of the said questionnaire are relevant as the Assessing Officer had raised queries regarding the value of the reserves as well as the taxability of the treatment of the surplus in the hands of the transferors (Department of Telecommunication Services and Department of Telecommunication Operation) the said queries are quoted below:

"5. Explain as to how the value of reserve, which factually is the balance of surplus amounting to Rs 3,31,609/-, has been worked out. Whether any final decision as to the surplus available on account of such takeover in the hands of DTS and DTO separately of the above said amount was finalized?"

6. In case no finalization as to the taxability or treatment of such surplus in the hands of DTS and DTO have been finalized, explain as to why such surplus should not be subjected to tax in the hands of the assessee company?"

**13.** The petitioner replied to the queries and the assessment order was framed after considering the same. The assessment order also noted that the assets had been transferred at book value which would not be less than Rs 63,000 Crores. The components, on the liability side of the balance sheet of the petitioner were examined and the Assessing Officer noted that the fixed components on the liability side consisted of share capital and loans aggregating to Rs. 20,000 Crores and the balance amount would be reflected as reserves which would increase or decrease

corresponding to the change in the book value of the assets as finalized. The relevant portion of the assessment order dated 11.02.2004 for the assessment year 2001-02 is quoted below:

> "10.2 It should be clearly understood that given the huge asset base, it was not possible to arrive at the precise value of the assets handed over by the Government. Therefore, it was decided that the precise value of the total assets would be arrived at in due course and in any case it would not be less than Rs 63,000 Crore. Till the process of precise ascertainment of the value of the assets transferred was completed it was expected that the amount would keep changing. This is true also because in the next year the assessee took over further assets amounting to Rs 3578 Crore and these were adjusted with the assets taken over as on 1.10.2000. Therefore, on the liability side the fixed components, consisting of capital and loan were only adding up to Rs 20,000 Crore as detailed above. The balancing figure was to represent the 'reserves' on the liability side and with the change in the value of the assets taken over the `reserve' was to be increased or decreased correspondingly. This formed the balance sheet of the company at the time of transfer of business from Government of India to BSNL."

**14.** It is thus contended on behalf of the petitioner, that the Assessing Officer was fully conscious of all relevant facts which had been duly disclosed before him. The provisions of Explanation 10 of Section 43(1) were not applicable and consequently the cost of assets had been taken at the book value and depreciation was computed accordingly. The subsequent action of the Assessing Officer in seeking to apply the provisions of Explanation 10 to Section 43(1) of the Act would only tantamount to a change of opinion as no new material was discovered which would warrant re-computation of depreciation, on the contrary, the issues relating to depreciation and value of assets had been discussed in the first round of assessment itself.

**15.** The learned counsel for the petitioner also relied on a full bench decision of this court in the case of **CIT v. Kelvinator of India Ltd.:** 99 (2002) DLT 221, wherein it has been held that if the Assessing Officer has examined the facts and not made an addition, it cannot be presumed that he had not applied his mind to the assessment. The learned



counsel also cited the decision of this court of in the case of **CIT v. Usha International Ltd.:** (2012) 348 ITR 485 (Del.) as also the decision of the Supreme Court in the case of **CIT Vs. Kelvinator of India Ltd.:** (2010) 320 ITR 561 (SC), in support of his contention that reassessment proceedings cannot be initiated on a mere change of opinion.

**16.** The learned counsel for the petitioner also urged that, even on merits, no reasonable person could come to the conclusion that the reserves of the company represented cost of the assets of the company being met by the government in the form of a subsidy, grant or reimbursement so as to attract the provisions of Explanation 10 to Section 43(1) of the Act. It is contended that treating the reserves separately from the capital was fallacious as the reserves represented shareholder's fund and the value of the shares would include not only the face value of shares but also reserves and surpluses.

**17.** We have heard the learned counsel for both the parties and the principal question that needs to be addressed is whether the action of the Assessing Officer in reopening the assessment is based on any tangible material or represents only a mere change of opinion? The second issue that can be considered is whether, on the basis of the capital structure of the petitioner, an inference could be drawn that reserves represented cost of assets met by the government so as to fall within the ambit of Explanation 10 to Section 43(1) of the Act?

**18.** The petitioner company has been incorporated to provide the telecom services which were being carried out earlier by Department of Telecommunication Services (DTS) and Department of Telecommunication Operations (DTO). As per the decision of the Government of India, the business being conducted by DTO and DTS were vested with the petitioner company. This was pursuant to NTP 1999, whereunder the Government had decided to corporatise certain services and operations being carried on by the Department of Telecommunications under the Ministry of Communications. Thus, in a sense the Government decided to incorporate a new company as a Government of India enterprise to carry on the business of telecom services instead of conducting the same directly. The assets were to be transferred at book values. The value of net assets was agreed to be in excess of Rs 63,000 Crores and, therefore, the same was provisionally taken as a book value of the business being transferred. The consideration

for the same was agreed to be met by issue of equity capital of Rs 5000 Crores (500 Crore shares of the face value of Rs 10/-each), preference share capital of Rs 7500 Crores and debt of Rs 7500 Crores. The balance consideration was reflected as reserves. This capital structure was also duly disclosed by the petitioner company in its Directors Report forming a part of the first annual report as under:

> "CAPITAL STRUCTURE & FINANCING
>
> The Authorised Share Capital of your Company is Rs 10000 crores, and the present paid up capital is Rs 5000 crores. Pursuant to the MoU dated 30th September, 2000, signed with the Government of India, Ministry of Communications, your Company took over the business of erstwhile Deptt. of Telecom Services and Deptt. of Telecom Operations with effect from 1st October, 2000 on a going concern basis alongwith all the assets, liabilities and all the contractual obligations. The business was transferred to the Company at an estimated value of Rs 63,000 crores. The Capital Structure of the Company as indicated by DoT is as under :
>
> Rs 5000 crores Fully paid up Equity Capital.
>
> Rs 7500 crores Preference Share Capital.
>
> Rs 7500 crores Loans.
>
> The Balancing figure will be represented by the Reserves."

**19.** Paragraph 2 of schedule T to the Final accounts for the period 15.9.2000 to 31.3.2001 containing the notes to the accounts as reproduced hereinbefore also disclosed the value at which the assets were transferred to the petitioner and also the capital structure as was decided at the material time. Indisputably, the Assessing Officer had occasion to examine the aspect of valuation of assets and the same is also clearly evident from the questionnaire framed by the Assessing officer for the purposes of scrutiny of the return filed by the petitioner. Merely because there is no discussion regarding applicability of Explanation 10 to Section 43(1) of the Act cannot lead to the conclusion that the Assessing Officer was ignorant of the said provisions. There is no occasion for us to presume that the assessment order framed by the Assessing Officer was without application of mind as to the relevant facts and the applicable laws. A full



bench of this court has held in the case of **CIT v. Kelvinator of India Ltd. (DHC)** (supra) as under:

> "43. We also cannot accept submission of Mr Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded on analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under Section 147 of the Act. The said submission is fallacious. An order of assessment can be passed either in terms of Sub-section (1) of Section 143 or Sub-section (3) of Section 143. When a regular order of assessment is passed in terms of the said Sub-section (3) of Section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of Clause (e) of Section 114 of the Indian Evidence Act the judicial and official acts have been regularly performed...."

**20.** Admittedly, no new tangible material has been discovered subsequent to the framing of the first assessment relating to the assessment year 2001-02. The reasons as furnished by the Assessing Officer, ex-facie, indicates that he has sought to make certain inferences based on disclosures which were already on record and had been considered while framing the first assessment. The relevant portion of the reasons for issue of notice under Section 148 are quoted below:

> "The assessee company came into existence on 1st October 2000 and the year under consideration is the first year of the assessee. The history of the assessee company is that in pursuance to the New Telecom Policy, 1999 the Government decided to corporatise the service provision functions of the Department of Telecommunication (DoT) were carved out for providing telecom services in the country and maintaining the telecom network factories. The business of providing telecom services and running the telecom Factories was transferred to the new company i.e. BSNL w.e.f. 1.10.2000 AND THE Government retained functions of policy formulation, licencing, R&D etc.
>
> The takeover of the assets and liabilities by the Company was in terms and conditions with the Office Memorandum No.-2-30/ 2000 dated 30.09.2000 issued by the Ministry of Communications, Govt. of India. In terms of this OM dated 30.09.2000, the total

book value of the assets transferred to BSNL was provisionally assessed as '63,000 crores subject to finalization of the transfer value by 31.03.2001. In the consultation with the Ministry of Finance. The assets transferred included fixed assets (like land, building etc.) and trading assets (like debtors raised by DOT and not realized till the time of transfer of business).

Para 3 (iv) of the OM further mentioned that the assets were transferred to the Company in consideration of Rs 5000 crores equity (for which the Company will issue Five Hundred crores Equity Shares of face value of Rs 10/-each fully paid up having aggregate value of Rs Five Thousand crores to the VENDOR or his nominees), Rs 1500 crores ways and means advance and the balance as a mix of long term debt, free reserves and preference share capital. It was also mentioned that the accounting treatment of this mix would be notified later.

Para 3 (v) of the OM mentioned that the capital structure of BSNL would be finalized by the Ministry of Communications, Department of Telecommunications in consultation with Ministry of Finance and the Comptroller and Auditor General of India, if necessary. Accordingly, another Office Memorandum No. 67-2/ 2002OC dated 19.06.2002 was issued by the Department of Telecommunications, Govt. Of India regarding the terms of capital structure and package of measures in the form of financial reliefs. As per this OM the capital structure of BSNL was as follows:

| | |
|---|---|
| Paid up Equity Share Capital | Rs 5000 crores |
| 9% (Non-Cumulative) Preference | Rs 7500 crores |
| Government Loan | Rs 7500 crores |
| MTNL Loan | Rs 3000 crores |
| Reserves | Balance of asset Value transferred. |

During the course of assessment for the A.Y. 2003-04, the assessee was required to explain the nature of reserves as mentioned in the capital structure of BSNL. In response the assessee stated that it is in the nature of a 'capital reserve' and is the 'balance of asset value transferred'. The assessee further gave a mathematical equation for reserves as:



RESERVES = Asset – Liabilities – Paid-up Equity Capital – 9% (NC) Preference Share Capital – Government Loan – MTNL Loan.

Thus, from the assesse's definition of reserves, the following can be derived:

ASSET = Reserves + Liabilities + Paid-up Equity Capital + 9% (NC) Preference Share Capital + Government Loan + MTNL Loan.

The assets transferred to BSNL include fixed assets as well as trading assets. Therefore from the above equation it is clear that part of the cost of fixed assets of the assessee company are met by the reserves, which as per the assessee are in the nature of capital reserves. This means that to the extent of reserves, the cost, of fixed assets of the assessee company is met by the Government.

Now, sub-section (1) of section 43 of the Income-tax Act, 1961 defines actual cost for the purpose of depreciation as the actual cost of assets to the assessee, reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority. Explanation 10 to this sub-section further states that where a portion of the cost of an asset is met directly or indirectly by the Central Government in the form of a subsidy or grant or reimbursement (by whatever name called), then so much of the cost as is relatable such subsidy or grant or proviso to this explanation further states that where such subsidy or grant or reimbursement is of such nature that it cannot be directly relatable to the asset acquired, so much of the amount which bears to the total subsidy or reimbursement or grant the same proportion as such asset bears to all the assets such asset in respect of the or with reference to which the subsidy or grant or reimbursement is so received, shall not be included in the actual cost of the asset to the assessee.

In the instant case part of fixed assets and part of other assets in met by the Government in form of reserves created at the time of corporatisation. Thus, the actual cost of fixed assets to the assessee must be reduced by that proportion of the reserves

as the fixed assets bears to all the assets taken over at the time of corporatization."

**21.** It is apparent from the above that the conclusion drawn by the Assessing Officer that the cost of fixed assets of the petitioner company has been met by the Government is based on the capital structure as was recorded in various documents including the Office Memorandum dated 30.09.2000 issued by the Ministry of Telecommunication, Government of India. Whereas the earlier Assessing Officer had not thought it fit to conclude that the cost of the fixed assets were required to be reduced to the extent of the reserves during the first round of assessment, the reasons as recorded disclose that this was sought to be done by reopening the assessment. This in our view represents a clear change in the opinion without there being any further "tangible material" to warrant the same. It is trite law that a mere change of opinion cannot be a reason for reassessing income under Section 147 of the Act. The Supreme Court in the case of **CIT vs. Kelvinator of India Ltd. (SC)** (Supra) has held as under:

"On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act (with effect from 1st April, 1989), they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review ; he has the power to reassess. But reassessment has to be based on fulfilment of certain pre-conditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department then, in the garb of



reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, the Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief."

**22.** Following the aforesaid view we are of the opinion that the notices dated 23.11.2005 and 12.03.2007 under Section 148 of the Act and all proceedings initiated pursuant thereto are illegal and are liable to be quashed.

**23.** In view of our decision above, it is not necessary to examine the question whether the configuration of the capital structure of the petitioner could by itself provide a reason for the Assessing Officer to believe that provisions of Explanation 10 to Section 43(1) of the Act were applicable and the book value at which the assets were vested with the petitioner were required to be reduced to the extent of the reserves of the company. However, having heard the counsel for the parties on this issue, it is apposite that we consider the same.

**24.** Explanation 10 to Section 43(1) of the Act is as under:

"Explanation 10. -Where a portion of the cost of an asset acquired by the assessee has been met directly or indirectly by the Central Government or a State Government or any authority established under any law or by any other person, in the form of a subsidy or grant or reimbursement (by whatever name called), then, so much of the cost as is relatable to such subsidy or grant or reimbursement shall not be included in the actual cost of the asset to the assessee:

Provided that where such subsidy or grant or reimbursement is of such nature that it cannot be directly relatable to the asset acquired, so much of the amount which bears to the total subsidy or reimbursement or grant the same proportion as such asset bears to all the assets in respect of or with reference to which the subsidy or grant or reimbursement is so received, shall not be included in the actual cost of the asset to the assessee."

**25.** The Assessing Officer seems to have proceeded on an assumption that whereas the value of share capital, issued to the Government as part consideration for the transfer of business to the petitioner company, is limited only to the face value of the shares, the reserves represent a subsidy, grant or reimbursement for meeting the cost of assets transferred. We find no basis for such an assumption. We are hard pressed to imagine as to how free reserves and surpluses of a company can be considered anything but as part of shareholders funds.

The Assessing Officer erred in completely ignoring that reserves and surpluses of a company are a part of shareholders funds and the book value of equity share consists of not only the paid up capital but also the reserves and surpluses of the company. The format of the balance sheet as prescribed under Schedule VI of the Companies Act, 1956 also clearly indicates that reserves and surpluses are a part of shareholders fund. The balance sheet of the petitioners company also reflects the reserves and surpluses as a part of shareholders' funds. The relevant portion of the balance sheet of the petitioner company as on 31.03.2001 is quoted below:

| | | |
|---|---|---|
| **"Shareholders' Funds** | | |
| Capital | A | 50.000,000 |
| Preference Capital pending allotment (Refer Note 2.3 on T) | | 75,000,000 |
| Reserves & Surplus | B | 339,079,523 |
| **Loan Funds** | | |
| Secured Loan | C | 5,100,000 |
| Unsecured Loans | D | 107,983,258 |
| Total | | 577,162,781" |

**26.** The scheme of hiving off the business of telecom services by Government of India to a corporate entity entailed incorporation of a wholly owned government company (i.e, the petitioner company) and the transfer of the business as a going concern along with all its assets and liabilities to the company. The net assets were transferred at book value, which was agreed to be at least Rs 63,000/- Crores and in consideration of this the petitioner company accepted a liability of Rs 7500 Crores and



issued both equity and preference share capital of the face value of Rs 5000 Crores and Rs 7,500 Crores, respectively. The balancing figure was reflected as reserves which is an integral part of the shareholders funds. The Government of India has transferred the assets to the petitioner company at their book value i.e., the value at which the said assets are reflected in the books of DTS and DTO and the book value of the Government of India's holding in the petitioner company as shareholder and a creditor aggregates the book value of the assets transferred. The configuration of the capital structure of the petitioner has no impact on the value of the Government's holding in the petitioner company as reserves of a company are subsumed in the book value of its capital. We find no basis, at all, for the Assessing Officer to surmise that reserves represent a subsidy, grant or reimbursement from which the cost of assets of the petitioner company are met and the whole consideration received by the Government of India for transfer of business is limited to the value of loans and the face value of the shares issued to the Government of India. A reserve represents the shareholders' fund and may be utilized in various ways including to declare dividends or for issuing bonus shares. There is no plausible reason to assume that the value of shareholders' holding in a company is limited to the face value of the issued and paid up share-capital and the reserves represent a subsidy or a grant or a reimbursement by the shareholders from which directly or indirectly the cost of the assets in the hands of a company are met. We are thus of the view that the reasons as furnished by the Assessing Officer for reopening the assessments could not possibly give rise to any belief that income of the petitioner had escaped assessment and proceedings initiated on the basis of such reasons are liable to be quashed.

**27.** We accordingly set aside the notices dated 23.11.2005 and 12.03.2007 issued under Section 148 of the Act and quash all proceedings initiated pursuant thereto. The parties are left to bear their own cost.

**ILR (2013) IV DELHI 3145**
**LPA**

**SURINDER KUMAR JAIN ....APPELLANT**

**VERSUS**

**DELHI DEVELOPMENT AUTHORITY & ANR. ....RESPONDENTS**

**(D. MURUGESAN, CJ. & JAYANT NATH, J.)**

**LPA NO. : 619/2012 DATE OF DECISION: 20.05.2013**

**Delhi Cooperative Society Rules, 1973—Rule 25(1)(c)—Assertion of the appellant that his brother was a member of respondent no.2, Cooperative house Building Society since October, 1966 and on his resignation from its membership on 02.02.1976, his membership was transferred in favour of the appellant as per the request of his brother and as per the rules of the Society w.e.f 24.02.1976—In a draw of lots in January, 1984 respondents allotted a plot at Arihant Nagar in favour of the brother of the appellant—Appellant objected to the said allotment and in view of his objection and the documents relied upon by him, DDA, respondent no.1 directed respondent no.2 to rectify its records vide letter dated 25.07.1985—However subsequently respondent no.1, DDA cancelled the allotment in favour of the appellant on the ground that the original allotment was in the name of his brother, who had concealed facts and had filed a false affidavit regarding non ownership of any residential property in Delhi—Vide the impugned order the writ petition filed by the appellant challenging the cancellation of allotment and contending that his membership could not have been cancelled for acts of omission of his brother, dismissed by the Ld. Single Judge. Held: A perusal of Rule 25(1)(c) of the Delhi**



**Cooperative Society Rules, 1973 makes it clear that a person who owns, in the NCT of Delhi, a residential house or a plot of land whether in his name or in the name of his spouse or dependent children or is a member of any other housing society is ineligible for admission as a member to Delhi Cooperative Society and sub-Rule (iii) thereof makes it clear that once a member incurs a disqualification, he shall be deemed to have ceased to be a member from the date when the disqualifications were incurred. The brother of the appellant had been allotted a plot in Malviya Nagar by respondent no.1, DDA in 1975, in respect of which full premium was paid by the brother of the appellant on 31.12.1975 and thereby he had become ineligible to remain a member of respondent no.2, Society w.e.f 1976 and his membership was liable to be cancelled and therefore could not have been transferred to the Appellant. Appeal dismissed.**

Reference may also be made to Rule 25(1)(c) of the Delhi Cooperative Society Rules, 1973 which reads as follows:-

"25. **Disqualification for Membership**

1. No person shall be eligible for admission as a member of a co-operative society if he-

...

(c) in the case of membership of a house society-

[(i) owns a residential house or a plot of land for the construction of a residential house in any of the approved or un-approved colonies or other localities in the National Capital Territory of Delhi, in his own name or in the name of his spouse or any of his dependent children, on lease hold or free-hold basis or on power of attorney or on agreement for sale:

...

(iii) he or his spouse or any of his dependent children is a member of any other housing society except otherwise permitted by the Registrar.

2. Notwithstanding anything contained in the rules or the bye-laws of the co-operative society, if a member becomes, or has already become, subject to any disqualifications specified in sub-rule (1), he shall be deemed to have ceased to be a member from the date when the disqualifications were incurred."

**(Para 17)**

A perusal of the above Rule makes it clear that a person who owns a residential house or a plot of land whether in his name or in the name of his spouse or dependent children or is a member of housing society is ineligible for admission as a member of any housing cooperative society. Rule 25(1)(c)(iii) also states that once a member incurs a disqualification, he shall be deemed to have ceased to be a member from the date when the disqualifications were incurred. Admittedly in the present case even as per the appellant his brother was allotted a plot in Malviya Nagar for which a lease was executed on 15.02.1977. Respondent-DDA has confirmed that the plot in Malviya Nagar was allotted on 20/21.8.1975 and the full premium was paid on 31.12.1975 by the brother of the appellant. The appellant has failed to give details as to how and on what circumstances the draw of lots took place in favour of the brother of the appellant in 1975 for the Malviya Nagar plot. No details are given by the appellant of the date of membership of the other Housing Society by his brother or as to how the brother was allotted the said plot. It is but obvious that material particulars have been withheld from this Court by the appellant. Even if we ignore the fact that in 1984 when the draw of lots took place, the membership of the appellant had not been cleared by the Registrar of Cooperative Societies, even as on 1976 when the brother of the appellant resigned from the membership of respondent No. 2-Society, the brother was ineligible to be a member of respondent No.



2-Society. His membership was hence liable to be cancelled.

**(Para 18)**

**Important Issue Involved:** As per provisions of the Delhi Cooperative Society Rules, 1973, once a member of a housing cooperative society incurs a disqualification to remain a member thereof, he is to be deemed to have ceased to be a member from the date when the disqualification is incurred.

**[An Gr]**

**APPEARANCES:**

**FOR THE APPELLANT** : Mr. Rakesh Munjal, Sr. Adv. with Mr. Maneesh Goyal, Advocate.

**FOR THE RESPONDENT** : Mr. Arun Birbal, Adv. for DDA Mr. Sumant De, Adv. for R-2

**RESULT:** Appeal Dismissed.

**JAYANT NATH, J.**

**LPA 619/2012**

**1.** By the present appeal, the appellant challenges the dismissal of his writ petition vide judgment dated 20.07.2012. In brief, it is the contention of the appellant that his brother-Ramesh Kumar Jain became a member of respondent No. 2-Vardhman Co-operative House Building Society in October 1966. The said brother-Sh. Ramesh Kumar Jain on 02.02.1976 resigned from the said membership. It is further stated that as per the rules, the membership could be transferred in favour of the appellant being a real brother (blood relation) of the said Sh. Ramesh Kumar Jain. In fact, Ramesh Kumar Jain had in his resignation expressed his desire and had requested respondent No. 2-Society to transfer all his rights, interest, etc. and membership of the Society in favour of the appellant.

**2.** It is further contended by the appellant that the resignation of Sh. Ramesh Kumar Jain was accepted by respondent No. 2 and simultaneously it was agreed to transfer the membership in favour of the appellant. Accordingly, the appellant paid admission fee of Rs. 10 on 02.02.1976.

The decision to accept the resignation and transfer the membership in favour of the appellant was ratified by the Management Committee of respondent No. 2 on 24.02.1976.

**3.** It is further contended by the appellant that having been inducted as member of respondent No. 2, he has been paying various amounts which have fallen due and demanded by respondent No. 2. He claims that even the lease amount accrued till date with respect to the plot in question stands paid by the appellant.

**4.** It appears that in January 1984 a draw of lots took place by respondents whereby Plot No. 23, Arihant Nagar, near Punjabi Bagh, New Delhi was allotted in favour of Sh. Ramesh Kumar Jain, the brother of the appellant. Hence the appellant raised an objection. It is contended that respondent No. 2 submitted all necessary documents and papers to respondent No. 1. It is stated that this was done on 07.07.1984. Respondent No. 1 accepted the receipt of letter dated 07.07.1984 vide its letter dated 25.07.1985 and directed respondent No. 2 to rectify its records. A reminder was also written on 06.08.1986 by respondent No. 2 to respondent No. 1.

**5.** Subsequently the appellant received a letter dated 06.10.1986 whereby it was informed to the appellant that the allotment in his favour stood cancelled on the ground that the original allotment was in the name of Sh. Ramesh Kumar Jain who had concealed facts and filed a false affidavit regarding non-ownership of any residential property either by him or his wife or dependent children within the area of Delhi when in fact he already owned a residential property in Delhi. The letter was purported to be in continuance of show cause notices dated 07.10.1985 and 14.01.1986. The appellant contends that no show cause notice was received by him and that in all probability the show cause notices were addressed to his brother who had nothing to do with the plot in question.

**6.** Similarly, a representation was made by the appellant which was rejected on 12.12.1990. Hence the appellant filed the present writ petition seeking following reliefs.

> "(i) CERTIORARI thereby quashing the communication dated 06.10.1986 and 12.12.1990 issued by respondent No. 1. (ii) Mandamus directing the respondents to allot plot No. 23, at Arihant Nagar, Near Punjabi Bagh, New Delhi in favour of the petitioner and handover the peaceful and vacant possession of the same to the petitioner."



**7.** It is the contention of the learned senior counsel for the appellant that after his brother-Sh. Ramesh Kumar Jain had resigned from the membership of respondent No. 2-Society on 02.02.1976, the appellant had become a member of the said Society. Hence, the acts, deeds or mis-deeds, if any, of his brother are of no consequence inasmuch as the appellant is now the member of the Society and there are no allegations about any wrong act or concealment by him. It is hence contended that the allotment of the plot could not be cancelled in these facts and circumstances.

**8.** Learned senior counsel for the appellant has also contended that since 02.02.1976 he was the member of respondent No. 2-Society and hence the action of the DDA in cancelling the allotment for any acts of omission done by his brother is not warranted. He relies upon Section 41 of the Delhi Cooperative Society Act, 2003 and Rule 34 of the Delhi Cooperative Society Rules 1973 to argue that on transfer being affected in his name, the membership cannot be cancelled for acts of omission of his brother. It is further contended that till the date when his membership stood cancelled due to resignation with the respondent No. 2 Society, even his brother has done no act which would lead to termination of the membership of the appellant of respondent No. 2 Society. He contends that admittedly on the day the conveyance deed was registered for the residential plot in favour of his brother i.e. 15.02.1977, his brother was not a member of respondent No. 2-Society and hence there are not grounds or basis to cancel the allotment. He further argues that the date that is material is not the date of allotment of the residential plot in favour of his brother but the date of registration of conveyance deed in favour of his brother.

**9.** On the other hand, learned counsel for respondent No. 1-DDA has argued that they have rightfully taken the step to cancel the allotment. The appellant had become a member of respondent No. 2-Society only on transfer of membership from his brother-Ramesh Kumar Jain. The said Ramesh Kumar Jain had given a wrong undertaking to the respondents claiming that he or his immediate family does not own any residential plot or accommodation in Delhi. The fact of the matter is that a plot in Malviya Nagar was allotted to him in 21.08.1975 and he had made full

payment on 31.12.1975. Hence he was ineligible for membership of respondent No. 2-Society. What was transferred to the appellant were the rights of his brother and hence DDA has rightfully cancelled the allotment. It is the stand of respondent-DDA in its counter affidavit filed before the learned Single Judge that the membership rights were transferred in the name of the appellant on 25.07.1985 whereas the draw of lots took place on 06.01.1984. It was stated that certain documents were submitted by respondent No. 2- Society to the answering respondent vide letter dated 07.07.1984 and it was only thereafter his membership rights were transferred in favour of the appellant on 25.07.1985. It is further stated that the Registrar of Co-operative Society had cleared the membership of the brother of the appellant-Shri Ramesh Kumar Jain on 05.12.1983 and hence confirmation of allotment was issued on 23.02.1984. It is further stated that on the date of the draw of lots, the brother of the appellant, Shri. Ramesh Kumar Jain was still the member of respondent No. 2 Society and he had an alternate residential plot in his name and hence the cancellation order dated 06.10.1986 was issued.

**10.** Learned counsel for respondent No. 2 has stated that respondent No. 2 transferred the membership of Ramesh Kumar Jain in favour of the appellant and that thereafter the appellant was treated as a member of the Society for all intents and purpose. Respondent No. 2 in their counter affidavit before the learned Single Judge have though confirmed that the membership was transferred in favour of the appellant in the meeting held on 24.02.1976 w.e.f. 02.02.1976 and though steps were taken by respondent No. 2 Society to communicate the change of membership in favour of the appellant only after the draw of lots held in 1984.

**11.** On 07.09.2012, this Court noted that though Sh. Ramesh Kumar Jain had resigned as member of respondent No. 2 Society on 02.02.1976, he was given a plot bearing No. D-15, Ashok Vihar in August 1976. Hence, the following directions were passed:-

> "2. It is the version of the appellant that the resignation of Shri Ramesh Kumar Jain was accepted on 2nd February, 1976. It is the case of the appellant himself that Shri Ramesh Kumar Jain was given possession of plot bearing No. D-15, Ashok Vihar in August, 1976. The moot question would be as to whether Shri Ramesh Kumar Jain was given the allotment of the said plot



> before 2nd February, 1976 in as much as if there was any allotment in his favour, he could not have become the member of the respondent no. 2 Society.
>
> 3. In these circumstances, we call upon the appellant to file an affidavit of himself and/or that of Shri Ramesh Kumar Jain disclosing when the respondent DDA made the allotment to him of the plot in Ashok Vihar, New Delhi."

**12.** In response to the said order, the appellant file an affidavit on 20.09.2012. As per the said affidavit, it is stated that the brother of the appellant was allotted a plot No. J-135, Malviya Nagar, New Delhi and the lease deed was executed on 15.02.1977 which was registered on 02.03.1977. It is further stated that his brother exchanged the plot No. J-135, Malviya Nagar, New Delhi with the plot No. D-15, Ashok Vihar vide exchange deed dated 15.02.1984. The affidavit does not mention about the date of allotment of the property in Malviya Nagar to the brother of the appellant though there was a specific direction to this effect in order dated 07.09.2012 of this Court. It is however contended by the appellant in the affidavit that mere allotment of a property does not give any person ownership of a property. In this context reliance is placed on section 55 of the DDA (Management and Disposal of Housing Estates) Regulations, 1968, according to which it is stated that an allottee becomes an owner of a property after the sale deed/conveyance deed is executed.

**13.** Respondent No. 1 DDA have filed an affidavit dated 04.03.2013 in compliance of order dated 09.10.2012 where the facts as stated by the appellant in his affidavit are reiterated. It is further clarified that the said plot No. 135, Block J, Malviya Nagar admeasuring 200 sq. yds. or thereabouts was allotted to Sh. Ramesh Kumar Jain in the draw of lots held on 20/21.08.1975 and that the balance premium was paid on 31.12.1975and possession of the plot was handed over on 04.08.1976. Subsequently, the plot has been exchanged on 15.02.1984 with another plot.

**14.** In our opinion the present appeal is devoid of merits. Much stress was laid by the learned senior counsel for the appellant on the fact that on the date of the draw of lots, the respondent No. 2 had accepted the appellant as its member and hence any mis-deed of his brother as on that date is of no consequence. Membership of the respondent No. 2

Society may have been transferred to the appellant on 02.02.1976 as contended by the appellant and respondent No. 2. Though the said submission does not inspire confidence in as much as it is strange that though membership was transferred in favour of the appellant on 24.02.1976 by respondent No. 2 yet respondent No. 2 chose to inform DDA about this change on 07.07.1984, after the draw. However, on the date when the allotment had been made in favour of the brother of the appellant for the plot in Malviya Nagar for which full consideration had been paid, he had become ineligible for the membership of the Society. Clearly the allotment of the plot in favour of the brother of the appellant was before he resigned as member of respondent No. 2 Society.

**15.** Further as evident from the record of the writ petition is that subsequent to the draw of lots in 1984, respondent No. 2 had written to the appellant to submit required papers failing which the right to the plot would be forfeited. In response thereto, the appellant filed an affidavit of his brother-Ramesh Kumar Jain dated 24.07.1984 which states as follows:-

> "I, Ramesh Kumar S/o Shri Amar Nath do hereby solemnly and declare as under:-
>
> i) The I hold valid membership of VARDHMAN Coop. House Building Society in accordance with the Delhi Cooperative Society Act, Rules and Bye-laws. My membership number is 151.
>
> ii) That neither I nor my husband/wife nor any of my dependent relations (including unmarried Children) during the period of my membership of this society has been a member of any other house building Cooperative Society, functioning in Delhi/New Delhi/Delhi Cantt.
>
> iii) That neither I nor my husband/wife nor any of my dependent relations (including unmarried children) during the period of my membership of this society has owned either in full or in part, on lease hold or free hold basis, any plot of land or a house in Delhi/New Delhi /Delhi Cantt.
>
> iv) That I will inform within one month the said society as well as the Lt. Governor, Delhi if any plot of land or house is occupied by me or my wife of any of my dependent relation, including unmarried children."



**16.** Hence as per the said affidavit dated 24.07.1984, the said brother was not a member of any house building cooperative society and had not owned any lease hold or free hold plot or house in Delhi. This was clearly false. It is clear that the entire process of allotment is based on a false and incorrect affidavit of the brother of the appellant. The fact of the matter is that land at Malviya Nagar was allotted to the brother on 20/21.08.1975 and full premium was paid on 31.12.1975, whereas the brother resigned on 02.02.1976 as a member of respondent No. 2-Society. The brother of the appellant was hence not entitled to the plot and allotment has been obtained by making a false statement. This was the position in 1976 when the brother resigned as a member of respondent No. 2 Society and was the position in 1984 when the brother gave the abovenoted affidavit.

**17.** Reference may also be made to Rule 25(1)(c) of the Delhi Cooperative Society Rules, 1973 which reads as follows:-

> "25. **Disqualification for Membership**
>
> 1. No person shall be eligible for admission as a member of a co-operative society if he-
>
> …
>
> (c) in the case of membership of a house society-
>
> [(i) owns a residential house or a plot of land for the construction of a residential house in any of the approved or un-approved colonies or other localities in the National Capital Territory of Delhi, in his own name or in the name of his spouse or any of his dependent children, on lease hold or free-hold basis or on power of attorney or on agreement for sale:
>
> …
>
> (iii) he or his spouse or any of his dependent children is a member of any other housing society except otherwise permitted by the Registrar.
>
> 2. Notwithstanding anything contained in the rules or the bye-laws of the co-operative society, if a member becomes, or has already become, subject to any disqualifications specified in sub-rule (1), he shall be deemed to have ceased to be a member from

the date when the disqualifications were incurred."

**18.** A perusal of the above Rule makes it clear that a person who owns a residential house or a plot of land whether in his name or in the name of his spouse or dependent children or is a member of housing society is ineligible for admission as a member of any housing cooperative society. Rule 25(1)(c)(iii) also states that once a member incurs a disqualification, he shall be deemed to have ceased to be a member from the date when the disqualifications were incurred. Admittedly in the present case even as per the appellant his brother was allotted a plot in Malviya Nagar for which a lease was executed on 15.02.1977. Respondent-DDA has confirmed that the plot in Malviya Nagar was allotted on 20/21.8.1975 and the full premium was paid on 31.12.1975 by the brother of the appellant. The appellant has failed to give details as to how and on what circumstances the draw of lots took place in favour of the brother of the appellant in 1975 for the Malviya Nagar plot. No details are given by the appellant of the date of membership of the other Housing Society by his brother or as to how the brother was allotted the said plot. It is but obvious that material particulars have been withheld from this Court by the appellant. Even if we ignore the fact that in 1984 when the draw of lots took place, the membership of the appellant had not been cleared by the Registrar of Cooperative Societies, even as on 1976 when the brother of the appellant resigned from the membership of respondent No. 2-Society, the brother was ineligible to be a member of respondent No. 2-Society. His membership was hence liable to be cancelled.

**19.** In view of the above, we see no reason to differ from the view taken by the learned Single Judge.

**20.** The present appeal is dismissed.

**CM No. 15715/2012 (stay)**

**21.** In view of the dismissal of the appeal, this application has become infructuous. It stands disposed of.

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**ILR (2013) IV DELHI 3156**
**ITA**

**THE COMMISSIONER OF INCOME TAX DELHI-II** **....APPELLANT**

**VERSUS**

**JAIN EXPORTS PVT. LTD.** **....RESPONDENT**

**(BADAR DURREZ AHMED & VIBHU BAKHRU, JJ.)**

**I.T.A. NO. : 235/2013** **DATE OF DECISION: 24.05.2013**

**Income Tax Act, 1961—Section 41(1), Limitation Act 1963 Section 18—Whether there is a cessation of liability if assessee continued to acknowledge credit balances/amount receivable in the balance sheet in respect of a number of creditors, lying unclaimed for several years—Assessing officer added balance liabilities to the income u/s 41(1) due to no likehood of creditor claiming the same in the near future—On challenge to the CIT (Appeals) assessee contended that due to continuation of acknowledgment or credit balance, there can be no cessation of liabilities to pay the creditors—Held: In order to attract the provisions of section 41 (1) of the Act, there should have been an irrevocable cessation of liability without any possibility of the same being revived. The cessation of liability may occur either by the reason of the liability becoming unenforceable in law by the creditor coupled with the debtor declaring his intention not to honour his liability, or by a contract between parties or by discharge of the debt. It is necessary that the benefit derived by an assesse results from cessation or remission of a trading liability. Held— the enforcement of a debt being barred by limitation does not ipso facto lead to the conclusion that there is cessation or remission of liability. Reflecting an amount successively over the**

**years as outstanding in the balance sheet by a company amounts to acknowledging the debt for purposes of section 18 of the limitation act as the period of limitation would stand extended upon such acknowledgment of debt.**

In order to attract the provisions of Section 41(1) of the Act, it is necessary that there should have been a cessation or remission of liability. As held by the Bombay High Court, in the case of **J. K. Chemicals Ltd.** (supra), cessation of liability may occur either by the reason of the liability becoming unenforceable in law by the creditor coupled with debtor declaring his intention not to honour his liability, or by a contract between parties or by discharge of the debt. In the present case, the assessee is acknowledging the debt payable to M/s Elephanta Oil & Vanaspati Ltd. and there is no material to indicate that the parties have contracted to extinguish the liability. Thus, in our view it cannot be concluded that the debt owed by the assessee to M/s Elephanta Oils & Vanaspati Ltd. stood extinguished. **(Para 20)**

Although, enforcement of a debt being barred by limitation does not ipso facto lead to the conclusion that there is cessation or remission of liability, in the facts of the present case, it is also not possible to conclude that the debt has become unenforceable. It is well settled that reflecting an amount as outstanding in the balance sheet by a company amounts to the company acknowledging the debt for the purposes of Section 18 of the Limitation Act, 1963 and, thus, the claim by M/s Elephanta Oil & Vanaspati Ltd. can also not be considered as time barred as the period of limitation would stand extended. Even, otherwise, it cannot be stated that M/s Elephanta Oil & Vanaspati Ltd. would be unable to claim a set-off on account of the amount reflected as payable to it by the assessee. Admittedly, winding up proceedings against M/s Elephanta Oil & Vanaspati Ltd. are pending and there is no certainty that any claim that may be made by the assessee with regard to the amounts receivable from M/s Elephanta Oil & Vanaspati Ltd. would be paid



without the liquidator claiming the credit for the amounts receivable from the assessee company. It is well settled that in order to attract the provisions of Section 41(1) of the Act, there should have been an irrevocable cession of liability without any possibility of the same being revived. The assessee company having acknowledged its liability successively over the years would not be in a position to defend any claim that may be made on behalf of the liquidator for credit of the said amount reflected by the assessee as payable to M/s Elephanta Oil & Vanaspati Ltd. **(Para 21)**

We may also add that, admittedly, no credit entry has been made in the books of the assessee in the previous year relevant to the assessment year 20082009. The outstanding balances reflected as payable to M/s Elephanta Oil & Vanaspati Ltd. are the opening balances which are being carried forward for several years. The issue as to the genuineness of a credit entry, thus does not arise in the current year and this issue could only be examined in the year when the liability was recorded as having arisen, that is, in the year 1984-1985. The department having accepted the balances outstanding over several years, it was not open for the CIT (Appeals) to confirm the addition of the amount of Rs. 1,53,48,850/- on the ground that the assessee could not produce sufficient evidence to prove the genuineness of the transactions which were undertaken in the year 1984-85. **(Para 22)**

**[An Ba]**

**APPEARANCES:**

**FOR THE PETITIONER** : Mr. Sanjeev Sabharwal, Advocate.

**FOR THE RESPONDENTS** : None

**CASES REFERRED TO:**

1. *CIT* vs. *Sugauli Sugar Works (P). Ltd.:* [1999] 236 ITR 518 (SC).
2. *J.K. Chemicals Ltd.* vs. *CIT:* [1966] 62 ITR 34 (Bom).

3. *Bombay Dyeing and Manufacturing Co. Ltd.* vs. *State of Bombay:* AIR 1958 SC 328.

**RESULT:** Appeal dismissed.

**VIBHU BAKHRU, J.**

**1.** This appeal is filed, on behalf of the revenue under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), challenging the order dated 30.03.2012 passed by Income Tax Appellate Tribunal, setting aside the addition of sum of Rs. 1,53,48,850/-made by the Assessing Officer on account of purported cessation of liability.

**2.** The assessee is a company incorporated under the Companies Act, 1956. The assessee company was engaged in the business of trading in agricultural commodities, however, the assessee did not conduct any business in the year 2007-2008 relevant to the assessment year 2008-2009. The assessee filed its return of income, on 25.09.2008, for the assessment year 2008-2009 showing a loss and declaring taxable income as nil. The return was initially accepted under Section 143(1) of the Act, however, subsequently, the return was selected for scrutiny. The Assessing Officer examined the balance sheet of the assessee company for the relevant period and noted that the balance sheet disclosed a sum of Rs. 1,57,54,011/- as sundry creditors. The said amount comprised the following outstanding credit balances:

| S.No. | Name | Amount |
|---|---|---|
| 1 | M/s Elephanta Oil &Vanaspati Ltd. | Rs. 1,53,48,850/- |
| 2 | M/s Geo-chem Laboratories (P) Ltd. | Rs. 41,231/- |
| 3 | M/s Jain House, Calcutta | Rs. 30,210/- |
| 4 | M/s Ramji Lal Investments (P) Ltd. | Rs. 38,874/- |
| 5 | Sh. Sohan Lal Ghai | Rs. 2,94,846/- |

**3.** The credit balances against the aforementioned creditors have been outstanding since several years. In the case of M/s Elephanta Oil & Vanaspati Ltd., the amount of Rs. 1,53,48,850/- was outstanding in the books since 19841985. The Assessing Officer called upon the assessee to provide confirmations from the creditors regarding the balance outstanding to their credit. The assessee filed a balance confirmation from M/s Ramji Lal Investments (P) Ltd. but could not provide confirmations from any of the other aforementioned creditors. The



Assessing Officer also issued notices under section 133(6) of the Act to the creditors, for the purpose of verifying the credit balance outstanding against their names. The notice issued to M/s Elephanta Oil & Vanaspati Ltd., M/s Geo-chem Laboratories (P) Ltd., M/s Jain House, Calcutta and Sh. Sohan Lal Ghai were returned un-served.

**4.** The Assessing Officer accepted the amount of Rs. 38,874/- outstanding to the credit of M/s Ramji Lal Investments (P) Ltd., but held that the balance liabilities in respect of other sundry creditors, which were lying unclaimed since several years, were liable to be added back to the income of the assessee under Section 41(1) of the Act. The Assessing Officer was of the view that there was cessation of these liabilities as there was no possibility of the creditors claiming the same in the near future. Accordingly, the aggregate of the balances outstanding to the credit of the aforementioned four creditors (i.e. M/s Elephanta Oil & Vanaspati Ltd., M/s Geo-chem Laboratories (P) Ltd., M/s Jain House, Calcutta and Sh. Sohan Lal Ghai) amounting to sum of Rs. 1,57,15,137/- were added back to the income of the assessee.

**5.** Aggrieved by the assessment order dated 01.11.2010 passed by the Assessing Officer, the assessee preferred an appeal before the CIT (Appeals), *inter-alia,* on the ground that there was no cessation of liabilities as the assessee continued to be liable for the amounts shown as outstanding against various creditors. In respect of the amount payable to M/s Elephanta Oil & Vanaspati Ltd., the assessee explained that M/s Elephanta Oil & Vanaspati Ltd. also owed a sum of Rs. 1,57,10,690.53/- to the assessee which was reflected as receivable in the balance sheet of the assessee company and thus in net terms M/s Elephanta Oil & Vanaspati Ltd. owed the assessee company a sum of Rs. 3,61,840.78. The amount payable to M/s Elephanta Oil & Vanaspati Ltd. was liable to be adjusted against the amount receivable from M/s Elephanta Oil & Vanaspati Ltd. and thus there could not be any cessation of liability towards the said creditor. The assessee company also provided its final accounts for the years ended on 31.03.2009 and 31.03.2010 which indicated the balances outstanding to the various sundry creditors continued to be reflected in the balance sheets of the assessee company for the subsequent years. It was, thus, contended by the assessee that, since the assessee continued to acknowledge the credit balances in the subsequent period also, there could be no cessation of its liability to pay the creditors.

**6.** It was also submitted on behalf of the assessee that the amounts payable to M/s Elephanta Oil & Vanaspati Ltd. were on account of certain bank guarantees which had been furnished by M/s Elephanta Oil & Vanaspati Ltd., on behalf of the assessee company, to the custom authorities. The assessee also gave details of the bank guarantees that had been issued by the bank against certain imports that had been made by the assessee company in the year 1984-85. M/s Elephanta Oil & Vanaspati Ltd. had become a sick company and had filed a reference before the Board of Industrial and Financial Reconstruction (BIFR). The BIFR was of the opinion that M/s Elephanta Oil & Vanaspati Ltd. be wound up and accordingly, winding up proceedings have been initiated in this Court and the official liquidator has been appointed as the provisional liquidator to take over possession of the books and accounts and other records of the M/s Elephanta Oil & Vanaspati Ltd.

**7.** The CIT (Appeals) deleted the addition made by the Assessing Officer with regard to the balance outstanding to the credit of M/s Geo-chem Laboratories (P) Ltd., M/s Jain House, Calcutta and Sh. Sohan Lal Ghai on the ground that the assessee had continued to reflect the liabilities against the names of these creditors in the subsequent period i.e. in the final accounts for the years ended on 31.03.2009 and 31.03.2010. The CIT (Appeals) held that as the assessee company continued to reflect amounts payable to those creditors there was no cessation of liability and consequently, the provisions of Section 41(1) of the Act were inapplicable. However, in the case of M/s Elephanta Oil & Vanaspati Ltd., the CIT (Appeals) upheld the addition made by the Assessing Officer, not on the ground that there was cessation of liability, but on the basis that the assessee had failed to establish the genuineness of the liability towards M/s Elephanta Oil & Vanaspati Ltd. The decision of the CIT (Appeals) was, inter-alia, based on the fact that the assessee had not been able to trace or produce any evidence with regard to the bank guarantees on account of which the liability to pay a sum of Rs. 1,53,48,850/- had arisen. The contention of the assessee that the transaction related back to the year 1984-1985 and had been accepted as genuine by the revenue through a series of scrutiny assessment made in the past, was not accepted. The plea of the assessee that, since the matter related to 1984-1985, the assessee could not produce the evidence of the initial transaction, was also not found to be acceptable by the CIT (Appeals).



**8.** While, the decision of the CIT (Appeals) was accepted by the revenue, the assessee preferred an appeal before the Income Tax Appellate Tribunal, *inter-alia,* challenging the confirmation of addition of Rs. 1,53,48,850/- by the CIT (Appeals). The Tribunal accepted the contention of the assessee that a sum of Rs. 1,57,10,690.53 was owed by M/s Elephanta Oil & Vanaspati Ltd. to the assessee company and thus, the net effect of the same would be that no amount would be payable by the assessee to M/s Elephanta Oil & Vanaspati Ltd. and a sum of Rs. 3,61,840.78 would be receivable after setting off the amount of Rs. 1,53,48,849/ which was standing to the credit of M/s Elephanta Oil & Vanaspati Ltd. The Tribunal was of the view that it was not correct to only accept the figure relating to the amount that was receivable by the assessee company while rejecting the amount payable by the assessee company to M/s Elephanta Oil & Vanaspati Ltd.

**9.** Aggrieved by the order passed by the Tribunal, the revenue has preferred the present appeal. It is contended before us on behalf of the revenue that there has been a cessation of liability of Rs. 1,53,48,849/- and the Tribunal has erred in setting aside the addition made on that account. It is further urged that the Tribunal was in error in taking note of the amount receivable from M/s Elephanta Oil & Vanaspati Ltd. while, considering the provisions of Section 41(1) of the Act. Whilst, it was conceded before us that the genuineness of the initial transaction was not in challenge, it was contended that the fact that the amount payable to M/s Elephanta Oil & Vanaspati Ltd. has been outstanding for 25 years indicated that the liability has ceased. It has been pleaded on behalf of the revenue that the following questions arise for our consideration:

1. "Whether ITAT erred in setting aside an amount of ` 1,53,48,850.00 holding that there was no cession of liability?"
2. "Whether while considering provisions of section 41(1) the net liability that after providing for receivables is to be considered or is relevant?"

**10.** We are unable to appreciate the stand taken on behalf of the revenue, which has, apparently, not been consistent. The Assessing Officer, inter-alia, added a sum of Rs. 1,57,15,137, being the aggregate of the amounts shown as payable to various sundry creditors, as income under Section 41(1) of the Act. Whilst the Assessing Officer held that

the liabilities due to the sundry creditors had ceased, the genuineness of the initial transaction on account of which the amounts were payable to various creditors was not made an issue. The only issue raised by the Assessing Officer was that since the outstanding balances had remained static on the books of the assessee for several years (in the case of M/s Elephanta Oil & Vanaspati Ltd. for over 25 years), there was no possibility of any claim being made by the creditors and the amount of liabilities outstanding were liable to be added as income of the assessee.

**11.** The CIT (Appeals) did not accept the reasoning of the Assessing Officer and deleted the addition made by the Assessing Officer with respect to amounts reflected as payable to various sundry creditors on the ground that assessee company continued to reflect the amounts payable even in the subsequent periods. The CIT (Appeals) held that there could be no cessation of liability as the assessee company continued to acknowledge its debt towards the creditors. However, the CIT (Appeals) concluded that the amount outstanding to the credit of M/s Elephanta Oil & Vanaspati Ltd. was not genuine as the assessee could not produce any confirmation or evidence of the original transaction which was undertaken in 1984-1985. It is relevant for us to notice that the revenue did not prefer any appeal against the order of the CIT (Appeals), and thus, accepted his decision that there was no cessation of liability in cases where the assessee company continued to acknowledge the amount owed by it to its creditors.

**12.** The question whether there had been any cessation of liability was thus not before the Tribunal as the Tribunal was only considering the correctness of the decision of the CIT (Appeals) wherein the transaction giving rise to the liability payable to M/s Elephanta Oil & Vanaspati Ltd. had been doubted. The Tribunal came to the conclusion, and rightly so, that the books of the assessee had been examined in the past and it would not be correct to accept a part of the account relating to a party and rejecting another part of the account. Whereas, the part of the account relating to dealings with M/s Elephanta Oil & Vanaspati Ltd. which resulted in the amount being receivable from M/s Elephanta Oil & Vanaspati Ltd. was accepted by the CIT (Appeals), the amount payable to the same entity was rejected. Accordingly, the Tribunal deleted the addition of Rs. 1,53,48,850/- confirmed by the CIT (Appeals).

**13.** The genuineness of the transaction entered into by the assessee



in 1984-85 with M/s Elephanta Oils & Vanaspati Ltd. is not being assailed before us and the only controversy sought to be raised before us is whether there has been cessation of liability owed by the assessee to M/s Elephanta Oil & Vanaspati Ltd. In our view, that question doesn't arise in the present case since the decision of the CIT (Appeals) that there is no cession of liability in cases where the debt has been acknowledged by the assessee company has already been accepted by the revenue. However, as the question whether there is any cessation of liability in the relevant previous year warranting an addition in terms of Section 41(1) of the Act has been urged on behalf of the revenue, we consider it appropriate to examine the same.

**14.** Section 41(1) of the Act is relevant and is quoted below:-

> "41. Profits chargeable to tax- (1) Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee (hereinafter referred to as the first-mentioned person) and subsequently during any previous year,
>
> (a) the first-mentioned person has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by such person or the value of benefit accruing to him shall be deemed to be profits and gains of business or profession and accordingly chargeable to income-tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not ; or
>
> (b) the successor in business has obtained, whether in cash or in any other manner whatsoever, any amount in respect of which loss or expenditure was incurred by the first-mentioned person or some benefit in respect of the trading liability referred to in clause (a) by way of remission or cessation thereof, the amount obtained by the successor in business or the value of benefit accruing to the successor in business shall be deemed to be profits and gains of the business or profession, and accordingly

chargeable to income-tax as the income of that previous year.

Explanation 1. – For the purposes of this sub-section, the expression 'loss or expenditure or some benefit in respect of any such trading liability by way of remission or cessation thereof' shall include the remission or cessation of any liability by a unilateral act by the first mentioned person under clause (a) or the successor in business under clause (b) of that sub-section by way of writing off such liability in his accounts."

**15.** Indisputably, Explanation 1 to section 41(1) of the Act, which was inserted, w.e.f. 01.04.1997 is not applicable, as the assessee has not written off the liability to pay M/s Elephanta Oil & Vanaspati Ltd. in its books of accounts.

**16.** The Supreme Court in the case of **CIT v. Sugauli Sugar Works (P). Ltd.:** [1999] 236 ITR 518 (SC) has held that section 41(1) of the Act contemplates obtaining by the assessee an amount either in cash or any other manner or any benefit by way of cessation or remission of liability. In order to come within the sweep of section 41(1) it is necessary that the benefit derived by an assessee results from cessation or remission of a trading liability. The relevant extract from the decision of the Supreme Court in the case of **CIT v. Sugauli Sugar Works (P.) Ltd.** (supra) is quoted below:-

"3. It will be seen that the following words in the section are important: 'the assessee has obtained, whether in cash or in any other manner whatsoever any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by him'. Thus, the section contemplates obtaining by the assessee of an amount either in cash or in any other manner whatsoever or a benefit by way of remission or cessation and it should be of a particular amount obtained by him. Thus, the obtaining by the assessee of a benefit by virtue of remission or cessation is sine qua non for application of this section."

**17.** The only issue that needs to be considered is whether the liability towards M/s Elephanta Oil & Vanaspati Ltd. has ceased on account of efflux of time.



**18.** The Supreme Court in the case of **'Bombay Dyeing and Manufacturing Co. Ltd.' v. State of Bombay:** AIR 1958 SC 328 has clearly held that even in cases where the remedy of a creditor is barred by limitation the debt itself is not extinguished but merely becomes unenforceable. The Court observed as under:-

"The position then is that, under the law, a debt subsists notwithstanding that its recovery is barred by limitation....."

**19.** This view has also been taken by the Supreme Court in the case of **CIT v. Sugauli Sugar Works P. Ltd.** (supra). In the said case, it was contended on behalf of the revenue that the liability has come to an end as the creditors in the said case had not taken any action to recover the amounts due to them for twenty years. The Supreme Court affirmed the decision of the Bombay High Court in the case of **J. K. Chemicals Ltd. v. CIT:** [1966] 62 ITR 34 (Bom) wherein the words "cessation or remission" had been interpreted. The Supreme Court quoted the following passage from the judgment of the Bombay High Court in the said case of **J.K. Chemicals Ltd. v. CIT** (supra):-

"The question to be considered is whether the transfer of these entries brings about a remission or cessation of its liability. The transfer of an entry is a unilateral act of the assessee, who is a debtor to its employees. We fail to see how a debtor, by his own unilateral act, can bring about the cessation or remission of his liability. Remission has to be granted by the creditor. It is not in dispute, and it indeed cannot be disputed, that it is not a case of remission of liability. Similarly, a unilateral act on the part of the debtor cannot bring about a cessation of his liability. The cessation of the liability may occur either by reason of the operation of law, i.e., on the liability becoming unenforceable at law by the creditor and the debtor declaring unequivocally his intention not to honour his liability when payment is demanded by the creditor, or a contract between the parties, or by discharge of the debt-the debtor making payment thereof to his creditor. Transfer of an entry is neither an agreement between the parties nor payment of the liability. We have already held in Kohinoor mills' case [1963] 49 ITR 578 (Bom) that the mere fact of the expiry of the period of limitation to enforce it, does not by itself constitute cessation of the liability. In the instant case, the liability

being one relating to wages, salaries and bonus due by an employer to his employees in an industry, the provisions of the Industrial Disputes Act also are attracted and for the recovery of the dues from the employer, under section 33C(2) of the Industrial Disputes Act, no bar of limitation comes in the way of the employees."

After quoting the above passage, the Supreme Court held as under:-

"This judgment has been quoted by the High Court in the present case and followed. We have no hesitation to say that the reasoning is correct and we agree with the same."

**20.** In order to attract the provisions of Section 41(1) of the Act, it is necessary that there should have been a cessation or remission of liability. As held by the Bombay High Court, in the case of **J. K. Chemicals Ltd.** (supra), cessation of liability may occur either by the reason of the liability becoming unenforceable in law by the creditor coupled with debtor declaring his intention not to honour his liability, or by a contract between parties or by discharge of the debt. In the present case, the assessee is acknowledging the debt payable to M/s Elephanta Oil & Vanaspati Ltd. and there is no material to indicate that the parties have contracted to extinguish the liability. Thus, in our view it cannot be concluded that the debt owed by the assessee to M/s Elephanta Oils & Vanaspati Ltd. stood extinguished.

**21.** Although, enforcement of a debt being barred by limitation does not ipso facto lead to the conclusion that there is cessation or remission of liability, in the facts of the present case, it is also not possible to conclude that the debt has become unenforceable. It is well settled that reflecting an amount as outstanding in the balance sheet by a company amounts to the company acknowledging the debt for the purposes of Section 18 of the Limitation Act, 1963 and, thus, the claim by M/s Elephanta Oil & Vanaspati Ltd. can also not be considered as time barred as the period of limitation would stand extended. Even, otherwise, it cannot be stated that M/s Elephanta Oil & Vanaspati Ltd. would be unable to claim a set-off on account of the amount reflected as payable to it by the assessee. Admittedly, winding up proceedings against M/s Elephanta Oil & Vanaspati Ltd. are pending and there is no certainty that any claim that may be made by the assessee with regard to the amounts receivable from M/s Elephanta Oil & Vanaspati Ltd. would be paid without



the liquidator claiming the credit for the amounts receivable from the assessee company. It is well settled that in order to attract the provisions of Section 41(1) of the Act, there should have been an irrevocable cession of liability without any possibility of the same being revived. The assessee company having acknowledged its liability successively over the years would not be in a position to defend any claim that may be made on behalf of the liquidator for credit of the said amount reflected by the assessee as payable to M/s Elephanta Oil & Vanaspati Ltd.

**22.** We may also add that, admittedly, no credit entry has been made in the books of the assessee in the previous year relevant to the assessment year 20082009. The outstanding balances reflected as payable to M/s Elephanta Oil & Vanaspati Ltd. are the opening balances which are being carried forward for several years. The issue as to the genuineness of a credit entry, thus does not arise in the current year and this issue could only be examined in the year when the liability was recorded as having arisen, that is, in the year 1984-1985. The department having accepted the balances outstanding over several years, it was not open for the CIT (Appeals) to confirm the addition of the amount of Rs. 1,53,48,850/-on the ground that the assessee could not produce sufficient evidence to prove the genuineness of the transactions which were undertaken in the year 1984-85.

**23.** The present appeal does not disclose any substantial question of law for our consideration and is, accordingly, dismissed.

**ILR (2013) IV DELHI 3169**
**W.P. (C)**

**B.N. SANAWAN ....PETITIONER**

**VERSUS**

**UOI & ANR. ....RESPONDENTS**

**(GITA MITTAL & DEEPA SHARMA, JJ.)**

**W.P. (C) NO. : 4332/2012 DATE OF DECISION: 03.07.2013**

**Service Law—Denial of promotion—Adverse remarks in Annual Confidential Reports—Brief facts—Petitioner joined the Indo Tibetan Border Police (ITBP) in the year 1995 as an Assistant Commandant and thereafter, on 1st July, 2004 was promoted as Deputy Commandant—On 23rd July, 2007, Memorandum communicating the three adverse remarks given to him in his Annual Confidential Report for the period w.e.f. 4th June, 2005 to 31st March, 2006—Petitioner made a general representation on 9th August, 2007 against the adverse remarks which was rejected vide an order dated 22nd January, 2008 passed by the respondents—Department of Personnel and Training of the Government of India issued an Office Memorandum dated 13th April, 2010 directing the respondents to give copies of all the below bench mark ACRs to the concerned—Pursuant to the Directives by Department of Personnel and Training of the Government of India, the petitioner was supplied with three of his ACRs including the ACR for the period w.e.f. 4th June, 2005 to 31st March, 2006—ACR recorded by the Initiating authority is placed for the first review by Reviewing Officer and a second consideration is accorded to it by the Senior Reviewing Officer—Petitioner's ACR for the period w.e.f. 4th June, 2005 to 31st March, 2006 was upgraded by Reviewing**



**Officer from "average" to "good"—Petitioner made a second representation dated 30th August, 2010 praying for upgradation of his ACR to "very good" and for expunction of adverse remarks on the basis of the comments of the Reviewing Officer—Representation of the petitioner was rejected informing him that after duly taking into consideration the representation of the petitioner and all the relevant facts and evidence on record, the department had come to the conclusion that there was not merit in the representation calling for revision of his grading from "good" to "very good" and had rejected the same being devoid of merit—Hence the present Writ petition. Held—Respondents had fully accepted and endorsed the upgradation of the petitioner's ACR to "good" and thus accepted the comments of the Reviewing Officer as well as the Counter—Signing Officer—Despite the above position and the pendency of the Petitioner's representation, the respondent proceeded to hold a Departmental Committee for promotion of officers to the post of Second-in-Command—Reviewing Officer had expunged the adverse remark against Petitioner and stated that the Officer was very good and deserved promotion—Respondents were treating the petitioner's ACR w.e.f. 4th June, 2005 to 31st March, 2006 as a "good ACR" without any adverse remarks—There is merit in the petitioner's contention that the ACR w.e.f. 4th June, 2005 to 31st March, 2006 could not have been treated as an adverse ACR or as an ACR containing adverse remarks as the same has been directed to be expunged by the Reviewing Officer—Respondents were endorsing the previous erroneous stand which had been taken by them on 22nd January, 2008 without considering the intervening circumstances and ignoring the review of the petitioner's ACR by the Reviewing Officer which had been confirmed by the Counter-Signing Officer and has been duly accepted by the respondents—Petitioner was finally promoted**

**on 12th April, 2012 as Second-in-Command—However, as a result of the Respondent's above noticed action, the petitioner stood superseded by 44 junior officers despite his meeting the bench mark as his ACR had been upgraded from "average" to "good" as well as the remarks of the Reviewing Officer therein to the effect that the petitioner was having good technical and practical knowledge and that there was nothing to show poor performance by him—Therefore, the denial of the promotion to the petitioner was illegal and unjustified and as the petitioner was entitled to a favourable consideration in the DPC leading to the passing of the order dated 12th May, 2012 for the first time in which he was superseded only on account of respondents erroneously treating the ACR for the period w.e.f. 4th June, 2005 to 31st March, 2005 as adverse—Petitioner deserves to be given the financial benefits and accordingly, if he is found fit to be promoted by the Review DPC w.e.f. 12th May, 2011 he shall be entitled to the consequential financial benefits—Petitioner shall also be entitled to costs of the present proceedings @ Rs. 20,000/-.**

It is undisputed before us that the ITBP follows three tier assessment for recording of the ACRs of its personnel. As such the ACR recorded by the Initiating authority is placed for the first review by Reviewing Officer and a second consideration is accorded to it by the Senior Reviewing Officer, who in the ITBP is called Counter-signing Officer. So far as the petitioner's ACR for the period w.e.f. 4th June, 2005 to 31st March, 2006 is concerned, the Reviewing Officer upgraded the petitioner's performance from 'average' to 'good'. It was also specifically noted therein that there was no advisory or correspondence to show poor performance by the petitioner and, therefore, his ACR was upgraded to 'Good'. The Counter Signing Officer had endorsed his agreement with the Reviewing Officer thereupon. As such, so far as the petitioner's ACR for the period w.e.f. 4th June, 2005 to 31st March, 2006 is concerned, the same attained



finality with the final assessment as 'Good'. **(Para 6)**

We may note that on receipt of the communication of the above upgradation by the Reviewing Officer, the petitioner made a second representation dated 30th August, 2010 wherein, he prayed for upgradation of his ACR to 'very good' and for expunction of adverse remarks on the basis of the comments of the Reviewing Officer. The petitioner in effect sought a review of the rejection order dated 22nd January, 2008 which was obviously erroneous in the light of the review of the petitioner's ACR and his upgradation from 'average' to 'good'. **(Para 7)**

This representation of the petitioner was rejected vide order dated 13th June, 2011 whereby the respondents informed that after duly taking into consideration the representation of the petitioner and all the relevant facts and evidence on record, the department had come to the conclusion that there was no merit in the representation calling for revision of his grading from 'good' to 'very good' and had rejected the same being devoid of merit. **(Para 8)**

It is implicit in this communication that the respondents had fully accepted and endorsed the upgradation of the petitioner's ACR to 'good' and thus accepted the comments of the Reviewing Officer as well as the Counter-Signing Officer.

**(Para 9)**

We are informed that despite the above position and the pendency of the petitioner's representation, the respondent proceeded to hold a Departmental Committee on 12th May, 2011 for promotion of officers to the post of Second-in-Command. The petitioner contends that he was entitled to consideration and promotion in view of the upgradation of his ACR, as he fulfilled the bench mark of three very good and two good reports in his last 5 ACRs. However, the respondents took a stand that there were adverse remarks in the ACR for the period w.e.f. 4th June, 2005 to 31st March, 2006 which had not been expunged, and hence, he

did not meet the ACR bench mark. The petitioner represented against his supersession and made a further representation. The petitioner was again superseded for promotion to the rank of Second-in-Command vide Order dated 29th June, 2011 whereby his juniors were again promoted overlooking him for the same reason. **(Para 10)**

**Important Issue Involved:** Denial of promotion—Adverse remarks in Annual Confidential Reports—When the ACR could not have been treated as an adverse ACR or as an ACR containing adverse remarks as the same has been directed to be expunged by the Reviewing Officer, the denial of the promotion to the petitioner was illegal and unjustified and he was entitled to a favourable consideration in the DPC.

**[Sa Gh]**

**APPEARANCES:**

**FOR THE PETITIONER** : Ms. Rekha Palli, Advocate with Ms. Punam Singh, Advocate.

**FOR THE RESPONDENT** : Mr. Ruchir Mishra, Advocate.

**RESULT:** Writ Petition Allowed.

**GITA MITTAL, J. (Oral)**

**1.** The petitioner in the instant case prays for issuance of a writ of Certiorari quashing the orders dated 10th February, 2012, 20th December, 2011 and the order dated 22nd January, 2008 passed by the respondent No. 2 rejecting the petitioner's representation in respect of certain adverse remarks which had been recorded in his Annual Confidential Report for the period w.e.f. 4th June, 2005 to 31st March, 2006. The petitioner has also prayed for issuance of writ of Mandamus seeking a direction to the respondents to hold a Review DPC for considering the case of the petitioner for promotion to the rank of Second-in-Command w.e.f. 12th May, 2011 along with all the consequential benefits.

**2.** The facts giving rise to the petition are within a narrow compass and are mainly undisputed. To the extent necessary the same are briefly



noted hereinafter.

**3.** The petitioner joined the Indo Tibetian Border Police (ITBP) in the year 1995 as an Assistant Commandant and thereafter, on 1st July, 2004 was promoted as Deputy Commandant. On 23rd July, 2007, the following Memorandum communicating the three adverse remarks given to him in his Annual Confidential Report for the period w.e.f. 4th June, 2005 to 31st March, 2006 was sent to the petitioner:-

| "S.No. | Particulars of Column | Adverse remarks. |
|---|---|---|
| 1. | Is he energetic and of active habits | Yes, for his own interests. |
| 2. | Dependability | Not dependable for sensitive job. Officer was assigned task of setting question papers for candidates appearing in "C" List. His carelessness in not despatching required no. of question papers to examination centre resulted in administrative inconvenience. |
| 3. | Integrity | Decision to be taken after finalization of enquiry report." |

**4.** The petitioner was further informed vide the Memorandum dated 23rd July, 2007 that only one representation would be entertained against the adverse remarks noted above. It is important to note that in terms of the prevailing Rules and Policies, the petitioner was not furnished a copy of the Annual Confidential Report. As such the petitioner made a general representation on 9th August, 2007 against the adverse remarks which came to be rejected vide an order dated 22nd January, 2008 passed by the respondents.

**5.** The Department of Personnel and Training of the Government of India issued an Office Memorandum dated 13th April, 2010 directing the respondents to give copies of all the below bench mark ACRs to the concerned. Pursuant to the Directives contained in the said Memo, the petitioner was supplied with three of his ACRs including the ACR for the period w.e.f 4th June, 2005 to 31st March, 2006. It was on receipt of

this ACR, that the petitioner for the first time came to know that his performance has been graded as 'average' by the Initiating Officer.

**6.** It is undisputed before us that the ITBP follows three tier assessment for recording of the ACRs of its personnel. As such the ACR recorded by the Initiating authority is placed for the first review by Reviewing Officer and a second consideration is accorded to it by the Senior Reviewing Officer, who in the ITBP is called Counter-signing Officer. So far as the petitioner's ACR for the period w.e.f. 4th June, 2005 to 31st March, 2006 is concerned, the Reviewing Officer upgraded the petitioner's performance from 'average' to 'good'. It was also specifically noted therein that there was no advisory or correspondence to show poor performance by the petitioner and, therefore, his ACR was upgraded to 'Good'. The Counter Signing Officer had endorsed his agreement with the Reviewing Officer thereupon. As such, so far as the petitioner's ACR for the period w.e.f. 4th June, 2005 to 31st March, 2006 is concerned, the same attained finality with the final assessment as 'Good'.

**7.** We may note that on receipt of the communication of the above upgradation by the Reviewing Officer, the petitioner made a second representation dated 30th August, 2010 wherein, he prayed for upgradation of his ACR to 'very good' and for expunction of adverse remarks on the basis of the comments of the Reviewing Officer. The petitioner in effect sought a review of the rejection order dated 22nd January, 2008 which was obviously erroneous in the light of the review of the petitioner's ACR and his upgradation from 'average'. to 'good'.

**8.** This representation of the petitioner was rejected vide order dated 13th June, 2011 whereby the respondents informed that after duly taking into consideration the representation of the petitioner and all the relevant facts and evidence on record, the department had come to the conclusion that there was no merit in the representation calling for revision of his grading from 'good' to 'very good' and had rejected the same being devoid of merit.

**9.** It is implicit in this communication that the respondents had fully accepted and endorsed the upgradtion of the petitioner's ACR to 'good' and thus accepted the comments of the Reviewing Officer as well as the Counter-Signing Officer.



**10.** We are informed that despite the above position and the pendency of the petitioner's representation, the respondent proceeded to hold a Departmental Committee on 12th May, 2011 for promotion of officers to the post of Second-in-Command. The petitioner contends that he was entitled to consideration and promotion in view of the upgradation of his ACR, as he fulfilled the bench mark of three very good and two good reports in his last 5 ACRs. However, the respondents took a stand that there were adverse remarks in the ACR for the period w.e.f. 4th June, 2005 to 31st March, 2006 which had not been expunged, and hence, he did not meet the ACR bench mark. The petitioner represented against his supersession and made a further representation. The petitioner was again superseded for promotion to the rank of Second-in-Command vide Order dated 29th June, 2011 whereby his juniors were again promoted overlooking him for the same reason.

**11.** It appears that on the petitioner's representation, comments were sought from his Reviewing Officer (who by now had stood appointed as Additional Director General of Police) with regard to the expunging of the adverse remarks. In the writ petition, the petitioner has categorically made the following averments:-

> "13. ...That the Petitioner has, however, now learnt that based on his representation, comments were sought from his then Reviewing Officer Sh. P.P. Singh, Additional Director General of Police vide letters dated 29.10.2008 who had while upgrading him from Average to Good recommended for expunction of the adverse remarks and thereafter again when comments were sought from him vide letter dated 23.03.2011, he had vide his letter dated 20.07.2011 specifically expunged the adverse remarks and further stated that the Petitioner was a very good officer and deserved promotion..."

**12.** The Reviewing Officer had thus written a letter dated 20th July, 2011, copy whereof has also been placed before us. In the letter, the Reviewing Officer has referred to a D.O. letter dated 23rd March, 2011 and specifically endorsed the following comments:-

> "...The secret note has no specific material in it. I don.t agree to spoil someone's carreer on "unconfirmed report".

**Hence remark expunged.**

**The Officer is very good and deserves promotion..."**

(Emphasis by us)

**13.** These averments made by the petitioner have not been disputed in the counter affidavit filed before us. It is apparent from the above as well as letter dated 13th June, 2011 that the respondents were treating the petitioner's ACR w.e.f. 4th June, 2005 to 31st March, 2006 as a "good ACR" without any adverse remarks. Vide the communication dated 20th July, 2011 the Reviewing officer had confirmed that the adverse remarks had been expunged.

**14.** In this background, we find that there is merit in the petitioner's contention that the ACR w.e.f. 4th June, 2005 to 31st March, 2006 could not have been treated as an adverse ACR or as an ACR containing adverse remarks as the same has been directed to be expunged by the Reviewing Officer. Despite the above position, the respondents were treating the matter differently and the petitioner was compelled to make a further representation dated 27th December, 2011. This representation of the petitioner was also rejected by the respondents vide communication dated 20th December, 2012 stating the ground that his earlier representation on the same issue was already rejected. It was stated therein that as per the existing rules, no memorial or appeal against the rejection of the representation against adverse entries could be allowed. Hence, the case could not be reviewed after the lapse of a considerable time.

**15.** Due to the above reasons, the petitioner was compelled to continuously make the representations for expunction of adverse remarks. While responding to the representation of the petitioner made on 9th January, 2012, the respondents had communicated that after duly taking into consideration the representations and all the relevant facts and evidence on record, it had come to the conclusion that there was no merit in the representation which called for a review of adverse remarks recorded in his APAR and the same was rejected being devoid of merits. The petitioner was warned for mis-representing the facts and advised that the Government servant should desist from making frequent and numerous representations on the same issue.

**16.** It is apparent that the respondents were endorsing the previous erroneous stand which had been taken by them on 22nd January, 2008



without considering the intervening circumstances and ignoring the review of the petitioner's ACR by the Reviewing Officer which had been confirmed by the counter-signing officer and had been duly accepted by the respondents.

**17.** The petitioner was finally promoted on 12th April, 2012 as Second-in-Command. However, as a result of the respondent's above noticed action, the petitioner stood superseded by 44 junior officers despite his meeting the bench mark as his ACR had been upgraded from 'average' to 'good' as well as the remarks of the Reviewing Officer therein to the effect that the petitioner was having good technical and practical knowledge and that there was nothing to show poor performance by him. When asked to do so, the Reviewing Officer had duly specified and clarified to the respondents vide the Communication dated 20th July, 2011 that the adverse comments in the said ACR stood duly expunged. Therefore, the denial of the promotion to the petitioner was illegal and unjustified and as the petitioner was entitled to a favourable consideration in the DPC leading to the passing of the order dated 12th May, 2012 for the first time in which he was superseded only on account of respondents erroneously treating the ACR for the period w.e.f. 4th June, 2005 to 31st March, 2005 as adverse. By this order, juniors of the petitioner had been promoted while he had been denied the promotion.

**18.** Mr.Ruchir Mishra, learned counsel for the respondents has urged that there are advisories against the petitioner and that his performance could not have been upgraded from 'average' to 'good' or the ACR cannot be treated a one without having adverse remarks. He has drawn our attention to the remarks recorded by the Initiating Officer made in the relevant ACR that the petitioner was not dependable for sensitive jobs and that he had been assigned the task of sending question papers for candidates appearing in 'C' list and it is the carelessness of the petitioner in not despatching the required number of question paper to the Examination Centre which resulted in administrative inconvenience and makes reference of the secret note annexed to the relevant ACR.

**19.** Mr. Mishra has also referred us to an order passed by the Deputy General whereby advisory was issued to the petitioner to intimate about his financial transactions and advised to be careful with regard to the advance taken by the petitioner.

**20.** The advisories issued to the petitioner regarding non intimation

of a financial transaction as per the rules have not formed the basis of the Initiating Officer's comment for the period w.e.f. 4th June 2005 to 31st March, 2005. The comments referring to certain shortfall in the examination paper and the reference to a secret note has no relevance in view of the upgradation of the ACR by the Reviewing Officer and its acceptance by the Counter Signing Officer. This has thereafter been accepted even by the respondents and there comments anymore does not lie any sign of to the adverse. The respondents have accepted that there was no adverse remarks in the ACR of the petitioner for the period w.e.f. 4th June, 2005 to 31st March, 2005 for this reason, the petitioner was given the promotion. No significance can be attached to the advisories. In any case nothing would turn on the advisories which have been referred to by the respondents so far as the technical practical knowledge of the petitioner is concerned. Needless to say that in view of the communication dated 13th June, 2011 and 20th July, 2011, the respondents cannot treat the ACR of the petitioner for the period w.e.f. 4th June, 2005 to 31st March, 2006 as an adverse ACR or as one containing any adverse remarks against him.

**21.** So far as the ACR of the petitioner is concerned, the same had attained finality upon it being endorsed by the Counter Signing Officer and endorsing comments of the Reviewing Officer and as such, the respondents could not have treated the same as an adverse ACR or as one containing adverse remarks.

**22.** In the light of above mentioned facts and circumstance, we find substance in the contentions of learned counsel for the petitioner. Accordingly, the orders dated 10th February, 2012, 20th December, 2011 and 22nd January, 2008, whereby, the petitioner's representations have been rejected are not sustainable in law and are hereby set aside and quashed. As a result, the petitioner would be entitled to consideration of his candidature by Review DPC for promotion to the rank of Second-in-Command w.e.f. 12th May, 2011 which shall be effected within a period of eight weeks from today. If recommended, the petitioner shall also be entitled to notional promotion and appropriate seniority with effect from, the date on which his juniors were promoted i.e. 12th May, 2011.

**23.** In our considered opinion, the petitioner deserves to be given the financial benefits and accordingly, if he is found fit to be promoted by the Review DPC w.e.f. 12th May, 2011, he shall be entitled to the



consequential financial benefits. The amount payable to the petitioner towards the financial benefits shall be computed by the respondents within a period of eight weeks from today and communicated to the petitioner. The payment in respect thereof be made to the petitioner within six weeks thereafter.

**24.** The petitioner shall also be entitled to costs of the present proceedings which are assessed @ Rs.20,000/- which shall be paid along with the next month's salary.

The writ petition is allowed in above terms.

Dasti.

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**ILR (2013) IV DELHI 3180**
**CO. APP.**

**PIONEER MULTIFILMS ....PETITIONER**

**VERSUS**

**PACQUICK INDUSTRIES LTD. ....RESPONDENT**

**(R.V. EASWAR, J.)**

**CO. APP. NOS. : 906/11, 13/2012 & 2437/12 IN CO. PET. 194/2006** **DATE OF DECISION: 08.07.2013**

**Companies Act, 1956—Section 433 (e) read with Section 434 (1)(a)—Brief Facts—M/s. Pacquick Industries Ltd., the "Company", had borrowed a sum of 11 crores (approximately) from M/s. Pradeshya Industrial and Investment Corporation of UP Ltd., Lucknow, "PICUP", for the purpose of its business—Company had obtained the loan by mortgage of the property at B-54, Sector-57, Noida, U.P. along with the plant and machinery-Title deeds relating to the property were handed over**

to PICUP - Soon the Company ran into rough weather and was unable to re-pay the amount to PICUP - Company had also borrowed a sum of 62,53,375/- from Pioneer Multifilms of Delhi, the Petitioner - Company was unable to re-pay the aforesaid amount also due to falling business - Petitioner filed Company Petition No.194/2006 for winding up of the Company under Section 433(e) read with Section 434 (1)(a) of the Companies Act, 1956 - In order to help the Company tide over its financial difficulties and revive its business, a one-time settlement ("OTS", for short) was entered into between PICUP and the Company under which the debt to PICUP was settled at 2,29,85,000/- Understanding was that on payment of the aforesaid sum, PICUP would return the title deeds to the Company and the Company would strive to revive its business - A joint application under Order 23, Rule 3 of the CPC was filed in C.A. No.10/2011 recording a settlement arrived at between petitioner and the company—Brief terms of the settlement were that Petitioner will pay the amount of 2,29,85,000/- to PICUP and when the company obtains the title deeds from PICUP, the property would be sold to petitioner - PICUP was impleaded as a party to the proceedings - OTS amount was already paid by petitioner to PICUP on 10.01.2011—On 07.03.2011 M/s. PICUP is directed to release the original title deeds of documents, property and machinery to the petitioner within a period of two weeks - Court directed that keeping in view the terms of the settlement between the parties, PICUP on direction, deposited the title deeds of the property in question with the Registrar of Court - Company Application No.906/2011 is an application filed by PICUP asking this Court to issue directions that the title deeds to the property shall not be handed over to Petitioner - Company Application No. 13/2012 is also filed by PICUP seeking return of the title deeds deposited with this Court - Company Application No.



2437/2012 is filed by one Raj Kumar Arora seeking to purchase the property for 3.25 crores or in the alternative to permit an auction of the property, since according to him the property has been wholly undervalued and was sought to be sold to petitioner only at 2,29,85,000/-

Held—Petitioner paid the amount of 2,29,85,000/- and there is ample documentary evidence on record to prove the same and once the amount has been paid to PICUP in terms of the OTS, and when subsequently the OTS is cancelled, it is idle on the part of PICUP to seek return of the title documents and also seek to hold on to the monies-PICUP cannot at the same breath contend that the OTS has been cancelled and also refuse to return the monies to petitioner-petitioner, is not the borrower from PICUP and what he did was only to discharge the amount due to PICUP by the Company-Terms of settlement between the Company and Petitioner were known to PICUP since PICUP impleaded as party to the proceedings by an order-If PICUP wants to get back the title deeds from the Registrar of this Court, it can do so only on paying the amount of 2,29,85,000/- to petitioner-After impleadment, PICUP cannot say that any fraud was sought to be played upon it by the Company and petitioner-PICUP, having consented to the impleadment, cannot now turn around and say that it was not aware of the proposed sale of the property in favour of petitioner-PICUP cannot retain the monies which it received from Petitioner—PICUP cannot take a contradictory stand that it would cancel the OTS and also not return the monies to petitioner-Technically and legally speaking, Petitioner was not the debtor; but the monies came from him and this was within the Knowledge of PICUP-PICUP was also aware of the source of the monies by being party to the settlement arrived at between Darshan Khurana and the Company-

**With such awareness, PICUP cannot sat that it is entitled to the return of the title deeds and is also entitled to retain the monies paid by Petitioner on account of the debt due by the Company-PICUP should return the amount of 2,29,85,000/- to petitioner within three weeks-Once the amount is paid as directed, PICUP will be entitled to get back the title deeds from the Registrar of this Court.**

On 07.03.2011 this Court passed another order in C.A. No.10/2011 directing that on the filing of an affidavit undertaking payment of RC collection charges levied on PICUP by the concerned District Authorities, *"M/s. PICUP is directed to release the original title deeds of documents, property and machinery to the petitioner within a period of two weeks thereafter"*. A company petition was filed by PICUP in C.A. No.749/2011 seeking modification of the order dated 07.03.2011, the modification sought for being that PICUP may be directed to release the title deeds to the company and not to Darshan Khurana (who was the petitioner) and also direct the guarantors of the company to file an undertaking to pay the RC collection charges. While disposing of this application by order dated 25.04.2011, this Court directed that keeping in view the terms of the settlement between the parties, PICUP should deposit the title deeds of the property in question with the Registrar of this Court within one week. This order was complied with by PICUP and as of now the title deeds to the property are in the custody of the Registrar of this Court. **(Para 6)**

I have before me today three applications for consideration. Company Application No.906/2011 is an application filed by PICUP asking this Court to issue directions that the title deeds to the property shall not be handed over to Darshan Khurana. Company Application No.13/2012 is also filed by PICUP seeking return of the title deeds deposited with this Court. Company Application No.2437/2012 is filed by one Raj Kumar Arora seeking to purchase the property for Rs. 3.25 crores or in the alternative to permit an auction of the



property, since according to him the property has been wholly undervalued and was sought to be sold to Darshan Khurana only at Rs. 2,29,85,000/-. **(Para 7)**

Before I take up the aforesaid three applications for disposal on the basis of the arguments heard by me from the Company as well as PICUP, I must refer to an order dated 10.04.2013 passed by this Court in Company Petition No.194/2006. In this order it was observed that the action taken by PICUP to cancel the OTS on the ground that the parties did not make full disclosure of the facts cannot be faulted. Apart from this observation, this Court recognised the difficult situation in which Darshan Khurana was placed inasmuch as he had not only not got back the amount of Rs. 62 and odd lakhs due from the company, but he has also paid PICUP a further sum of Rs. 2,29,85,000/- without getting anything in return till date. Ultimately this Court noted that the Company and Darshan Khurana have certain proposals to make to PICUP and directed them to make them before the Managing Director of PICUP within 10 days, with the further direction that the MD may meet the parties at any date between 13th and 20th May, 2013 after giving at least one week's advance notice. The decision taken by the MD was directed to be placed before this Court by 4th July, 2013. **(Para 8)**

At the outset, the learned counsel for PICUP stated that no meeting had taken place between Darshan Khurana and the Company on the one hand and the Managing Director of PICUP on the other till today. He therefore submitted that the proceedings have become infructuous and nothing further needs to be done. That may be so, but that does not impinge on the disposal of the other three applications taken up for hearing today. **(Para 9)**

In support of the applications filed by PICUP, it is contended that the Company and Darshan Khurana have colluded and played a fraud on PICUP. It is stated that the sale of the property mortgaged to PICUP, in favour of Darshan Khurana was contrary to the terms of the OTS and once it came to

the knowledge of PICUP, the OTS was cancelled. It is further stated that against the cancellation of the OTS, the Company has filed a writ petition before the Lucknow Bench of the Allahabad High Court and notices have been issued. It is pointed out that the limited scope of the present proceedings is only whether the title deeds should be returned to PICUP pursuant to the cancellation of the OTS. This in fact is the prayer in Company Application No.13/2012. The contention of PICUP in Company Application No.906/2011 is that the title deeds to the property can in no event be handed over to Darshan Khurana as that would prejudice the claims of PICUP drastically. In effect, it is submitted that the logical result of the cancellation of the OTS is that the title deeds should be returned to PICUP. **(Para 10)**

**Important Issue Involved:** Companies Act, 1956—Section 433(e) read with Section 434 (1)(a)—Once the amount has been paid to PICUP in terms of the OTS, and when subsequently the OTS is cancelled, it is idle on the part of PICUP to seek return of the title documents and also seek to hold on to the monies—PICUP cannot at the same breath contend that the OTS has been cancelled and also refuse to return the monies to Petitioner.

**[Sa Gh]**

**APPEARANCES:**

**FOR THE PETITIONERS** : Mr. Vivek Sibal with Ms. Pooja, M. Saigal, Advocates for the applicant Darshan Khurana.

**FOR THE RESPONDENT** : Mr. Sandeep Aggarwal, Advocate for PICUP Mr. Pankaj Kumar Singh, Advocate for the applicant in Co. App. No. 2094/2012 Mr. Preet Pal Singh for Respondents 1 to 3.

**RESULT:** Applications Disposed.



**R.V. EASWAR, J.**

**1.** A brief history of the case requires to be noted. M/s. Pacquick Industries Ltd., hereinafter referred to as the "Company", had borrowed a sum of Rs. 11 crores (approximately) from M/s. Pradeshya Industrial and Investment Corporation of UP Ltd., Lucknow, hereinafter referred to as "PICUP", for the purpose of its business. The Company had obtained the loan by mortgage of the property at B-54, Sector-57, Noida, U.P. along with the plant and machinery. The title deeds relating to the property were handed over to PICUP. Soon the Company ran into rough weather and was unable to re-pay the amount to PICUP. The Company had also borrowed a sum of Rs. 62,53,375/- from one Darshan Khurana, sole proprietor of Pioneer Multifilms of Delhi. The Company was unable to re-pay the aforesaid amount also due to falling business. In these circumstances, Darshan Khurana filed Company Petition No.194/2006 for winding up of the Company under Section 433(e) read with Section 434 (1)(a) of the Companies Act, 1956.

**2.** In order to help the Company tide over its financial difficulties and revive its business, a one-time settlement ('OTS', for short) was entered into between PICUP and the Company under which the debt to PICUP was settled at Rs. 2,29,85,000/-. The understanding was that on payment of the aforesaid sum, PICUP would return the title deeds to the Company and the Company would strive to revive its business.

**3.** In the meantime a joint application under Order 23, Rule 3 of the CPC was filed in C.A. No.10/2011 recording a settlement arrived at between Darshan Khurana and the Company. The brief terms of the settlement were that Darshan Khurana will pay the amount of Rs. 2,29,85,000/- to PICUP and when the company obtains the title deeds from PICUP, the property would be sold to Darshan Khurana. C.A. No.11/2011 was an application filed for impleadment of PICUP in the settlement proceedings.

**4.** On 07.01.2011 this Court issued notice in both the applications to the standing counsel for PICUP and directed him to file a reply within three weeks. In the interim and subject to further orders of this Court, it was directed that the OTS offer be complied with by the parties by depositing the amount with PICUP. The matter was directed to be fixed again on 01.03.2011.

**5.** On 01.03.2011 both the applications were taken up by this Court for disposal. The impleadment application (C.A. No.11/2011) was allowed with the consent of the parties and PICUP was impleaded as a party to the proceedings. On the same date this Court also passed an order in C.A. No.10/2011 recording the fact that the OTS amount was already paid by Darshan Khurana to PICUP (on 10.01.2011).

**6.** On 07.03.2011 this Court passed another order in C.A. No.10/2011 directing that on the filing of an affidavit undertaking payment of RC collection charges levied on PICUP by the concerned District Authorities, *"M/s. PICUP is directed to release the original title deeds of documents, property and machinery to the petitioner within a period of two weeks thereafter"*. A company petition was filed by PICUP in C.A. No.749/2011 seeking modification of the order dated 07.03.2011, the modification sought for being that PICUP may be directed to release the title deeds to the company and not to Darshan Khurana (who was the petitioner) and also direct the guarantors of the company to file an undertaking to pay the RC collection charges. While disposing of this application by order dated 25.04.2011, this Court directed that keeping in view the terms of the settlement between the parties, PICUP should deposit the title deeds of the property in question with the Registrar of this Court within one week. This order was complied with by PICUP and as of now the title deeds to the property are in the custody of the Registrar of this Court.

**7.** I have before me today three applications for consideration. Company Application No.906/2011 is an application filed by PICUP asking this Court to issue directions that the title deeds to the property shall not be handed over to Darshan Khurana. Company Application No.13/2012 is also filed by PICUP seeking return of the title deeds deposited with this Court. Company Application No.2437/2012 is filed by one Raj Kumar Arora seeking to purchase the property for Rs. 3.25 crores or in the alternative to permit an auction of the property, since according to him the property has been wholly undervalued and was sought to be sold to Darshan Khurana only at Rs. 2,29,85,000/-.

**8.** Before I take up the aforesaid three applications for disposal on the basis of the arguments heard by me from the Company as well as PICUP, I must refer to an order dated 10.04.2013 passed by this Court in Company Petition No.194/2006. In this order it was observed that the



action taken by PICUP to cancel the OTS on the ground that the parties did not make full disclosure of the facts cannot be faulted. Apart from this observation, this Court recognised the difficult situation in which Darshan Khurana was placed inasmuch as he had not only not got back the amount of Rs. 62 and odd lakhs due from the company, but he has also paid PICUP a further sum of Rs. 2,29,85,000/- without getting anything in return till date. Ultimately this Court noted that the Company and Darshan Khurana have certain proposals to make to PICUP and directed them to make them before the Managing Director of PICUP within 10 days, with the further direction that the MD may meet the parties at any date between 13th and 20th May, 2013 after giving at least one week's advance notice. The decision taken by the MD was directed to be placed before this Court by 4th July, 2013.

**9.** At the outset, the learned counsel for PICUP stated that no meeting had taken place between Darshan Khurana and the Company on the one hand and the Managing Director of PICUP on the other till today. He therefore submitted that the proceedings have become infructuous and nothing further needs to be done. That may be so, but that does not impinge on the disposal of the other three applications taken up for hearing today.

**10.** In support of the applications filed by PICUP, it is contended that the Company and Darshan Khurana have colluded and played a fraud on PICUP. It is stated that the sale of the property mortgaged to PICUP, in favour of Darshan Khurana was contrary to the terms of the OTS and once it came to the knowledge of PICUP, the OTS was cancelled. It is further stated that against the cancellation of the OTS, the Company has filed a writ petition before the Lucknow Bench of the Allahabad High Court and notices have been issued. It is pointed out that the limited scope of the present proceedings is only whether the title deeds should be returned to PICUP pursuant to the cancellation of the OTS. This in fact is the prayer in Company Application No.13/2012. The contention of PICUP in Company Application No.906/2011 is that the title deeds to the property can in no event be handed over to Darshan Khurana as that would prejudice the claims of PICUP drastically. In effect, it is submitted that the logical result of the cancellation of the OTS is that the title deeds should be returned to PICUP.

**11.** The contention of the learned counsel for the petitioner (Darshan Khurana, Proprietor: Pioneer Multifilms) however, is that the amount of Rs. 2,29,85,000/- was paid by him and there is ample documentary evidence on record to prove the same and once the amount has been paid to PICUP in terms of the OTS, and when subsequently the OTS is cancelled, it is idle on the part of PICUP to seek return of the title documents and also seek to hold on to the monies. It is contended that PICUP cannot at the same breath contend that the OTS has been cancelled and also refuse to return the monies to Darshan Khurana. It is pointed out that Darshan Khurana, the petitioner, is not the borrower from PICUP and what he did was only to discharge the amount due to PICUP by the Company. It is further submitted that the terms of settlement between the Company and Darshan Khurana were known to PICUP since PICUP was impleaded as party to the proceedings by an order of this Court passed on 01.03.2011 in Company Application No.11/2011, which order has become final. In these circumstances, it is contended that if PICUP wants to get back the title deeds from the Registrar of this Court, it can do so only on paying the amount of Rs 2,29,85,000/- to Darshan Khurana.

**12.** I find sufficient force in the submission of Mr. Sibal, appearing for the respondent Darshan Khurana, Proprietor, Pioneer Multifilms in the application filed by PICUP. As rightly pointed out by him, PICUP was impleaded in the settlement arrived at between Darshan Khurana and the Company. After impleadment, PICUP cannot say that any fraud was sought to be played upon it by the Company and Darshan Khurana. In fact, this Court has recorded in its order dated 01.03.2011 in Company Application No.11/2011 that the application for impleading PICUP was allowed with the consent of the parties. PICUP, having consented to the impleadment, cannot now turn around and say that it was not aware of the proposed sale of the property in favour of Darshan Khurana. I am not in the present proceedings concerned with the validity of the action taken by PICUP in cancelling the OTS, which is the subject matter of separate proceedings before the Lucknow Bench of the Allahabad High Court. Even assuming that the cancellation was valid, it gives no right to PICUP to retain the monies which it received from Darshan Khurana on account of the dues of the Company and in full discharge thereof as per the OTS which was then operational. PICUP cannot take a contradictory stand that it would cancel the OTS and also not return the monies to Darshan Khurana. The argument of the learned counsel for PICUP that



PICUP does not recognise Darshan Khurana as its debtor cannot, in the circumstances of the case, be accepted. Technically and legally speaking, Darshan Khurana himself was not the debtor; but the monies came from Darshan Khurana and this was within the knowledge of PICUP. PICUP was also aware of the source of the monies by being party to the settlement arrived at between Darshan Khurana and the Company. With such awareness, PICUP cannot say that it is entitled to the return of the title deeds and is also entitled to retain the monies paid by Darshan Khurana on account of the debt due by the Company.

**13.** Mr. Sibal submitted in Court that he should either get the title deeds to the property or get back the money paid to PICUP in discharge of the dues of the Company. For the reasons stated above, I am of the view that PICUP should return the amount of '2,29,85,000/- to Darshan Khurana. It is directed to do so within three weeks. Once the amount is paid as directed, PICUP will be entitled to get back the title deeds from the Registrar of this Court by making a separate application. C.A. No.13/2012 is disposed of in these terms.

**14.** C.A. No.906/2011 which has been filed by PICUP is that the title deeds shall not be handed over to Darshan Khurana. In the light of the order passed in C.A. No.13/2012, the question of handing over the title deeds to Darshan Khurana does not arise. The application is disposed of accordingly.

**C.A. No.2437/2012**

**15.** This application has become infructuous in the light what is stated above and is dismissed as such.

**CO. PET. 194/2006**

Renotify on 19.09.2013.

**ILR (2013) IV DELHI 3191**
**CO. PET.**

**SERVEL INDUSTRIES** **....PETITIONER**

**VERSUS**

**ALCOBREW DISTILLERIES (INDIA) PVT. LTD.** **....RESPONDENT**

**(R.V. EASWAR, J.)**

**CO. PET. NO. : 37/2012** **DATE OF DECISION: 11.07.2013**

**Companies Act, 1956—Section 433(e) read with Section 434 (1)(a) - Brief Facts—Respondent company deducted income tax of 74,184/- but the net amount after deduction was never paid to the Petitioner-Total amount originally payable to petitioner was 32,67,975/- out of which a sum of 28,29,058/- was paid on 20.03.2009 -Balance amount payable is 3,64,773/- Though this amount was not paid, the respondent company deducted income tax of 74,184/- from the same which according to the petitioner amounted to the acknowledgement of the liability of the respondent company -Petitioner's wife was carrying on a business under the name and style of M/s. Innovations which entered into a settlement with a company called Focus Brands Trading (India) Pvt. Ltd.- ("Focus", for short) according to which as against the total amount of 69,74,721/- due by Focus, the matter was settled on payment of 25,00,000/- in Company Petition No. 326/ 2010, but this has nothing to do with the transactions between the present petitioner and the respondent company - Petition filed by M/s. Servel Industries through its proprietor Puneet Soni, under Section 433(e) read with Section 434 of the Companies Act, 1956 for the winding up of the company by name M/s**



**Alcobrew Distillers (India) Pvt. Ltd. -Respondent company took the objection that the claim of the petitioner stood settled vide order of this Court passed on 16.05.2011 in Company Petition No. 326/2010 -Short question for consideration is whether the claim of the petitioner against the respondent company stood settled as contended on its behalf -It is contended that the objection taken by the respondent company to the effect that nothing was due by it to the petitioner is untenable -Reliance is placed on the order of this Court (Manmohan, J.) passed on 20.05.2011 in Company Petition No.326/2010 recording the Memorandum of Settlement between Innovations and Focus and it is pointed out that this settlement did not bind the present petitioner -It is further pointed out that even the respondent company was not party to the Memorandum of Settlement and, therefore, no reliance can be placed upon the same to contend that the petitioner's claim also stood settled -As against this, it is contended on behalf of the respondent that it had an agreement with Focus, which was marketing international brands of liquor, under which it acted as bottlers for Focus.**

**Held—It is true that in the Memorandum of Settlement dated 20.05.2011 arrived at between the petitioner (Servel Industries) and his wife (M/s. Innovations) on the one hand and Focus on the other, that a total outstanding of 69,74,721/- was settled at 25 lakhs— This amount consisted of the principal sum of 55,57,721/- and interest of 14,17,000/- It prima facie appears that the Memorandum of Settlement was entered into only with reference to the amount payable by Focus -It refers to the fact that M/s. Innovations filed Company Petition No.326/2010 before this Court for winding up of Focus on the ground that it was unable to pay the aforesaid amount to it—There is no reference in the Memorandum of Settlement to the**

**agreement dated 25.01.2007 entered into between the Focus and the respondent-company, clause 5.7 of which made Focus responsible for all consequences arising out of non-payment of dues by the respondent company to the suppliers -Further, the order of this Court passed on 20.05.2011 in Company petition No.326/2010 refers only to "respondent's debt to the petitioner", which means the amount owed by Focus to Innovations—In the order passed on 16.05.2011 in Company Petition No. 326/2010, it was made clear that "in terms of the said settlement, respondent shall pay a sum of 25 lakhs in full and final settlement of the amount due and payable not only to the petitioner but also to M/s. Servel Industries Ltd.," -Thus it is more that clear that under the MoS dated 20.05.2011, it is only the amount due by Focus, both to the present petitioner and M/s. innovations, that was sought to be settled—There is no mention in the orders of this Court in Company Petition No. 326/2010 about the amount due by the respondent-company -If this factual position alone is taken note of, it would appear that the respondent-company has to fail in its contention—In the light of the statement made by the petitioner in he e-mail dated 29.03.2010, the petitioner cannot be permitted now to say, after the settlement has been arrived at, that the amount of 3,64,773/- due from the respondent-company was not part of the settlement - To permit him to do so would be contrary to the tenor of the Memorandum of settlement and the entire events leading up to it and would also amount to not giving due weight to the agreement dated 25.01.2007 entered into between the respondent and Focus, particularly clause 5.7 thereof -Company petition is dismissed the with no order as to costs.**

I have carefully considered the matter. I have also perused the file in Company Petition No.326/2010. It is true that in the Memorandum of Settlement dated 20.05.2011 arrived at



between the petitioner (Servel Industries) and his wife (M/s. Innovations) on the one hand and Focus on the other, that a total outstanding of Rs. 69,74,721/- was settled at Rs. 25 lakhs. This amount consisted of the principal sum of Rs. 55,57,721/- and interest of Rs. 14,17,000/-. It prima facie appears that the Memorandum of Settlement was entered into only with reference to the amount payable by Focus to both the petitioner and his wife for material allegedly supplied to Focus. It refers to the fact that M/s. Innovations filed Company Petition No.326/2010 before this Court for winding up of Focus on the ground that it was unable to pay the aforesaid amount to it. There is no reference in the Memorandum of Settlement to the agreement dated 25.01.2007 entered into between the Focus and the respondent-company, clause 5.7 of which made Focus responsible for all consequences arising out of non-payment of dues by the respondent company to the suppliers. Further, the order of this Court passed on 20.05.2011 in Company Petition No.326/2010 refers only to "respondent's debt to the petitioner", which means the amount owed by Focus to Innovations. In the order passed on 16.05.2011 in Company Petition No.326/2010, it was made clear that "in terms of the said settlement, respondent shall pay a sum of Rs. 25 lakhs in full and final settlement of the amount due and payable not only to the petitioner but also to M/s. Servel Industries Ltd.". Thus it is more than clear that under the MoS dated 20.05.2011, it is only the amount due by Focus, both to the present petitioner and M/s. Innovations, that was sought to be settled. There is no mention in the orders of this Court in Company Petition No.326/2010 about the amount due by the respondent-company. If this factual position alone is taken note of, it would appear that the respondent-company has to fail in its contention. **(Para 8)**

But the contention of the learned counsel for the respondent-company is based on clause 5.7 of the agreement dated 25.01.2007 entered into between itself and Focus. I have already extracted the clause. This clause seems to suggest

that though the primary responsibility for paying for the supplies of the materials on due dates would be that of the respondent-company, Focus shall be responsible for the consequences arising out of non-payment of the dues by the respondent-company to the suppliers, subject to the condition that such non-payment was not due to any act or omission attributable to the respondent-company. The absence of any reference to the dues of the respondent-company in the orders of this Court in Company Petition No.326/2010 and the fixation of the primary responsibility for the payment in respect of materials supplied to respondent-company on it appears to clinch the decision in favour of the petitioner. **(Para 9)**

However, that does not seem to be the end of the matter. In the e-mail sent by Puneet Soni on behalf of his proprietary concern (Servel Industries) and on behalf of his wife's propriety concern (Innovations) on 29.03.2010 (Annexure-R to the Company Petition No.326/2010) he has confirmed that the amount of Rs. 63,08,563/- which is due for the financial year 2008-2009 includes an amount of Rs. 3,64,773/- from Alcobrew, which is the respondent-company. This e-mail shows that even according to the petitioner, the amount due from Focus, which was ultimately settled at Rs. 25 lakhs under the Memorandum of Settlement dated 20.05.2011, included the amount of Rs.3,64,733/- due from the respondent-company. The fact that the e-mail was written by Puneet Soni both on behalf of his proprietary concern and on behalf of his wife's proprietary concern furnishes the link not only between them on the one hand and Focus on the other, but also indicates the link between Focus and the respondent-company on the other hand when it mentions that the amount outstanding from Focus includes the amount outstanding from Alcobrew, the respondent-company in the present proceedings. The agreement between Focus and the respondent-company entered into on 25.01.2007, particularly clause 5.7 thereof, becomes relevant for this reason that though it was the primary responsibility of the



respondent-company to pay for the materials supplied to it, the consequences of the non-payment would have to be met by Focus. This in turn means that if the respondent-company failed to pay the amount of Rs. 3,64,773/- due to the petitioner, it would be the liability of Focus to discharge the same. Thus all amounts which, for some reason, were not paid by the respondent-company became the liability of Focus which stood at Rs. 63,08,563/- for the financial year 2008-2009 and at Rs. 64,70,563/- on a subsequent date. Therefore, there can be no dispute that the amount of Rs. 3,64,773/- stood included in the amount of Rs. 69,74,721/- which was the total amount due by Focus. When this amount was settled by payment of Rs. 25 lakhs, it is obvious that the amount of Rs. 3,64,773/- was also part of the settlement and cannot be sought to be recovered again by the petitioner from the respondent-company. The settlement which was recorded by this Court in Company Petition No.326/2010 extinguished the debt of Rs. 3,64,773/- owed by the respondent-company to the petitioner. The petitioner has not succeeded in demonstrating that the amount of Rs. 69,74,721/- is distinct and separate from, and does not include the amount of Rs. 3,64,773/-. In the light of the statement made by the petitioner in the e-mail dated 29.03.2010, the petitioner cannot be permitted now to say, after the settlement has been arrived at, that the amount of Rs. 3,64,773/- due from the respondent-company was not part of the settlement. To permit him to do so would be contrary to the tenor of the Memorandum of Settlement and the entire events leading up to it and would also amount to not giving due weight to the agreement dated 25.01.2007 entered into between the respondent and Focus, particularly clause 5.7 thereof. **(Para 10)**

**Important Issue Involved:** Companies Act, 1956—Section 433(e) read with Section 434 (1) (a)—Petitioner cannot, after the settlement has been arrived at, contend that the amount of 3,64,773/- due from the respondent company was not part of the settlement—To permit him to do so would be contrary to the tenor of the Memorandum of Settlement and the entire events leading up to it and would also amount to not giving due weight to the agreement dated 25.01.2007 entered into between the respondent and Focus, particularly clauses 5.7 thereof.

**[Sa Gh]**

**APPEARANCES:**

**FOR THE PETITIONER** : Mr. Anoop Bagai, Sr. Advocate with Mr. Amitesh Kumar, Advocate.

**FOR THE RESPONDENT** : Mr. Amit Goel, Advocate.

**RESULT:** Petition Dismissed.

**R.V. EASWAR, J.**

**1.** This is a petition filed by M/s. Servel Industries through its proprietor Puneet Soni, under Section 433(e) read with Section 434 of the Companies Act, 1956 for the winding up of the company by name M/s. Alcobrew Distillers (India) Pvt. Ltd. a company having its registered office in New Delhi. Notice was issued to the respondent company which took the objection that the claim of the petitioner stood settled when this Court passed an order on 16.05.2011 in Company Petition No.326/2010. This objection was vehemently contested by the petitioner whose contention was that the present petition relates to a separate and distinct transaction and has nothing to do with the settlement in Company Petition No.326/2010. In order to examine this contention, the file of Company Petition No.326/2010 was requisitioned and the same has been placed before this Court.

**2.** The short question for consideration is whether the claim of the petitioner against the respondent company stood settled as contended on its behalf.



**3.** The learned counsel for the petitioner submitted that the respondent company deducted income tax of Rs. 74,184/-, but the net amount after deduction was never paid to the petitioner. The total amount originally payable to the petitioner was Rs. 32,67,975/- out of which a sum of Rs. 28,29,058/- was paid on 20.03.2009. The balance amount payable is Rs. 3,64,773/-. Though this amount was not paid, the respondent company deducted income tax of Rs. 74,184/- from the same which according to the petitioner amounted to the acknowledgement of the liability of the respondent company. My attention was drawn to the affidavit of Puneet Soni, sole proprietor of the petitioner and the annexures thereto. It is pointed out that the petitioner's wife was carrying on a business under the name and style of M/s. Innovations which entered into a settlement with a company called Focus Brands Trading (India) Pvt. Ltd. ("Focus", for short) according to which as against the total amount of 69,74,721/- due by Focus, the matter was settled on payment of Rs. 25,00,000/- in Company Petition No.326/2010, but this has nothing to do with the transactions between the present petitioner and the respondent company. It is contended that the objection taken by the respondent company to the effect that nothing was due by it to the petitioner is untenable. Reliance is placed on the order of this Court (Manmohan, J.) passed on 20.05.2011 in Company Petition No.326/2010 recording the Memorandum of Settlement between Innovations and Focus and it is pointed out that this settlement did not bind the present petitioner. It is further pointed out that even the respondent company was not party to the Memorandum of Settlement and, therefore, no reliance can be placed upon the same to contend that the petitioner's claim also stood settled.

**4.** As against this, it is contended on behalf of the respondent that it had an agreement with Focus, which was marketing international brands of liquor, under which it acted as bottlers for Focus. My attention was drawn to the relevant clauses of the agreement, particularly clause 5.7 under which the respondent company was to pay the suppliers for all the material on the due dates under the respective invoices, but Focus shall be responsible for all consequences arising out of non-payment of dues to the suppliers. The actual clause reads as under:-

> "5.7 ADIPL shall pay, from the Account, the suppliers of the Materials on due dates under the respective invoices raised therefor, FBTIL shall be responsible for all consequences arising out of non payment of dues to suppliers provided that the non

payment is not due to any act or omission attributable to ADIPL under this Agreement."

**5.** My attention was also drawn to two e-mails written by Puneet Soni on behalf of both the petitioner and M/s. Innovations. The first e-mail (Annexure-E to the Company Petition No.326/2010) reads as under:-

"From: puneet soni (puneet_servel@yahoo.com)
To: priytosh_wali@focusbrands.in;
Date: Tuesday, August 11, 2009 15:53:39
Subject: Pleasure Meeting You!

Dear Mr. Wali,

It was indeed a pleasure meeting you in your office today.

As mentioned by you, the payment plans of Focus Brands have now been put in place. I need to thank you & your team, especially Sumit & Anirban for initiating the process of clearing long overdue payments. Though a start has been made to clear my outstandings, by a payment of Rs. 24.5L, the outstandings are still upwards of 65L. In view of the inordinate delay in the payments, & as also appreciated by you in our meeting, these need to be cleared at the earliest within definite timelines. I'm sure, with you at the helm, this would be achieved.

As mentioned to you during the meeting, I've been in the business of supplying POS merchandise to various liquor companies for over 20 years, & have been associated with Focus Brands since its inception more than 8 years back.

The last year or so, has been a difficult year for Focus & subsequently due to it's cascading effect, these were very trying times for me as well. But I'm positive that in times to come, our business association can only get bigger & better.

Looking forward to a renewed & more meaningful association with you & your team at Focus Brands.

Regards,
Puneet Soni
SERVEL INDUSTRIES
INNOVATIONS"



**6.** The second e-mail is at page 126 (Annexure-R) which reads as under: -

"From: puneet soni <puneet_servel@yahoo.com>
To: Hem Javeri <hemjaveri@yahoo.com>; Priytosh Wali <priytosh_wali@focusbrands.in>; takesh mathur <takesh_mathur@jepl.com>
Cc: Vishal Mahajan <vishal_mahajan@jepl.com>; Martin Pala <martin.pala@compari.com>; Jean-Yves Laforet <jeanyves.laforet@campari.com>
Sent: Monday, March 29, 2010 11:44:20

Subject: Outstanding Payments!

Dear Mr. Javeri, Mr. Wali, Mr. Mathur,

This is further to our meeting of 2nd March, 2010 & our subsequent telecons on the subject of my outstanding payments (Rs. 64,70,563.00)

During our meeting, you, Mr. Mathur had appreciated my patience & had advised me to exercise a little more patience while you address the issue in consultation with Mr. Javeri & Mr. Mahajan. Though patience is a much valued virtue in conducting ones business it also has it's limits & mine have been tested to it's full.

Though I've reiterated on numerous occasions, let me again tell you that out of the above amount, Rs. 63,08,563.00 (including Rs. 3,64,773.00 from Alcobrew) is for the financial year 2008-2009 which also reflects in your audited books of accounts. Further, I've been issued TDS certificates for all this amount which is a clear, admission of your liability.

As my accompanying mails will show that I've repeatedly requested you to release my complete outstanding payments, but you have not done so on one pretext or the other.

In view of the above, if I do not receive my outstanding payments immediately, I'll be constrained to exercise my litigation options including filing for winding up of your company FBTIL.

Regards,
Puneet Soni
INNOVATIONS
SERVEL INDUSTRIES"

**7.** Strong reliance is placed on the second e-mail which, according to the respondent, shows that the amount of Rs. 63,08,563/- due from Focus to the petitioner includes the amount of Rs. 3,64,773/- due from the respondent-company. The contention is that since the amount due from Focus has been settled at Rs. 25 lakhs, that settlement also covered the amount due by the respondent-company to the petitioner and therefore nothing is recoverable from the respondent-company. It is pointed out that the petitioner has written the e-mails on behalf of both his propriety concern and the proprietary concern of his wife and that he cannot deny any knowledge of the settlement arrived at between his wife's proprietary concern and Focus. It is thus contended that nothing is recoverable from the respondent-company by the petitioner, and since no debt is due, the winding-up petition is not maintainable.

**8.** I have carefully considered the matter. I have also perused the file in Company Petition No.326/2010. It is true that in the Memorandum of Settlement dated 20.05.2011 arrived at between the petitioner (Servel Industries) and his wife (M/s. Innovations) on the one hand and Focus on the other, that a total outstanding of Rs. 69,74,721/- was settled at Rs. 25 lakhs. This amount consisted of the principal sum of Rs. 55,57,721/- and interest of Rs. 14,17,000/-. It prima facie appears that the Memorandum of Settlement was entered into only with reference to the amount payable by Focus to both the petitioner and his wife for material allegedly supplied to Focus. It refers to the fact that M/s. Innovations filed Company Petition No.326/2010 before this Court for winding up of Focus on the ground that it was unable to pay the aforesaid amount to it. There is no reference in the Memorandum of Settlement to the agreement dated 25.01.2007 entered into between the Focus and the respondent-company, clause 5.7 of which made Focus responsible for all consequences arising out of non-payment of dues by the respondent company to the suppliers. Further, the order of this Court passed on 20.05.2011 in Company Petition No.326/2010 refers only to "respondent's debt to the petitioner", which means the amount owed by Focus to Innovations. In the order passed on 16.05.2011 in Company Petition No.326/2010, it was made clear that "in terms of the said settlement,



respondent shall pay a sum of Rs. 25 lakhs in full and final settlement of the amount due and payable not only to the petitioner but also to M/s. Servel Industries Ltd.". Thus it is more than clear that under the MoS dated 20.05.2011, it is only the amount due by Focus, both to the present petitioner and M/s. Innovations, that was sought to be settled. There is no mention in the orders of this Court in Company Petition No.326/2010 about the amount due by the respondent-company. If this factual position alone is taken note of, it would appear that the respondent-company has to fail in its contention.

**9.** But the contention of the learned counsel for the respondent-company is based on clause 5.7 of the agreement dated 25.01.2007 entered into between itself and Focus. I have already extracted the clause. This clause seems to suggest that though the primary responsibility for paying for the supplies of the materials on due dates would be that of the respondent-company, Focus shall be responsible for the consequences arising out of non-payment of the dues by the respondent-company to the suppliers, subject to the condition that such non-payment was not due to any act or omission attributable to the respondent-company. The absence of any reference to the dues of the respondent-company in the orders of this Court in Company Petition No.326/2010 and the fixation of the primary responsibility for the payment in respect of materials supplied to respondent-company on it appears to clinch the decision in favour of the petitioner.

**10.** However, that does not seem to be the end of the matter. In the e-mail sent by Puneet Soni on behalf of his proprietary concern (Servel Industries) and on behalf of his wife's propriety concern (Innovations) on 29.03.2010 (Annexure-R to the Company Petition No.326/2010) he has confirmed that the amount of '63,08,563/- which is due for the financial year 2008-2009 includes an amount of Rs. 3,64,773/- from Alcobrew, which is the respondent-company. This e-mail shows that even according to the petitioner, the amount due from Focus, which was ultimately settled at Rs. 25 lakhs under the Memorandum of Settlement dated 20.05.2011, included the amount of Rs.3,64,733/- due from the respondent-company. The fact that the e-mail was written by Puneet Soni both on behalf of his proprietary concern and on behalf of his wife's proprietary concern furnishes the link not only between them on the one hand and Focus on the other, but also indicates the link between Focus and the respondent-company on the other hand when it mentions

that the amount outstanding from Focus includes the amount outstanding from Alcobrew, the respondent-company in the present proceedings. The agreement between Focus and the respondent-company entered into on 25.01.2007, particularly clause 5.7 thereof, becomes relevant for this reason that though it was the primary responsibility of the respondent-company to pay for the materials supplied to it, the consequences of the non-payment would have to be met by Focus. This in turn means that if the respondent-company failed to pay the amount of Rs. 3,64,773/- due to the petitioner, it would be the liability of Focus to discharge the same. Thus all amounts which, for some reason, were not paid by the respondent-company became the liability of Focus which stood at Rs. 63,08,563/- for the financial year 2008-2009 and at Rs. 64,70,563/- on a subsequent date. Therefore, there can be no dispute that the amount of Rs. 3,64,773/- stood included in the amount of Rs. 69,74,721/- which was the total amount due by Focus. When this amount was settled by payment of Rs. 25 lakhs, it is obvious that the amount of Rs. 3,64,773/- was also part of the settlement and cannot be sought to be recovered again by the petitioner from the respondent-company. The settlement which was recorded by this Court in Company Petition No.326/2010 extinguished the debt of Rs. 3,64,773/- owed by the respondent-company to the petitioner. The petitioner has not succeeded in demonstrating that the amount of Rs. 69,74,721/- is distinct and separate from, and does not include the amount of Rs. 3,64,773/-. In the light of the statement made by the petitioner in the e-mail dated 29.03.2010, the petitioner cannot be permitted now to say, after the settlement has been arrived at, that the amount of Rs. 3,64,773/- due from the respondent-company was not part of the settlement. To permit him to do so would be contrary to the tenor of the Memorandum of Settlement and the entire events leading up to it and would also amount to not giving due weight to the agreement dated 25.01.2007 entered into between the respondent and Focus, particularly clause 5.7 thereof.

**11.** For the above reasons, I am unable to accept the claim of the petitioner that an amount of Rs. 3,64,733/- is still outstanding from the respondent-company in respect of the supply of PoS merchandise by the petitioner together with a sum of Rs. 1,64,140/- claimed as interest on the principal amount at 18% per annum. I accordingly dismiss the company petition with no order as to costs.

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**ILR (2013) IV DELHI 3204**
**CS (OS)**

**SACHIN AND ORS. ....PLAINTIFFS**

**VERSUS**

**KRISHNA KUMARI NANGIA AND ORS. ....DEFENDANTS**

**(JAYANT NATH, J.)**

**CS (OS) NO. : 1325/2011 DATE OF DECISION: 12.07.2013**

**Partition—Suit for partition and possession of Property & declaration—Suit filed by three children of Rajkumari claiming that Rajkumari was married to Pran Nath and that the three plaintiffs were born out of the said wedlock—Defendants denied that there was any marriage between Rajkumari and Pran Nath and instead claimed the defendant no.1 was married to Pran Nath and defendants no. 2 to 4 were children of Pran Nath. Held that plaintiffs failed to prove the marriage between Rajkumari and Pran Nath. Held that a presumption in favour of marriage does not arise merely on the ground of cohabitation but it must be cohabitation with 'habit' and 'repute'.**

**Hindu Marriage Act, 1955—Section 16 held that Section 16 (1) applies only in a case in which marriage is infact proved, which may otherwise be null & void as per Section 11 of the Act—Benefit of Section 16(1) is not available to the plaintiffs in absence of proof of marriage between Pran Nath & Raj Kumar.**

**Indian Evidence Act—Section 112—Admittedly, Raj Kumari was married to one Krishan Lal Batra and he was alive—Held that even Section 112 comes in the way of relief to plaintiffs as there was a presumption**

**of plaintiffs being legitimate children of Krishna Lal Batra and Raj Kumari.**

**[Di Vi]**

**APPEARANCES:**

**FOR THE PLAINTIFF** : Mr. Samrat Nigam and Ms. Ankita Mahajan, Advocates.

**FOR THE DEFENDANT** : Mr. Sanjiv Bahl and Mr. Eklavya Bahl, Advocates.

**CASES REFERRED TO:**

1. *Revanasiddappa and Anr.* vs. *Mallikarjun and Ors.* (2011) 11 SCC 1.
2. *Bharatha Matha and Anr.* vs. *R. Vijaya Renganathan and Ors.* AIR 2010 SC 2685.
3. *Dibakar Behera & Anr.* vs. *Padmabati Behera & Anr.* AIR 2008 Orrissa 92.
4. *Shyam Lal @ Kuldeep* vs. *Sanjeev Kumar,* AIR 2009 SC 3115.
5. *Lata Singh* vs. *State of U.P. and Anr.* AIR 2006 SC 2522.
6. *Shree Bhagwan and Ors* vs. *Suraj Bhan and Ors.* 2006 VIII AD (Del) 380.
7. *Laxmi Sahoo and Anr.* vs. *Chaturbhuj Sahoo and Anr.* reported in AIR 2003 Orissa 8.
8. *Ramkali and Anr.* vs. *Mahila Shyamwati & Ors.,* AIR 2000 MP 288.
9. *Mrs. Sudershan Karir and Ors* vs. *The State and Ors.* AIR 1988 Del 368.
10. *Chiruthakutty* vs. *Subramanian* AIR 1987 Kr. 5.
11. *Perumal Nadar (dead) by LR* vs. *Ponnuswami Nadar (minor)* AIR 1971 SC 2352.
12. *C.A. Kalla Maistry* vs. *Kanniammaj & Ors.* AIR 1963 Mad 210.



13. *Raghavan Pillai* vs. *Gourikutty Amma and Ors.* AIR 1960 Ker. 119.
14. *Kundan Singh and Ors* vs. *Hardan Singh* AIR 1953 All. 501.
15. *G.R. Sane* vs. *D'S. Sonavane & Com & Ors.* AIR (33) 1946 Bom 110.
16. *Shuja Uddin Ahmad* vs. *Emperor* AIR 1922 All 214 (1).

**RESULT:** Suit Dismissed.

**JAYANT NATH, J.**

**1.** The present Suit has been filed by the plaintiffs seeking a decree of partition by metes and bounds and possession of property AB-14, Safdarjung Enclave, Community Centre, New Delhi. The plaintiffs also seek a decree of declaration declaring that the plaintiffs are the owners of the respective shares in respect of the said property and a decree for rendition of accounts in favour of the plaintiffs and against the defendants and other reliefs.

**2.** The brief facts on the basis of which the present Suit is filed are that plaintiffs 1 to 3 submit that their mother Smt.Raj Kumari married Shri Pran Nath Nangia on 12.12.1963 at Delhi according to Hindu Rites and Customs. It is stated that out of the said wedlock the plaintiffs were respectively born. It is further submitted that the property AB-14, Safdarjung Enclave, Community Centre, New Delhi (hereinafter referred to as the 'Suit property') was purchased by their father late Shri Pran Nath Nangia during his lifetime and he constructed various shops and rooms from his own funds on the property. Shri Pran Nath Nangia died on 22nd January, 1985. The plaint is silent about the relationship between the plaintiffs and the defendants. It is, however, claimed that the plaintiffs have requested the defendants a number of times to partition of the suit property but to no effect. Hence the present suit is filed.

**3.** The defendants have filed a written statement. The defendants have submitted that late Shri Pran Nath Nangia is the husband of defendant No.1 Smt.Krishna Kumari Nangia and the said late Shri Pran Nath Nangia and defendant No.1 got married on 20th January, 1949. The defendants No.2 to 4 are the daughters of late Shri Pran Nath Nangia and defendant No.1. It is stated that on the death of late Shri Pran Nath Nangia the defendants have inherited the rights to the suit property. It is stated that the said Smt.Raj Kumari mother of the plaintiffs is actually the wife of

Shri Krishan Lal Batra. Smt. Raj Kumari is said to have also claimed that Late Shri Pran Nath Nangia had executed a Will in her favour though the Will is a forged and fabricated one. It is pointed out that said Smt.Raj Kumari mother of the plaintiffs filed a suit bearing No.429/1985 which was pending in the Court of Shri M.K.Gupta ,the then Sub-Judge First Class, where she has stated that there was a Will executed allegedly in her favour by Late Shri Pran Nath Nangia dated 4.3.1984. Nothing is stated above about the outcome of the said suit by the parties. It is further stated that in view of the conduct of the said Smt.Raj Kumari mother of the plaintiffs, defendants were forced to file an appropriate Suit seeking a declaration to the effect that the defendants are owner/ landlord of the suit property and that Smt. Raj Kumari mother of the plaintiff has no right or interest in the suit property. Accordingly, Suit No.1550/1991 titled Mrs.Krishna Kumari Nangia versus Smt.Raj Kumari was filed before this Court. The Suit was decreed by the Court of Mr.Justice K.Ramamoorthy vide order dated 26.07.1995 and the defendants herein were declared as the exclusive owners of the suit property and Smt.Raj Kumari was held to have no right or interest in the suit property. Based on the said decree, it is stated that Delhi Development Authority executed a perpetual Lease Deed for the suit property dated 29.05.1997 in favour of the defendants rejecting the claim of Smt.Raj Kumari based on the forged and fabricated Will of Late Shri Pran Nath Nangia. Hence, it is stated that in view of the above facts the plaintiffs have no right, title or interest in the suit property. It is further submitted by the defendants that plaintiffs are not the children of Late Shri Pran Nath Nangia and as such have no right, title or interest in the property of Late Shri Pran Nath Nangia. It is reiterated that the plaintiffs are the children of Smt.Raj Kumari and her husband Shri Krishan Lal Batra and that both their parents are alive.

**4.** On the basis of the above averments issues were framed on 24th May, 2006 as follows:-

> "1. Whether the plaintiff has not approached the court with clean hands and has suppressed various material facts as disclosed in the written statement? OPP.
>
> 2. Whether the plaintiff has got any right, title or interest in the suit property? Onus on parties.
>
> 3. Whether the suit has not been properly valued for the court fees and jurisdiction? OPD.



> 4. Whether the suit is barred by time? OPD
>
> 5. Whether Smt.Raj Kumar was legally wedded wife of Sh.Pran Nath Nangia? Onus on parties.
>
> 6. Whether the plaintiff is entitled to a decree of partition? OPP
>
> 7. Whether the plaintiff is entitled to a decree of declaration? OPP
>
> 8. Whether the plaintiff is entitled to a decree of rendition of accounts? OPP
>
> 9. Whether the plaintiff is entitled to a decree of permanent injunction? OPP
>
> 10. Relief."

A perusal of the issues would show that some of the onus have been wrongly mentioned. By consent of the parties the onus has been corrected as follows:

> "1. Whether the plaintiff has not approached the court with clean hands and has suppressed various material facts as disclosed in the written statement? OPD
>
> 2. Whether the plaintiff has got any right, title or interest in the suit property? OPP.
>
> 3. Whether the suit has not been properly valued for the court fees and jurisdiction? OPD.
>
> 4. Whether the suit is barred by time? OPD
>
> 5. Whether Smt.Raj Kumar was legally wedded wife of Sh.Pran Nath Nangia? OPP
>
> 6. Whether the plaintiff is entitled to a decree of partition? OPP
>
> 7. Whether the plaintiff is entitled to a decree of declaration? OPP
>
> 8. Whether the plaintiff is entitled to a decree of rendition of accounts? OPP
>
> 9. Whether the plaintiff is entitled to a decree of permanent injunction? OPP
>
> 10. Relief."

**5.** I will now first deal with Issue Nos. 2 and 5 which are the most

crucial issues namely:

"2. Whether the plaintiff has got any right, title or interest in the suit property? OPP.

5. Whether Smt.Raj Kumar was legally wedded wife of Sh.Pran Nath Nangia? OPP"

**6.** It is the contention of the plaintiff that their mother Smt. Raj Kumari married Sh. Pran Nath Nangia on 12.12.1963 in Delhi according to Hindu rites and customs. PW1, namely, plaintiff No.1 has said so in his affidavit. He also relied upon kundali-milan of his father and mother which has been exhibited as PW1/A. He has stated that out of the wedlock, plaintiff Nos. 1 to 3 were born. He relies upon his birth certificate issued by the Registrar of Birth and Death, Civil Lines Zone, Municipal Corporation, Delhi which has been marked as Ex. PW 1/B which states that he is the son of late Shri Pran Nath Nangia. (Plaintiff No.1's name is not mentioned in the said Birth Certificate.) He also relies upon the degree certificate of B'Sc. for the year 1987 issued by Delhi University for his elder sister Ms. Neelam which is Mark A and the school certificate/ Board certificate of his elder sister Ms. Shallu which is Ex. PW1/1. It is stated in the said documents that the two sisters are the daughters of Late Shri Pran Nath Nangia. Documents Ex. PW1/A and 1/B have been exhibited, subject to objections of the counsel for the defendant about their being not tendered in accordance with the recognised mode of proof.

**7.** Apart from himself PW1 the plaintiff has also examined two witnesses namely PW3 Sh. Preetam Singh and PW4 Sh. Deepak Sharma, who were stated to be the neighbours of the plaintiffs, parents while they were staying in Roshanara Road. They have deposed that Sh. Pran Nath Nangia and Smt. Raj Kumari were living together as husband and wife.

**8.** The plaintiff has also led evidence of one Mr. J.P. Garg working as Assistant Secretary in CBSE Ajmer who has placed on record the copy of the certificate of CBSE Secondary School Examination along with mark sheet of Ms. Shallu.

**9.** The learned counsel for the plaintiffs submits that irrespective of whether he is able to prove the marriage ceremonies of his parents, in view of Section 16 of the Hindu Marriage Act, 1955, the plaintiff would still be entitled to a share in the suit property. Section 16 of the Hindu Marriage Act reads as under:



"16. Legitimacy of children of void and voidable marriages. – (1) Notwithstanding that marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act."

**10.** The learned counsel for the plaintiff relies on **Shree Bhagwan and Ors v. Suraj Bhan and Ors.** 2006 VIII AD (Del) 380 and **Bharatha Matha and Anr v. R. Vijaya Renganathan and Ors.** AIR 2010 SC 2685, to contend that he need not prove the marriage ceremony of his parents and the mere fact that the plaintiffs are the children of late Shri Pran Nath Nangia, would itself in view of the provisions of Section 16 of the 1955 Act give rights to the plaintiffs in the suit property.

**11.** The defendants have denied the factum of the marriage of late Shri Pran Nath Nangia and Smt.Raj Kumari. The defendants have filed the evidence of only one witness i.e. of defendant No.1 (DW1). Defendant No.1 in her evidence by way of affidavit has made the aforementioned averment i.e. that Shri Pran Nath Nangia never married Smt. Raj Kumari. Defendant No.1 in her evidence also points out that she was married to Late Shri Pran Nath Nangia on 21.1.1949 and defendants No.2 to 4 are her daughters born from the wedlock of Shri Pran Nath Nangia. She alleges that after the death of Shri Pran Nath Nangia, the said Mr.Raj Kumari started alleging that she was married to Shri Pran Nath Nangia before his death. It is also stated that Smt.Raj Kumari filed the suit bearing No.429/1985 which is pending in the court of Shri M.K.Gupta Sub-Judge, First Class, Delhi where it has been alleged that late Shri Pran Nath Nangia executed a Will dated 4.3.1984 in her favour. It is stated that defendant herein were not made a party to the Suit. No further details about the Suit have been mentioned. It is further stated by defendants that in view of the allegedly forged and fabricated Will dated 5.3.1984, propounded by Smt. Raj Kumari the defendants filed Suit No.1550/1991 titled Smt.Krishna Kumari Nangia and others versus Mrs. Raj Kumari before this Court which was decreed on 26.7.1995. Copy of the order has been marked as Ex.PW1/1. It is further stated that pursuant to the said decree a perpetual lease deed dated 25.5.1997 was executed by DDA in favour of the defendants which has been marked as Ex.DW1/

2. It is contended that in view of the said orders and perpetual lease the defendants are the absolute owners of the suit property.

**12.** Learned counsel appearing for the defendant has also submitted that to get the benefit of Section 16 of the 1955 Act, the plaintiffs had to prove marriage of late Shri Pran Nath Nangia and Smt. Raj Kumari. It is contended that Section 16 applies only where a marriage is null and void under Section 11 or where a decree of nullity is granted in respect of that marriage under the Act. Hence in the absence of a marriage, the question of a marriage being null and void or a decree of nullity being granted to the marriage cannot and does not arise. For the above submissions, learned counsel for the defendant relies upon **Mrs. Sudershan Karir and Ors v. The State and Ors.** AIR 1988 Del 368 and **Revanasiddappa and Anr v. Mallikarjun and Ors.** (2011) 11 SCC 1.

**13.** It is also the contention of the learned counsel for the defendant that the aforesaid judgment of **Bhartha matha** (supra), of the Supreme Court would apply squarely to the facts of the present case. He has pointed out that in the cross examination of PW 1/plaintiff No.1, admits that his mother Smt. Raj Kumari married to Sh. Krishan Lal Batra. He submits that there is no denial of the fact that the mother of the plaintiff Smt. Raj Kumari and the said Krishan Lal Batra are alive. He further submits that the plaintiff has failed to bring on record any evidence to show that Smt. Raj Kumari and Sh. Krishan Lal Batra did not have access to each other at any point of time when the plaintiffs were conceived/born. He hence submits that in view of the interpretation of Section 112 of the Indian Evidence Act, 1872 as stated in the above judgment of the Hon.ble Supreme Court a presumption would arise that plaintiffs are the children of Smt. Raj Kumari and Shri Krishan Lal Batra.

For the above propositions he also relies upon the following judgments:

(i) **Kundan Singh and Ors v. Hardan Singh** AIR 1953 All. 501;

(ii) **G.R. Sane v D'S. Sonavane & Com & Ors.** AIR (33) 1946 Bom 110;

(iii) **C.A. Kalla Maistry v Kanniammaj & Ors.** AIR 1963 Mad 210;

(iv) **Shyam Lal @ Kuldeep v. Sanjeev Kumar & Ors.** AIR 2009 SC 3115;



(v) **Raghavan Pillai v. Gourikutty Amma and Ors.** AIR 1960 Ker. 119; **Chiruthakutty v. Subramanian** AIR 1987 Kr. 5

(vi) **Perumal Nadar (dead) by LR v. Ponnuswami Nadar (minor)** AIR 1971 SC 2352;

(vii) **Shuja Uddin Ahmad v. Emperor** AIR 1922 All 214 (1)

(viii) **Dibakar Behera & Anr v. Padmabati Behera & Anr.** AIR 2008 Orrissa 92.

**14.** In my view, the plaintiffs have failed to prove that they have any right or title in the suit property or that Smt.Raj Kumari is the legally wedded wife of Shri Pran Nath Nangia.

**15.** The sum and substance of evidence led by the plaintiff to prove the factum of marriage of Smt.Raj Kumari with late Shri Pran Nath Nangia is only confined to one para in his affidavit by way of evidence. The said para, namely, para 2 of the Affidavit of Shri Sachin PW 1 reads as follows:

> "2. I say that my mother Smt. Raj Kumari, was married with Sh.Pran Nath Nangia s/o Late Sh.Ghanshyam Dass Nangia, on 12.12.1963 at Delhi, according to Hindu Rites and Customs, in the presence of respectable persons of both the families. The original Kundli Milan of my mother and father is exhibited as Ex.PW-1/A. Out of the said wedlock, myself and my elder sisters Mrs.Neelam and Mrs'Shallu respectively were born. The birth certificate of myself issued by Registrar Birth and Death, Civil Line Zone, Municipal Corporation of Delhi, is exhibited as Ex.PW-1/B. The Degree Certificate of B'Sc. passed in the year 1987 issued by Delhi University, Delhi of my elder sister Mrs.Neelam is exhibited as Ex.PW-1/C and School Certificate/Degree Certificate of my elder sister Smt'Shallu, is exhibited as Ex.PW-1/D."

**16.** Apart from the above averments there are the statements of PW 3 and 4 the alleged neighbours who have said that Smt.Raj Kumari and late Shri Pran Nath Nangia stayed together. There is no other evidence on record to show the marriage of Smt.Raj Kumari with late Shri Pran Nath Nangia. The affidavit of PW1, plaintiff is devoid of details. No details or evidence is given as to where the marriage ceremony allegedly took place, who all were present in the marriage ceremony. It is also not explained as to under what circumstances the marriage took place and

as to after the said marriage how long the parties resided together and if so, where did the parties reside together. There is no averment or evidence to show that late Shri Pran Nath Nangia took care of the household expenses of Smt.Raj Kumari and the plaintiffs including the schooling and other expenses. There is also no explanation given as to what was the relationship between said late Shri Pran Nath Nangia and defendant No.1 before 1963 or after 1963. One also cannot lose sight of the fact that late Shri Pran Nath Nangia died in 1984. The suit has been filed in 2005 twenty one years after the death of late Shri Pran Nath Nangia. No explanation for the delay are given in the plaint or the evidence of the plaintiff. There is no attempt to explain about what happened in the suit filed by Smt.Raj Kumari based on a Will of late Shri Pran Nath Nangia. Clearly basic details of evidence to show that Shri Pran Nath Nangia and Smt.Raj Kumari were ever married are missing. It is no doubt true that the defendant No.1 has in her evidence also given absolutely no details about the life of late Shri Pran Nath Nangia. Defendant No.1 also does not aver whether Shri Pran Nath Nangia stayed with her from 1949 till his death. However, it was for the plaintiff to establish their case which they have completely failed.

**17.** As pointed out by the Madhya Pradesh High Court in the case of **Ramkali and Anr. Vs. Mahila Shyamwati & Ors.,** AIR 2000 MP 288, a presumption in favour of marriage does not arise merely on the ground of cohabitation but it must be cohabitation with 'habit' and 'repute' The condition of 'habit' and 'repute' must be satisfied beyond doubt. The court further held that a mere statement that a person is or is not married is not admissible under Section 50 of the evidence Act. What the court wants under Section 50 of the Act is opinion expressed by conduct of any person who as a member of the family or otherwise has special means of knowledge of the relationship.

In fact, a reference may be had to illustration (a) to Section 50 of The Evidence Act 1872 which reads as follows:-

"50. .....

(a) The question is, whether A and B were married.

The fact that they were usually received and treated by their friends as husband and wife, is relevant."

The plaintiffs here have failed to prove cohabitation between Sh. Pran Nath Nagia and Smt. Raj Kumari. PW1 does not state that his



parents cohabitated together. There is of course the statement of PW3 and PW4. But merely stating that Sh. Pran Nath Nagia and Smt. Raj Kumari stayed together as husband and wife does not prove the factum of marriage between Sh. Pran Nath Nagia and Smt. Raj Kumari. PW3 and PW4 are not related to Shri Pran Nath Nangia and Smt. Raj Kumari. They also do not have special means of knowledge.

**18.** Similarly reliance cannot be placed upon the documents filed by the plaintiff namely birth certificate being PW1/B and Board Certificate being PW1/1 or Kundali Milan PW1/A. As far as the kundali Milan and birth certificates are concerned the best person to prove the said documents have not been summoned. Further, the documents are self-generated documents in the sense that it has not been shown that Sh. Pran Nath Nangia signed any application which resulted in these documents being issued.

**19.** The plaintiff has also filed some photographs which were allowed to be placed on record as secondary evidence on 06.03.2007 by the order of learned Addl. District Judge. There is no reference to these photographs in the evidence filed by PW1/plaintiff nor have any submissions been made regarding the effect of these photographs.

**20.** One also cannot help noting that the best person to lead evidence in this case was Smt. Raj Kumari herself. She has not entered the witness box. PW3 and PW4 have deposed that the said Smt. Raj Kumari is not feeling well and is going under mental depression. However in their cross examination both stated that they have come to depose at the instance of Smt. Raj Kumari and that the said Smt. Raj Kumari had requested them to come and depose in the matter. Plaintiffs have also failed to place on record any medical record to show that Smt. Raj Kumari was mentally unwell. It is obvious that she was the best person to prove the factum of her marriage with Late Shri Pran Nath Nangia.

**21.** Hence, I hold that there is no proof to show that Smt.Raj Kumari was the legally wedded wife of late Shri Pran Nath Nangia or that any marriage ceremony took place.

**22.** I have also to reject the submission made by the learned counsel for the plaintiff that irrespective of whether the factum of marriage between late Shri Pran Nath Nangia and Smt.Raj Kumari is proved, the plaintiff would still be entitled to a claim in the suit property in view of section 16(1) of the 1955 Act.

**23.** In my view, the judgments cited by the learned counsel for the defendant apply to the facts of this case. In **Sudershan Karir** (supra) a Single Judge of this Court held that Section 16 (1) of the 1955 Act applies only in a case in which a marriage is in fact proved to have taken place between two persons, which may otherwise be null and void as per Section 11. Similar are the observations of the Hon.ble Supreme Court in the case of **Revanasiddappa** (supra). The Hon.ble Supreme Court in para 37 of the judgment held as follows:

> "37. However, one thing must be made clear that benefit given under the amended Section 16 is available only in cases where there is a marriage but such marriage is void or voidable in view of the provisions of the Act."

**24.** In contrast, the judgments relied upon by the learned counsel for the plaintiff do not support the contention raised by him, namely, that proving of marriage ceremony of parents is not necessary for application of Section 16 of the 1955 Act. In **Shree Bhagwan** (supra), the judgment of this Court has been passed on the facts of that case. In that case, the plaintiffs themselves pleaded that the father had two wives though in certain parts of the plaint they had referred to the step mother as father's keep. Hence the court accepted the fact that the father of the plaintiff had two wives.

**25.** Similarly, reliance of the learned counsel for the plaintiff on the judgment of the Supreme Court in the case of **Bharatha Matha** (supra) is also misconceived. In that case, the Hon.ble Supreme Court has, relying on an earlier judgment of the Supreme Court in the case of **Lata Singh v. State of U.P. and Anr.** AIR 2006 SC 2522, reiterated that living in relationship is permissible only in unmarried major persons of heterogeneous sex. In case one of the said persons is married, the man may be guilty of offence of adultery and it would amount to an offence under Section 497 IPC.

**26.** Reference in the above context may also be had to the judgment of Madhya Pradesh High Court in **Ramkali and Anr. Vs. Mahila Shyamwati** (supra), where the Madhya Pradesh High Court held as follows:

> "In the aforesaid circumstances, when there is no proof of soleminsation of marriage and there is further no proof that there was a de jure marriage or even a de facto marriage where during long cohabitation as husband and wife with habit and repute a



> child is born, there can be no occasion whatsoever for making available the statutory presumption envisaged under Section 16 of the Hindu Marriage Act, 1955 securing the status of a legitimate child in favour of such a child born out of a union which was either viod ab initio or declared to be so under a decree passed under Section 11 or 12 of the Hindu Marriage Act, 1955."

Same view has been expressed by the Orissa High Court in the case of **Laxmi Sahoo and Anr. Vs. Chaturbhuj Sahoo and Anr.** reported in AIR 2003 Orissa 8 where it was held that it is only where marriage between the parties is proved, even though it is declared invalid, the child born through their union could claim right under Section 16 of the Hindu Marriage Act. In the book by Kumud Desai "Indian Law of Marriage and Divorce" it has, while writing on Section 16 of the Hindu Marriage Act, been noted as follows:

> "Children are entitled to the benefit under Section 16 only in case the marriage of the mother and the father was void or voidable, where there is no marriage, children have no right." (page 228, 7th Ed.)

**27.** In view of my finding above that the plaintiffs have failed to prove the marriage of Shri Pran Nath Nangia and Smt. Raj Kumari, the benefit of Section 16(1) of the Hindu Marriage Act will not be available to the plaintiff. In view of the above judgments it is clear that section 16(1) applies only where the marriage ceremony between the parties is proved but is null and void under Section 11 of the said Act or where a decree of nullity has been granted in respect of that marriage. Where there is no marriage and where it is an admitted position that one of the parties is still married, Section 16(1) of the 1955 Act would have no application.

**28.** Another obstruction to the claim and contentions of the plaintiff is Section 112 of The Indian Evidence Act. One cannot lose sight of the fact that it is an admitted position of the plaintiff that their mother Smt.Raj Kumari married Shri Krishan Lal Batra. No details have been given by the plaintiff as to whether the said marriage subsists or not. It is also not denied that Shri Krishan Lal Batra was alive. Plaintiff No.1 in his cross says that he is not aware whether Shri Krishan Lal Batra is alive or not. There is substance in the contention of the learned counsel for the defendant that Section 112 of the Evidence Act would hit the claim of the plaintiffs. In **Bharat Matha** (supra) the Hon.ble Supreme Court

held that Section 112 of the Evidence Act provides for a presumption of a child being legitimate and such a presumption can only be displaced by strong preponderance of evidence and not merely by balance of probabilities. Similarly, in the case of **Shyam Lal @ Kuldeep versus Sanjeev Kumar,** AIR 2009 SC 3115 the Hon.ble Supreme court held that once validity of a marriage is proved then there is a strong presumption about legitimacy of a child born during continuation of the valid marriage.

**29.** Similar position was upheld in the case of **Perumal Nadar** (supra). In para 12 of the said Judgment the Hon.ble Supreme Court stated as follows:

> "12. Nor can we accept the contention that the plaintiff, Ponnuswami is an illegitimate child. If it be accepted that there was a valid marriage between Perumal and Annapazham and during the subsistence of the marriage the plaintiff was born, a conclusive presumption arises that he was the son of Perumal, unless it be established that at the time when th plaintiff was conceived, Perumal had no access to Annapazham. There is evidence on the record that there were in 1957 some disputes between Annapazham and Perumal. Annapazham had lodged a complaint before the Magistrate's Court that Perumal had contracted marriage with one Bhagvathi. That complaint was dismissed and the order was confirmed by the High Court of Madras. Because of this complaint, the relations between the parties were strained and they were living apart. But it is still common ground that Perumal and Annapazham were living in the same village, and unless Perumal was able to establish absence of access the presumption raised by Section 112 of the Indian Evidence Act will not be displaced."

**30.** In view of section 112 of the Evidence Act it is clear that the submission of the plaintiff even otherwise cannot be accepted. Hence, I hold that the plaintiffs have no right, title or interest in the suit property.

**31.** Issues No.1 and 3 are reproduced as under:-

> "1.Whether the plaintiff has not approached the court with clean hands and has suppressed various material facts as disclosed in the written statement? OPP.
>
> 3.Whether the suit has not been properly valued for the court fees and jurisdiction? OPD.



No submissions have been made by the defendants on the above two issues. Hence, both the issues are held in favour of the plaintiffs.

**32.** Issue No. 4.

"Whether the suit is barred by time? OPD"

Learned counsel for the defendant has argued that late Shri Pran Nath Nangia died in 1985 and the suit has been filed in 2005 and hence the Suit is barred by Limitation. On the other hand, learned counsel for the plaintiff submits that the suit is mainly for partition of the suit property and the decree of declaration sought is of no consequence whatsoever. There is merit in the submissions of the counsel for the plaintiffs. It is, hence, held that the Suit is not barred by limitation.

**33.** Regarding issue Nos. 6,7,8 and 9, in view of my order on Issue Nos. 2 and 5, no relief as sought by the plaintiff can be granted.

**34.** The Suit is dismissed. No order as to costs.

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**ILR (2013) IV DELHI 3218**
**CS (OS)**

**SANGIT AGRAWAL ....PLAINTIFF**

**VERSUS**

**PRAVEEN ANAND & ANR. ....DEFENDANT**

**(JAYANT NATH, J.)**

**CS (OS) NO. : 2039/2008 DATE OF DECISION: 19.07.2013**

**Specific Performance—Suit for Specific Performance of Agreement to Sell dated 28.09.2006—Whether plaintiff was ready and willing to perform his part of contract—Readiness and willingness has to be judged with regard to the conduct of parties and attending circumstances—It depends on fact & circumstances of each case—One would normally expect that if the**

**plaintiff is willing, he would unequivocally inform the defendants that he has requisite funds to complete the transaction and other processes, purchase of stamp papers etc. would be completed—If defendant is evasive plaintiff expected to vigorously follow up and chase the defendant atleast around the time of completion—In this case plaintiff at the most met the defendant only once in early 2007 whereas the transaction was to be completed within three months—No written correspondence before 2.04.2008—Whole transaction managed by one Mr. R and plaintiff never contacted the defendants or Mr. R to complete transaction—Plaintiff was not possessed of sufficient funds to complete the transaction—Held no cogent evidence to show that plaintiff was willing to perform his part of contract.**

**[Di Vi]**

**APPEARANCES:**

**FOR THE PLAINTIFF** : Mr. C.S. Yadav, Advocate.

**FOR THE DEFENDANTS** : Ms. Shobhna Takiar, Advocate.

**CASES REFERRED TO:**

1. *N.P. Thirugnanam* vs. *Dr. R. Jagan Mohan Rao* (1995) 5 SCC 115.
2. *Prakash Chandra* vs. *Angad Lal and Ors.* AIR 1979 SC 1241.

**RESULT:** Suit Dismissed.

**JAYANT NATH, J.**

**1.** The plaintiff has filed the present Suit seeking a decree of Specific Performance of Agreement to Sell dated 28th September, 2006 and for directions to the defendant to execute all necessary documents of sale in favour of the plaintiff as per the said Agreement.

**2.** The brief facts of the case as set out by the plaintiff in the Plaint are that defendants approached the plaintiff, that defendant No.1 is the



sole and exclusive owner of Plot No.143, Pocket-6, block 8 Sector 28 Rohini, Phase-IV, Residential Scheme, measuring 60 sq. meters and allotted by Delhi Development Authority. It is stated that defendant No.2 claimed to be the General Power of Attorney holder of defendant No.1 in respect of the abovesaid plot. On 28th September, 2006 an Agreement to Sell took place between the plaintiff and defendant No.1 whereby the defendant agreed to sell the aforesaid plot for a total consideration of Rupees 23,50,000/-. In advance an earnest money/bayana of Rupees 4,50,000/- was also paid. The Agreement to Sell was signed by defendant No.2 on behalf of defendant No.1.

**3.** It is further submitted by the plaintiff that the Agreement to Sell stipulated that the transaction shall be completed within a period of three months. It is further stated that the defendants had agreed to convert the property from leasehold to freehold within three months and simultaneously the defendant would transfer the absolute rights and title of the property in favour of the plaintiff.

**4.** It is further submitted by the plaintiff that after execution of the Agreement to Sell, the plaintiff made innumerable queries from the defendants about the execution of the sale documents. The plaintiff claims to have informed the defendant that he had arranged the required money from his friends and relatives and is ready and willing to deliver the same to the defendant at the time of registration of the sale documents. It is stated that defendant No.2 on each occasion on the pretext that defendant No.1 has gone to Australia avoided to execute the documents. It is also stated that the defendants also informed the plaintiff that due to this reason the formalities with DDA could not be completed and that the same shall be done immediately once defendant No.1 returns from Australia. It is further stated in the Plaint that the plaintiff came to know that the defendants are negotiating with other parties. The plaintiff sent a legal notice dated 2nd April, 2008 through his Advocate calling upon the defendants to execute the sale documents. The legal notice sent to Defendant No.1 was received unserved with the remark "no such person in part I". It is stated that the Legal Notice sent to defendant No.2 was served. Plaintiff is also stated to have filed a complaint dated 8th August, 2008 with the Police Station Greater Kailash, New Delhi against defendant No.1. On the above averments, the plaintiff filed the present Suit seeking a decree of Specific Performance of Agreement dated 28.09.2006. The Suit was filed on 25th September, 2008.

**5.** Defendants No.1 and 2 have filed a common Written Statement. It is stated by them that defendant No.2 was approached by one Mr. Ravi Raj who represented that he would get the said plot in question sold and that he had a prospective buyer, namely, the plaintiff. It is further stated that said Mr.Ravi Raj got drafted and signed an Agreement to Sell which only had signatures of Defendant No.2 and that the said Mr.Ravi Raj paid an amount of Rs.4,50,000/- in advance. It is submitted by the defendant that neither defendant No.1 nor defendant No.2 have met the plaintiff in any manner whatsoever nor received any money from him. It is the contention of the defendants that defendant No.2 visited Australia from November, 2006 to 11th January, 2007. The said defendant No.2 continued to contact Mr.Ravi Raj for completing the sale, as defendant No.1 was in urgent need of funds for purchase of a house in Australia but for some reason or the other the said Mr.Ravi Raj kept postponing the matter. The defendant No.2 claimed to have remained in touch with the said Mr.Ravi Raj. It is stated that from the date of execution of the alleged Agreement to Sell till the date of filing of the present Suit, the plaintiff never contacted the defendants at any point of time. It is the contention of the defendants that they have been constantly following up the matter with Mr.Ravi Raj for completion of the transaction and that the plaintiff at no stage has contacted the defendants in any manner whatsoever and has failed to complete the transaction. It is also stated that they even offered to the said Mr.Ravi Raj to return the amount already received in case he was not in a position to get the transaction completed.

**6.** In the light of the above pleadings, the following issues were framed by this Court on 19th May, 2009:

> "1.Whether the plaintiff has been ready and willing to perform his part of the agreement to sell? OPP
>
> 2.Whether the discretion in the grant of the relief of specific performance is to be exercised in favour of the plaintiff? OPP
>
> 3.Whether the defendants had not dealt with the plaintiff and had dealt with Mr.Ravi Raj only and whether the said Mr.Ravi Raj had defaulted in any of the obligations undertaken by him and if so to what effect? OPD
>
> 4. Relief."



**7.** ISSUE NO.1

> "1.Whether the plaintiff has been ready and willing to perform his part of the agreement to sell? OPP"

Issue No.1 is the main issue which is whether the plaintiff has been ready and willing to perform his part of the Agreement to Sell. I will deal with the said issue first.

**8.** There is some controversy regarding the Agreement to Sell. The defendants in their Written Statement have not accepted the validity and authenticity of the Agreement to Sell dated 28.09.2006. It is stated by the defendant that the same was got executed only from defendant No.2 and that the plaintiff had never signed the said document in their presence. It is also stated that defendant never received any amount nor any advance/ consideration from the plaintiff.

**9.** The above submissions of the defendants are without merits. The Agreement to Sell has been admitted by counsel for defendants No.1 and 2 and was duly exhibited as Exhibit P-1. There was no protest to the said exhibition at any subsequent stage. Even otherwise, a perusal of the said Agreement to Sell shows that the blank that is filled up by hand is the name of the defendant No.2 Shri S.K.Chopra. The name of the plaintiff Mr'Sangit Aggarwal is typed out. Further, defendant No.2 has admitted in his cross-examination that he received a sum of Rs.4.5 lacs and that the said amount was deposited in the bank account of defendant No.1 at Punjab National Bank, Greater Kailash, New Delhi. This fact was stated in the cross-examination of defendant No.2 on 28.11.2011. Defendant No.1 also has at no stage denied that defendant No.2 was not authorised on her behalf to sign the Agreement to Sell. Hence submission of the defendant on this issue are without merit. It is obvious that defendant No. 2 has signed the Agreement on behalf of defendant No. 1 and received advance that was also paid to defendant No. 1. In view of the above, it is clear that a concluded agreement took place between plaintiff and defendant No.1 for the suit property in question.

**10.** The question, however, remains as to whether the plaintiff was ready and willing to perform his part of the Agreement to Sell. The Plaintiff in the Plaint has claimed that after execution of the agreement and receipt of Rs.4.5 lacs by the defendants, the defendants started avoiding the plaintiff. He further states that he informed the defendants

that he had arranged the required money from his friends and relatives and is ready and willing to deliver the same but defendant No,2 on the pretext that defendant No.1 has gone to Australia avoided to execute the documents. It is also stated that formalities with DDA could not be completed by the defendant. The above averments have also been made in evidence by way of affidavit filed by PW1, the plaintiff.

**11.** Apart from his own Affidavit by way of evidence the plaintiff has placed on record statement of his account in the Hong Kong and Shangai Bank Corporation, statement of Euroasia Global in Allahabad Bank and a communication dated 9th December, 2006 written by Tibson Investment Private Limited addressed to the plaintiff which purports to provide a loan of Rs.20 lacs repayable within one year on security of the Suit property. This letter was proved by PW-4 Shri Pramod Kumar Tibrewala, Finance Adviser, Tibson Investment Private Limited. The letter was marked as Ex.PW4/1. The bank statement regarding his account in the Hong Kong and Shanghai Bank Corporation Limited is filed by PW 2 and marked as Ex.PW2/1. The statement of accounts of Euro Asia Global in Allahabad Bank is filed by PW3. Plaintiff claims to be a partner of the firm Euroasia Global. On the basis of the above evidence, the plaintiff submits that he has been ready and willing to perform his part of the Agreement to Sell.

The Factum of readiness and willingness to perform the plaintiff's part of the contract is to be adjudged with regard to the conduct of the parties and attending circumstances.

**12.** Reference may be had to relevant portion of Section 16 of the Specific Reliefs Act which reads as follows:

> "16. Personal bars to relief. – Specific performance of a contract cannot be enforced in favour of a person – ***"
>
> (c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.
>
> Explanation.-For the purposes of clause (c),
>
> (i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;
>
> (ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.



It is indisputable that in a suit for specific performance of contract, the plaintiff must establish his readiness and willingness to perform his part of the contract. The question as to whether the onus which is on the plaintiff is discharged or not will depend upon facts and circumstances of each case.

In **JP Builders v. A. Ramadas Rao,** (2011) 1 SCC 429, the Hon'ble Supreme Court interpreted the term/words "Ready and willing" in para 22. The Court has held as under:

> "The words "Ready" and "Willing" imply that the person was prepared to carry out the terms of the contract. The distinction between "Readiness" and "Willingness" is that the former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance. Generally, readiness is backed by willingness.

**13.** I would first look into the willingness of the plaintiff to perform his part of the contract. One would normally expect that if the plaintiff is willing to carry out his part of the contract, he would at the time when the conveyance deed was to be registered and the transaction was to be finalised, unequivocally inform the defendants that he has the requisite funds to complete the transaction and other processes regarding preparation of documents, purchase of stamp papers etc, would be attempted to be completed. If for some reason, as is the case of the plaintiff that the defendant were being evasive, one would expect the plaintiff to vigorously follow up and chase the defendants at least around the period when the transaction is to be completed. The entire transaction was to be completed within three months on the date of the agreement. This is obvious from perusal of clause 2 of the agreement to sell which clearly states that the transaction will be completed within three months from the date of execution of the agreement.

**14.** The facts in this case show that after Agreement to Sell dated

28th September, 2006, there has been hardly any activity on the part of the plaintiff to suggest that he was ready and willing to perform his part of the contract. The first written communication addressed by the plaintiff to the defendants is the legal notice dated 2.4.2008 i.e. after nearly 18 months after the Agreement to Sell. The transaction was to be completed within three months from the date of execution of the Agreement. Yet the plaintiff has taken 18 months to send his first communication/legal notice.

**15.** Apart from the absence of a written communication by the plaintiff, there is no cogent evidence led by the plaintiff to show any attempt to communicate his readiness or willingness to perform his part of the agreement. Vague and general statements have been made by the plaintiff in his affidavit by way of evidence. In paragraph 8 and 9 of his Affidavit plaintiff states as follows:

> "8. Thereafter I made innumerable inquiries with the defendants about the execution of the sale documents I have expressed my readiness to pay the balance consideration. I informed the defendants that I have arranged the required money from my friends and relatives and is ready and willing to deliver the same to them at the time of the registration of the sale documents. I arranged the required money and the same are reflected in the statement of my saving account and account of my firm. I had also arranged the finance facilities from the finance company in the event of any eventualities. However, the defendant No.2 on each occasion, on the pretext that the defendant No.1 has gone to Australia avoided executing the documents. The defendants also informed me that due to this reason, the formalities with DDA could not be completed and the same would be done immediately once the defendant no.1 returns from Australia. I bonafidely believed the defendants.
>
> 9.I say that I informed the defendants time and again about the readiness and willingness to complete my obligation under the agreement dated 28.09.2008 and pay the balance consideration amount at the time of the execution of the sale documents."

**16.** Clearly no details have been given as to how contact was established with defendants No. 1 & 2 especially keeping in view the fact that defendant No.1 was mostly outside the country. There is no attempt



to explain when the plaintiff contacted defendant No. 1 or 2, whether the contact was by phone or whether any personal meetings took place. It is expected that in case the plaintiff was serious about completing the transaction, he would have vigorously followed up with defendants No. 1 & 2 especially if the said defendants were not responding.

**17.** In fact the deposition of the plaintiff falls if one looks at the cross examination of the plaintiff. As noted above, in his evidence by way of affidavit he has stated that he made innumerable enquiries with the defendant about execution of the sale document. However, the relevant portion of his cross-examination that took place on 18.12.2009 reads as follows:-

> "Q-I put it to you that you never met defendant No. 2 Mr. S.K. Chopra?
>
> Ans. It is wrong. I further state that I met him twice. One time in the office of Ravi Raj and second time I alongwith Mr. Lalit Gulati went to his (S.K. Chopra) home alongwith Mr. Ravi Raj also to know why he is delaying the execution of the sales documents. His (S.K. Chopra) house is near to one big temple in Greater Kailash.
>
> Q-As you have deposed above, that for the second time, you met Mr'S.K. Chopra, in which year, did you meet him? Ans. I met him in early of the year 2007.
>
> Q-Is it correct that after you met in the early of the year 2007, thereafter you never met Mr. S.K. Chopra? Ans. It is correct. (emphasis added) (Vol. During the meeting of the year 2007 with Mr. S.K. Chopra, he told me that as he (S.K. Chopra) used to travel a lot and I should meet/contact Mr. Ravi Raj for the sale transaction execution date.)
>
> Q. Is it correct that you never met defendant No.1 Mrs. Parveen Anand, nor had ever talked her?
>
> Ans. It is correct. (emphasis added) (Vol. Mr. S.K. Chopra told that Mrs. Anand is staying abroad and she has given attorney to him (S.K. Chopra) for sales of the plot in question. Therefore, all the matters relating to this transaction has to be completed by Mr. Chopra Only)."

**18.** Further on 28.11.2011 when defendant No. 2 was cross-examined, counsel for the plaintiff put a question that the plaintiff had met defendant No. 2 several times in his office. Defendant No. 2 denied the suggestion.

**19.** In view of the above cross-examination, it is clear that at best the plaintiff has met defendant No. 2 once as alleged in early 2007. Apart from that there has been no contact whatsoever between the parties. What follows is that after the Agreement to Sell dated 28.09.2006, the plaintiff met defendant No.2 only once in early 2007 (which meeting is also doubtful), no telephonic talk took place (none is proved) and no correspondence also took place till legal notice dated 02.04.2008. On the evidence placed on record it is obvious that there has been no worthwhile communication between the plaintiff and the defendants. Hence the contention of the plaintiff that he made innumerable enquiries from the defendant about execution of the sale documents and that he was willing to pay the balance consideration is incorrect.

**20.** One cannot help noticing the evidence led by defendant. A perusal of the evidence by way of affidavit filed by defendant No.2 would show that the entire transaction appears to have been managed by one Mr.Ravi Raj son of Mr.Ram Lal. Defendant No.2 has clearly stated in his evidence that they have repeatedly been contacting Mr. Ravi Raj who was the person with whom the entire transaction was worked out and at no stage ever they met the plaintiff prior to filing of the present court proceedings. Similar evidence has been led by Defendant No.1. Reference may be had to relevant part of the cross-examination of Defendant No.2 which took place on 28.11.2011 which reads as follows:

> "Q.I put it to you that Mr.Ravi Raj has no role in the execution of the agreement Ex.P1?
>
> Ans. It is incorrect. Vol. it was only Ravi Raj and nobody else who had come to me.
>
> Q. I put it to you that what you have deposed hereinabove that "it was only Ravi Raj and nobody else who had come to me" is wrong?
>
> Ans. It is incorrect.
>
> Q. Did you read Ex.P1 before signing the same?



> Ans. Yes, I had read before signing the same." .....
>
> Q. I put it to you that the payment of Rs.4.50 lacs was made by plaintiff and not by Ravi Raj?
>
> Ans. It is incorrect.
>
> Q. I put it to you that plaintiff approached to you as well as defendant No.1 many times for the registration of the perpetual lease of the suit property?
>
> Ans. It is incorrect. Vol. Nobody, never approached me. I had met none else except Ravi Raj.
>
> Q. I put it to you that plaintiff met you several times in your office?
>
> Ans. It is incorrect. Vol. Nobody, never approached me. I had met none else except Ravi Raj."

Similarly reference may had to the cross-examination of defendant No.1 held on 3.5.2011 relevant portion of which reads as follows:

> ".Q Is it correct that plaintiff/Shri Sangeet Aggarwal met you and paid you the consideration for the agreement to sell Ex.P1?
>
> **(At this stage, the record of the case has been placed before the witness.)**
>
> Ans. I never saw Mr. Sangeet Aggarwal. Today is the first day when I saw him in the Court premises.
>
> Q. I put it to you that you have met Sangeet Aggarwal/plaintiff when the agreement to sell was signed?
>
> Ans. It is incorrect.
>
> Q. Please see para No.6 of your affidavit of evidence. I put it to you that the figure of Rs.4.00 lacs mentioned therein is wrong?
>
> **(At this stage, the record of the case has been placed before the witness.)**
>
> Ans. I never met Ravi Raj. I never met Sangeet Aggarwal and never received any money from them.

Q. Is it correct that plaintiff Sangeet Aggarwal offered you to pay the balance consideration mentioned in the agreement to sell Ex.P1?

Ans. I never ever met and talk to him/Sangeet Aggarwal and nobody contacted me.

Q. I put it to you that the plaintiff talked to you as well as to your attorney for making the payment of the balance consideration mentioned in the agreement to sell Ex.P1? Ans. It is incorrect.

**21.** The above cross-examination of defendants No. 1 and 2 and the cross examination of the plaintiff establish that the whole transaction has been managed by Mr. Ravi Raj who appears to be the broker. However, in the plaint and in the plaintiff evidence, there is no mention of Mr. Ravi Raj. In his cross examination, the plaintiff admits that it was Mr. Ravi Raj who got the dealing done for the plot in question. It hence is clear that defendants were only in touch with Mr. Ravi Raj. Plaintiff has never contacted the defendants or Mr. Ravi Raj to complete the transaction.

Clearly, there is no cogent evidence to show that the plaintiff was willing to perform his part of the contract.

**22.** On the issue of readiness on the part of the plaintiff i.e., as to whether the plaintiff had the funds to complete the transaction, the plaintiff has, through his two witnesses, filed statement of accounts of two of his bank accounts. He has also filed on record a communication of Tibson Investment Pvt Ltd.

**23.** Perusal of the Statement of Account filed by the two witnesses of the plaintiff from Hong Kong and Shanghai Bank and Allahabad Bank reveals that as on January, 2007 the plaintiff does not have adequate funds in the bank accounts. The Agreement to Sell is dated 20.09.2006, the period of three months for completion of the transaction, lapses by the end of December, 2006. The statement filed by Hong Kong and Shanghai Bank being Ex.PW 2/1 shows that on 31.01.2007 the balance in the account of the plaintiff was only Rs.51,795.46. It is only after 13th March, 2007 that the balance had crossed Rs.20 lacs. Similarly, though the plaintiff claims to be a partner of Euroasia Global nothing is placed on record to prove the same. The statement of account of Allahabad Bank being Ex.PW3/1 of Euroasia Global also shows that on 5.2.2007 when the account starts the balance is only Rs.5,100/-. These accounts



do not show that the plaintiff has sufficient funds in December 2006/ January 2007, the relevant period.

**24.** The communication of Tibson Investment Private Limited Ex.PW4/1 inspires no confidence. The background of the said Tibson Investment Private Limited is not placed on record. There is a letter dated 2.12.2006 allegedly written by the plaintiff to the said investment company and the reply dated 9.12.2006 stating willingness to give the said loan which is Ex.PW4/1. No details are given about the said Tibson Industrial Private Limited Company, whether it is in the business of giving loans on mortgage of properties or the kind of business it is running. Further, in the cross-examination of Mr.Pramod Kumar Tibriwala, PW 4, who is stated to be the Finance Officer of Tibson Investment Private Limited states that the said finance company has all the documents including supporting applications, copies of Income Tax Return, Balancesheet, copy of Agreement to Sell dated 28.09.2006. However, the documents placed on record, namely, the letter dated 9.12.2006 of Tibson Investment Private Limited (Ex.PW4/1) and the letter allegedly written by the plaintiff to the said investment company dated 2.12.2006 (Mark A) do not in any way show that the documents, namely, copies of Income Tax Return and balancesheet were forwarded by the plaintiff when allegedly applying for the loan from the said investment company. Hence, the letter dated 09.12.2006 being exhibit PW 4/1 inspires no confidence. In the absence of any proper background of Tibson Investment Private Limited, the letter cannot be accepted. The contention of the plaintiff that it could have raised the funds from the private company cannot be believed.

**25.** Learned counsel for the plaintiff and defendant have, after the hearing, filed a compilation of various judgments. All of them need not be mentioned as the proposition of law is quite clear. Reference only may be had to one of the judgment filed by the plaintiff of the Hon'ble Supreme Court in the case of **Prakash Chandra v. Angad Lal and Ors.** AIR 1979 SC 1241 where the Hon'ble Supreme Court held that the ordinary rule is that specific performance should be granted. It ought to be denied only when equitable considerations point to its refusal and the circumstances show that the damages would constitute an adequate relief.

Learned counsel for the defendant relies on the judgment of the Hon'ble Supreme Court in the case of **J.P Builders** (supra) where in para 27, it was held as follows:

"It is settled law that even in the absence of specific plea by the opposite party, it is the mandate of the statute that plaintiff has to comply with Section 16(c) of the Specific Relief Act and when there is non-compliance with this statutory mandate, the Court is not bound to grant specific performance and is left with no other alternative but to dismiss the suit. It is also clear that readiness to perform must be established throughout the relevant points of time. "Readiness and Willingness" to perform the part of the contract has to be determined/ascertained from the conduct of the parties."

Reference may be had to the judgment of the Supreme Court in the case of **N.P. Thirugnanam v. Dr. R. Jagan Mohan Rao** (1995) 5 SCC 115 where it was held as follows:

"5. ..'Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must 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 has 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 he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was always ready and willing to perform his part of the contract."



**26.** Coming to the facts of this case, the statement of accounts filed by the witness of the plaintiff show that the plaintiff at the relevant period did not have sufficient funds. The alleged financial accommodation given to him by Tibson Investment Pvt Ltd cannot be believed. It would hence follow that at the relevant time i.e. three months after the Agreement to Sell when the transaction had to be completed, the plaintiff was not possessed of sufficient funds to complete the transaction. It is neither pleaded nor proved that plaintiff sought extension of time from the defebdabt. Hence it is held that on facts, the plaintiff was neither ready nor willing to perform his part of the transaction.

**27.** One more contention of the plaintiff may be noted. In the course of arguments, counsel for the plaintiff relied on Clause 3 of the Agreement to Sell dated 28.09.2006 (Ex.P1) which reads as follows:

"3. That the first party will be competed of perpetual lease deed upto registered in the office of concerned authority within the above said period at his/her/their own cost and expenses. If the first party will not be complete the perpetual lease deed within above said period then the final date of payment has been extended upto the registration of Perpetual Lease Deed."

**28.** The clause is not properly drafted. However, the plaintiff contends that as per the clause it was the obligation of the seller to have the perpetual lease deed registered and in case the perpetual lease deed was not registered the final date of payment would stand extended. Learned counsel for the plaintiff contends that the defendant has not placed on record either the date of registration of the lease deed by DDA nor a copy of the same has been placed on record and hence according to his submission the period for making payment by the plaintiff stands extended. The learned counsel further submitted that even as of today, the defendant has not placed on record the date of registration of the lease deed or a copy of the same and hence the period for making payment by the plaintiff has, even on date, not arisen.

**29.** The said contention of the plaintiff has to be rejected outright. In the plaint no such contention has been made by the plaintiff. On the contrary, in the plaint in paragraph 7 it is contended that defendants had agreed that they would convert the property from lease hold to free hold within three months. There is no reference to the execution of a lease deed by DDA. This contention appears to have been raised for the first

time while cross-examining defendant No.1 on 03.05.2011. The relevant part of the cross-examination reads as follows:-

> "Q. Is it correct that in DDA you were supposed to apply for registration of the lease deed prior to execution of sale document in favour of the plaintiff?
>
> Ans. As far as I understand in January 2004 I paid all/full amount of money to the DDA and the plot was allotted to me in my name in January 2004.
>
> Q. I put it to you that it was only you who could have applied to the DDA for registration of the perpetual lease deed of the suit plot?
>
> Ans. Perpetual lease deed was executed in my name by the DDA of the suit plot.
>
> Q. I put it to you that the perpetual lease deed of the suit plot was not executed in your name by the DDA?
>
> Ans. It is incorrect."

**30.** In view of the above, it is clear that the lease deed has been registered by DDA way back in 2004. The contention of the plaintiff that he had no knowledge of registration of the lease deed and that the defendant ought to have placed a copy of the said lease deed on record has no merits. As there was no such issue or contention raised in the plaint, hence there was no occasion for the defendant to have filed the said document on record. Hence, the contention of the plaintiff that in the absence of a copy of the perpetual leased deed on record, the time for completing the agreement to sell gets extended in perpetuity cannot be accepted. No such plea was raised in the plaint. No such contention flows from a reading of clause 3 of the agreement to sell.

**31.** In view of the above, I hold that the plaintiff has not been ready and willing to perform his part of the agreement. Issue no.1 is decided accordingly.

**32.** ISSUE NO.2

Issue No. 2 is whether the discretion in the grant of the relief of specific performance is to be exercised in favour of the plaintiff. In view of what is my finding on issue No. 2, the present issue would not arise



as the plaintiff has failed to make out a case for specific performance of the Agreement to Sell.

**33.** ISSUE NO.3

Issue No. 3 is whether the defendants had not dealt with the plaintiff and had dealt with Mr.Ravi Raj only and whether the said Mr.Ravi Raj had defaulted in any of the obligations undertaken by him and if so to what effect.

**34.** Admitted fact is that Mr. Ravi Raj is one of the brokers who got the transaction executed. The defendants have clearly stated that they have dealt only with Mr. Ravi Raj and have at no stage interacted with the plaintiff. It is nobody's case that Mr. Ravi Raj was the attorney of the plaintiff. Hence the fact that the defendants dealt only with Mr. Ravi Raj is of no legal consequence. At best, it only shows plaintiff was not in touch with the defendants.

**35.** In view of the above the present suit is dismissed. No orders as to costs.

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**ILR (2013) IV DELHI 3234**
**I.A.**

**BIJENDER CHAUHAN @ BIJENDER KUMAR ....PLAINTIFF**

**VERSUS**

**FINANCIAL EYES (INDIA) LTD. ....DEFENDANT**

**(JAYANT NATH, J.)**

**I.A. NO. : 5269/2012 IN CS (OS) NO. : 2576/2011** **DATE OF DECISION: 23.07.2013**

**Civil Procedure Code, 1908—S. 37—Defendant claimed Leave to defend on the ground that goods supplied were defective—Held defendant paid part amount and**

**it follows that defendant was receiving the goods and has been making payment in part indicating that no defect was there in goods—The two letters written by defendant do not stipulate rejection of goods rather they indicate that defendant utilised the goods and later on their customer's complained to defendants about quality of packing—Nothing to show defendant rejected goods within reasonable time—Defendants utilised goods namely packing material for packing rice and exporting it abroad—Action of defendant contrary to Section 42 of Sales of Goods Act. Suit based on 20 invoices and merely because a mention is made to a statement of account in the plant would not make the suit based on statement of accounts. Order 37 CPC applies to a suit even on the basis of invoices—Invoices contained full details regarding the quantity and rate of goods—Invoices tantamount to binding contract between parties.**

**[Di Vi]**

**APPEARANCES:**

**FOR THE PLAINTIFF** : Mr. A.K. Trivedi and Mr. Avinash Trivedi, Advocates.

**FOR THE DEFENDANT** : Mr. Raman Kapur, Sr. Advocate with Mr. Dhiraj Sachdeva and Mr. Ankur Gosain, Advocates.

**CASES REFERRED TO:**

1. *Lohmann Rausher GMBH* vs. *Medisphere Marketing Pvt. Ltd.,* 117 (2004) DLT 95.
2. *M/s KLG Systel Ltd.* vs. *M/s Fujitsu ICIM Ltd.* AIR 2001 Del. 357.
3. *Beackon Electronics* vs. *Sylvania & Laxman Limited,* 1998(3) AD (Delhi) 141.
4. *Corporate Voice Private Limited* vs. *Uniroll Leather India Limited,* 60(1995) DLT 321.



5. *M/s. Punjab Pen House* vs. *Samrat Bicycles Limited,* AIR 1992 Delhi 1.
6. *M/s Mechalec Engineers & Manufacturers* vs. *M/s Basic Equipment Corporation* AIR 1977 SC 577.
7. *Smt. Kiranmoyee Dassi and Anr.* vs. *Dr. J. Chatterjee* 49 C.W.N. 246.

**RESULT:** Suit Decreed.

**JAYANT NATH, J.**

**I.A. 5269/2012 in CS(OS) 2576/2011**

**1.** This is an application under Order 37 Rule 3(5) of the Code of Civil Procedure on behalf of the defendant for leave to defend and contest the suit. The accompanying Suit is filed by the plaintiff under Order 37 CPC for recovery of Rs.30,97,959/-. The plaintiff in the plaint has contended that it is doing the business of trading and manufacturing of corgated box, pouches and other packaging material of rice to its different customers. It is further stated that the plaintiff has business relations with the defendant since 4.11.2007. It is stated that statement of account is finalised till the financial year of 2009-10. Fresh transactions started from 2.4.2010 and the plaintiff had supplied goods to the defendant till 5.1.2011. The plaintiff submits that he had delivered the goods to the defendant between the period 2.4.2010 to 5.1.2011. In paragraph 4 of the plaint the details of 20 invoices raised on the defendant have been provided. The total amount due as per the said 20 invoices is Rs.52,12,726/-. The plaintiff admits that defendant had paid Rs.23,30,804/- and is liable to pay the remaining amount of Rs.28,81,922/-. Summons of judgment in the prescribed format under Order 37 CPC Rule 3(4) CPC were issued to the defendant. The defendant entered appearance and after receiving the summons of judgment has filed the present application for leave to defend.

**2.** The defendant in the leave to defend application has firstly submitted that the plaint does not comply with the mandatory provisions of Order 37 Rule 2 of CPC and that the requirement of making an inscription immediately below the number of the Suit and title of the Suit that the Suit is under Order 37 of Code of Civil Procedure has not been made in this case. Hence, it is submitted that present Suit cannot be treated as a Summary Suit.

**3.** It is secondly submitted by the defendant in his application that recently the plaintiff had supplied bad quality of poly-pouches and cartons and has thereby defrauded the defendant. The buyer of the defendant has pointed out to the defendant personally and through brokers that the quality of bags and cartons are not good and had asked for compensation towards the damages and losses and has raised certain initial claims. Hence, it is stated by the defendant that the supply of bad quality bags and cartons has not only caused loss to the defendant but also a huge loss to its reputation as a reliable exporter of India.

**4.** It is further contended that there is an initial claim of damages and loss incurred by the defendant of US$ 39,154 (approximately Rs.18 lacs) and that balance will be finalised by the defendants buyer. However, it is stated that the plaintiff has failed to pay the said initial claim of approximately Rs.18 lacs of the defendant.

**5.** Learned senior counsel appearing for the defendant submits that in view of the fact that the plaintiff had supplied poor quality goods and the fact that the defendant has suffered huge damages no amount whatsoever is due or payable to the plaintiff and in fact on the contrary it is the plaintiff who owes money to the defendant. Learned senior counsel also relies upon letters dated 2.12.2010 and 24.4.2011 received from one U.R.Trading company who have pointed out about problem of opening of poly pouches and torn-up Master cartons in the rice shipments. It is also pointed out that in letter dated 24.4.2011 it is specifically pointed out that the packaging material is very weak and bad. Learned senior counsel for the defendant also relies upon communication dated 15.12.2010 and 28.04.2011 allegedly written by the defendant to the plaintiff pointing out the damages suffered by the defendant on account of poor quality of products supplied.

**6.** Learned senior counsel for the defendant thirdly submits that the present Suit does not lie under Order 37 CPC as it is based on accounts. He submits that along with the list of documents the plaintiff has filed a statement of account which is Annexure P-24. He submits that this account is not signed by the defendant and it is based on this account that the plaintiff is claiming Rs.28,81,922/-. He submits that no suit under Order 37 CPC lies based on the statement of accounts. He relies upon a Judgment of this Court in CS(OS) 2109/2002 titled as M/S. Associates India Financial Services (P) Ltd. versus M/s.Atwal and Associates and Ors. dated 9th August, 2012 where it was held that Suits claiming



amounts which are only balance due based on accounts cannot be treated as falling under Order 37 CPC because the amount claimed is not a liquidated amount. Hence, he submits that the present Suit under Order 37 CPC would not lie. He also relies upon an Order of a learned Single Judge of this Court dated 23rd January, 2012 in RFA 202/2011 titled as M/s.K.& K Health Care Pvt. Ltd. versus M/s. Pehachan Advertising.

**7.** The learned senior counsel for the defendant fourthly contends that if it is argued that the present suit is based on invoices, he submits that, then also a suit under Order XXXVII CPC cannot be filed based on invoices. He relies upon the aforenoted judgment of this High Court in the case of **M/S. Associates India Financial Services Pvt. Ltd.** (supra).

**8.** In view of the above grounds he submits that there are enough reasons that unconditional leave to defend should be granted to the defendant.

**9.** On the other hand, learned counsel for the plaintiffs submits that as far as compliance of Order 37 Rule 2 CPC is concerned the title of the Suit itself very categorically states that it is a suit under Order 37 Rule 2 CPC.

**10.** He further submits that there is no denial by the defendant in the present application regarding delivery of goods and regarding the fact that the defendant has paid only a sum of Rs.23,30,804/- leaving a balance liability of Rs.28,81,922/-. He further submits that the contention of the defendant about the bad quality of goods supplied is absolutely false and only a bogus submission to wriggle out the liability. He points out that the reliance of the defendant on the two communications dated 15.12.2010 and 28.04.2011 is misconceived. These communications were never received by the plaintiff and no proof of despatch has been placed on record. He also points out that the first communication is allegedly dated 15.12.2010. He further submits that goods for about 8 lacs were supplied by the plaintiffs to the defendant after alleged letter dated 15.12.2010. These goods were duly received by the defendant without any protest or demeanour. He submits that the said act of the defendants completely falsifies its case and unequivocally demonstrates that these communications dated 15.12.2010 and 28.04.2011 are fabricated documents.

**11.** Learned counsel further relies upon judgment of this Court in **Lohmann Rausher GMBH versus Medisphere Marketing Pvt. Ltd.,** 117 (2004) DLT 95 where it was held that invoices/bills/written contracts

are within the contemplation of Order 37 Rule 2 CPC. The said judgment also states that under Section 41 of 'The Sale of Goods Act, 1930. the defendant had a right to inspect the goods on delivery and report defects within a reasonable time of delivery. If goods are not rejected within a reasonable time, the judgment states that the mandate of Section 42 would apply and the defendants would be deemed to have accepted the goods. He submits that in this case the defendant has accepted the goods and at no stage rejected the same. He submits that the defence of the defendant regarding quality of goods is purely fabricated and after-though and is contrary to law. Defendant is deemed to have accepted the goods in terms of the Sales of the Goods Act.

**12.** I will now look into the merits of the rival contentions. In the context of grant of leave to defend, the principles of law applicable are well known. The basic judgment in this regard, namely, **M/s Mechalec Engineers & Manufacturers v. M/s Basic Equipment Corporation** AIR 1977 SC 577, may be looked into for the said purpose. In para 8, the Hon.ble Supreme Court has held as follows:

> "In **Smt. Kiranmoyee Dassi and Anr. v. Dr. J. Chatterjee** 49 C.W.N. 246, Das. J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by order 17 C.P.C. in the form of the following propositions (at p. 253) :
>
> (a) If the Defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the Defendant is entitled to unconditional leave to defend.
>
> (b) If the Defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the Defendant is entitled to unconditional leave to defend.
>
> (c) If the Defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the Plaintiff is not entitled to judgment and the Defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.



> (d) If the Defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the Plaintiff is entitled to leave to sign judgment and the Defendant is not entitled to leave to defend.
>
> (e) If the Defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the Plaintiff is entitled to leave to sign judgment, the Court may protect the Plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the Defendant on such condition, and thereby show mercy to the Defendant by enabling him to try to prove a defence."

In the light of the above, I may now consider the submissions of the defendant.

**13.** As far as the first contention of the defendant regarding non compliance of Order 37 Rule 2 of CPC is concerned, i.e. it is contended that below the number of the Suit in the title of the Suit it is to be mentioned that the Suit is under Order 37 CPC. The contention further is that this provision has not been complied with by the plaintiff. The contention is absolutely devoid of merits. Perusal of the plaint filed in the present case shows that in the heading, after the details of the parties, the following is clearly stated:

> "Suit under Order 37 Rule 2 of CPC for recovery of Rs.30,97,959/- alongwith interest @ 18% on behalf of plaintiff."

Hence, there is no merit in the said contention of the defendant. The plaintiff has complied with Order XXXVII CPC.

**14.** Regarding the second contention of the defendant that the goods supplied by the plaintiff were defective, the said submission is also completely devoid of merits. The submissions made by the defendant in this regard are utterly vague. It is not in dispute that the goods dispatched by 20 bills as elaborated in paragraph 4 of the plaint have been duly received by the defendant. The period when the goods have been received is from 2.4.2010 to 5.1.2011. Defendants had ample time to physically

inspect the goods. They utilised the goods for packaging of their rice and had also dispatched the packages containing rice to their customers abroad. It is difficult to believe that the defendant who is in the said trade since long time and have dealt with the plaintiffs since long, could not on an inspection of the goods and on usage of the goods detect defects in the quality of the goods supplied by the plaintiff. The contention is wholly meritless.

**15.** There is also merit in the submission of the learned counsel for the plaintiff that the two communications placed on record by the defendant are manipulated documents. No proof of despatch of these documents is filed. Further after letter dated 15.12.2010 was allegedly written by the defendant to the plaintiff the defendants have received material worth about Rs.8 lac from the plaintiff. There was no protest or endeavour to ensure at that time that goods of the right quality were supplied to the defendant. There is not a whisper about this. In the two communications dated 15.12.2010 and 28.4.2011 the defendant does not point out the nature of defect in the goods. The communications clearly cannot be believed.

**16.** Notice may also be taken of the fact that out of the 20 invoices raised, the defendant has paid a sum of Rs.23,30,804/-. It would naturally follow that the defendant was receiving the goods and has been making payment in part clearly indicating that they have found no defect in the goods. A perusal of the two letters dated 15.12.2010 and 28.04.2011 shows that they do not stipulate a rejection of the goods. They indicate that the defendant has utilized the goods and later one their customers had complained about the quality of the packing.

**17.** In the above context, reference may be had to the judgment of this High Court in the case of **M/s KLG Systel Ltd. v. M/s Fujitsu ICIM Ltd.** AIR 2001 Del. 357, where this Court held as follows:

> "12. The disputes between the parties cannot be decided do hors the sundry provisions of the Sale of Goods Act. Part-payment to a substantial extent has been made by the Defendant/Applicant. When a buyer such as the Defendant/Applicant asserts that the merchandise/goods were defective, it is not open to it to withhold payment once the delivery is accepted; since they are deemed to have been accepted by operation of law."

It was further held in para 13:



> "On a careful reading of the Act, it appears that the intendment is generally that the price of the goods must be paid and if there is a subsequent defect (in contradistinction to a defect detected within a reasonable time of the delivery) the remedy that is envisaged is for the Buyer to sue for damages. This is obviously impregnated with sound commonsense and business ethics. In the present case, raising questions pertaining to the suitability of the supply after one year is not reasonable. A friable issue does not arise because what was supplied by the Plaintiff was what was ordered by the Defendant, if it did not suit the latter's requirements the Plaintiff cannot be made responsible and liable. Significantly, it has not been shown that any legal action has been filed even by FEDO for recovery of damages from the Defendant. Some prima facie evidence of such an action should have been filed by the Defendant to justify the grant of leave to defend."

This case of **M/s. KLG Systel Ltd.** (supra) pertained to supply of certain software. The defendant had accepted the software; later on the defendant said that there is a failure in the software package and a third party connected with the defendant had complained about the same. This Court rejected the said contention and declined to grant leave to defend. The Court relied on Sec. 41 and 42 of the Sales of Goods Act. It was also pointed out in that case that the third party has taken no legal action against the defendant.

This Court in the case of **Lohmann Rausher GMBH** (supra) while interpreting Sections 41 & 42 of the Sale of Goods Act held as follows in para 21:

> "21. As per the mandate of Section 41 of the Sale of Goods Act, the defendant not having inspected the goods in question prior to delivery, had a right to inspect the case on delivery and report defects within a reasonable time of delivery. If not rejected within reasonable time, mandate of Section 42 stipulates that the defendant would be deemed to have accepted the goods."

**18.** One may have a look at sections 41 and 42 of the Sales Good Act, 1930 which read as follows:

> 41. **Buyer's right of examining the goods.**-(1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has

had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

**42.Acceptance.**-The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

**19.** There is nothing on record to show that the defendant rejected the goods within a reasonable time. The goods were admittedly received by the defendant between April, 2010 and January, 2011. The defendant has utilized the goods namely packing material for packing rice etc. and exporting it abroad. The action of the defendant is clearly contrary to the provisions of Section 42 of the Sales of Goods Act. By utilizing the goods, the defendant has done an act in relation to them which is inconsistent with the ownership of the seller. The defendant continued to retain the goods without intimating the seller that he has rejected the same and can have them picked up. The defence of the defendant about the quality of goods supplied by the plaintiff being defective is a completely sham defence and absolutely without any merit.

**20.** The third contention of the defendant that the present suit is based on a Statement of Account and hence would not lie is a vague contention and is also without merits. A perusal of the plaint would show that the present case is not based on a statement of accounts but is based on the 20 invoices which have been raised on the defendant pursuant to which the goods have been supplied to the defendant. The plaint in paragraph 4 relies on the said invoices. The Plaint further states that out of the total figure of Rs.52,12,726/- worth of invoices raised on the plaintiff the defendant had paid Rs.23,30,804. Hence, the suit is based on the balance on these invoices. Merely because a mention is made to a Statement of Account in the plaint would not make the present suit to be based on Statement of Accounts. A specific query was made to learned senior counsel appearing for the defendant about the figures



mentioned in the plaint. Learned senior counsel fairly stated that in the application for leave to defend the receipt of the goods, the value of the goods and payments having been made by the defendant is not disputed. He submitted that the defence of the defendant is regarding quality of goods.

**21.** The judgments cited by the learned counsel for the plaintiff to argue that a suit based on statement of account does not lie under Order 37 CPC would not apply to the facts of the case. In both cases namely **Associate India Financial Services** (supra) and **M/s K & K Health Care Pvt. Ltd.** the Court came to the conclusion that the case is based on the statement of accounts. Hence, the said judgments have no application to the present facts as I have held that the present suit is based on invoices.

**22.** In the context of the above contention of the learned senior counsel for the defendant, reference may also be had to the judgement of this Court in **M/s. Dura – Line India Pvt. Ltd. Vs. BPL Broadband Network Pvt. Ltd.** (AIR 2004 Delhi 186) where in para 8 the Court held as follows:

"8....

The said submission is misconceived. The suit is based on a written contract comprising the offer, its acceptance by issuance of purchase orders and raising of invoices in execution thereof. These constitute the written contract. The amounts claimed are those due in the suit under the above written contract. Additionally, reliance has been placed on the acknowledgement and confirmation of balance issued by the defendant. The mere averment in the plaintiff that the plaintiff also maintains a running account, reflecting the price of the goods supplied and the payments made therefore, does not change the nature of the suit as in one being based on a running account. The mere maintenance of a running account does not disentitle the plaintiff from filing the suit under Order XXXVII, CPC, based on a written contract and acknowledgement in writing."

**23.** In view of the above judgement clearly even otherwise the contention of the learned senior counsel for the defendant on this account is without any merit.

**24.** The fourth contention of the learned senior counsel for the

defendant that Order 37 CPC would not apply to a suit even on the basis of invoices is stated to be rejected. A perusal of the invoices placed on record would demonstrate that they contain full details regarding the quantity and rate of the goods. These invoices tantamount to a binding contract between the parties. None of the facts and figures stated in the bills are in fact even disputed. It would follow that present Suit would lie based on the invoice which is a binding contract. A perusal may also be had to the reasoning in paragraph 15 of the judgment in the case of **Lohmann Rausher GMBH** (supra), which reads as follows:

> "15. It is apparent that a suit which seeks to recover a debt or a liquidated demand in money payable by the defendant arising out of a written contract is maintainable under Order XXXVII Rule 1 as a summary suit. It is no longer res-integra that invoices/ bills are "written contracts" within the contemplation of Order XXXVII Rule 2. Reference could conveniently be made to decisions of this Court reported as **M/s. Punjab Pen House v. Samrat Bicycles Limited,** AIR 1992 Delhi 1; **Corporate Voice Private Limited v. Uniroll Leather India Limited,** 60(1995) DLT 321; **Beackon Electronics v'Sylvania & Laxman Limited,** 1998(3) AD (Delhi) 141; and **M/s. KIG Systel Limited v. M/ s. Fujitsu ICIM Ltd.,** 92 (2001) DLT 88= AIR 2001 Delhi 357."

**25.** The above judgment of **M/s KLG Systel Ltd.** (supra) also holds that an Order XXXVII Suit lies based on an invoice. In para 11, the Court held as follows:

> "11. The Defendant/Applicant has also challenged the maintainability of the suit under Order XXXVII of the C.P.C., stating that "there is no debt or liquidated demand in money payable to defendant-Company (sic. read Plaintiff)) and/or based on a written contract". It is no longer res integra that Invoices/ Bills are 'written contracts' within the contemplation of this Order. Reference is directed to **Messrs. Punjab Pen House vs. Samrat Bicycle Ltd.; Corporate Voice (Pvt.) Ltd. vs. Uniroll Leather India Ltd;** and **Beacon Electronics vs. Sylvania and Laxman Ltd.,** 1998 (3) Apex Decisions (Delhi) 141. There is, thus, no hesitancy in holding that the present suit is a suit which should be tried under the summary procedure of Order XXXVII of the C.P.C."



**26.** In view of the above, it is obvious that the defence raised by the defendants is a sham defence. The defence of the defendant that the quality of the goods supplied by the plaintiff is defective cannot be accepted in view of Sections 41 & 42 of the Sales of Good Act. The other legal issues raised by the defendant have been held by me to be without merit. Granting leave to defend would merely enable the defendant to prolong a litigation by raising frivolous and untenable pleas. There are no plausible grounds stated by the defendants which may be deemed sufficient to entitle the defendant to defend the preset suit. The present application is accordingly dismissed.

**CS(OS) 2576/2011.**

In view of the fact that the above application for leave to defend of the applicant/defendant has been dismissed, the Suit is decreed for a sum of Rs.30,97,959/- in favour of the plaintiff and against the defendant.

The plaintiff shall be entitled to pendent lite interest @ 10% per annum from the date of filing of the Suit till recovery. The plaintiff shall also be entitled to costs.

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**ILR (2013) IV DELHI 3246**
**CO. PET.**

**HARDEEP GILL ....PETITIONER**

**VERSUS**

**PUMPKIN STUDIO PVT. LTD. & ANR. ...RESPONDENTS**

**(R.V. EASWAR, J.)**

**CO. PET. NO. : 379/2012 DATE OF DECISION: 26.07.2013**
**& C.A NO. : 1501/2012**

**Companies Act, 1956—Section 433(e) read with Section 434 (1) (a)—Brief Facts—Company was incorporated in 2002 to carry on the multimedia centre where training was to be imparted to students and to carry on the**

software development—A franchise agreement was entered into by the company with Maya Academy of Advanced Cinematics for period of five years in this behalf—Initially the petitioner and the second respondent were the only shareholders of the Company whose share capital was Rs. One lakh only—Taruna Ummati was inducted as a shareholder and she and the petitioner held 30% share each—Respondent No. 2 held the balance 40% shares in the Company—Soon there were allegations of mismanagement levelled by the second respondent, who was stationed in Chandigarh, against the petitioner herein, who was managing the Company's affairs in Delhi and disputes arose—Franchise agreement was terminated in 2005—Second respondent filed a petition under sections 397-398 of the Act in the Company Law Board ('CLB') which directed that the petitioner would manage the affairs of the Company together with respondent No.2—An appeal against the order of the CLB is said to be pending before this Court—Despite the order of the CLB the disputes continued and the board meeting could not be conducted—Annual returns of the Company, the profit and loss accounts and the balance sheets could not be filed with the Registrar of Companies ('ROC') —There was thus a stalemate—In the above background, respondent No.2 filed Company Petition No. 182/2010 before this court under clauses (e) and (f) of section 433 for the winding up of the Company—This petition was, however, permitted to be withdrawn with liberty to file appropriate recovery proceedings vide order of the learned single judge (Manmohan, J.,) dated 20-9-2011—It is contended in support of the present petition that it is just and equitable that the Company be wound up—It is contended that respondent No.2 herself had earlier sought winding up of the Company on the same grounds and therefore there cannot be any objection from her to the present winding-up petition—Moreover,



it is contended, the substratum of the Company is lost and hence it is just and equitable that it is wound up—It is also pointed out that the business of the Company has been suspended for more than a year and therefore clause (c) of section 433 applies; and that the company has not filed its annual return, balance sheets and profit and loss accounts for five consecutive years with the ROC and therefore clause (g) of section 433 applies.

Held—Petition for winding-up is not opposed on behalf of the respondents—Business of the Company has been suspended for more than one year and so clause (c) of section 433 of the Act applies; the annual accounts and annual returns have not been filed since the year 2007 which attracts clause (g) of Section 433—It is just and equitable that the Company be wound up—Its share capital is small and is held by only three persons—It is more akin to a partnership concern—There are allegations against each other by the two directors and the business has ceased—There is a stalemate—In fact, the substratum of the Company seems to have been lost—Moreover, the Company is becoming debt-ridden due to the burden of maintaining of its office—On date the Company owes an outstanding debt of Rs. 50,00,000 towards ICICI Bank which the Company is unable to pay—There are other proceedings against the petitioner stated to be pending—Clause (f) of section 433 is also attracted—Petition is, therefore, admitted—Official Liquidator attached to this Court is appointed as the Provisional Liquidator ("PL") of the respondent—OL is directed to take over all the assets, books of accounts and records of the respondent forthwith—OL shall also prepare a complete inventory of all the assets of the respondent before sealing the premises in which they are kept—Company and its directors/servants/ agents etc. are restrained from selling, transferring,

**mortgaging, alienating, creating any charge, or parting with possession of any of its immovable assets.**

Considering the aforesaid submissions and the facts of the case, the winding-up petition is admitted. The business of the Company has been suspended for more than one year and so clause (c) of section 433 of the Act applies; the annual accounts and annual returns have not been filed since the year 2007 which attracts clause (g) of Section 433. In addition to these two clauses, I am of the view that it is just and equitable that the Company be wound up. Its share capital is small and is held by only three persons. It is more akin to a partnership concern. There are allegations against each other by the two directors (the petitioner herein and respondent No.2) and the business has ceased. There is a stalemate. In fact, the substratum of the Company seems to have been lost. Moreover, the Company is becoming debt-ridden due to the burden of maintaining of its office. It is stated in the present petition that as on date the Company owes an outstanding debt of Rs.50,00,000 towards ICICI Bank which the Company is unable to pay. There are other proceedings against the petitioner stated to be pending. It is therefore held that clause (f) of section 433 is also attracted. **(Para 7)**

The petition is, therefore, admitted. The Official Liquidator attached to this Court is appointed as the Provisional Liquidator ('PL') of the respondent. The OL is directed to take over all the assets, books of accounts and records of the respondent forthwith. The OL shall also prepare a complete inventory of all the assets of the respondent before sealing the premises in which they are kept. He may also seek the assistance of a valuer to value the assets. He is permitted to take the assistance of the local police authorities, if required. **(Para 8)**



**Important Issue Involved:** Companies Act, 1956—Section 433 (e) read with Section 434 (1)(a)—Business of the Company has been suspended for more than one year and so clause (c) of section 433 of the Act applies; the annual accounts and annual returns have not been filed since the year 2007 which attracts clause (g) of section 433—It is just and equitable that the Company be wound up.

**[Sa Gh]**

**APPEARANCES:**

**FOR THE PETITIONER** : Mr. Surjeet Kumar Mishra, Advocate.

**FOR THE RESPONDENTS** : Mr. Ajit Singh, Advocate for R-1. Ms. Gurpreet Gill, R-2 in person.

**RESULT:** Petition Admitted.

**R.V. EASWAR, J.**

**1.** This is a petition filed by Mr. Hardeep Gill, one of the directors of Pumpkin Studio Private Limited ("Company"), the first respondent herein, for the winding up of the Company under sections 433(c), (f) and (g) of the Companies Act, 1956 ("Act"). One of the other directors, Mrs. Gurpreet Gill, has been impleaded as the second respondent. She has filed the reply to the petition on behalf of the Company.

**2.** The Company was incorporated in 2002 to carry on the multimedia centre where training was to be imparted to students and to carry on the software development. A franchise agreement was entered into by the Company with Maya Academy of Advanced Cinematics for period of five years in this behalf. Initially the petitioner and the second respondent were the only shareholders of the Company whose authorised, issued, subscribed and paid-up share capital was Rs. one lakh only; subsequently, one Taruna Ummati was inducted as a shareholder and she and the petitioner held 30% shares each, whereas respondent No. 2 held the balance 40% shares in the Company.

**3.** Soon there were allegations of mismanagement levelled by the second respondent, who was stationed in Chandigarh, against the petitioner herein, who was managing the Company's affairs in Delhi and disputes

arose. The franchise agreement was terminated in 2005. The second respondent filed a petition under sections 397-398 of the Act in the Company Law Board ("CLB") which directed that the petitioner would manage the affairs of the Company together with respondent No.2. An appeal against the order of the CLB is said to be pending before this Court in Company Appeal (SB) No. 17/2009. Despite the order of the CLB the disputes continued and the board meetings could not be conducted. The annual returns of the Company, the profit and loss accounts and the balance sheets could not be filed with the Registrar of Companies ("ROC"). There was thus a stalemate.

**4.** In the above background, respondent No.2 filed Company Petition No. 182/2010 before this court under clauses (e) and (f) of section 433 for the winding up of the Company. This petition was, however, permitted to be withdrawn with liberty to file appropriate recovery proceedings vide order of the learned single judge (Manmohan, J.,) dated 20-9-2011.

**5.** It is contended in support of the present petition that it is just and equitable that the Company be wound up. It is contended that respondent No.2 herself had earlier sought winding up of the Company on the same grounds and therefore there cannot be any objection from her to the present winding-up petition. Moreover, it is contended, the substratum of the Company is lost and hence it is just and equitable that it is wound up. It is also pointed out that the business of the Company has been suspended for more than a year and therefore clause (c) of section 433 applies; and that the company has not filed its annual return, balance sheets and profit and loss accounts for five consecutive years with the ROC and therefore clause (g) of section 433 applies.

**6.** On behalf of the respondents, the petition for winding-up is not opposed. No reply to the present petition has been filed by the respondent No.2. This Court, therefore, directed her to file the reply in Court and to pay costs of Rs.5,000/- for the delay in fling the reply. The learned counsel for the company however preferred not to file any reply and submitted that she would argue the matter without filing the filing the said reply. It is submitted that the petitioner has started another company with a similar sounding name – Pumpkin Academy of Digital Arts – and has taken away all the assets of the respondent-Company which should be directed to be returned to it. It is also submitted that criminal proceedings and proceedings for infringement of trade mark are pending against the petitioner, in addition to the Company appeal pending before this Court.



**7.** Considering the aforesaid submissions and the facts of the case, the winding-up petition is admitted. The business of the Company has been suspended for more than one year and so clause (c) of section 433 of the Act applies; the annual accounts and annual returns have not been filed since the year 2007 which attracts clause (g) of Section 433. In addition to these two clauses, I am of the view that it is just and equitable that the Company be wound up. Its share capital is small and is held by only three persons. It is more akin to a partnership concern. There are allegations against each other by the two directors (the petitioner herein and respondent No.2) and the business has ceased. There is a stalemate. In fact, the substratum of the Company seems to have been lost. Moreover, the Company is becoming debt-ridden due to the burden of maintaining of its office. It is stated in the present petition that as on date the Company owes an outstanding debt of Rs.50,00,000 towards ICICI Bank which the Company is unable to pay. There are other proceedings against the petitioner stated to be pending. It is therefore held that clause (f) of section 433 is also attracted.

**8.** The petition is, therefore, admitted. The Official Liquidator attached to this Court is appointed as the Provisional Liquidator ('PL') of the respondent. The OL is directed to take over all the assets, books of accounts and records of the respondent forthwith. The OL shall also prepare a complete inventory of all the assets of the respondent before sealing the premises in which they are kept. He may also seek the assistance of a valuer to value the assets. He is permitted to take the assistance of the local police authorities, if required.

**9.** The Company and its directors/servants/agents etc. are restrained from selling, transferring, mortgaging, alienating, creating any charge, or parting with possession of any of its immovable assets.

**10.** The directors of the Company are directed to file a Statement of Affairs with the Provisional liquidator within twenty-one (21) days from today. They shall also appear before the Provisional Liquidator on 7th August, 2013 at 3 p.m. and make a statement under Rule 130 of the Companies (Court) Rules, 1959.

**11.** Citation to be published in two newspapers – The Statesman (English) and Jansatta (Hindi) in terms of Rule 24 of the Companies (Court) Rules, 1959 ('Rules'). The cost of publication shall be borne by the Petitioner.

**12.** A copy of this order shall be issued to the Official Liquidator within 5 days from today. He shall file status report before the next date of hearing.

List on 29th October, 2013 for further proceedings.

---

**ILR (2013) IV DELHI 3253**
**W.P. (C)**

**SATISH KUMAR** **....PETITIONER**

**VERSUS**

**UNION OF INDIA & ORS.** **.....RESPONDENT**

**(GITA MITTAL & DEEPA SHARMA, JJ.)**

**W.P. (C) NO. : 6934/2012** **DATE OF DECISION: 01.08.2013**

**Army Act, 1950—Section 63—Section 80/82—Summary Trial—Conviction—Brief Facts—Petitioner was enrolled as a Sepoy on 10.3.2003 and posted with 22nd Batallion Rajputana Rifles—Unblemished service record—In March, 2012, Petitioner sent to Jaipur on temporary duty for an official attachment—Received a message of minor daughter's sickness—Petitioner's case is that he requested the Adm Commandant of Station Headquarter Cell, Jaipur for two days casual leave from 08 to 09 May, 2012—Having been granted such leave, Petitioner proceeded to his home town; took his daughter to a nearby hospital for treatment and thereafter returned to Station Headquarter, Jaipur Cell within time—On completion of the temporary duty, Petitioner was sent back to his parent unit on 12th May 2012.—Petitioner's parent unit objected to his having taken casual leave from the Administration Commandant, Station Head Quarters and not from**



**Capt. Gaurav Tewari who was deputed as Admn. Officer of the Station Cell at Jaipur—Consequently, Petitioner subjected to a summary trial under Section 80/82 of the Army Act, 1950 on the aforenoticed charge—Petitioner entered a plea of guilty Respondents have recorded that the Petitioner returned a plea of guilty and was thereafter sentenced to 7 day rigorous imprisonment—Hence the present petition—Petitioner contended that he could not have disputed that he had taken casual leave but it was his categorical stand that the casual leave and had been duly sanctioned by the Station Commandant, who was the competent authority to have granted the station leave—Contended that looked from any angle, seven days rigorous imprisonment which would vest the petitioner with a red ink entry in his record is unduly and completely disproportionate to the nature of the offence for which the petitioner was charged. Held—Petitioner was charged with unauthorised absence from duty—Respondents are unable to dispute the correctness of the petitioner's statement that he had sought the permission before proceeding on two days casual leave with the authority of Station head quarter at Jaipur—Petitioner has submitted that he was tense on account of sickness of his minor daughter—He had taken sanction of leave from the Station Commandant—Undisputedly, the Station Commandant was the highest authority in the Station Headquarter—Petitioner could not have been summarily tried and punished in the proceedings—No statutory provision, law or regulation which prescribes that despite the sanction by the Station Headquarter, the Petitioner was required to obtain as sanction of the same from the Adm Officer has been pointed out—Station Commandant was an officer of the rank of Colonel while the Admn. Officer was an officer of the rank of Captain—Petitioner acted as per directives of the senior most officer in the Station—Charge against the Petitioner was**

**unwarranted and the punishment against the petitioner was unduly harsh—Proceedings of the summary trial, order of conviction and punishment dated were arbitrary and illegal and are thereby set aside and quashed—Punishment shall not operate against the Petitioner for any purpose—Writ Petition is allowed accordingly.**

In view of the above, we find merit in the petitioner's challenge and submission that the petitioner could not have been summarily tried and punished in the proceedings dated 7th May 2012. No statutory provision, law or regulation which prescribes that despite the sanction by the Station Headquarter, the petitioner was required to obtain a sanction of the same from the Adm Officer has been pointed out. The Station Commandant was an officer of the rank of Colonel while the Admn. Officer was an officer of the rank of Captain. The petitioner acted as per directives of the senior most officer in the Station. The charge against the petitioner was unwaranted. Looked at from any angle, the punishment against the petitioner was unduly harsh. **(Para 8)**

In view of the above, it is held that the proceedings of the summary trial, order of conviction and punishment dated 19th June 2012 were arbitrary and illegal and are thereby set aside and quashed. The punishment shall not operate against the petitioner for any purpose. **(Para 9)**

**Important Issue Involved:** Army Act—Section 63—Section 80/82—Petitioner had sought the permission before proceeding on two days casual leave with highest authority in the Station Headquarter—No statutory provision, law or regulation which prescribes that despite the sanction by the Station Headquarter, the Petitioner was required to obtain a sanction of the same from the Adm Officer has been pointed out.

**[Sa Gh]**



**APPEARANCES:**

**FOR THE PETITIONER** : Ms. Archana Ramesh, Adv.

**FOR THE RESPONDENT** : Dr. Ashwani Bhardwaj, Adv. With Maj. Mahesh Sharma.

**RESULT:** Petition Allowed.

**GITA MITTAL, J. (Oral)**

**1.** By way of the present writ petition the petitioner has prayed for quashing of punishment dated 19.06.2012 in a summary trial for commission of an offence under Section 63 of the Army Act. The petitioner was subjected to summary trial on the following charge:-

> "AA Sec 63
>
> AN ACT PREJUDICIAL TO GOOD ORDER AND MILITARY DISCIPLINE
>
> in that he,
>
> at peace (Jaipur), on 07 May 2012 at 1800 hours, proceeded on 02 days Casual Leave wef 08 May 2012 to 09 May 2012, while temp att with Stn HQ, Jaipur did not info IC-72947L Cap Gaurav Tewari (Adm Offr rep), JC-469996W Sub Satyvir Singh (Adm JCO rep), and also coy JCO, JC-NYA 2886459F Nb Sub Indraj Singh present in Jaipur, which is in contravention to the laid down orders."

**2.** The facts on record show that the petitioner was enrolled as a Sepoy on 10.3.2003 and posted with 22nd Batallion Rajputana Rifles. Other than the present case, the petitioner had an unblemished service record. In March, 2012, the petitioner was sent to Jaipur on temporary duty for an official attachment. He received a message of his minor daughter's sickness. The petitioner's case is that he requested the Adm Commandant of Station Headquarter Cell, Jaipur for two days casual leave from 08 to 09 May, 2012. Having been granted such leave, the petitioner proceeded to his home town; took his daughter to a nearby hospital for treatment and thereafter returned back to Station Headquarter, Jaipur Cell within time. On completion of the temporary duty, the petitioner was sent back to his parent unit on 12th May 2012.

**3.** It appears that the petitioner's parent unit took a strong objection to the fact that the petitioner had taken casual leave from the Administration Commandant, Station Head Quarters and not from Capt.Gaurav Tewari who was deputed as Admn. Officer of the Station Cell at Jaipur. Consequently, the petitioner was subjected to a summary trial under Section 80/82 of the Army Act, 1950 on the aforenoticed change. On the above noted charge, the petitioner had entered a plea of guilty. The respondents have recorded that the petitioner returned a plea of guilty and was thereafter sentenced to 7 days rigorous imprisonment.

**4.** Learned counsel for the petitioner has urged that the petitioner could not have disputed that he had taken casual leave and hence the admission which the petitioner made. She submits that it was a categorical stand of the petitioner that the casual leave had been duly sanctioned by the Station Commandant, who was the competent authority to have granted the station leave. In any case, it is urged that even if the petitioner was to be faulted for not having taken leave from the unit Admn Officer, the same was taking a hyper technical view of the matter. It is contended that looked from any angle, seven days rigorous imprisonment which would vest the petitioner with a red ink entry in his record is unduly harsh and completely disproportionate to the nature of the offence for which the petitioner was charged.

**5.** We have heard learned counsel for the parties and perused the available record.

**6.** The instant case is not a case where the petitioner was charged with unauthorised absence from duty. The respondents are unable to dispute the correctness of the petitioner's statement that he had sought the permission before proceeding on two days casual leave with the authority of Station head quarter at Jaipur. The petitioner has submitted that he was tense on account of sickness of his minor daughter. He had taken sanction of leave from the Station Commandant. It also cannot be disputed that the Station Commandant was the highest authority in the Station Headquarter.

**7.** In this regard, the petitioner has placed the copy of the sanction of the petitioner's casual leave dated 7th May 2012 between 08 May and 09 May, 2012 before this court. In the written sanction which was given to the petitioner, the Station Commandant has also noted the address at which the petitioner was to remain available during this period and that



on expiry of leave he would report back to the Headquarter for duty. In view of this sanction of the leave by the Station Headquarter, the petitioner cannot be faulted for having proceeded on leave in accordance with the directives of the senior most officer at the station. The petitioner reported back as directed.

**8.** In view of the above, we find merit in the petitioner's challenge and submission that the petitioner could not have been summarily tried and punished in the proceedings dated 7th May 2012. No statutory provision, law or regulation which prescribes that despite the sanction by the Station Headquarter, the petitioner was required to obtain a sanction of the same from the Adm Officer has been pointed out. The Station Commandant was an officer of the rank of Colonel while the Admn. Officer was an officer of the rank of Captain. The petitioner acted as per directives of the senior most officer in the Station. The charge against the petitioner was unwaranted. Looked at from any angle, the punishment against the petitioner was unduly harsh.

**9.** In view of the above, it is held that the proceedings of the summary trial, order of conviction and punishment dated 19th June 2012 were arbitrary and illegal and are thereby set aside and quashed. The punishment shall not operate against the petitioner for any purpose.

**10.** This writ petition is allowed accordingly.


# INDIAN LAW REPORTS
# DELHI SERIES
# 2013

**(Containing cases determined by the High Court of Delhi)**

# VOLUME-4, PART-II

**(CONTAINS GENERAL INDEX)**



**PUBLISHED UNDER THE AUTHORITY OF HIGH COURT OF DELHI,
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**DELHI HIGH COURT**

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**HIGH COURT OF DELHI : NEW DELHI**
**NOTIFICATION**

No. 178/Rules/DHC Dated: 18.03.2013

In exercise of powers conferred under Article 235 of the Constitution of India, Section 47 of the Punjab Courts Act, 1918 and all other powers enabling it in this behalf, the High Court of Delhi hereby makes the following amendment in the "Delhi Higher Judicial Service (Leave) Rules, 2010", namely:-

1. The following shall be substituted for the existing sub-rule (4) of Rule 41:-

**"(4) Study leave out of India shall not be granted for the prosecution of studies in subjects for which adequate facilities exist in Delhi.**

**Note: Adequate facilities would mean that the course content has comparable variety of subjects and comparable course content."**

**NOTE:** THIS AMENDMENT SHALL COME INTO FORCE FROM THE DATE OF ITS PUBLICATION IN THE GAZETTE.

BY ORDER OF THE COURT
Sd/-
**(V.P. VAISH)**
**REGISTRAR GENERAL**



**HIGH COURT OF DELHI : NEW DELHI**
**NOTIFICATION**

No. 711/Rules/DHC Dated: 08.05.2013

In exercise of the powers conferred by Sub-Section (10) of Section 11 of the Arbitration and Conciliation Act, 1996 (No. 26 of 1996) read with Para 12 of the Scheme for Appointment of Arbitrators, 1996 notified vide Notification No. 16/Rules/DHC dated 29.01.1996 and further amended vide Notification No. 174/Rules/DHC dated 18.08.2003, Notification No. 391/Rules/DHC dated 09.11.2009 and Notification No. 253/Rules/DHC dated 23.07.2010, Hon'ble the Chief Justice of High Court of Delhi hereby makes the following amendment in Para 10 of the said Scheme:-

1. **Para 10 shall stand deleted.**

**NOTE:** THIS AMENDMENT SHALL COME INTO FORCE FROM THE DATE OF ITS PUBLICATION IN GAZETTE.

BY ORDER OF THE COURT
Sd/-
**(SANGITA DHINGRA SEHGAL)**
**REGISTRAR GENERAL**

## PRACTICE DIRECTIONS FOR ELECTRONIC FILING (E-FILING) IN THE HIGH COURT OF DELHI

1. These practice directions will apply to electronic filing (e-filing) of cases in the High Court of Delhi and will be effective from the dates and for the categories of cases as may be notified by the Chief Justice of the High Court of Delhi from time to time.

2. Except as provided elsewhere in these practice directions, all petitions, applications, appeals and all pleadings/documents in fresh, pending and disposed of cases will be filed electronically in the manner hereafter provided.

### 3. PROCEDURE FOR E-FILING

3.1 The original text material, documents, notice of motion, memorandum of parties, main petition or appeal, as the case may be, and interlocutory applications etc. will be prepared electronically using MS word or open office software. The formatting style of the text will be as under:

| | | |
|---|---|---|
| Paper size | : | A-4 |
| Margins | : | |
| Top | : | 1.5” |
| Bottom | : | 1.5” |
| Left | : | 1.75” |
| Justification | : | full |
| Font | : | Times New Roman |
| Font size | : | 14 |
| Line spacing | : | 1.5 |

3.2 The documents should be converted into Portable Document Format (PDF) using any PDF converter or in-built PDF conversion plug-in provided in the software. Procedure to convert word document to PDF is set out in **Appendix-I** to these Practice Directions.

3.3 where the document is not a text document and has to be enclosed with the petition, appeal or application or other pleadings, the document should be scanned using an image resolution of 300 dpi (dot per inch) and saved as a PDF document.

3.4 The maximum permissible size of the file that can be uploaded at the time of e-filing is 100 MB.



3.5 The text documents prepared in MS Word/Open Office as well as scanned documents should be merged as a single PDF file and book-marked. The procedure for this purpose is set out in **appendix-II** to these Practice Directions.

3.6 The merged documents should be uploaded at the time of e-filing by using the facility provided at the e-filing centre in the High Court lawyers’ Chambers Block-1. The screen shots of the manner of accessing the e-filing portal and filing up the relevant columns for the purpose of e-filing are set out in **appendix-III** to these Practice Directions.

### 4. DIGITAL SIGNATURE

All electronic documents filed using the e-filing system will have to be digitally signed by the advocate for the parties or where it is being filed in person, by the party concerned. The list of recognized Digital Signature Providers and the procedure involved in appending single or multiple digital signatures are set out in **Appendix-IV** to the Practice Directions.

### 5. PAYMENT OF COURT FEE

Court fee can be paid by purchase of electronic court fee either from the online facility provided by the Stock Holding Corporation of India Limited (http://www.shcilestamp.com/) or the counters provided for the purpose in the Delhi High Court or from any other authorized court fee vendor in delhi. The payment code whether automatically generated on payment of court fee online through the payment gateway of Stock Holding Corporation of India Limited on the receipt when court fee is purchased from the counter, has to be filled in the appropriate box at the time of e-filing.

### 6. RETENTION OF ORIGINALS

6.1 The originals of the following documents that are scanned and digitally signed either by counsel or parties in person at the time of e-filing should be preserved for production upon being directed by the court at any time. In any event, they should be preserved at least for a period of two years till after the final disposal of the case: (final disposal shall include disposal of appeals if any).

(a) signed Vakalatnama,

(b) Signed and notarized / attested affidavit,

(c) Documents of title or conveyance, agreements etc.,

(d) any other document whose authenticity is likely to be questioned.

6.2 The responsibility for producing the originals and proving their genuineness shall be of the party that has electronically filed the scanned copies thereof.

7. **ACCESS TO ELECTRONIC DOCUMENTS**

Access to documents and pleadings filed electronically in a case will be provided only to advocates for the parties in that case or the concerned parties themselves. The advocate or the party may obtain documents from the Filing Counter by mailing an application along with a blank CD-R/DVD-R to be provided by the party.

8. **EXEMPTION FROM ELECTRONIC FILING**

Exemption from e-filing of the whole or part of the pleadings and/ or documents may be permitted by the court upon an application for that purpose being made to the court in the following circumstances:

(i) e-filing is, for the reasons to be explained in the application, not feasible; or

(ii) there are concerns about confidentiality and protection of privacy; or

(iii) the document cannot be scanned or filed electronically because of its size, shape or condition; or

(iv) the e-filing system is either inaccessible or not available for some reason; or

(v) any other sufficient cause.

9. **SERVICE OF ELECTRONIC DOCUMENTS**

In addition to the prescribed mode of service, notices, documents, pleadings that are filed electronically may also be served through e-mail by the High Court of Delhi. The e-mail ID of the High Court of Delhi (delhihighcourt@nic.in) will be published on its website so as to enable the recipients to verify the source of the e-mail at the e-mail at the e-mail



addresses, if available, of the advocates or parties.

10. **COMPUTATION OF TIME**

10.1 Electronic filing through the e-filing centre is permissible up to 4 p.m. on the date of filing. All other rules relating to holidays etc. for the purpose of Computation of limitation, as specified in the Rules of the High Court of Delhi will apply to online electronic filing as will. Period during which e-filing system is in-operational for any reason will be excluded from the computation of such time. This, however, will not extend limitation for such filing for which the facility of Section 5 of the Limitation Act, 1963 or any other statutory extension of period of limitation is not available.

10.2 For electronic filing done through the e-filing centre in the delhi high court premises, the rules relating to time for the purposes of limitation will be no different from those applicable for the normal filing.

10.3 As and when the facility of electronic online filing commences, such electronic online filing would be permissible up to midnight on the date of filing.

11. **CAVEATS, SUPPLEMENTARY AFFIDAVITS ETC.**

Caveats can be registered, and all written statements, counter affidavits or reply affidavits, affidavits by way of rejoinder, documents, applications in pending matters or in disposed of matters, supplementary pleadings, documents etc in pending cases can be filed electronically using the e-filing system. The procedure for this purpose is set out in **Appendix V** to these Practice Directions.

12. **HARD COPIES OF PLEADINGS AND DOCUMENTS FILED ELECTRONICALLY**

Lawyers as will as parties can print hard copies of all pleadings and documents filed electronically for their use in the court or elsewhere. Likewise the Registry will, wherever required, prefare hard copies for use of the courts.

13. **STORAGE AND RETRIEVAL OF ELECTRONICALLY FILED DOCUMENTS AND PLEADINGS**

The pleadings and documents electronically filed will be stored on

an exclusive server maintained under the control and directions of the High Court of Delhi. Each case will be separately labeled and encrypted for this purpose to facilitate easy identification and retrieval. The security of such document and pleadings will be ensured and access to them would be restricted in the manner indicated hereinbefore and as may be notified from time to time. Back-up copies of all electronically filed pleadings and documents will be preserved in the manner decided by the Court on its administrative side.

**List of appendices** [please click on the link.]





## PREAMBLE

The purpose of this protocol is to present guidelines and mandatory recommendations, to improve the response of the justice dispensation system to vulnerable witnesses.

This protocol prescribes guidelines while recording depositions of vulnerable witnesses in order to enable them to give their best evidence in criminal proceedings. Each witness is unique and is to be handled accordingly. Some of the most challenging cases handled by judges during the course of their careers are those involving vulnerable witnesses as, what happened to or was witnessed by them, impact significantly on their quality of deposition and potentially outcome of a trial.

Vulnerable witnesses, find the criminal justice system intimidating, particularly the courtroom experience. Under these circumstances, a vulnerable witness may be a poor witness, providing weak testimony and contributing less information than should have been elicited. Further, the lengthy process of navigating the formal and adversarial criminal justice system can effect the vulnerable witnesses psychological development and disable this sensitivity in significant and long-lasting ways.

To respond effectively to the needs of vulnerable witnesses the criminal justice system needs to respond proactively with sensitivity in an enabling and age appropriate manner, so that the trial process is less traumatic for them.

Judges have to strike a balance between protecting the accused's right to a fair trial, and ensuring that witnesses who give evidence in the case are enabled to do so, to the best of their ability.

*(The UN Model Law on Justice in Matters involving Child Victims and Witnesses of Crime published by the UN Office on Druges and Crime, Vienna, UN, New York 2009 has provided valuable insight and has been a major reference in formulating these guidelines and to enable compliance with international standards on the subject.)*

## OBJECTIVES OF THESE GUIDELINES

1. To elicit and secure complete, accurate and reliable evidence from vulnerable witnesses;
2. To minimize harm or secondary victimization of vulnerable witnesses in anticipation and as a result of participation in

the criminal justice system;

3. To ensure that the accused's right to a fair trial is maintained.

## Applicability

Unless otherwise provided, these guidelines shall govern the examination of vulnerable witnesses during criminal trial who are victims or witnesses to crime.

1. **Short Title, extent and commencement-**

These guidelines shall be called, "Guidelines for recording evidence of vulnerable witnesses in criminal matters".

They shall apply to every criminal court in delhi.

Their application shall commence from the date notified by the Delhi High Court.

2. **Construction of the guidelines.** These guidelines shall be liberally construed to uphold the interests of vulnerable witnesses and to promote their maximum accommodation without prejudice to the accused to a fair trial.

3. **Definitions -**

a. **Vulnerable Witness** - is a child who has not completed 18 years of age.

b. **Support Person** - Means and includes guardian *ad litem*, legal aid lawyer, facilitators, interpreters, translators and any other person appointed by court or any other person appointed by the court to provide support, accompany and assist the vulnerable witness to testify or attend judicial proceedings.

c. **Best Interests of the Child** - Means circumstances and conditions most congenial to security, protection of the child and most encouraging to his physical, psychological and emotional development and shall also include available alternatives for safeguarding the growth and development of the child[1].

d. **Development Level** - Development level refers to the specific growth phase in which most individual are expected to behave and function in relation to the advancement of their physical, socio economical, cognitive

1. Section 327 (2) Cr. PC.



and moral abilities[2].

e. **In-Camera Proceedings** - means criminal matters or part thereof wherein the public and press are not allowed to participate, for good reason as adjudged by the court.

f. **Concealment of Identity of witness -** Means and includes any condition prohibiting publication of the name, address and other particulars which may lead to the indentification of the witness[3].

g. **Comfort Items -** Comfort items mean any article which shall have a calming effect on a vulnerable witness at the time of deposition and may include stuffed toy, blanket or book.

h. **Competence of a vulnerable Witness -** Every vulnerable witness shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions due to tender years, diseases, either of body or mind, or any other cause of the same kind.

> **Explanation:** A mentally ill person may also be held competent unless he is prevented by his lunacy to understand questions[4].

i. **Court House Tour -** A pre-trial tour of court room to familiarize a vulnerable witnesses with the environment and the basic process of adjudication and roles of each court official[5].

j. **Descriptive Aids -** A human figure model, anatomically correct dolls or a picture or anatomical diagrams or any other aids deemed appropriate to help a vulnerable witness to explain an act or a fact.

k. **Live Link -** 'Live link' means and includes a live television link, audio-video electronic means or other arrangement whereby a witness, while absent from the courtroom[6] is nevertheless present in the court room by remote communication using technology to give evidence and be cross-examined.

2. Sec. 228A IPC. Sec. 21 of the Juvenile Justice (Care and Protection of Children) Act, 2000.

3. Sec. 228A IPC Sec. 21 of the Juvenile Justice (Care and Protection of Children) Act, 2000.

4. Section 118 Evidence Act.

5. Alternative pre-trial processes for child witnesses in New Zealand's criminal justice system, Issue Paper, Min. of Justice, New Zealand Govt. 2010.

6. Sec. 275 Cr. P.C. Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, CJSHI; UK.

l. **Special Measures -** mean and include the use of any mode, method and instrument, etc, considered necessary for providing assistance in recording deposition of vulnerable witnesses.

m. **Testimonial Aids** - means and includes screens; live links, image and/or voice altering devices; or any other technical devices.

n. **Secondary Victimization** - means victimization that occurs not as a direct result of a criminal act but through the response of institutions and individuals to the victim.

o. **Revictimization** - means a situation in which a person suffers more than one criminal incident over a period of time.

p. **Waiting Room** - A safe place for vulnerable witnesses where they can wait. It shall have toys, books, TV, etc. which can help them lower their anxiety[7].

4. **Special Measures Direction** - The Court shall direct as to which, special measure will be used to assist a particular eligible witness in providing the best evidence. Directions may be discharged or varied during the proceedings, but normally continue in effect until the proceedings are concluded, thus enabling the witness to know what assistance to expect.

5. **Applicability of guidelines to all vulnerable witnesses.**

For the avoidance of doubt, it is made cleat that these guidelines are to apply to any vulnerable witness including a child party, regardless of which party is seeking to examine the witness.

6. **No adverse inference to be drawn from special measures.**

The fact that a witness has had the benefit of a special measure to assist them in deposition, shall not be regarded in any way whatsoever as being adverse to the position of the other side and this should be made clear by the judge at the time of passing order in terms of these guidelines to the parties when the vulnerable witness is examined and when the final judgment is pronounced.

7. **Identification of Stress causing factors of adversarial Criminal Justice System-**

Factors which cause stress on child witness, rendering them further vulnerable witnesses, and impeding complete disclosure by them shall, amongst others, include:

7. Alternative pre-trial and trial processes for child witnesses in New Zealand.



(i) Multiple depositions and not using developmentally appropriate language.

(ii) Delays and continuances.

(iii) Testifying more than once.

(iv) Prolonged/protracted Court proceedings.

(v) Lack of Communication between professionals including police, doctors, lawyers, prosecutors, investigators, psychologists, etc.

(vi) Fear of public exposure.

(vii) Lack of understanding of complex legal procedures.

(viii) Face-to-face contract with the accused.

(ix) Practices are insensitive to development needs.

(x) Inappropriate cross-examination.

(xi) Lack of adequate support and victims services.

(xii) Sequestration of witnesses who may be supportive to the child.

(xiii) Placement that exposes the child to intimidation, or continued abuse.

(xiv) Inadequate preparation for fearless and robust testifying.

(xv) Worry about not being believed especially when there is no evidence other than the testimony of the vulnerable witness.

(xvi) Formality of court proceedings and surroundings including formal dress of members of the judiciary and legal personnel[8].

8. **Competency of vulnerable witness:-**

(i) Every vulnerable witness shall be presumed to be qualified as a witness unless prevented by the following-

(a) Age

(b) Physical or mental disability leading to recording a finding of doubt regarding the ability of such witness to perceive, remember,

8. Breaking the Cycle of Violence : Recommendations to improve the Criminal Justice Response to Child Victims and Witnesses, US Deptt. of Justice.

communicate, distinguish, truth from falsehood or appreciate the duty to tell the truth, and/or to express the same.

**Explanation:** The Court shall conduct a competency examination before recording the testimony of such witness, or on an application of either prosecution or defence or *suo motu*[9].

9. Persons allowed at competence assessment.-only the following are allowed to the competence assessment:

(i) the judge and such court personnel deemed necessary and specified by order of the judge concerned;

(ii) the counsel for the parties;

(iii) the guardian *ad litem*;

(iv) one or more support persons for the child; and

(v) the accused, unless the court determines the competence requires to be and can be fully evaluated in his absence.

(vi) any other person, who in the opinion of the Court can assist in the competence assessment.

10. **Conduct of competence assessment.-** the assessment of a child of a to his competence as a witness shall be conducted only by the judge.

11. **Developmentally appropriate question.-** the questions asked to assess the competency of the child shall appropriate to the age and developmental level of the child; shall not be related to the issues at trial; and shall focus on the ability of the child to remember, communicate, distinguish between truth and falsehood, and appreciate the duty to testify truthfully.

12. **Continuing duty to assess competence –** the court has the duty of continuously assessing the competence of the vulnerable witnesses throughout their testimony and to pass appropriate order, as and when deemed necessary.

13. **Pre-trial of witnesses to the court –**

Vulnerable witness shall be allowed a pre trial court visit along with the support person to enable such witnesses to familiarize themselves

9. (a) Section 118 Evidence Act, (b) Ratan Singh Vs. State, AIR 2004 SC 23 and (c) Virender Vs. State - full reference Crl.A. No. 121/08 decided on 29.09.09.



with the layout of the court, and may include visit to and explanation of the following:

(i) The location of the accused in the dock;

(ii) Court officials (what their roles are and where they sit);

(iii) Who else might be in the court, for example those in the public gallery;

(iv) The location of the witness box;

(v) A run-through of basic court procedure;

(vi) The facilities available in the court;

(vii) Discussion of any particular fears or concerns with the intermediaries, prosecutors and the judge to dispel the fear, trauma and anxiety in connection with the prospective deposition at court.

(viii) Demonstration of any special measures applied for and/or granted, for example practising on the live link and explaining who will be able to see them in the courtroom, and showing the use of screens (where it is practical and convenient to do so)[10].

14. **Meeting the judge-**

The judge may meet a vulnerable witness *suo motu* on reasons to be recorded or on an application of either party in the presence of the prosecution and defence lawyer or in their absence before they give evidence, for explaining the court process in order to help them in understanding the procedure and giving their best evidence.

15. **Appointment or guardian ad litem.-**

The court may appoint any person as guardian ad litem as per law to a witness who is a victim of, or a witness to a crime having regard to his best interests after considering the background of the guardian ad litem and his familiarity with the judicial process, social service programs, and child development, giving preference to the parents of the child, if qualified. The guardian ad litem may be a member of bar / practicing advocate, except a person who is a witness in any proceeding involving the child.

10. Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, UK) Safe guarding Children as Victims and witnesses: UK)

16. **Duties of guardian ad litem:**

It shall be the duty of the guardian ad litem so appointed by court to:

(i) Attend all deposition, hearing, and trial proceedings in which a vulnerable witness participates.

(ii) Make recommendations to the court concerning the welfare of the vulnerable witness keeping in view the needs of the child and observing the impact of the proceedings on the child.

(iii) Explain in a language understandable to the vulnerable witness, all legal proceedings, including police investigations, in which the child is involved;

(iv) Assist the vulnerable witness and his family in coping with the emotional effects of crime and subsequent criminal or non-criminal proceedings in which the child is involved;

(v) Remain with the vulnerable witness while the vulnerable witness waits to testify;

17. **Legal assistance**

A vulnerable witness may be provided with legal assistance by the court, if the court considers the assignment of a lawyer to be in the best interests of the child, throughout the justice process in the following instances:

(a) At the request of the support person, if one has been designate;

(b) Pursuant to an order of the court on its own motion.

18. **Court to allow presence of support persons**

(a) A court shall allow suo motu or on request, verbal or written, to child testifying at a judicial proceeding to have the presence of one person of his own choice to provide him support who shall within the view and if the need arise may accompany the child to the witness stand, provided that such support person shall not completely obscure the child from the view of the opposing party or the judge.

(b) The court may allow the support person to hold the hand



of the vulnerable witness or take other appropriate steps to provide emotional support to the vulnerable witness in the course of the proceedings.

(c) The court shall instruct the support persons not to prompt, sway, or influence the vulnerable witness during his testimony. The support person shall also be directed that he/she shall in no circumstances discuss the evidence to be given by the vulnerable witness.

(d) Where no other suitable person is available only in very rare cases should another witness in the case be appointed as a support person. The court shall ordinarily appoint a neutral person, other than a parent, as a support person. It is only in exceptional circumstances keeping the condition of the vulnerable witness in mind, that the court should appoint a parent as a support person.

19. **The testimony of support person to be recorded prior:**

A testimony of such support person if he also happens to be a witness shall be recorded, ahead of the testimony of the child.

20. **Court to appoint facilitator.**

(i) to assist the vulnerable witnesses in effectively communicating at various stages of trial and or to coordinate with the other stake holders such as police, medical officer, prosecutors, psychologists, defence counsels and court, the court shall allow use of facilitators.

(ii) The court may, suo motu or upon an application presented by either party or a support person of vulnerable witnesses appoint a facilitator if it determines that such witness is finding it difficult to understand or respond to questions asked.

**Explanation :** (i) the facilitator may be an interpreter, a translator, child psychologist, psychiatrist, social worker, Guidance counselor , teacher, Parent, or relative of such witness who shall be under oath to pose questions according to meaning intended by the counsel.

(ii) If the court appoints a facilitator, the respective counsels for the parties shall pose questions to the vulnerable witness only

through the facilitator, either in the words used by counsel or, if the vulnerable witness is not to understand the same, in words or by such mode as is comprehensible to vulnerable witness and which convey the meaning intended by counsel.

21. **Right to be informed**

A vulnerable witness, his or her parents or guardian, his or her lawyer, the support person, if designated, or other appropriate person designated to provide assistance shall, from their first contact with the court process and throughout that process, be promptly informed by the court about the stage of the process and, to the extent feasible and appropriate, about the following:

(a) Procedures of the criminal justice process including the role of vulnerable witnesses, the importance, timing and manner of testimony, and the ways in which proceedings will be conducted during the trial;

(b) Existing support mechanisms for a vulnerable witness when participating in proceedings, including making available appropriate person designated to provide assistance;

(c) Specific time and places of hearings and other relevant events;

(d) Availability of protective measures;

(e) Relevant rights of child victims and witnesses pursuant to applicable laws, the convention on the rights of the child and other international legal instruments, including the guidelines and the declaration of basic principles of justice for victims of crime and abuse of power, adopted by the general assembly in its resolution 40/34 of 29 November 1985;

(f) The progress and disposition of the specific case, including the apprehension, arrest and custodial status of the accused and any pending changes to that status, the prosecutorial decision and relevant post-trial developments and the outcome of the case.

22. **Language, interpreter and other special assistance measures**

(i) The court shall ensure that proceedings relevant to the testimony of a child victim or witness are conducted in language that is simple and comprehensible to a child



(ii) If a child needs the assistance of interpretation into a language or mode that the child understands, an interpreter shall be provided free of charge.

(iii) If, in view of the child's age, level of maturity or special individual needs, which may include but are not limited to disabilities if any, poverty or risk f revictimization, the child requires special assistance measures in order to testify or participate in the justice process, such measures shall be provided free of charge.

23. **Waiting area for vulnerable witness**

The courts shall ensure that a waiting area for vulnerable witnesses with the support person, lawyer of the witness facilitation, if any, is separate from waiting areas used by other persons, the waiting area for vulnerable witnesses should be furnished so as to make a vulnerable witness comfortable.

24. **Duty to provide comfortable environment**

It shall be the duty of the court to ensure comfortable for the vulnerable witness by issuing directions and also by supervising, the location, movement and deportment of all persons in the courtroom including the parties, child witnesses, support persons, guardian *ad litem*, facilitator, and court personnel. The child may be allowed to testify from a place other than the witness chair. The witness chair or other place from which the child testifies may be turned to facilitate his testimony but the opposing party and his counsel must have a frontal or profile view of the child even by a video link, during the testimony of the child. The witness child or other place from which the child testifies may also be rearranged to allow the child to see the opposing party and his counsel, if he chooses to look at them, without turning his body or leaving stand. While deciding to make available such environment, the judge may be a dispensed with wearing his judicial robes[11].

25. **Testimony during appropriate hours**

The court may order that the testimony of the vulnerable witness should be taken during a time of day when the vulnerable witness is well-rested.

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11. Virender vs. State of NCT Delhi-decided by Hon'ble Delhi High Court in Crl. A. No. 121/08 dt. 29.09.09.

26. **Recess during testimony**

The vulnerable witness may be allowed reasonable periods of relief while undergoing depositions as often as necessary depending on his developmental need.

27. **Measures to protect the privacy and well-being of child victims and witnesses.**

(1) At the request of a child victim or witness, his or her parents or guardian, his or her lawyer, the support person, other appropriate person designated to provide assistance, or the court on its own motion, taking into account the best interests of the child, may order one or more of the following measures to protect the privacy and physical and mental well-being of the vulnerable witness child and to prevent undue distress and secondary victimization:

(a) expunging from the public record any names, addresses , workplaces, professions or any other information that could be used to identify the child;

(b) forbidding the defence lawyer and persons present in court room from revealing the identity of the child or disclosing any material or information that would tend to identify the child;

(c) ordering the non-disclosure of any record that identify the child, until such time as the court may find appropriate;

(d) assigning a pseudonym or a number to a child, in which case the full name and date of birth of the child shall be revealed to the accused within a reasonable period for the preparation of his or her defence;

(e) efforts to conceal the features or physical description of the child giving testimony or to prevent distress or harm to the child, including testifying;

(i) behind screen;

(ii) using image-or voice-altering devices;

(iii) through examination in another place, transmitted simultaneously to the courtroom by means of video link;

(iv) through a qualified and suitable intermediary, such as, but not limited to, an interpreter for children with hearing, sight, speech or other disabilities;



(f) holding closed sessions;

(g) if the child refuses to give testimony in the presence of the accused or if circumstances show that the child may be inhibited from speaking the truth in that person`s presence, the court shall give orders to temporarily remove the accused from the courtroom to an adjacent room with a video link or a one way mirror visibility into the court room. In such cases, the defence lawyer shall remain in the courtroom and question the child, and the accused's right of confrontation shall thus be guaranteed;

(h) taking any other measure that the court may deem necessary, including, where applicable, anonymity taking into account the best interests of the child and the rights of the accused.

(2) Any information including name, parentage, age, address, etc. revealed by the child victim or witness which enables identification of the person of the child, shall be kept in a sealed cover on the record and shall not be made available for inspection to any party or person. Certified copies there of shall also not issued. The reference to the child victim or witness shall be only by the pseudonym assigned in the case.

28. **Directions for Criminal Court Judges**[12]**-**

(i) Vulnerable witnesses shall receive high priority and shall be handled as expeditiously as possible, minimizing unnecessary delays and continuances. (Whenever necessary and possible, the court schedule will be altered to ensure that testimony of the child victim or witness is recorded on sequential days, without delays.)

(ii) judges and court administrator should ensure that the development needs of vulnerable witnesses are recognized and accommodated in the arrangement of the courtroom.

(iii) separate and safe waiting areas and passage thereto should be provided for vulnerable witnesses.

(iv) judges should ensure that the developmental stages and needs of vulnerable witnesses are identified recognized

12. Virender vs. State of NCT Crl. A. No. 121/08 decided by Delhi High Court on dt. 29.09.09.

Breaking the Cycle of violence: Recommendations to Improve the Criminal Justice Response to Child VIctims and Witnesses, US Dept. of Justice). UN Model Laws.

and addressed throughout the court process by requiring usage of appropriate language, by timing hearings and testimony to meet the attention span and physical needs of such vulnerable witnesses by allowing the use of testimonial aids as well interpreters, translators, when necessary.

(v) judges should be flexible in allowing the vulnerable witnesses to have a support person present while testifying and should guard against unnecessary sequestration of support persons.

(vi) hearings involving a vulnerable witness may be scheduled on days/time when the witness is not in inconvenienced or is not disruptive to routine/ regular schedule of child.

29. **Allowing proceedings to be conducted in camera**

(i) When a vulnerable witness testifies, the court may order the exclusion from the courtroom of all persons, who do not have a direct interest in the case including members of the press. Such an order may be made to protect the right to privacy of the vulnerable witness or if the court determines on the record that requiring the vulnerable witness to testifies in open court would cause psychological harm to him,hindre the ascertainment of truth, or result in his inability to effectively communicate due to embarrassment, fear, or timidity.

(ii) In making its order, the court shall consider the developmental level of the vulnerable witness, the nature of the crime, the nature of his testimony regarding the crime, his relationship to the accused to person attending the trial, his desires, and the interests of his parents or legal guardian.

(iii) The court may, *motu proprio*, exclude the public from the courtroom if the evidence to be produced during trial is of such character as to be distressing, personal, offensive to decency or public morals.

30. **Live-link television testimony in criminal cases where the vulnerable witness is involved -**

(a) The prosecutor, counsel or the guardian ad litem may



apply for an order that the testimony of the child be taken in a room outside the courtroom and be televised to the courtroom by live-link television[13].

(b) In order to take a decision of usage of a live-link the judge may question the child in chambers, or in some comfortable place other than the courtroom, in the presence of the support person guardian *ad litem*, prosecutor, and counsel for the parties. The questions of the judge shall not be related to the issues at trial but to the feelings of the child about testifying in the courtroom.

(c) The court on its own motion, if deemed appropriate , may pass orders in terms of (a) or any other suitable directions for recording the evidence of a vulnerable witness.

31. **Provision of screens, one-way mirrors, and other devices to vulnerable witness from accused.**

The court may *suo motu* or on an application made even by the prosecutor or the guardian *ad litem* may order that the chair of the vulnerable witness or that a screen or other device be placed in the courtroom in such a manner that the child cannot see the accused while testifying. The court shall issue an order stating the reasons and describing the approved courtroom arrangement.

32. **Factors to be considered while considering the application under Guidelines 31 & 32.**

The court may order that the testimony of the vulnerable witness be taken by live-link television if there is a substantial likelihood that the vulnerable witness would not provide a full and candid account of the evidence if required of testify in the presence of the accused, his counsel or the prosecutor as the case may be.

The order granting or denying the use of live-link television shall the reasons therefore and shall consider the following:

(i) the age and level of development of the vulnerable witness;

(ii) his physical and mental health, including any mental or physical disability;

(iii) any physical, emotional, or psychological harm related to the case on hand or trauma experienced by the child;

13. Proviso to Section 275 of Cr. PC.

(iv) the nature of the alleged offence and circumstances or its commission;

(v) any threats against the vulnerable witness;

(vi) his relationship with the accused or adverse party;

(vii) his reaction to any prior encounters with the accused in court or elsewhere;

(viii) his reaction prior to trial when the topic of testifying was discussed with him by parents or professionals;

(ix) specific symptoms of stress exhibited by the vulnerable witness in the bays prior to testifying;

(x) testimony of expert or lay witnesses;

(xi) the custodial situation of the child and the attitude of the members of his family regarding the events about which he will testify; and

(xii) other relevant factors, such as court atmosphere and formalities of court procedure.

33. **Mode of questioning**

To facilitate the ascertainment of the truth the court shall exercise control over the questioning of vulnerable witness.

(i) ensure that questions are stated in a form appropriate to the developmental level of the vulnerable witness;

(ii) protect vulnerable witness from harassment or undue embarrassment; and

(iii) avoid waste of time by declining questions which the court considers unacceptable due to their being improper, unfair, misleading, needless, repetitive or expressed in language that is too complicated for the witness to understand.

(iv) the court may allow the child witness to testify in a narrative from.

(v) questions shall be put to the witness only through the court[14].

34. **Rules of deposition to be explained to the witnesses**

The court shall explain to a vulnerable witness to listen carefully to

14. Shiv Narain Jafa Vs. Hon'ble Judges of High Court of Allahabad, AIR 1953 SC 368.



the questions and to tell the whole truth, by speaking loudly and not to respond by shaking head in yes or no and also to specifically state that the witness does not remember where he has forgotten something and to clearly ask when the question is not understood.

A gesture by a child to explain what had happened shall be appropriately translated and recorded in the child's deposition.

35. **Objections to questions**

Objections to questions should be couched in a manner so as not to mislead, confuse, frighten a vulnerable witness.

36. **Allow questions in simple language**

The court to allow questions to be put in simple language avoiding slang, esoteric jargon, proverbs, metaphors and acronyms. The court must not allow the question carrying words capable of two-three meanings, questions having use of both past and present in one sentence, or multiple questions which is likely to confuse a witness. Where the witness seems confused instead of repetition of the same question, the court should direct for its re-phrasing.

**Explanation:** (i) The reaction of vulnerable witness shall be treated as sufficient clue that question was not clear so it shall be rephrased and put to the witness in a different way[15].

(ii) Given the witness developmental level, excessively long questions shall be required to be rephrased and thereafter put to witness.

(iii) Questions framed as compound or complex sentence structure; or two part questions or those containing double negatives shall be rephrased and thereafter put to witness.

37. **Testimonial aids.**

The court shall a child to use testimonial aids as defined in the definition clause.

15. (a) Virender vs. State of NCT Delhi- decided by Hon'ble Delhi High Court in Crl. A. No. 121/08 dt. 29.09.09.

(b) The Journey to Justice- A Guide to Thinking. Talking and Working as Term for Young Victims in Canada's North, 2009 Centre for Children & Families in the Justice System, Department of Justice, Canada.

38. **Protection of privacy and safety**

(a) **Confidentiality of records.-**Any record regarding a vulnerable witness shall be confidential and kept under seal. Except upon written request and order of the court, the record shall only be made available to the following:

(i) Members of the court staff for administrative use;

(ii) The Public Prosecutor for inspection;

(iii) Defence counsel for inspection;

(iv) The guardian *ad litem* for inspection;

(v) Other persons as determined by the court.

(b) **Protective order.-** The depositions of the vulnerable witness recorded by video link shall be video recorded except under reasoned order requiring the special measures by the judge. However where any videotape or audiotape a vulnerable witness is made, it shall be under a protective order that provides as follows:

(i) A transcript of the testimony of the vulnerable witness shall be prepared and maintained on record of the case. copies of such transcript shall be furnished to the parties of the case.

(ii) Tapes may be viewed only by parties, their counsel, their expert witness, and the guardian *ad litem*.

(iii) No person shall be granted access to the tape, or any part thereof unless he signs a written affirmation that he has received and read a copy of the protective order; that he submits to the jurisdiction the court with respect to the protective order; and that in case of violation thereof, he will be subject to the contempt power of the court.

(iv) Each of the tapes, if made available to the parties or their counsel, shall bear the following cautionary notice:

"This object or document and the contents thereof are subject to a protective order issued by the court in (case title), (case number). They shall not be examined, inspected, viewed, or copied by any person, or disclosed to any person, except as provided in the protective order. No additional copies of the tape of any of its portion shall be made, given, sold, or shown to any person without prior court order. Any person violating such protective order is subject to the contempt power of the court and other penalties prescribed by law."



(v) No tape shall be given, loaned, sold, or shown to any person except as ordered by the court.

(vi) This protective order shall remain in full force and effect until further order of the court.

(c) **Personal details during evidence likely to cause threat to physical safety of vulnerable witness to be excluded—**A vulnerable witness has a right at any court proceeding not to testify regarding personal identifying information, including his name, address, telephone number, school, and other information that could endanger his physical safety or his family. The court may, however, require the vulnerable witness to testify regarding personal identifying information in the interest of justice.

(d) **Destruction of videotapes and audiotapes—**Any videotapes or audiotape of a child produced under the provisions of these guidelines or otherwise made part of the court record shall be destroyed as per rules formed by the Delhi High Court.

39. **Protective measures**

At any stage in the justice process where the safety of a child victim or witness is deemed to be at risk, the court shall arrange to have protective measures put in place for the child. Those measures may include the following:

(a) avoiding direct or indirect contact between a child victim or witness and the accused at any point in the justice process;

(b) restraint orders;

(c) a pretrial detention order for the accused or with restraint or "no contact" bail conditions which may be continued during trial;

(d) protection for a child victim or witness by the police or other relevant agencies and safeguarding the whereabouts of the child from disclosure;

(e) any other protective measures that may be deemed appropriate.

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**ADMINISTRATIVE LAW**—Petitioner applied for allotment of flat under IVth Registration Scheme on New Pattern, 1979 mentioning her address at "SB"—Later on, Petitioner intimated to DDA her correspondence address of Haryana—Petitioner was successful in draw of lots held by DDA—However, Demand-cum-Allotment Letter admittedly was sent on old address of Petitioner which was received undelivered—Since no response received from petitioner, allotment was cancelled—petitioner preferred writ petition praying for issuance of a mandamus to DDA to allot her flat in lieu of cancelled one at cost prevailing at time of original allotment—Held—Onus of proving that letter of petitioner informing change of address was not received by it was upon DDA which DDA has miserably failed to prove—petitioner has discharged initial onus placed upon her of proving that she had intimated DDA about her change of address by placing on record a letter showing diary registration number and seal of DDA and onus thereupon shifted to Respondents to prove that no such intimation was received—Petitioner is not custodial of records of DDA and therefore, she cannot be asked to produce same—It is now for Respondents to produce relevant entry in diary register, for which adverse inference is liable to be drawn against respondents in case they fail to produce same— respondents had a duty to search in files of petitioner for any other address for correspondence after receiving report that no such person was residing at earlier address of petitioner—It failed to do so and that too in circumstances when a long time had expired between date of registration of petitioner and date of issuance of demand—





cum—Allotment letter—"Wrong Address Policy" of DDA is applicable in case of petitioner and as she had approached DDA within 2 years from date of allotment, she is clearly entitled to allotment of a flat at old cost, prevalent at time when her priority matured and allotment letter was issued, and no interest is liable to be charged —Direction issued to DDA to allot and issue a Demand—cum—Allotment Letter for LIG flat of same size and in same locality as flat which was allotted to Petitioner earlier and preferably of same flat unless it has been allotted to any other person at cost prevailing at relevant time.

*Pushpa Khatkar* v. *D.D.A. & Anr.* ..... *2968*

**ARBITRATION & CONCILIATION ACT, 1996—SECTION 31,** Sub-Section (7)(b)—Arbitrator awarded interest upto the date of Award only—In Execution proceedings, future interest also allowed in favour of the respondent—Held, in terms of Clause (b) of Section 31 of the Act, if the Award is silent in regard to the interest from the date of Award, or does not specify the rate of interest from the date of Award, then the party in whose favour Award is made, will be entitled to interest @ 18% per annum from the date of Award and such party can claim the said amount in execution proceedings also even though there is no reference to any post Award interest in the Award.

Delhi Development Author*ity v. Jagdish Chander Khanna & Sons.* ..... *2833*

**ARMED FORCES**— Army Regulations—Rule 520—During operation Rakshak-III (so notified by Central Government) while petitioner was driving vehicle for returning after completion of certain local repair work of equipments and machinery, met with accident—Invalidating Medical Board evaluated 100 % disability and petitioner invalidated out of service—Respondent failed to treat petitioner's injury as a battle casualty and treated it as a physical casualty—Armed Forces Tribunal rejected petitioner's challenge to action of respondent—Order of Tribunal challenged before HC—Plea

taken, case is squarely covered under Category E Sub Clause (i) of Circular issued by Ministry of Defence dated 31st January, 2001 in respect of war injury pension payable to armed forces personnel who are invalidated from service on account of disability sustained during circumstances due to attributable/aggravated causes—Held—Signatures on statement attributed to petitioner in Court of Inquiry do not even remotely resemble his admitted signatures or signatures on Court Record—Court of Inquiry has in fact proceeded to return findings which effect character and reputation of petitioner and hold that petitioner was responsible for injuries sustained—Such Court of Inquiry could not have been legally held in absence of petitioner who had to be given opportunity to challenge statement of witnesses, if any, against him as well as record of finding against him—Court of Inquiry conducted in this case, is contrary to provisions of Army Regulations Rule 520—Petitioner was discharging duty while participating in operation Rakshak in Kargil area which operation had been specially notified by GOI in terms of Clause (i) of Category E in para 4.1 of circular dated 31st January, 2001—This aspect has not been noted by Tribunal in its judgment—As a result, it has to held that petitioner is entitled to all benefits including monetary benefits.

*J.P. Bhardwaj* v. *UOI and Ors.* ..... *2767*

— Denial of appointment to the post of Constable (GD) in the Central Armed Forces—Signatures in Capital letters in English—Petitioner's entire signatures consists of the four letters which constitute his name "ARIF". Petitioner writes the letter 'A' 'R' and 'F' in capital letters while the letter 'I' is in running hands—A short issue which arises in this case is as to whether the petitioner, whose signatures are entirely in capital letters in English can be denied appointment to the post of Constable (GD) in the Central Armed Forces i.e. BSF, CISF, CRPF, SSB etc. Held—This issue has been dealt with earlier vide a pronouncement dated 24th February, 2012 in W.P. (C) 1004/2012 titled as *Delhi Subordinate Services*



*Selection Board and Another v. Neeraj Kumar and Another*—A similar issue thereafter was decided in favour of the writ petitioner in W.P. (C). 6959/2012 vide an order dated 5th November, 2012 titled as *Bittoo v. Union of India and Another*—The order dated 4th December, 2012 in W.P. (C) 7158/2012 titled *AS Pawan Kumar v. Union of India and Another* deals with the same issue and was also decided in favour of writ petitioner—It is well settled that there is no law which prohibits a person to sign in capital letters—It has been held in the judgment of this Court in *Pawan Kumar* (Supra) that a signature is a trait which a person develops over a period of time and these traits can develop even with reference to capital letters—Petitioner cannot be denied consideration for appointment if otherwise eligible for the appointment to the post of Constable in the CISF on the ground that the candidature of the petitioner was rejected mainly due to his signatures being done in English capital letters—Writ petition is allowed.

*Arif* v. *UOI and Anr.* ..... *2780*

**ARMS ACT, 1959**—Section 25—Appellant (accused) was convicted under Section 302 for death of the victim in the event of robbery—Appeal filed—Only motive was robbery and there was no ill-will between the accused and the victim—Whether conviction fell under Section 302 or 304, IPC—Held:-Accused was armed with dangerous weapon and victim was unarmed—Sufficient to indict the accused with the offence of murder—Accused may not have intention to kill but he voluntarily caused death—Appeal dismissed.

*Ramesh* v. *State (NCT) of Delhi* ..... *2597*

— Section 25—Appellant (convicts) argued that the Trial Court did not appreciate the evidence in its true and proper perspective and fell into grave error by relying into testimony of sole witness—Respondent argued that there are no valid reasons to discard the cogent testimony of the victim who had no prior animosity with the assailants. Held, it is settled

legal proposition that while appreciating evidence of witness minor discrepancies on trivial matters, which do not affect prosecution's case may not prompt Court to reject the evidence its entirety. The Court can convict an accused on the statement of the sole witness provided that the statement of such witness should satisfy legal parameters i.e. it is trustworthy, cogent and corroborated with the oral of documentary evidence. Only when single eye witness is found to be wholly unreliable by the Court, his testimony can be discarded in toto—Appeal dismissed due to lack merit of the case.

*Naresh & Anr.* v. *State of Delhi* ..... *2622*

**ARMY ACT, 1950**—Section 63—Section 80/82—Summary Trial—Conviction—Brief Facts—Petitioner was enrolled as a Sepoy on 10.3.2003 and posted with 22nd Batallion Rajputana Rifles—Unblemished service record—In March, 2012, Petitioner sent to Jaipur on temporary duty for an official attachment—Received a message of minor daughter's sickness—Petitioner's case is that he requested the Adm Commandant of Station Headquarter Cell, Jaipur for two days casual leave from 08 to 09 May, 2012—Having been granted such leave, Petitioner proceeded to his home town; took his daughter to a nearby hospital for treatment and thereafter returned to Station Headquarter, Jaipur Cell within time—On completion of the temporary duty, Petitioner was sent back to his parent unit on 12th May 2012.—Petitioner's parent unit objected to his having taken casual leave from the Administration Commandant, Station Head Quarters and not from Capt. Gaurav Tewari who was deputed as Admn. Officer of the Station Cell at Jaipur—Consequently, Petitioner subjected to a summary trial under Section 80/82 of the Army Act, 1950 on the aforenoticed charge—Petitioner entered a plea of guilty Respondents have recorded that the Petitioner returned a plea of guilty and was thereafter sentenced to 7 day rigorous imprisonment—Hence the present petition—Petitioner contended that he could not have disputed that he



had taken casual leave but it was his categorical stand that the casual leave and had been duly sanctioned by the Station Commandant, who was the competent authority to have granted the station leave—Contended that looked from any angle, seven days rigorous imprisonment which would vest the petitioner with a red ink entry in his record is unduly and completely disproportionate to the nature of the offence for which the petitioner was charged. Held—Petitioner was charged with unauthorised absence from duty—Respondents are unable to dispute the correctness of the petitioner's statement that he had sought the permission before proceeding on two days casual leave with the authority of Station head quarter at Jaipur—Petitioner has submitted that he was tense on account of sickness of his minor daughter—He had taken sanction of leave from the Station Commandant—Undisputedly, the Station Commandant was the highest authority in the Station Headquarter—Petitioner could not have been summarily tried and punished in the proceedings—No statutory provision, law or regulation which prescribes that despite the sanction by the Station Headquarter, the Petitioner was required to obtain as sanction of the same from the Adm Officer has been pointed out—Station Commandant was an officer of the rank of Colonel while the Admn. Officer was an officer of the rank of Captain—Petitioner acted as per directives of the senior most officer in the Station—Charge against the Petitioner was unwarranted and the punishment against the petitioner was unduly harsh—Proceedings of the summary trial, order of conviction and punishment dated were arbitrary and illegal and are thereby set aside and quashed—Punishment shall not operate against the Petitioner for any purpose—Writ Petition is allowed accordingly.

*Satish Kumar* v. *Union of India & Ors.*..... *3253*

**BORDER SECURITY FORCE ACT, 1968**—Section 19(a), 40, 46, 74(2) and 117—Border Security Force Rules, 1969—Rule 45 and 51—CCS (Pension) Rules—Rule 41—Indian Penal Code, 1860—Section 354—Petitioner assailed finding and

sentence of Summary Security Force Court (SSFC) and order passed by DG, BSF rejecting statutory appeal against same—Plea taken, petitioner was denied opportunity to effectively defend himself for reason that proceedings were conducted in Bengali, a language he was not conversant with—Second ground of challenge is that conviction and sentence of SSFC are based on no evidence at all for reason that complainant has failed to identify him and also her testimony renders occurrence of incident impossible in given circumstances—Held—Respondents had appointed two interpreters—One interpreter was conversant with Hindi and English language and second with Bengali and other languages—During trial, petitioner made no objection at all to proceedings of SSFC or that he was unable to understand proceedings—There is no merit in Petitioner's plea that he was prejudiced in any manner for reason that some of witnesses were local civilians or he was not able to understand their deposition—There is ample evidence which establishes that petitioner entered house of PW6 without authority and with intention to outrage her modesty for which he was accosted by civilians—Challenge by way of instant writ petition has to be rejected.

*Vijay Kumar v. UOI and Ors.* ..... *2875*

— Section 20(a) and 22(a)—Border Security Force Rules, 1969—Rule, 45, 99 and 149—Petitioner found guilty of both charges framed against him by Summary Security Force Court (SSFC)—Statutory appeal filed by Petitioner rejected by Director General (DG), Border Security Force (BSF)—Order challenged before High Court of Judicature at Allahabad who directed DG, BSF to decide statutory petition of petitioner by passing a speaking order—DG, BSF altered finding of guilt in respect of two charges substituting same by a finding of not guilty—DG as appellate authority, did not vary finding of guilty so far as first charge is concerned and also held that punishment which was imposed on petitioner, was commensurate with gravity of offence committed by him—Order challenged before HC—Plea taken, DG, BSF had no



jurisdiction to pass impugned order—Matter should have been remanded to SSFC for consideration afresh which alone had authority to consider same—Further contended, SSFC ought to have complied with requirement of Rule 99 of BSF Rules which required SSFC to record reasons for its findings—Held—DG, BSF has considered matter in compliance with directions passed by HC and has passed a reasoned and speaking order which has been duly communicated to petitioner–It is not open to petitioner to now contend that DG could have only remanded matter and could not have considered matter afresh—So far as challenge to order passed by SSFC is concerned, same rests on sole ground that impugned order is not a reasoned or speaking orders—This challenge is premised on petitioner's reading of Rule, 99—Rule 99 of BSF Rules does not relate to a trial by SSFC but applies to record and announcement of finding by General Security Force Court and Petty Security Force Court—Challenge by Petitioner to findings of SSFC relying on Rule 99 of BSF Rules is wholly misconceived—Writ petition is wholly misconceived and legally untenable.

*Anil Kumar Rai v. Union of India and Ors.* ..... *2887*

**CODE OF CIVIL PROCEDURE, 1908**—S. 32—Territorial Jurisdiction—The Petitioner Commissioner, Indian Premiere League (IPL)—Organizing Cricket matches proceeded against by Directorate of Enforcement (DoE) for FEMA violation in parking funds in foreign bank—The petitioner based abroad summoned to appear in person before the authorities to explain certain aspect of his dealing as Commissioner, IPL avoided to appear ground security threat to his life in India—Kept making representation through his attorney—DoE not satisfied with explanation referred the matter to passport authority for impounding/revocation of passport-passport authority revoked his passport vide order dated 3.3.2011—Petitioner appealed to Regional Passport Officer (RPO) without success preferred writ petition—Held—Passport Act does not contemplate division of proceedings before passport authority into two

half—Show cause notice clearly put the petitioner in picture that if he failed to satisfy officer with regard to tenability of his defence charge made against him—Action under Passport Act would follow—Last Clause (e) of S. 10 (3) of the Passport Act invest the passport authority to impound/revoke passport in 'general public interest' as well as input provided by statutory authority and other wings of government in the possession of actionable material—No fault found with passport authority—Assistant Passport Officer (APO) received information—Actionable provided necessary jurisdictional facts to exercise power under S. 37 to take recourse to provision of Section 32 CPC against witnesses and noticee—Show cause notice issued by APO while hearing held by superior officer RPO—This did not involve violation of principle of natural justice—Response of EOW of Bombay Police to RTI application made to it did not supprt petitioner's case in the absence of passport being available with authority the only order which would be passed is of revocation—Writ petition dismissed.

*Lalit Kr. Modi* v. *Union of India and Ors.* ..... *2484*

— Order 1 Rule 10—Writ petition filed challenging action of MTNL to evict petitioner from store—During pendency of instant petition, property of MTNL transferred to proposed Respondent-BSNL which had taken over property of MTNL—BSNL directed petitioner to deposit license fee which petitioner deposited—Application filed to implead BSNL yet to be disposed of—Ld DB remanded matter on a misrepresentation that BSNL was impleadment as it is a necessary party, since property in question belongs to BSNL— Per contra, MTNL relied on communication stating that area of occupation under MTNL and BSNL respectively shall continue to be so occupied for time being and MTNL may defend case against Petitioner—Held—Since BSNL has not yet been impleaded a party, response of BSNL on aforesaid communication could not be ascertained—This letter does not obviate necessity of impleading BSNL as a party which is necessary for purpose



of determining ownership rights of MTNL / BSNL—Application allowed— Amended memo of parties taken on record.

*Jankalyan Telecom Coop. Store* v. *M.T.N.L. & Ors.* ..... *3069*

— S. 37—Defendant claimed Leave to defend on the ground that goods supplied were defective—Held defendant paid part amount and it follows that defendant was receiving the goods and has been making payment in part indicating that no defect was there in goods—The two letters written by defendant do not stipulate rejection of goods rather they indicate that defendant utilised the goods and later on their customer's complained to defendants about quality of packing—Nothing to show defendant rejected goods within reasonable time—Defendants utilised goods namely packing material for packing rice and exporting it abroad—Action of defendant contrary to Section 42 of Sales of Goods Act. Suit based on 20 invoices and merely because a mention is made to a statement of account in the plant would not make the suit based on statement of accounts. Order 37 CPC applies to a suit even on the basis of invoices—Invoices contained full details regarding the quantity and rate of goods—Invoices tantamount to binding contract between parties.

*Bijender Chauhan @ Bijender Kumar* v. *Financial Eyes (India) Ltd.* ..... *3234*

**CODE OF CRIMINAL PROCEDURE, 1973**—Section 161 & 313—Factories Act—Section 31—Appellant (convict) argued that the Trial Court fell into grave error while relying upon testimonies of hostile witness—No due weightage was given to the testimonies of the defence witnesses—Vital discrepancies emerging in the statement of the witnesses were ignored—Held—The testimony of an illiterate and rustic witness is to be appreciated, ignoring minor discrepancies and contradictions—Credibility of the testimony, oral or circumstantial depends considerably on the judicial evaluation

of the totality, not isolated scrutiny—The Court has to appraise the evidence to see to what extent it is worthy of acceptance—For conviction under Section 307 IPC it is not essential that bodily injury capable of causing death should have been inflicted—It is not necessary that the injury actually caused to the victim should be sufficient under ordinary circumstances to cause death of the victim—The Court will be give regard to intention, knowledge and circumstance irrespective of the result of conviction under Section 307 IPC—It requires an enquiry into the intention and knowledge of the accused and whether or not by his act, he intended to cause death that would amount to murder under Section 300 IPC—The nature of weapon used, the intention expressed by the accused at the time of the act, the motive, the nature and size of injuries, the part of the body where injuries were caused and severity of the blows are the relevant factors to find out intention/knowledge—Appeal dismissed.

*Vijay Kumar Kamat* v. *The State (NCT of Delhi)* ... *2612*

— Section 313—Statement of the accused—Section 357—Compensation to victim appellant father of the prosecutrix charge sheeted for offences under section 376 and 506—Male child born after registration of FIR—Charges framed—Pleaded not guilty—Prosecution examined 14 witnesses—Statement of accused recorded denied committing rape—Convicted—Sentenced to imprisonment for life with rider and fine—Compensation awarded to the victim—Preferred appeal—Contended—DNA test not properly conducted—Falsely implicated by the wife and daughter for money—Taken possession of his assets including land—Victim of conspiracy—Sexual act was consensual—Held:- Prosecutrix and her mother are the material witnesses baby delivered after registration of FIR—Blood samples of the baby, prosecutrix and appellant collected under the order of the Court—Appellant voluntarily agreed sample drawn by an expert—No fault with drawl of blood sample—No suggestion given to expert as to non conduct of DNA test properly during cross examination—



No such plea can be permitted—Expert opined the appellant and the prosecutrix to be the biological parents of the child—Appellant had sexual intercourse with the prosecutrix established was aged about 17 years on the date of commission of offence tenor of cross examination implies plea of informed consent to the sexual act—Prosecutrix testified the act committed by keeping her at knife point and under threat—No reason to disbelieve dependent on appellant for shelter, bread and butter did not have the choice to resist appellant's act—Consent under threat is no consent—There cannot be voluntary participation in the act—Conviction proper—Case did not fall in any clause under sub section (2) of section 376—Not liable to be punished with imprisonment for life with rider—Sentence maintained but without the rider—Appeal disposed of.

*Sant Ram @ Sadhu Ram* v. *The State* ..... *2894*

— Section 340—Procedure for taking action by the Court—Section 195—Contempt of lawful authority of public servants for offences against public justice—Indian Penal Code—Section 193—Punishment for giving false evidence—FIR No. 287/99 under section 302 IPC and 27 Arms Act PS Mehrauli—All nine accused persons acquitted—Acquittal challenged through appeal to the High Court—Acquittal of six accused persons upheld while three accused persons convicted—During trial 32 witnesses turned hostile initiated proceedings for perjury under section 340 suo motu called upon the 32 witnesses to show cause why proceedings be not initiated—Conviction challenged before the Supreme Court—Conviction upheld—Notices of 10 witnesses out of 32 discharged—Respondents moved individual applications for discharge—Contended—Action based on previous statements made to police during investigation not sustainable cannot be the basis of proposed action no adverse comments made against the respondents in the judgments court is to give fair and adequate opportunity whom it intends to refer for trial—Material inadmissible in evidence is to be eliminated—State

contended—Role played by the Respondents were aimed at deliberately assisting the accused—Court is to satisfy whether it would expedient in the interest of the justice to make complaint—Merits of the case cannot be looked into only comparison of statements made is to be done—Held:- PW Shyam Munshi is the author of FIR duly signed by him—Admitted to have witnessed the entire episode yet declined to identify the offender—Attempted to mention two persons firing relied on accused's counsel prima facie indicative of attempt to not stating the facts suppressing it with a view to help the accused action prima facie warranted against him (PW2)—PW95 Prem Shanker Manocha—A ballistic expert—Discrepancy between the opinion and his deposition in Court—Testified correctness of his report—Expressed inability to give an opinion about the weapon during Court deposition stated cartridges appear to be fired by two separate weapons—helped the defence to urge two weapon theory—Theory accepted by trial Court—Failed in his duty as an expert—A case for further proceeding against him—Other witnesses resiled from their statements recorded under section 161—Unsigned—Not made under oath—No adverse comments by the Court—Notices discharged.

*State (GNCT of Delhi)* v. *Sidhartha Vashisht @ Manu Sharma & Ors.* ..... *2627*

— Section 427 & 428—Appellant was convicted on 04/11/09 for offences punishable U/s 397/394/392/34 IPC in FIR No. 346/05—He was also sentenced on 02/11/09 for offences punishable U/s 392/397 IPC in case FIR No. 877/05 and convicted on 15/09/09 in case FIR No. 375/05—His sentence for offences emerging in FIR No. 375/05 & 877/05 were already over—Appellant filed appeal against his conviction for FIR No. 346/05 but he did not contest appeal on merits and only prayed for his sentence to run concurrently to enable him to come out of jail earlier. Held:- A person already undergoing sentence of imprisonment in one case and is further sentenced in a second case, the second sentence shall commence at the



expiry of the imprisonment to which he had been previously sentenced, unless the Court directs the subsequent sentence to run currently. The power of the Court U/s 482 of the Code to direct sentences to run concurrently is unquestioned yet to be decided on the facts and circumstances of each case.

*Rajesh @ Raju* v. *State (NCT of Delhi)*..... *2855*

**COMPANIES ACT, 1956**—Section 433 (e) read with Section 434 (1)(a)—Brief Facts—M/s. Pacquick Industries Ltd., the "Company", had borrowed a sum of 11 crores (approximately) from M/s. Pradeshya Industrial and Investment Corporation of UP Ltd., Lucknow, "PICUP", for the purpose of its business—Company had obtained the loan by mortgage of the property at B-54, Sector-57, Noida, U.P. along with the plant and machinery- Title deeds relating to the property were handed over to PICUP - Soon the Company ran into rough weather and was unable to re-pay the amount to PICUP - Company had also borrowed a sum of 62,53,375/- from Pioneer Multifilms of Delhi, the Petitioner - Company was unable to re-pay the aforesaid amount also due to falling business - Petitioner filed Company Petition No.194/2006 for winding up of the Company under Section 433(e) read with Section 434 (1)(a) of the Companies Act, 1956 - In order to help the Company tide over its financial difficulties and revive its business, a one-time settlement ("OTS", for short) was entered into between PICUP and the Company under which the debt to PICUP was settled at 2,29,85,000/- Understanding was that on payment of the aforesaid sum, PICUP would return the title deeds to the Company and the Company would strive to revive its business - A joint application under Order 23, Rule 3 of the CPC was filed in C.A. No.10/2011 recording a settlement arrived at between petitioner and the company—Brief terms of the settlement were that Petitioner will pay the amount of 2,29,85,000/- to PICUP and when the company obtains the title deeds from PICUP, the property would be sold to petitioner - PICUP was impleaded as a party to the proceedings - OTS amount was already paid by petitioner to

PICUP on 10.01.2011—On 07.03.2011 M/s. PICUP is directed to release the original title deeds of documents, property and machinery to the petitioner within a period of two weeks - Court directed that keeping in view the terms of the settlement between the parties, PICUP on direction, deposited the title deeds of the property in question with the Registrar of Court - Company Application No.906/2011 is an application filed by PICUP asking this Court to issue directions that the title deeds to the property shall not be handed over to Petitioner - Company Application No. 13/2012 is also filed by PICUP seeking return of the title deeds deposited with this Court - Company Application No. 2437/2012 is filed by one Raj Kumar Arora seeking to purchase the property for 3.25 crores or in the alternative to permit an auction of the property, since according to him the property has been wholly undervalued and was sought to be sold to petitioner only at 2,29,85,000/-.

— Held—Petitioner paid the amount of 2,29,85,000/- and there is ample documentary evidence on record to prove the same and once the amount has been paid to PICUP in terms of the OTS, and when subsequently the OTS is cancelled, it is idle on the part of PICUP to seek return of the title documents and also seek to hold on to the monies-PICUP cannot at the same breath contend that the OTS has been cancelled and also refuse to return the monies to petitioner-petitioner, is not the borrower from PICUP and what he did was only to discharge the amount due to PICUP by the Company-Terms of settlement between the Company and Petitioner were known to PICUP since PICUP impleaded as party to the proceedings by an order-If PICUP wants to get back the title deeds from the Registrar of this Court, it can do so only on paying the amount of 2,29,85,000/- to petitioner-After impleadment, PICUP cannot say that any fraud was sought to be played upon it by the Company and petitioner-PICUP, having consented to the impleadment, cannot now turn around and say that it was not aware of the proposed sale of the property



in favour of petitioner-PICUP cannot retain the monies which it received from Petitioner—PICUP cannot take a contradictory stand that it would cancel the OTS and also not return the monies to petitioner-Technically and legally speaking, Petitioner was not the debtor; but the monies came from him and this was within the Knowledge of PICUP-PICUP was also aware of the source of the monies by being party to the settlement arrived at between Darshan Khurana and the Company-With such awareness, PICUP cannot sat that it is entitled to the return of the title deeds and is also entitled to retain the monies paid by Petitioner on account of the debt due by the Company-PICUP should return the amount of 2,29,85,000/- to petitioner within three weeks-Once the amount is paid as directed, PICUP will be entitled to get back the title deeds from the Registrar of this Court.

*Pioneer Multifilms* v. *Pacquick Industries Ltd. ..... 3180*

— Section 433(e) read with Section 434 (1)(a) - Brief Facts—Respondent company deducted income tax of 74,184/- but the net amount after deduction was never paid to the Petitioner-Total amount originally payable to petitioner was 32,67,975/- out of which a sum of 28,29,058/- was paid on 20.03.2009 -Balance amount payable is 3,64,773/- Though this amount was not paid, the respondent company deducted income tax of 74,184/- from the same which according to the petitioner amounted to the acknowledgement of the liability of the respondent company -Petitioner's wife was carrying on a business under the name and style of M/s. Innovations which entered into a settlement with a company called Focus Brands Trading (India) Pvt. Ltd.- ("Focus", for short) according to which as against the total amount of 69,74,721/- due by Focus, the matter was settled on payment of 25,00,000/- in Company Petition No. 326/2010, but this has nothing to do with the transactions between the present petitioner and the respondent company - Petition filed by M/s. Servel Industries through its proprietor Puneet Soni, under Section 433(e) read with Section 434 of the Companies Act,

1956 for the winding up of the company by name M/s Alcobrew Distillers (India) Pvt. Ltd. -Respondent company took the objection that the claim of the petitioner stood settled vide order of this Court passed on 16.05.2011 in Company Petition No. 326/2010 -Short question for consideration is whether the claim of the petitioner against the respondent company stood settled as contended on its behalf -It is contended that the objection taken by the respondent company to the effect that nothing was due by it to the petitioner is untenable -Reliance is placed on the order of this Court (Manmohan, J.) passed on 20.05.2011 in Company Petition No.326/2010 recording the Memorandum of Settlement between Innovations and Focus and it is pointed out that this settlement did not bind the present petitioner -It is further pointed out that even the respondent company was not party to the Memorandum of Settlement and, therefore, no reliance can be placed upon the same to contend that the petitioner's claim also stood settled -As against this, it is contended on behalf of the respondent that it had an agreement with Focus, which was marketing international brands of liquor, under which it acted as bottlers for Focus.

— Held—It is true that in the Memorandum of Settlement dated 20.05.2011 arrived at between the petitioner (Servel Industries) and his wife (M/s. Innovations) on the one hand and Focus on the other, that a total outstanding of 69,74,721/- was settled at 25 lakhs—This amount consisted of the principal sum of 55,57,721/- and interest of 14,17,000/- It prima facie appears that the Memorandum of Settlement was entered into only with reference to the amount payable by Focus -It refers to the fact that M/s. Innovations filed Company Petition No.326/2010 before this Court for winding up of Focus on the ground that it was unable to pay the aforesaid amount to it—There is no reference in the Memorandum of Settlement to the agreement dated 25.01.2007 entered into between the Focus and the respondent-company, clause 5.7 of which made Focus responsible for all consequences arising out of non-payment



of dues by the respondent company to the suppliers -Further, the order of this Court passed on 20.05.2011 in Company petition No.326/2010 refers only to "respondent's debt to the petitioner", which means the amount owed by Focus to Innovations—In the order passed on 16.05.2011 in Company Petition No. 326/2010, it was made clear that "in terms of the said settlement, respondent shall pay a sum of 25 lakhs in full and final settlement of the amount due and payable not only to the petitioner but also to M/s. Servel Industries Ltd.," -Thus it is more that clear that under the MoS dated 20.05.2011, it is only the amount due by Focus, both to the present petitioner and M/s. innovations, that was sought to be settled—There is no mention in the orders of this Court in Company Petition No. 326/2010 about the amount due by the respondent-company -If this factual position alone is taken note of, it would appear that the respondent-company has to fail in its contention—In the light of the statement made by the petitioner in he e-mail dated 29.03.2010, the petitioner cannot be permitted now to say, after the settlement has been arrived at, that the amount of 3,64,773/- due from the respondent-company was not part of the settlement -To permit him to do so would be contrary to the tenor of the Memorandum of settlement and the entire events leading up to it and would also amount to not giving due weight to the agreement dated 25.01.2007 entered into between the respondent and Focus, particularly clause 5.7 thereof - Company petition is dismissed the with no order as to costs.

*Servel Industries* v. *Alcobrew Distilleries (India) Pvt. Ltd.* ..... *3191*

— Section 433(e) read with Section 434 (1) (a)—Brief Facts—Company was incorporated in 2002 to carry on the multimedia centre where training was to be imparted to students and to carry on the software development—A franchise agreement was entered into by the company with Maya Academy of Advanced Cinematics for period of five years in this behalf—Initially the petitioner and the second respondent were the only

shareholders of the Company whose share capital was Rs. One lakh only—Taruna Ummati was inducted as a shareholder and she and the petitioner held 30% share each—Respondent No. 2 held the balance 40% shares in the Company—Soon there were allegations of mismanagement levelled by the second respondent, who was stationed in Chandigarh, against the petitioner herein, who was managing the Company's affairs in Delhi and disputes arose—Franchise agreement was terminated in 2005—Second respondent filed a petition under sections 397-398 of the Act in the Company Law Board ('CLB') which directed that the petitioner would manage the affairs of the Company together with respondent No.2—An appeal against the order of the CLB is said to be pending before this Court—Despite the order of the CLB the disputes continued and the board meeting could not be conducted—Annual returns of the Company, the profit and loss accounts and the balance sheets could not be filed with the Registrar of Companies ('ROC') —There was thus a stalemate—In the above background, respondent No.2 filed Company Petition No. 182/2010 before this court under clauses (e) and (f) of section 433 for the winding up of the Company—This petition was, however, permitted to be withdrawn with liberty to file appropriate recovery proceedings vide order of the learned single judge (Manmohan, J.,) dated 20-9-2011—It is contended in support of the present petition that it is just and equitable that the Company be wound up—It is contended that respondent No.2 herself had earlier sought winding up of the Company on the same grounds and therefore there cannot be any objection from her to the present winding-up petition—Moreover, it is contended, the substratum of the Company is lost and hence it is just and equitable that it is wound up—It is also pointed out that the business of the Company has been suspended for more than a year and therefore clause (c) of section 433 applies; and that the company has not filed its annual return, balance sheets and profit and loss accounts for five consecutive years with the ROC and therefore clause (g) of section 433 applies.



— Held—Petition for winding-up is not opposed on behalf of the respondents—Business of the Company has been suspended for more than one year and so clause (c) of section 433 of the Act applies; the annual accounts and annual returns have not been filed since the year 2007 which attracts clause (g) of Section 433—It is just and equitable that the Company be wound up—Its share capital is small and is held by only three persons—It is more akin to a partnership concern—There are allegations against each other by the two directors and the business has ceased—There is a stalemate—In fact, the substratum of the Company seems to have been lost—Moreover, the Company is becoming debt-ridden due to the burden of maintaining of its office—On date the Company owes an outstanding debt of Rs. 50,00,000 towards ICICI Bank which the Company is unable to pay—There are other proceedings against the petitioner stated to be pending—Clause (f) of section 433 is also attracted—Petition is, therefore, admitted—Official Liquidator attached to this Court is appointed as the Provisional Liquidator ("PL") of the respondent—OL is directed to take over all the assets, books of accounts and records of the respondent forthwith—OL shall also prepare a complete inventory of all the assets of the respondent before sealing the premises in which they are kept—Company and its directors/servants/agents etc. are restrained from selling, transferring, mortgaging, alienating, creating any charge, or parting with possession of any of its immovable assets.

*Hardeep Gill* v. *Pumpkin Studio Pvt. Ltd. & Anr.. 3246*

**CONSTITUTION OF INDIA, 1950**—Article 226—Petitioner challenges action of the respondents in not considering him for award grace marks in the examination held for the post of SI/GD through limited departmental competitive examination (LDCE) 2011, in terms of standing order 01-2011—Held:- there is nothing in the standing order which stipulates that a candidate who has failed to obtained the prescribed marks in the examination shall be entitled to the

award of grace marks and the standing order merely sets out the guidelines for conducting the LDCE—Petition found without merit.

*Purkha Ram* v. *UOI & Ors.* ..... *2619*

— Petitioner assailed findings of disciplinary proceedings conducted against him, accepting recommendations and findings of Inquiry Officer and imposing punishment of dismissal from service—It was urged, disciplinary authority had sought advice of Union Public Service Commission (UPSC) which recommended imposition of penalty of dismissal from service upon petitioner—But petitioner was not given copy of advice of UPSC so that he could make representation against advice and submit his point of view. Held:- It is settled principle of natural justice that if any material is to be relied upon in departmental proceedings, a copy of the same must be supplied in advance to the charge-sheeted employee so that he may have a chance to rebut the same.

*C.P. Gupta* v. *Union of India and Ors.* ..... *2859*

— Petitioner held posts of Charge Electrician, Charge Mechanic, Superintendent (E&M), Overseers, Superintendent (B&R) in GREF—Aggrieved with pay fixation w.e.f 01/01/1996 and its consequential impact, he filed writ petition claiming similar rights and privileges as made available to other employees holding similar positions as that of petitioner—Also, said issue was adjudicated in other writ petition which had attained finality as even SLP was dismissed. Held:- When a principle of law pertaining to payment on fixation is decided by a Court on a writ petition filed by an individual but decision relates to a matter of principle of law to be applied, the said decision has to be implemented in rem, i.e. with respect to all such persons who hold similar posts and not qua the persons who approach the Court.

*Gulbir Singh* v. *Union of India & Ors.* ..... *2868*

— Article 226-227—Writ Petition—Fundamental Rights Article 14,19, 21—Passport Act—Revocation of Passport—Principles



of Natural Justice—Violation of—Foreign Exchange & Management Act, 1999 (FEMA)—Code of Civil Procedure—S. 32—Territorial Jurisdiction—The Petitioner Commissioner, Indian Premiere League (IPL)—Organizing Cricket matches proceeded against by Directorate of Enforcement (DoE) for FEMA violation in parking funds in foreign bank—The petitioner based abroad summoned to appear in person before the authorities to explain certain aspect of his dealing as Commissioner, IPL avoided to appear ground security threat to his life in India—Kept making representation through his attorney—DoE not satisfied with explanation referred the matter to passport authority for impounding/revocation of passport-passport authority revoked his passport vide order dated 3.3.2011—Petitioner appealed to Regional Passport Officer (RPO) without success preferred writ petition—Held—Passport Act does not contemplate division of proceedings before passport authority into two half—Show cause notice clearly put the petitioner in picture that if he failed to satisfy officer with regard to tenability of his defence charge made against him—Action under Passport Act would follow—Last Clause (e) of S. 10 (3) of the Passport Act invest the passport authority to impound/revoke passport in 'general public interest' as well as input provided by statutory authority and other wings of government in the possession of actionable material—No fault found with passport authority—Assistant Passport Officer (APO) received information—Actionable provided necessary jurisdictional facts to exercise power under S. 37 to take recourse to provision of Section 32 CPC against witnesses and noticee—Show cause notice issued by APO while hearing held by superior officer RPO—This did not involve violation of principle of natural justice—Response of EOW of Bombay Police to RTI application made to it did not supprt petitioner's case in the absence of passport being available with authority the only order which would be passed is of revocation—Writ petition dismissed.

*Lalit Kr. Modi* v. *Union of India and Ors.* ..... *2484*

— Article 14—Policy making—Validity of provision in the office memorandums issued by UOI from time to time requiring the petitioners to achieve minimum benchmark qua production of single Super Sulphate Fertilizer (SSP) challenged on the grounds of unreasonableness—Held:- in view of case set up by UOI, the policy under challenge was introduced in order to increase productivity and the fact that since the introduction of the policy in August, 2009, there was been an increase in the production shows that the policy has worked and petitioner's contention that the provision for minimum benchmark for production ought to be declared production ought to be declared unreasonable and discriminatory is without merit—Further held, main thrust of the policy under challenge is to provide good quality SSP fertilizer in optimum quantities to the farmers and as long as the Government is able to achieve this objective, the incidental impact on inefficient manufacturers cannot render the policy illegal on the grounds of arbitrariness or unreasonableness and if by and large a policy is fair and achieves the object it seeks to achieve, the Court is not called upon to iron out the creases in the policy just because there is another point of view available—Petitions are without merit and dismissed.

*Devyani Phosphate Private Ltd. & Anr.* v. *UOI* ..... *2518*

— Petitioners held posts of Charge Electrician, Charge Mechanic, Superintendent (E&M), Overseers, Superintendent (B&R) in GREF—Aggrieved with pay fixation w.e.f 01/01/1996 and its consequential impact, they filed writ petition claiming similar rights and privileges as made available to other employees holding similar positions as that of petitioners—Also said issue was adjudicated in other writ petition which had attained finality as even SLP was dismissed. Held:- When a principle of law pertaining to payment on fixation is decided by a Court on a writ petition filed by an individual but decision relates to a matter of principle of law to be applied, the said decision has to be implemented in rem, i.e. with respect to all such persons



who hold similar posts and not qua the persons who approach the Court.

*Bhupinder Kumar & Ors.* v. *Union of India & Ors.* ..... *2864*

— Petitioner preferred writ petition praying for staying of his movement order whereby he stood posted to Barrackpore w.e.f. 24/06/13—Petitioner alleged he had to contest Transfer Petition filed by his wife in Hon'ble Supreme Court of India listed for 22/07/13—Also, he was entitled to normal tenure of five years at Barrackpore instead of three years restricted tenure posting for which petitioner had made representation before competent authority and was pending disposal. Held:- Respondents to consider the representation made by petitioner with applicable statutory provisions and policies, pass an order thereon and communicate the same to petitioner forthwith thereafter.

*Kundan Ghosh* v. *Union of India & Ors.* ..... *2873*

— Article 226—227—Writ Petition—Service Law—Promotion—Medical 'Shape' Certificate—Central Police Organization (CPO)—Central Industrial Security Force (CISF)—Petitioner appointed as Sub—Inspector (Fire)—Promoted to Inspector on 28.07.1997 placed at SI. No. 18 on the seniority list of Inspectors—R2 and R4 placed at SI. No. 20 and 22—List containing name of Inspectors in the zone of consideration forwarded to Commandant CISF—Vide letter directed a Medical "Shape" Certificate valid as on 01.01.2012 in respect of candidates be forwarded immediately—Assistant Commandant of Petitioner's unit wrote to petitioner on 9.3.2012 to submit the Medical "Shape" Certificate on or before 15.03.2012—Petitioner relieved for medical on 13.03.2012—Medical examination conducted at named hospital before forwarded by Assistant Commandant on 19.03.2012 case of petitioner not considered for promotion other promoted on 11.12.2012—Petitioner preferred writ petition—Contended respondent arbitrarily did not consider his case of

promotion and considered juniors in seniority list—Respondent contended circular issued by department that Medical "Shape" Certificate as on 01.01.2012 not before DPC—DPC met nearly 9 months later—Court observed-petitioner made aware of medical examination in March, 2012 his candidature overlooked for want of medical certificate as on 01.01.2012—Held—The rigid adherence to such time frame not mandated in law—undermines the objective for which created—The objective of medical certificate on record to ensure the concerned authority recommending promotion certified that the official fulfills the health parameter-interpretation placed on relevant circular and guideline unjustified directed respondents to consider case of promotion—Writ petition allowed.

*Beg Raj Indoria* v. *Union of India & Ors.* ..... *2955*

— Article 226-227—Writ petition—Service Law-pensionary benefit—death—disability attributable to operation—aggravated case—classification of residual head—petition working in Indian Army-posted at Battalic Sector in June, 1999 during 'Operation Vijay' at Kargil—awarded Operation Vijay Medal—Operation Vijay Star on 23.10.2000—while on duty during operation moving from Battalic to Leh—Jeep met with an accident—sustained injury attributable to military service in operation high altitude area—injury left him with 100% permanent disability—discharged from service on 19.03.2005—given terminal benefit and 100% disability pension in addition to other admissible retrial benefit—Petitioner's claim for grant of war injury pension recommended by unit—Adjutant General twice accept his request—recommended his case—however—after several reminders—rejected—ground did not incur disability during war or war like operation in terms of applicable guideline—circular was on account of accident while on duty—he was given disability pension for it—petitioner filed O.A. before Arm Force Tribunal—rejected—preferred writ petition—relied upon Central Government Ministry of Defence letter no.1(2)/97/I/



D (Penc) dated 31.01.2001 for war injury pension—Contended—claim fall in the relevant category of para 4.1—was on his way as per order given by superior in an operation which had been notified by Central Government as 'Operation Rakshak—III' during which armed forces engaged in flushing out the enemy forces after the Kargil War—Contested—Contended—classification of petitioner's injury as accidental could not be found fault with—unlike in the war like situation the petitioner traveling in his jeep—therefore the authority could not be asked to pay war injury pension—court Observed—petition deployed in Kargil—was a transport commandor-asked to report for briefing—The "Operation Rakshak—III" was on—no doubt that injury classifiable falling into category E(j) i.e during operation specifically notified by the government from time to time—Held—Residual head of classification to be read as to broad objective of the policy i.e. those who imperil themselves either directly or indirectly in the line of fire during the operation would be covered under this head—Writ petition allowed with cost.

*Major Arvind Kumar Suhag* v. *Union of India and Ors.* ..... *2989*

— Article 226—Premises of Petitioner burnt in riots of 1984 and before same could be reconstructed, whole area was taken over by MCD and DDA for construction of flyover—Survey conducted by DDA & MCD on persons doing business therefrom for allotment of alternative sites to them under Alternative Allotment Scheme—Petitioner had shifted to his native place in H.P. after riots and made several representations with documentary proof of running of business from site to DDA for inclusion of his name in list of evictees for allotment of alternative site—DDA order a fresh survey to be conducted which reported that existence and running of business of petitioner from site in question prior to eviction of traders stood established—Case of petitioner and two other cases approved by VC for alternative sites—However, LG declined to give allotment to Petitioner—On

recommendation of Lok Adalat, matter submitted for reconsideration to LG who once again rejected case—Order challenged before HC—Plea taken, when survey list of 579 persons had already been extended and persons not mentioned therein also allotment plots, there was no justification for denying same relief to Petitioner—Per contra plea taken, name of Petitioner did not figure either in survey list conducted by Planning Department of DDA or in list of units furnished by four local trader's associations—Cases of two other persons who were alloted alternative sites had produced substantive proof of their respective establishments but documents of Petitioner had failed to establish that Petitioner was running a business from said premises—Writ petition is barred by delay and laches—Held—LG and Permanent Lok Adalat had held that two cases where alternative sites were provided were similar to case of Petitioner—As regards objection regarding insufficiency of documents furnished by Petitioner, due application of mind on part of statutory authority is imperative and as a matter of fact statutory is estopped from urging reasons which do not form part of order and relying upon grounds de hors order—It is for this reason that production of records by state or statutory authority to justify its action by production of records or otherwise and not by assigning reasons and grounds in affidavits and Additional Affidavits filed by them before Court—Reasons set out in Counter Affidavit and Additional Affidavit of Respondent which find no mention in orders of LG are de-hors record cannot be allowed to be pressed into service by Respondent at this stage—Petitioner throughout was following up matter with DDA and Permanent Lok Adalat on whose recommendations matter was placed before LG for reconsideration—Writ cannot be said to be inordinately delayed—A writ of certiorari quashing action of DDA is issued and a writ of mandamus directing DDA to forthwith allot and give possession of a suitable alternative industrial plot to Petitioner measuring 200 sq. yds. in lieu of his premises in Zakhira Chowk, Delhi.

*Thakur Tankers* v. *D.D.A & Anr.* ..... *3056*



**CUSTOMS ACT, 1962**—Section 110(2) and 124—Hazardous Waste (Management, Handling and Trans-boundary) Rules, 2008—Chapter-IV—Seizure of imported photocopiers machines challenged in writ by Petitioner—Plea taken, since no shown cause notice has been issued to petitioners within one year of date of seizures, goods are to be returned to petitioners unconditionally—Per contra plea taken, goods can only be released provided petitioners have permission from Ministry of Environment and Forest—Held—Section 110(2) specifically mandates that when any goods are seized under Sub-Section (1) and no notice in respect thereof is given under clause (a) of Section 124 within six months or within the further extended period of six months (totaling one year) of seizure of goods, goods shall be returned to person from whose possession they were seized—Circular issued by Central Board of Excise and Customs would apply at stage of clearance of goods—Goods in present case had already been cleared and that too much prior to issuance of circular—Respondents directed to return goods to petitioners unconditionally.

*Vipin Chanana* v. *Directorate of Revenue Intelligence* ..... *2941*

**DELHI COOPERATIVE SOCIETY RULES, 1973**—Rule 25(1)(c)—Assertion of the appellant that his brother was a member of respondent no.2, Cooperative house Building Society since October, 1966 and on his resignation from its membership on 02.02.1976, his membership was transferred in favour of the appellant as per the request of his brother and as per the rules of the Society w.e.f 24.02.1976—In a draw of lots in January, 1984 respondents allotted a plot at Arihant Nagar in favour of the brother of the appellant—Appellant objected to the said allotment and in view of his objection and the documents relied upon by him, DDA, respondent no.1 directed respondent no.2 to rectify its records vide letter dated 25.07.1985—However subsequently respondent no.1, DDA cancelled the allotment in favour of

the appellant on the ground that the original allotment was in the name of his brother, who had concealed facts and had filed a false affidavit regarding non ownership of any residential property in Delhi—Vide the impugned order the writ petition filed by the appellant challenging the cancellation of allotment and contending that his membership could not have been cancelled for acts of omission of his brother, dismissed by the Ld. Single Judge. Held: A perusal of Rule 25(1)(c) of the Delhi Cooperative Society Rules, 1973 makes it clear that a person who owns, in the NCT of Delhi, a residential house or a plot of land whether in his name or in the name of his spouse or dependent children or is a member of any other housing society is ineligible for admission as a member to Delhi Cooperative Society and sub-Rule (iii) thereof makes it clear that once a member incurs a disqualification, he shall be deemed to have ceased to be a member from the date when the disqualifications were incurred. The brother of the appellant had been allotted a plot in Malviya Nagar by respondent no.1, DDA in 1975, in respect of which full premium was paid by the brother of the appellant on 31.12.1975 and thereby he had become ineligible to remain a member of respondent no.2, Society w.e.f 1976 and his membership was liable to be cancelled and therefore could not have been transferred to the Appellant. Appeal dismissed.

*Surinder Kumar Jain* v. *Delhi Development Authority & Anr.* ..... *3145*

**DELHI DEVELOPMENT AUTHORITY, 1979**—New Pattern Registration Scheme, 1979—Trail End Policy of DDA—Petitioner booked LIG flat in year, 1979 under NPRS, 1979—Petitioner made several representations to DDA to know status of allotment and attended several public hearings—On moving RTI application, Petitioner came was mentioned as Jony Monga instead of Hony Monga and demand letter was received back by DDA undelivered—Petitioner filed writ petition before HC for allotment of flat—Plea of DDA, present petition not maintainable and liable to be dismissed on ground of delay and



laches— Case of Petitioner is not covered under wrong address policy because Petitioner had been sent demand letter at correct address and this is sufficient to Presume that communication would have been delivered at address of Petitioner—Held—Demand letter was not address to registrant i.e. Petitioner and was received back undelivered by DDA—Petitioner can't be deprived of allotment to which she is entitled on account of lapse of DDA—Respondent has admittedly received back communication and hence is estopped from contending that there is a presumption of service—Objection raised by Respondent that petition is barred by laches is also lacking in merit, Petitioner was in constant touch with department and was told her file was misplaced, cannot be faulted for sitting over matter—Writ of Mandamus issued to Respondent directing respondent to hold a mini draw within a period of four weeks from today and make allotment of LIG flat to petitioner, in same area if possible— Petitioner shall make payment in terms of Demand-cum-Allotment letter issued to petitioner earlier.

*Madhu Arora Alias Hony Monga* v. *Delhi Development Authority*..... *3001*

— Petitioner applied to DDA for substitution of her name in place of her deceased husband / lessee of plot in question—DDA demanded Rs. 6,51,020 towards 50% unearned increase—DB of this court set aside demand—Hon'ble SC recorded that both sides had arrived at a consensus that petitioner would pay a sum of Rs. 3,73,745/- to DDA towards unearned increase—Plot mutated in name of Petitioner after DDA received aforesaid amount from Petitioner—Petitioner requested for extension of time for construction of plot and for waiver of composition fee stating that she was liable to pay composition fee from date of mutation only on ground that matter had remained undecided / subjudice for a long period of time—Respondents demanded Rs. 42,83,618/- towards composition fee- Petitioner preferred present writ petition challenging

demand of composition fee—Plea of DDA, possession was handed over to Petitioner but Petitioner failed to construct plot in question—Composition fee policy of DDA provided different contingencies where exemption can be given for payment of composite fee—It does not cover contingency of pending litigation—Held— Indubitably Vice-Chairman has power to condone delay without composition where there are internecine disputes amongst legal heirs of original allottee and to direct DDA to take account of period spent in litigation—It is only when mutation is effected by DDA after resolution of pending litigation that it would be possible for legal heirs to pursue there application for extension of time to carry out construction— Present case stands even on better footing in that litigation was pending between DDA and petitioner in respect of a demand raised by DDA for mutating plot in name of Petitioner—Till mutation was effected, Petitioner could not have pursued his application for extension of time for construction—There is nothing in sub clause (iv) of Clause 1.4 of Circular of DDA dated 31.10.1995 to show that application of said sub-clause is restricted to delays in mutation of plot to legal heirs of original allottee and not to transferees of a plot-Delays in mutation would be equally applicable to legal heirs of original allotee and those who have stepped into shoes of allottee as a result of transfer, sale etc. - To hold otherwise would be inequitable and unfair for it would mean that while period of litigation between legal heirs of original allottees is to be excluded for purpose of calculation of composition fee, transferees of original allottee are to be kept deprived of such benefit and must bear brunt of delay in mutation, even if it is for no fault of theirs—Litigation between Petitioner and DDA was not a frivolous one- Demand raised by DDA on account of composition fee quashed and DDA directed to recalculate composition fee for period after mutation of plot in favour of Petitioner and to issued a fresh demand thereafter within a period of eight weeks from today.

*Vijaya C. Gursahaney* v. *Delhi Development Authority & Anr.* ..... *3006*



— Tail End Policy and Policy of missing Priority of DDA—'AS' booked MIG flat under New Pattern Registration Scheme, 1979—After his death, DDA transferred mutation in favour his wife—She was alloted a flat at Rohini but she opted for allotment of flat as per tail end policy of DDA by paying cancellation / tail end charges—On her death, petitioner applied for mutation and transfer of registration against acknowledgment receipt—Tail end personal hearings, no MIG flat allotted to her—Writ petition filed by petitioner for writ of mandamus directing DDA to allot her a MIG flat under policy of missing priority framed by DDA—DDA admitted case of petitioner in toto but took plea that there was inordinate delay on part of petitioner in approaching Court and if at all petitioner is held entitled to allotment of a MIG flat, same has to be at old cost prevalent at time of original allotment plus 12% simple interest w.e.f. date of original allotment till date of issue of fresh Demand-cum-Allotment Letter—Held—Petitioner had herself approached DDA to complain that her name had not been included in tail end priority draw—Thus, petitioner cannot be said to be at fault as she approached DDA in less than four years with request to allot to her a flat at cost of draw held earlier—Contention of DDA that Petitioner is liable to pay interest @ 12% per annum for intervening period was repelled by Division Bench in *Basu Dev Gupta's* case as it disproved circular relied upon by DDA as it contradicts mandamus issued by Id. Single Judge in *Raj Kumar Malhotra's* case which has been approved by Devision Bench as well as Supreme Court—Mandamus issued to DDA to allot a MIG flat to Petitioner by issuing fresh Demand-cum-Allotment Letter to Petitioner at same cost at which demand was raised on other for flats allotted at draw of lots held on 31.03.2004.

*Ravinder Kaur* v. *Delhi Development Authority* ..... *3073*

— Double Allotment—DDA alloted a flat to Petitioner which was

already alloted in favour of another person—Demand letter demanding cost of flat issued to Petitioner—Petitioner informed DDA that flat alloted in his favour was already under occupation of another person—Since Petitioner did not receive any response, he did not deem it fit to deposit cost of flat allotted to him—Petitioner made a spate representations to DDA to make a fresh allotment against his registration number, but to no avail—Writ petition filed before HC against DDA for its inaction in not allotting a fresh MIG flat to him in lieu of wrong allotment made—Plea taken by DDA, Petitioner did not deposit confirmation amount and it was assumed that he had no desire to take flat / allotment and writ was liable to be dismissed for delay and laches—Held—Before expiry of stipulated date for depositing cost of flat, Petitioner had sent a representation to DDA that flat in question was already occupied by someone else, who was in possession of necessary documents from DDA—Admittedly, no response was sent by DDA to communication of Petitioner—Petitioner was not expected to deposit amount demanded by DDA knowing fully well that he had been illegally granted double allotment of flat in question and said flat was occupied by another person who professed to have valid documents issued by DDA in his possession—Petitioner was victim of double allotment due to error / fraud of officials of DDA—Respondent can't be allowed to reap benefit of its own wrong by now pressing into service pleas such as those of delay and laches, closure of scheme etc.—Writ of mandamus issued directing DDA to allot and handover to Petitioner possession of a MIG flat at original cost in lieu of earlier flat allotment of which had earlier been made in his favour.

*C.P. Inasu* v. *DDA* ..... *3083*

**DELHI DEVELOPMENT AUTHORITY (DISPOSAL OF DEVELOPED NAZUL LAND) RULES, 1981**— Rule 17-DDA cancelled allotment of plot of Petitioner No.1 at Rohini as she had purchased property at Naraina Vihar (NV)— Order challenged before HC— Plea taken, property at NV is a joint



family property where her undivided share is only 26 sq. mtrs.—As her share in property at NV was less than 67sq.mtrs., bar against allotment of Nazul land by DDA to her was not applicable— Per contra Plea taken, Petitioner's reliance upon Nazul Rules was misplaced as said Rules came into existence after floating of Rohini Residential scheme, 1981— Property at NV having been purchased in a single name cannot be a jointly owned property— petitioner had filed a false affidavit affirming that neither she nor her husband owned any leasehold or freehold residential flat / plot in Delhi—Held-Nazul Rules would be applicable to all such cases where allotment has been made after Rules have come into force—Petitioner No.1 had no source of income— Property at NV was purchased by joint family— Indubitably undivided share of Petitioner in said property comes to 26 sq. mtrs.— Since land owned by petitioner was less than 67 sq. mtrs., bar against allotment of Nazul land enshrined in rule 17 of Nazul Rules would not apply— A writ of mandamus issued directing Respondents not to dispossess Petitioners of plot in question at Rohini or interfere in any manner whatsoever with enjoyment and possession of said plot presently in possession of petitioners.

*Mohinder Kaur Bajaj & Ors.* v. *D.D.A and Anr.* ... *2977*

— Father of Petitioner No. 1 migrated from Pakistan and squatted upon property at Jhandewalan—In pursuance of Gadgil Assurance Scheme, DDA declared father of Petitioner No. 1 eligible to allotment under category 'A' upto 200 sq. yards to be regularised in his favour subject to Payment of damages—Petitioners pursued case for a alternative allotment with DDA but no plot was allotted—DDA noted in its records that plot at Jhandewalan cannot be allotted to Petitioners as said plot falls in road widening of Jhandewalan Road, case of Petitioners for allotment of alternative plot in same zone at Shanker Road was put up for consideration—In Permanent Lok Adalat, but Respondents did not allot same—After Vice-

Chairman made scathing remarks on record, Commissioner (LD) submitted for approval of Competent Authority allotment of plot at Rajendra Nagar in favour of Petitioner—Decision approved by Vice-Chairman and communicated by Respondent Authority to Petitioners—Respondent Authority thereafter recalled its allotment of Rajendra Nagar Plot and sought to carve out a completely undeveloped plot in Ashok Nagar—Order challenged before HC—Plea taken, cancellation was arbitrary as a valuable right which had crystallized in favour of Petitioners was sought to be taken away without giving Petitioners opportunity of being hear—Plot now sought to be allotted is totally uninhabitable and there is no development—Per contra, plea taken by DDA, plot at Rajendra Nagar which is a developed plot in residential scheme can't be allotted to Petitioners—In past, such a developed land in residential scheme has never been allotted under Gadgil Assurance Scheme and it may set bad precedent—Said plot has huge market value and as such it can be allotted only through auction/tender mode as per Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981—In commercial matters, Courts should not risk their judgments for judgments of bodies to which that task is assigned—Nothings and/or decisions recorded in official files by officers of Government at different levels and even ministers do not become decisions of Government unless same are sanctified and acted upon by issuing order in name of President or Governor, as case may be, and is communicated to affected persons—Held—Predecessor-in-interest of Petitioners was refused allotment of site occupied by him at Jhandewalan as said site was required by Government of purpose of road widening—Petitioners were therefore entitled to allotment of developed land—Rajendra Nagar plot is not on Nazul Land covered under the Nazul Rules—Present case being under Assurance Scheme extended by Government of India to migrants from West Pakistan cannot be called a "commercial matter"—Object and idea behind this scheme was to



rehabilitate refugees from West Pakistan and earning of profit as in a commercial transaction was not purpose—Malafides are writ large in decision of Respondent Authority in arbitrarily cancelling allotment already made to Petitioners with approval of VC and allot them instead uninhabitable plot with no approach road and other facilities and that too after issuance of letter of allotment in their favour—Where notings have fructified into order and said order has been communicated to concerned party, it is no longer open to concerned statutory body to review/overturn its decision—In instant case, order of allotment has been communicated to Petitioners and Petitioners informed of same, thereby affecting rights of Petitioners which have crystallized as a result of said order—It was, therefore, no longer open to DDA to review its earlier decision and that too arbitrarily and illegally—Writ of certiorari issued quashing impugned letter with a direction to DDA to handover Petitioners Possession of Plot at Rajendra Nagar originally alloted to Petitioner in lieu of plot at Jhandewalan on completion of necessary formalities within three months from today.



**DELHI SALES TAX ACT, 1975**—Section 21 (3)—Section 27 (1)—Under the Delhi Sales Tax Act, 1975 quarterly returns are required to be filed unless by specific direction those returns are required to be filed monthly—Petitioner did not file any return in respect of the year 1980-81—petitioner had also not deposited any tax during the currency of that year—Section 23 (5) of the said Act deals with the situation where a dealer fails to furnish returns in respect of any period by the prescribed date, in such eventuality, the Commissioner is mandated to, after giving the dealer a reasonable opportunity of being heard, make a best judgment assessment—Consequently, after due notice and opportunity to the petitioner, a best judgment assessment was made on 26.03.1985 by the

assessing authority whereby the petitioner was directed to pay a sum of 52,39,763.23 under the said Act and by a separate order of the same date, the petitioner was required to pay a sum of 5,92,469/- under the Central Sales Tax Act, 1956— However, in neither case was any interest levied by the assessing authority under section 27(1) of the said Act— Thereafter, on 01.10.1985, a show— cause notice was issued by the Assistant Commissioner seeking suo moto revision of the assessment orders under section 46 of the said Act— Thereafter, the Assistant Commissioner passed an order on 03.09.1986 giving directions to the Sales Tax Officer to issue the necessary demand notice and challans in terms of the said order, which included computation of interest for each of the four quarters of 1980—81 both under the local Act as well as under the central Act— Being aggrieved by the said order dated 03.09.1986 the petitioner preferred an appeal before the Sales Tax Appellate Tribunal—Tribunal decided appeal by an order dated 31.07.1989 in favour of the petitioner/ dealer by quashing the order passed by the Assistant Commissioner on 03.09.1986 and restoring the ex-parte orders of the Sales Tax Officer (assessing authority) which created the additional demand of 52,39,769/— under the local Act and 5,92,466.68 under the central Act— Thereafter, the revenue filed a review application before the Tribunal which was disposed of by the order dated 13.02.1994 reviewing its earlier order dated 31.07.1989, inter alia, on the point of interest—Tribunal took the view that the issue of interest under section 27(1) of the said Act had not been considered by the Tribunal in the first round and as it ought to have considered the same, a review was in order—Thereafter, the Tribunal considered the matter on merits and decided that interest was chargeable from the petitioner under section 27(1) of the said Act. The Tribunal reviewed its order, dismissed the appeal filed by the petitioner in so far as the question of interest was concerned and directed the petitioner to pay the interest as determined by the Assistant Commissioner by virtue of his order dated



03.09.1986—The writ petition has been filed by the petitioner being aggrieved by the said order passed by the Tribunal on 13.02.1994. Held— From an examination of the Constitution Bench decision of the Supreme Court in the case of *State of Rajasthan v. Ghasilal:* AIR 1965 SC 1454, the decision in *Associated Cement Company Ltd. V. CTO:* (1981) 4 SCC 578, Constitution Bench decision in the case of *J. K. Synthetics Ltd. V. CTO:* (1994) 4 SCC 276 and *Maruti Wire Industries Pvt. Ltd. v. STO & ORS.:* (2001) 3 SCC 735, it is apparent that the expression "tax due" as appearing in section 27(1) of the said Act would have to be read in relation to the provisions of section 21(3) thereof— Section 21(3) of the said Act has clear reference to the furnishing of a return Moreover, it has reference to the full amount of tax due from a dealer under the Act "according to such return"—Tax which is said to be due under section 27(1) of the said Act must be the tax which is due "according to a return"—It is obvious that if no return is filed then there could be no tax due within the meaning of section 27(1) of the said Act read with section 21(3) thereof— Tax which is ultimately assessed is the tax which becomes due on assessment and if this tax so assessed is not paid even after the demand is raised then the dealer would be deemed to be in default and would be liable to pay interest can be levied on such a dealer, who has not filed a return under section 27(1) of the said—Impugned order dated 13.02.1994 is not in accord with the Constitution Bench decisions of the Supreme Court— Consequently, the impugned order, to the extent it requires the petitioner to pay interest under section 27(1) of the said Act, is set—aside —Sales tax department shall give consequential relief to the petitioner in respect of the amount deposited towards interest on an application being made by the petitioner within four weeks—Writ petition is allowed to the aforesaid extent.

*Pure Drinks (New Delhi) Limited* v. *The Member, Sales Tax Tribunal & Ors.* ..... *3035*

— Quarterly returns are required to be filed unless by specific direction those returns are required to be filed monthly— Petitioner did not file any return in respect of the year 1980-81—petitioner had also not deposited any tax during the currency of that year—Section 23 (5) of the said Act deals with the situation where a dealer fails to furnish returns in respect of any period by the prescribed date, in such eventuality, the Commissioner is mandated to, after giving the dealer a reasonable opportunity of being heard, make a best judgment assessment—Consequently, after due notice and opportunity to the petitioner, a best judgment assessment was made on 26.03.1985 by the assessing authority whereby the petitioner was directed to pay a sum of 52,39,763.23 under the said Act and by a separate order of the same date, the petitioner was required to pay a sum of 5,92,469/- under the Central Sales Tax Act, 1956—However, in neither case was any interest levied by the assessing authority under section 27(1) of the said Act—Thereafter, on 01.10.1985, a show—cause notice was issued by the Assistant Commissioner seeking suo moto revision of the assessment orders under section 46 of the said Act—Thereafter, the Assistant Commissioner passed an order on 03.09.1986 giving directions to the Sales Tax Officer to issue the necessary demand notice and challans in terms of the said order, which included computation of interest for each of the four quarters of 1980—81 both under the local Act as well as under the central Act— Being aggrieved by the said order dated 03.09.1986 the petitioner preferred an appeal before the Sales Tax Appellate Tribunal—Tribunal decided appeal by an order dated 31.07.1989 in favour of the petitioner/ dealer by quashing the order passed by the Assistant Commissioner on 03.09.1986 and restoring the ex-parte orders of the Sales Tax Officer (assessing authority) which created the additional demand of 52,39,769/— under the local Act and 5,92,466.68 under the central Act— Thereafter, the revenue filed a review application before the Tribunal which was disposed of by the order dated



13.02.1994 reviewing its earlier order dated 31.07.1989, inter alia, on the point of interest—Tribunal took the view that the issue of interest under section 27(1) of the said Act had not been considered by the Tribunal in the first round and as it ought to have considered the same, a review was in order—Thereafter, the Tribunal considered the matter on merits and decided that interest was chargeable from the petitioner under section 27(1) of the said Act. The Tribunal reviewed its order, dismissed the appeal filed by the petitioner in so far as the question of interest was concerned and directed the petitioner to pay the interest as determined by the Assistant Commissioner by virtue of his order dated 03.09.1986—The writ petition has been filed by the petitioner being aggrieved by the said order passed by the Tribunal on 13.02.1994. Held— From an examination of the Constitution Bench decision of the Supreme Court in the case of *State of Rajasthan v. Ghasilal:* AIR 1965 SC 1454, the decision in *Associated Cement Company Ltd. V. CTO:* (1981) 4 SCC 578, Constitution Bench decision in the case of *J. K. Synthetics Ltd. V. CTO:* (1994) 4 SCC 276 and *Maruti Wire Industries Pvt. Ltd. v. STO & ORS.:* (2001) 3 SCC 735, it is apparent that the expression "tax due" as appearing in section 27(1) of the said Act would have to be read in relation to the provisions of section 21(3) thereof— Section 21(3) of the said Act has clear reference to the furnishing of a return Moreover, it has reference to the full amount of tax due from a dealer under the Act “according to such return”—Tax which is said to be due under section 27(1) of the said Act must be the tax which is due “according to a return”—It is obvious that if no return is filed then there could be no tax due within the meaning of section 27(1) of the said Act read with section 21(3) thereof—Tax which is ultimately assessed is the tax which becomes due on assessment and if this tax so assessed is not paid even after the demand is raised then the dealer would be deemed to be in default and would be liable to pay interest can be levied on such a dealer, who has not filed a return under section

27(1) of the said—Impugned order dated 13.02.1994 is not in accord with the Constitution Bench decisions of the Supreme Court— Consequently, the impugned order, to the extent it requires the petitioner to pay interest under section 27(1) of the said Act, is set—aside —Sales tax department shall give consequential relief to the petitioner in respect of the amount deposited towards interest on an application being made by the petitioner within four weeks—Writ petition is allowed to the aforesaid extent.

*Pure Drinks (New Delhi) Limited* v. *The Member, Sales Tax Tribunal & Ors.* ..... *3035*

**FACTORIES ACT**—Section 31—Appellant (convict) argued that the Trial Court fell into grave error while relying upon testimonies of hostile witness—No due weightage was given to the testimonies of the defence witnesses—Vital discrepancies emerging in the statement of the witnesses were ignored—Held—The testimony of an illiterate and rustic witness is to be appreciated, ignoring minor discrepancies and contradictions—Credibility of the testimony, oral or circumstantial depends considerably on the judicial evaluation of the totality, not isolated scrutiny—The Court has to appraise the evidence to see to what extent it is worthy of acceptance—For conviction under Section 307 IPC it is not essential that bodily injury capable of causing death should have been inflicted—It is not necessary that the injury actually caused to the victim should be sufficient under ordinary circumstances to cause death of the victim—The Court will be give regard to intention, knowledge and circumstance irrespective of the result of conviction under Section 307 IPC—It requires an enquiry into the intention and knowledge of the accused and whether or not by his act, he intended to cause death that would amount to murder under Section 300 IPC—The nature of weapon used, the intention expressed by the accused at the time of the act, the motive, the nature and size of injuries, the part of the body where injuries were caused



and severity of the blows are the relevant factors to find out intention/knowledge—Appeal dismissed.

*Vijay Kumar Kamat* v. *The State (NCT of Delhi)* ... *2612*

**FINANCE ACT, 1994**—Section 65B (44)—Chit Fund Business—Petitioner, an Association of Chit Fund Companies challenged the notification that sought to subject the activities of business of chit fund companies to service tax to the extent of 70% of the consideration received for the services—Petitioner contended that as per law, such services are not taxable at all, therefore, there is no scope for exempting a part of consideration received for the services—Nature of chit fund activities explained in details—Held:- in chit business, the subscription is tendered in any one of the forms of money as defined under Section 65B(33), therefore, it would be a transaction in money and accordingly would fall within the exclusionary part of the definition of the word "service" as being merely a transaction in money, as such there can be no levy of service tax on the footing that services of foreman of a chit business constitute a taxable service—The impugned notification quashed.

*Delhi Chit Fund Association* v. *UOI & Anr.* ..... *2542*

**FOREIGN EXCHANGE & MANAGEMENT ACT, 1999 (FEMA)**—Code of Civil Procedure—S. 32—Territorial Jurisdiction—The Petitioner Commissioner, Indian Premiere League (IPL)—Organizing Cricket matches proceeded against by Directorate of Enforcement (DoE) for FEMA violation in parking funds in foreign bank—The petitioner based abroad summoned to appear in person before the authorities to explain certain aspect of his dealing as Commissioner, IPL avoided to appear ground security threat to his life in India—Kept making representation through his attorney—DoE not satisfied with explanation referred the matter to passport authority for impounding/revocation of passport-passport authority revoked his passport vide order dated 3.3.2011—Petitioner appealed to Regional Passport Officer (RPO) without success preferred

writ petition—Held—Passport Act does not contemplate division of proceedings before passport authority into two half—Show cause notice clearly put the petitioner in picture that if he failed to satisfy officer with regard to tenability of his defence charge made against him—Action under Passport Act would follow—Last Clause (e) of S. 10 (3) of the Passport Act invest the passport authority to impound/revoke passport in 'general public interest' as well as input provided by statutory authority and other wings of government in the possession of actionable material—No fault found with passport authority—Assistant Passport Officer (APO) received information—Actionable provided necessary jurisdictional facts to exercise power under S. 37 to take recourse to provision of Section 32 CPC against witnesses and noticee—Show cause notice issued by APO while hearing held by superior officer RPO—This did not involve violation of principle of natural justice—Response of EOW of Bombay Police to RTI application made to it did not supprt petitioner's case in the absence of passport being available with authority the only order which would be passed is of revocation—Writ petition dismissed.

*Lalit Kr. Modi* v. *Union of India and Ors.* ..... *2484*

**HINDU MARRIAGE ACT, 1955**—Section 16 held that Section 16 (1) applies only in a case in which marriage is infact proved, which may otherwise be null & void as per Section 11 of the Act—Benefit of Section 16(1) is not available to the plaintiffs in absence of proof of marriage between Pran Nath & Raj Kumar.

— Indian Evidence Act—Section 112—Admittedly, Raj Kumari was married to one Krishan Lal Batra and he was alive—Held that even Section 112 comes in the way of relief to plaintiffs as there was a presumption of plaintiffs being legitimate children of Krishna Lal Batra and Raj Kumari.

*Sachin and Ors.* v. *Krishna Kumari Nangia and Ors.* ..... *3204*



**INCOME TAX ACT, 1961**—Section 14, 80IA, 139, 142(1), 143(3), 147, 148, 260A—Notice issued to Petitioner by Deputy Commissioner of Income Tax (DCIT) indicating that he has reason to believe that Petitioner's income chargeable to tax for Assessment Year (AY) 2000-01 has escaped assessment and re-assessment of income for said AY was proposed—Petitioner was required to deliver a return in prescribed form for said AY within 30 days—Two purported reasons for re-opening of case were pertaining to non eligibility of deduction in respect of steam turbine of combined cycle gas power stations belonging to Petitioner and taxability of income tax recoverable by NTPC from State Electricity Boards—Writ petition filed seeking quashing of notice—Plea taken, there is no income chargeable to tax which has escaped assessment not has there been any failure on part of assessee to disclose fully and truly all material facts necessary for assessment—Held—Impugned notice was issued beyond period of four years from end of relevant AY i.e. from end of 31.03.2001—In order that such a notice could be sustained in law, ingredients and pre-conditions set out in proviso to Section 147 have to be satisfied—First condition is that income chargeable to tax must have escaped assessment—Second condition is that such escapement from assessment must be by reason of failure on part of assessee to, inter alia, disclose fully and truly all material facts necessary for his assessment for that AY—If either of these two conditions is missing, exception to bar not up in provisio, does not get triggered—Consequence being that assessment cannot be re-opened—Entire process of generation of electricity has been explained by petitioner in great detail in assessment proceedings for AY, 1998-99 which has been taken notice of by Assessment Officer (AO)—It was not as if it was a fact or a figure hidden in some books of accounts which AO could have, with due diligence, discovered but had not done so—This is not a case where assessee/petitioner can be said to have failed to disclose fully and truly all material facts necessary for assessment in respect of AY, 2000-01—Thus, this by itself, is sufficient for

us to conclude that exception carved out in proviso to Section 147 is not attracted and, therefore, there is a bar from taking action under Section 147 inasmuch as the period of four years has expired—Impugned notice is, therefore, liable to be quashed on this ground—Second purported reason for re-opening assessment pertains to taxability of income tax recoverable by petitioner from State Electricity Boards—Perusal of actual figures with regard to assessee's method of grossing up rate of tax and departments proposed method of grossing up of income shows no income has escaped assessment—As such, precondition for triggering exception in proviso to Section 147 are not satisfied—Impugned notice quashed.

*NTPC Ltd.* v. *DCIT & Others* ..... *2455*

— Section 132 and 153A—Revenue received information that DS Group was involved in sales which were not accounted for in books and undisclosed accounts of DS Groups were being kept at residence of Petitioner—Satisfaction note for purposes of conducting a search was recorded—Based on search note, search was authorized on DS Group and residence premises of Petitioner—Warrant of authorization was issued in name of Petitioner—Writ filed seeking a declaration that warrant of search issued against Petitioner was without authority of law—Plea taken, although warrant of authorization is in name of Petitioner, there could not have been any reason to believe that preconditions stipulated in clause (a), (b) and (c) of Section 132 (1) of Act had been satisfied—Per contra plea taken, reason to believe was in respect of DS Group, once that was satisfied, search could be conducted in any building, place etc. where officer authorized had 'reason to suspect' that books of accounts, other documents etc. were kept—Held—Warrant of authorization under Section 132 (1) had been issued in name of Petitioner—Information and reason to believe were to be formed in connection with Petitioner and not DS Group—Had warrant of authorization been issued in



name of DS Group and in course of searches conducted by authorized office premises of Petitioner had also been searched, then position might have been different—Warrant of authorization was in name of Petitioner and it was absolutely necessary that precondition set out in Section 132 (1) ought to have been fulfilled—Since these conditions had not been satisfied, warrant of authorization would have to be quashed.

*Madhu Gupta* v. *Director of Income-Tax (Investigation) and Others* ..... *2919*

— Section 139, 147 and 148—Respondent issued notice whereby assessment of income of Petitioner for Assessment Year (AY), 2005—06 was sought to be reopened—Objections filed by Petitioner were rejected—Order/Notice challenged before HC—Plea taken, this is a case where conditions stipulated in proviso to Section 147 of Act would have to be satisfied because notice has been issued after a period of four years from end of relevant AY—Conditions stipulated in proviso are not satisfied and therefore said notice is bad in law—Per contra plea taken, it was a case of escapement of income as indicated in notice itself—Held—Notice is bad in law as same had been issued beyond a period of four years from end of relevant AY without satisfying condition precedent therefor—Proviso to Section 147 of Act imposes injunction on revenue authorities prohibiting them from taking in any action beyond said period of four years unless (i) any income chargeable to tax has escaped assessment for such AY (ii) by reason of failure on part of assessee (a) to file a return u/s 139 of said Act or in response to a notice issued under Sub-Section (1) or Section 147 or Section 148 of said Act or (b) to disclose fully or truly all material facts necessary for assessment for that AY—It is not case of revenue that assessee had failed to file return under any of provisions—Only way in which notice under Section 148 of said Act beyond period of four years could be justified would be if there was failure on part of assessee to disclose fully and truly all material facts necessary for his assessment—It is not sufficient

that income chargeable to tax has escaped assessment but it further be shown that this has escaped as a result of failure on part of assessee to disclose fully and truly all material facts necessary for his assessment—Neither notice nor order discloses that there has been a failure on part of assessee to fully and truly discloses all material facts necessary for assessment or what material facts has not been disclosed by assessee—Impugned notice set aside.

*Shivalik Bimetal Controls Ltd.* v. *Income Tax Officer* ..... *2936*

— Section 148—Explanation 3 to Section 153—Initiation of reassessment proceedings—Assessments are sought to be reopened on the ground that the Income Tax Appellate Tribunal, Hyderabad had passed a consolidated order dated 13.01.2010 pertaining to assessment years 1999-2000 to 2006-2007 and held that the interest income was not taxable in the hands of the Co-operative Electrical Supply Society Ltd., Siricilla but, was taxable in the hands of the petitioner—Petitioner had advanced loans to the said Co-operative Electrical Supply Society Ltd. Which created a special corpus fund—The said society earned interest on the special fund but did not disclose it in its returns of incomes on the ground that the money, as mentioned in the purported reasons, actually belonged to the petitioner and that any income earned thereon was on behalf of the petitioner—Tribunal agreed with the submissions of the said Co-operative Electrical Supply Society Ltd. and held that the said interest income was not taxable in the hands of the society but ought to be taxed in the hands of the petitioner—Notices u\s 148 of the Income Tax Act, 1961 were issued to the petitioners seeking to tax the interest income as it had escaped assessment—Hence the present petition challenging the Notices—petitioner contended that though the Tribunal had returned a finding that the said interest income was not taxable in the hands of the said society, there was no specific or clear finding that the same should be taxable in the hands of the Petitioner—That all the notices under



Section 148 had been issued beyond the period of six years stipulated in Section 149 of the said Act and the bar of limitation prescribed in Section 149 would be applicable unless the revenue was able to establish that the present cases fell within Section 150 of the said Act read with Explanation 3 to Section 153. Held—before a notice under Section 148 can be issued beyond the time limits prescribed under Section 149, the ingredients of Explanation 3 to Section 153 have to be satisfied—Those ingredients require that there must be a finding that income which is excluded from the total income of one person must be held to be income of another person—The second ingredient being that before such a finding is recorded, such other person should be given an opportunity of being heard—In the present case, when the Tribunal held in favour of the said society by concluding that the interest income was not taxable in its hands and held against the petitioner by concluding that the said interest income ought to have been taxed in the hands of the petitioner, an opportunity of hearing ought to have been given to the petitioner—No opportunity of hearing was given to the petitioner prior to the passing of the order dated 13.01.2010 by the Income Tax Appellate Tribunal, Hyderabad in the cases of the said society—As such, one essential ingredient of Explanation 3 was missing and, therefore, the deeming clause would not get triggered—Section 150 would not apply and, therefore, the bar of limitation prescribed by Section 149 is not lifted—In view of the fact that the deeming provision provided in Explanation 3 to Section 153 does not get attracted in the present case because an opportunity of hearing had not been given to the petitioner, the provisions of Section 150 would also not be attracted—In such a situation, the normal provisions of limitation prescribed under Section 149 of the said Act would apply—Those provisions restrict the time period for reopening to a maximum of six years from the end of the relevant assessment year—In the present writ petitions, the notices under Section 148 have all been issued beyond the said period of six years—Therefore, the said notices are time

barred—Consequently, the writ petitions are allowed—Impugned notices under Section 148 of the said Act are set aside and so, too, are all the proceedings pursuant thereto, including the assessment orders that have been passed.

*Rural Electrification Corporation Ltd.* v. *Commissioner of Income Tax-(LTU) and Anr.* ..... *3091*

— Section 43 (1), 143 (3), 147 and 148—Petitioner challenged notices and proceedings initiated pursuant thereto for reopening concluded assessments for assessement year (AY), 2001-02 and 2002-03—Plea taken, action of Assessing Officer (AO) in seeking reassessment for reasons as supplied indicate that assessments were sought to be reopened only on a mere change of opinion as all relevant facts were within knowledge of AO during first round of assessment and were subject matter of inquiry in initial assessment proceedings—Held—It is apparent that conclusion drawn by AO that cost of fixed assets of Petitioner company has been met by Government is based on capital structure as was recorded in various documents including OM dated 30.09.2000 issued by Ministry of Telecommunication, GOI—Whereas earlier AO had not thought it fit to conclude that cost of fixed assets were required to be reduced to extent of reserves during first round of assessment, reasons as recorded disclose that this was sought to be done by reopening assessment—This in our view represents a clear change in opinion without there being any further 'tangible material' to warrant same—A mere change of opinion cannot be a reason for reassessing income under Section 147 of Act—Following aforesaid view, notices under Section 148 of Act and all proceedings initiated pursuant thereto are illegal and are liable to be quashed—Reasons as furnished by AO for reopening assessments could not possibly give rise to any belief that income of Petitioner had escaped assessment and proceedings initiated on basis of such reasons are liable to be quashed.

*Bharat Sanchar Nigam Ltd.* v. *Deputy Commissioner of Income* ..... *3125*



— Section 41(1), Limitation Act 1963 Section 18—Whether there is a cessation of liability if assessee continued to acknowledge credit balances/amount receivable in the balance sheet in respect of a number of creditors, lying unclaimed for several years—Assessing officer added balance liabilities to the income u/s 41(1) due to no likehood of creditor claiming the same in the near future—On challenge to the CIT (Appeals) assessee contended that due to continuation of acknowledgment or credit balance, there can be no cessation of liabilities to pay the creditors—Held: In order to attract the provisions of section 41 (1) of the Act, there should have been an irrevocable cessation of liability without any possibility of the same being revived. The cessation of liability may occur either by the reason of the liability becoming unenforceable in law by the creditor coupled with the debtor declaring his intention not to honour his liability, or by a contract between parties or by discharge of the debt. It is necessary that the benefit derived by an assesse results from cessation or remission of a trading liability. Held— the enforcement of a debt being barred by limitation does not ipso facto lead to the conclusion that there is cessation or remission of liability. Reflecting an amount successively over the years as outstanding in the balance sheet by a company amounts to acknowledging the debt for purposes of section 18 of the limitation act as the period of limitation would stand extended upon such acknowledgment of debt.

*The Commissioner of Income Tax Delhi-II* v. *Jain Exports Pvt. Ltd.* ..... *3156*

**INDIAN CONTRACT ACT, 1872**—Sec. 62—Respondent invited bids—It contained a draft agreement which was to be executed between Respondent and the successful bidder—License awarded to Appellant—R Sent the final license agreement for signatures with material changes to the draft agreement, which formed part of the bid document—Held, it was impermissible for R to unilaterally changes terms and

conditions.

*Zoom-Toshali Sands Consortium* v. *Indian Railway Catering & Tourism Corporation Ltd.* ..... *2758*

**INDIAN PENAL CODE, 1860**—Section 39, 302, 397, 307 and 304, Arms Act, 1959—Section 25—Appellant (accused) was convicted under Section 302 for death of the victim in the event of robbery—Appeal filed—Only motive was robbery and there was no ill-will between the accused and the victim—Whether conviction fell under Section 302 or 304, IPC—Held:- Accused was armed with dangerous weapon and victim was unarmed—Sufficient to indict the accused with the offence of murder—Accused may not have intention to kill but he voluntarily caused death—Appeal dismissed.

*Ramesh* v. *State (NCT) of Delhi* ..... *2597*

— Section 498A, 304B—Deceased expired after sustaining burn injuries—Appellants (accused) convicted under sections 498A/ 304B/34 IPC—Appeal—Appellant contended that no evidence to prove that 'soon before her death' any dowry demand was made—Perusal of Section 113B of Evidence Act and Section 304B shows that there must be material to show that the victim was subjected to cruelty and harassment by her husband or any relative—Cruelty and harassment should be for in connection with demand of dowry and is cause of death of the women—Held—Prosecution failed to establish that victim was subject to cruelty and harassment—No investigation and evidences of surrounding circumstances leading to the death of the victim—Appeal allowed.

*Krishna & Anr.* v. *State of Delhi*..... *2607*

— Sections 300, 307 & 326—Criminal Procedure Code, 1973—Section 161 & 313—Factories Act—Section 31—Appellant (convict) argued that the Trial Court fell into grave error while relying upon testimonies of hostile witness—No due weightage was given to the testimonies of the defence witnesses—Vital discrepancies emerging in the statement of



the witnesses were ignored—Held—The testimony of an illiterate and rustic witness is to be appreciated, ignoring minor discrepancies and contradictions—Credibility of the testimony, oral or circumstantial depends considerably on the judicial evaluation of the totality, not isolated scrutiny—The Court has to appraise the evidence to see to what extent it is worthy of acceptance—For conviction under Section 307 IPC it is not essential that bodily injury capable of causing death should have been inflicted—It is not necessary that the injury actually caused to the victim should be sufficient under ordinary circumstances to cause death of the victim—The Court will be give regard to intention, knowledge and circumstance irrespective of the result of conviction under Section 307 IPC—It requires an enquiry into the intention and knowledge of the accused and whether or not by his act, he intended to cause death that would amount to murder under Section 300 IPC—The nature of weapon used, the intention expressed by the accused at the time of the act, the motive, the nature and size of injuries, the part of the body where injuries were caused and severity of the blows are the relevant factors to find out intention/knowledge—Appeal dismissed.

*Vijay Kumar Kamat* v. *The State (NCT of Delhi)* ... *2612*

— Section 393/34 read with Section 398—Arms Act—Section 25—Appellant (convicts) argued that the Trial Court did not appreciate the evidence in its true and proper perspective and fell into grave error by relying into testimony of sole witness—Respondent argued that there are no valid reasons to discard the cogent testimony of the victim who had no prior animosity with the assailants. Held, it is settled legal proposition that while appreciating evidence of witness minor discrepancies on trivial matters, which do not affect prosecution's case may not prompt Court to reject the evidence its entirety. The Court can convict an accused on the statement of the sole witness provided that the statement of such witness should satisfy legal parameters i.e. it is trustworthy, cogent and corroborated with the oral of documentary evidence. Only when single eye

witness is found to be wholly unreliable by the Court, his testimony can be discarded in toto—Appeal dismissed due to lack merit of the case.

*Naresh & Anr.* v. *State of Delhi* ..... *2622*

— Sections 363, 376(2), 323—Appellant was convicted under Sections 363/376/323 IPC—Whether improvements made by a witness during examination before the Court which has the effect of changing the entire case of the prosecution, can be made basis of conviction for an offence which was never complained of or revealed to have been committed?—Right to cross examine in criminal trial includes right to confront the witness against him not only on fact but by showing that examination-in-chief was untrue—Trial Court has to discern the truth after considering or evaluating testimony of material prosecution witnesses on the touchstone of basic human conduct, improbabilities and effect of disposition before the Court—Trial Court failed to protect the statutory right to have fair trial guaranteed under Article 21 of the Constitution—Impugned judgment is mere reproduction of testimony of witnesses citing judgments that uncorroborated testimony of victim can form basis of conviction but without addressing to (sic) to the second test i.e. sterling quality as well as effect of improvements and embellishments which changes the entire nature of the case—If conviction is based and punishment is awarded on farfetched conjectures and surmises, it would amount to doing violence to the basic principles of criminal jurisprudence—Conviction of Appellant for offence punishable under Section 363, 37692 and 506 IPC set aside in the absence of creditworthy evidence—Appeal disposed of.

*Mumtaz* v. *State (Govt. of NCT of Delhi)* ..... *2706*

— Sections 302 and 300 [Exception 4]—The Accused was held guilty by the Trial Court for the offence punishable under Section 302—Appeal—Accused (appellant) argued that the occurrence had taken place without premeditation, in a sudden fight—Whether Accused can be held guilty of offence



punishable under Section 302 or is entitled to benefit of Exception 4 of Section 300—Held—For bringing in operation of Exception 4 to Section 300 IPC, it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner—Conviction cannot be under Section 302 but under Section 304, Part I IPC—Appeal Partly allowed.

*Albert Ezung* v. *State Govt. of NCT of Delhi* ..... *2746*

— Section 130-B—Prevention of Corruption Act, 1988—Sections 7, 13(1)(d) and 13(2)—Appellants (convicts) argued that offence under section 120-B IPC could not be established as the main culprit/offender B.K. Ahluwalia expired during trial—Appellants never challenged the recovery of bribe money from their possession—Held, it is not essential that more than one person should be convicted for offence of criminal conspiracy—It is enough if the Court is in a position to find out that two or more persons were actually concerned in the criminal conspiracy—All conspirators are liable for the offences even if some of them have not actively participated—Merely because one offender died during trial, it does not absolve the appellants of the offence whereby they actively participated and assisted B.K. Ahluwalia for committing the crime—Prosecution of appellants upheld—Sentence reduced due to mitigating circumstances.

*Bimal Kishore Pandey* v. *C.B.I.* ..... *2785*

— Section 307—Appeal against conviction U/s 307 of Code, it was argued as per medical evidence, nature of injuries simple and not very deep, thus, no intention to be attributed to appellant to cause death of injured person—Per contra on behalf of State, it was urged knife blow was aimed at chest of injured who tried to save himself from the blow which struck left side of his neck—Thus, intention was to cause death or at any rate appellant had knowledge that such an

injury could cause death. Held:- Under Section 307, intention of accused is of material consideration; such intention should be to cause death under first part of section even if no injury caused, the offender shall be liable to punishment. However, under the second part of the section if hurt is caused the offender shall be liable to a higher punishment. Conviction altered from 307 to 323 IPC.

*Mohd. Yusuf* v. *State* ..... *2793*

— Sections 302—Appellants convicted U/s 302 read with Section 34 of Code for causing death of one Ali Baksh @ Pappu—Prosecution case primarily rested on sole testimony of an eye witness—As per appellants, eye witness account of prosecution witness was neither credible nor corroborated by testimonies of remaining independent witnesses, motive for offence not established coupled with delay of 15 hours for reporting of incident to police made prosecution case incredible. Held:- Even in the case of a hostile witness, that part of his testimony which substantiates case of prosecution can be extricated from his remaining deposition and utilized for the purpose of convicting accused.

*Manoj Kumar* v. *State (NCT) of Delhi* ..... *2810*

— Sections 302—Appellants convicted U/s 302 read with Section 34 of Code for causing death of one Ali Baksh @ Pappu—Prosecution case primarily rested on sole testimony of an eye witness—According to appellants, from injuries suffered by deceased it could only be inferred that he was indiscriminately beaten—Accordingly, there was no intention on part of appellants to cause specific injury which resulted in death of deaceased. Held:- Where incident takes place on a sudden quarrel between the assailants and deceased, and deceased suffers indiscriminate blows administered by assailants without any mens rea and without premeditation accused persons to be convicted U/s 304 Part 1 and not U/s 302 of IPC.

*Manoj Kumar* v. *State (NCT) of Delhi* ..... *2810*



— Sections 302, 377, 363 & 411—Aggrieved appellant challenged his conviction U/s 302, 377, 363 & 411 of Code—Prosecution case rested on circumstantial evidence—Trial Court concluded, circumstantial evidence clinching and prosecution discharged burden casted upon it beyond shadow of doubt—Whereas, according to appellant circumstantial evidence adduced by prosecution did not formulate composite chain of evidence unerringly pointing towards accusation leveled against appellant. Held:- In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, by fully established. Each fact must be proved individually and only thereafter the Court should consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of the guilt. If the combined effect of all the facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts, by itself/themselves, is/are not decisive. The circumstances proved should be such as to exclude every hypothesis except the one sought to be proved.

*Musa Singh* v. *State* ..... *2833*

— Section 375—Rape—Section 376—Punishment for rape—Section 506—Threat to kill—Code of Criminal Procedure, 1973—Section 313—Statement of the accused—Section 357—Compensation to victim appellant father of the prosecutrix charge sheeted for offences under section 376 and 506—Male child born after registration of FIR—Charges framed—Pleaded not guilty—Prosecution examined 14 witnesses—Statement of accused recorded denied committing rape—Convicted—Sentenced to imprisonment for life with rider and fine—Compensation awarded to the victim—Preferred appeal—Contended—DNA test not properly conducted—Falsely implicated by the wife and daughter for money—Taken possession of his assets including land—Victim of conspiracy—Sexual act was consensual—Held:-

Prosecutrix and her mother are the material witnesses baby delivered after registration of FIR—Blood samples of the baby, prosecutrix and appellant collected under the order of the Court—Appellant voluntarily agreed sample drawn by an expert—No fault with drawl of blood sample—No suggestion given to expert as to non conduct of DNA test properly during cross examination—No such plea can be permitted—Expert opined the appellant and the prosecutrix to be the biological parents of the child—Appellant had sexual intercourse with the prosecutrix established was aged about 17 years on the date of commission of offence tenor of cross examination implies plea of informed consent to the sexual act—Prosecutrix testified the act committed by keeping her at knife point and under threat—No reason to disbelieve dependent on appellant for shelter, bread and butter did not have the choice to resist appellant's act—Consent under threat is no consent—There cannot be voluntary participation in the act—Conviction proper—Case did not fall in any clause under sub section (2) of section 376—Not liable to be punished with imprisonment for life with rider—Sentence maintained but without the rider—Appeal disposed of.

*Sant Ram @ Sadhu Ram* v. *The State* ..... *2894*

**INDUSTRIAL DISPUTES ACT, 1947**—Section 25-B—Petitioner claimed he was a regular employee and had served continuously for 240 days—Onus to prove on him—Failed to prove—His contention that his statement in the affidavit to this effect was by itself sufficient proof—Not Correct.

*Mohd. Zulfikar Ali* v. *(Wakf) Hamdard Laboratories Thr. Its Head Hr, P & A Hamdard Building* ..... *2801*

**INTERNATIONAL LAW**—Covenant on Civil and Political Right (CCPR)—Article 12 not applicable—Expression in the interest of general public in Passport Act, cannot be construed as per Article 12 of Covenant on Civil and Political Right (CCPR) in view of the fact that the municipal law holds the field.

*Lalit Kr. Modi* v. *Union of India and Ors.* ..... *2484*



**LABOUR LAW**—Industrial Disputes Act, 1947—Section 25-B—Petitioner claimed he was a regular employee and had served continuously for 240 days—Onus to prove on him—Failed to prove—His contention that his statement in the affidavit to this effect was by itself sufficient proof—Not Correct.

*Mohd. Zulfikar Ali* v. *(Wakf) Hamdard Laboratories Thr. Its Head Hr, P & A Hamdard Building* ..... *2801*

**LIMITATION ACT, 1963—**Section 18—Whether there is a cessation of liability if assessee continued to acknowledge credit balances/amount receivable in the balance sheet in respect of a number of creditors, lying unclaimed for several years—Assessing officer added balance liabilities to the income u/s 41(1) due to no likehood of creditor claiming the same in the near future—On challenge to the CIT (Appeals) assessee contended that due to continuation of acknowledgment or credit balance, there can be no cessation of liabilities to pay the creditors—Held: In order to attract the provisions of section 41 (1) of the Act, there should have been an irrevocable cessation of liability without any possibility of the same being revived. The cessation of liability may occur either by the reason of the liability becoming unenforceable in law by the creditor coupled with the debtor declaring his intention not to honour his liability, or by a contract between parties or by discharge of the debt. It is necessary that the benefit derived by an assesse results from cessation or remission of a trading liability. Held— the enforcement of a debt being barred by limitation does not ipso facto lead to the conclusion that there is cessation or remission of liability. Reflecting an amount successively over the years as outstanding in the balance sheet by a company amounts to acknowledging the debt for purposes of section 18 of the limitation act as the period of limitation would stand extended upon such acknowledgment of debt.

*The Commissioner of Income Tax Delhi-II* v. *Jain Exports Pvt. Ltd.* ..... *3156*

**NARCOTICS DRUGS AND PSYCHOTROPIC SUBSTANCES ACT (NDPS ACT)**—Section 21, 29, 67, 42(1), 42(2), 43, 50 & 57—Appellant argued that Trial Court wrongly acquitted the respondents on technical grounds for non compliance of Sections 42(1), 42(2), 40 & 57 of NDPS Act—It was further argued that Section 41(1) was not attracted as secret information is required to be recorded in writing only if the information that narcotics drugs are kept or concealed in any building, conveyance or an enclosed place—Held, when there is specific information that narcotics drugs were concealed at a particular place, it is immaterial whether the said place is a public place or private place, provisions of Section 42 would apply—If the information is not reduced in writing, there is a violation of Section 42 (1)—The Court reiterated that if the search is to be conducted at a public place which is open to general public, Section 42 would not be applicable—But the same would not be the case if the search is being conducted on the basis of prior information and there is enough time to for compliance of reducing the information into writing—The language of Section 42 is the penal provision and prescribe very harsh punishment for the offender—It is settled principle that the penal provisions particularly with harsher punishment and with clear intendment of legislature for definite compliance, ought to be construed strictly—The principle of substantial compliance would be applicable to cases where the language of the provisions strictly or by necessary implication admits such compliance—Non compliance of Section 50 amounts to denial of fair trial—If two views are possible on evidence adduced in the case, then one favorable to the accused should be adopted.

*Narcotics Control Bureau* v. *Kulwant Singh* ..... *2732*

**PARTITION**—Suit for partition and possession of Property & declaration—Suit filed by three children of Rajkumari claiming that Rajkumari was married to Pran Nath and that the three plaintiffs were born out of the said wedlock—Defendants denied that there was any marriage between Rajkumari and



Pran Nath and instead claimed the defendant no.1 was married to Pran Nath and defendants no. 2 to 4 were children of Pran Nath. Held that plaintiffs failed to prove the marriage between Rajkumari and Pran Nath. Held that a presumption in favour of marriage does not arise merely on the ground of cohabitation but it must be cohabitation with 'habit' and 'repute'.

— Section 16 held that Section 16 (1) applies only in a case in which marriage is infact proved, which may otherwise be null & void as per Section 11 of the Act—Benefit of Section 16(1) is not available to the plaintiffs in absence of proof of marriage between Pran Nath & Raj Kumar.

— Indian Evidence Act—Section 112—Admittedly, Raj Kumari was married to one Krishan Lal Batra and he was alive—Held that even Section 112 comes in the way of relief to plaintiffs as there was a presumption of plaintiffs being legitimate children of Krishna Lal Batra and Raj Kumari.

*Sachin and Ors.* v. *Krishna Kumari Nangia and Ors.* ..... *3204*

**PENSION REGULATION FOR THE ARMY 1961 (PART-II)**—Regulation 12—Petitioner's husband, a Sepoy in Indian Army was detected as suffering from Cancer—Release Medical Board assessed his percentage of disability at 90% and invalidated him out of service in medical category EEE-Claim of disability pension of jawan was rejected—Appeal and second appeal of widow of deceased jawan against rejection of her husband's disability pension were rejected by Government of India (GOI)—Writ petition challenging all those orders was rejected by Armed Forces Tribunal (AFT) it holding that prayer cannot be granted under any applicable rules and regulations—Order challenged before HC—Plea taken, there is no record with regard to any ailment or disease which affected Petitioner at time of his initial recruitment—Deceased husband of Petitioner was diagnosed as suffering

from Cancer which he acquired only after he joined service—Per contra plea taken, ailment of diseased was not connected with exigencies of service—Held—A presumption is required to be drawn with regard to fitness of jawan at time of his original enrolment and consequential benefits to petitioner upon presumption in his favour—There is no record to show petitioner had any kind of medical ailment at time of entering into service—It has to be held that service conditions would have aggravated his condition and disease, its progression—Petitioner would be entitled to relief prayed—Rejection of claim of jawan for award of disability pension and petitioner's claim for special family pension by respondents as well as order of AFT are contrary of law—Late Sepoy entitled to disability pension based on 90% disability from date of invalidation from service till his death and Petitioner entitled to award of special family pension w.e.f. death of her husband during her life time.

*Kamlesh Devi* v. *Union of India and Ors.* ..... *2911*

**PREVENTION OF CORRUPTION ACT, 1988**—Sections 7, 13(1)(d) and 13(2)—Appellants (convicts) argued that offence under section 120-B IPC could not be established as the main culprit/offender B.K. Ahluwalia expired during trial—Appellants never challenged the recovery of bribe money from their possession—Held, it is not essential that more than one person should be convicted for offence of criminal conspiracy—It is enough if the Court is in a position to find out that two or more persons were actually concerned in the criminal conspiracy—All conspirators are liable for the offences even if some of them have not actively participated—Merely because one offender died during trial, it does not absolve the appellants of the offence whereby they actively participated and assisted B.K. Ahluwalia for committing the crime—Prosecution of appellants upheld—Sentence reduced due to mitigating circumstances.

*Bimal Kishore Pandey* v. *C.B.I.* ..... *2785*



**SERVICE LAW**—Respondents engaged on contract basis, while performing the duties of motor lowry driver (MLD) filed OAs before the Central Administrative Tribunal which were allowed on the basis of judgment in the case of *Lalji Ram* by the Tribunal holding that the respondents are entitled to consideration for temporary status—Order of the Tribunal challenged by the petitioners, which writ petitions were disposed of by the Delhi High Court observing that if the contract labour was employed after the date from which the private respondents were deployed and have been given permanent status, then on parity such benefits should also be made available to the private respondents—Held, the respondents working against group C are not entitled to the grant of temporary status under the provisions contained in the scheme and therefore, the department cannot absorb them on the post of MLD as no other contract labour was deployed after the date of deployment of the respondents.

*UOI & Ors.* v. *Vijender Singh and Ors.* ..... *2555*

— Petitioners challenged the order of the Central Administrative Tribunal, New Delhi whereby the Tribunal allowed the OA and quashed the order of the petitioners and directed the petitioners to open the sealed cover adopted in the case of the respondent in the matter of promotion to the post of Commissioner Income Tax—While the respondent was working as Additional Commissioner of Income Tax, CBI registered a case against her under Prevention of Corruption Act and sanction to prosecute was accorded and at that stage, the respondent was considered for promotion but recommendations of the DPC were kept in sealed cover—Held:- On mere issuance of sanction order, the DPC proceedings could not have been kept in sealed cover and since the charge sheet was filed later on, the procedure of sealed cover was wrongly adopted—No infirmity in the order of Tribunal.

*UOI & Ors.* v. *Doly Loyi*..... *2566*

— Petitioner, working as HC was recruited as constable in CRPF in 1983 and medically examined several times and was found in medical category of shape-I and promoted to the post of HC in 1989—After petitioner cleared promotion cadre course in 2012, he was recommended for promotion as ASI but in the medical examination, he was declared unfit for the reasons of colour blindness and was based in medical category of shape-III —The respondents cancelled the promotion order of the petitioner—Challenged in writ petition—Held, in view of the judicial precedents, cited, since the colour blindness of the petitioner also could not be detected at the time of original induction but was detected subsequently, petitioner also is entitled to the same benefits which were given in the cited judicial precedents.

*Ram Pyare* v. *UOI & Ors.* ..... *2576*

— Departmental proceedings—Parity in punishment—The petitioner was chargesheeted by the respondents on several counts alleging that he acted in connivance with another employee Mr. S.C. Saxena enquiry officer held the charges proved—Disciplinary authority remitted the case to the enquiry officer for further examination of some witnesses—Enquiry officer held further enquiry and reported that all the charges against the petitioner were not proved—Disciplinary authority did not agree with the findings of the enquiry officer and issued a disagreement note thereby affording the petitioner an opportunity to submit representation—After considering the representation the disciplinary authority came to a conclusion which was challenged by the petitioner in the Allahabad Bench of Central Administrative Tribunal—The OA of petitioner was allowed but in the writ proceedings filed by the respondents, High Court of Allahabad remanded the case to the Tribunal for deciding afresh—The Tribunal decided that the OA being premature was not maintainable and dismissed—In the meanwhile, the petitioner retired from service—Finally, disciplinary authority in consultation with UPSC took a view that charges stood proved, so penalty of 20% cut in monthly



pension of the petitioner for five years was imposed—Punishment order challenged by the petitioner before the Tribunal mainly on the grounds that petitioner would be entitled to parity with co-accused Mr. S.C. Saxena, who was exonerated—Tribunal rejected the OA—Challenged in writ petition—Held, a comparison of charges framed against the petitioner and Mr. S.C. Saxena shows the commission of misconduct by them in connivance with each other, so what has been held in favour of Mr. S.C. Saxena on merits of charges must hold good in favour of the petitioner also, rather role of Mr. S.C. Saxena was deeper in as much as it is he who recorded false measurements in the measurement book and lapse of petitioner was only lack of proper supervision, so if Mr. S.C. Saxena was exonerated, the petitioner could not be treated differently—Penalty order liable to be set aside.

*C.D. Sharma* v. *Union of India and Ors.* ..... *2582*

— Constitution of India, 1950—Article 226—Petitioner challenges action of the respondents in not considering him for award grace marks in the examination held for the post of SI/GD through limited departmental competitive examination (LDCE) 2011, in terms of standing order 01-2011—Held:- there is nothing in the standing order which stipulates that a candidate who has failed to obtained the prescribed marks in the examination shall be entitled to the award of grace marks and the standing order merely sets out the guidelines for conducting the LDCE—Petition found without merit.

*Purkha Ram* v. *UOI & Ors.* ..... *2619*

— Constitution of India, 1950—Petitioner assailed findings of disciplinary proceedings conducted against him, accepting recommendations and findings of Inquiry Officer and imposing punishment of dismissal from service—It was urged, disciplinary authority had sought advice of Union Public Service Commission (UPSC) which recommended imposition of penalty of dismissal from service upon petitioner—But

petitioner was not given copy of advice of UPSC so that he could make representation against advice and submit his point of view. Held:- It is settled principle of natural justice that if any material is to be relied upon in departmental proceedings, a copy of the same must be supplied in advance to the charge-sheeted employee so that he may have a chance to rebut the same.

*C.P. Gupta* v. *Union of India and Ors.* ..... *2859*

— Constitution of India, 1950—Petitioner held posts of Charge Electrician, Charge Mechanic, Superintendent (E&M), Overseers, Superintendent (B&R) in GREF—Aggrieved with pay fixation w.e.f 01/01/1996 and its consequential impact, he filed writ petition claiming similar rights and privileges as made available to other employees holding similar positions as that of petitioner—Also, said issue was adjudicated in other writ petition which had attained finality as even SLP was dismissed. Held:- When a principle of law pertaining to due to this—Furthermore, the entire sequence of facts has resulted in a Kafkaesque situation whereby the petitioner is without employment, even after being promoted (an event which resulted in the impugned cancellation of his candidature) and at the same time not being appointed to the civilian post, despite being the most meritorious—Having regard to the overall conspectus of circumstances, Petitioner's appointment could have been sustained only upon rejection of the petitioner's candidature, which has been held illegal—The writ petition succeeds—Respondents directed to process the petitioner's candidature for appointment to the civilian post of Godown Overseer at the Equine Breeding Stud (EBS), Babugarh, and issue the appointment letter within six weeks.

*NB Ris Ravinder Kumar Singh* v. *Union of India and Ors.* ..... *3106*

— Denial of promotion—Adverse remarks in Annual Confidential Reports—Brief facts—Petitioner joined the Indo Tibetan Border Police (ITBP) in the year 1995 as an Assistant



Commandant and thereafter, on 1st July, 2004 was promoted as Deputy Commandant—On 23rd July, 2007, Memorandum communicating the three adverse remarks given to him in his Annual Confidential Report for the period w.e.f. 4th June, 2005 to 31st March, 2006—Petitioner made a general representation on 9th August, 2007 against the adverse remarks which was rejected vide an order dated 22nd January, 2008 passed by the respondents—Department of Personnel and Training of the Government of India issued an Office Memorandum dated 13th April, 2010 directing the respondents to give copies of all the below bench mark ACRs to the concerned—Pursuant to the Directives by Department of Personnel and Training of the Government of India, the petitioner was supplied with three of his ACRs including the ACR for the period w.e.f. 4th June, 2005 to 31st March, 2006—ACR recorded by the Initiating authority is placed for the first review by Reviewing Officer and a second consideration is accorded to it by the Senior Reviewing Officer—Petitioner's ACR for the period w.e.f. 4th June, 2005 to 31st March, 2006 was upgraded by Reviewing Officer from "average" to "good"—Petitioner made a second representation dated 30th August, 2010 praying for upgradation of his ACR to "very good" and for expunction of adverse remarks on the basis of the comments of the Reviewing Officer—Representation of the petitioner was rejected informing him that after duly taking into consideration the representation of the petitioner and all the relevant facts and evidence on record, the department had come to the conclusion that there was not merit in the representation calling for revision of his grading from "good" to "very good" and had rejected the same being devoid of merit—Hence the present Writ petition. Held—Respondents had fully accepted and endorsed the upgradation of the petitioner's ACR to "good" and thus accepted the comments of the Reviewing Officer as well as the Counter—Signing Officer—Despite the above position and the pendency of the Petitioner's representation, the respondent proceeded to hold a

Departmental Committee for promotion of officers to the post of Second-in-Command—Reviewing Officer had expunged the adverse remark against Petitioner and stated that the Officer was very good and deserved promotion—Respondents were treating the petitioner's ACR w.e.f. 4th June, 2005 to 31st March, 2006 as a "good ACR" without any adverse remarks—There is merit in the petitioner's contention that the ACR w.e.f. 4th June, 2005 to 31st March, 2006 could not have been treated as an adverse ACR or as an ACR containing adverse remarks as the same has been directed to be expunged by the Reviewing Officer—Respondents were endorsing the previous erroneous stand which had been taken by them on 22nd January, 2008 without considering the intervening circumstances and ignoring the review of the petitioner's ACR by the Reviewing Officer which had been confirmed by the Counter-Signing Officer and has been duly accepted by the respondents—Petitioner was finally promoted on 12th April, 2012 as Second-in-Command—However, as a result of the Respondent's above noticed action, the petitioner stood superseded by 44 junior officers despite his meeting the bench mark as his ACR had been upgraded from "average" to "good" as well as the remarks of the Reviewing Officer therein to the effect that the petitioner was having good technical and practical knowledge and that there was nothing to show poor performance by him—Therefore, the denial of the promotion to the petitioner was illegal and unjustified and as the petitioner was entitled to a favourable consideration in the DPC leading to the passing of the order dated 12th May, 2012 for the first time in which he was superseded only on account of respondents erroneously treating the ACR for the period w.e.f. 4th June, 2005 to 31st March, 2005 as adverse—Petitioner deserves to be given the financial benefits and accordingly, if he is found fit to be promoted by the Review DPC w.e.f. 12th May, 2011 he shall be entitled to the consequential financial benefits—Petitioner shall also be entitled to costs of the present proceedings @ Rs. 20,000/-.

*B.N. Sanawan* v. *UOI & Anr.* ..... *3169*



**SPECIFIC PERFORMANCE**—Suit for Specific Performance of Agreement to Sell dated 28.09.2006—Whether plaintiff was ready and willing to perform his part of contract—Readiness and willingness has to be judged with regard to the conduct of parties and attending circumstances—It depends on fact & circumstances of each case—One would normally expect that if the plaintiff is willing, he would unequivocally inform the defendants that he has requisite funds to complete the transaction and other processes, purchase of stamp papers etc. would be completed—If defendant is evasive plaintiff expected to vigorously follow up and chase the defendant atleast around the time of completion—In this case plaintiff at the most met the defendant only once in early 2007 whereas the transaction was to be completed within three months—No written correspondence before 2.04.2008—Whole transaction managed by one Mr. R and plaintiff never contacted the defendants or Mr. R to complete transaction—Plaintiff was not possessed of sufficient funds to complete the transaction—Held no cogent evidence to show that plaintiff was willing to perform his part of contract.

*Sangit Agrawal* v. *Praveen Anand & Anr.* ..... *3218*