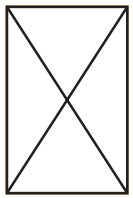

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DELHI SERIES
2013

(Containing cases determined by the High Court of Delhi)

VOLUME-5, PART-I

(CONTAINS GENERAL INDEX)

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CONTENTS

VOLUME-V, PART-I

SEPTEMBER, 2013

Pages

COMPARATIVE TABLE

ILR (DS) 2013 (V) = OTHER JOURNAL

SEPTEMBER, PART-I

Page No.	Journal	Page No.		Journal Name	Page No.
3259	No Equivalent				
3266	2013 (137) DRJ 59		=	2013 AIR (Del) 194	
3279	2013 (137) DRJ 67				
3300	No Equivalent				
3311	No Equivalent				
3322	2013 (202) DLT 278		=	2013 (8) AD (D) 642	
3332	2013 (6) AD (D) 180		=	2013 (3) JCC 1867	
3337	2013 (7) AD (D) 217				
3343	2013 (3) ArbLr 105				
3355	2013 (6) AD (D) 595				
3377	2013 (202) DLT 740		=	2013 (4) JCC 2655	
3394	2013 (3) JCC 1976				
3402	No Equivalent				
3406	2013 (3) JCC 1996		=	2013 (3) JCC 1996	
3414	No Equivalent				
3433	2013 (3) JCC 2155				
3455	No Equivalent				
3471	No Equivalent				
3479	No Equivalent				
3493	2013 (10) AD (D) 126		=	2013 (137) DRJ 700	
3493	2013 (203) DLT 473				
3504	2013 (137) DRJ 548				
3521	2013 (7) AD (D) 214				
3525	2013 (137) DRJ 653				
3539	No Equivalent				
3552	No Equivalent				

3563	2013 (137) DRJ 537				
3577	No Equivalent				
3590	2013 (8) AD (D) 324				
3608	2013 (137) DRJ 707				
3621	2013 (137) DRJ 684				
3632	No Equivalent				
3644	2013 (204) DLT 451				
3648	No Equivalent				
3654	2013 (138) DRJ 362		=	2014 (1) AD (D) 294	
3677	2013 (204) DLT 356		=	2014 (1) AD (D) 206	
3684	2013 (203) DLT 538		=	2013 (138) DRJ 335	
3684	2014 (1) AD (D) 626				

COMPARATIVE TABLE

OTHER JOURNAL = ILR (DS) 2013 (V)

SEPTEMBER, PART-I

Journal Name Page No.	=	ILR (DS) 2013 (V)	Page No.
2013 (3) ArbLr 105	=	ILR (DS) 2013 (V)	3343
2013 (8) AD (D) 642	=	ILR (DS) 2013 (V)	3222
2013 (6) AD (D) 180	=	ILR (DS) 2013 (V)	3332
2013 (7) AD (D) 217	=	ILR (DS) 2013 (V)	3347
2013 (6) AD (D) 595	=	ILR (DS) 2013 (V)	3355
2013 (10) AD (D) 126	=	ILR (DS) 2013 (V)	3493
2013 (7) AD (D) 214	=	ILR (DS) 2013 (V)	3521
2013 (8) AD (D) 324	=	ILR (DS) 2013 (V)	3590
2014 (1) AD (D) 294	=	ILR (DS) 2013 (V)	3654
2014 (1) AD (D) 206	=	ILR (DS) 2013 (V)	3677
2014 (1) AD (D) 626	=	ILR (DS) 2013 (V)	3684
2013 AIR (Del) 194	=	ILR (DS) 2013 (V)	3266
2013 (202) DLT 278	=	ILR (DS) 2013 (V)	3322
2013 (202) DLT 740	=	ILR (DS) 2013 (V)	3377
2013 (203) DLT 473	=	ILR (DS) 2013 (V)	3493
2013 (204) DLT 451	=	ILR (DS) 2013 (V)	3644
2013 (204) DLT 356	=	ILR (DS) 2013 (V)	3677
2013 (203) DLT 538	=	ILR (DS) 2013 (V)	3684
2013 (137) DRJ 67	=	ILR (DS) 2013 (V)	3279
2013 (137) DRJ 59	=	ILR (DS) 2013 (V)	3266
2013 (137) DRJ 700	=	ILR (DS) 2013 (V)	3493
2013 (137) DRJ 548	=	ILR (DS) 2013 (V)	3504
2013 (137) DRJ 653	=	ILR (DS) 2013 (V)	3525
2013 (137) DRJ 537	=	ILR (DS) 2013 (V)	3563
2013 (137) DRJ 707	=	ILR (DS) 2013 (V)	3608

2013 (137) DRJ 684	=	ILR (DS) 2013 (V)	3621
2013 (138) DRJ 362	=	ILR (DS) 2013 (V)	3654
2013 (138) DRJ 335	=	ILR (DS) 2013 (V)	3684
2013 (3) JCC 1867	=	ILR (DS) 2013 (V)	3332
2013 (4) JCC 2655	=	ILR (DS) 2013 (V)	3377
2013 (3) JCC 1976	=	ILR (DS) 2013 (V)	3394
2013 (3) JCC 1996	=	ILR (DS) 2013 (V)	3406
2013 (3) JCC 1996	=	ILR (DS) 2013 (V)	3406
2013 (3) JCC 2155	=	ILR (DS) 2013 (V)	3433

HIGH COURT OF DELHI AT NEW DELHI
CIRCULAR

F. No..(B)/Com./DHC/1228
Dated 20September, 2013

Lawyers and litigants are informed that this Court proposes to commence e-filing in Company and Tax Jurisdictions in the first week of October, 2013. For the purposes of e-filing in the said jurisdictions, a lawyer or a litigant in person, as the case may be, will beet to purchase a digital signature. The list of vendors (Licenced Certifying Authorities) who offer digital signatures for sale is available on the website htt:// ccs.gov.in.

A lawyer desirous of acquinting himself or herself with the e-filing procedure can visit the e-filing kiosk at Room No. 4 on the ground floor of Lawyers Chamber Block-I.

(H.C. Suri)
Registrar (Computer)
for Registrar General

HIGH COURT OF DELHI AT NEW DELHI

No. 25/Rules/DHC Dated: 25.09.2013

PRACTICE DIRECTION

In order to preserve the original documents such as Wills, Title Deeds, Lease Deeds, Cheques, General Power of Attorney, Special Power of Attorney, Conveyance Deeds, Agreement of Sell, Sale Deed and any other original document of value, which are in the judicial files pending in the High Court, Hon'ble the Chief Justice has been pleased to issue the following practice directions:

1. Henceforth all original documents be got sealed and kept in safe custody after retaining their photocopies in the judicial files.
2. All such original documents shall be kept in sealed cover irrespective of Court orders for sealing.
3. The sealing shall be done before the Deputy Registrar/ Assistant Registrar concerned.
4. The sealed documents shall be duly numbered and kept in safe custody of the officer concerned.

This Practice Direction will come into force immediately.

By Order
Sd/-
(SANGITA DHINGRA SEHGAL)
REGISTRAR GENERAL

NOMINAL-INDEX
VOLUME-V, PART-I
SEPTEMBER, 2013

SUBJECT-INDEX

VOLUME-V, PART-I

SEPTEMBER, 2013

CODE OF CIVIL PROCEDURE, 1908—Two cross suits filed by appellant and respondent with respect to a license agreement dated 01.09.1995 executed between them—Vide the agreement certain premises in Bangalore were licensed by the respondent to the appellant company for 36 months with a clause for renewal and the agreement was renewed till August, 2001—On expiry of the agreement by efflux of time in August, 2001, the appellant shifted its office from the suit premises—Disputes arose between the parties with respect to the arrears of license fee and the refund of security deposits made by the appellant to Karnataka Electricity Board (KEB) for securing permission for additional load of electricity and to a third party for providing standby gen sets—Appellant filed a suit seeking a sum of Rs. 45,23,414/- towards the refund of security deposits alongwith interest while the respondent filed a suit claiming Rs.9,58,448/- towards the license fee of September, 1995 and for license fee towards 01.10.2001 to 14.02.2002—Vide a single order the LD. Single Judge decreed the suit in favour of the appellant for a sum of Rs.20,41,939/- with interest at the rate of 6% per annum—Appellant challenged the findings of the Ld. Single Judge on the grounds that the respondent was not entitled to claim license fee for the month of September, 1995 as the said claim was time barred and that it had not led any proof to show that the said fee was unpaid and further that the Ld. Judge erred in not allowing the refund of security deposit paid to the service provider and in holding the appellant liable to pay rent till 04.10.2001 whereas it had vacated the premises by 31.08.2011. Appellant also challenged the different rates of interest awarded by the Ld. Judge to the parties on the amounts due—Held: Once there was a claim for recovery of dues, the burden to prove that the rent was paid is on the licensee and the appellant failed to discharge the said burden that it had paid the rent of September, 1995. No specific denial by the appellant that the said rent stood paid and therefore it failed to meet the requirements of the provisions of Order 8 Rule 3 and Rule 5 CPC. The claim for the said month also not time barred for the period prescribed under the Limitation Act bars the remedy

of filing suit for recovery of an amount beyond the said period but it does not bar the claim of an amount which is otherwise due and payable and therefore respondent entitled to adjust the security deposit against its dues. The security deposit made by the appellant company with a service provider with respect to gen sets installed at the premises could only be claimed from the said service provider and not the respondent for there was no privity of contract between the respondent and the third party, more so when no evidence led to show that after the premises were vacated, the deposit was used by the succeeding tenant. Appellant also liable to pay rent till 04.10.2001, for by its own communication dated 28.09.2001, it had called upon the respondent to take over possession of the premises w.e.f. 05.10.2001. The respondents also not entitled to claim rent w.e.f 05.10.2001 to 14.02.2002 because it deliberately refused to take possession as offered on 05.10.2001 and thereafter unilaterally took the same on 14.02.2002. On the question of interest, Ld. Single Judge treated all rival rights on equal footing for the amounts accrued prior to the filing of suit and hence no infirmity in this regard but Ld. Judge erred in not providing interest in regard to the security deposit paid by the appellant in favour of KEC for additional electricity for even when no interest was agreed to be paid on the said sum, the court does possess a statutory power u/s 34 CPC to grant pendent lite interest in respect of the dues claimed and thus appellant granted interest at the rate of 6% per annum on the said amount and therefore the appeal succeeds in part only to this extent.

— Order XXXVII—Appellant no. 1 Company through its Managing Director, Appellant no.2 entered into an agreement with the respondent vide which the respondent was to provide consultancy services to the appellant company—Disputes arose between the parties with regard to the payment of consultancy fee and during the pendency of a winding up petition filed by the respondent against the appellant company,

two settlement agreement were executed between the parties in April, 2005 and vide the said agreements, the appellants acknowledged a liability amounting to Rs. 2,40,31,800/- and undertook to pay the same by way of monthly installments and issued 19 post dated cheques for the same. Some of the cheques got dishonoured and the respondent then instituted a suit under Order XXXVII CPC for recovery of Rs. 1,80,81,800/- alongwith interest—On the issuance of summons for judgment, though no application for leave to defend was filed, an affidavit of one K.L. Swami, Director of appellant company was filed which was treated as an application for leave to defend by the Ld. Single Judge—Vide the impugned judgment dated 07.11.2012 leave to defend was denied and the suit was decreed in favour of the respondent and both the appellants were directed to pay the suit amount with interest at the rate of 24% - Appellants in the RFA filed contended that the suit is barred by limitation and that the Court did not have the territorial jurisdiction to entertain the suit and no cause of action had accrued against appellant no.2. Held: The execution of the settlement agreements dated 02.04.2005 has been admitted and by necessary inference, the applicants has admitted their liability for payment in April, 2005 and had issued cheques. The last of the cheques in pursuance of the agreements handed over by the appellants to the respondent admittedly is dated 09.10.2007 and the present suit having been filed on 07.10.2010 is within limitation. Limitation will run only from the date of the said cheque for the same could have been presented for encashment only on or after the said date. Merely because the appellants are carrying on business at Bangalore and had signed the cheques therein, will not take away the jurisdiction of the Delhi Court, more so when appellants not having controverted that the agreements were executed in New Delhi, had infact made payments to the respondents at New Delhi. The agreement between the parties also revealed that appellant no.2 had signed the agreement on behalf of appellant no.1, company and had agreed to become personally liable for the dues of appellant no.1, company and therefore is now estopped from contending that no cause of action had accrued

against him Findings of Ld. Single Judge therefore affirmed, however the rate of pendilite interest granted stands reduced from 24% to 8% per annum, for in the absence of any agreement or statutory provision or on mercantile usage, interest payable can only be at a market rate.

Khoday India Ltd. & Anr. v. *Rakesh Gupta* *3455*

— O. 37 R 3(5)—suit filed seeking a decree for a sum of Rs.28 Lacs with interest- Plaintiff contends to have an agreement to sell between the parties for a total sum of Rs.1.5 crores and an advance of Rs. 28 Lacs was paid to the defendant as advance money—Plaintiff further contends that huge dues were pending against the property and tenant was sitting on the property-Plaintiff sought cancellation of the deal and refund of the amount paid, which was refused—Hence, the present suit. Defendant denies liability and submits that the agreement to sell is a forged document—That the tenant of the Suit Property, being plaintiff's father was interested in the suit property—An oral agreement to sell was entered into and plaintiff was to pay Rs. 15 lacs as advance- However, only Rs.5 lacs was realised by cheque with the plaintiff promising to pay the remainder with the full balance of the sale amount- However, due to such non payment, amount of Rs. 5 lacs stands forfeited. Held: Defendant accepts receipt of Rs. 5 Lakhs. Proof of balance payment of Rs. 23 lakhs in cash is agreement to sell which is denied by the Defendant. Since father of the plaintiff is the tenant of the suit property, Submission of the plaintiff that defendant had misled the plaintiff with regard to suppressing the existence of a tenant is totally false- Plaintiff has to prove validity of agreement to sell- Defendant has raised triable issues with regard to a fair and bonafide defence—Application allowed, defendant granted unconditional leave to defend.

S.V. Construction Company v. *Parshuram Bhardwaj* *3493*

— Order 2 Rule 2, Order 7 Rule 11, Order 23 Rule 1—Suit filed for partition, declaration and permanent injunction by plaintiff who claims to be co-owner of the suit property, against her brother, Defendant. Owner of the suit property, parents of the plaintiff and defendant, died without leaving behind any will. Property was a Joint property and plaintiff claims to be a co-sharer. Defendant contends that relinquishment deed in favour of the defendant has been signed by the Plaintiff. Plaintiff denies the same, claiming that the Defendant had fraudulently obtained her signatures on the relinquishment deed. Defendant filed an application U/O 7 R 11 for rejection of plaint, since plaintiff had earlier filed a suit for permanent injunction in the court of the Senior Civil Judge, which was withdrawn after filing the present suit without taking any liberty to file the fresh suit. Plaintiff contends that the cause of action in the present suit differs from the earlier one, since the relinquishment deed wasn't in the knowledge of the plaintiff while filing the earlier suit. Held: On a joint reading of both the plaints, held that both are based on the same cause of action. O. 23 R. 1 CPC held not applicable since the present suit was filed by the plaintiff during the pendency of the previous suit. Suit is dismissed as being barred under O2 R. 2.

Deepa Dua v. *Tejinder Kumar Muteneja*..... *3525*

— Order XXXVII Rule 3 (6) (b)-Appellant company in the business of developing land entered into an agreement of purchase of certain land, with the Respondent company and in consideration thereof issued six cheques towards the purchase amount and took over the original ownership documents of the land—Cheques issued by the Appellant company dishonoured on presentation and the respondent filed a summary suit and the Ld. Single Judge held the appellant entitled to conditional leave, subject to the appellant depositing 50% of the principal amount in the Court—On appeal, the Division Bench modified the order of the Ld. Single Judge and directed deposit of 25% of the principal amount—As against this order, Special Leave Petition filed by the Appellant in the

Hon'ble Supreme Court was dismissed—No amount, however was deposited by the appellant and yet again the Division Bench was approached with a prayer that the requirement of depositing amount be substituted with the requirement of providing security of immovable property for the entire suit amount—Division Bench rejected the said prayer and vide order dated 24/09/2012 held that in case the appellant is unable to deposit 25% of the principal amount within a period of one month of the date of the order, consequences for non depositing the amount as a condition of leave would follow—Vide the impugned order dated 30/01/2013 the Ld. Single Judge decreed the suit filed by the Respondent after taking into account that no amount was deposited by the appellant within the time granted by the Division bench—The said order challenged on the ground that the interpretation given by the Single Judge with respect to the provisions of Order XXXVII Rule 3(6)(b) CPC contrary to law and that the court was under an obligation to look into the merits of the case before decreeing the suit. Held: Contention of appellant misconceived. The provisions of Order XXXVII Rule 3(6)(b) clearly envisage that on the failure of the Appellant, to deposit the amount required to be deposited by it as a condition to the grant of leave to defend the suit, the Court has no other option but to pass a judgment forthwith.

Agarwal Developers Pvt. Ltd. v. *Icon Buildcon Pvt. Ltd.* *3648*

CODE OF CRIMINAL PROCEDURE, 1973—Section 372—Appeal against acquittal—Complaint for rape and threat—FIR under section 376/506/34 IPC registered on the statement of the complainant/appellant—Her statement under section 164 Cr. P.C. recorded—Section 377/511, 342,452 IPC also added—Prosecution examined 16 witnesses—Statements of the accused persons recorded u/s. 313 Cr. P.C.—Stated to be falsely implicated and lodging of complaints against the appellant and husband—Examined three witnesses in their defence—Observing that the incident as alleged could not have taken place, respondents acquitted—Aggrieved complainant/

etc. and he was to look after the sales and thus was made non-functional—Petitioner resigned but the resignation of petitioner not filed with ROC—It was argued by the petitioner that it was just an equitable to went up the company. Held, clause (f) of Section 433 uses the expression "just and equitable". This expression is not to be construed ejusdem generis with the other clauses of the section, as held by the Supreme Court in *Rajamundry Electric Supply Corporation Ltd. v. A. Nageswara Rao,* (1955) 2 SCR 1066. The facts alleged in the petition and elaborated show that this is a case to which the provisions of Sections 397-398 may be attracted. It is well-settled that winding-up proceedings have to be used as a last resort. In a case such as the present one, there are preventive provisions in the Act safeguarding against oppression and mismanagement. If some other remedy is available to the petitioner that should be exhausted first. The winding-up petition is premature and is not maintainable. It is dismissed at the admissions stage itself along with the connected application.

Ashutosh Sharma v. *Torque Cables Pvt. Ltd. 3521*

— Sec. 224(7)/397/398 & 402—Company Preferred an application U/s 224(7) to Central Government for removal of auditors—Regional Director opined that it would not be proper to issue any order on the application since a petition U/s 397 & 398 was pending before CLB and the company was given option to approach CLB for necessary directions—Instead of the company, one of the promoter directors of the company filed the application before CLB without being authorised by the company and CLB disposed off that application as not filed by authorised person. Held no valid application filed before the CLB as a company is a distinct person in law—Though, a distinct corporate personality can act only through human agency, but that principle is applicable where the company professes to act itself and this principle cannot be pressed into service to support an argument that all the acts done by an individual share holder are those of the company —The

principle of piercing the corporate veil cannot also be invoked since that principle is normally invoked only to reveal the true identity of a company and to expose those persons who seek to use the cloak of corporate personality to hide and shun such exposure.—Held, however the CLB in exercise of its powers U/s 402 can take a decision in the pending petition U/s 397/ 398, regarding the removal of auditors.

S.P. Gupta v. *Packwell Manufacturers (Delhi) Pvt. Ltd. 3590*

— Sec. 433 (e), 434 & 439—Petition for winding up—Notice U/s 433 (e) r/w 434 of the Act sent by the petitioner at registered office through post received back with remark "left"- Notice also sent by e-mail to e-mail id of the company as intimated to ROC to which no reply sent—held there is no requirement that statutory notice should be served on the respondent company; it was only necessary to send notices to the registered office of the respondent—Contention that earlier communications were made on different e-mail ids not relevant.

Grandeur Collection v. *Shahi Fashions Pvt. Ltd. 3644*

— Sec. 10F—Valuer appointed by CLB—Appellant undertook to bear the entire fees of the valuer and paid part installment—Held, as a professional valuer, it was not the duty of the valuer to keep the appellant inform as how every input supplied by the appellant was considered and factored while arriving at the value of land—It would have been unprofessional if the valuer were to do so—Merely because the appellant had agreed to bear the entire fees of the valuer, it gives no right to the appellant to demand that every step in the process of valuation of the land should be made known to it and it should be taken into confidence as to how the valuation is arrived at and what is the value determined. Also held Sec. 8(1) of the Arbitration & Conciliation Act, 1996 not attracted to the dispute between the appellant and the valuer and it was the appellant which approached CLB with application seeking refund of the first

installment paid to the valuer and after having lost that application takes contradictory stand that CLB had no jurisdiction to pass the impugned order.

Agya Holdings Pvt. Ltd. v. *Jones Lang Lasalle Property Consultants (India) P. Ltd. & Ors.* *3677*

— Question whether CPC applicable to proceedings before CLB—Held strict provisions of CPC, Indian Evidence Act etc. not applicable to proceedings before Tribunals to make the functioning of these specialised tribunals effected—Enactment constituting the tribunals makes specific provisions as to the extent of the applicability of the provisions of CPC wherever required—The result is that except the provisions of the CPC made applicable, the other provisions are not applicable—Therefore, unless specifically conferred, CPC not applicable to CLB. Also held that the object and purpose of Sec. 397 & 398 of the Companies Act and the wide and unbridled powers given to the CLB U/s 402 of the Act, the CLB should be extremely reluctant to reject the petition in the threshold itself on highly technical grounds. Thus, the permission granted by the CLB earlier to withdraw the petition and file afresh petition on a fresh cause of action should not be viewed on the basis of strict parameters of Order 7 Rule 11 of the CPC. Also held there is no requirement that the petition against oppression and mismanagement should be filed only by minority or that it cannot be filed by majority members.

Gurpartap Singh & Anr. v. *Vista Hospitality Pvt. Ltd. & Ors.* *3684*

CONTRACT OF EMPLOYMENT—The principal question which came to be considered by the court was whether the respondent had any vested right in continuing with his employment despite his contract of employment having come to an end by efflux of time. Held the contract leaves on doubt as to the terms of the employment and there is no right in favour of the respondent entitling him to insist for extension of contract despite the performance of the respondent found

wanting—Respondent cannot contend that his services were liable to be continued de-hors the contract which he had voluntarily signed—Services of persons employed for a project cannot be co-terminous with the project in question- No show cause notice was necessary to hear the respondent in the event of decision not to extend a contract which cameo end by efflux of time. The decision not to extend the contract of employment cannot be considered to be a dismissal from service by way of punishment—It is discharged simplicitor on the employment contract coming to an end by efflux of time—An employee will have no right to be heard where an enquiry is made merely for the purposes of considering the suitability for extending the contract of employment—Respondent a qualified chartered accountant and was aware that his employment with the project was only for a fixed term—He had no vested right to insist that his contract of service be extended beyond the aggrieved period.

Union of India & Anr. v. *Satish Joshi* *3504*

ELECTION PROCESS—Question arose whether election process ought to have been interdicted once it has commenced. Held once an election process has commenced it must be concluded expeditiously as per its schedule and any legal challenge to the election must await the conclusion of the election. The courts would normally Pass orders only to assist completion of the elections and not to interdict the same.

The Yachting Association of India v. *Boardsailing Association of India & Ors.* *3539*

INDIAN PENAL CODE, 1860—Sections 393 and 308—Robbery and attempt to cause culpable homicide—Appellant with his associates entered into a godown—Armed with knives and Saria—Asked the Chowkidar/Complainant Ram Avtar not to raise alarm—Chowkidar raised alarm—Gave beatings and injured Ram Avtar—Public persons gathered—Attempted to escape—Appellant and one of his associates apprehended—Other associated to flee—Left knives at the spot—handed over

to police alongwith the Knives—FIR no. 111/2007 IPC registered at P.S. Nangloi appellant and his associates charge sheeted for offence punishable under section 392/394/395/397/398/308/34 IPC and Section 25 Arm Act—Charges for offence punishable under section 395/398/308/34 IPC framed—prosecution examined 12 witnesses—Statement of appellant under section 313 Cr. P.C. recorded—Appellant held guilty for offence under section 393/308 IPC—aggrieved appellant preferred appeal—Held—Major Discrepancies and contradiction regarding exact number of assailants, the manner of their apprehension, the circumstances in which they were apprehended—Identity of Assailants not known to the eye witnesses—no Test Identification proceedings conducted—injuries on the person of one of the assailants not explained—Prosecution voluntarily suppressed true facts–Prosecution not presented true facts—Conviction cannot be sustained—Appeal Allowed—Judgment set aside.

— Section 308—Attempt to commit culpable homicide—Quarrel between complainant and respondents over a trivial issue—Injured removed to hospital—Medically examined—Complainant got his statement recorded on next day—FIR lodged—Charge sheet for offence under section 308/34 IPC filed—Charge framed—Prosecution examined 11 witnesses—Statements of respondents under section 313 Cr.P.C. recorded—Examined 8 witnesses in defence—Respondents acquitted for the charge—State did not challenge the acquittal—Aggrieved complainant/victim preferred appeal—Contended—Complainant implicated and attributed specific role to respondents in causing injuries—Other witnesses corroborated him on all material facts—no ulterior motive to falsely implicate the respondents—No conflict in the ocular and medical evidence—Respondents contended—Acquittal based on fair appraisal of evidence—No sound reasons to interfere—Held—Nature of Simple with blunt object—Inordinate delay in lodging the complaint—Complainant was

conscious and oriented—No reason/excuse for not making the statement then and there—Statement was made after due deliberations and consultation—No weapon of offence recovered form respondents—Presence of witnesses doubtful as neither intervened to sane the injured nor took the victim to hospital—Were interested witnesses—One of the respondents also suffered injuries—Medically examined—Injuries were simple with sharp object—No explanation for not registering a cross-case—No explanation as to how and under what circumstances respondents suffered injuries—No sound reason for registered FIR for attempt to commit culpable homicide—No infirmity in the judgment—Appeal unmerited—Dismissed.

— Section 302—Murder—Section 201—Causing disappearance of evidence—Information regarding recovery of body in a house—Crime team summoned—body taken out of the gutter—Statement of victim's daughter recorded—FIR No. 118/2004 under sections 302/201 IPC registered at PS Gokalpuri—Charge sheet for offences under section 302/201 IPC filed—charges framed—Prosecution examined 19 witnesses—statement of accused under section 313 Cr. P.C. recorded—Convicted for offences punishable under sections 304 part II/201 IPC—Aggrieved appellant preferred appeal—Contended—Putting chunni around the neck of her husband and not taking proper care to untie it was a rash and negligent act—Had no intention or motive to murder—not aware of the consequences of her act—In exercise of private defence tied chunni with cot—did not flee and arrested after six years—Additional Public Prosecutor contended—Deliberately and intentionally put chunni around the deceased's neck—All contentions dealt with in the judgment—Held—PW2 proved her version as given to the police without any variation—No material discrepancy emerged in cross examination—no ulterior motive assigned to her to falsely implicate her

selection process was cancelled—Petitioners assailed the cancellation of the Selection Process. Candidature of Petitioners in WP no. 5457/2011 and W.P. 6403/2011 were cancelled on the basis of incorrect selection certificate and candidature of petitioners in 4997/2011 was cancelled as the selection process had been scrapped. Held : It is clearly evident from the evidence led by the Petitioners in WP no.5457/2011 and W.P 6403/2011 that the Respondents have affirmed authenticity as well as correctness of the experience certificates—Validity of such certificates stands finally settled and needs no further adjudication—That the candidature of the writ petitioners in both writ petitions was rejected on the sole ground that their certificates were not with the prescribed procedure—Objection no longer subsists—Respondents are directed to issue appointment to the Petitioners. Writ respect to Petitioners in WP no. 4997/2011 it was held that it is trite law that one the selection can be segregated and chaff separated from grain, the candidates whose appointment was not tained or illegal have to be given appointments. Cancellation of selection process illegal.

— Constitution of India, 1950—Article 226; Aircraft Rules, 1937—Rule 8A—Principles relating to Rule 8A of the Aircraft Rules, 1937, pertaining to the "Procedure for Passenger and Carrying on Baggage Screening"—Duties of X Ray officers notified in para 5.4. As per Para 5.4.5 it is mandated that if any unauthorized articles are present or if there is doubt as the contents of any bag, the bag must be hand searched. The petitioner approached the court assailing the order of the disciplinary authority imposing a penalty a reduction in pay scale, and of not earning increments of pay for a period of two years on the charge of gross misconduct, indiscipline and dereliction of duty in leaving his duty post on his own. The Petitioner was deployed as Trained Staff No. 2 to monitor X-Ray machine on 25.07.07, when he spotted that certain

baggage either had a large amount of cash or explosives. The Petitioner than requested the passenger to go for a manual search of the bag, and the baggage in question was handed over to the Petitioner's superior, a Sub—Inspector, complying with the provisions of para 5.4 of Rule 8A of the Aircraft Rules after which the role of the Petitioner came to an end. On the complaint of the passenger, subsequently, it emerged that while manually searching the bag, the Petitioner's superiors extorted a sum of Rs. 2,00,000, which they admitted to, from which an amount of Rs. 90,000 was recovered. Despite the above position, Petitioner was charge sheeted with a) Deliberately providing his superiors an opportunity for physical checking of the bag which contained a large amount of cash and b) for leaving his duty post, and held guilty of the first charge by the Disciplinary Authority. Petitioner challenged the decision on the ground that there was no evidence against him. Held: No dispute that Petitioner was not involved with the illegal actions of his superiors. Further, deemed to have complied with all the requirements of informing the Shift in-charge, and could not have anticipated that the Shift in charge would extort money from the passenger. No evidence against the Petitioner, and findings of the Revisional Authority finding the Petitioner guilty are quashed and set aside.

— CISF Act, 1968—Section 9—CISF Rules, 2001—Rule 25—Service of petitioner terminated during probation period—Order challenged before HC—Plea taken, even though termination was during period of probation however order was stigmatic as per alleged misconduct and in nature of alleged malpractice in securing his appointment as ASI with CISF—Held—Admittedly, respondent did not conduct any form of disciplinary inquiry—Action of respondent is clearly in violation of principles of natural justice—Impugned order as well as appellate order are contrary to law and violation of principles of natural justice—Order set aside and quashed—

Respondents shall pass consequential orders permitting petitioner to continue training within 4 weeks—However, respondents shall be free to take suitable action following procedure which is in accordance with law.

Ravi Ranjan Kumar v. *Union of India and Ors.*..... *3402*

— Commuted Leave—FRSR Part III Leave Rules—Rules 7 (2), 24(3) & 30—Brief Facts—Petitioner joined the Border Security Force as Sub-Inspector retired as Deputy Commandant on 31st December, 2005 at the age of 57 years—When he was posted at Barmer, Rajasthan, he availed 30 days earned leave from the period 11th February, 2005 to 13th March, 2005 and came to Delhi—Petitioner while on earned leave in Delhi fell ill and he reported to BSF hospital, Tigri (Delhi) and was referred to Safdarjung Hospital where he continued treatment first for his Urological problem and thereafter his heart ailment and underwent Angiography also—CMO (SG) I/C STS Hospital, Tigri (Delhi) who was apprised of the medical condition of the petitioner had sent telegrams dated 7th May, 2005 19th May, 2005, 26th May, 2005, 8th June, 2005, 10th June, 2005, 15th June, 2005 regularly apprising the respondent of Medical conditions of petitioner—No issue was raised by the respondents—Vide his application dated 10th May, 2005 the petitioner had informed the respondents about his treatment and inability to join his duty—Respondents made no objection and accepted the correctness of this position—Petitioner joined duty at Barmer (Rajasthan) on 23rd June, 2005 and submitted an application to the Respondents for sanctioning 102 days commuted leave on 25th June, 2005—On 15th July, 2005 the respondent no.2 through the petitioner's Commandant passed an order converting the petitioner's request of 102 days commuted leave into earned leave and so informed the petitioner—Petitioner's request dated 17th August, 2005 for reconsideration of the matter to the Commandant was also not favourably considered—Hence the present Petition.

Held—Sole requirement of Rule 30 FRSR Part III Leave Rules in that the government servant is required to furnish a medical certificate for sanction of commuted leave on medical grounds—This is obviously because the employer is to be satisfied that the employee was prevented by sickness from performing duties—Cardiology department of Safdarjung Hospital refused to initially issue the medical and fitness certificate on the ground that petitioner was still undergoing treatment in the hospital—Cadiology department of Safdarjung Hospital however, subsequently issued a medical certificate of 50 days from 2nd May, 2005 to 20th May, 2005 which was duly submitted by petitioner along with his review application dated 22nd November, 2005—It however, was not given any weightage by the reviewing authorities—Even though the petitioner could not produce the medical certificate for the entire period of his absence, contemporaneous documents, including information from the BSF Hospital, were regularly given to them—Petitioner has stated that he had submitted necessary documents with his leave application as well—In this background though, not in prescribed form, there was substantive compliance with the requirement of the respondents—The above document clearly show that the petitioner could not produce the medical certificate to the respondents while applying for commuted leave only because the concerned hospital refused to issue the same—In Rule 24 (3) which requires production of a medical certificate of fitness, the rule making authority has used the expression "may" not return without a fitness certificate suggesting that the requirement of production of the medical certificate was directory and not mandatory—Failure on the part of the petitioner to submit the requisite medical certificate in prescribed format along with commuted leave application cannot be held to be fatal for the petitioner's request because of any fault attributable to him—Respondents do not dispute that the petitioner had been unwell and that his absence was on account of the ongoing medical treatment—The progress thereof was regularly informed to the respondents by the BSF Hospital—Petitioner has produced the medical certificate for

on his ceasing to hold office by virtue of Sec. 10(a) of the Act.

Also held that it is well settled that a statute must be interpreted by giving the words of the statue there ordinary and plain meaning.

Shri Rajan Sharma v. *Union of India & Anr.*..... *3563*

— Compulsory Retirement—Appellant compulsarily retired on account of being found guilty of sexual harassment—Writ petition filed before Ld. Single Judge dismissed. Held in proceedings under Article 226 of the Constitution of India, the court is not required to re-appreciate the evidence on the basis of which findings return in a domestic disciplinary proceedings—Court is not called upon to re-examine the material considered by the Inquiry Committee and the Appeals Committee -All that Court is required to examine is whether there is any material on the basis of which the inquiry committee could have come to a conclusion that the appellant was guilty of harassing respondent no.5 and whether the required procedure was followed—Held, no perversity in the findings arrived at by the inquiry committee and the appeals committee. Also held that the penalty imposed by the Registrar approved by the Vice Chancellor as well as Executive Counsel of the University and the Registrar being a University functionary as per Rule III (ix) of the GSCASH Rules there is no infirmity in his acting on behalf of the university for the purposes of disciplinary proceedings.

S. Raju Aiyer v. *Jawaharlal Nehru University & Ors.*..... *3577*

SICK INDUSTRIAL COMPANIES (SPECIAL PROVISIONS) ACT, 1985 (HEREAFTER "SICA")—Reconstruction and revival-fiscal concessions-scope—Brief facts-Petitioner was incorporated under the Companies Act, 1956 named Modi Alkalies & Chemicals Limited—Petitioner filed reference before the Board for Industrial and Financial Reconstruction ("BIFR")

based on its accounts—BIFR declared that the Petitioner was a sick company and directed IDBI to act as the Operating Agency (OA)—By ex-parte order dated 02.06.2004, BIFR directed winding up of the Petitioner Company under Section 20(1) of SICA and accordingly directed issuance of Show Cause Notice (SCN) for Winding Up—Aggrieved by that order of BIFR, the Petitioner filed an appeal being No. 154/2004—During pendency of the said appeal, the first Respondent, i.e. the Income Tax Department filed an application on 14.11.2005 under Section 22(1) of SICA seeking permission to recover its dues of Rs. 997.79 lakhs—It is stated that on 14.03.2006, during the pendency of the appeal before BIFR, the Petitioner could settle the dues of all its secured creditors (except IIBI, RIICO & UTI)—Appellate Authority for Industrial and Financial Reconstruction (hereafter "AAIFR"), taking note of the fact that the Petitioner, out of its 10 secured creditors namely IDBI, ICICI, IFCI SBI, PNB, Syndicate Bank, Indian Bank, IIBI, RIICO & UTI had already settled the dues of 7 creditors (except IIBI, RIICO and UTI), by order dated 14.03.2006 allowed the appeal and set aside the order (dated 02.06.2004) and remanded the matter with a direction that a suitable provision for payment of income tax dues amounting to Rs. 997.79 lakhs payable by the Petitioner ought to be made in the rehabilitation scheme—By its order dated 22.09.2006, BIFR directed for circulation/publication of the Draft Rehabilitation Scheme (DRS), in compliance with provisions of Section 18(3) of SICA—BIFR after considering the objections/suggestions of the secured creditors to the DRS sanctioned the scheme on 30.11.2006; a copy of the sanctioned scheme was duly sent by BIFR to the Income tax sanctioning of the scheme was brought to the notice of the income tax authorities on 27th February, 2007—In September 2008, being aggrieved by the order (dated 30.11.2006 of BIFR), the Income Tax Department preferred a belated appeal to AAIFR, (being Appeal No. 227 of 2008) in respect of the Income Tax reliefs and concessions provided in the Sanctioned scheme in Paras 10.7(1), (2), (3) & (4)—By the impugned order, the AAIFR finally allowed the Income Tax

Department's appeal and set aside Clause 11.5 of the published scheme, approved by the BIFR -Hence the present Writ Petition.

Held—The decision of the Supreme Court in *Commissioner of Income tax v Anjum. M.H. Ghaswala & Ors.* (2002) 1 SCC 633 is no doubt an authority for the proposition that interest waiver cannot be granted to anyone except those specified in the Income Tax Act—However the court did not have any occasion to deal with provisions of SICA, or their interface with provisions and orders under the Income Tax Act—Tenor and express provisions of Section 32 of SICA, in the opinion of this court, leave no doubt that the provisions of SICA are to prevail, except to the extent excluded—The immunity or exception from, the non obstante clause, is limited to the provisions of enactments referred—The non obstinate clause contained in sub- section (1) of Section 32 of SICA does not give the SICA a blanket overriding effect on all other laws; the overriding effect is given to the provisions of SICA, rules or schemes made thereunder only to the extent of inconsistency therewith contained in any other law excepting a few exceptions enumerated therein—Exempting from and suspending the operation of the provisions contained in Section 41 of the Income-Tax Act, 1961 as regards a sick industry amounts to sacrifice from the Central Govt.'- It is for the BIFR to form an opinion while framing a scheme of rehabilitation for a sick industry whether an exemption from operation of S 41 of the Income-Tax Act, 1961 is required to be engrafted in the scheme so as to secure the object of rehabilitation and if so then to what extent—If the BIFR may form an opinion in favour of grant of such exemption then the same amounts to 'financial assistance' from the Central Govt. to the extent of the sick industry having been exempted from the operation of Section 41 of the Income-tax."

— Nodal authority for coordinating between BIFR and the Central Board was the Director General (Administration)—However, the blanket submission that when the circular under Section 119 is ignored, and a scheme is given effect to by income tax authorities themselves, the BIFR's order or scheme is void, cannot be countenanced—The Income Tax authorities in this case were aware in the earlier round, about the reference and possibility of a scheme; they requested for provision to recover their dues—Having regard to these circumstances and Section 32 of the Act as well as the Circular No. 683 of 1994 under the Income tax Act, the failure of income tax authorities to inform the Director General (since the Circular was in existence at the time of formulation of the scheme in the present case) would not result in the invalidity of BIFR's scheme—Another aspect which this court notices is that the Income Tax authorities, i.e. the assessing officer and the Commissioner, have given effect to the orders of BIFR—These were pursuant to the orders of the Income Tax Appellate Tribunal (ITAT) dated 19.02.2008—That order stands and has attained finality—Besides, the period for operation of the limited concessions in the scheme has also apparently ended—In view of the above discussion, the writ petition is entitled to succeed.

SPECIFIC PERFORMANCE—Indian Penal Code, 1860—Section 307—Attempt to murder—Appellant/accused working with the victim—Victim made a complaint against the appellant/accused—Inflicted injuries with Sambal—Fled after inflicting injuries—Victims removed to the hospital—Medically examined—Unfit for statement injuries opined to be grievous—Complaint lodged—FIR No. 245/2007 under section 307 IPC PS Kalyanpuri recorded—Statement of the injured recorded—Investigation completed charge sheet filed—Charge for offence under section 307 IPC framed 10 witnesses examined by prosecution—Convicted vide judgment dated 20.08.2011—Aggrieved accused preferred appeal contended appellant/

accused not author of the injuries—Injuries caused by the employer—Witnesses are interested witnesses their testimonies cannot be relied upon—Statement of injured was recorded after considerable delay—No explanation furnished for the delay—Complainant is a planted witness was not present at the spot at the time of incident version given by injured is in consultation with complainant—Appellant had no motive to inflict injuries—No independent public witnesses associated in recovery—Recovery of weapon highly doubtful—Complainant himself caused injuries to the victim as injured was repeatedly demanding dues—APP contended—The role played by the appellant proved—No reason to disbelieve no variance between ocular and medical evidence—Held—No evidence to substantiate plea of injuries being caused by the employer—No material discrepancy emerged in cross examination of the injured—Victim had got employment for appellant not expected to spare real culprit and falsely implicate the accused—No prior animosity Complaint lodged by victim was the immediate provocation Injured gave graphic details of infliction of injuries no ulterior motive assigned to victim—No conflict between the ocular and medical evidence—No plausible explanation to incriminating evidence in statement recorded under Section 313 Cr.P.C. —No witness examined in defence—Conviction under section 307 IPC cannot be faulted—appeal unmerited—Dismissed.

Chandan @ Manjit v. *State* *3471*

SPECIFIC RELIEF ACT, 1963—Section 23—Appellant filed a suit claiming specific performance of a contract for sale of immovable property, bearing A-66, Saraswati Vihar, Delhi on the basis of an agreement to sell dated 6/5/1995 executed between him and one Nanak Chand, who expired in the second week of August, 1995 and whose legal heirs, the Respondents, initially agreed to abide by the contract—During the trial, the Ld. Single Judge framed an additional issue with respect to the maintainability of the suit and after hearing the parties on the said issue held vide the impugned order that

the suit seeking a decree for specific performance was not maintainable and the appellant could only claim damages, in view of a condition of the agreement [clause (e)] vide which the parties had agreed that in case of default of purchaser, the earnest money deposited would stand forfeited and in case of default of the seller, he would liable to pay double the amount of the earnest money. Held: The mere existence of a term in a contract, providing for payment of a sum, in case of its breach, is not a bar to seeking the specific performance of the contract and such a contract may be specifically enforced, if a Court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purposes of securing performance of the contract and not for the purpose of giving to a party in default, an option of paying money in lieu of specific performance. In the absence of any opportunity to the plaintiff and the parties to lead evidence, to the effect that Clause (e) of the contract in question was meant only as a condition to secure enforcement, the Ld. Single Judge Could not have held the suit as not being maintainable, only on the basis of the existence of condition i.e. Clause (e).

Simmi Katyal v. *Ram Pyari Batra & Ors.* *3266*

SUIT FOR SPECIFIC PERFORMANCE—Compromise Decree in Favour of DH passed on 15.04.1998—JD executed a GPA in favour of DH and also executed Possession Letter on 11.05.2000—JD failed to execute Sale Deed—Execution filed on 09.04.2012—Objections filed by JD before Executing Court—Objections dismissed by Single Judge—In the appeal, issue of limitation raised—Held that since JD had himself set the time at large by executing a GPA in favour of DH and also executed Possession Letter on 11.05.2000, it cannot be argued that DH had at any point of time by his conduct waived the obligation of JD to execute Sale Deed. Also the compromise decree had the imprimatur of the Court, therefore, it was enforceable—Appeal dismissed.

Gopal Kamra v. *Karan Luthra* *3479*

MOTOR ACCIDENT CLAIM—In a road accident, a bus driven in a rash and negligent manner collided against a two wheeler consequent to which the driver of the scooter Naveen Chander Sharma and its pillion rider, Ajay Popli suffered injuries—Injuries suffered by Naveen Chander Sharma proved to be fatal and two separate claim petitions were filed, one by injured Ajay Popli and the other by the LRs of the deceased Naveen Sharma—Claims Tribunal vide a common judgment awarded compensation in both the said Petitions—Two appeals were filed by the Insurance Company on the ground that the driving license of the offending vehicle was fake and therefore the insurance company is entitled to be exonerated and the third appeal was filed by the LRs of Naveen Sharma for enhancement of the compensation. Held: To avoid its liability towards the insured, insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care regarding use of vehicle by a duly licensed driver or one who was not disqualified to drive. In the facts of the case, the driver of the offending vehicle had in his possession two licenses, out of which one was found out to be fake but it is not a case where the insured, the owner of the offending vehicle, was aware of the possession of two driving licenses by the driver. On the other hand, the insured has deposed that in pursuance of the notice given by the Insurance Company, he had produced a copy of the driving license before them and that at the time of employing the driver he had also taken his driving test and found him to be a skilled driver. The license furnished by the insured was not got verified by the insurance company and insurance company failed to prove any willful or conscious breach of the terms and conditions of the insurance policy, by the insured and therefore the appeals filed by the insurance company are dismissed. As regards the appeal filed for enhancement of compensation, compensation under the head of loss of dependency enhanced from Rs.5,28,000/- awarded by the Tribunal to Rs.8,36,550/- after taking into consideration that the Tribunal had wrongly rejected an amount of Rs.2,950/- being earned by the deceased from part time employment. The compensation awarded by Claim

Tribunal towards loss of love and affection, funeral expenses and loss to estate as Rs.25,000/- in all is also to be enhanced, for Rs.25,000/- is to be awarded under the loss of love and affection alone and therefore in addition to the said sum, Rs. 10,000/- awarded each towards funeral expenses and loss to estate.

Tara Sharma & Anr. v. *The New India Assurance Co. Ltd. & Ors.* *3608*

MOTOR VEHICLE ACT, 1988—Respondent no. 5 caused a motor vehicle accident on 25/04/2005 which resulted in death of one Abid and the MACT awarded a compensation of Rs.5,05,000/- in favour of respondents 1 to 3, legal heirs of the deceased—Appellant Insurance Company challenged the order of MACT on the ground that the respondent no. 5 possessed a license to drive LMV (NT) and not a commercial vehicle and as the offending vehicle was a commercial transport vehicle the appellant insurance company was not liable to compensate or in any case was not entitled to indemnify the insured and was hence entitled to recovery rights against respondent no. 4, the owner of the vehicle. Held: The owner of the vehicle is liable for breach of the terms of the insurance policy as he willfully allowed a driver to drive a commercial taxi when the driver possessed a license only to drive LMV (NT) The appellant insurance company however cannot avoid its liability towards third party as the liability of the insurance company to satisfy the award in the first instance is statutory and it can recover the amount of compensation paid form the owner and the driver (respondents 4 and 5) in execution of the MACT judgment without having recourse to independent civil proceedings.

Oriental Insurance Co. Ltd. v. *Shahnawaz & Ors.* *3632*

— Motor Accident Claim—A road accident involving a tempo vehicle carrying goods resulted in the death of two of its occupants and injuries to three of its occupants—

Compensation awarded by the Tribunal in respect of three injury cases paid by the insurance company however two appeals preferred against the order of the Tribunal by the insurance company challenging its liability and quantum of compensation to be paid to the LRs of the deceased persons on the ground that the deceased were gratuitous passengers and that even otherwise they were travelling on the top of the tempo and not in the cabin besides the driver and further that the driver of the offending vehicle did not hold a valid and effective license and further the compensation granted was excessive—LRs of the deceased also filed appeals for enhancement of the compensation granted by the Tribunal. Held—On the basis of the evidence adduced it is to be held that the two deceased persons were owners of the goods being transported in the vehicle and hence were not gratuitous passengers and further that both of them were travelling in the cabin of the tempo, alongwith the driver. Copy of certificate of insurance proved on record shows the siting capacity of the tempo to be three and therefore only two persons could have travelled alongwith the driver in the cabin. In case of injury to persons more than carrying capacity in the vehicle, the insurance company is liable to pay the highest compensation payable to the persons as per the carrying capacity and thus in the absence of any appeal filed by the insurance company against the compensation awarded to the three injured which infact was very small, the insurance company cannot shy away from its liability to pay compensation to the LRs of the two deceased. As regards the breach of the terms of the insurance policy, the order of the Tribunal making the insurance company liable to pay the compensation despite it having proved the breach of the terms of the policy, fully justified for an insurer has a statutory liability to pay the compensation to a third party and it simply has a right to recover the same from the insured/tortfeasor. In view thereof insurance company liable to satisfy the award in the first instance but is however entitled to recover the amount of compensation from the driver and the owner of the vehicle in execution of this very judgment without having

recourse to independent civil proceedings. With respect to the quantum of compensation, the Tribunal should have accepted the testimony of the LR of the deceased Naresh s/o Harpal that the deceased had an income of Rs.4500/- per month, for it is not necessary that in every case there must be some documentary evidence to support the income of the deceased. However since the deceased Naresh s/o Harpal was not in permanent or regular employment, no additions can be made towards future prospects. Similarly, since deceased Naresh s/o Kashmira was also having only a temporary job, his LRs would not be entitled to any addition towards future prospects/ inflation. However Compensation towards funeral expenses and loss of love and affection liable to be enhanced in view of settled judicial dicta.

ILR (2013) V DELHI 3259
W.P.

SAROJ DEVI ....PETITIONER

VERSUS

UNION OF INDIA & ANR. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. NO. : 2557/2013 DATE OF DECISION: 03.07.2013

Service Law—Pension—Constitution of India, 1950—Article 226—Central Civil Service (Extraordinary Pension) Rules—Principles relating to recalculation i.e. fixation of pension which was admissible to the Petitioner—Petitioner is the widow of Late Shri Chamru Oraon who was employed with the CISF since 1977—Petitioner's husband died due to asphyxiation due to drowning having fallen down into a water tank while on duty—Despite representation by the Petitioner, Respondents failed to grant her extra ordinary pension in accordance with Central Civil Service (Extraordinary Pension) Rules—Aggrieved, Petitioner filed the writ petition for payment of extra ordinary pension along with interest from the date of the death of her husband to the date of realization—Held: It is trite law that payment of pension or extra ordinary pension are required by dependents for their monthly requirements—Delay in effecting the same causes irreparable harm—The factum of the Petitioner's son having been granted compassionate appointment does not disentitle Petitioner to the grant of extra ordinary pension—Petitioner is entitled to arrears of extra ordinary pension scheme along with interest.

It is trite and needs no elaboration that financial payments especially in the nature of pension or extraordinary pension

are required by the dependants of a deceased official for meeting their monthly requirements. Delay in effecting such payments would irreparably cause harm to such dependants as the petitioner. **(Para 10)**

So far as the contention that the petitioner has not made disclosure of the compassionate appointment of her son is concerned, we may note that the petitioner is an illiterate and poor lady residing in a remote village in district Gumla, Jharkhand. In any case, the factum of the engagement of the son of the deceased does not in any manner disentitle the widow to the grant of the extraordinary family pension. This is evident from the order dated 28th June, 2013 passed by the respondents finding the petitioner's claim for extraordinary pension justified. **(Para 11)**

A perusal of this order dated 28th June, 2013 would show that the respondents have held that the petitioner is entitled to arrears of extraordinary pension scheme w.e.f. 16th July, 2000 till date. It is evident that the same has been wrongly denied to her for no fault of hers. **(Para 12)**

In view of the above, we direct as follows:-

(i) The petitioner shall be entitled to interest at the rate of 9% on the amount of Rs.9,00,000/- paid as extraordinary pension to the petitioner w.e.f. 15th July, 2000 (date of expiry of Late Chamru Oraon) till 7th March, 2012 when the amount was paid.

(ii) The petitioner shall be entitled to interest on the amounts found due and payable to the petitioner in terms of the communication dated 28th June, 2013 with effect from the date they became due and payable till date the payment is actually effected at the rate of 12% per annum.

(iii) The respondents shall effect the computation in terms of our above order within a period of four weeks and communicate the same to the petitioner immediately thereupon. Copy thereof shall be filed in this court positively

within a period of six weeks from today. In case the petitioner has any grievance with regard to the same, she shall be at liberty to take appropriate legal remedy in respect thereof.

(iv) The respondents shall effect payment of arrears to the petitioner within a period of four weeks thereafter.

(v) The petitioner shall be entitled to costs which are quantified at Rs.25,000/- which shall be paid on or before the seventh day of each English calendar month.

(vi) This writ petition is allowed in the above terms.

Dasti to parties. **(Para 17)**

Important Issue Involved: Delay in effecting pension causes irreparable harm-compassionate appointment does not disentitle grant of extra ordinary pension.

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Akhilesh Arora, Adv.

FOR THE RESPONDENTS : Mr. Amrit Pal Singh, CGSC with Mr. Gurjinder Kaur, Adv. & Mr. R. Jayaram, AC/CISF.

RESULT: Writ Petition allowed.

GITA MITTAL, J. (ORAL)

1. Learned counsel for the respondents has handed over a copy of the communication dated 28th June, 2013 whereby the respondents have communicated the recalculation and re-fixation of the pension which is found admissible to Smt. Saroj Devi, widow of Late Shri Chamru Oraon. Learned Standing Counsel for the Central Government has also handed over a copy of communication dated 21st June, 2013 received by him from the Directorate General of the Central Industrial Security Force in order to explain the circumstances in which the delay occurred in making payment of the extraordinary pension to the petitioner.

2. So far as the writ petition is concerned, the respondents have

disclosed the following facts:-

(i) CISF No.774400121 Exh-HC/GD Chamru Oraon was appointed in CISF on 05.04.1977.

(ii) He was posted to CISF Unit BCCL Dhanbad on 15.06.1999 and deployed at area No.VII of BCCL Dhanbad.

(iii) On 15th July, 2000 he was deployed for duty from 2100 hrs at Barari Coke plant of Bhagabandh Area with rifle and ammunition. Apprehending that HC/GD Chamru Oraon has fallen down in the water tank, some civilians went inside the tank with the help of a ladder and recovered the unconscious body of HC/GD Chamru Oraon from the water tank. He was taken to nearby Kustor Hospital for treatment, where the doctor declared him brought dead at about 2135 hrs on 15th July, 2000.

(iv) On the next date i.e. on 16th July, 2000 postmortem was conducted at Pataliputra Medical College Hospital (PMCH) Dhanbad. In the post-mortem report it was opined, the cause of death to be due to Asphyxia as a result of drowning.

(v) As per the laid down procedure, a Board of Officers was detailed to conduct the Court of Inquiry so as to ascertain the facts and circumstances of the incident vide Commandant, CISF Unit BCCL Dhanbad order No.(1709) dated 27th July, 2000. (vi) The Board conducted the inquiry and submitted its report on 5th August, 2000. In its report the Board opined that the cause of death to be due to falling down of the individual in the water tank and subsequently drowning in the water.

3. The petitioner has stated that the deceased was an able bodied officer who had served the respondents for a period of more than 23 years and that the deceased had actually drowned when he was on duty when he was posted at Bhaga Bandh, Dhanbad, Jharkhand.

4. There is no dispute that Head Constable/GD Chamru Oraon died on 16th July, 2000 while on duty. No fault could be attributed to him.

5. So far as the pension is concerned, the respondents sanctioned ordinary family pension as per Rule 54 of the CCS Pension Rules, 1964 vide PPO No.237040001094 dated 9th November, 2000 and made the following payments:-

(a) DCRG-Rs.1,31,389/- vide Cheque No.0900-488604 dated 21.11.2000.

(b) CGEGIS-Rs.30,000/- and Rs.12,924/- vide Cheque No.0900-486537 dated 25.10.2000

(c) EL/HPL-Rs.28,887/- vide Cheque No.0903-719072 dated 24.08.2001.

(d) RMS-Rs.42,303/- vide B.D. No.0971-327412 dated 20.10.2000

(e) GPF Rs.24,221/- vide B.D. No.0901-525408 dated 20.10.2001

6. No other payments were made to the family of the deceased Head Constable till 9th March, 2012 when the respondents released an ex gratia amount of Rs.5,00,000/- to his widow (the present petitioner) after passage of 11 years and 7 months from the death of the petitioner's husband.

7. The petitioner represented against the failure of the respondents to grant her extraordinary pension in accordance with the Central Civil Service (Extraordinary Pension) Rules but her representation evoked no response from the respondents, let alone a favourable consideration.

8. It is noteworthy that the petitioner, who appears to be illiterate, is a resident of Village Siyang, Post Charda, District Gumla, Jharkhand and would have been hard pressed in seeking legal redressal. On failure of the respondents to do justice to her, she has been compelled to file the writ petition in this court making a prayer for issuance of writ of mandamus directing the respondents to calculate the pension payable to her towards extraordinary pension in accordance with the afore-noticed rules and to make payment with interest from the date of death of the husband of the petitioner till its realization.

9. Learned standing counsel for the respondents has painstakingly urged that the respondents were acting bona fide and that their concern with the petitioner is manifested from the fact that they have granted compassionate appointment to Shri Binod Oraon, son of the deceased. We are informed by the respondents that such appointment has been effected by an order passed on 22nd January, 2007, which is also almost seven years after the expiry of Late Shri Chamru Oraon. This appointment

on compassionate basis has been effected as a welfare measure under a scheme of compassionate appointment framed by the petitioners. No special favour has been done to the petitioner and such appointment does not in any manner denigrate from the right or entitlement of the petitioner to grant of her lawful dues which included the extraordinary family pension. The compassionate appointment of the deceased soldier's son itself manifests that the respondents accepted the urgency of the needs of the family of the deceased soldier.

10. It is trite and needs no elaboration that financial payments especially in the nature of pension or extraordinary pension are required by the dependants of a deceased official for meeting their monthly requirements. Delay in effecting such payments would irreparably cause harm to such dependants as the petitioner.

11. So far as the contention that the petitioner has not made disclosure of the compassionate appointment of her son is concerned, we may note that the petitioner is an illiterate and poor lady residing in a remote village in district Gumla, Jharkhand. In any case, the factum of the engagement of the son of the deceased does not in any manner disentitle the widow to the grant of the extraordinary family pension. This is evident from the order dated 28th June, 2013 passed by the respondents finding the petitioner's claim for extraordinary pension justified.

12. A perusal of this order dated 28th June, 2013 would show that the respondents have held that the petitioner is entitled to arrears of extraordinary pension scheme w.e.f. 16th July, 2000 till date. It is evident that the same has been wrongly denied to her for no fault of hers.

13. The writ petition was listed before us for the first time on 22nd April, 2013 when we had noted that the matter is pending for a period of almost thirteen years for grant of pension and that no orders had been passed till that date. In this background, peremptory order was passed against the respondents to place before us on affidavit the manner in which the petitioner's case for the amount of pension has been processed.

14. The respondents were directed to show cause as to why compensation should not be paid to the petitioner. In further directions, we had also directed as follows:-

> "xxx We shall be given a date-wise progress of the matter in the instant case. In case an order, granting or rejecting the petitioner's

prayer has not been passed, the PCDA shall personally remain present on the next date of hearing.

4. In case orders stand passed and only implementation is awaited, the respondent shall ensure that the needful is undertaken before the counter affidavit is filed.

5. Liberty is given to the petitioner to file rejoinder to the counter affidavit before the next date of hearing.

6. Appropriate orders as to showing cause as to why compensation should not be paid to the petitioner shall be considered on the receipt of the counter affidavit."

15. On 17th May, 2013, we had noted that the respondents failed to render any explanation as to why it had taken over twelve years to the respondents to grant of ex gratia payment of Rs.12,00,000/- in spite of death of her husband on 16th July, 2000 by drowning while on duty which amount was released only on 7th March, 2012. We had also noted that the respondents had failed to consider the petitioner's entitlement to extraordinary pension till the hearing on 17th May, 2013 and had only asserted a bald plea of denial in the counter affidavit to the petitioner for the same. It is obviously the passing of order dated 17th May, 2013 which has motivated the respondents to look into the matter in accordance with law and passing the order dated 28th June, 2013.

16. The petitioner became entitled to the amounts which have been paid by the respondents upon the demise of Late Shri Chamru Oraon on 15th July, 2000. The respondents are not in a position to inform us even today as to whether the amounts in terms of their own order dated 28th June, 2013 have actually been released to the petitioner till date or not. In the given facts, we are of the view that the petitioner deserves to be paid interest on the amounts which have been belatedly assessed as payable and paid to the petitioner.

17. In view of the above, we direct as follows:-

(i) The petitioner shall be entitled to interest at the rate of 9% on the amount of Rs.9,00,000/- paid as extraordinary pension to the petitioner w.e.f. 15th July, 2000 (date of expiry of Late Chamru Oraon) till 7th March, 2012 when the amount was paid.

(ii) The petitioner shall be entitled to interest on the amounts found due and payable to the petitioner in terms of the communication dated 28th June, 2013 with effect from the date they became due and payable till date the payment is actually effected at the rate of 12% per annum.

(iii) The respondents shall effect the computation in terms of our above order within a period of four weeks and communicate the same to the petitioner immediately thereupon. Copy thereof shall be filed in this court positively within a period of six weeks from today. In case the petitioner has any grievance with regard to the same, she shall be at liberty to take appropriate legal remedy in respect thereof.

(iv) The respondents shall effect payment of arrears to the petitioner within a period of four weeks thereafter.

(v) The petitioner shall be entitled to costs which are quantified at Rs.25,000/- which shall be paid on or before the seventh day of each English calendar month.

(vi) This writ petition is allowed in the above terms.

Dasti to parties.

ILR (2013) V DELHI 3266
RFA (OS)

SIMMI KATYAL **....APPELLANT**

VERSUS

RAM PYARI BATRA & ORS. **.....RESPONDENTS**

(S. RAVINDRA BHAT & NAJMI WAZIRI, JJ.)

RFA (OS) NO. : 28/2007, **DATE OF DECISION: 04.07.2013**
C.M. APPL. NO. : 5436/2007

Specific Relief Act, 1963—Section 23—Appellant filed a suit claiming specific performance of a contract for

sale of immovable property, bearing A-66, Saraswati Vihar, Delhi on the basis of an agreement to sell dated 6/5/1995 executed between him and one Nanak Chand, who expired in the second week of August, 1995 and whose legal heirs, the Respondents, initially agreed to abide by the contract—During the trial, the Ld. Single Judge framed an additional issue with respect to the maintainability of the suit and after hearing the parties on the said issue held vide the impugned order that the suit seeking a decree for specific performance was not maintainable and the appellant could only claim damages, in view of a condition of the agreement [clause (e)] vide which the parties had agreed that in case of default of purchaser, the earnest money deposited would stand forfeited and in case of default of the seller, he would liable to pay double the amount of the earnest money. Held: The mere existence of a term in a contract, providing for payment of a sum, in case of its breach, is not a bar to seeking the specific performance of the contract and such a contract may be specifically enforced, if a Court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purposes of securing performance of the contract and not for the purpose of giving to a party in default, an option of paying money in lieu of specific performance. In the absence of any opportunity to the plaintiff and the parties to lead evidence, to the effect that Clause (e) of the contract in question was meant only as a condition to secure enforcement, the Ld. Single Judge Could not have held the suit as not being maintainable, only on the basis of the existence of condition i.e. Clause (e).

It is thus apparent, that even in P. D.Souza, the Court underlined the correct legal position that *"It would not be correct to contend that only because such a clause exists, a suit for specific performance of contract would not be maintainable."* Earlier, in Devender Singh, this was

underscored, similarly, by saying that the *"fact that the parties themselves have provided a sum to be paid by the party breaking the contract does not, by itself, remove the strong presumption contemplated by the use of the words "unless and until the contrary is proved." The sufficiency or insufficiency of any evidence to remove such a presumption is a matter of evidence."* **(Para 13)**

Both in *Devender Singh* and *P.D.Souza,* the Court had the benefit of evidence recorded after a full trial; even the cases and decisions subsequent to *Devender Singh* cited in *P.D. Souza* were after considering the sufficiency of evidence. In the present case, however, the learned Single Judge went merely by the existence of the condition, i.e. Clause (e) and held that mutuality, or want of it, played a part. This Court is of the opinion that such a narrow view, based entirely on the reading of a condition, and in the absence of any opportunity to the plaintiff and the parties to lead evidence, to the effect that it was meant as a condition to secure enforcement, in keeping with the presumption – in Section 23, spoken about by the Supreme Court, in *Devender Singh,* is not tenable. The parties had completed pleadings and the court had framed issues; Issue Nos. 2 to 4 contemplated documentary and oral evidence about the parties' entitlement to support their respective positions, including on the enforceability of the contract. Such being the case, the learned Single Judge should have refrained from holding – as he did, on an appreciation only of clause (e) that the suit was not maintainable. **(Para 14)**

Important Issue Involved: In a suit filed for specific performance of a contract, a plaintiff must be given an opportunity to lead evidence to prove that a term in the contract providing for payment of a sum, in case of its breach, was named only for the purposes of securing performance of the contract and not for the purpose of giving to a party in default, an option of paying money in lieu of specific performance.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. S.K. Singla, Sr. Advocate with Mr. Bhaskar Tiwary, Advocate.

FOR THE RESPONDENTS : Mr. Vijay Kishan and Mr. Vikram Jetly, Advocates, for Resp. no. 5.

CASES REFERRED TO:

1. *P.D. Souza* vs. *Shondrilo Naidu* 2004 (6) SCC 649.
2. *M.L. Devender Singh and Others* vs. *Syed Khaja* AIR 1973 SC 2457.
3. *A. Abdul Rashid Khan (Dead) and Ors.* vs. *P.A.K.A. Shahul Hamid and Ors.,* MANU/SC/2734/2000 2000 (10) SCC 636.
4. *M.L. Devender Singh and Ors.* vs. *Syed Khaja* AIR 1973 SC 2457.

RESULT: Appeal allowed.

S. RAVINDRA BHAT, J.

1. The present appeal questions the decision of the learned Single Judge dated 05.10.2006 whereby the unsuccessful plaintiffs' suit claiming specific performance of a contract for sale of immovable property was dismissed. Briefly the facts are that in the suit, the plaintiff relied upon an agreement said to have been entered on 06.05.1995, whereby the defendants (respondents in this case), and hereafter called "sellers" agreed to convey a 190 sq. yard residential plot, being A-66, Saraswati Vihar, Delhi (hereafter called "the suit property"), for total consideration of Rs. 25 lakhs. The plaintiff had relied upon a receipt-cum-agreement which contained the terms of the contract. It was also alleged that the contract was to be completed within 100 days; the initial advance of Rs. 25 lakhs was paid. The plaintiff alleged that after entering into the contract, the seller, i.e. Nanak Chand, died, sometime in the second week of August 1995. It was submitted that the plaintiff approached the heirs of the seller, i.e. his children and widow. In the suit, it was alleged further that at that time, the legal heirs of the seller agreed to abide by the contract for sale but subsequently did not do so. As a result, the plaintiff

issued a legal notice on 13.06.1996 and subsequently filed a suit. In the written statement, the defendants, i.e. heirs of Nanak Chand denied the plaintiff's entitlement to specific performance, contending that the seller was not the absolute owner of the property. The defendants also contested the binding nature of the agreement, stating that Nanak Chand did not have the authority to enter into a binding legal arrangement. It was further stated that the lapse of 100-day period within which the plaintiff allegedly did not approach the legal heirs, disentitled him to specific relief.

2. On the basis of the pleadings of the parties and the documents brought on the record, the Court framed the following issues, on 19.11.1998:-

1. Whether late Shri Nanak Chand, father of Defendant No.5 enter into an agreement to sell dated 6th May 1995 in respect of property No.66, Block-A, Saraswati Vihar, Pitampura, Delhi, as alleged para 1 of the plaint? OPP;

2. Whether Defendant No.5 is owner of half undivided share in the suit property, namely, property No. 66, Block-A, Saraswati Vihar, Pitampura, Delhi, if so, to what effect? OPD;

3. Whether the plaintiff fulfilled and complied with the terms and conditions of alleged agreement dated 6th May 1995 as alleged in the plaint? OPP;

4. Whether the plaintiff was and is ready and willing to perform his part of alleged contract dated 6th May 1995? OPP;

5. Whether the plaintiff is entitled to the relief of specific performance? OPP;

6. Relief.

3. Later on 26.11.2002, additional issues were framed. They are as follows:

1. Whether receipt-cum-agreement dated 6th May 1995 is inadmissible registered in accordance with law;

2. Whether receipt-cum-agreement dated 6th May 1995 is forged and fabricated as alleged.

4. The parties had not completed the evidence in the matter when the learned Single Judge was seized of the suit, on 19.07.2006. It was directed that the question of maintainability of the suit seeking specific performance would be first heard. Accordingly, the parties were heard on 05.10.2006. On that day, by the impugned judgment, the suit was dismissed. Learned Single Judge relied upon a decision of the Supreme Court reported as **P.D.Souza v. Shondrilo Naidu** 2004 (6) SCC 649 as well as an earlier decision reported as **M.L. Devender Singh and Others v. Syed Khaja** AIR 1973 SC 2457. On an appreciation of the law declared by the Supreme Court in those decisions, the learned Judge interpreted Clause (e) of the receipt-cum-agreement, and held as follows:-

> "9. Where parties provide for a consequence in the agreement, the consequences have to be followed and adhered to.
>
> 10. By recording, that in case the prospective purchaser fails to fulfill his reciprocal obligations the transaction shall stand cancelled parties have evidenced that they were at ad idem on the point that failure of the purchaser to comply with his reciprocal obligations would amount to a cancellation of the contract. Remedy of the seller was to forfeit the earnest money.
>
> XXXXXX XXXXXX XXXXXX
>
> 12. Learned counsel for the plaintiff submits that effect of transaction being treated as cancelled is limited only to the default of the purchaser. Qua default of the seller, law as explained in P.D.Souza's case holds good.
>
> 13. I am afraid, reciprocity demands equal consequences to flow.
>
> 14. As I read clause 'e' of the agreement, parties are at ad idem that in case of default (of either party) transaction shall stand cancelled. Limited rights have been given to either party. Right of the seller is to forfeit the earnest money. Right of the purchaser is to seek recompense by claiming double the amount of the earnest money.
>
> 15. I accordingly hold that the suit is not maintainable in so far it seeks a decree for specific performance. Suit would be maintainable for damages in terms of clause 'e' of the agreement."

5. The appellant's senior counsel urged that the impugned judgment is in error in as much as it interpreted the decision in **P. D.Souza** and **M.L. Devender Singh** (supra) wrongly. It was also urged that by virtue of Section 23 of the Specific Relief Act, 1963, although a sum is named in contract (as the sum to be paid in case of its breach), and despite the party in default's willingness to pay it, the contract, if otherwise appropriate and capable of being specifically performed, can be enforced if the Court, having regard to the terms of the contract and other circumstances, is satisfied that the sum was named only for the purpose of securing the contract. Elaborating on this, it was urged that where the sum mentioned in a contract for sale of property is only for the purpose of securing enforcement or for discharge of mutual or liabilities, its entitling the party to a decree for specific performance, is a question of fact that has to be examined in the light of certain circumstances and evidence. Learned counsel relied upon the observations in **M.L. Devender Singh** (supra) and submitted that in the present case the evidence of the parties was never gone into by the learned Single Judge, who merely, on a facial interpretation of Clause(e) of the receipt-cum-agreement, straightaway proceeded to hold that it spelt-out consequence of non-performance, i.e. the entitlement to only deploy the amount of earnest money. It was emphasized that the learned Single Judge, therefore, fell into error in holding that the relief of specific performance was ruled-out in the present case.

6. Learned counsel for the respondents/defendants justified the impugned judgment and relied upon the observations in **P. D.Souza** (supra). He sought to urge that contracts, especially those which can be enforced through a decree of specific performance can well be refused for want of mutuality in the contract. For this proposition, he relied upon the following passage from Fry's Treatise on the Specific Performance of Contracts, Sixth Edition, Page 219:

> "460. A CONTRACT to be specifically enforced by the Court must, as a general rule, be mutual, - that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. When, therefore, whether from personal incapacity to contract, or the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is, generally, incapable of enforcing it against the other, though its execution in the latter

way might in itself be free from the difficulty attending its execution in the former."

7. It was urged that the conclusions arrived at by the learned Single Judge were in consonance with the principle enunciated in **Fry** (supra). Learned counsel also relied upon *Halsbury's Law of England, Third Edition, Volume 36, Page 269*, where it is stated that:

> **"369. Contracts lacking mutuality.** Want of mutuality is in general a ground for refusing a judgment of specific performance(p). If a contract cannot be enforced against one party by reason of circumstances existing at the date of the contract, such as personal incapacity or the nature of the contract, that party will not be enabled to enforce the contract against the other party. Thus, an infant cannot sue for specific performance(q), since he cannot be sued therefor(r); a plaintiff cannot enforce a contract which could not be enforced against himself as involving performance of personal service or continuous acts, even though the consideration to be performed by the defendant is not in itself of a nature to exclude specific performance(s); and a vendor of property in or over which he had no estate or power at the time of the sale may be met by this fact as a defence to a suit by him for specific performance(t). Formerly a tenant in tail could not in general enforce a contract entered into by a tenant for life(u); now, however, a contract made by a tenant for life within the meaning of the Settled Land Act, 1925(a), if properly made, is enforceable against and by every successor in title of the tenant for life(b).
>
> The want of mutuality must be judged as at the date of the contract. The fact that a defendant by his own neglect or default has since the date of the contract lost the right to enforce it will not prevent its being enforced against him(c). Conversely, if the terms of the contract were such as originally to preclude specific performance, performance of these terms by the plaintiff will not obviate the objection(d)."

8. It is, therefore, stated that when the consequence of either nature and eventuality embracing both possibilities, i.e. the plaintiff defaulting in the performance of his part of the bargain and the seller also refusing to convey the property is envisioned in the contract, such

consequence alone has to be respected and the Court would desist from decreeing specific performance. Learned counsel also submitted that having regard to the conspectus of circumstances, the impugned judgment is justified and in order since the basis of the agreement in the present case was the seller's inability to fund his treatment. As he could not obtain the amount from the plaintiff within the period and he died, the Court's conclusions can also be supported by application of Section 20 of the Specific Relief Act since under the circumstances, it would be inequitable to direct the seller's successors, i.e. his legal representatives to part with the suit property.

9. In the present case, the condition which impelled the learned Single Judge to dispose of the suit, and hold that the remedy of specific relief was barred, reads as follows:-

> "(e) If the prospective purchaser fail to fulfill the above conditions. The transaction shall stand cancelled and earnest money will be forfeited. In case I fail to complete the transaction as stipulate above the purchaser will get the DOUBLE amount of the earnest money. In the both condition, DEALER will get 4% commission from the faulty party."

10. There is, as a matter of fact, no doubt that the parties did envision a consequence; i.e. forfeiture of the amount in case the purchaser defaulted, and in case the seller defaulted, his liability to pay double the amount. The question, however, is whether the condition ipso facto precluded the plaintiff from claiming specific relief – a reason which persuaded the learned single judge to dismiss the suit, without recording evidence, though issues had been framed.

11. Section 23 of the Specific Relief Act, reads as follows:-

> "23. Liquidation of damages not a bar to specific performance.-
>
> (1) A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance.

(2) When enforcing specific performance under this section, the court shall not also decree payment of the sum so named in the contract."

12. In **M.L. Devender Singh** (supra) the Supreme Court considered the previous law, and the effect of Section 23. The Court held that:

"16. XXXXXX XXXXXX XXXXXX

From what has been said it will be gathered that contracts of the kind now under discussion are divisible into three classes:

(i) Where the sum mentioned is strictly a penalty – a sum named by way of securing the performance of the contract, as the penalty is a bond:

(ii) Where the sum named is to be paid as liquidated damages for a breach of the contract:

(iii) Where the sum named is an amount the payment of which may be substituted for the performance of the act at the election of the person by whom the money is to be paid or the act done.

XXXXXX XXXXXX XXXXXX

20. The fact that the parties themselves have provided a sum to be paid by the party breaking the contract does not, by itself, remove the strong presumption contemplated by the use of the words "unless and until the contrary is proved." The sufficiency or insufficiency of any evidence to remove such a presumption is a matter of evidence. The fact that the parties themselves specified a sum of money to be paid in the event of its breach is, no doubt, a piece of evidence to be considered in deciding whether the presumption has been repelled or not. But, in our opinion, it is nothing more than a piece of evidence. It is not conclusive or decisive.

21. The second assumption underlying the contentions on behalf the Defendants-Appellants is that, once the presumption contained in explanation to Section 12 of the old Act, is removed, the bar contained in Section 21 of the old Act, against the specific enforcement of a contract for which compensation in money is an adequate relief, automatically operates, overlooks that the

condition for the imposition of the bar is actual proof that compensation in money is adequate on the facts and circumstances of a particular case before the Court. The effect of the presumption is that the party coming to Court for the specific performance of a contract for sale of immovable property need not prove anything until the other side has removed the presumption. After evidence is led to remove the presumption, the plaintiff may still be in a position to prove, by other evidence in the case, that payment of money does not compensate him adequately."

Again, in **P.D.Souza** the Supreme Court recollected the law on the issue, and observed as follows:-

"27. The clause as regards payment of damages as contained in clause (7) of agreement of sale reads as under:

> "7. That if the vendor fails to discharge the mortgage and also commits any breach of the terms in this agreement and fails to sell the property, then in that event he shall return the advance of Rs. 10,000/- paid as aforesaid and shall also be liable to pay a further sum of Rs. 2,000/- as liquidated damages for the breach of the agreement."

28. The mortgage was, thus, required to be redeemed. From Exhibit P-40 dated 15-6-1979, it appears that the Life Insurance Corporation of India admitted the execution of the discharge and the mortgagor (defendant) was authorized to present the same for registration. The mortgage deed was executed as far back as 3-6-1963. A further charge was created by a deed dated 10-7-1964. The entire mortgage money was paid only on or about 15-6-1979..

29. Clause (7) of the agreement of sale would be attracted only in a case where the vendor is in breach of the term. It was for the plaintiff to file a suit for specific performance of contract despite having any option to invoke the said provision. It would not be correct to contend that only because such a clause exists, a suit for specific performance of contract would not be maintainable.

30. Section 23 of the Specific Relief Act, 1963 read as under:-

"23. (1) A contract, otherwise proper to be specifically enforced, may be so enforced though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing the performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance.

(2) When enforcing specific performance under this section, the court shall not also decree payment of the sum so named in the contract."

31. In **M.L. Devender Singh and Ors. v. Syed Khaja** AIR 1973 SC 2457, the following statement of law appears (SCC p. 522, para 16):

XXXXXX XXXXXX XXXXXX

32. A distinction between liquidated damages and penalty may be important in common law but as regards equitable remedy, the same does not play any significant role.

33. In Manzoor Ahmed Magray v. AIR 2000 SC 191, this Court reiterated the ratio laid down in **M.L. Devender Singh** (supra) (See also **A. Abdul Rashid Khan (Dead) and Ors. v. P.A.K.A. Shahul Hamid and Ors.,** MANU/SC/2734/2000 2000 (10) SCC 636."

13. It is thus apparent, that even in P. D.Souza, the Court underlined the correct legal position that "It would not be correct to contend that only because such a clause exists, a suit for specific performance of contract would not be maintainable." Earlier, in **Devender Singh,** this was underscored, similarly, by saying that the *"fact that the parties themselves have provided a sum to be paid by the party breaking the contract does not, by itself, remove the strong presumption contemplated by the use of the words "unless and until the contrary is proved." The sufficiency or insufficiency of any evidence to remove such a presumption is a matter of evidence."*

14. Both in **Devender Singh** and **P.D.Souza,** the Court had the benefit of evidence recorded after a full trial; even the cases and decisions

subsequent to **Devender Singh** cited in **P.D.Souza** were after considering the sufficiency of evidence. In the present case, however, the learned Single Judge went merely by the existence of the condition, i.e. Clause (e) and held that mutuality, or want of it, played a part. This Court is of the opinion that such a narrow view, based entirely on the reading of a condition, and in the absence of any opportunity to the plaintiff and the parties to lead evidence, to the effect that it was meant as a condition to secure enforcement, in keeping with the presumption – in Section 23, spoken about by the Supreme Court, in **Devender Singh,** is not tenable. The parties had completed pleadings and the court had framed issues; Issue Nos. 2 to 4 contemplated documentary and oral evidence about the parties' entitlement to support their respective positions, including on the enforceability of the contract. Such being the case, the learned Single Judge should have refrained from holding – as he did, on an appreciation only of clause (e) that the suit was not maintainable.

15. In view of the above discussion, it is held that the impugned judgment has to be, and is accordingly set aside. The suit shall be listed before the appropriate roster Judge, on 15th July, 2013, for further proceedings. The appeal is allowed in the above terms. There shall, however, be no order on costs.

ILR (2013) V DELHI 3279
RFA (OS)

SILICON GRAPHICS SYSTEMS INDIA PRIVATE LIMITED **....APPELLANT**

VERSUS

NIDAS ESTATES PRIVATE LTD. **....RESPONDENT**

(S. RAVINDRA BHAT & NAJMI WAZIRI, JJ.)

RFA (OS) NO. : 116/2011, **DATE OF DECISION: 04.07.2013**
C.M. APPL. NO. : 4178/2012

Code of Civil Procedure, 1908—Two cross suits filed by appellant and respondent with respect to a license agreement dated 01.09.1995 executed between them—Vide the agreement certain premises in Bangalore were licensed by the respondent to the appellant company for 36 months with a clause for renewal and the agreement was renewed till August, 2001—On expiry of the agreement by efflux of time in August, 2001, the appellant shifted its office from the suit premises—Disputes arose between the parties with respect to the arrears of license fee and the refund of security deposits made by the appellant to Karnataka Electricity Board (KEB) for securing permission for additional load of electricity and to a third party for providing standby gen sets—Appellant filed a suit seeking a sum of Rs. 45,23,414/- towards the refund of security deposits alongwith interest while the respondent filed a suit claiming Rs.9,58,448/- towards the license fee of September, 1995 and for license fee towards 01.10.2001 to 14.02.2002—Vide a single order the LD. Single Judge decreed the suit in favour of the appellant for a sum of Rs.20,41,939/- with interest at the rate of 6% per annum—Appellant challenged the findings of the Ld. Single Judge on the grounds that

the respondent was not entitled to claim license fee for the month of September, 1995 as the said claim was time barred and that it had not led any proof to show that the said fee was unpaid and further that the Ld. Judge erred in not allowing the refund of security deposit paid to the service provider and in holding the appellant liable to pay rent till 04.10.2001 whereas it had vacated the premises by 31.08.2011. Appellant also challenged the different rates of interest awarded by the Ld. Judge to the parties on the amounts due—Held: Once there was a claim for recovery of dues, the burden to prove that the rent was paid is on the licensee and the appellant failed to discharge the said burden that it had paid the rent of September, 1995. No specific denial by the appellant that the said rent stood paid and therefore it failed to meet the requirements of the provisions of Order 8 Rule 3 and Rule 5 CPC. The claim for the said month also not time barred for the period prescribed under the Limitation Act bars the remedy of filing suit for recovery of an amount beyond the said period but it does not bar the claim of an amount which is otherwise due and payable and therefore respondent entitled to adjust the security deposit against its dues. The security deposit made by the appellant company with a service provider with respect to gen sets installed at the premises could only be claimed from the said service provider and not the respondent for there was no privity of contract between the respondent and the third party, more so when no evidence led to show that after the premises were vacated, the deposit was used by the succeeding tenant. Appellant also liable to pay rent till 04.10.2001, for by its own communication dated 28.09.2001, it had called upon the respondent to take over possession of the premises w.e.f. 05.10.2001. The respondents also not entitled to claim rent w.e.f 05.10.2001 to 14.02.2002 because it deliberately refused to take possession as offered on 05.10.2001 and thereafter

unilaterally took the same on 14.02.2002. On the question of interest, Ld. Single Judge treated all rival rights on equal footing for the amounts accrued prior to the filing of suit and hence no infirmity in this regard but Ld. Judge erred in not providing interest in regard to the security deposit paid by the appellant in favour of KEC for additional electricity for even when no interest was agreed to be paid on the said sum, the court does possess a statutory power u/s 34 CPC to grant pendent lite interest in respect of the dues claimed and thus appellant granted interest at the rate of 6% per annum on the said amount and therefore the appeal succeeds in part only to this extent.

The appellant's arguments relating to award for payment of license fee with interest for the period of September, 1995 would be dealt with first. The first question is regarding the placing of burden of proof upon the appellant and the argument that the claim is barred by limitation. This Court sees no merit in these submissions as both parties had agreed in their meeting on October 5, 2001 that the Appellant would reconcile its accounts and write back to the respondent, although the appellant did not agree to any liability. This Court finds no such evidence on record to see that the appellant actually reconciled its accounts and wrote back to the respondent. Further, once there was a claim for recovery of dues, the burden to prove that the rent was paid is on the licensee/tenant and in this case, the appellant has failed to extend such proof. Also, the appellant, in its affidavit through Mr. Sanjay Bhanot, did not claim that no dues were liable to be paid for the month of September, 1995, thereby failing to meet the requirements of Order 8, Rule 3 read with Order 8, Rule 5 of the CPC requiring specific denial of allegations. It was observed by the Supreme Court in **Badat and Co. v. East Indian Trading Co.** AIR 1964 SC 538 that if a denial of fact is not specific but evasive that fact shall be taken to be admitted and in such an event the admission itself being

proof, no other proof is necessary. Thus, in the absence of any specific denial, the admission being construed as adequate proof in the case at hand, the learned Single Judge was correct in placing the burden to disprove the same on the appellant. **(Para 13)**

This Court finds no merit in the contention that the claim of the respondent for the month of September, 1995 is time-barred. We agree with the finding of the learned Single Judge that the period prescribed under the Limitation Act bars the remedy of filing suit for recovery of an amount which has become barred by limitation, but it does not bar the claim of an amount which is otherwise due and payable. Further, Clause 3 of the agreement also empowered the respondent to adjust the security deposit against its dues and the same is not barred by limitation. In **Punjab National Bank v. Surendra Prasad Sinha** AIR 1992 SC 1815, a security bond was executed by a guarantor and a Fixed Deposit Receipt was handed over by him which would mature on 1.11.1988. The debt for which the concerned party stood as surety became barred by limitation, on 5.5.1987. After the period of limitation provided for filing a suit against the principal debtor, the bank enforced the security and adjusted the amount due from the FD of the surety. The surety filed a complaint against the bank alleging offences under Sections 409 and 109/114 of the Indian Penal Code. Dealing with that case the Supreme Court held thus:

> "Though the right to enforce the debt by judicial process is barred under Section 3 read with the relevant Article in the Schedule, the right to debt remains. The time barred debt does not cease to exist by reason of Section 3. That right can be exercised in any other manner than by means of a suit. The debt is not extinguished, but the remedy to enforce the liability is destroyed. What S.3 refers is only to the remedy but not to the right of the creditors. Such debt continues to subsist so long as it is not paid. It is not

obligatory to file a suit to recover the debt. It is settled law that the creditor would be entitled to adjust, from the payment of a sum by a debtor, towards the time barred debt. It is also equally settled law that the creditor when he is in possession of an adequate security, the debt due could be adjusted from the security in his possession and custody."

Further, the Kerala High Court in **Thankappan.V.K., Manager vs Uthiliyoda Muthukoya** 2011 (2) KLT 953 held:

"In the case of a debt barred by lapse of time, the right of the creditor to recover the debt is not transferred to or conferred upon the debtor. It becomes dormant and becomes unenforceable in a court of law. That does not mean that debt is destroyed or extinguished and that the creditor is not entitled, under any circumstances, to claim or recover it in any manner whatsoever."

From the above discussion, it is clear that mere delay does not bar the party of a right to claim it in a form other than by a suit.

That part of the decree was not time barred; the Court finds no infirmity in the impugned judgment on this aspect. **(Para 14)**

Counsel for the appellant further contended that the learned Single Judge erred in not decreeing the security deposit of Rs. 6,25,000/- paid towards the installation of gen-sets to Embassy Group. It was argued that the respondent exercised its right under clause 6 of the agreement to retain such installations made by the appellant. This Court is unable to agree to this submission as no conclusive evidence was adduced before this court to show that the respondent exercised its option under clause 6 of the agreement. The minutes recorded on October 5, 2001 read as follows:-

"2. NEPL also has confirmed from Embassy Group, the deposit of Rs. 6,25,000/- for genset paid by SGI to Embassy Group on NEPL's behalf. This amount needs to be refunded to SGI. Embassy Group and NEPL to decide amongst themselves as to who would refund this."

This was a mere agreement by the respondent to negotiate with the Embassy group to decide whether it would retain the genset or the security deposit of Rs. 6,25,000/- should be refunded to the appellant. This did not impose any liability on the respondent to pay the security deposit as was contended by the appellant. Further, the agreement for installation of the gensets was between the appellant and a third party (Embassy Group); the respondent was a stranger to the agreement. There was no privity of contract between the respondent and such third party; consequently, no liability ensued on the respondent. The appellant also did not lead any evidence that even after the premises were vacated, the deposit was used by the succeeding tenant, as was contended by it. Therefore, the claim for Rs. 6,25,000/- made by the appellant against the respondent was meritless. **(Para 16)**

It was contended that the impugned judgment erred in holding the appellant liable to pay rent till 4.10.2001 whereas it had vacated the premises by 31.08.2001. This contention is not acceptable and has no force, because the appellant by a letter dated 28.09.2001 had called upon the respondent to send a representative in person to take possession of the premises, which clearly showed that complete and unequivocal possession was not given to the respondent. The appellant was well aware of being in the possession of the said premises as of 28.09.2001. There is no infirmity in the findings of the learned Single Judge on this point. **(Para 17)**

On the question of interest, this Court notices that the learned Single Judge granted interest @ 18% from 5.10.2001

to 22.08.2003 (date of the suit) treating all rival rights in equal footing. The interest rate of 6% granted was only in respect of cost, pendente lite and future interest, in consonance with Section 34 of the CPC. This Court notices that the award of interest for the period prior to the suit and for a later period, has to be based on exercise of discretion. So long as the Court exercising it is shown to have not judiciously exercised such power, the appellate court would be slow in interfering with the award of the court of first instance. In this case, there is nothing to suggest that such differential treatment for different periods was not based on sound exercise of discretion. The argument on this aspect is consequently rejected. The appellant had argued that the learned Single Judge erred in granting interest at the rate of 18% p.a to the respondent (for dues relating to June to August 2001) while the appellant, through a letter in May, 2001 itself had asked to respondent to adjust the dues with the security deposit. The license agreement clearly mentioned that all dues, adjusted with the security deposit shall be with an interest rate @ 18% p.a. and the said letter mentions nothing about the interest rate, nor was an interest free adjustment agreed to by the respondent. Further, the license agreement makes no mention of an obligation to adjust security against rent for a period mentioned by the appellant and thus, this Court finds that contractually, the respondent was not obliged to adjust the security deposit upon the request of the appellant without any interest as imposed. For these reasons, the Court finds no need to interfere with this reasoning of the learned Single Judge. **(Para 18)**

The final claim of the appellant is that the learned Single Judge erred in not providing interest in regard to the sum of Rs. 2,02,100/- paid by the appellant in favour of Karnataka Electricity Board for additional electricity. The reasoning behind the said decision of the learned Single Judge seems to us to be unsustainable in law. The learned Single Judge held that the parties during their minutes on 05.10.2001 agreed only to pay the original amount of security deposit

and no interest was contemplated. While the same is true, upon denial to pay the same, the court does possess a statutory power under Section 34 of CPC to grant pendente lite interest in respect of the dues claimed. We find no reason to deny the appellant interest in the instant matter, when the respondent, despite agreeing to refund the security deposit has failed to do so for over a decade. Thus, we reverse the decision of the learned Single Judge on this issue, and grant interest for the period from 01.01.2001 till date of the decree or date of payment, whichever is later, at the rate of 6% per annum. **(Para 19)**

As regards the cross objections raised of the respondent, learned counsel for the respondent contended that the Single Judge has erred in holding that absolute and vacant possession of the premises was tendered to the respondent on 5.10.2001 whereas the appellant had sent a letter dated 22.01.2002 seeking Rs. 5,00,000/- for the fittings. It is also contended that the learned Single Judge had erred in holding that the security deposit should have been tendered by the respondent after making legitimate deductions. This Court is unable to agree with this contention as the respondent on 14.02.2002 itself had taken the possession of the property by using duplicate keys with all the fittings still intact whereas it could have done so as early as 05.10.2001. The law ensues upon every claimant, the duty to take due care to reduce and mitigate the damage or injury caused and neglect in that regard, does not confer upon the claimant any special right to claim damages for such default. This is one such case where the respondent deliberately refused to take possession as offered on 05.10.2001 whereas it did so unilaterally on 14.02.2002. If the respondent was not interested in the fittings, it could have either sent a notice to the appellant to remove such fixtures or could have done the same and deducted the cost of doing so from the security deposit. However, the respondent failed to take any such action. Further, it is not the case of the respondent that the fixtures created any damage to the premises even during its claims on 05.10.2001.

It is indeed the responsibility of every party to an agreement to perform the same in good faith and the respondent ought to have tendered the security deposit back after making legitimate deductions, including some part for the purpose of removing the fixtures and fittings. The respondent had relied on some correspondence to show that the appellant, despite holding out the offer to vacate, kept corresponding for extension of lease, or for favourable terms. That however, does not in any manner advance the cross objector's case further, because no mutually agreed terms were arrived at; the offer to hand over possession therefore, stood. For these reasons, we are unable to agree with this contention of the respondent. **(Para 20)**

Important Issue Involved: (A) If a denial of a fact is not specific but evasive that fact shall be taken to be admitted and in such an event the admission itself being proof, no other proof is necessary,

(B) The period prescribed under the Limitation Act bars the remedy of filing suit for recovery of an amount beyond the said period but it does not bar the claim of an amount which is otherwise due and payable and the said claim can be adjusted against a security amount received.

(C) Even if parties do not contemplate the payment of interest, the court does possess a statutory power u/s 34 CPC to grant pendente lite interest in respect of the dues claimed.

(D) The law ensues upon every claimant, the duty to take due care to reduce and mitigate the damage or injury caused and neglect in that regard, does not confer upon the claimant any special right to claim damages for such default.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Sh. Rajiv Tyagi, Advocate.

FOR THE RESPONDENT : Sh. T.K. Ganju, Sr. Advocate with Sh. Mannmohit, K. Puri, Advocate.

CASES REFERRED TO:

1. *B.R. Mulani* vs. *Dr. A.B. Aswathanarayana* AIR 1993 Kant 257.
2. *Punjab National Bank* vs. *Surendra Prasad Sinha* AIR 1992 SC 1815.
3. *Badat and Co.* vs. *East Indian Trading Co.* AIR 1964 SC 538.
4. *Chiranji Lal* vs. *Shankar Lal and Anr.* AIR 1951 Raj 36.

RESULT: Appeal is partly allowed.

S. RAVINDRA BHAT, J.

FACTS

1. The present appeal arises against the decree passed by the learned Single Judge in CS(OS) 1661/2003 and CS(OS) 2108/2011 for the recovery of Rs. 45,23,414/-.

2. The appellant and respondent, both private limited companies registered under the Companies Act, 1956 entered into a license agreement dated 01.09.1995 in respect of premises bearing No 305A and 305B, Embassy Square, 148 Infantry Road, Bangalore ("suit premises"). The said premises were licensed by the respondent to the appellant company for 36 months, with a condition enabling renewal for 3 further years. The agreement was renewed till 31st August 2001. A security deposit of Rs. 27,45,000/- was paid through cheques to the respondent by the appellant. The agreement expired by efflux of time and the appellant shifted its office from the suit premises.

3. The appellant applied and secured permission from the Karnataka Electricity Board for additional load, for the said licensed premises; it made a refundable security deposit of Rs. 2,02,100/- (in terms of Clause 6 of the license agreement). It also installed standby generating sets and made a refundable security deposit of Rs. 6,25,000/- for maintenance

etc. The appellant argued that the respondent opted to retain the additional electricity load and the generating systems installed, and had agreed to reimburse the security deposit paid in this regard by the appellant. On 04.09.2001, the appellant by a letter, called upon the respondent to renew the license agreement or to take back possession of the premises upon refunding the security deposit after adjustments. The respondent, however, did not agree to the terms of the agreement offered for renewal and made a counter offer for which no reply was received from the appellant till 28.09.2001. On 05.10. 2001, a meeting was held between the representatives of both parties, the minutes of which is in the record of this Court. The learned single Judge notes that the parties in the meeting had agreed to as follows:-

> 1. NEPL acknowledge the receipt of security deposit of Rs. 27,45,000.
>
> 2. NEPL also has confirmed from Embassy Group, the deposit of Rs. 6,25,000/- for genset paid by SGI to Embassy Group on NEPL's behalf. This amount needs to be refunded to SGI. Embassy Group and NEPL to decide amongst themselves as to who would refund this.
>
> 3. NEPL have claimed that rent for the month of September, 1995 (Rs.152,500.00 less TDS of Rs.35,075.00) has not been received by them. SGI to reconcile this account by Tuesday the October 9, 2001 and get back to NEPL.
>
> 4. NEPL has also claimed Rs. 1,37,250.00 being the balance due against arrears received in the month of May, 1998. SGI to reconcile this as well by Tuesday the October 9, 2001 and get back to NEPL.
>
> 5. NEPL has requested SGI not to surrender the additional electrical load obtained by SGI to KEB since NEPL wants to retain the same, NEPL to apply to KEB for transferring the same from SGI to NEPL. All charges pertaining to this would be borne by the NEPL.
>
> 6. The vacant possession has already been offered by SGI to NEPL at the end of the license period, against refund of Security Deposit.

> 7. SGI offers the following to NEPL against payment. Amounts to be mutually decided. . False Ceiling . Air condition ducting with pipes.
>
> - Fire Protection pipes
> - Electrical Control Panel.

4. The appellant alleges that subsequent to this meeting too, the respondent did not take possession of the premises and subsequently sent a legal notice dated 27.12.2001 (to the appellant) claiming Rs. 25,29,582.50/- as rent/license fee for the months of September/ October 1995 and September – December, 2001. The appellant replied to the same through a legal notice dated 22.01.2002 where it reiterated its willingness to handover possession of the premises. In a subsequent legal notice dated 14.02.2002, the respondent informed the appellant of taking over possession of the premises by it, using the duplicate keys and the induction of M/s AT&T, a multinational corporation as the new tenant in the premises. Through that notice, the respondent also claimed an additional sum of Rs. 9,58,448/- from the appellant after adjusting the security deposit completely. The appellant alleges that the respondent did not mention anything about the other security deposits it was liable to pay the appellant and did not account for the worth of the furniture and fixtures taken over by the respondent. The appellant contends that the respondent with a mala fide intent of appropriating the security deposits and the other deposits worth Rs. 35,72,100/- used the duplicate keys to obtain possession when the appellant was ready to give possession earlier.

5. The respondent filed a suit for injunction against the appellant in the City Civil Court, Bangalore seeking an order of permanent injunction from interfering with the possession of the suit premises. The respondent instituted a Suit No. 1164/2002 claiming a decree for Rs. 9,58,448/- from the appellant. Subsequently, the appellant filed a suit bearing Suit No. 1661/2003 against the respondent seeking a sum of Rs. 45,23,414/-.

6. The learned Single Judge, by its order dated 30.08.2011 decreed the suit in favour of the appellant for a sum of Rs. 20,41,939/- with interest of 6% per annum. Aggrieved by the said order, the appellant has preferred this appeal.

7. The appellant has argued that the impugned judgement is in error of law in proceeding on irrelevant considerations and returning contradictory findings. It is urged that the learned Single Judge erred in placing the burden of proof on the appellant in respect of the alleged unpaid fee of Rs. 1,17,425/- for the month of September 1995 along with an interest of 18% p.a amounting to Rs. 1,28,410/- (from 7.9.1995 to 5.10.2001) out of the security deposit paid by the appellant. Further, it is submitted that the claim relating to September, 1995 is one barred by limitation. It has been urged that the learned Single Judge relied upon certain documents while allowing this claim whereas rejected similar documents for other similar claims.

8. Learned counsel for the appellant argued that the Single Judge failed to appreciate that the onus was upon the respondent to prove that the license fee of September, 1995 was due and payable (by the appellant) and further contended that the Respondent did not lead any evidence to show that rent was due from September 1995. Further, it was contended that the Single Judge contradicted himself by rejecting the other alleged arrears on license fee stating that the respondent had to lead positive evidence to prove the total amount payable whereas the same was not followed in regard to the license fee payable for September 1995. It was argued that the learned Single Judge wrongly relied upon the minutes of the meeting on 5th October, 2001 for allowing the payment/ adjustment of licence fee relating to September 1995, whereas the appellant had only agreed to reconcile, re-check and confirm if the said amount was paid or not.

9. Learned counsel for the appellant contends that the learned Single Judge had erred in not allowing the refund of Security Deposit of Rs. 6,25,000/- paid to the service provider upon confirmation by the respondent upon the expiry of license that the deposit may not be claimed from the service provider and that they shall refund the amount to the appellant. It was urged that the learned Single Judge failed to appreciate that the respondent did not deny the allegation regarding the payment of Rs. 6,25,000/- in any proceeding before the court. The respondent had used its right under Clause 6 of the agreement to retain the infrastructure for uninterrupted power supply.

10. The appellant also contended that the learned Single Judge erred in holding that it was liable to pay the respondent additional license fee

of Rs, 3,73,276/- along with interest at 18% p.a. from 1.10.2001 to 5.10.2001 as it had actually and physically vacated the premises on 31.08.2001 and the respondent had refused to take possession of the vacant premises till 14.02.2002. Further, the grant of interest @ 18% p.a. for the respondents and at 6% p.a. for the appellant has been questioned. It was contended that the Single Judge should have treated the rival claims on equal footing and should have allowed interest of 18% p.a. Lastly, the Appellant contends that the award of license fee with interest at 18% p.a. in favour of the Respondent for June 2001 to August 2001 though the appellant had given notice to the respondent to adjust the aforesaid licence fees against the security deposit in May 2001 itself is erroneous since the amount was with the respondent prior to the expiry of the licence agreement due to efflux of time.

Respondent's Arguments

11. The respondent argued that the appellant never tendered vacant possession of the premises as admittedly fitting and fixtures of the appellant were lying in the suit premises. Further, it is contended in support of the counter claim that the learned Single Judge has failed to hold that the appellant ought to have removed all its goods including fitting and fixtures from the suit premises and in the absence of the same, it cannot be held to have been vacated. Learned counsel for the respondent contends that the learned Single Judge erred in holding that the vacant premises was offered for possession on 5th October, 2001 when the fittings and fixtures were in the premises and alleged that the appellant offered to the respondent to keep the fitting and fixtures for a sum of Rs. 5,00,000/- on 22.01.2002. It is further contended that the learned Single Judge equated damages for restoration of premises to its original condition to vacating the premises whereas one relates to the damage caused to the premises and the other relates to physically vacating the premises which is sine qua non of the license agreement.

12. It was urged that the learned Single Judge erred in holding that in the absence of issue in regard to the institution of the suit by a competent person the court cannot adjudicate on that question; the respondent had led evidence on that. Counsel submits that the facts relating to lack of competence was in the exclusive knowledge of the appellant and hence the learned Single Judge erred in holding the denial for want of knowledge as a ground for not taking the issue for

consideration. It is next urged that the impugned judgement erred in holding that the respondent did not prove its entitlement to arrears in rent of Rs. 9,58,448/-. The appellant did not specifically deny that these amounts were due nor did it file any document to prove that it has paid such amounts. The appellant was liable to pay the said amounts along with an interest at 18% p.a. for the period from 01.09.2001 to 14.02.2002. Further, it was argued that the Single Judge erred in holding that the respondent ought to have offered to return the security deposit after adjusting the arrears of rent when the appellant had not vacated the premises. Counsel also contended that the Single Judge erred in holding that the respondent was liable to pay the security deposit of Rs. 2,02,100/- on the basis of the minutes of the meeting dated 05.10.2001. It was contended that the learned Single Judge placed undue reliance on the authorities and the board resolution filed by the respondent.

Analysis of Arguments

13. The appellant's arguments relating to award for payment of license fee with interest for the period of September, 1995 would be dealt with first. The first question is regarding the placing of burden of proof upon the appellant and the argument that the claim is barred by limitation. This Court sees no merit in these submissions as both parties had agreed in their meeting on October 5, 2001 that the Appellant would reconcile its accounts and write back to the respondent, although the appellant did not agree to any liability. This Court finds no such evidence on record to see that the appellant actually reconciled its accounts and wrote back to the respondent. Further, once there was a claim for recovery of dues, the burden to prove that the rent was paid is on the licensee/tenant and in this case, the appellant has failed to extend such proof. Also, the appellant, in its affidavit through Mr. Sanjay Bhanot, did not claim that no dues were liable to be paid for the month of September, 1995, thereby failing to meet the requirements of Order 8, Rule 3 read with Order 8, Rule 5 of the CPC requiring specific denial of allegations. It was observed by the Supreme Court in **Badat and Co. v. East Indian Trading Co.** AIR 1964 SC 538 that if a denial of fact is not specific but evasive that fact shall be taken to be admitted and in such an event the admission itself being proof, no other proof is necessary. Thus, in the absence of any specific denial, the admission being construed as adequate proof in the case at hand, the learned Single Judge was correct in placing the burden to disprove the same on the appellant.

14. This Court finds no merit in the contention that the claim of the respondent for the month of September, 1995 is time-barred. We agree with the finding of the learned Single Judge that the period prescribed under the Limitation Act bars the remedy of filing suit for recovery of an amount which has become barred by limitation, but it does not bar the claim of an amount which is otherwise due and payable. Further, Clause 3 of the agreement also empowered the respondent to adjust the security deposit against its dues and the same is not barred by limitation. In **Punjab National Bank v. Surendra Prasad Sinha** AIR 1992 SC 1815, a security bond was executed by a guarantor and a Fixed Deposit Receipt was handed over by him which would mature on 1.11.1988. The debt for which the concerned party stood as surety became barred by limitation, on 5.5.1987. After the period of limitation provided for filing a suit against the principal debtor, the bank enforced the security and adjusted the amount due from the FD of the surety. The surety filed a complaint against the bank alleging offences under Sections 409 and 109/114 of the Indian Penal Code. Dealing with that case the Supreme Court held thus:

> "Though the right to enforce the debt by judicial process is barred under Section 3 read with the relevant Article in the Schedule, the right to debt remains. The time barred debt does not cease to exist by reason of Section 3. That right can be exercised in any other manner than by means of a suit. The debt is not extinguished, but the remedy to enforce the liability is destroyed. What S.3 refers is only to the remedy but not to the right of the creditors. Such debt continues to subsist so long as it is not paid. It is not obligatory to file a suit to recover the debt. It is settled law that the creditor would be entitled to adjust, from the payment of a sum by a debtor, towards the time barred debt. It is also equally settled law that the creditor when he is in possession of an adequate security, the debt due could be adjusted from the security in his possession and custody."

Further, the Kerala High Court in **Thankappan.V.K., Manager vs Uthiliyoda Muthukoya** 2011 (2) KLT 953 held:

> "In the case of a debt barred by lapse of time, the right of the creditor to recover the debt is not transferred to or conferred upon the debtor. It becomes dormant and becomes unenforceable

> in a court of law. That does not mean that debt is destroyed or extinguished and that the creditor is not entitled, under any circumstances, to claim or recover it in any manner whatsoever."

From the above discussion, it is clear that mere delay does not bar the party of a right to claim it in a form other than by a suit.

That part of the decree was not time barred; the Court finds no infirmity in the impugned judgment on this aspect.

15. The appellant had contended that the Single Judge contradicted his findings by holding that the onus of proof was upon the appellant (to prove that there were no dues for the month of September, 1995) whereas for other dues, he has demanded positive evidence from the respondent. No such contradiction exists in the finding of the learned Single Judge. The appellant did not make any clear denial of liability to pay for the month of September, 1995 and despite having agreed to reconcile accounts, failed to do so. These were relevant facts in placing the burden of proof on the appellant. The learned Single Judge did not fall into error in holding as he did on this aspect.

16. Counsel for the appellant further contended that the learned Single Judge erred in not decreeing the security deposit of Rs. 6,25,000/- paid towards the installation of gen-sets to Embassy Group. It was argued that the respondent exercised its right under clause 6 of the agreement to retain such installations made by the appellant. This Court is unable to agree to this submission as no conclusive evidence was adduced before this court to show that the respondent exercised its option under clause 6 of the agreement. The minutes recorded on October 5, 2001 read as follows:-

> "2. NEPL also has confirmed from Embassy Group, the deposit of Rs. 6,25,000/- for genset paid by SGI to Embassy Group on NEPL's behalf. This amount needs to be refunded to SGI. Embassy Group and NEPL to decide amongst themselves as to who would refund this."

This was a mere agreement by the respondent to negotiate with the Embassy group to decide whether it would retain the genset or the security deposit of Rs. 6,25,000/- should be refunded to the appellant. This did not impose any liability on the respondent to pay the security deposit as was contended by the appellant. Further, the agreement for

installation of the gensets was between the appellant and a third party (Embassy Group); the respondent was a stranger to the agreement. There was no privity of contract between the respondent and such third party; consequently, no liability ensued on the respondent. The appellant also did not lead any evidence that even after the premises were vacated, the deposit was used by the succeeding tenant, as was contended by it. Therefore, the claim for Rs. 6,25,000/- made by the appellant against the respondent was meritless.

17. It was contended that the impugned judgment erred in holding the appellant liable to pay rent till 4.10.2001 whereas it had vacated the premises by 31.08.2001. This contention is not acceptable and has no force, because the appellant by a letter dated 28.09.2001 had called upon the respondent to send a representative in person to take possession of the premises, which clearly showed that complete and unequivocal possession was not given to the respondent. The appellant was well aware of being in the possession of the said premises as of 28.09.2001. There is no infirmity in the findings of the learned Single Judge on this point.

18. On the question of interest, this Court notices that the learned Single Judge granted interest @ 18% from 5.10.2001 to 22.08.2003 (date of the suit) treating all rival rights in equal footing. The interest rate of 6% granted was only in respect of cost, pendente lite and future interest, in consonance with Section 34 of the CPC. This Court notices that the award of interest for the period prior to the suit and for a later period, has to be based on exercise of discretion. So long as the Court exercising it is shown to have not judiciously exercised such power, the appellate court would be slow in interfering with the award of the court of first instance. In this case, there is nothing to suggest that such differential treatment for different periods was not based on sound exercise of discretion. The argument on this aspect is consequently rejected. The appellant had argued that the learned Single Judge erred in granting interest at the rate of 18% p.a to the respondent (for dues relating to June to August 2001) while the appellant, through a letter in May, 2001 itself had asked to respondent to adjust the dues with the security deposit. The license agreement clearly mentioned that all dues, adjusted with the security deposit shall be with an interest rate @ 18% p.a. and the said letter mentions nothing about the interest rate, nor was an interest free adjustment agreed to by the respondent. Further, the license agreement makes no

mention of an obligation to adjust security against rent for a period mentioned by the appellant and thus, this Court finds that contractually, the respondent was not obliged to adjust the security deposit upon the request of the appellant without any interest as imposed. For these reasons, the Court finds no need to interfere with this reasoning of the learned Single Judge.

19. The final claim of the appellant is that the learned Single Judge erred in not providing interest in regard to the sum of Rs. 2,02,100/- paid by the appellant in favour of Karnataka Electricity Board for additional electricity. The reasoning behind the said decision of the learned Single Judge seems to us to be unsustainable in law. The learned Single Judge held that the parties during their minutes on 05.10.2001 agreed only to pay the original amount of security deposit and no interest was contemplated. While the same is true, upon denial to pay the same, the court does possess a statutory power under Section 34 of CPC to grant pendente lite interest in respect of the dues claimed. We find no reason to deny the appellant interest in the instant matter, when the respondent, despite agreeing to refund the security deposit has failed to do so for over a decade. Thus, we reverse the decision of the learned Single Judge on this issue, and grant interest for the period from 01.01.2001 till date of the decree or date of payment, whichever is later, at the rate of 6% per annum.

20. As regards the cross objections raised of the respondent, learned counsel for the respondent contended that the Single Judge has erred in holding that absolute and vacant possession of the premises was tendered to the respondent on 5.10.2001 whereas the appellant had sent a letter dated 22.01.2002 seeking Rs. 5,00,000/- for the fittings. It is also contended that the learned Single Judge had erred in holding that the security deposit should have been tendered by the respondent after making legitimate deductions. This Court is unable to agree with this contention as the respondent on 14.02.2002 itself had taken the possession of the property by using duplicate keys with all the fittings still intact whereas it could have done so as early as 05.10.2001. The law ensues upon every claimant, the duty to take due care to reduce and mitigate the damage or injury caused and neglect in that regard, does not confer upon the claimant any special right to claim damages for such default. This is one such case where the respondent deliberately refused to take possession as offered on 05.10.2001 whereas it did so unilaterally on 14.02.2002. If the

respondent was not interested in the fittings, it could have either sent a notice to the appellant to remove such fixtures or could have done the same and deducted the cost of doing so from the security deposit. However, the respondent failed to take any such action. Further, it is not the case of the respondent that the fixtures created any damage to the premises even during its claims on 05.10.2001. It is indeed the responsibility of every party to an agreement to perform the same in good faith and the respondent ought to have tendered the security deposit back after making legitimate deductions, including some part for the purpose of removing the fixtures and fittings. The respondent had relied on some correspondence to show that the appellant, despite holding out the offer to vacate, kept corresponding for extension of lease, or for favourable terms. That however, does not in any manner advance the cross objector's case further, because no mutually agreed terms were arrived at; the offer to hand over possession therefore, stood. For these reasons, we are unable to agree with this contention of the respondent.

21. Learned counsel for respondent contended that the Single Judge had erred in holding that the court could not go into the question of incompetence of the person filing the suit when a question to that effect is not framed by the court. It has been contended before us that lack of knowledge of this fact was the reason behind non-framing of such issue. As a general rule, courts will not go into issues which are not framed by the court unless it has been proven to the satisfaction of the court that a new fact has arisen which, in the interest of justice, should be taken note of by the court and a new issue relevant to the fact should be framed. In the case at hand, we find that no material fact, with detailed averments have been made to the court. A simple statement which is not substantiated in any manner squarely falls within the ambit of Order 8, Rule 3 and it cannot be construed as a substantial allegation before the court. Even presuming lack of knowledge, there was nothing prohibiting the respondent to make an application under Order 6, Rule 17 CPC for amendment of its pleadings to add any new fact which had come to its knowledge. However, no such application has been made in this case. Further, the Karnataka High Court in **B.R. Mulani v. Dr. A.B. Aswathanarayana** AIR 1993 Kant 257 held that whenever a party raises a plea and does not have the issue raised in that regard and goes to trial and have the matter decided without having an issue raised on the plea, the party is deemed to have given up such plea. The same has also been

held in **Chiranji Lal v. Shankar Lal and Anr.** AIR 1951 Raj 36. The non-framing of an issue after raising a plea is thus fatal to the claim as far as the main claim for adjudication has been dealt with by the court and substantial justice has been done. This court therefore affirms the findings of the learned single judge on this point that the court could not have adjudicated upon a question on which no issue has been framed by the court.

22. Learned counsel for the respondent contended that the learned Single Judge has erred in holding that the burden to prove the existence of any dues is on the respondent as there had been no specific denial by the appellant. It is settled law from section 101 of the Evidence Act that the burden to prove claims is on the person asserting the right. The finding of the learned Single Judge falls squarely within this ambit of this section and jurisprudence therein and the allegation of absence of specific denial seems baseless. Thus, we agree with the findings of the learned Single Judge. The other contention that the learned Single Judge has placed imbalanced relevance on authorities and documents cited by the respondent has not been established and is meritless.

23. In view of the above discussion, the appeal succeeds in part, only to the extent indicated in Para 19 of the judgment, so far as interest on Rs. 2,02,100/- for the period 01-01-2001 till date of the decree or date of payment, whichever is later, at the rate of 6% per annum is concerned. The rest of the appeal, and the cross objections fail; the decree arising from the impugned judgment shall stand modified to the extent indicated. The appeal is partly allowed, to that extent; the cross objections are dismissed. There is no order as to costs.

ILR (2013) V DELHI 3300
W.P.

GP. CAPT. JOE EMMAUEL STEPHEN .....PETITIONER

VERSUS

COMMANDANT (PERSONAL) DIRECTORATE GENERAL OF BSF AND ORS. .....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 2862/2012& CM NO. : 9283/2012
W.P.(C) NO. : 4268/2012

DATE OF DECISION: 08.07.2013

Service Law—Constitution of India, 1950—Article 226—The petitioners are commissioned pilots in the Indian Air Force—Deputed to the BSF, Air Wing as Captain/Pilot from 11.01.2010—First contention raised was that in light of the terms and conditions of their appointment governed by the MOU dated 08.02.2008, over and above full pay and allowances, petitioners are additionally entitled to flying incentives for every flying hour undertaken as set down by the BSF—Petitioners held entitled to the same. Second contention raised was with regard to deductions effected towards the SPBY/LIC policy which has been effected form the pay and allowance of the petitioners despite their unwillingness towards the Same—Such action of the respondent has been held to be illegal and arbitrary. Third contention raised was that as per circular dated 11.05.07 of the Home Ministry ,a Captain/Pilot while posted with the BSF Air Wing was entitled to the same allowances as a DIG in the BSF—However, these entitlements were withdrawn arbitrarily in June, 2010 by the respondent without even a formal letter—Such action held to be arbitrary and illegal, and such officers

were held to be entitled to the same benefits and facilities admissible to the DIG.

The respondents have thus taken a stand that an officer of the Indian Air Force flying wing posted on deputation to the BSF Air Wing is entitled to the flying incentive in addition to the flying pay which he was getting while flying for the Indian Air Force. The respondents have also taken the decision that past cases would require to be reviewed in the context of this decision. **(Para 16)**

In view thereof, no dispute remains with regard to the entitlement of both the petitioners to the flying incentives. Flying incentives have to be issued in addition to flying pay to the petitioners who are Indian Air Force pilots and have been sent on deputation to the BSF Air Wing. **(Para 17)**

The second issue which has been raised in the present writ petition relates to the legality of the deductions effected towards the premium payable towards the Seema Prahari Beema Yojana of the LIC which has been effected from the pay and allowances of the petitioners despite their expression of unwillingness for the same. **(Para 18)**

It is submitted by Mr. Malhotra, learned counsel for the petitioners that given the paltry nature of the deduction towards the Seema Prahiri Beema Yojana, the petitioner in WP (C) No.2862/2012 does not press the recovery thereof in these proceedings. We note that the submissions in this regard have been made only in view of the arbitrariness and illegal action of the respondents so far as Group Captain J.E. Stephen is concerned. **(Para 20)**

We may now come to the third area of controversy. Group Captain J.E. Stephen has claimed that he was sent on deputation to the post & rank of DIG in the BSF Air Wing. Other officers of the Indian Air Force were also posted in the rank of DIG though in the BSF General Duty Branch. The petitioner was initially given all benefits commensurate with his posting in the rank of DIG in the Border Security Force

which included the flag and star on the vehicle as per the entitlement of the DIG in the Border Security Force. It is submitted that the respondents arbitrarily withdrew this facility without even passing a formal order w.e.f. June, 2010 and did not restore the same despite repeated representations of the petitioners. **(Para 21)**

A bare reading of the above would show that Indian Air Force Officers who are sent on deputation to the Border Security Force are required to wear the uniform and carry their own rank and badges. It is, however, clearly stipulated that such deputationists to the BSF, Air Wing will be extended the facility of the corresponding post of BSF, Air Wing Personnel as laid down in the MHA Letter no.17/27/74-ORG/BSF/PFA dated 11th May, 2007. **(Para 25)**

Thus, it is apparent that the Indian Air Force deputationists to BSF have been accorded special status and it is inherent in para 44 of the MOU dated 8th February, 2008 above that the Indian Air Force deputationists to the BSF Air Wing are required to be extended all facilities of the corresponding post of the BSF Air Wing. So far as the uniform is concerned, the Indian Air Force officers are required to wear their own uniform and carry their own rank and badges in terms of para 44. **(Para 26)**

As per the Ministry of Home Affairs letter dated 11th May, 2007, a Group Captain in the Indian Air Force is equivalent to the Deputy Inspector General of the Border Security Force. A Group Captain of the Indian Force who is posted on deputation to BSF, Air Wing would, therefore, be entitled to the same benefits and all facilities which are admissible to the DIG. **(Para 27)**

In view of the above discussion, we direct as follows:-

(i) The respondents shall effect computation of the arrears admissible to the petitioners in terms of the letter dated 13th June, 2013 within eight weeks from today and communicate the calculations as well as amount thereof to the petitioner

forthwith.

(ii) The respondents shall ensure that payment of the amounts found due and admissible to the petitioners are effected within a further period of four weeks thereafter.

(iii) The petitioners shall be entitled to costs of these petitions which are assessed at Rs.15,000/- each which shall be paid within four weeks from today.

These writ petitions are allowed in the above terms.

(Para 33)

[An Ba]

APPEARANCES:

FOR THE PETITIONERS : Mr. S.C. Malhotra, Adv. with MR. Arijit, Adv.

FOR THE RESPONDENTS : Mr. BV. Niren, CGSC, Mr. Ravinder Agarwal, CGSC.

RESULT: Writ Petitions allowed.

GITA MITTAL, J. (ORAL)

1. The petitioners in these two writ petitions were commissioned as pilots in the Indian Air Force. After his promotion to the rank of Group Captain, Joe Emmanuel Stephen-the petitioner in WP (C) No.2862/2012 was sent on deputation to the Border Security Force (BSF), Air Wing as Captain/Pilot which position he assumed on 11th January, 2010.

2. So far as the Wing Commander S.K. Saini, the petitioner in WP (C) No.4268/2012 is concerned, while working in this rank, was also sent on deputation to the Border Security Force, Air Wing as Co-Pilot.

3. Group Capt. Joe Emmanuel Stephen has complained that the Ministry of Home Affairs by its letter dated 11th May, 2007 has extended the status of Deputy Inspector General (DIG) to the post of Captain/ Pilot, which an officer of the rank of Group Captain from the Indian Air Force was fulfilling. In terms of the letter of the Ministry of Home Affairs dated 11th May, 2007, such Captain/Pilot while posted with the BSF Air Wing on deputation was allowed the usage of BSF service

vehicle as well as the flag/star plate to which a BSF officer in the rank of DIG was entitled.

4. The petitioner received these benefits when he was initially appointed. However, w.e.f. June, 2010, the petitioner was not permitted to usage of flags/star plate on the BSF vehicle assigned to him and he was thereby denied the status of the DIG despite equivalence by the Ministry of Home Affairs in their circular dated 11th of May, 2007.

5. The petitioners Group Captain Joe Emmanuel Stephen as well as Wing Commander S.K. Saini, have also complained that despite their expressing unwillingness to be parties to Seema Prahri Beema Yojna (SPBY), the respondents effected unwarranted deductions towards premium payable to the Life Insurance Corporation towards this scheme and the petitioners were entitled to full refund thereof.

6. As the respondents failed to address the petitioners' grievance in this regard, the petitioners were compelled to file these writ petitions. Both the petitioners have made a grievance that while serving with the Flying Branch of the Indian Air Force, they are entitled to flying pay, the amount whereof has been fixed keeping in view the rank held by the officer. Thus, an officer in the rank of Wing Commandant and Group Captain would get Rs.14,000/- which after 1st January, 2011 stands increased to Rs.17,500/- (as the DA is being released at 51%, consequently the flying pay has been increased by 25%) towards the flying pay.

7. We are informed that pilots in the Border Security Force are paid flying incentives, the rates whereof have been fixed based on type of aircraft, to be flown by the pilot. Thus a pilot in the BSF Air Wing who is flying MI 17 helicopters, is paid flying incentive of Rs.1800/- per hour in addition to the pay and allowances being otherwise admissible to them.

8. The petitioners' contention is that so far as the pay and allowances of Indian Air Force officers serving with the BSF Air Wing are concerned, they are entitled to full pay and allowances which would include their basic pay; the flying pay as well as the other allowances from the Indian Air Force. Additionally, for every flying hour undertaken by the pilot (flying BSF aircraft), he would be entitled to flying incentives at the above rates.

9. We may note that so far as the officers who are sent on deputation from the Indian Air Force to the Border Security Force, Air Wing are

concerned, the terms and conditions of their appointment are governed by the Memorandum of Understanding (MOU) dated 8th February, 2008, the relevant paras 43 to 45 whereof reads as follows:-

> "43. Pay & Allowance IAF deputationists would continue to draw the pay and allowances as they were entitled and drawing in the IAF with deputation allowance as per GOI instructions. They may claim in addition flying and technical incentives at par with BSF Air Wing personnel with a minimum amount equal to the flying pay admissible in IAF from time to time.
>
> 44. Status of IAF Officers IAF officers will wear their uniform and carry their own rank and badges. However, IAF deputationists to BSF Air Wing will be extended the facilities of corresponding post of BSF Air Wing personnel as laid down in MHA letter no.17/27/74-ORG/BSF/PF-1 dated 11 May 07. Rank wise status of IAF officers of other branches on deputation to BSF Air Wingh vis-a-vis BSF officers shall be the same as that of IAF flying branch officers.
>
> 45. Insurance Cover IAF deputationists can avail Seema Prahari Beema Yojna/LIC while on deputation subject to contribution made by deputationists as per prevailing rates and other conditions laid down by Insurance Company in addition to the existing AF GIS cover."

10. This MOU was revised on the 19th of May, 2010, however, there is no material change to the above terms. Upon denial of the benefits of the flying incentives, the amounts of the petitioners having been wrongly contributed towards Seema Prahari Beema Yojana/LIC and failure of the respondents to refund the amounts which have been deducted towards SPBY/LIC, the petitioners have been compelled to file the present writ petitions.

11. The above narration shows that in terms of the MOU dated 8th February, 2000 and the circular dated 11th of May, 2007, were entitled to all benefits which were admissible to them as pilots with the Indian Air Force which included flying pay. Upon their joining BSF Air Wing on deputation, they became entitled to the benefits in terms of the Memorandum of Understanding dated 8th February, 2008 as revised on 19th May, 2010.

12. As noted above, para 43 of the MOU dated 8th February, 2008 provided the payment of flying incentives to the Indian Air Force pilots posted with the BSF Air Wing.

13. The BSF, however, has taken the position that flying incentives was required to be adjusted out of the flying pay which was admissible to Indian Air Force pilots who were posted with them and so proceeded in the matter. It is stated that flying pay was being adjusted out of the flying incentives.

14. This issue was the subject matter of protracted correspondence between the petitioners on the one hand and the Border Security Force on the other and has remained a vexed issue.

15. Today, Mr. Ravinder Aggarwal, learned standing counsel for the Central Government has handed over a copy of the communication dated 13th June, 2013 which has taken into consideration this issue. In the context of implementation of the aforesaid Memorandum of Understanding between the Ministry of Home Affairs and the Ministry of Defence for deputation of the Indian Air Force Officers to the Border Security Force-Air Wing, it has issued the following clarification regarding flying pay and flying incentive thereto:-

> "Having been gone through the policy related to the subject matter, it is stated that flying pay and flying incentives are of a difference allowance which are being paid to Air Force officers/ other personnel who come to BSF on deputation and there is no overlapping between the above two allowances. Henceforth, flying incentive would be paid according to the rate as applicable in force and it would not be restricted to flying pay as was alone earlier.
>
> It is pertinent to mention here that past case related to the above matter may also be reviewed."

16. The respondents have thus taken a stand that an officer of the Indian Air Force flying wing posted on deputation to the BSF Air Wing is entitled to the flying incentive in addition to the flying pay which he was getting while flying for the Indian Air Force. The respondents have also taken the decision that past cases would require to be reviewed in the context of this decision.

17. In view thereof, no dispute remains with regard to the entitlement of both the petitioners to the flying incentives. Flying incentives have to be issued in addition to flying pay to the petitioners who are Indian Air Force pilots and have been sent on deputation to the BSF Air Wing.

18. The second issue which has been raised in the present writ petition relates to the legality of the deductions effected towards the premium payable towards the Seema Prahari Beema Yojana of the LIC which has been effected from the pay and allowances of the petitioners despite their expression of unwillingness for the same.

19. So far as the Group Captain J.E. Stephen is concerned, the respondents submit that he had assumed charge in the BSF, Air Wing on deputation as Captain/ Pilot on 11th January, 2010 and had expressed unwillingness to participate in the afore-noticed insurance scheme only on 28th February, 2010. By this time, the respondents had effected deduction of the first instalment which was payable to SPBY/LIC. It is explained that on receipt of Group Captain J.E. Stephen's unwillineness, the respondents have not deducted any other amount. It is explained by learned counsels that the deduction which is effected towards the SPBY scheme is bi-annual and so far as the petitioner was concerned, deductions have been effected till February, 2011. No deductions were effected in the second bi-annual instalment and the deduction was effected upto August, 2011. However, in view of the petitioner's objections, the respondents have submitted that they refunded the amount deducted in August, 2011. The above narration would show that the respondents have, therefore, deducted amounts from the salary of the petitioner-Group Captain J.E. Stephen.

20. It is submitted by Mr. Malhotra, learned counsel for the petitioners that given the paltry nature of the deduction towards the Seema Prahiri Beema Yojana, the petitioner in WP (C) No.2862/2012 does not press the recovery thereof in these proceedings. We note that the submissions in this regard have been made only in view of the arbitrariness and illegal action of the respondents so far as Group Captain J.E. Stephen is concerned.

21. We may now come to the third area of controversy. Group Captain J.E. Stephen has claimed that he was sent on deputation to the post & rank of DIG in the BSF Air Wing. Other officers of the Indian Air Force were also posted in the rank of DIG though in the BSF General

Duty Branch. The petitioner was initially given all benefits commensurate with his posting in the rank of DIG in the Border Security Force which included the flag and star on the vehicle as per the entitlement of the DIG in the Border Security Force. It is submitted that the respondents arbitrarily withdrew this facility without even passing a formal order w.e.f. June, 2010 and did not restore the same despite repeated representations of the petitioners.

22. We may note that Group Captain J.E. Stephen was repatriated on 10th January, 2013 to the Indian Air Force on completion of his tenure on deputation. However, Mr. S.C. Malhotra, learned counsel for the petitioners has pressed this issue for the reason that the same is likely to arise again in view of the stand taken by the respondents.

23. The respondents have urged that the petitioner Group Captain Shri J.E. Stephen was not entitled to these benefits for the reason that he was wearing the uniform of the Indian Air force even though he was having the benefit of a Border Security Force vehicle as well as a driver from the BSF.

24. So far as this question is concerned, the petitioner places reliance on para 44 of the Memorandum of Understanding dated 8th February, 2008 executed between the Ministry of Defence and Ministry of Home Affairs which reads as follows:-

> "44. Status of IAF Officers IAF officers will wear their uniform and carry their own rank and badges. However, IAF deputationists to BSF Air Wing will be extended the facilities of corresponding post of BSF Air Wing personnel as laid down in MHA letter no.17/27/74-ORG/BSF/PF-1 dated 11 May 07. Rank wise status of IAF officers of other branches on deputation to BSF Air Wingh vis-a-vis BSF officers shall be the same as that of IAF flying branch officers."

25. A bare reading of the above would show that Indian Air Force Officers who are sent on deputation to the Border Security Force are required to wear the uniform and carry their own rank and badges. It is, however, clearly stipulated that such deputationists to the BSF, Air Wing will be extended the facility of the corresponding post of BSF, Air Wing Personnel as laid down in the MHA Letter no.17/27/74-ORG/BSF/PFA dated 11th May, 2007.

26. Thus, it is apparent that the Indian Air Force deputationists to BSF have been accorded special status and it is inherent in para 44 of the MOU dated 8th February, 2008 above that the Indian Air Force deputationists to the BSF Air Wing are required to be extended all facilities of the corresponding post of the BSF Air Wing. So far as the uniform is concerned, the Indian Air Force officers are required to wear their own uniform and carry their own rank and badges in terms of para 44.

27. As per the Ministry of Home Affairs letter dated 11th May, 2007, a Group Captain in the Indian Air Force is equivalent to the Deputy Inspector General of the Border Security Force. A Group Captain of the Indian Force who is posted on deputation to BSF, Air Wing would, therefore, be entitled to the same benefits and all facilities which are admissible to the DIG.

28. There is yet another circumstance which compels us to so declare. The petitioner has placed before this court the respondents' reading of para 44 of the Memorandum of Understanding and its implementation. Not only was that the benefit initially extended to the petitioner but the respondents have been consistently advancing all benefits which are admissible to DIGs of the BSF to the deputationists of the Indian Air Force . In this regard, the petitioner has drawn our attention to the cases of Group Captain M. Rawat & Group Captain (Retd.) K.M. Reddy who were posted on deputation with the BSF Air Wing and were given the benefit of all facilities as were admissible to a DIG. The petitioner has filed an affidavit of Group Captain (Retd.) K.M. Reddy in this regard which has submitted that during his tenure with BSF till 21st July, 2009, though he was wearing the Air Force uniform as required, he was still authorised to use a BSF vehicle for all official duties with flag and stars in terms of Ministry of Home Affairs letter dated 11th May, 2007.

29. The petitioner has also placed on record affidavits of Wing Commander Mahesh Singh Bhandari and Wing Commandar Pradeep Bishnoi who have stated that during their tenure with the BSF Air Wing, though the Indian Air Force Officers continued to wear their Air Force uniform and carrying their own rank and badges, yet they were extended all facilities of the corresponding posts of the BSF-Air Wing personnel, the equivalence stood laid down in the MHA letter dated 11th May, 2007.

30. The respondents had taken time to verify the correctness of the submissions made in these affidavits. Nothing to the contrary has been placed on record.

31. We have, therefore, no hesitation in concluding that the respondents were treating the letter dated 11th May, 2007 as well as clause 44 of the Memorandum of Understanding dated 8th February, 2008 as binding and had implemented the same even qua the petitioner Group Capt. Joe Emmauel Stephen. However, the facilities which were advanced to the petitioner were arbitrarily and illegally withdrawn from him for no justifiable reasons.

32. Inasmuch as the petitioner as Group Captain has been repatriated, no directions qua in terms of para 44 and MHA letter dated 11th May, 2007 are required to be passed in his case. However, the respondents shall ensure that they strictly abide by requirements of MHA letter dated 11th May, 2011 as well as para 44 of MOU dated 8th February, 2008 qua Indian Air Force officers who are sent on deputation to the Border Security Force.

33. In view of the above discussion, we direct as follows:-

(i) The respondents shall effect computation of the arrears admissible to the petitioners in terms of the letter dated 13th June, 2013 within eight weeks from today and communicate the calculations as well as amount thereof to the petitioner forthwith.

(ii) The respondents shall ensure that payment of the amounts found due and admissible to the petitioners are effected within a further period of four weeks thereafter.

(iii) The petitioners shall be entitled to costs of these petitions which are assessed at Rs.15,000/- each which shall be paid within four weeks from today.

These writ petitions are allowed in the above terms.

ILR (2013) V DELHI 3311
W.P.

BINOD SINGH AND ORS. PETITIONERS

VERSUS

UNION OF INDIA AND ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P.(C) NO. : 4997/2011, 5457/2011 & 6403/2011 **DATE OF DECISION: 10.07.2013**

Service Law—Constitution of India, 1950—Article 226—Appointment to 31 posts of Administrative officers in BRO. UPSC published advertisement—The Petitioners were short listed and participated in interview and recommended for selection—Certain unsuccessful candidates challenged alleged defects in the selection process on the basis of the experience certificates—Three member Screening Committee was constituted by the BRDB to look into the alleged defects—On the basis of the report of this Screening committee, entire selection process was cancelled—Petitioners assailed the cancellation of the Selection Process. Candidature of Petitioners in WP no. 5457/2011 and W.P. 6403/2011 were cancelled on the basis of incorrect selection certificate and candidature of petitioners in 4997/2011 was cancelled as the selection process had been scrapped. Held : It is clearly evident from the evidence led by the Petitioners in WP no.5457/2011 and W.P 6403/2011 that the Respondents have affirmed authenticity as well as correctness of the experience certificates—Validity of such certificates stands finally settled and needs no further adjudication—That the candidature of the writ petitioners in both writ petitions was rejected on the sole ground that their certificates were not with the prescribed procedure—Objection

no longer subsists—Respondents are directed to issue appointment to the Petitioners. Writ respect to Petitioners in WP no. 4997/2011 it was held that it is trite law that one the selection can be segregated and chaff separated from grain, the candidates whose appointment was not tained or illegal have to be given appointments. Cancellation of selection process illegal.

[An Ba]

APPEARANCES:

FOR THE PETITIONERS : Ms. Jyoti Singh, Sr. Advocate with Mr. Tinu Bajwa & Mr. Amandeep Joshi, Advocate.

FOR THE RESPONDENTS : Mr. Rajeeve Mehra, ASG writ Mr. Himanshu Bajaj, Adv. for R-1 to R-4, Mr. Naresh Kaushik with Ms. Amita Kalkal Chaudhary & Mr. Vardhman Kaushik, Advocate. for R-5.

CASES REFERRED TO:

1. *Ravi Shankar Singh and Others* vs. *Union of India & Others* WP (C) No. 5457/2011.
2. *Binod Singh & Ors.* vs. *Union of India & Ors.* WP(C)No.4997/2011.
3. *East Coast Railway & Anr.* vs. *Mahadev Appa Rao & Ors.* (2010) 7 SCC 678.
4. *Girjesh Shrivastava & Ors.* vs. *State of Madhya Pradesh & Ors.* (2010) 10 SCC 707.
5. *Union of India & Ors* vs. *Rajesh P.U. Puthuvalnikathu & Anr. Ref.* (2003) 7 SCC 285.
6. *Banwari Lal Meena & Anr.* vs. *Union of India & Ors.* WP(C)No.6403/201.

RESULT: Writ Petition allowed.

GITA MITTAL, J. (Oral)

1. The instant case relate to appointments to 31 posts of Administrative Officers (Group 'A' post) in the Border Road Organization which were requisitioned by the Border Roads Development Board (herein referred to as 'BRDB') by its letter of 15th May, 2007 addressed to the UPSC towards these appointments. The UPSC published and circulated an advertisement bearing No. 06 dated 28 March, 2009 (WP(C) No.5457/2011). As per this advertisement, applications were invited for 31 posts, out of which 5 were reserved for scheduled castes category candidates; 2 for schedules tribes category candidates; 8 for other backward classes and 1 post was reserved for physically handicapped candidate. As a result 15 posts remained available for the unreserved category. In addition to the stipulated educational qualifications, the candidates were required to possess five years experience in a supervisory capacity in General Administration, Establishment, Finance & Accounts. It is noteworthy that by a corrigendum dated 28th April, 2010, the UPSC wrote to the BRDB that the qualifying experience for appointment to the said post of Administrative Officer to be increased from 5 years to 7 years in supervisory capacity for purposes of short-listing as there were large number of applicants.

2. Based on this short-listing criteria, the UPSC short-listed 178 candidates for interview.

3. It is undisputed that all the petitioners in W.P. Nos.4997/2011; 5457/2011 as well as in the third petition No.6403/2011 were short-listed for interview. The writ petitioners are persons who are serving in different capacities with the Border Roads Organization. As they met the eligibility criteria, they applied for appointment to the BRDB pursuant to the advertisement dated 28th March, 2009. The applications were supported by the experience certificates issued by the concerned authorities with the different units of the Border Roads Organization (which included General Reserve Engineering Force).

4. We may note that in the communication dated 28th April, 2010, the UPSC had sought comments of the BRDB on the suggested short-listing criterion and the 178 candidates who had been short-listed. In the response dated 6th May, 2010, the BRDP confirmed that they had no comments on the issue.

5. It is undisputed that the petitioners were short-listed and had participated in the interview process conducted between 17th to 21st and 24th to 26th May, 2010.

6. The UPSC forwarded its recommendation regarding selection of the 38 candidates in June, 2010 and results thereof were published in the Employment News.

7. Vide a letter dated 28th June, 2010, the respondents informed the Administrative Medical Officers to conduct the medical examination of the petitioner as they had been recommended in June, 2010 for appointment by the UPSC.

8. In view of the communication dated 30th August, 2010 the BRDB requested the UPSC to re-consider the decision, and on 12th December, 2010, the UPSC advised the BRDB to re-examine the decision and look into the suitability of the candidates who had applied.

9. At that stage some disgruntled unsuccessful candidates sent notice to the respondents alleging defects in the selection process. As a result, the BRDB constituted a three member Committee by an order dated 27th December, 2010 to examine the experience certificate of the selected candidates.

10. At this stage, the petitioners in WP(C)No.4997/2011, **Binod Singh & Ors. v. Union of India & Ors.** filed a writ petition being WP(C) No.2308/2011 praying for directions to appoint them in terms of the declared result. This writ petition was disposed of by an order dated 26th April, 2011 with the direction to the Ministry (Road Transport and Highways) to take a final decision in the matter of the selection of the petitioners.

11. The three member Screening Committee gave its report on the 28th February, 2011 recommending cancellation of the entire selection process. As a result the BRDB issued cancellation letters on 1st June, 2011 to the selected candidates. Aggrieved by the cancellation of the selection process, the petitioners assail the same by way of the present writ petitions.

12. The only factual question which arises before us and is pressed for adjudication, is the validity of the experience certificates which were relied upon by the petitioners. This is the only ground on which the

petitioners eligibility is being assailed.

13. So far as WP(C)No.4997/2011, **Binod Singh & Ors. v. Union of India & Ors.** is concerned, Ms. Jyoti Singh have drawn our attention to a report dated 28th February, 2011. This report dated 28th February, 2011 was given by the three member Committee after examining the experience certificates of all candidates for the post of Administrative Officers in the Border Roads Organization. More important, this report is relied upon by the respondents as well.

14. So far as WP(C)No.6403/201, **Banwari Lal Meena & Anr. vs. Union of India & Ors.** is concerned, it is pointed out that the candidature of Sh. Indresh Kumar-petitioner No.2 was cancelled as it was found that his experience certificate was incorrect and he was therefore not issued an offer of appointment. So far as Banwari Lal Meena's selection is concerned, inasmuch as the respondents cancelled the entire selection process, he could not be appointed. The petitioners have challenged the failure of the respondents to make their appointments.

15. So far as WP(C)No.4997/2011, **Binod Singh & Ors. v. Union of India & Ors.** is concerned, the candidature of the 16 petitioners (Virendra Kumar Banerjee, Gurvinder Singh Khanna, Binod Singh, Rakesh Pratap Singh, Ram Sewak, Potanna Chinanna Abulkod, Sanjeev Kumar, Laxman Singh Rawat, K Vardan Chari, Rakesh Sopori, Pradeep Kumar Namdeo Gaikwad, Ashok Kumar, Tulasi Ram, Takhellambam Kunjakeshwar, Mahesh Singh Tanwar and Kiran Kumar Dasari) were not rejected by the Committee which had commented about them as follows:- "The Committee further opined that the experience certificates of the remaining 21 candidates whose names are given below may be considered valid for their appointment to the post of Administrative Officer in BRO:

S.No.	Roll No.	Name
1.	856/844	Virendra Kumar Banerjee
2.	xxx	xxx
3.	83	Gurvinder Singh Khanna
4.	156	Binod Singh
5.	596	Rakesh Pratap Singh
6.	367	Ram Sewak
7	157	Potanna Chinanna Abulkod
8.	758	Sanjeev Kumar
9.	564	Laxman Singh Rawat
10.	763	K Vardan Chari
11.	309/414	Rakesh Sopori
12.	xxx	Xxx
13.	647/733	Pradeep Kumar Namdeo Gaikwad
14.	103	Ashok Kumar
15.	Xxx	xxx
16.	Xxx	xxx
17.	885	Tulasi Ram
18.	350	Takhellambam Kunjakeshwar
19.	xxx	Xxx
20.	603	Mahesh Singh Tanwar
21.	417	Kiran Kumar Dasari

16. Even the experience certificates of these 16 petitioners were found in order, they were also not issued the appointment letters for the reason that the respondents had scraped the entire selection process. We may first examine the issue with regard to the validity of the experience certificate.

17. We therefore find that there is no issue with regard to the experience certificate of the writ petitioners in WP(C)No.4997/2011 and Banwari Lal Meena- writ petitioner No.1 in WP(C)No.6403/2011.

18. So far as the petitioners in WP (C) No. 5457/2011, **Ravi Shankar Singh and Others Vs. Union of India & Others** is concerned, the question which arises for consideration is as to whether the eligibility certificate produced by the petitioners met the prescribed requirements of the respondents?

19. These writ petitions had come up for consideration before this court on the 14th of December, 2012. The petitioners had contended that they were actually functioning in supervisory capacity to the post and, therefore, were entitled to be considered eligible for appointment to the post of Administrative Officer as they possess the prescribed experience in such posts. In this regard, our attention has been drawn to the following categorical averment made by the petitioner in ground 'C' of WP(C)No.5457/2011:-

> "C. ...It is brought out that the Gazette of India Notification dated 24.11.1962, lists out the civilian officers and supervisory

staff in GREF and also stipulates the wearing of their Rank Badges. The list provided therein includes the designation of the petitioners herein like Clerk, UDC, Stenographers, Supervisor NT Grd.-II and others under the heading of Supervisory Staff. Copy of the Gazette notification dated 24.11.1962 is annexed herein as Annexure P-8. Regulation 32 of the Border Roads Regulations brings the GREF personnel within the ambit of Army Act, 1950 for purpose of disciplinary matters. Regulation 33 of the same BR Regulations includes Annexure-6 stipulating equivalent ranks of Army and GREF also lists out the petitioners under the heading of Junior Commissioned Officers including Supervisor NT Grade-1, Superintendent Clerical, Assistant, PA, Stenographer, UDC etc. and are hence to be reckoned as Supervisors, as JCOs in Army are held as Supervisors. Copy of Regulation 32 and 33 of BR Regulations, alongwith the said Annexure-6 of BR Regulations is attached as Annexure P-9 (Colly). Besides, the Convening Orders for the composition of various Departmental Boards also makes it mandatory for one of the Board Member detailed to be a JCO/Supervisor. A perusal of various convening orders for the various Departmental Boards reveals that the petitioners herein have been detailed in the capacity of Members of such Board thereby signifying their supervisory status. Copies of such convening orders for the mentioned Boards are annexed herein as Annexure P-10 (Colly). Further, Para 33 of the policy letter on 'Instructions for Maintenance of Cash and Funds., issued by the Headquarters DGBR, on maintenance of cash books categorically stipulates that the duty of writing of the cash book is the responsibility of Subordinate Commissioned Officer or Junior Commissioned Officer/Supervisors. Herein again, the petitioners have been performing the duty of writing and maintenance of cash book signifying their status as Supervisors. Copy of HQ DGBR policy letter on 'Instructions for Maintenance of Cash and Funds is annexed herein as Annexure P-11. Additionally, the supervisory status of the petitions is also certified as the petitioners herein are declared members of 'Supervisors Mess'. Copy of Mess Bill in respect of one of the petitioners to this effect is annexed herein as Annexure P-12. The Supervisory status of the petitioners is also brought out by the fact that they have been authorized to wear leather belt on the uniform which

is authorized only to the supervisors in terms of HQ DGBR letter dated 11.10.2010. Copy of HQ DGBR letter dated 11.10.2010 is annexed herein as Annexure P-13. Furthermore, GOI letter dated 20.10.2010 lists out the payment of High Altitude Allowance (HAA) to member of GREF in which Supervisors have also been listed for payment of Rs.960/- and Rs.1440/- depending on the altitude. The petitioners herein are also in receipt of the mentioned HAA which again signifies their status as Supervisors. Copy of Govt. of India letter dated 20.10.2009 is annexed herein as Annexure P-14 and copy of the pay slip of one of the petitioners showing receipt of high altitude allowance is annexed herein as Annexure P-15. It is also pertinent to mention that the list of Sr. Administrative Officers in BRO as on date has serving Administrative Officers who had the same designations as LDC, UDC, NT Supervisor capacity, similar to the ones held by petitioners herein. Hence, it is not understood as to how the petitioners herein cannot qualify as supervisors based on their present designation whereas in the past, the same designations have led to the appointment of present Administrative Officers. In one case these designations qualify as supervisor while in another similar case the same designations are not considered as qualifying the criteria leading to arbitrary discrimination. Copy of the list of latest Administrative Officers is annexed herein as Annexure P-16. In view of the foregoing, and in light of statutory provisions mentioned above, it is amply clear that the designations of the petitioners herein have been established beyond doubt as fulfilling the role of Supervisors and hence, they have met the essential requirement of their experience in supervisory capacity. As such, the findings of the Committee on the subject were erroneous and wrong in law.

20. A perusal of the counter affidavit filed by the respondents would show that the above of the petitioner have not been disputed by the respondents.

21. The petitioners have also placed before us an additional affidavit dated 29th November, 2012 making detailed assertions about the duties of the petitioners in supervisory capacity and enclosing documents in support along with. In addition, the petitioners have placed on record the following documentary material in support of their contention:-

(i) Starred question in the Parliament as to whether the Border Roads Organization has recruited a large number of Administrative Officers between 1983-96 based on wrong experience certificates as pointed out by BRDB by the letter dated 25th July, 2011? If so, as to how many officers have been recruited during the period and what action has been taken on the issue.

(ii) The reply dated 13th December, 2012 sent by the DGBR to the effect that recruitment in the past by the UPSC must have been done with due diligence as per the rules and regulations in vogue and that the issuance of experience certificates by the employer to the employees for the works done by them is within the ambit of office procedure and ethics and that in the present case no situation of blame or error has been established at any level of scrutiny.

(iii) A communication dated 6th December, 2012 sent by DGBR referring to the disciplinary action initiated against the GREF officers with regard to the experience certificates (as relied upon by the petitioners) issued by them who stood discharged in the disciplinary proceedings.

22. In order to completely and effectively adjudicate on the subject matter, the respondents were granted leave to respond to the specific averments made in ground 'C' of the writ petition as well as to deal with the aforenoticed documentary evidence placed before this court. In the response, the respondents have filed an affidavit dated 22nd January, 2013 enclosing as Annexure 'B' a copy of a document purporting to be a duty chart in respect of different posts in the DGBR. However, perusal of the document does not show what the document is a part of and the particulars of the authority which has issued the said chart. The respondents were given liberty to place complete document on record which has not been done even in their additional affidavit. Obviously this incomplete document cannot be looked at for any purpose.

23. However, this aspect of the matter does not need to detain us any further. In consonance with response of the respondents to the parliamentary question, the respondents have filed an affidavit dated 1st July, 2013 in WP(C)No.4997/2011 (page 281). The para 4 of this affidavit deserves to be considered in extensor and reads thus:-

"4. That it is submitted that the supervisory experience certificates have been issued by officers of BRO following the practice and precedence hitherto existing in the matter of issuing certificate for the similar posts in the absence of any guidelines on the subject matter."

(Emphasis supplied)

24. It is clearly evident from the above that respondents have affirmed the authenticity as well as correctness of the certificates on which the petitioners were placing reliance. It is also clearly stated that such certificates were being issued in due course and as prescribed by the Border Roads Organization.

25. In this background, the issue as to the validity of the certificates on which the petitioners place reliance and the question as to whether they were performing duties in a supervisory capacity or not finds finally settled and needs no adjudication.

28. The candidature of the writ petitioners in WP(C)Nos.5457/2011 and 6403/2011 was rejected on the sole ground that their aforenoticed certificates were not with the prescribed procedure. This objection does not subsist any further.

29. The experience certificates relied upon by the petitioners have to be thus considered as valid and proper. No issue at all remains with regard to the experience possessed by the petitioners before this court and as such the service of the petitioners in WP(C)Nos.6403/2011 as well as 5457/2011 are required to be considered as meeting the requirements of the eligibility conditions notified by the UPSC are valid.

30. In view of the above discussion, there remains no reason for denying appointment to the petitioners.

31. So far as writ petitioners in WP(C)No.4997/2011 are concerned, the respondents scrapped the selection process even though there was no reason at all for rejection of their candidature.

32. It is necessary to point out that even the Committee in its report dated 28th February, 2011 had recommended the selection of these petitioners in para 4 and 5 of its report. The respondents therefore had before them the list of candidates whose candidature was recommended and those whose candidature were not being recommended by the

committee or faulted on the ground of the experience certificate. It is trite that once the selection can be segregated and chaff separated from grain, the candidates whose appointment is not tainted or illegal have to be given appointments (Ref. (2003) 7 SCC 285, **Union of India & Ors vs. Rajesh P.U. Puthuvalnikathu & Anr.** and (2010) 7 SCC 678, **East Coast Railway & Anr. vs. Mahadev Appa Rao & Ors.** and connected case). There was therefore no reason for not issuing the appointments to these 21 candidates.

33. Ms. Jyoti Singh, learned Senior counsel appearing for the petitioner has also drawn our attention to the principle laid down in (2010) 10 SCC 707 **Girjesh Shrivastava & Ors. vs. State of Madhya Pradesh & Ors.** Wherein it has been held that UPSC can validly shortlist when applications are large in number and this does not amount to change or altering the criteria in the Recruitment Rules or advertisement. No such issue has been raised before us.

34. In view of the above, these writ petitions have to be allowed and we direct as follows:-

(i) The rejection of the candidature of writ petitioners in WP(C) Nos.5457/2011 and 6403/2011 is held to be illegal and is hereby set aside and quashed.

(ii) We also hold that the cancellation of the selection process held pursuant to advertisement No.6 dated 28th March, 2009 – 3rd April, 2009 of Employment Newspaper to the post of Administrative Officers for the General Reserve Engineer Force of the Border Roads Organization to be illegal, unjustified, arbitrary and is hereby set aside and quashed.

(iii) The respondents shall, as a result of the above, issue offer of appointment to the petitioners in these three writ petitions in accordance with prescribed procedure within eight weeks from today.

35. Needless to say that the appointments would be subject to petitioners fulfilling all prescribed requirements which would include the requisite medical examination.

36. These writ petitions are allowed in the above terms.(2010) 10 SCC 707 **Girjesh Shrivastava & Ors. vs. State of Madhya Pradesh & Ors.**

ILR (2013) V DELHI 3322
W.P.

DK SINGH ....PETITIONER

VERSUS

UOI & ORS. RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. NO. : 1981/2012 DATE OF DECISION: 10.07.2013

Service Law—Constitution of India, 1950—Article 226; Aircraft Rules, 1937—Rule 8A—Principles relating to Rule 8A of the Aircraft Rules, 1937, pertaining to the "Procedure for Passenger and Carrying on Baggage Screening"—Duties of X Ray officers notified in para 5.4. As per Para 5.4.5 it is mandated that if any unauthorized articles are present or if there is doubt as the contents of any bag, the bag must be hand searched. The petitioner approached the court assailing the order of the disciplinary authority imposing a penalty a reduction in pay scale, and of not earning increments of pay for a period of two years on the charge of gross misconduct, indiscipline and dereliction of duty in leaving his duty post on his own. The Petitioner was deployed as Trained Staff No. 2 to monitor X-Ray machine on 25.07.07, when he spotted that certain baggage either had a large amount of cash or explosives. The Petitioner than requested the passenger to go for a manual search of the bag, and the baggage in question was handed over to the Petitioner's superior, a Sub—Inspector, complying with the provisions of para 5.4 of Rule 8A of the Aircraft Rules after which the role of the Petitioner came to an end. On the complaint of the passenger, subsequently, it emerged that while manually searching the bag, the Petitioner's superiors extorted a sum of Rs. 2,00,000,

which they admitted to, from which an amount of Rs. 90,000 was recovered. Despite the above position, Petitioner was charge sheeted with a) Deliberately providing his superiors an opportunity for physical checking of the bag which contained a large amount of cash and b) for leaving his duty post, and held guilty of the first charge by the Disciplinary Authority. Petitioner challenged the decision on the ground that there was no evidence against him. Held: No dispute that Petitioner was not involved with the illegal actions of his superiors. Further, deemed to have complied with all the requirements of informing the Shift in-charge, and could not have anticipated that the Shift in charge would extort money from the passenger. No evidence against the Petitioner, and findings of the Revisional Authority finding the Petitioner guilty are quashed and set aside.

It is evident that the above procedure is to be followed if, the physical checking of the passenger, a more detailed checking is envisaged. This prescription does not relate to detection/ suspicion about the contents of a passenger baggage while subjecting it to an X-Ray examination. The above narration would show that there is not a whit of evidence to support charge no.1 which was levelled against the petitioner. The Circular No.AS-10/2007 dated 16th May, 2007 thus had no application to the case in hand. **(Para 25)**

The petitioner could not have had any knowledge that Sub-Inspector K.B. Kopuri nursed any mala fide intention with regard to the contents of the passenger's baggage. The petitioner cannot be faulted for informing Sub-Inspector K.B. Kopuri, the colleague who was admittedly on duty with the petitioner. Certainly, the petitioner could not have expected that his Shift In-charge (Inspector/Exe. R.S. Shekhawat) would have extorted amounts from the passenger. In any case, no fault can be attributed to the petitioner for the wrong doings of his superior Inspector/Exe R.S. Shekhawat, the Shift In-Charge or his college Sub-Inspector K.B. Kopuri.

The passenger has made no complaint at all against the petitioner. It is manifest that there is no evidence against the petitioner. **(Para 26)**

For all the above reasons, the finding of the Enquiry Officer; the order dated 13th June, 2008 of the Disciplinary Authority; order dated 9th April, 2009 of the Appellate Authority and 11th January, 2010 of the Revisional Authority finding the petitioner guilty of the first charge are not sustainable in law and are hereby set aside and quashed. **(Para 27)**

As a result, the petitioner would be entitled to all consequential benefits upon setting aside of the aforenoticed punishment imposed upon the petitioner. **(Para 28)**

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Anand Mishra, Advocate.

FOR THE RESPONDENTS : Mr. Asish Nischal, Advocate.

RESULT: Writ Petition allowed.

GITA MITTAL, J. (Oral)

1. By way of the present writ petition, the petitioner has assailed the order dated 13th June, 2008 passed by the disciplinary authority accepting the recommendations dated 12th May, 2008 made by the Enquiry Officer on conclusion of disciplinary proceedings against the petitioner. The petitioner has also assailed the order passed on 9th April, 2009 by the appellate authority rejecting his appeal and the order dated 11th January, 2010 made by the revisional authority.

2. There is no material dispute to the facts giving rise to the present petition.

3. It appears that the petitioner was working as a Sub Inspector with the Central Industrial Security Force and was posted as X-Ray Baggage Inspection System (X-BIS) at the Indira Gandhi International Airport, New Delhi on the 25th of July, 2007, between 0700 hrs. to 2000 hrs. At that time, Inspector/Exe R.S. Shekhawat was deployed as the Inspector In-charge of Security Hold Area (SHA) – 1A at the said airport.

The petitioner was deployed as Trained Staff No.2 to monitor X-Ray Machine Screen while Sub-Inspector K.B. Kopuri was deployed as Trained Staff No.3 (for manual search) at point SHA (IA) X-BIS No.2. The petitioner monitored the baggage of a passenger, Mr. Sudesh Kumar Gulati on the X-Ray machine. As the baggage image showed something in orange colour and dark, there was suspicion of huge cash amount or explosive being carried by the passenger. As such the petitioner requested the said passenger to go for manual search of his bag to which passenger requested his baggage check to be conducted in privacy.

4. The petitioner has drawn our attention to the circular No.23/2005 (page 24) dated 11th July, 2005 whereby the respondents have notified the "Procedure for Passenger and Carry-On Baggage Screening" in term of Rule 8A of the Aircraft Rules 1937. As per the respondents policy, we find that the duties of the X-Ray Officer have been notified in para 5.4.

As per para 5.4, the baggage of the passenger is required to be submitted to examination by X-Ray machine. As per para 5.4.5, it is mandated that if any unauthorized articles are present or if there is doubt as to the contents of any bag, the bag must be hand searched.

5. So far as the incident of 25th July, 2007 is concerned, the petitioner had claimed to have handed over the baggage to Trained Staff No.3 -Sub-Inspector K.B. Kopuri for the manual search. Sub-Inspector K.B. Kopuri told the owner that for check in privacy he had to come to separate room to which the passenger consented. The petitioner, therefore, had complied with the requirements of para 5.4.5.

6. So far as information to the Inspector In-charge of Security Hold Area is concerned, the petitioner duly informed Sub-Inspector K.B. Kopuri. It is an admitted fact that the private search was conducted by Sub-Inspector K.B. Kopuri along with Inspector/Exe R.S. Shekhawat in a separate room. It is also an admitted fact that the role of the petitioner came to an end with his having intimated Sub-Inspector K.B. Kopuri about there being something suspicious in the baggage of the passenger.

7. It appears that on the 26th of July, 2007, the passenger Mr. Sudesh Kumar Gulati lodged the following complaint:-

> "It is submitted that on 27.07.07 at about 1130 hrs with family arrived from Mumbai by Flight Nos.S2 102. Shri Gulati came to Domestic CISF C/Room, IGI Airport and reported that on 25.07.07 at about 0830 hrs when he along with his family was travelling by flight IC-167 to Mumbai, then in SHA 1-A while he was screened by the CISF security personnel, he was informed that his bag contained some suspicious item and the bag had to be checked physically. After this, I got the bag checked by the screening person. After checking the bag, screening man took me to a room outside SHA, where four of the CISF ladies staff was having breakfast. The screening man told those ladies to go out of the room and they obliged his directions. One Inspector came inside the room and latched the room and CISF person opened my bag, and asked me from where did you get such huge amount of cash? Then I answered that I got this money for the admission of my child, then screening man said that Rs. Five Lakhs should be given to him otherwise he would be arrested. In the course of bag checking a bundle of Rs.500/-domination notes fell down, subsequently I told the screening man that a bundle had fallen down but he refused to acknowledge this, then I myself picked the bundle and kept that in my bag. After that screening man took Rs.500000/-(five lakh), then I pleaded that screening man that the amount was meant for the admission of my child and if he takes I would be in trouble. But the screening man did not yield to the plea and replied that it was my headache/problem. After that the screening man kept two bundles of Rs.1000/- denomination note (two lacs). Then Inspector instructed the screening man to let the passenger go. While coming out of the room I read the names of the screening man and Inspector as K.B. Kopuri and R.S. Shekhawat respectively. Later, screening man informed me to go with the bag. I came to the SHA and the bag was screened, stamped and I proceeded to the boarding gate as I was the last pax of the flight."

8. The petitioner was suspended from service with effect from 27th July, 2007.

9. The matter was informed to Senior Commandant by the Raman, the then Deputy Commandant. The Senior Commandant with other officers thereupon interrogated Inspector/Exe R.S. Shekhawat and Sub-Inspector K.B. Kopuri as well as the petitioner. During the interrogation, Inspector/Exe R.S. Shekhawat as well as Sub-Inspector K.B. Kopuri admitted that

they had extorted Rs.2,00,000/- from Mr. Sudesh Kumar Gulati on the 25th of July, 2007. It is on record that an amount of Rs.90,000/- was recovered from the residence of Inspector/Exe R.S. Shekhawat through Inspector S.S. Rana. So far as the balance amount of Rs.1,10,000/-is concerned, Sub-Inspector K.B. Kopuri revealed that he had invested this amount in shares and the amount would be handed over to the CISF officers on 27th July, 2007 by 1300 hrs.

Mr. Asish Nischal, learned counsel appearing for the respondents confirms that this amount was actually handed over by Sub-Inspector K.B. Kopuri to the CISF officer as stated.

10. Despite the above position, the petitioner was issued a charge sheet dated 20th August, 2007 wherein the following two charges were made against him:-

"ARTICLE OF CHARGE I

An act of gross misconduct, indiscipline, violation of lawful orders and malafide intention in that No.033610018 SI/EXE D.K. Singh of CISF Unit IGI Airport New Delhi while detailed for day shift duty at SHA IA X-BIS No.2 after detecting orange color layer impression in the machine of a baggage which could have been explosive or huge quantity of cash in bundles without report the matter to SHA I/C, deliberately provided opportunity to SI/ EXE K.B. Kopuri for physical checking of said baggage which actually contained a huge quantity of cash in bundles and which led SI/Exe K.B. Kopuri to extort Tx.02 lacs from concerned pax in violation of IG/APS HQrs Circular No.AS 10/07 dated 16.5.2007.

ARTICLE OF CHARGE II

An act of gross misconduct, indiscipline and dereliction of duty in that No.033610018 SI/EXE D.K. Singh of CISF Unit IGI Airport New Delhi while detailed for day shift duty from 0700 hrs to 2000 hrs at SHA IA X-BIS No.2 on 25.07.2007 left his duty post on his own"

11. The petitioner submitted his reply dated 27th August, 2007 informing the respondents that he had complied with the prescribed procedure in discharge of his duties.

12. The Enquiry Officer was appointed in the matter who conducted an inquiry on the above charges. The petitioner had pleaded not guilty to the charges.

13. Interestingly, the respondents produced only Inspector/Exe R.S. Shekhawat and Sub-Inspector K.B. Kopuri as witness in the matter. The inquiry was concluded on 12th May, 2008 and a detailed inquiry report of the same date was submitted by the Enquiry Officer. In the inquiry report, the Enquiry Officer absolved the petitioner of charge no.2. He however, returned a finding of "guilty" so far as charge no.1 was concerned.

14. The Disciplinary Authority agreed with the findings in the report of the Enquiry Officer. As a result of finding of guilt so far as charge no.2 was concerned, the Disciplinary Authority imposed the penalty of *"Reduced to minimum in the time scale of pay for a period of two years. It is further directed that he will not earn increments of pay during the period of reduction and that on expiry of this period the reduction will have the effect of postponing his future increments of pay"* with immediate effect upon the petitioner.

15. The petitioner had made a statutory appeal to the Deputy Inspector General, Airport Sector (North Zone), CISF. This appeal was also rejected by the appellate authority by the order dated 9th April, 2009. The petitioner's revision to the Additional Director General, CISF (Ministry of Home Affairs) was rejected by an order dated 11th June, 2010. The petitioner has assailed the finding of the Enquiry Officer; order dated 13th June, 2008 of the Disciplinary Authority; order dated 9th April, 2009 of the Appellate Authority and 11th January, 2010 of the Revisional Authority by way of the present writ petition.

16. The challenge of the petitioner primarily rests on the ground that the instant case was a case of no evidence to support the charges against the petitioner.

17. During the course of submissions, it was brought to our notice that the respondents have conducted disciplinary proceedings against Inspector/Exe R.S. Shekhawat pursuant to a charge sheet dated 17th July, 2008 wherein the following charges were levelled against him:-

"Article of Chare – I

An act of gross misconduct, indiscipline and dishonesty in that No.924330432 Insp/Exe R S Sekhawat of CISF Unit IGI Airport New Delhi, colluded with SI/Exe K B Kopuri in extorting an amount of Rs.02 lacs from a passenger with malafide intention on 25.7.2007 at about 0830 hrs. While performing day shift duty at SHA Terminal IA as In-charge SHA and collected Rs.90,000/-as his share of the extorted amount.

Article of Charge – II

Gross misconduct & dereliction of duty in that No.924330432 Insp/Exe R S Sekhawat of CIST Unit IGI Airport New Delhi being In-charge of SHA Terminal IA on 25.07.2007 in day shift failed to discharge his duty efficiently & honestly.

Article of Charge – III

Gross misconduct and dereliction of duty in that No.924330432 Insp/Exe R S Sekhawat of CISF Unit IGI Airport New Delhi being In-charge of SHA Terminal IA on 25.07.2007 in day shift also failed to exercise proper supervision over his subordinates in violation of instructions in IG/AS Circular No.AS 10/07 dated 16.05.07 wherein the personnel of ASG are barred from questioning about carriage of cash & other valuables"

18. We are informed that Inspector/Exe R.S. Shekhawat was found guilty of all charges in the disciplinary proceedings and stands dismissed from service on 17th July, 2008.

19. So far as Sub-Inspector K.B. Kopuri is concerned, disciplinary proceedings were held against him pursuant to the following charge sheet dated 6th August, 2007:-

"ARTICLE OF CHARGE – I

An act of gross misconduct, indiscipline and violation of lawful orders in that No.032460045 SI/Exe K.B. Kopuri of CISF Unit IGI Airport New Delhi while detailed for day shift duty at SHA-1A on 25/07/2007 asked a pax about carriage of huge amount of cash violating IG/APS HQrs. New Delhi Circular No.10/07 dated 16.05.2007.

ARTICLE OF CHARGE – II

An act of gross misconduct, indiscipline and dishonesty in that No.032460045 SI/Exe K.B. Kopuri of CISF Unit IGI Airport New Delhi extorted Rs.02 lakhs from a passenger with malafide intention on 25.7.2007 at about 0825 hours while detailed for day shift duty at SHA-1A.

ARTICLE OF CHARGE – III

An act of gross misconduct, indiscipline in that No.032460045 SI/Exe K.B. Kopuri of CISF Unit IGI Airport New Delhi violated sub rule (1) of Rule 16 CCS (Conduct) Rules by indulging in speculative trading of shares etc.

20. These charges were also proved in the disciplinary proceedings and he was dismissed from service on 19th July, 2008.

21. Coming to the case of the petitioner, the respondents have contended that he had failed to inform the Shift In-charge about the same. Perusal of the circular dated 16th May, 2007 would show that in case there is suspicion with regard to the baggage of any person upon its X-Ray, the same has to be subjected to hand search. The petitioner was assigned duties is stated to have so noticed some article and had informed Sub-Inspector K.B. Kopuri who was also on duty with him.

22. In terms of Circular No.23/2005 dated 11th July, 2005 whereby the respondents have prescribed the procedure for passenger and carry-on baggage screening which has been issued in terms of Rule 8A of the Aircraft Rules, 1937. As per para 5.4.5 noted above, the petitioner had met the requirements of this para as he had given due information of his being noticing image in orange colour. There is no dispute at all that the petitioner was not involved in the illegal actions of Inspector/Exe R.S. Shekhawat and Sub-Inspector K.B. Kopuri.

23. The respondents state that the petitioner was deputed at the X-Ray machine. The expectation that the petitioner would leave the X-Ray machine unmonitored while he went to Inspector/Exe R.S. Shekhawat to inform him would be impermissible and was also practically not possible. Even if there was the requirement of expressly informing the Shift In-Charge by the X-Ray machine operator himself, the petitioner would be deemed to have complied with such requirement as he had informed

Sub-Inspector K.B. Kopuri of the same, who conveyed the information to Inspector/Exe. R.S. Shekhawat, the Shift In-charge.

24. The respondents have placed reliance on para 7 of the Circular No.AS-10/2007 dated 16th May, 2007 which reads as follows:

> "(vii) If, initial physical checking of the passenger calls for a more detailed checking or if the passenger himself requests for the checking to be made away from the normal area, further checking must be carried out by the ASG personnel under the close supervision of Inspector Incharge or AC Incharge available at the time."

25. It is evident that the above procedure is to be followed if, the physical checking of the passenger, a more detailed checking is envisaged. This prescription does not relate to detection/suspicion about the contents of a passenger baggage while subjecting it to an X-Ray examination. The above narration would show that there is not a whit of evidence to support charge no.1 which was levelled against the petitioner. The Circular No.AS-10/2007 dated 16th May, 2007 thus had no application to the case in hand.

26. The petitioner could not have had any knowledge that Sub-Inspector K.B. Kopuri nursed any mala fide intention with regard to the contents of the passenger's baggage. The petitioner cannot be faulted for informing Sub-Inspector K.B. Kopuri, the colleague who was admittedly on duty with the petitioner. Certainly, the petitioner could not have expected that his Shift In-charge (Inspector/Exe. R.S. Shekhawat) would have extorted amounts from the passenger. In any case, no fault can be attributed to the petitioner for the wrong doings of his superior Inspector/ Exe R.S. Shekhawat, the Shift In-Charge or his college Sub-Inspector K.B. Kopuri. The passenger has made no complaint at all against the petitioner. It is manifest that there is no evidence against the petitioner.

27. For all the above reasons, the finding of the Enquiry Officer; the order dated 13th June, 2008 of the Disciplinary Authority; order dated 9th April, 2009 of the Appellate Authority and 11th January, 2010 of the Revisional Authority finding the petitioner guilty of the first charge are not sustainable in law and are hereby set aside and quashed.

28. As a result, the petitioner would be entitled to all consequential

benefits upon setting aside of the aforenoticed punishment imposed upon the petitioner.

29. The respondents shall pass appropriate orders in this regard within four weeks from today and communicate the same to the petitioner forthwith.

30. The payment in terms of the orders passed shall be effected to the petitioner within a further period of six weeks thereafter. This writ petition is allowed in the above terms.

ILR (2013) V DELHI 3332
CRL. A.

DHARMENDRA ....APPELLANT

VERSUS

STATE ....RESPONDENT

(S.P. GARG, J.)

CRL. A. NO. : 64/2011 DATE OF DECISION: 18.07.2013

Indian Penal Code, 1860—Sections 393 and 308—Robbery and attempt to cause culpable homicide—Appellant with his associates entered into a godown—Armed with knives and Saria—Asked the Chowkidar/ Complainant Ram Avtar not to raise alarm—Chowkidar raised alarm—Gave beatings and injured Ram Avtar—Public persons gathered—Attempted to escape—Appellant and one of his associates apprehended—Other associated to flee—Left knives at the spot—handed over to police alongwith the Knives—FIR no. 111/2007 IPC registered at P.S. Nangloi appellant and his associates charge sheeted for offence punishable under section 392/394/395/397/398/308/34 IPC and

Section 25 Arm Act—Charges for offence punishable under section 395/398/308/34 IPC framed—prosecution examined 12 witnesses—Statement of appellant under section 313 Cr. P.C. recorded—Appellant held guilty for offence under section 393/308 IPC—aggrieved appellant preferred appeal—Held—Major Discrepancies and contradiction regarding exact number of assailants, the manner of their apprehension, the circumstances in which they were apprehended—Identity of Assailants not known to the eye witnesses—no Test Identification proceedings conducted—injuries on the person of one of the assailants not explained—Prosecution voluntarily suppressed true facts–Prosecution not presented true facts—Conviction cannot be sustained—Appeal Allowed—Judgment set aside.

Important Issue Involved: Where the identity of the assailants is not known to the eye-witness, it is incumbent upon the Investigating Officer to get such suspect identified from eye-witnesses in Test Identification parade to ensure that the person arrested is the real culprit.

Omission to explain injuries on the accused can be regarded as voluntary suppressing true facts.

Merely because a person was apprehended by public, it dose not follow that he was the culprit.

Major discrepancies and contradictions in the deposition of prosecution witnesses reflects that the prosecution has not presented true facts.

[Vi Gu]

APPEARANCES:

FOR THE APPELLANT : Mr. R.R. Rajesh, Advocate.

FOR THE RESPONDENT : Mr. M.N. Dudeja, APP for the State.

RESULT: Appeal allowed.

S.P. GARG, J.

1. The appellant-Dharmendra challenges a judgment dated 01.11.2010 in Sessions Case No.140/2007 arising out of FIR No.111/2007 registered at Police Station Nangloi by which he was convicted under Section 393/308 IPC and sentenced to undergo Rigorous Imprisonment for five years under Section 393 IPC and Rigorous Imprisonment for three years under Section 308 IPC with fine Rs. 10,000/-.

2. Allegations against the appellant were that on 08.02.2007 at about 03.00 A.M. he and his associates Munna Khan (since P.O.), Kalia, Subodh and Chotu (not arrested) committed trespass in a godown at Todar Mal Chowk, Mundka in occupation of Cadila Health Care Limited. Ram Avtar was Chowkidar at the said godown. After finding the assailants in the godown, he came out of his cabin and inquired from them as to who they were. The assailants were armed with knives and saria. They asked Ram Avtar not to raise alarm or else he would be killed. He raised an alarm. Public persons from the neighbourhood gathered there. The assailants gave beatings and injured him. They attempted to escape from the spot. Dharmendra and Munna Khan were apprehended after some chase and their associates succeeded to flee. The police was informed and their custody was handed over to the Investigating Officer along with the knives left at the spot. Necessary proceedings were conducted at the spot. The injured was taken to hospital and medically examined. The Investigating Officer lodged First Information Report and recorded the statement of the witnesses conversant with the facts. Pursuant to Munna's disclosure statement, a country made pistol with cartridge was recovered. After completion of investigation both Dharmendra and Munna Khan were sent for trial for committing offences punishable under Sections 392/394/395/397/398/34 IPC and under Section 25 Arms Act. Vide orders dated 29.08.2007, they were charged for committing offences punishable under Section 395/398/308/34 IPC and Section 25 Arms Act. The prosecution examined 12 witnesses to substantiate the charges. During trial, Munna Khan absconded and finally declared Proclaimed Offender. In his 313 statement, Dharmendra pleaded false implication. On appreciating the evidence and after considering the various contentions raised by the parties, the Trial Court, by the impugned judgment held Dharmendra guilty for committing offences under Section 393/308 IPC

only. It is relevant to note that the State did not file any appeal to challenge appellant's acquittal under Section 395/398 IPC and 25 Arms Act.

3. I have examined the relevant materials. It reveals that major discrepancies and contradictions have emerged in prosecution case regarding the exact number of assailants and how and in what manner Dharmendra and Munna Khan were apprehended etc. Complainant-Ram Avtar in his statement (Ex.PW-1/A) had given the exact number of assailants i.e. four. However, after conclusion of investigation, the police charge-sheeted five individuals. As per the prosecution, Dharmendra and Munna Khan were apprehended at the spot and the other assailants succeeded to flee. It is unclear how the investigating agency ascertained that assailants/intruders were five in number as the identity of Kalia, Subodh and Chotu could not be ascertained and established. It is not certain how and from where the police came to know their names. Their addresses could not be ascertained/found during investigation. The Trial court for valid reasons did not believe the prosecution's case and rightly concluded that it was not a case of 'dacoity'. During examination, Ram Avtar was not sure how many assailants had committed trespass. He merely deposed that he saw four-five boys who had entered in the godown by jumping the wall/gate.

4. The prosecution witnesses including the complainant have given inconsistent version as to how and under what circumstances both Dharmendra and Munna Khan were apprehended. In Daily Diary (DD) No.30A (Ex.PW-11/A) recorded at 03.12 A.M. at Police Station Nangloi, there is no mention that the assailants were apprehended at the spot and were in the custody of the public. In statement (Ex.PW1/A) it is recorded that the assailants were chased and the complainant was successful to apprehend Dharmendra and Munna Khan after some chase. PW-1 (Ram Avtar) did not support the prosecution and in court statement as PW-1 categorically stated that he was informed by the neighbours that two of the assailants who were trying to escape by climbing a tree were apprehended by the police. He further deposed that the said two individuals were not arrested in his presence. Additional Public Prosecutor cross-examined him after seeking court's permission. The complainant denied the suggestion that he had stated to the police about the chase and apprehension of the accused at the spot. There are no reasons to disbelieve PW-1 (Ram Avtar). PW-2 (Amit @ Bittoo) who reached the spot after

hearing the noise of the villagers gave contradictory version about the circumstances in which the appellant and Munna Khan were apprehended. He deposed that when he came out of his house on hearing the noise, the village people told him that two thieves had entered in the back side of his house while escaping. They searched for them and were found in one of the kothri constructed in the back side of his house. PW-8 (ASI Vir Singh), PCR official on duty deposed that at about 03.00 A.M. he reached the spot on getting information about a quarrel. The public persons had apprehended two boys and one was having injury mark. They produced both the boys before him with two knives. He, however, could not identify the accused persons. In the cross-examination by Additional Public Prosecutor, he expressed his inability to say that names of the boys produced before him were Munna and Dharmendra. He volunteered that he had not seen their faces. He further claimed that he had not produced both the accused persons before the Investigating Officer. He volunteered to add that he only produced the knives before the Investigating Officer. Scanning the testimony of these witnesses it transpires that there are inconsistent versions as to how, when and where Dharmendra and Munna Khan were apprehended. PW-1 (Ram Avtar) who had direct confrontation with the assailants at odd hours at night did not claim that they were apprehended from inside the kothri in the back side of PW-2's house as disclosed by the village people. The prosecution did not examine any village people who had apprehended Dharmendra and Munna Khan at the site. Since the identity of the assailants was not known to the eye witness, it was incumbent upon the Investigating Officer to get such suspect identified from eye-witnesses in a test Identification Parade to ensure that the person arrested was the real culprit. It was more so, as Ram Avtar denied apprehension by him after chase. However, during investigation, no such Test Identification Proceedings were conducted. The Trial Court discarded the prosecution's version about possession of knife with the appellant. PW-1 (Ram Avtar) did not attribute any specific role to the appellant in inflicting injury to him or use of knife, in the occurrence. He was unable to disclose if the injuries sustained by him were caused with 'saria' or 'knife'. There was no blood on the knives found at the spot. One of the assailants had sustained injuries, however, he was not taken for medical examination and the prosecution did not explain injuries recovered by him. Omission to explain the injuries on the accused can be regarded as voluntary suppressing true facts. Merely because the appellant was apprehended by

public, it does not follow that he was the culprit. In the MLC Ex.PW-9/A there is mention of only of 'physical assault' and nature of injuries as 'simple'. The victim was discharged after four or five hours. PW-3 (Anil Jaitely), owner of the godown, was not informed of the incident immediately.

5. In the light of vital and major discrepancies and contradictions, it appears that the prosecution has not presented true facts. Consequently, the appellant's conviction cannot be sustained. The appeal is allowed and the impugned judgment is set aside. The appellant be released forthwith, if not required in any other case.

6. A copy of the order be sent to Jail Superintendent for compliance of the above order. Copy be also sent to the accused/appellant through Jail Superintendent. Trial Court record, if any, along with copy of this order be sent back to the Trial Court.

ILR (2013) V DELHI 3337
CRL. A.

MANPREET SINGH @ BOBBY ....APPELLANT

VERSUS

JITENDER SINGH @ SONU & ORS. ....RESPONDENTS

(S.P. GARG, J.)

CRL.A. NO. : 1166/2011 DATE OF DECISION: 19.08.2013

Indian Penal Code, 1860—Section 308—Attempt to commit culpable homicide—Quarrel between complainant and respondents over a trivial issue—Injured removed to hospital—Medically examined—Complainant got his statement recorded on next day—FIR lodged—Charge sheet for offence under section 308/34 IPC filed—Charge framed—Prosecution examined 11 witnesses—Statements of respondents under section 313 Cr.P.C. recorded—Examined 8 witnesses in defence—Respondents acquitted for the charge—State did not challenge the acquittal—Aggrieved complainant/victim preferred appeal—Contended—Complainant implicated and attributed specific role to respondents in causing injuries—Other witnesses corroborated him on all material facts—no ulterior motive to falsely implicate the respondents—No conflict in the ocular and medical evidence—Respondents contended—Acquittal based on fair appraisal of evidence—No sound reasons to interfere—Held—Nature of Simple with blunt object—Inordinate delay in lodging the complaint—Complainant was conscious and oriented—No reason/excuse for not making the statement then and there—Statement was made after due deliberations and consultation—No weapon of offence recovered form respondents—Presence of witnesses doubtful as neither intervened to sane the injured nor took the victim to hospital—Were interested witnesses—One of the respondents also suffered injuries—Medically examined—Injuries were simple with sharp object—No explanation for not registering a cross-case—No explanation as to how and under what circumstances respondents suffered injuries—No sound reason for registered FIR for attempt to commit culpable homicide—No infirmity in the judgment—Appeal unmerited—Dismissed.

Important Issue Involved: The Standards to be applied by the High Court while considering an appeal against acquittal is one were the prosecution establishes substantial and compelling reason, which by and large are confined to serious or grave mis-appreciation of wrong application of law and an approach which lead to complete miscarriage of justice.

Appeal against acquittal is considered on slightly different parameters compared to an ordinary appeal.

The presumption of innocence of the accused is further strengthened by his acquittal after a full trial, which assumes critical importance in our jurisprudence.

If two views are possible on evidence adduced in the case then the favourable to the accused should be adopted.

[Vi Gu]

APPEARANCES:

FOR THE APPELLANT : Mr. Mahesh Verma, Advocate.

FOR THE RESPONDENTS : Mr. Anil Kumar and Sunil Singh, Advocate.

RESULT: Appeal Dismissed.

S.P. GARG, J.

1. Manpreet Singh @ Bobby (the victim) challenges the correctness of judgment dated 26.07.2011 in Sessions Case No.181/2009 arising out of FIR No.697/2007 registered at Police Station Rajouri Garden by which the respondents were acquitted of all the charges.

2. Daily Diary (DD) No.40 (Ex.PW8/A) was recorded on 06.09.2007 at about 10.35 P.M. at police post Raghubir Nagar about a quarrel at RGB-142, Janta Flat, Raghubir Nagar, Delhi. The investigation was assigned to ASI Partap Singh who with Const. Narender Singh went to the spot and learnt that injured had already been taken to DDU hospital. The Investigating Officer went there and collected the MLC of the complainant. He did not lodge complaint due to pain in head. His statement was recorded on 07.09.2007 at about 07.00 P.M. and the First Information Report was lodged. Statements of witnesses conversant with the facts were recorded. After completion of investigation a charge-sheet was filed under Section 308/34 IPC against the respondents in the court. They were duly charged and brought to trial. The prosecution examined 11 witnesses. In their 313 statements, the respondents pleaded false

implication. They also examined 8 witnesses in defence. On appreciating the evidence and considering the rival contentions of the parties, the Trial court by the impugned judgment acquitted the respondents of the charge. Being aggrieved, the complainant/victim has preferred the appeal. It is relevant to note that the State did not challenge respondents' acquittal.

3. Appellant's counsel urged that the Trial Court did not appreciate the evidence in its true and proper perspective. The complainant categorically implicated all the respondents and attributed specific role to them in causing injuries to him. PW-2 (Satnam Singh Khalsa), PW-3(Manmohan Singh) and PW-4 (Mukesh) corroborated him on all material facts. They had no ulterior motive to falsely implicate the respondents. There is no conflict in the ocular and medical evidence. As per MLC (Ex.PW10/B) injuries were found on the body of the complainant. Respondent's counsel urged that there are no sound reasons to interfere in the impugned judgment of acquittal which is based on fair appraisal of the evidence.

4. I have considered the submissions of the parties and have examined the Trial court record. A quarrel had taken place between the complainant and the respondents over a trivial issue. It appears that in the quarrel both the parties sustained injuries. The complainant was medically examined and PW-11 (Dr.Samarjeet Singh) proved the MLC (Ex.PW10/B). Nature of injuries was simple with blunt object. It further reveals that respondent No.4 Manpreet Singh @ Monu R/o RGB-142, Janta Flat, Raghubir Nagar also sustained injuries in the incident. The Investigating Officer, however, did not opt to initiate any proceedings against the assailant(s) for the injuries caused to him. Vide MLC No.21127 on 06.09.2007 Manpreet Singh S/o Satnam Singh was medically examined on 6.9.2007 itself at DDU hospital. Nature of injuries are simple with sharp object. The Investigating Officer did not explain as to why no cross-case was registered against the assailants for the injuries caused to Manpreet Singh @ Monu. He (Manpreet Singh @ Monu) has filed a complaint case under Section 156 (3) Cr.P.C. and the matter is pending for consideration before the court of Metropolitan Magistrate. The complainant admitted injuries on the body of the Manpreet but termed those on 'self-inflicted injuries'. The prosecution did not examine the concerned doctor to ascertain if the injuries found on the body of respondent No.4-Manpreet Singh @ Monu could be self-inflicted.

Apparently, the prosecution/complainant has failed to explain as to how and under what circumstances respondent No.4 Manpreet Singh @ Monu sustained injuries with sharp weapon in the incident.

5. There was inordinate delay in lodging the complaint with the police by the complainant. When the Investigating Officer went to the hospital to record the complainant's statement, he did not lodge it. He made statement on the next day at about 07:00 P.M. in which he gave graphic detail as to how and under what circumstances, he sustained injuries. He even alleged that he had lost his mobile, cash and golden chain. MLC (Ex.PW10/B) reveals that the complainant was conscious and oriented. There was no reason/excuse for him not to make statement then and there. It seems that statement (Ex.PW-1/A) was made after due deliberations and consultations. No weapon of offence was recovered in the case from the possession of the respondents or at their instance. The complainant has alleged that Neeta (since expired) was armed with a Kripan. However, there is no evidence ocular or medical if Neeta caused any injuries with Kripan on the body of the complainant. Presence of PW-2 (Satnam Singh Khalsa), PW-3(Manmohan Singh) and PW-4 (Mukesh) appears doubtful as none of them intervened to save the injured. None of them took the victim to the hospital. They did not corroborate complainant's version if any cash/mobile was lost/stolen in the incident.

The Trial Court has discarded their version as they were interested witnesses.

6. Facts and circumstances reveal that it was a quarrel over a trivial issue in which both the sides participated and sustained injuries. It was the duty of the Investigating Officer to find out as to who was the aggressor. Only on the complainant's statement on the next day, the Investigating Officer opted to lodge First Information Report under Section 308 IPC against the respondents and for no apparent reasons, no action was taken against the assailants for the injuries caused to respondent No.4-Manpreet Singh. There was no sound reason to register FIR for attempt to commit culpable homicide when a complainant was discharged on the same day and had not sustained grievous or dangerous injuries with any deadly weapon on the vital organs.

7. The standards to be applied by the High Court while considering an appeal against acquittal is one where the prosecution establishes

substantial and compelling reasons, which by and large are confined to serious or grave mis-appreciation of evidence, wrong application of law and an approach which would lead to complete miscarriage of justice. In the present case, the Trial Court listed various grounds on which it acquitted the respondents/accused. All of them, to my mind, are reasonable and none of them can be termed as misapplication of law or wrongful appreciation of the evidence placed before the Court by the prosecution.

8. Appeal against the acquittal is considered on slightly different parameters compared to an ordinary appeal preferred to this Court. When an accused is acquitted of a criminal charge, a right vests in him to be a free citizen and this Court is cautious in taking away that right. The presumption of innocence of the accused is further strengthened by his acquittal after a full trial, which assumes critical importance in our jurisprudence. If two views are possible on the evidence adduced in the case, then the one favourable to the accused, should be adopted.

9. Considering all the facts and the circumstances of the case, I find no infirmity in the impugned judgment. The appeal is unmerited and is consequently dismissed.

10. Trial Court record be sent back forthwith.

ILR (2013) V DELHI 3343
FAO.

SCHOLAR PUBLISHING HOUSE PVT. LTD. ....APPELLANT

VERSUS

KHANNA TRADERS ....RESPONDENT

(S. RAVINDRA BHAT & NAJMI WAZIRI, JJ.)

FAO (OS) NO. : 184/2013, C.M. APPL. NO. : 5414/22013 (FOR STAY), C.M. APPL. NO. : 5416/2013 (FOR DELAY IN FILING) & C.M. APPL. NO. : 5417/2013 (FOR DELAY IN REFILLING)

DATE OF DECISION: 19.07.2013

Arbitration and Conciliation Act, 1996—Section 7 & 34—Appellant company was engaged in the business of printing and publishing and the respondent/claimant used to supply paper to the appellant and the invoice raised by the claimant at the time of delivery of the goods, contained a stipulation that in case of any dispute including dispute of non payment in respect of the invoice, the same would be referred to "Paper Merchants Association" for arbitration—Disputes arose w.r.t.. payments pertaining to supplies made to the appellant during the period 1.4.2004 to 23.7.2005 Respondent referred the disputes to an arbitrator in terms of stipulation contained in the invoice—Appellant did not participate in the arbitration proceedings and on 21.12.2006 the Arbitrator published award in favour of the respondent/claimant—Appellant filed objections to the award before the Ld. Single Judge and contended that he had never consented for arbitration and that the mere issuance of an invoice containing stipulation for referring disputes to arbitration, after

conclusion of an oral agreement of sale and delivery of goods, was unilateral and did not evidence *consensus ad idem* and further did not satisfy the conditions with regard to the existence of an arbitration agreement as per Section 7 of the Act—Objections dismissed by the Ld. Single Judge. Held: There is no strait-jacket formula to say whether an invoice can or cannot amount to binding arbitration clauses. Section 7 of the Act does not compel the parties to adhere to any particular form of agreement or document and an arbitration agreement can be inferred through a series of correspondence or from the conduct of the parties. In the present case identically phrased invoices containing the arbitration stipulation were accepted and acted upon for more than a decade and therefore no merit in the contention of the appellant and hence appeal dismissed.

h **Newsprint Sales Corporation** (supra), the Learned Single Judge noticed the Bombay and Calcutta High Court decisions, and concluded correctly, if one may say so, that there is no strait-jacket formula to say that such invoices cannot or can amount to binding arbitration clauses. The decision correctly surmised that the views of the other High Court had stressed the necessity to consider the conduct of the parties, evident from the record. Thereafter, in **Newsprint Sales Corporation** (supra), dealing with the facts in question, the Learned Single Judge concluded that there was no agreement. The relevant observations are as follows:-

> "32. None of the delivery challans refers that the supply made is on the condition that the disputes, if any, would be referred to the arbitration of an arbitrator appointed by the Paper Merchants Association (Regd.).
>
> 33. It is a case where pursuant to an oral contract where goods were delivered, post delivery, bills have been raised and in the said bills, referred to as debit

memo, terms have been printed, one of which being the term, that disputes would be referred for sole arbitration.

34. Parties have to be ad idem on material terms of the contract when they enter into a contract and not post execution of the contract, unless of course, at the post execution stage, parties agree on certain terms to vary or modify terms of the contract.

35. Petitioner has not brought any material on record to show that before or at the time of effecting supply, it had made known to the respondent that delivery would be on a term that dispute, if any, would be referred to arbitration in terms of the rules and regulations or bye laws of the Paper Merchants Association. In that view of the matter, the inevitable conclusion is that the respondent objector cannot be bound by the arbitration clause contained in the bye laws of the Paper Merchant Association for the reason parties were not ad idem that dispute would be referred to an arbitrator to be nominated by the Paper Merchants Association." **(Para 7)**

The Court also notices that Section 7 of the Act does not compel the parties to adhere to any particular form of agreement or document. An arbitration agreement can be inferred through a series of correspondence, or even on demur of one of the parties to an arbitration proceeding, who can otherwise object to it, on the ground of absence of agreement; if such party does not urge the contention in the reply to claim, the arbitration agreement is deemed to exist. **(Para 9)**

In the present case, there is a wealth of material in the form of more than a decade of commercial relationship during which identically phrased invoices containing the arbitration stipulation were accepted and acted upon. It is not the appellant's case that the disputed invoices were the only

documents containing such stipulations, which were freshly introduced. Having regard to these circumstances, the court is of opinion that there is no merit in the appeal; it is therefore dismissed along with pending applications without any order as to costs. **(Para 10)**

Important Issue Involved: There is no strait-jacket formula to say whether an invoice can or cannot amount to binding arbitration clauses. An arbitration agreement can be inferred through a series of correspondence, or even on demur of one of the parties to an arbitration proceeding, who can otherwise object to it, on the ground of absence of agreement; if such party does not urge the contention in the reply to claim, the arbitration agreement is deemed to exist.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Sh. Akhil Sibal, Sh. Chirag Jamwal, Sh. Ajay Upadhyay and Sh. Pradeep Chhindra, Advocates.

FOR THE RESPONDENT : Sh. Sandeep Sethi, Sr. Advocate with Sh. Samrat Nigam and Ms. Ankita Mahajan, Advocates.

CASES REFERRED TO:

1. *Keshoram Cotton Mills* vs. *Kunhyalal Bagwani* 44 CWN 607 (D).
2. *Newsprint Sales Corporation* vs. *The Daily Pratap* CS(OS)2630-A of 1992 dated 1st September 2006.
3. *Lewis W. Fernandez* vs. *Jivatlal Partapshi & Ors.* AIR 1947 Bom 65.
4. *Ram Chandra Ram Nag Ram Rice & Oil Mills Ltd.* vs. *Howrah Oil Mills Ltd. and Anr.* AIR 1958 Cal 620.
5. *Sankar Lal Lachmi Narain* vs. *Jainey Brothers* : AIR 1931 All 136.

6. *Radha Kanta Das* vs. *Bearlien Brothers Ltd.* AIR 1929 Cal 97.

RESULT: Appeal Dismissed.

S. RAVINDRA BHAT, J.

1. The question sought to be agitated in the present appeal directed against the judgment and order of a Learned Single Judge of this court is whether the award rendered on a dispute referred to arbitration by the respondent/claimant was legal and binding inasmuch as did the parties enter into an arbitration agreement.

2. The facts relating to the disputes are that the appellant used to receive paper supplied by the respondent/claimant, a sole proprietorship concern. The Appellant is engaged in the business of printing and publishing. In the normal course of trade, the claimant used to supply paper according to the specification and requirements of the appellant, and also furnish an invoice for the goods delivered. The invoice would contain a stipulation which read as follows:-

> "In case of any dispute including dispute of non-payment in respect of this bill the same shall be referred to the "Paper Merchants Association (Regd) Delhi" for sole arbitration and the judgment given by the arbitrator/arbitrators appointed by the executive committee shall be final and binding on both the Parties. The Civil Suit at Delhi can also be filed at the option of the Seller."

3. The Claimant had approached this Court filing an application under Section 9 of the Arbitration and Conciliation Act 1996, (hereafter called "the Act") seeking interim relief against the appellant. The Appellant appeared before the Court on 28.07.2006 and submitted that he was denying existence of the arbitration agreement. In the meanwhile, the respondent preferred claims before the arbitrator based on the dispute raised by it, which pertained to supplies made to the appellant during the period 01.04.2004 and 23.07.2005, based upon the invoices issued for that period towards the goods supplied. The appellant concededly did not participate in the arbitration proceedings. Eventually, on 21.12.2006 the arbitrator published award holding that the appellant had to pay to the respondent/claimant a sum of Rs. 3,44,28,861/- including *pendente lite* interest and future interest @ 12% per annum. The appellant objected to

the award under Section 34 of the Act, contending that it was unenforceable because the parties had never agreed to submit their disputes to arbitration. The Learned Single Judge negatived the Appellant's argument that the stipulation in the invoice, referring to arbitration of disputes was unilateral, and was never consented to. The Appellant had contended that the mere issuance of an invoice did not indicate consent for the condition, and the relevant conditions spelt out in Section 7 with regard to existence of an arbitration agreement were not fulfilled. In rejecting this submission, the Learned Single Judge relied upon a previous Single Judge decision of this Court in **Newsprint Sales Corporation v The Daily Pratap.** [CS(OS)2630-A of 1992 dated 1st September 2006]

4. It is argued by the Appellant's counsel, Shri Akhil Sibal that the impugned order is ex facie erroneous. Counsel underlined the fact that the Single Judge in this case based his conclusions on an entirely erroneous premise that **Newsprint Sales Corporation** (supra) had ruled that printed conditions, stipulating submission of disputes to arbitration, in invoices can be construed as arbitration agreements, whereas in truth, the decision holds quite the opposite. Relying extensively on the decision in *Newsprint Sales Corporation* (supra), learned counsel submitted that for a court or arbitrator to hold that the parties had entered into a legally binding arbitration agreement, it is necessary to prove consensus ad idem, in that regard. The issuance of an invoice after conclusion of transaction, essentially an oral agreement for sale and delivery of goods, cannot evidence such consensus especially when one party to the transaction disputes the agreement and enforceability of such clause.

5. Learned Senior Counsel for the respondents submitted that the appeal lacks in merit. He relied on the observations in **Newsprint Sales Corporation** (supra), as well as the decisions reported as **Lewis W. Fernandez v Jivatlal Partapshi & Ors.** AIR 1947 Bom 65 and **Ram Chandra Ram Nag Ram Rice & Oil Mills Ltd. v. Howrah Oil Mills Ltd. and Anr.** AIR 1958 Cal 620. The respondent/claimants also urge that the history of transactions between the parties clearly showed that the appellant had accepted by his conduct, the invoices which contained the arbitration clause, and on most occasions honored them. It was therefore, not open for him to contest the existence of an arbitration agreement. Reliance was also placed on the findings and observations of the arbitrator in the award published by him.

6. In the award, while dealing with the question of whether the parties had entered into an arbitration agreement, the arbitrator held as follows:-

> ".....The bills filed with the petition clearly show that there is an arbitration clause between the parties and the claimant is the member of the Paper Merchant Association. The bills/ invoices issued by the claimant have been duly received and acknowledged by the defendants. The claimant and defendants are working together since 1996 and the opposite party has made payment against the supplies made by the claimant prior to the arising of the present controversy. From 1996 when the business dealings were started the claimant and defendants were duly placing orders and were receiving goods and was making the payments. The bills issued were having arbitration clause as per which this Arbitrator has got power to adjudicate the dispute. The rates and terms mentioned on all the bills have been acknowledged and accepted by the defendants. The statements of accounts have been signed by the Director and confirmed by the defendants. The Debit Notes for interest issued by the claimant were accepted and the required TDS was deducted and TDS certificates were issued. The defendants have never made any objection with regard to the bills, rates and terms or the adjudication of the dispute by this tribunal, thus, it can be easily said that defendants have nothing to say in their defence....."

7. In **Newsprint Sales Corporation** (supra), the Learned Single Judge noticed the Bombay and Calcutta High Court decisions, and concluded correctly, if one may say so, that there is no strait-jacket formula to say that such invoices cannot or can amount to binding arbitration clauses. The decision correctly surmised that the views of the other High Court had stressed the necessity to consider the conduct of the parties, evident from the record. Thereafter, in **Newsprint Sales Corporation** (supra), dealing with the facts in question, the Learned Single Judge concluded that there was no agreement. The relevant observations are as follows:-

> "32. None of the delivery challans refers that the supply made is on the condition that the disputes, if any, would be referred to the arbitration of an arbitrator appointed by the Paper Merchants

> Association (Regd.).
>
> 33. It is a case where pursuant to an oral contract where goods were delivered, post delivery, bills have been raised and in the said bills, referred to as debit memo, terms have been printed, one of which being the term, that disputes would be referred for sole arbitration.
>
> 34. Parties have to be ad idem on material terms of the contract when they enter into a contract and not post execution of the contract, unless of course, at the post execution stage, parties agree on certain terms to vary or modify terms of the contract.
>
> 35. Petitioner has not brought any material on record to show that before or at the time of effecting supply, it had made known to the respondent that delivery would be on a term that dispute, if any, would be referred to arbitration in terms of the rules and regulations or bye laws of the Paper Merchants Association. In that view of the matter, the inevitable conclusion is that the respondent objector cannot be bound by the arbitration clause contained in the bye laws of the Paper Merchant Association for the reason parties were not ad idem that dispute would be referred to an arbitrator to be nominated by the Paper Merchants Association."

8. The Bombay High Court, dealing with an identical question in **Lewis. W. Fernandez** (supra) about existence of an arbitration agreement contained in a contract note issued after delivery of the goods, agreeing to submit disputes to arbitration in terms of Bye laws of an association, held that the conduct of the parties was relevant and determinative in that case. The court observed that:-

> "It is also clear that up to June 30, 1944, and some time later there was no dispute whatever raised by the plaintiff as regards the transactions effected by the defendants for and on behalf of the plaintiff in accordance with the instructions conveyed by the plaintiff through the sub-broker and in effect the plaintiff accepted the contract notes. It was only when the contract note in respect of the closing transaction of June 30, 1914, was sent by the defendants to the plaintiff and a demand for the sum of Rs. 11,112-8-0 was made by the defendants upon the plaintiff by

their letter dated July 18, 1944, that the plaintiff came out by his letter in reply of July 20, 1944, stating that the amount shown as due by him to the defendants, viz, Rs. 11,112-80 was not correct inasmuch as it did not show the statement of his sale of 500 bales of September 1944 delivery. It is admitted that this statement as regards 500 bales of September 1944 delivery was a mistake on the part of the plaintiff and that really it ought to have been a sale of 1,000 bales of September 1944 delivery which according to the plaintiff was outstanding on that date. The plaintiff by his letter called upon the defendants to send to him a complete statement of his account with the defendants showing separately the transactions for the month of July and September settlements after which he stated that he would settle the account of the defendants. It is significant to note that in that letter the plaintiff did not state that he had not received all the contract notes or all the statements of account in respect of the several transactions which the defendants entered into for July 1944 and September 1944 settlements as he seems to have done in the subsequent correspondence. The defendants wrote to the plaintiff on July 21, 1944, expressing their surprise at the attitude taken up by the plaintiff and referred the plaintiff to the contracts and weekly statements which had been submitted by them to the plaintiff as usual. The defendants stated that on perusing the same the plaintiff would be convinced that there was no outstanding business in his account and that the total amount of Rs. 11,112-8-0 shown by the defendants to his debit was correct. The plaintiff replied by his letter dated July 25, 1944, where he disingenuously stated that he had not been receiving the defendants' contracts and weekly statements regularly and that he had to rely upon verbal information from the sub-broker who he considered was the agent and sub-broker of the defendants for information regarding his position. The plaintiff, therefore, called upon the defendants to send to him a complete statement of account showing separately the July and September transactions. He further expressed his astonishment to learn that he had no outstanding business with the defendants and called upon the defendants to let him know under whose instructions the outstanding sale of 1,000 bales of September had been cut off, again repeating the mistake as to 500 bales instead of 1,000

bales of September 1944 settlement. It is significant, however, to note that in this letter also he did not deny that he had received the contract notes and the weekly statements of account which the defendants alleged they had been sending to him as usual, the only allegation made by him being that he had not been receiving the same regularly. The statements made by Jivatlal Partapshi, the partner of the defendants' firm in paragraph 3 of his affidavit in support of this notice of motion dated september 30, 1944, in that behalf were also denied in that affidavit of the plaintiff dated October 11, 1944, in the same vague and indefinite manner by stating:

> "I further deny that the defendants had submitted all the contract notes and statements of accounts as falsely alleged in the said affidavit or that I have acknowledged receipts in respect of contract notes and statements of accounts in respect of all my transactions in the office despatch book of the defendants."

5. This denial, in my opinion, is not honest and leads me to the conclusion that the plaintiff in fact received all the contract notes and the statements of accounts as alleged by the defendants in the usual course at the address given by the plaintiff to the defendants in that behalf and in effect accepted the contract notes which had been so sent by the defendants to him. I am satisfied on these materials that the contract notes in respect of all the transactions except the last disputed one of the purchase of 1,000 bales of September 1944 settlement on June 30,1944, were sent by the defendants to the plaintiff and were in effect accepted by the plaintiff by his conduct, with the result that in respect of all of the contracts except the last disputed one which I have mentioned above there were arbitration agreements within the meaning of the Indian Arbitration Act of 1940."

The Calcutta High Court, in the decision **Ram Chandra Ram Nag and Ram Rice & Oil Mills Ltd.** echoed the views of the Bombay High Court, and held as follows:-

> "2.....The first point raised by Mr. Mukherjee is that it cannot be said that there was any arbitration agreement between the plaintiff and the defendant No. 1 and consequently

the courts below acted without jurisdiction in making an order of stay under Section 34 of the Indian Arbitration Act. The contract in this case was entered into by the delivery and acceptance of bought and sold notes to the buyer and seller respectively. The bought notes delivered by the broker to me defendant No. 1 have been produced by them but the sold notes, though produced by the plaintiff in the Gaya Court, have not been produced in the Howrah Court, and both the Courts have drawn an adverse inference against the plaintiff for the non-production and have held that the sold notes, if produced would have shown that they are the counter parts of the bought notes which have been produced by the defendant No. 1. The bought notes which have been produced by the defendant No. 1 contain an arbitration clause which runs as follows: "All disputes regarding the contract are to be settled by two Arbitrators one nominated by buyers and one nominated by sellers respectively in accordance with the Indian Arbitration Act in Calcutta". The bought notes which have been produced by the defendant No. 1 also show that they are signed by the broker only and so it may be inferred that the sold notes were similarly signed by the broker only. From this fact Mr. Mukherjee at one stage sought to argue that the acceptance of these bought and sold notes by the buyer and seller respectively at best created a contract between the buyer and the broker on the one hand and the seller and the broker on the other, and that it did not create any privity of contract between the buyer and the seller. When, however, it was realised that this argument would strike at the very foundation of the plaintiff's claim against the defendant No. 1, it was abandoned. It was, however, still argued that the contract did not create an arbitration agreement between the plaintiff and the defendant No. 1 within the meaning of the Arbitration Act. Reliance was placed on the definition of "arbitration agreement" as given in Section 2(a) of the Indian Arbitration Act, and it was argued that in order to constitute an arbitration agreement, the agreement must be signed by both the parties. This view was taken in certain English cases which were followed by Page, J., in the case of **John Batt and Co. v. Kanoolal and Co.** (A). This view, however, was expressly dissented from by a Division Bench presided over by Rankin, C. J., in the case of **Radha Kanta Das v. Bearlien**

Brothers Ltd. AIR 1929 Cal 97. After referring to the view taken by Page, J. in John Batt's case (A), Sir George Rankin observed as follows:

"In my judgment, the law is the other way. The Arbitration Act of 1889 and the Indian Arbitration Act, for the best of good reasons have not required that the agreement to submit should be signed by both parties."

The same view was taken in the case of **Sankar Lal Lachmi Narain v. Jainey Brothers** : AIR 1931 All 136. In the case of **Keshoram Cotton Mills v. Kunhyalal Bagwani** 44 CWN 607 (D), Panckridge, J. also followed this view."

9. The Court also notices that Section 7 of the Act does not compel the parties to adhere to any particular form of agreement or document. An arbitration agreement can be inferred through a series of correspondence, or even on demur of one of the parties to an arbitration proceeding, who can otherwise object to it, on the ground of absence of agreement; if such party does not urge the contention in the reply to claim, the arbitration agreement is deemed to exist.

10. In the present case, there is a wealth of material in the form of more than a decade of commercial relationship during which identically phrased invoices containing the arbitration stipulation were accepted and acted upon. It is not the appellant's case that the disputed invoices were the only documents containing such stipulations, which were freshly introduced. Having regard to these circumstances, the court is of opinion that there is no merit in the appeal; it is therefore dismissed along with pending applications without any order as to costs.

ILR (2013) V DELHI 3355
W.P.(C)

LORD CHLORO ALKALIES LTD. ....PETITIONER

VERSUS

DIRECTOR GENERAL OF INCOME TAX (ADMN) AND ANR. ....RESPONDENTS

(S. RAVINDRA BHAT & NAJMI WAZIRI, JJ.)

W.P. (C) NO. : 1915/2013, C.M. APPL. NO. : 3645/2013 DATE OF DECISION: 19.07.2013

Sick Industrial Companies (Special Provisions) Act, 1985 (hereafter "SICA")—Reconstruction and revival-fiscal concessions-scope—Brief facts-Petitioner was incorporated under the Companies Act, 1956 named Modi Alkalies & Chemicals Limited—Petitioner filed reference before the Board for Industrial and Financial Reconstruction ("BIFR") based on its accounts—BIFR declared that the Petitioner was a sick company and directed IDBI to act as the Operating Agency (OA)—By ex-parte order dated 02.06.2004, BIFR directed winding up of the Petitioner Company under Section 20(1) of SICA and accordingly directed issuance of Show Cause Notice (SCN) for Winding Up—Aggrieved by that order of BIFR, the Petitioner filed an appeal being No. 154/2004—During pendency of the said appeal, the first Respondent, i.e. the Income Tax Department filed an application on 14.11.2005 under Section 22(1) of SICA seeking permission to recover its dues of Rs. 997.79 lakhs—It is stated that on 14.03.2006, during the pendency of the appeal before BIFR, the Petitioner could settle the dues of all its secured creditors (except IIBI, RIICO & UTI)—Appellate Authority for Industrial and Financial Reconstruction (hereafter "AAIFR"), taking note of the fact that the Petitioner,

out of its 10 secured creditors namely IDBI, ICICI, IFCI SBI, PNB, Syndicate Bank, Indian Bank, IIBI, RIICO & UTI had already settled the dues of 7 creditors (except IIBI, RIICO and UTI), by order dated 14.03.2006 allowed the appeal and set aside the order (dated 02.06.2004) and remanded the matter with a direction that a suitable provision for payment of income tax dues amounting to Rs. 997.79 lakhs payable by the Petitioner ought to be made in the rehabilitation scheme—By its order dated 22.09.2006, BIFR directed for circulation/publication of the Draft Rehabilitation Scheme (DRS), in compliance with provisions of Section 18(3) of SICA—BIFR after considering the objections/suggestions of the secured creditors to the DRS sanctioned the scheme on 30.11.2006; a copy of the sanctioned scheme was duly sent by BIFR to the Income tax sanctioning of the scheme was brought to the notice of the income tax authorities on 27th February, 2007—In September 2008, being aggrieved by the order (dated 30.11.2006 of BIFR), the Income Tax Department preferred a belated appeal to AAIFR, (being Appeal No. 227 of 2008) in respect of the Income Tax reliefs and concessions provided in the Sanctioned scheme in Paras 10.7(1), (2), (3) & (4)—By the impugned order, the AAIFR finally allowed the Income Tax Department's appeal and set aside Clause 11.5 of the published scheme, approved by the BIFR -Hence the present Writ Petition.

Held—The decision of the Supreme Court in *Commissioner of Income tax v Anjum. M.H. Ghaswala & Ors.* (2002) 1 SCC 633 is no doubt an authority for the proposition that interest waiver cannot be granted to anyone except those specified in the Income Tax Act—However the court did not have any occasion to deal with provisions of SICA, or their interface with provisions and orders under the Income Tax Act—Tenor and express provisions of Section 32 of SICA, in

the opinion of this court, leave no doubt that the provisions of SICA are to prevail, except to the extent excluded—The immunity or exception from, the non obstante clause, is limited to the provisions of enactments referred—The non obstinate clause contained in sub- section (1) of Section 32 of SICA does not give the SICA a blanket overriding effect on all other laws; the overriding effect is given to the provisions of SICA, rules or schemes made thereunder only to the extent of inconsistency therewith contained in any other law excepting a few exceptions enumerated therein—Exempting from and suspending the operation of the provisions contained in Section 41 of the Income-Tax Act, 1961 as regards a sick industry amounts to sacrifice from the Central Govt.'- It is for the BIFR to form an opinion while framing a scheme of rehabilitation for a sick industry whether an exemption from operation of S 41 of the Income-Tax Act, 1961 is required to be engrafted in the scheme so as to secure the object of rehabilitation and if so then to what extent—If the BIFR may form an opinion in favour of grant of such exemption then the same amounts to 'financial assistance' from the Central Govt. to the extent of the sick industry having been exempted from the operation of Section 41 of the Income-tax."

The first question is whether the income tax authorities are justified in stating that the order of BIFR, to the extent that it scaled down interest (on income tax liability) are beyond jurisdiction, since only the Board through its designate has the authority to waive or remit interest under the Income Tax wholly or in part. The petitioner in this context, relies on Section 32 of SICA; it reads as follows:-

> "32. Effect of the Act on other laws.—(1) The provisions of this Act and of any rules or schemes made there under shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973 (46 of 1973) and the Urban Land (Ceiling and Regulation) Act, 1976 (33 of 1976) for the time being in force or in the Memorandum or Articles of Association of an industrial company or in any other instrument having effect by virtue of any law other than this Act.
>
> (2) Where there has been under any scheme under this Act an amalgamation of a sick industrial company with another company, the provisions of section 72A of the Income-tax Act, 1961 (43 of 1961), shall, subject to the modifications that the power of the Central Government under that section may be exercised by the Board without any recommendation by the specified authority referred to in that section, apply in relation to such amalgamation as they apply in relation to the amalgamation of a company owning an industrial undertaking with another company."

The decision of the Supreme Court in **Anjum M.H. Ghaswala** (supra) is no doubt an authority for the proposition that interest waiver cannot be granted to anyone except those specified in the Income Tax Act. However, the court did not have any occasion to deal with provisions of SICA, or their interface with provisions and orders under the Income Tax Act. **(Paras 12)**

One well recognized principle of statutory construction is that when courts have to deal with conflicting or inconsistent laws, or inconsistent provisions of two separate enactments, the first approach should be to attempt at harmonization of the two provisions, to avoid, or minimize the conflict. The second line of approach is to see which of the two laws is a general law. A prior special law will prevail over a later and general law. This is more so, when the prior law contains a non-obstante clause (**R.S. Raghunath vs State of Karnataka And Anr.** AIR 1992 SC 81; **Allahabad Bank v. Canara Bank & Anr.** (2000) 4 SCC 406). The tenor and

express provisions of Section 32 of SICA, in the opinion of this court, leave no doubt that the provisions of SICA are to prevail, *except to the extent excluded.* The immunity, or exception from, the non obstante clause, is limited to the provisions of enactments referred, of the enactments referred. The specific reference to Foreign Exchange Regulation Act and Urban Land Ceiling Act in Section 32 (1) and to Section 72-A of the Income Tax Act, mean that those provisions will stand excluded from the rigors of Section 32 of SICA. **(Para 13)**

A somewhat similar question had been considered by the Supreme Court in **Aswini Kumar Ghosh & Anr. v. Arabinda Bose & Anr.,** [1953] SCR 1, when it was observed that -*"It should first be ascertained what the enacting part of the section provides on a fair construction of the words used according to their natural and ordinary meaning, and the non obstante clause is to be understood as operating to set aside as no longer valid anything contained in relevant existing laws which is inconsistent with the new enactment."* In the case of Section 32 SICA, the specific exclusion of two enactments, and the express reference to Section 72A of the Income Tax Act, to say that its provisions apply (by Section 32 (2)) manifest Parliamentary intention that provisions of SICA have to prevail over those of the Income Tax Act. This court's conclusion is strengthened by precedent. In http://indiankanoon.org/doc/366360/ **Mewar Sugar Mills Ltd. v. Chairman, Central Board of Direct Taxes & Anr.** 1998 VI AD(DELHI) 309 a Division Bench had concluded that:-

> "21. To sum up:
>
> (1) The non obstinate clause contained in sub-section (1) of Section 32 of SICA does not give the SICA a blanket overriding effect on all other laws; the overriding effect is given to the provisions of SICA, rules or schemes made thereunder only to the extent of inconsistency therewith contained in any other law

> excepting a few exceptions enumerated therein.
>
> (2) Exempting from and suspending the operation of the provisions contained in Section 41 of the Income-tax Act, 1961 as regards a sick industry amounts to 'sacrifice from the Central Govt.'-the expression as used in Section 19(1) of SICA.
>
> (3) It is for the BIFR to form an opinion while framing a scheme of rehabilitation for a sick industry whether an exemption from operation of S 41 of the Income-Tax Act, 1961 is required to be engrafted in the scheme so as to secure the object of rehabilitation and if so then to what extent. If the BIFR may form an opinion in favour of grant of such exemption then the same amounts to 'financial assistance' from the Central Govt. to the extent of the sick industry having been exempted from the operation of Section 41 of the Income-tax Act."
>
> This court also notices that a similar view has been expressed by the Bombay High Court in **Vadilal Dairy International Ltd v. State of Maharashtra** 2009 (1) Comp. LJ 466 (Bom). **(Para 14)**

Nodal authority for coordinating between BIFR and the Central Board was the Director General (Administration)—However, the blanket submission that when the circular under Section 119 is ignored, and a scheme is given effect to by income tax authorities themselves, the BIFR's order or scheme is void, cannot be countenanced—The Income Tax authorities in this case were aware in the earlier round, about the reference and possibility of a scheme; they requested for provision to recover their dues—Having regard to these circumstances and Section 32 of the Act as well as the Circular No. 683 of 1994 under the Income tax Act, the failure of income tax authorities to inform the Director General (since the Circular was in existence

at the time of formulation of the scheme in the present case) would not result in the invalidity of BIFR's scheme—Another aspect which this court notices is that the Income Tax authorities, i.e. the assessing officer and the Commissioner, have given effect to the orders of BIFR—These were pursuant to the orders of the Income Tax Appellate Tribunal (ITAT) dated 19.02.2008—That order stands and has attained finality—Besides, the period for operation of the limited concessions in the scheme has also apparently ended—In view of the above discussion, the writ petition is entitled to succeed.

The next issue is whether the revenue is correct in saying that by virtue of Section 119 of the Income Tax Act, and circulars issued under that enactment, the Board of Direct Taxes' views have primacy over that of BIFR. Section 119 reads as follows:-

> **"119. Instructions to subordinate authorities**
>
> (1) The Board may, from time to time, issue such orders, instructions and directions to other income-tax authorities as it may deem fit for the proper administration of this Act, and such authorities and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board: Provided that no such orders, instructions or directions shall be issued-
>
> (a) so as to require any income-tax authority to make a particular assessment or to dispose of a particular case in a particular manner; or
>
> (b) so as to interfere with the discretion of the Deputy Commissioner (Appeals) or the Commissioner (Appeals)] in the exercise of his appellate functions.
>
> (2) Without prejudice to the generality of the foregoing power,

> (a) the Board may, if it considers it necessary or expedient so to do, for the purpose of proper and efficient management of the work of assessment and collection of revenue, issue, from time to time whether by way of relaxation of any of the provisions of sections 5[139], 143, 144, 147, 148, 154, 155, 6[sub-section (1A) of section 201, sections 210, 211, 7[234A, 234B], 234C], 271 and 273 or otherwise, general or special orders in respect of any class of incomes or class of cases, setting forth directions or instructions (not being prejudicial to assessees) as to the guidelines, principles or procedures to be followed by other income-tax authorities in the work relating to assessment or collection of revenue or the initiation of proceedings for the imposition of penalties and any such order may, if the Board is of opinion that it is necessary in the public interest so to do, be published and circulated in the prescribed manner for general information;
>
> (b) the Board may, if it considers it desirable or expedient so to do for avoiding genuine hardship in any case or class of cases, by general or special order, authorise 8[any income-tax authority, not being a Deputy Commissioner (Appeals) or Commissioner (Appeals)] to admit an application or claim for any exemption, deduction, refund or any other relief under this Act after the expiry of the period specified by or under this Act for making such application or claim and deal with the same on merits in accordance with law.
>
> (c) the Board may, if it considers it desirable or expedient so to do for avoiding genuine hardship in any case or class of cases, by general or special order for reasons to be specified therein, relax any requirement contained in any of the provisions of Chapter IV or Chapter VIA, where the assessee has failed to comply with any requirement specified in

such provision for claiming deduction thereunder, subject to the following conditions, namely:(i) the default in complying with such requirement was due to circumstances beyond the control of the assessee; and (ii) the assessee has complied with such requirement before the completion of assessment in relation to the previous year in which such deduction is claimed: Provided that the Central Government shall cause every order issued under this clause to be laid before each House of Parliament.

(3) Every Income-tax Officer employed in the execution of this Act shall observe and follow such instructions as may be issued to him for his guidance by the Director of Inspection or by the Commissioner or by the Inspecting Assistant Commissioner within whose jurisdiction he performs his functions." **(Para 15)**

In pursuance of the above provision, the Central Board of Direct Taxes had withdrawn previous circulars, and in its Circular No. 683 dated 08.06.1994, required that the nodal authority for coordinating between BIFR and the Central Board was the Director General (Administration). This was sought to be highlighted by counsel for the revenue. This court has no doubt about the proposition. However, the blanket submission that when the circular under Section 119 is ignored, and a scheme is given effect to by income tax authorities themselves, the BIFR's order or scheme is void, cannot be countenanced. There is no material on record to suggest such a conclusion. The Income Tax authorities in this case were aware in the earlier round, about the reference and possibility of a scheme; they requested for provision to recover their dues. The AAIFR specifically remitted the matter to BIFR to consider this aspect, which it did. Although the income tax authorities were not given notice, the order of BIFR reveals that it applied its mind, and granted limited concession only as regards reduction and waiver of interest. The larger pleas of the company towards income tax dues and concessions were denied by the BIFR. Having regard to

these circumstances, and Section 32 of the Act as well as the Circular No. 683 of 1994 under the Income Tax Act, the failure of income tax authorities to inform the Director General (since the Circular was in existence at the time of formulation of the scheme in the present case) would not result in the invalidity of BIFR's scheme. Another aspect which this court notices is that the Income Tax authorities, i.e. the assessing officer and the Commissioner, have given effect to the orders of BIFR. These were pursuant to the orders of the Income Tax Appellate Tribunal (ITAT) dated 19.02.2008. That order stands and has attained finality. Besides, the period for operation of the limited concessions in the scheme has also apparently ended. Lastly, in view of the concurrence of the other secured creditors, and implementation of the approved scheme, it would be inequitable and unjust to put the clock back, at the behest of the Income Tax authorities. **(Para 16)**

In view of the above discussion, the writ petition is entitled to succeed. The impugned orders of AAIFR dated 01.04-2009 and 27.09.2012 in Appeal No. 227/2008 are hereby quashed. The orders of BIFR sanctioning the scheme, on 30th November, 2006 are hereby restored. The writ petition is allowed in these terms; there shall be no order as to costs. **(Para 17)**

Important Issue Involved: Industrial Reconstruction under provisions of the Sick Industrial Companies (Special Provision) Act, 1985 Tenor and express provisions of Section 32 of SICA, in the opinion of this court, leave no doubt that the provisions of SICA are to prevail, except to the extent excluded—It is for the BIFR to form an opinion while framing a Scheme of rehabilitation for a sick industry whether an exemption from operation of S 41 of the Income-Tax Act, 1961 is required to be engrafted in the scheme so as to secure so as to secure the object of rehabilitation and if so then to what extent.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONERS : Sh. J.P. Sengh, Sr. Adv. with Ms. Vinita Sasidharan, Ms. Varsha Banerjee, Sh. Sumeet Batra and Ms. Ankita Gupta, Advs.

FOR THE RESPONDENT : Sh. Sanjeev Sabharwal, Sr. Standing Counsel.

CASES REFERRED TO:

1. *Vadilal Dairy International Ltd* vs. *State of Maharashtra* 2009 (1) Comp. LJ 466 (Bom).
2. *Commissioner of Income tax* vs. *Anjum. M.H. Ghaswala & Ors.* (2002) 1 SCC 633.
3. *Allahabad Bank* vs. *Canara Bank & Anr.* (2000) 4 SCC 406).
4. *Mewar Sugar Mills Ltd.* vs. *Chairman, Central Board of Direct Taxes & Anr.* 1998 VI AD(DELHI) 309.
5. *R.S. Raghunath* vs. *State Of Karnataka and Anr.* AIR 1992 SC 81.
6. *Aswini Kumar Ghosh & Anr.* vs. *Arabinda Bose & Anr.,* [1953] SCR 1.

RESULT: Petition Allowed.

S. RAVINDRA BHAT, J.

1. In these proceedings under Article 226 of the Constitution of India, the petitioner challenges the orders of the Appellate Authority for Industrial Reconstruction (hereafter "AAIFR") under provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereafter "SICA") dated 01.04.2009 and 27.09.2012 in Appeal No. 227/2008. By that order, the AAIFR had set aside a scheme formulated under the SICA to the extent it dealt with waiver and deduction of interest under provisions of the Income Tax Act, 1961.

2. The Petitioner was incorporated under the Companies Act, 1956 on 1st March, 1979; it was originally named Modi Alkalies & Chemicals

Limited, which was subsequently changed to M/s Lord Chloro Alkalies Ltd in the year 2003. It started commercial production of caustic soda in 1994-95 with a capacity of 126 TPD which was later enhanced to 195 TPD based on mercury cell technology which was replaced by membrane cell technology in the year 1994-95 with a further enhancement in its capacity to 255 TPD. Till 1997-98 the Petitioner-company operated satisfactorily. Later, due to adverse market conditions, change in government policy, high cost of power, high cost of production and heavy interest burden, the Petitioner started incurring heavy losses resulting in closure of its operations. On 30.06.1999, in view of the colossal losses, the net worth of the Petitioner eroded pursuant to which it made a reference under Section 15(1) of SICA to the Board for Industrial Finance and Reconstruction (hereafter "BIFR"); it was rejected in July 2001 as not maintainable. Later, on 30.06.2000, the Petitioner filed another reference before the BIFR based on its accounts. This time, it was registered as Case No.308 of 2001. On 15.01.2002, BIFR declared that the Petitioner was a sick company and directed IDBI to act as the Operating Agency (OA).

3. Holding that no feasible rehabilitation proposals were forthcoming from the Petitioner Company, BIFR by its order dated 19.08.2003 directed the OA to issue an advertisement for change of management (COM) as the offers received by the OA for COM did not fructify. Taking these factors into account BIFR prima facie concluded that it would be just, fair and in public interest that the Company should be wound-up and show cause notice for Winding Up should be issued to the Petitioner Company. By ex-parte order dated 02.06.2004, BIFR directed winding up of the Petitioner Company under Section 20(1) of SICA and accordingly directed issuance of Show Cause Notice (SCN) for Winding Up. Aggrieved by that order of BIFR, the Petitioner filed an appeal being Appeal No. 154/ 2004.

4. During pendency of the said appeal, the first Respondent, i.e. the Income Tax Department filed an application on 14.11.2005 under Section 22(1) of SICA seeking permission to recover its dues of Rs. 997.79 lakhs with an alternative claim that in the event a scheme is allowed to be formulated then a suitable provision for payment of income tax dues of the Petitioner-Company ought to be made in the scheme itself. It is stated that on 14.03.2006, during the pendency of the appeal before BIFR, the Petitioner could settle the dues of all its secured creditors

(except IIBI, RIICO & UTI). The AAIFR, taking note of the fact that the Petitioner, out of its 10 secured creditors namely IDBI, ICICI, IFCI SBI, PNB, Syndicate Bank, Indian Bank, IIBI, RIICO & UTI had already settled the dues of 7 creditors (except IIBI, RIICO and UTI), by order dated 14.03.2006 allowed the appeal and set aside the order (dated 02.06.2004) and remanded the matter with a direction that a suitable provision for payment of income tax dues amounting to Rs. 997.79 lakhs payable by the Petitioner ought to be made in the rehabilitation scheme. By its order dated 22.09.2006, BIFR directed for circulation/publication of the Draft Rehabilitation Scheme (DRS), in compliance with provisions of Section 18(3) of SICA. The DRS was duly published. The BIFR after considering the objections/suggestions of the secured creditors to the DRS sanctioned the scheme on 30.11.2006; a copy of the sanctioned scheme was duly sent by BIFR to the income tax authorities on 15.12.2006. The petitioner states that by a separate letter, the sanctioning of the scheme was brought to the notice of the income tax authorities on 27th February, 2007.

5. In September 2008, being aggrieved by the order (dated 30.11.2006 of BIFR), the Income Tax Department preferred a belated appeal to AAIFR, (being Appeal No.227 of 2008) in respect of the Income Tax reliefs and concessions provided in the Sanctioned scheme in Paras 10.7(1), (2), (3) & (4). An accompanying application, M.A. No.46 of 2009 for condoning the delay of two years was filed. The appeal and application were objected to by the Petitioner. On 01.04.2009 by its interim order, AAIFR allowed the application for condonation of delay and held that the first Respondent department had no knowledge of the proceedings before the BIFR prior to 07.08.2008. The Petitioner had opposed the application and argued that the Income Tax Department had in fact, given effect to clause 11.5 of the sanctioned scheme and waived the interest under Section 234B of Income Tax Act to the extent of Rs.2,47,34,779/- and interest under Section 220(2) amounting to Rs.3,20,62,504/- in respect of the Petitioner Company for assessment year 1996-1997. By the impugned order, the AAIFR finally allowed the Income Tax Department's appeal and set aside Clause 11.5 of the published scheme, approved by the BIFR.

6. The Petitioner argues, in its pleadings, and through the submissions of its senior counsel, Shri J.P. Sengh, that the impugned order is not sustainable in law. It is pointed out that the finding regarding the order

(of AAIFR) having been made in contravention of principles of natural justice is contrary to facts. It was argued in this regard that the letter of 30.09.2009 of the concerned assessing officer of the Income Tax Department itself shows that the Respondents were aware of the BIFR's orders, and accepted them without demur. The said letter reads as follows:-

"Order to give effect to the decision of the BIFR u/Ss 22 & 32 of the SICA Act 1985 Dated : 30-9-2009

The Board for Industrial and Financial Reconstruction, New Delhi in Case No. 308/2001 in the case of M/s Lords Chloro Alkalies Ltd. Dated 13.12.2006 has passed the order as per para 11.5 which is as under:-

> "The statutory liabilities which are under litigation/appeal shall on crystallization after exercise of all the legal remedies available to the company be paid over a period of seven years on interest free basis. All the penal interest, damages, penalties, charges are chargeable on the same shall be waived."

The Hon'ble ITAT, Jaipur in its decision in appeal no.199/JP/2000 and 210/JP/2000 dated 19.02.2008 set aside the decision before the ld. CIT(A), Alwar in view of the decision passed by the BIFR for fresh adjudication de novo in the assessment year 1996-97.

To give effect to the decision of BIFR, the interest u/s 234B amounting to Rs.2,47,34,779/-and interest u/s 220(2) amounting to Rs. 3,20,62,504/- waived by the BIFR is hereby reduced from the arrear demand against the M/s. Modi Alkalies & Chemicals Ltd., Alwar."

Learned senior counsel also relied on the order of the CIT (Appeals) dated 4th March, 2011, especially Paras 31 and 32, to say that the determination of BIFR was accepted, and directions contained in its order were implemented. Consequently argued counsel, the Income Tax authorities should not have made a grievance of the BIFR scheme. The consequential order of the assessing officer, dated 29.03.2011, reducing the demands, in line with the order of BIFR was relied on. The said order reads as follows:-

"Consequent to order of Ld.CIT(A), Alwar of AY 199997, a demand has been reduced to Rs.2,87,17,062/- after appeal effect.

As per order of BIFR, you are required to make the payment of above demand in seven installments. Accordingly, it is requested to pay Rs.41,02,437/(1/7th of Rs. 2,87,17,062/-) by 31.03.2011 positively.

Please note in the event of non-response the above mentioned demand will be recovered by adopting coercive measures."

7. It is argued on behalf of the Petitioner that in the above circumstances, the Income Tax authorities were estopped and bound by the principle of waiver from contending that the orders of the BIFR were not binding upon them. Counsel further emphasised that the order of BIFR had been worked out and the benefits of both in respect of the income tax concessions as well as the other benefits mandated under the rehabilitation scheme had been implemented. In these circumstances, contended learned senior counsel, it would be unjust and inequitable to set aside the order of BIFR on an erroneous interpretation of law and mistaken view of the facts.

8. Learned Counsel next argued that in terms of Section 32 of the Sick Industrial Companies (Special Provisions) Act, 1985, overriding effect has been given to the orders of BIFR and schemes of rehabilitation which are otherwise legally valid.

9. On behalf of the official respondents, it is argued by Shri. Sanjeev Sabharwal, learned Standing Counsel, that the income tax authorities were completely in the dark about the nature of the scheme finalised by BIFR. It was argued that after the previous order of remand by the AAIFR, a duty had been cast upon the BIFR to circulate the draft scheme to it i.e. the income tax authorities. There was no material on the record to suggest that such an obligation had been fulfilled.

10. More substantially, learned Standing Counsel argued that the provisions of SICA could not prevail over those of the Income Tax Act. In this context, it was argued that in terms of the decision of the Supreme Court in **Commissioner of Income tax v Anjum. M.H. Ghaswala & Ors.** (2002) 1 SCC 633 it was held that the interest contemplated under Sections 234A, 234B and 234C is mandatory in nature and the power of waiver or reduction, having not been expressly

conferred on the Settlement Commission, waiver or reduction in payment of statutory interest is outside the purview of the settlement proceedings, contemplated in Chapter XIX-A of the Act. It was submitted that likewise, since no provision of SICA enabled waiver or reduction of statutory interest mandated by the Act, BIFR could not have unilaterally directed such a relief. In this respect, contended Learned Standing Counsel, the sole repository of the power to grant a waiver or reduction of interest rates or amounts was the Board of Direct Taxes, under Section 119 (2) of the Income Tax Act. Reliance was also placed on Board Circular No. 400/234-95/IT (B) which has specified the authorities entitled to consider the question of waiver of interest and such other relief. It was submitted that in the present case, the assessing officers and Commissioners had unilaterally, and without reference to the Board, and its circulars, which they were bound to respect, given effect to the orders of the BIFR.

11. The broad and brief facts necessary to decide this petition are not in dispute. The company was declared sick; when a reference was made, BIFR circulated the draft rehabilitation scheme with the broad acceptance of the company's secured creditors. At that stage, the income tax authorities were in the know of the scheme. During the pendency of an appeal to the AAIFR, the Income Tax Commissioner had preferred an application, on 14.11.2005. In that application, the following reliefs were claimed:-

"1) the Deptt may be granted permission u/s 22(1) of SICA to recover its dues of Rs. 976.79 lakhs as intimated by the company.

2) If a scheme is being directed to be formulated, provision may be directed to be kept in that revival scheme for the payment of I.T. dues of Rs. 976.79 lakhs on priority basis.

3) Taking cognizance of Section 281 of the I.T. Act, 1961 the Deptt may be given priority in the matter of recovery of Rs. 976.79 lakhs. In the event, a scheme is allowed to be formulated the 1.T.dues of Rs. 976.79 Iakhs may be given due priority for payment over other dues.

XXXXXX XXXXXX XXXXXX"

The AAIFR, while disposing of the appeal, took note of the claims of the Income Tax Department, and directed as follows, in its order dated 14.03.2006:

"XXXXXX XXXXXX XXXXXX

Given this context we set aside the impugned order and remand the case to the BIFR. We also direct the company and the OA severally to ensure that a fully tied up revival scheme is presented to the BIFR not later than 60 days of this order. If in the meanwhile negotiations cannot be completed with IIBI, RIICO and UTI then the scheme may provide that their dues will be settled by the company/ promoters separately. One Trivedi & Sons who is an unsecured creditor and had appeared before us has some dues from the company which should be taken care of in an appropriate manner in the scheme itself. Income Tax Authorities in a separate application dated 14th Nov. 2005 have filed an application seeking permission under Section 22(1) of SICA to recover its dues of 997.79 lakhs.

XXXXXX XXXXXX XXXXXX"

The BIFR scheme complied with this direction, and expressly provided that *"The statutory liabilities which are under litigation/appeal shall on crystallization after exercise of all the legal remedies available to the company be paid over a period of seven years on interest free basis. All the penal interest, damages, penalties, charges are chargeable on the same shall be waived."*

12. The first question is whether the income tax authorities are justified in stating that the order of BIFR, to the extent that it scaled down interest (on income tax liability) are beyond jurisdiction, since only the Board through its designate has the authority to waive or remit interest under the Income Tax wholly or in part. The petitioner in this context, relies on Section 32 of SICA; it reads as follows:-

"32. Effect of the Act on other laws.—(1) The provisions of this Act and of any rules or schemes made there under shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973 (46 of 1973) and the Urban Land (Ceiling and Regulation) Act, 1976 (33 of 1976) for the time being in force or in the Memorandum or Articles of Association of an industrial company or in any other instrument having effect by virtue of any law other than this Act.

(2) Where there has been under any scheme under this Act an amalgamation of a sick industrial company with another company, the provisions of section 72A of the Income-tax Act, 1961 (43 of 1961), shall, subject to the modifications that the power of the Central Government under that section may be exercised by the Board without any recommendation by the specified authority referred to in that section, apply in relation to such amalgamation as they apply in relation to the amalgamation of a company owning an industrial undertaking with another company."

The decision of the Supreme Court in **Anjum M.H. Ghaswala** (supra) is no doubt an authority for the proposition that interest waiver cannot be granted to anyone except those specified in the Income Tax Act. However, the court did not have any occasion to deal with provisions of SICA, or their interface with provisions and orders under the Income Tax Act.

13. One well recognized principle of statutory construction is that when courts have to deal with conflicting or inconsistent laws, or inconsistent provisions of two separate enactments, the first approach should be to attempt at harmonization of the two provisions, to avoid, or minimize the conflict. The second line of approach is to see which of the two laws is a general law. A prior special law will prevail over a later and general law. This is more so, when the prior law contains a non-obstante clause (**R.S. Raghunath vs State Of Karnataka And Anr.** AIR 1992 SC 81; **Allahabad Bank v. Canara Bank & Anr.** (2000) 4 SCC 406). The tenor and express provisions of Section 32 of SICA, in the opinion of this court, leave no doubt that the provisions of SICA are to prevail, *except to the extent excluded.* The immunity, or exception from, the non obstante clause, is limited to the provisions of enactments referred, of the enactments referred. The specific reference to Foreign Exchange Regulation Act and Urban Land Ceiling Act in Section 32 (1) and to Section 72-A of the Income Tax Act, mean that those provisions will stand excluded from the rigors of Section 32 of SICA.

14. A somewhat similar question had been considered by the Supreme Court in **Aswini Kumar Ghosh & Anr v. Arabinda Bose & Anr.,** [1953] SCR 1, when it was observed that -*"It should first be ascertained what the enacting part of the section provides on a fair construction of the words used according to their natural and ordinary meaning, and the*

non obstante clause is to be understood as operating to set aside as no longer valid anything contained in relevant existing laws which is inconsistent with the new enactment." In the case of Section 32 SICA, the specific exclusion of two enactments, and the express reference to Section 72A of the Income Tax Act, to say that its provisions apply (by Section 32 (2)) manifest Parliamentary intention that provisions of SICA have to prevail over those of the Income Tax Act. This court's conclusion is strengthened by precedent. In http://indiankanoon.org/doc/366360/ **Mewar Sugar Mills Ltd. v. Chairman, Central Board of Direct Taxes & Anr.** 1998 VI AD(DELHI) 309 a Division Bench had concluded that:-

> "21. To sum up:
>
> (1) The non obstinate clause contained in sub-section (1) of Section 32 of SICA does not give the SICA a blanket overriding effect on all other laws; the overriding effect is given to the provisions of SICA, rules or schemes made thereunder only to the extent of inconsistency therewith contained in any other law excepting a few exceptions enumerated therein.
>
> (2) Exempting from and suspending the operation of the provisions contained in Section 41 of the Income-tax Act, 1961 as regards a sick industry amounts to 'sacrifice from the Central Govt.'-the expression as used in Section 19(1) of SICA.
>
> (3) It is for the BIFR to form an opinion while framing a scheme of rehabilitation for a sick industry whether an exemption from operation of S 41 of the Income-Tax Act, 1961 is required to be engrafted in the scheme so as to secure the object of rehabilitation and if so then to what extent. If the BIFR may form an opinion in favour of grant of such exemption then the same amounts to 'financial assistance' from the Central Govt to the extent of the sick industry having been exempted from the operation of Section 41 of the Income-tax Act."

This court also notices that a similar view has been expressed by the Bombay High Court in **Vadilal Dairy International Ltd v. State of Maharashtra** 2009 (1) Comp. LJ 466 (Bom).

15. The next issue is whether the revenue is correct in saying that by virtue of Section 119 of the Income Tax Act, and circulars issued under that enactment, the Board of Direct Taxes' views have primacy

over that of BIFR. Section 119 reads as follows:-

> **"119. Instructions to subordinate authorities**
>
> (1) The Board may, from time to time, issue such orders, instructions and directions to other income-tax authorities as it may deem fit for the proper administration of this Act, and such authorities and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board: Provided that no such orders, instructions or directions shall be issued-
>
> (a) so as to require any income-tax authority to make a particular assessment or to dispose of a particular case in a particular manner; or
>
> (b) so as to interfere with the discretion of the Deputy Commissioner (Appeals) or the Commissioner (Appeals)] in the exercise of his appellate functions.
>
> (2) Without prejudice to the generality of the foregoing power,
>
> (a) the Board may, if it considers it necessary or expedient so to do, for the purpose of proper and efficient management of the work of assessment and collection of revenue, issue, from time to time whether by way of relaxation of any of the provisions of sections 5[139], 143, 144, 147, 148, 154, 155, 6[sub-section (1A) of section 201, sections 210, 211, 7[234A, 234B], 234C], 271 and 273 or otherwise, general or special orders in respect of any class of incomes or class of cases, setting forth directions or instructions (not being prejudicial to assessees) as to the guidelines, principles or procedures to be followed by other income-tax authorities in the work relating to assessment or collection of revenue or the initiation of proceedings for the imposition of penalties and any such order may, if the Board is of opinion that it is necessary in the public interest so to do, be published and circulated in the prescribed manner for general information;
>
> (b) the Board may, if it considers it desirable or expedient so to do for avoiding genuine hardship in any case or class of cases, by general or special order, authorise 8[any income-tax authority,

not being a Deputy Commissioner (Appeals) or Commissioner (Appeals)] to admit an application or claim for any exemption, deduction, refund or any other relief under this Act after the expiry of the period specified by or under this Act for making such application or claim and deal with the same on merits in accordance with law.

(c) the Board may, if it considers it desirable or expedient so to do for avoiding genuine hardship in any case or class of cases, by general or special order for reasons to be specified therein, relax any requirement contained in any of the provisions of Chapter IV or Chapter VIA, where the assessee has failed to comply with any requirement specified in such provision for claiming deduction thereunder, subject to the following conditions, namely:(i) the default in complying with such requirement was due to circumstances beyond the control of the assessee; and (ii) the assessee has complied with such requirement before the completion of assessment in relation to the previous year in which such deduction is claimed: Provided that the Central Government shall cause every order issued under this clause to be laid before each House of Parliament.

(3) Every Income-tax Officer employed in the execution of this Act shall observe and follow such instructions as may be issued to him for his guidance by the Director of Inspection or by the Commissioner or by the Inspecting Assistant Commissioner within whose jurisdiction he performs his functions."

16. In pursuance of the above provision, the Central Board of Direct Taxes had withdrawn previous circulars, and in its Circular No. 683 dated 08.06.1994, required that the nodal authority for coordinating between BIFR and the Central Board was the Director General (Administration). This was sought to be highlighted by counsel for the revenue. This court has no doubt about the proposition. However, the blanket submission that when the circular under Section 119 is ignored, and a scheme is given effect to by income tax authorities themselves, the BIFR's order or scheme is void, cannot be countenanced. There is no material on record to suggest such a conclusion. The Income Tax authorities in this case were aware in the earlier round, about the reference and possibility of a scheme; they requested for provision to recover their

dues. The AAIFR specifically remitted the matter to BIFR to consider this aspect, which it did. Although the income tax authorities were not given notice, the order of BIFR reveals that it applied its mind, and granted limited concession only as regards reduction and waiver of interest. The larger pleas of the company towards income tax dues and concessions were denied by the BIFR. Having regard to these circumstances, and Section 32 of the Act as well as the Circular No. 683 of 1994 under the Income Tax Act, the failure of income tax authorities to inform the Director General (since the Circular was in existence at the time of formulation of the scheme in the present case) would not result in the invalidity of BIFR's scheme. Another aspect which this court notices is that the Income Tax authorities, i.e. the assessing officer and the Commissioner, have given effect to the orders of BIFR. These were pursuant to the orders of the Income Tax Appellate Tribunal (ITAT) dated 19.02.2008. That order stands and has attained finality. Besides, the period for operation of the limited concessions in the scheme has also apparently ended. Lastly, in view of the concurrence of the other secured creditors, and implementation of the approved scheme, it would be inequitable and unjust to put the clock back, at the behest of the Income Tax authorities.

17. In view of the above discussion, the writ petition is entitled to succeed. The impugned orders of AAIFR dated 01.04-2009 and 27.09.2012 in Appeal No. 227/2008 are hereby quashed. The orders of BIFR sanctioning the scheme, on 30th November, 2006 are hereby restored. The writ petition is allowed in these terms; there shall be no order as to costs.

ILR (2013) V DELHI 3377
CRL. A.

NARESH @ KOKI ....PETITIONER

VERSUS

STATE OF DELHI ....RESPONDENT

(SUNITA GUPTA, J.)

CRL. A. NO. : 201/2003 DATE OF DECISION: 22.07.2013

Indian Penal Code, 1860—Section 302/307/34—Murder and attempt to murder—Quarrel took place—Four accused persons assaulted the complainant and the deceased with knife—Inflicted a number of injuries on chest and stomach—People started gathering also started petting stone at accused persons—All the accused persons ran away from the spot—Injureds removed to hospital—One of the injureds fit for statement—His statement recorded—Case FIR No. 268/2000 u/s. 307/34 IPC PC Sangam Vihar registered—Injured Sunil expired in hospital—Charge sheet for offences punishable u/s. 302/307/34 IPC filed—Charges under sections 302/307/34 IPC framed against all the four accused persons—Prosecution examined 15 witnesses—Statement of the accused persons recorded u/s. 313 CR. P.C.—All the accused Persons convicted for offences u/s. 326/324/34 IPC—Aggrieved accused/appellant preferred appeal against conviction—Contended—Statements of witnesses not reliable—Role assigned in initial statement changed during deposition—Complainant himself a convict in case u/s. 307 IPC—Motive to commit offence not established—Place of incident not established—recovery of knife doubtful—The knife may not have been used in commission of crime—Statement of the deceased recorded but not brought on record—One

more person introduced not made an accused—No offence u/s. 326 IPC made out—Public prosecutor contended—Presence of all the accused persons at the spot established—Discrepancy in the role played by the accused persons is of no consequence—Motive also proved—Lenient view has already been taken—Held—Discrepancies in testimony caused by memory lapse acceptable—Accused persons well known to all the witnesses—Presence and their participation in crime, coming together and leaving together deposed by all material witnesses—All had common intention—who assaulted whom not material and some contradiction not a ground to reject otherwise reliable evidence—Ocular testimony finds corroboration from medical evidence—Recovery of knife effected in presence of PM13 and PW15 as well—No reason to disbelieve their testimony—Recovery of knife at the instance of appellant proved—Blood on Knife matched with the blood group of deceased—deceased was declared unfit for statement—IO not questioned on this aspect—No active involvement of Subhash alleged—Prosecution relying on direct evidence of eye-witnesses—Not necessarily required to prove motive—Absence of motive is secondary—All accused—No fault can be found with finding of Trial Court—Already a liberal view taken while awarding sentence—No further leniency warranted—No merit in appeal—Dismissed.

Important Issue Involved: Discrepancies in the testimony of a witness which may be caused by memory lapses are acceptable, contradictions in the testimony are not.

Where the prosecution witnesses had come out with two inconsistent versistent versions of the occurrence, one given in the court and the other before the police, the contradictory versions make his testimony wholly unreliable.

Where common intention to kill is established, and the medical evidence shows that injuries caused were sufficient in the ordinary cause of nature to cause death, the case squarely false under section 302/34 IPC and the question as to who actually dealt the fatal blow is immaterial.

Assault by a number of persons at one and the same time with different weapons, some contradictions as to who assaulted whom and with what weapon cannot be a ground to reject the evidence of the eye-witnesses, if otherwise reliable.

The testimony of police personnel should be treated in the same manner as testimony of any other witness and there is no principle of law that without corroboration by independent witnesses their testimony cannot be relied upon.

Where the medical evidence is at variance with ocular evidence, it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye witnesses account which had to be tested independently.

Where the eye witnesses account is found credible and trustworthy, a medical opinion pointing to alternative possibilities cannot be accepted as conclusive.

If injured/witness (s) is/are found to be reliable in respect of involvement of accused then improvement of versions by roping of more persons would not make whole statement unreliable.

Prosecution is not required to necessarily prove motive when it relies upon direct evidence i.e. evidence of eye-witness. Failure to establish motive would not reflect upon the creditability of a witness.

[Vi Gu]

APPEARANCES:

FOR THE PETITIONER : Mr. Hem C. Vashisht, Advocate.

FOR THE RESPONDENT : Ms. Fizani Husain, App for the State.

CASES REFERRED TO:

1. *Narain Singh* vs. *State,* 2013 (1) AD (Delhi) 685.
2. *Sunil Clifford Daniel* vs. *State of Punjab,* (2013) 1 SCC (Cri) 438).
3. *Sampath Kumar* vs. *Inspector of Police, Krishnagiri,* 2012 (2) JCC 1185.
4. *Mohinder* vs. *State,* 2010 VII AD (Delhi) 645.
5. *Abdul Sayeed* vs. *State,* 2010 IX AD SC. 615.
6. *State of U.P.* vs. *Dinesh,* (2009) 11 SCC 566.
7. *Khambam Raja Reddy & Another.* vs. *Public Prosecutor,* High Court of A.P., (2006) 11 SCC 239.
8. *Karanjit Singh* vs. *State* (Delhi Admn., 2003 5 SCC 291.
9. *Chittarmal* vs. *State of Rajasthan,* 2003 (1) AD SC 239.
10. *Narayan Chetanram Chaudhary & Anr.* vs. *State of Maharashtra,* (AIR 2000 SC 3352).
11. *State of Haryana* vs. *Bhagirath & Another,* (1999) 5 SCC 96.
12. *State of Himachal Pradesh* vs. *Lekh Raj and Anr.,* AIR 1999 SC 3916.
13. *Satbir* vs. *Surat Singh And Ors.,* (1997) 4 SCC 192.
14. *Bhagirath and Ors.* vs. *State of Haryana,* AIR 1996 SC 3431.
15. *Mani Ram & Others* vs. *State of U.P.,* 1994 Supp (2)

SCC 289.

16. *State of Maharashtra* vs. *Kalu Shivram Jagtap and Ors.,* 1980 Supp SCC 224.

17. *Molu* vs. *State of Haryana,* AIR 1976 SC 2499.

18. *State of Haryana* vs. *Gurdial Singh & Pargat Singh,* AIR 1974 SC 1871.

19. *Solanki Chimanbhai Ukabhai* vs. *State of Gujarat,* AIR, 1983 SC 484.

RESULT: Appeal Dismissed.

SUNITA GUPTA, J.

1. Challenge in this appeal is to the judgment dated 22nd February, 2003 and order on sentence dated 7th March, 2003 arising out of Sessions Case No.133/2000 in case FIR No. 268/2000, PS Sangam Vihar under Sections 302/307/34 IPC vide which the appellant along with co-accused was held guilty of offence under Section 324/34 IPC and 326/34 IPC. All the accused were sentenced to undergo rigorous imprisonment of five years and a fine of Rs.10,000/- each under Section 326/34 IPC, in default of payment of fine to undergo simple imprisonment of six months. Further rigorous imprisonment for one year was awarded to each of the accused persons under Section 324/34 IPC. The substantive sentences were to run concurrently. Out of the fine, if so deposited, an amount of Rs.30,000/- was directed to be paid to legal heirs of the deceased Sunil Kumar as compensation.

2. The factual matrix of the case is:-

On 11th July, 2000, on receipt of DD No. 17B Ex. PW 12/B SI Girish Kumar Singh PW15 along with Constable Yad Ram reached near Shubham Vatika, Devli Extn., where he came to know that a quarrel had taken place and injured had already gone to hospital. Thereafter, he along with Constable Yad Ram reached All India Institute of Medical Sciences where injured Sunil S/o Ramprakash and Aas Mohd. were admitted. SI Girish moved an application Ex. PW15/A on which injured Sunil was declared unfit for statement. Injured Aas Mohd. was declared fit for statement. As such, he recorded statement Ex. PW3/A wherein he disclosed that he is resident of A-80, Devli Extn., New Delhi and is a carpenter by profession. On 10th July, 2000, his friend Trilok had a

quarrel with Chini and Babloo in respect of some money transaction. On 11th July, 2000 at about 11:00 a.m. Vinod @ Chini, Babloo @ Vicky, Naresh @ Koki and Irshad met him at Subham Vatika where he and his friend Sunil S/o Ram Prakash were standing. All the four persons caught hold of him and Sunil. Vinod @ Chini and Babloo caught hold of him and Naresh @ Koki and Irshad caught hold of Sunil. He tried to save himself from the said persons but Vinod @ Chini took out a knife and gave a knife blow which landed on his right hand. He shouted 'Bachao-Bachao' and on this, Babloo @ Vicky exhorted *"Aaj tum dono ko jaan se hi khatam kar denge."* Thereafter, Vinod @ Chini again inflicted knife injury on his stomach. In the meanwhile, he freed himself from both of them and started running. Thereafter all the four persons caught hold of deceased Sunil. Irshad caught hold of Sunil from his back and Naresh @ Koki who was also having a knife inflicted number of knife injuries on Sunil on his chest and stomach. Irshad exhorted *"Isko khatam kar ke hi chodna"*. In the meanwhile, people gathered there and started pelting stones on those persons. Then they ran away. All the four persons, namely, Vinod @ Chini, Babloo @ Vicky, Irshad and Naresh @ Koki inflicted injuries on him and Sunil with intention to kill them.

3. On the basis of this complaint, FIR No. 268/2000 under Section 307/34 IPC was registered at PS Sangam Vihar, New Delhi and investigation started. SI Girish Kumar Singh made endorsement Ex.PW15/C on the statement of Aas Mohd. and sent Constable Yad Ram to police station for registration of the case, on the basis of which FIR Ex. PW12/C was registered by ASI Sarita (PW12). At the instance of PW4 Trilok Singh, site plan Ex. PW15/D was prepared. SI Girish Kumar inspected the place of incident where some blood was lying on the ground. He lifted the blood stained earth and earth control. The same was kept in plastic panni and was sealed with the seal of GKS and were seized vide seizure memo Ex.PW4/C. Thereafter, he along with Constable Yad Ram and Trilok reached A-10, Devli Extn. New Delhi where Naresh @ Koki was present. He was interrogated. He made a disclosure statement Ex.PW4/E. He was arrested and his personal search was conducted vide Ex.PW4/D. In pursuance to the disclosure statement, accused Naresh pointed out the place of incident vide pointing out memo Ex.PW4/5. He also got recovered a knife from near the place of incident. Sketch of the knife Ex.PW4/F was prepared which was seized vide seizure memo Ex.PW4/A. Thereafter, accused Babloo @ Vicky, Vinod Kumar @ Chini and

Irshad Khan were arrested. Vide DD 15A, Ex.PW14/A, an information was received that the injured Sunil has expired in the hospital. On 12th July, 2000, dead body of Sunil was identified by PW7 Jagdish and PW8 Surinder Kumar. Post-mortem on the dead body of Sunil was conducted by Dr. Sanjeev Lalwani. Scaled site plan Ex.PW10/A was prepared. After completing investigation, charge sheet was submitted against all the accused.

4. Charge under Section 307/302/34 IPC was framed against all the accused persons, to which they pleaded not guilty and claimed trial.

5. To substantiate its case, prosecution examined 15 witnesses. Thereafter statements of all the accused persons were recorded under Section 313 Cr. P.C. wherein they denied the case of prosecution and alleged false implication in the case.

6. Vide order dated 22nd February, 2003, all the accused were convicted and sentenced as mentioned above. Only accused Naresh @ Koki has challenged his conviction by filing the present appeal.

7. It was submitted by learned counsel for the appellant that the statements of the witnesses are not reliable inasmuch as they have been changing their statements time and again. The role assigned to the accused persons in the initial statement which led to registration of case FIR has been changed during their deposition in the Court. Moreover, complainant himself is a convict in a case under Section 307 IPC and is now languishing in jail. Furthermore, motive to commit the crime is not established. Moreover, exhortation made by the accused persons as alleged in the complaint Ex.PW3/A has been denied by all the prosecution witnesses. Even the place of incident is not established. Recovery of knife from accused Naresh @ Koki is doubtful. Even otherwise PW2 Dr. Sanjeev Lalwani who conducted post-mortem on the dead body of Sunil Kumar, could not deny in his cross-examination that the knife allegedly recovered at the instance of Naresh @ Koki may not have been used in the commission of crime. Furthermore, it has come in the statement of the witnesses that deceased Sunil made a statement to the Investigating Officer, however, that statement has not been brought on record by the prosecution which cast doubt on the prosecution story. Furthermore, the public witnesses have introduced one Subhash with four accused persons but he was not made an accused. As such, prosecution has failed to prove its case. Even the learned Additional Sessions Judge did not convict

any of the accused for offence under Section 302 IPC, but convicted them for offence u/s 326 IPC, however, even offence under Section 326 IPC is not made out against the accused. As such, the impugned order deserves to be set aside. In case, the conviction is upheld, then the appellant has already undergone half of the sentence, he has a family to support, as such, he be released on the period already undergone.

8. Per contra, it was submitted by learned Public Prosecutor that presence of all the accused at the spot is proved by all the public witnesses. Some discrepancy has appeared regarding the role played by them but that is of no consequence. The Court has already taken a lenient view by convicting them under Section 326 IPC. The motive is also proved from the testimony of the prosecution witnesses. Supporting the judgment, it was submitted that there is no infirmity in the impugned order which calls for interference. As such, the appeal is liable to be dismissed.

9. I have given my thoughtful consideration to the respective submissions of learned counsels for the parties and have perused the record.

10. Material witnesses to unfold the case of prosecution are PW3 Aas Mohd., the complainant, PW4 Trilok Singh, PW6 Anil Kumar and PW9 Ajay Kumar.

11. PW3 Aas Mohd. unfolded that all the four accused persons were known to him from before. On 11th July, 2000 at about 11.00 a.m. he was present at Tea Shop near his house at Devli Extn. and deceased Sunil was also sitting with him. All the four accused persons along with one Subhash came towards them and caught hold of him and Sunil. They took out knife and inflicted injuries on his person and then inflicted injuries with knife on the person of Sunil. He further deposed that accused Vinod @ Chini and Babloo @ Vicky gave knife blows on his person and when he fell down, they gave knife blows on the person of Sunil whereas two other accused persons, namely, Irshad and Naresh with Subhash caught hold of Sunil. Accused Vinod @ Chini gave knife blow on the stomach of Sunil whereas accused Babloo gave knife blow on his chest. Sunil started bleeding from injuries and thereafter he lost conscious and regained consciousness in the hospital. His statement Ex.PW3/A was recorded by the police. He further stated that statement of Sunil was also recorded by police in which he named five persons to be the assailants

and he was on a separate bed lying in the same room of the hospital.

12. Since this witness resiled from his earlier statement, he was cross-examined by learned Public Prosecutor wherein he stated that he knew all the accused prior to the incident, however, he denied that they were present near Shubham Vatika when the incident took place. He also denied that accused Vinod @ Chini and Babloo @ Vicky caught hold of him or that accused Naresh @ Koki and Irshad caught hold of deceased Sunil. He admitted that when he tried to rescue himself from accused Vinod @ Chini and Babloo @ Vicky, at that time, Vinod took out a knife and gave knife blow on his right hand as he tried to save himself. He further deposed that accused Vinod @ Chini was holding a knife and he gave several knife blows to Sunil. He also denied that accused Irshad ever exhorted "Isko Khatm Karke Chhodna". He also denied that he along with Subhash took Sunil in a scooter to AIIMS or that statement of Sunil could not be recorded as he expired. He admitted that cause of quarrel was money dispute between Trilok and Sunil but later on accused Vinod @ Chini, Babloo @ Vickey and Naresh @ Koki intervened. He denied having joined the investigation on 11th September, 2000.

13. PW4 Trilok Singh deposed that he was to take money from Sonu as Sonu had taken atta (flour) from his shop (chakki) on credit. On 10th July, 2000, he demanded money from Sonu but he brought accused Babloo @ Vicky, Vinod @ Chini and Naresh @ Koki to threaten that he should not demand money from Sonu. On 10th July, 2000, in the evening he and Sunil again met four accused persons and quarrel had taken place amongst them. Accused gave beatings to him and deceased Sunil took his side on which accused persons threatened him and Sunil to see them next day. On the next day, i.e., 11th July, 2000, he got an information about a quarrel going on between the accused persons and the complainant. Thereupon, he rushed to the place of incident where he saw all the accused persons holding knives in their hands and saw accused Vinod @ Chini giving a knife blow on the chest of Sunil while accused Babloo @ Vicky, Naresh @ Koki and Irshaad were holding Sunil and as he tried to save Sunil, accused Babloo @ Vicky exhorted "Tu bhi aa ja". People gathered there on hearing his alarm and accused persons ran away. He brought an auto rickshaw and took Sunil to hospital along with Aas Mohd. In his presence, a knife, by which accused Vinod @ Chini inflicted injuries on the person of Sunil, was seized vide seizure memo Ex.PW4/A. Since this witness also did not support the case of

prosecution in entirety, he was also cross-examined by the learned Public Prosecutor and then he admitted that all the accused persons caught hold of Sunil and accused Naresh @ Koki gave several knife blows to Sunil. Sunil was bleeding profusely. He, however, denied the arrest of the accused persons or recovery of knife in his presence.

14. PW6 Anil Kumar deposed that on 11th July, 2000 at about 10:30/11:00 a.m., he reached near Shubham Vatika where accused Irshad and Naresh @ Koki were holding Sunil Kumar and accused Vinod @ Chini and Babloo gave knife blows to Aas Mohd. Thereafter Aas Mohd. managed to escape and then accused Vinod @ Chini and Babloo gave knife blows on the person of Sunil. Aas Mohd. ran away. Sunil fell down due to injuries received at the hands of Vinod @ Chini and Babloo @ Vicky. Public gathered there and pelted stones on accused persons, as a result of which, they started running. He hired a three wheeler scooter and took Aas Mohd. and Sunil to AIIMS hospital and got them admitted there. This witness also did not support the case of prosecution, as such, he was declared hostile. In cross-examination, he admitted that accused Vinod @ Chini was holding a knife in his hand and he inflicted injuries on the person of Aas Mohd but denied the suggestion that accused Babloo ever exhorted *"Isko Khatam Kar De"*. He also denied that accused Irshad, Babloo and Vinod @ Chini caught hold of Sunil and accused Irshad exhorted *"Koki Isko Khatam Kar Ke Hi Chhodna"*. He denied giving knife blows by accused Naresh @ Koki to Sunil.

15. PW9 Ajay Kumar identified all the accused persons but did not support the case of prosecution by deposing that he had not seen anyone stabbing the injured with his own eyes. He went on stating that when he reached the place of incident he saw a crowd gathered there and he came to know that injured was stabbed by someone. Thereafter Anil, one Shakti and Trilok took Sunil/injured to hospital and he also accompanied them.

16. The prosecution case, from the initial statement made by Aas Mohd., which became the bed rock of investigation, reveals that according to him accused Vinod @ Chini gave a knife blow to him while accused Babloo @ Vicky hold him from the back. Accused Naresh @ Koki gave deadly blows by knife to Sunil while accused Irshad caught hold of Sunil from his back. The roles qua accused Babloo @ Vicky and Irshad are of exhorting. However, as seen above, a twist came in the prosecution

story when the witnesses came to depose before the Court. Aas Mohd. in his deposition before the Court stated that accused Irshad, Naresh @ Koki with Subhash caught hold of deceased Sunil while accused Vinod @ Chini and Babloo @ Vicky gave knife blows on his stomach and chest. He also stated in his cross-examination that accused Vinod @ Chini gave knife blows on his stomach. According to PW4 Trilok Singh, all the four accused were present with knife while Babloo @ Vicky, Naresh @ Koki and Irshad were holding the deceased Sunil, accused Vinod @ Chini gave knife blows to deceased Sunil. According to PW6 Anil Kumar, accused Vinod @ Chini and Babloo @ Vicky gave knife blows to Sunil and Aas Mohd. Thus, there is change in roles of accused persons.

17. Under the circumstances, learned counsel for the appellant relied upon **Sampath Kumar vs. Inspector of Police, Krishnagiri,** 2012 (2) JCC 1185 for contending that the statement made by the witnesses are wholly unreliable. In this case, reference was made to **Narayan Chetanram Chaudhary & Anr. v. State of Maharashtra,** (AIR 2000 SC 3352), where it was held that while discrepancies in the testimony of a witness which may be caused by memory lapses were acceptable, contradictions in the testimony were not. It was observed:-

> "Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of the witness. The omission in the police statement by itself would not necessarily render the testimony of witness unreliable. When the version given by the witness in the Court is different in material particulars from that disclosed in his earlier statements, the case of the prosecution becomes doubtful and not otherwise. Minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and the sense of observation differ from person to person."

18. In **Sampath Kumar** (supra), the statement made by the witness was in complete contrast with the statement made by him before the police where the witness stated nothing about having seen the appellants standing near the deceased around the time of incident. The omission was considered to be of very vital character. It was observed that he did not, in his version given to the police, come out with what according to him is the truth, but withheld it for a period of five years till he was

examined as a prosecution witness in the Court. He made substantial improvement in the version without giving any acceptable explanation. As such, it was observed that his testimony is wholly unreliable.

19. The difference between discrepancies and contradictions was explained in **State of Himachal Pradesh Vs. Lekh Raj and Anr.,** AIR 1999 SC 3916 and **State of Haryana Vs. Gurdial Singh & Pargat Singh,** AIR 1974 SC 1871 where the prosecution witnesses had come out with two inconsistent versions of the occurrence. One of these versions was given in the Court while other was contained in the statement made before the police. It was held that in view of the contradictory versions, the conviction of the accused could not be sustained.

20. Things are entirely different in the instant case. Accused persons were well known to the witnesses from before. As such, their identity is not in dispute. Presence of all the accused and their participation in the crime, their coming together and leaving the spot together was also deposed by all the material prosecution witnesses. It was only regarding the role assigned to the accused persons in which some variance has come.

21. In **State of Maharashtra Vs. Kalu Shivram Jagtap and Ors.,** 1980 Supp SCC 224, it was held that where common intention of two or more accused persons to kill the deceased is established and the medical evidence shows that injuries caused by the accused were sufficient in the ordinary course of nature to cause death, the case squarely falls under Section 302/34 IPC and the question as to who actually dealt the fatal blow is wholly immaterial.

22. In **Satbir Vs. Surat Singh And Ors.,** (1997) 4 SCC 192 also, three persons were assaulted by a number of persons at one and the same time with different weapons. It was held that in such situation, some contradictions as to who assaulted whom and with what weapon cannot be made a ground to reject the evidence of the eyewitnesses, if it was otherwise reliable.

23. Again in **Mahmood and Anr. Vs. State of U.P.,** AIR 2008 SC 515, it was held that once membership of an unlawful assembly is established, it is not incumbent on the prosecution to establish any specific overt act to any of the accused for fastening of liability with the aid of Section 149 of the IPC. Although, that was a case under Section 302

IPC read with Section 149 IPC, however, ratio decidendi of that case is equally applicable to the facts of the present case. It is established on record that all the accused came together to the place of incident which proves their common intention. Simple injuries to Aas Mohd and grievous injuries to Sunil were caused by them. In such a fact situation, some contradiction as to who assaulted whom cannot be made a ground to reject their evidence which otherwise is reliable. They had no axe to grind to falsely implicate accused persons, more particularly when no animosity, ill-will or grudge is alleged against them.

24. The ocular testimony of the prosecution witnesses finds corroboration from the medical evidence. PW1 Dr. Imli examined the complainant Aas Mohd. and proved the MLC Ex.PW1/A which shows 2 c.m. stab wound in right lumber region and wound of 2 c.m. in right forearm. The nature of injuries was opined as simple by blunt object.

25. PW2 Dr. Sanjeev Lalwani, of AIIMS Hospital conducted post-mortem of Sunil, S/o Ram Prakash on 12th July, 2000 and proved post-mortem report Ex.PW2/A. The post-mortem report Ex.PW2/A shows various injuries but the material injuries are injury Nos. 2 & 7. As per the post-mortem report, following material injuries were found on the person of deceased Sunil:-

> Injury No.1 is stitched wound 21 cm over chest wall left side laterally going obliquely upward and backward. On dissection underlying mascular haematoma on chest wall with fracture of 5.6 ribs seen. Injury No.2 is stab wound present over it, upper chest laterally of six 1.5 cm x 1 cm situated 9.5 cm above and lateral to it, nipple, 12 cm from shoulder tip & 14.5 cm lateral and left to midline with underline mascular downward piercing second left interpostal space in mid clabucular line penetrating pleura as well. Injury No.7 shows left lung collapsed showing repair at both upper and lower labs at four sides, two at upper and two at lower ribs. Both upper repaired wound were communicated to each other and both lower repaired wound were communicated to each other. Right wt. 380 grams and left wt. 150 gm."
>
> He opined that injury No. 1, 2 & 7 as mentioned in post-mortem report Ex.PW2/A are sufficient in ordinary course of nature to cause death. He further deposed that injuries on the persons of

deceased were possible with dagger/chhuri Ex.PW4/1. Under the circumstances, ocular testimony of the witnesses finds due corroboration from the medical evidence.

26. As regards the submission of learned counsel for the appellant that recovery of knife from accused Naresh @ Koki is doubtful, same is devoid of merit inasmuch as although PW4 Trilok Singh who was one of the witnesses in whose presence recovery was effected has not supported the case of prosecution but then there is testimony of PW13 Constable Yad Ram and PW15 Girish Kumar Singh in whose presence the recovery was effected. There is no reason to disbelieve the testimony of both these witnesses.

27. The testimony of police personnel should be treated in the same manner as testimony of any other witnesses and there is no principle of law that without corroboration by independent witnesses their testimony cannot be relied upon. The presumption that a person acts honestly applies, as much in favour of police personnel as of other person and it is not a proper judicial approach to distrust and suspect them without good ground. (**Karanjit Singh Vs. State (Delhi Admn.,** 2003 5 SCC 291; **Sunil Clifford Daniel vs. State of Punjab,** (2013) 1 SCC (Cri) 438). Record reveals that both the police officials were subjected to searching cross-examination but nothing could be elicited to discredit their testimony, as such, recovery of knife at the instance of appellant Naresh @ Koki stands proved.

28. Furthermore, PW2 Dr. Sunil Lalwani has also deposed that knife/dagger Ex.PW4/1 may be responsible for injuries caused to deceased Sunil. Learned counsel for the appellant, however, referred to his cross-examination where the witness could not deny that injuries on the person of Sunil may not have been caused by this knife. Thus there is variance in the testimony of doctor inasmuch as in examination-in-chief, he deposed that injuries were possible by this knife whereas in cross examination could not rule out the possibility that injuries may not be caused by this knife. This, however, is not sufficient to discard the ocular testimony of witnesses all of whom have deposed that injuries on the person of Aas Mohd and Sunil were caused by knife. It is settled law that where the medical evidence is at variance with ocular evidence, it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye witnesses, account which had to be tested independently.

Where the eye witnesses, account is found credible and trustworthy, a medical opinion pointing to alternative possibilities cannot be accepted as conclusive.

29. In **State of Haryana v. Bhagirath & Another,** (1999) 5 SCC 96, it was held as follows:-

> "17. The opinion given by a medical witness need not be the last word on the subject. Such opinion shall be tested by the court. If the opinion is bereft of logic or objectivity, court is not obliged to go by that opinion. After all opinion is what is formed in the mind of a person regarding a fact situation. If one doctor forms one opinion and another doctor forms a different opinion on the same facts it is open to the judge to adopt the view which is more objective or probable. Similarly, if the opinion given by one doctor is not consistent with probability the court has no liability to go by that opinion merely because it is said by the doctor. Of course, due weight must be given to opinions given by persons who are experts in the particular subject."

30. In **Solanki Chimanbhai Ukabhai v. State of Gujarat,** AIR, 1983 SC 484, the Supreme Court observed:

> "Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye witnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eye witnesses, the testimony of the eye witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence. Similar view was taken in **Mani Ram & Others v. State of U.P.,** 1994 Supp(2) SCC 289; **Khambam Raja Reddy & Another. V. Public Prosecutor,** High Court of A.P., (2006) 11 SCC 239; **State of U.P. v. Dinesh,** (2009) 11 SCC 566 and **Abdul Sayeed vs. State,** 2010 IX AD SC. 615.

31. Under the circumstances, variance in the deposition of the doctor as to whether the knife recovered at the instance of appellant was

used in the crime or not is not fatal, more particularly so, because he could not rule out the possibility of user of this knife in the crime. There is no categorical assertion that injuries could not have been inflicted with this knife.

32. Moreover, during the course of investigation, the knife was sent to FSL from where report Ex.PW15/G was received which reflects that blood of 'A' Group was found on dagger which matched with the blood group or blood stained gauge of deceased Sunil. This is another clinching piece of evidence against the accused.

33. As regards the submission that the deceased Sunil had made a statement to the Investigating Officer but same has been withheld by the prosecution, same is devoid of substance, inasmuch as, it has come in the statement of PW15 SI Girish Kumar Singh that he had moved an application Ex.PW15/A for recording the statement of Sunil but he was declared unfit for statement. In cross-examination, no question was put to the witness that Sunil had made a statement which had been withheld. Under the circumstance, it cannot be believed that deceased Sunil made any statement to the Investigating Officer. In fact PW4 Trilok Singh has denied that deceased Sunil ever made any statement to the Investigating Officer.

34. As regards, introduction of Subhash by some of the prosecution witnesses, that does not cast any dent on the prosecution case. No active involvement of Subhash was even otherwise alleged by any of the prosecution witnesses. In **Chittarmal Vs. State of Rajasthan,** 2003 (1) AD SC 239, it was held that if injured witness(s) is/are found to be reliable in respect of involvement of accused then improvement of versions viz. roping of more persons would not make whole statement unreliable.

35. As regards, the submission that the place of occurrence has been changed by PW3 Aas Mohd. in his deposition before the Court, that, at best, is a minor variation which does not affect the basic substratum of the case. All the other witnesses have deposed that the place of occurrence was near Shubham Vatika. The Investigating Officer had also visited the place of incident which was an open plot near Shubham Vatika and seized blood stained earth and earth control sample vide seizure memo Ex.PW4/C. Site plan Ex.PW15/D also reflects that the place of incident was near Shubham Vatika. Under the circumstances, the discrepancy is of a minor nature which does not cast any dent on

the prosecution case.

36. Another limb of arguments that motive is not established is also devoid of substance. As revealed by PW-4 Trilok Singh, he had to take money from Sonu as he had taken atta from his shop on credit. On 10th July, 2000, he demanded money from Sonu, instead of paying the same, he brought accused Babloo @ Vicky, Vinod @ Chini and Naresh @ Koki to threaten that he should not demand money. Thereafter, on the same day, in the evening, a quarrel took place between him and accused persons and Sunil was also present at that time. Accused gave beatings to Trilok Singh and at that time, Sunil took his side on which the accused persons threatened Sunil and Trilok Singh to see them next day. On the next day, the incident took place. Even if it is taken that there was no enmity between accused persons and the injured Aas Mohd. and Sunil, even then, in view of the direct evidence available on record, specifying the role of the accused persons, even if motive to commit crime is not established, same pales into insignificance. In **Bhagirath and Ors. vs. State of Haryana,** AIR 1996 SC 3431; **Molu vs. State of Haryana,** AIR 1976 SC 2499; **Mohinder vs. State,** 2010 VII AD (Delhi) 645, **Narain Singh v. State,** 2013 (1) AD (Delhi) 685, it was held that prosecution is not required to necessarily prove motive when it relies upon direct evidence, i.e., evidence of eye-witnesses. Failure to establish motive would not reflect upon the credibility of a witness. In the instant case, since direct evidence is available, absence of motive assumes secondary role.

37. The entire evidence led by the prosecution was minutely scrutinized by the learned Additional Sessions Judge. It was observed that in view of the interpolation of roles, though the benefit of doubt in respect of the fact as to who actually inflicted the murderous assault had to be given but since all accused had common intention to teach lesson to Aas Mohd. and Sunil and they all acted together having knife, each one of them must be held to have knowledge that grievous injury is likely to be caused as such case u/s 324/326/34 IPC was made out. No fault can be found in this finding of learned Trial Court.

38. As regards the quantum of sentence, leniency in sentence was prayed on the ground that the appellant has suffered half of the sentence and he has a family to support. As such, he be released on the period already undergone. However, this submission is not fortified by the nominal

roll received from jail according to which the unexpired portion of sentence is 3 years, 11 months and 15 days. Even otherwise, the appellant was convicted for committing offence under Section 326/324/34 of IPC. The sentence prescribed under Section 326 IPC is imprisonment for life or imprisonment which may extend to ten years and shall also be liable to fine. The appellant was sentenced to undergo rigorous imprisonment for five years only and fine under Section 326 IPC and for one year under Section 324 IPC. As such, already a liberal view has been taken by learned Additional Sessions Judge while awarding sentence. No further leniency is warranted. That being so, there is no merit in the appeal, the same is accordingly dismissed.

39. Trial Court record be sent back.

ILR (2013) V DELHI 3394
CRL. A.

RANJANA **....APPELLANT**

VERSUS

STATE **....RESPONDENT**

(S.P. GARG, J.)

CRL. A. NO. : 984/2011 **DATE OF DECISION: 23.07.2013**

Indian Penal Code, 1860—Section 302—Murder—Section 201—Causing disappearance of evidence—Information regarding recovery of body in a house—Crime team summoned—body taken out of the gutter—Statement of victim's daughter recorded—FIR No. 118/2004 under sections 302/201 IPC registered at PS Gokalpuri—Charge sheet for offences under section 302/201 IPC filed—charges framed—Prosecution examined 19 witnesses—statement of accused under section 313 Cr. P.C. recorded—Convicted for offences

punishable under sections 304 part II/201 IPC—Aggrieved appellant preferred appeal—Contended—Putting chunni around the neck of her husband and not taking proper care to untie it was a rash and negligent act—Had no intention or motive to murder—not aware of the consequences of her act—In exercise of private defence tied chunni with cot—did not flee and arrested after six years—Additional Public Prosecutor contended—Deliberately and intentionally put chunni around the deceased's neck—All contentions dealt with in the judgment—Held—PW2 proved her version as given to the police without any variation—No material discrepancy emerged in cross examination—no ulterior motive assigned to her to falsely implicate her mother—No reason to disbelieve her testimony—No pre-planning or pre-meditation—Occurrence took place on a trivial issue—Had no intention to cause death or any intention to cause bodily injury likely to cause death—Act was such which might cause death—Deceased was in drunken state—was unable to take care of himself—Incapacitated and unable to release himself—Appellant did not explain her unreasonable and unnatural conduct—Cause of death was asphyxia due to blockage of respiratory track—There was direct nexus between 'the act' the death—Attributed with knowledge that such act might cause death or such bodily injury as likely to cause death—not a case of mere neglect—Conviction confirmed—Sentence modified—Appeal disposed of.

Important Issue Involved: Before examining a child witness, the trial court must be satisfied that the child is able to understand and answer the questions properly.

For culpable homicide not amounting to murder there must be a direct nexus between 'the act and the 'the death'.

Conduct of accused is relevant to ascertain his her guilt.

Tying an intoxicated person with a chunni around his neck and thereafter tying the chunni with leg of the cot is an act of such character that no reasonable mind would be ignorant of the likelihood of its causing death.

Failure to explain his her unreasonable and unnatural conduct by the accused is relevant in imputing knowledge of the consequences of his act.

[Vi Gu]

APPEARANCES:

FOR THE APPELLANT : Mr. Gaurav Kumar, Advocate.

FOR THE RESPONDENT : Mr. M.N. Dudeja, APP for the State.

RESULT: Appeal disposed of.

S.P. GARG, J.

1. Ranjana (the appellant) impugns a judgment dated 05.04.2010 in Sessions Case No.52/2009 arising out of FIR No.118/2004 registered at police station Gokalpuri by which she was convicted for offences punishable under Sections 304 part II/201 IPC and sentenced to undergo Rigorous Imprisonment for six years with total fine Rs. 3,000/-.

2. Daily Diary (DD) No.8A was recorded at 12.00 (noon) on 22.03.2004 at Police Statoin Gokalpuri on getting information about recovery of body in a house at A-block, Gali No.1, Rama Garden, Karawal Nagar, Delhi. The investigation was assigned to ASI Tara Dutt who with Constable Harinder Singh reached the spot. The investigation was taken over by PW-11 (SI Amul Tyagi) who with Constable Sohanvir went to the spot. ASI Tara Dutt informed him that Rakambir Singh's dead body was lying in a gutter inside the house. Crime team was summoned. The Investigating Officer made inquiries from Kumari Durgesh, victim's daughter, aged eight years and recorded her statement (Ex.PW-2/A). Crime team reached the spot and got the crime scene photographed. The

body was taken out of the gutter. SI Amul Tyagi lodged First Information Report. Dr.Arvind Kumar (PW-10) conducted post-mortem examination of the body. Statements of witnesses conversant with the facts were recorded. Exhibits were sent for analysis to Central Forensic Science Laboratory, Kolkata. On completion of investigation, Ranjana was sent for trial for committing offences under Section 302/201 IPC. She was duly charged and brought to trial. The prosecution examined 19 witnesses in all to establish her guilt. In her 313 statement she claimed innocence and pleaded false implication.

3. Kumari Durgesh, appellant's daughter, revealed startling facts and disclosed that on 20.03.2004 at about 10.00 P.M. her father and his friend Rajpal consumed liquor in the house. Rajpal left thereafter. Her father did not allow her mother to go to bed. On that, her mother put a chunni in his neck and made him to lie on the cot. She tied that chunni with the cot and made them to sleep stating that she would untie him in the morning. On the next morning, she saw him dead. On 21st March, 2004, on Sunday, her mother dragged him from the cot and threw him in a gutter inside the house.

4. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court by the impugned judgment convicted Ranjana for the offences mentioned previously and sentenced her accordingly. Being aggrieved, she has preferred the appeal.

5. Learned counsel for the appellant urged that the Trial Court did not appreciate the evidence in its true and proper perspective and fell into grave error in holding that it was a case of culpable homicide not amounting to murder. The counsel emphasised that it was a rash and negligent act of the appellant as she put chunni around the neck of her husband and did not take proper care to untie it. She had no intention or motive to murder her husband. She was not aware of the consequences of her act. The deceased was in the habit of beating the appellant. To prevent him from consuming more liquor and to beat her, she in exercise of private defence, tied chunni with the cot. She did not flee the spot and was arrested after an inordinate delay of six years. Learned Additional Public Prosecutor urged that there is no infirmity in the impugned judgment to interfere with. All the contentions of the appellant have been dealt with minutely in the impugned judgment. The appellant deliberately and intentionally put the chunni around the deceased's neck. The testimony

of the doctor, who conducted the autopsy is relevant to establish her guilt.

6. I have considered the submissions of the parties. The material facts are undisputed and have been admitted by the appellant in her statement under Section 313 Cr.P.C. Star witness to prove the appellant's guilt is her daughter PW-2 (Kumari Durgesh), a child witness aged eight years. The First Information Report was lodged on her statement. She gave graphic account of circumstances leading to the death of her father. In her court statement as PW-2, she proved the version given to the police at the first instance without any variation. The learned presiding officer put number of preliminary questions before recording her statement to ascertain if she was a competent witness and able to understand the question and give rational answers. The Trial Court was satisfied that PW-2 (Kumari Durgesh) was able to understand and answer the questions properly. She deposed that on 20.03.2004 at about 10.00 P.M. her father and Rajpal consumed liquor. After consuming liquor, her father asked her mother for dinner but she did not it. She got angry and tied a chunni around his neck with her hands. When she (PW-2) tried to stop her not to tie chunni around her father's neck, she (the appellant) stated that she would untie the chunni next morning. She (the appellant) bolted the door from inside. After consuming liquor, Rajpal uncle left the house. After tying the chunni, her mother made him to lie on a cot and tied that chunni with a leg of the cot. On the next morning, she got up and touched his body. It was without motion and had turned bluish. She saw her mother opening gutter cover by removing the cement on it. She, her brothers and sisters were made to sleep. Her mother put her father's body in the gutter. In the cross-examination, she admitted that she and her mother used to ask the deceased not to consume alcohol. The deceased used to consume alcohol in the house despite their resistance. She further admitted that under the influence of liquor, her father used to quarrel, abuse and beat her mother. She volunteered to add that she (the appellant) also used to beat him and neighbours used to intervene occasionally. She further elaborated that on the day of incident, her mother had not cooked food.

7. No material discrepancy emerged in the cross-examination of the child witness to disbelieve and discard her statement. No ulterior motive was assigned to her to falsely implicate her mother for her father's death. In her 313 Cr.P.C. statement, the appellant admitted that on 20.03.2004 at about 10.00 P.M. her husband and his friend Rajpal had

consumed liquor. She denied that she had tied chunni (Ex.P-1) around the neck of her husband and claimed that she had tied his hands only with a view to restrain him from going out of the house again to consume liquor. She further admitted that she made him to lie on the cot and tied chunni with one leg of the cot. She admitted that when on the next morning Kumari Durgesh woke up and touched his body, she found that it was motionless and had turned bluish. She admitted that after making children to fall sleep, in the afternoon she put the body in the gutter located in the gallery of her house. She admitted that she gave false explanation about his whereabouts to his relatives. She admitted recovery of the body from the gutter. She did not challenge the correctness of the statement (Ex.PW2/ A) made by Kumari Durgesh to the police on the basis of which First Information Report was lodged. She admitted that the videographs and photographs were done when the body was taken out of the gutter/sewer. The court has no reasons to disbelieve PW-2 Kumari Durgesh's version that the appellant had put chunni (Ex.P-1) around the neck of her father. She tied the chunni with the leg of the wooden cot. The Trial Court discussed in detail that no ulterior motive surfaced on record. Since an altercation had taken place between the two on consumption of liquor, it appeared that in order to avoid further quarrel, the appellant tied him with a chunni with an intention to untie it next morning. There was no pre-planning or pre-meditation and the occurrence took place on a trivial issue of consumption of liquor in the house. It appears that the appellant adopted aggressive posture against the deceased to scare him and to prevent him to consume more liquor or not to pick up quarrel with her. The Trial Court rightly concluded that the appellant had no intention to cause death or any intention to cause such bodily injury as was likely to cause death. The Trial Court was, however, of the view that the appellant could be attributed knowledge that her act was such which might cause death or knowledge of causing such bodily injury as was likely to cause death. I find no good reasons to deviate from the conclusion arrived at by the Trial Court. Apparently the deceased was in a drunken state and was unable to take care of himself. She in a merciless manner put chunni (Ex.P-1) around his neck and tied it with the leg of the cot on which he was made to lie. Apparently, the deceased was incapacitated and was unable to release himself. After tying him with the chunni, she did not bother to take care of him and kept him at the risk of dying throughout the night.

8. Post-mortem examination report (Ex.PW-10/A) by Dr.Arvind Kumar reveals that the cause of death was asphyxia due to blockage of respiratory track by gastric content as a result of regurgitation which is possible in the state of intoxication due to alcohol. Post-mortem examination on the body was conducted on 23.03.2004. The opinion regarding cause of death was withheld for want of chemical analysis report of viscera. On 09.02.2009 after scanning the post-mortem report (Ex.PW-10/A) and CFSL report, PW-10 Dr.Arvind Kumar gave his opinion (Ex.PW-10/B). He was not cross-examined despite an opportunity given. The opinion given by expert witness remained unchallenged. Obviously, there was direct nexus between 'the act' and the 'death'. To tie an intoxicated person with a chunni around his neck and thereafter to tie the chunni with a leg of the cot appears to be an act of such character that no reasonable mind would be ignorant of the likelihood of its causing death. The appellant's conduct is relevant to ascertain her guilt. After Durgesh found her father motionless next morning, the appellant did not bother to provide him medical aid. She did not take him to hospital. She even did not inform his close relatives who lived in the vicinity. When they made inquiries about his whereabouts subsequently, she gave false explanation faking that he had gone somewhere. She put the dead body in the gutter to conceal her guilt. She did not even bother to perform last rites as per customs. The body was recovered from the gutter when PW-2 (Kumari Durgesh) got an opportunity after two or three days and informed her uncle Premvir who lived in an adjacent house. She did not explain unreasonable and unnatural conduct. I do not subscribe to the view that it is a case of mere neglect.

9. The statement of the appellant's daughter was enough to arrest her immediately. The investigation was transferred from one police officer to another and none of them attempted to file the charge-sheet. The CFSL result was collected after a considerable delay on 31st January, 2009 and the appellant was arrested on 27.02.2009. During this period, she did not attempt to flee. She is not a previous convict. She is in custody since then. Her substantive sentence was suspended on her furnishing a personal bond in the sum of Rs. 20,000/- with one surety in the like amount by an order dated 09.09.2011. It was subsequently reduced to Rs. 1,000/- with one surety on 04.10.2012. She was not in a position to furnish it. Order dated 05.03.2013 records that she is frequently admitted to the medical room for her aggressive and violent

behavior and is under constant treatment in IHBAS. It further records that her family consists of three minor children. There is nobody to look after her at home. Medical report dated 01.03.2013 of Medical Officer, Incharge, Central Jail No.6 on record reveals that she was diagnosed as 'Bi polar affective disorder and mostly manic'. She was referred to IHBAS psychiatric department. On 22.12.2012 she was again sent to IHBAS with detailed behavior report and was advised medication. On 05.01.2013 she was reviewed at IHBAS and advised medication. She is being seen by jail psychiatrist and has been advised to continue the same treatment. Nominal roll dated 29.06.2011 reveals that she has already spent two years and four months in custody as on 27.06.2011. The period has since increased to four and a half years.

10. Taking into consideration all these facts and circumstances, while confirming the conviction under Section 304 Part II/201 IPC order on sentence is modified and the substantive sentence of the appellant is reduced to five years with total fine of Rs. 1,000/-and failing to pay the fine to undergo SI for fifteen days.

11. The appeal stands disposed of in the above terms.

12. A copy of the order be sent to Jail Superintendent. Copy be also sent to the accused/appellant through Jail Superintendent. Trial Court record, if any, along with copy of this order be sent back to the Trial Court.

ILR (2013) V DELHI 3402
W.P. (C)

RAVI RANJAN KUMAR ....PETITIONER

VERSUS

UNION OF INDIA AND ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 1813/2013 DATE OF DECISION: 26.07.2013

Service Law—CISF Act, 1968—Section 9—CISF Rules, 2001—Rule 25—Service of petitioner terminated during probation period—Order challenged before HC—Plea taken, even though termination was during period of probation however order was stigmatic as per alleged misconduct and in nature of alleged malpractice in securing his appointment as ASI with CISF—Held—Admittedly, respondent did not conduct any form of disciplinary inquiry—Action of respondent is clearly in violation of principles of natural justice—Impugned order as well as appellate order are contrary to law and violation of principles of natural justice—Order set aside and quashed—Respondents shall pass consequential orders permitting petitioner to continue training within 4 weeks—However, respondents shall be free to take suitable action following procedure which is in accordance with law.

Important Issue Involved: Services of a probationer cannot be terminated without conducting disciplinary inquiry if the order is stigmatic.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mrs. Rekha Palli, Ms. Punam Singh

and Ms. Amrita Prakash, Advocates.

FOR THE RESPONDENTS : Mr. Saqib and Ms. Shipra Shukla, Advocates.

CASE REFERRED TO:

1. *Yogender Singh* vs. *Union of India and Ors. Writ Petition* (Civil) No.1756/2013.

RESULT: Allowed.

GITA MITTAL, J. (Oral)

1. The writ petitioner seek before us quashing of the order dated 9th February, 2013 which was passed by the respondent No.5 vide which the services of the petitioner who was serving as ASIs (Executive) with the CISF were terminated during the period of probation on the allegation of malpractices during the recruitment/selection process conducted by the respondents to the said post.

2. The respondent terminated the services of the petitioner by an order which reads as under:

"Office of the Dy. Inspector General
Cenrtal Industrial Security Force
(Ministry of Home Affairs)

Regional Training Centre, Arakkonam
Post : Suraksh Campus,
District : Vellore (Tamilnadu)
Date: 09.02.2013

Letter No.E-37035/RTC (A) CISF/3rd(B)ASI/EXE/Trg./ 2013/ 883

TERMINATION ORDER

1. Whereas CISF No.103280765 (Roll No.3206012343) ASI/ EXe (U/T) (3rd Batch) Ravi Ranjan Kumar has been provisionally appointed for the post of ASI/Exe in CISF vide CISF RTC Arakkonam Letter No.E14099/ RTC(A)/CISF/Trg/12/4784 dated 12.06.2012 and letter of even No.(6202) dated 21.07.2012 subject to the condition that his service is liable to be terminated if there

is prima face proof of having indulged in any malpractice during the examination. As per information received from ASI/EXe (U/ T) (3Batch) Ravi Ranjan Kumar indulged in Staff Selection Commission through CISF Hqrs., New Delhi, CISF No.103280765 (Roll No.3206012343) malpractice to qualify the examination conducted by the SSC for the post of ASI/Exe – 2011 in CISF. He has been on probation for a period of two years from the date of his appointment and still continues to be so.

2. Whereas by virtue of the provision contained in Rule 25 of CISF Rules, 2001, the appointing authority of CISF No.103280765 (Roll No.3206012343) ASI/EXe (U/T) (3rd Batch) Ravi Ranjan Kumar is empowered to terminate his services during the period of probation, if it is of the opinion that he is not fit for permanent appointment in CISF.

3. Now, therefore, in exercise of powers conferred upon the undersigned by virtue of Rule 25 of CISF Rules 2001, I hereby issue one month's salary in lieu of one month's notice to CISF No.103280765 (Roll No.3206012343) ASI/EXe (U/T) (3rd Batch) Ravi Ranjan Kumar for termination of his services. He shall be deemed to be no more in service of CISF with immediate effect.

To

CISF No.103280765	Through Coy
ASI/EXe (U/T)	Commander
Ravi Ranjan Kumar	"Cholas" Coy in
S/o Shri Anil Kumar	duplicate for
Singh	service and
CISF RTC	returned the ackd.
ARAKKONAM.	copy to this office for record."

3. The petitioner has challenged the case primarily on the ground that even though the termination was during the period of probation however the order was stigmatic as per alleged misconduct and in the nature of alleged malpractice in securing his appointment as an Assistant Sub Inspector with the CISF. It is an admitted position before us that the respondent did not conduct any form of disciplinary inquiry. The petitioner has stated that he was issued notice that he had indulged in malpractice without any details being furnished to him. The action of the

respondent is clearly in violation of principles of natural justice.

4. The petitioner has also contended that he had preferred departmental appeal on 18.2.2013 under Section 9 of the CISF Act against the said termination. An oral submission is made before us to the effect that inasmuch as the appellate order was passed during the pendency of the writ petitions, a substantive challenge thereto could not be laid in the main writ petitions.

5. The petitioner submits that the appellate order dated 26.4.2013 is not sustainable for the same reasons that the order of termination dated 9th February, 2013 has to be held as being violative of principles of natural justice as well as law.

6. The petitioner has placed reliance on an order dated 20th March, 2013 passed in the Writ Petition (Civil) No.1756/2013 titled as **Yogender Singh vs. Union of India and Ors.** by this court who was identically placed as the petitioner in the order dated 9th February, 2013 terminating his services had been passed in similar circumstances as of the petitioner in WP(C) No.1756/2013.

7. Ms. Saqib, learned counsel for the respondents has handed over a communication dated 11th July, 2013 received by him informing him that the ratio of the judgment dated 20th March, 2013 in **Yogender Singh** (supra) squarely applies to these cases which deserve to be disposed of on identical terms.

8. Our attention is drawn to the appellate orders dated 29th April, 2013 and 30th April, 2013 which have been placed on record. We have heard counsel for the parties on illegality and the validity of these orders as well. For all the foregoing reasons we direct as follows:

i) We hereby hold that the impugned order dated 9th February, 2013 as well as the appellate orders dated 26th April, 2013 are contrary to law and violative of principles of natural justice and therefore hereby set aside and quashed.

ii) The respondents shall pass consequential orders permitting the petitioners to continue their training within a period of 4 weeks from today.

9. It is however made clear that respondents shall be free to take suitable action, if they so find, following the procedure which is in

accordance with law.

These writ petitions are allowed in the above terms.

Dasti.

ILR (2013) V DELHI 3406
CRL. A.

VIRENDER @ PAPPU ETC. ....APPELLANT

VERSUS

STATE ....RESPONDENT

(S.P. GARG, J.)

CRL. A. NO. : 481/2007 & CRL. REV. P. NO. : 601/2007 **DATE OF DECISION: 01.08.2013**

Indian Penal Code, 1860—Sections 323/452/307/34—Appellants/accused persons picked up quarrel caused injuries to the complainant and others—FIR No. 19/2001 under sections 323/452/307/34 PS Gandhi Nagar registered injured medically examined—Articles lying at the spot seized—Charge sheet filed—Charges framed—Prosecution examined 17 witnesses—Pleaded false implications—A-1 to A-5 held guilty of offences under section 323/452/307/34 IPC—Aggrieved appellants preferred appeal—One of the victims preferred revision for enhancement of sentence—State did not file any appeal/revision against the sentence—Contended—Reliance on the testimonies of interested witnesses not proper no independent witness from neighbourhood associated in investigation—Ocular and medical evidence at variance—No injury with knife found on victim—Incident occurred at spur of moment—

Sections 452 and 307 not applicable—APP contended—Injured have corroborated each other on material particulars—No reason to disbelieve their version—Complainant contended—Injuries were dangerous—Punishment awarded not commensurate with offence—Held—Doctor opined injuries on the person of one of the victims to be dangerous appellants not explained injuries on their person—No material discrepancies in the cross examination—Appellants/accused did not deny their presence at the spot another injured proved the version given to the Police without variations named A-1 to A-5 as authors of injuries—role attributed to the accused remained unchallenged in cross examination—No ulterior motive assigned—No prior animosity with accused persons—Appellants were aggressors and authors of injuries—Blows caused with lathi/blunt object—No history of previous quarrel had no pre-plan to cause injuries to Raju Gandhi—Not armed with deadly weapons knife not used to cause injury on any vital organ—Other victims suffered only simple injuries—Injuries not sufficient in the ordinary cause of nature to cause death—No intention to commit murder—Only knowledge can be attributed—Liable for committing offence under section 308—Sentence of A-1 commensurate with offence—A-2 to A-5 deserved lesser sentence—Sentence of A-2 to A-5 modified—Appeal disposed of—No valid reason to accept revision petition—Revision petition dismissed.

Important Issue Involved: Exaggeration per se do not render the evidence brittle. Minor contradictions, inconsistencies, embellishments or improvements on trival matters without diluting the core of the prosecution case cannot be made a ground to reject the evidence in its entirety.

Testimony of a stamped witness has its own relevance and efficacy. The injury to a witness is an inbuilt guarantee of his presence at the scene of crime and he will not want to let his actual assailant go unpunished merely to falsely implicate a third person.

To justify a conviction under Section 307, it is sufficient if there is present an intent coupled with some overt act in execution thereof. The Court has to see whether the act, irrespective of its result was done with the intention or knowledge and under circumstances mentioned under Section 307. It depends upon the facts and circumstances of the each case whether the accused had the intention to cause death or knew in the circumstances that his act was going to cause death.

If an accused does not intend to cause death or any bodily injury as is sufficient, in the ordinary course of nature to cause death, Section 308 would apply.

Offence punishable under Section 308 postulates doing of an act with such intention or knowledge and under such circumstances that if one by that act caused death, he would be guilty of culpable homicide not amounting to murder. An attempt of that nature may actually result in hurt or may not.

[Vi Gu]

APPEARANCES:

FOR THE APPELLANT : Mr. S.K. Bhattacharya, Advocate with Mr. Ajay Kumar, Advocate.

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

CASE REFERRED TO:

1. *Sushil Kumar* vs. *NCT of Delhi,* 1998 SCC (Crl.) 1552.

RESULT: Appeal disposed of.

S.P. GARG, J.

1. Virender @ Pappu (A-1), Rajesh @ Pappu (A-2), Surender (A-3), Anand Sharma (A-4) and Ved Prakash @ Sonu Sharma (A-5) (the appellants) impugn a judgment dated 25.07.2007 of learned Additional Sessions Judge in Sessions Case No. 140/2006 arising out of FIR No. 19/2001 PS Gandhi Nagar by which they were held guilty for committing offences punishable under Sections 323/452/307/34 IPC. By an order dated 26.07.2007, they were sentenced to undergo RI for three years with total fine Rs. 12,000/- each.

2. Allegations against the appellants were that on 05.02.2001 at around 03.30 P.M. they picked up a quarrel and caused injuries to Raju Gandhi, Pawandev Gandhi, Pinki Gandhi and Ramu. Daily Diary (DD) No.21A (Ex.PW-15/H) was recorded at 16.05 P.M. at PS Gandhi Nagar on getting information about the quarrel. The investigation was assigned to SI Adesh Kumar who after recording victim Pawandev Gandhi's statement (Ex.PW-7/A) lodged First Information Report. The articles lying at the spot were seized. During the course of investigation A-1 to A5 were arrested. The MLCs (of the victims) were collected. Statements of the witnesses conversant with the facts were recorded. The exhibits were sent to Forensic Science Laboratory for examination. After completion of the investigation, a charge-sheet was submitted against the appellants. They were duly charged and brought to Trial. The prosecution examined seventeen witnesses to substantiate the charges. In their 313 statement, A1 to A-5 pleaded false implication. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court by the impugned judgment held A-1 to A-5 guilty of the offences mentioned previously. Being aggrieved, they have preferred the appeal. Victim (Raju Gandhi) has preferred Criminal Revision Petition for enhancement of the sentence awarded to the appellants. It is relevant to note that State did not file any appeal/ revision against the sentence order.

3. I have heard the learned APP, Counsel for A-1 to A-5 and Counsel for the complainant and have examined the record. The appellants' counsel urged that the Trial Court did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the testimonies of interested witnesses. No independent public witness from the neighbourhood was associated at any stage of investigation. The ocular and medical evidence are at variance. No injury with knife was

found on the victim (Raju Gandhi)'s body. Section 452 and 307 IPC are not applicable as the incident occurred at the spur of moment without pre-meditation. Identity of any stranger with the appellants at the spot has not been established and determined. Learned APP urged that the injured persons have corroborated each other on material facts and there are no good reasons to disbelieve their version. Complainant's counsel emphasised that the victim sustained injuries which were 'dangerous' in nature and the punishment awarded to the appellants was not commensurate with the offence committed by them.

4. PW-9 (Raju Gandhi) was admitted at SDN Hospital, Shahdara at 04.30 P.M. on 05.02.2001 by HC Murari Lal. He was referred to LNJP Hospital, admitted there on the same day and discharged on 04.03.2001. PW-2 (Dr.Vivek) examined him and vide MLC (Ex.PW-2/A) six Clean Lacerated Wounds (CLWs) of various dimensions were noticed on his body. PW-1 (Dr.A.K.Kulshreshth) was of the opinion (Ex.PW-1/A) that the injuries were 'dangerous' in nature. PW-17 (Dr.Arvind) proved the documents (marked as P-17) by which medical treatment was given to the victim. The injuries sustained by victim Raju Gandhi are not under challenge. The appellants have suggested that he (Raju Gandhi) got injuries after fall from his scooter and his head stuck against the pavement. They, however did not adduce any evidence to substantiate that injuries on the victim's body were due to fall from the scooter. None of the accused revealed the registration number of the scooter allegedly driven by him. They did not examine any witness from the neighbourhood to prove their version. The victims have categorically denied injuries due to fall from the scooter. In the incident, PW-7 (Pawandev Gandhi), PW-6 (Pinki Gandhi) and PW-8 (Ramu) were also injured and were medically examined. PW-3 (Dr. Kameshwar Parsad) proved MLCs Ex.PW-3/B (of Pawandev Gandhi), Ex.PW-3/C (of Ramu) and Ex.PW-3/D (of Pinki Gandhi). Injuries were 'simple' caused by blunt object. The appellants did not explain as to how and under what circumstances they sustained injuries on their bodies.

5. PW-9 (Raju Gandhi) in his Court statement deposed that when he went to the spot, A-1 to A-5 with a stranger were breaking the articles in the shop of his brother Pawandev Gandhi. When he enquired from A-1, why his brother & bhabhi were beaten, he inflicted a 'lathi' blow on his head. A-4 gave a knife blow on the left side of his head behind the ear. When he went inside the shop to make telephone call, the accused persons chased him and A-5 who had 'khapcha' gave a blow on his

person. A-3 hit him with a 'palta'. A-2 broke his teeth with an iron weight. A-1 and A-3 exhorted to kill him. A-4 again inflicted a knife blow on his head and he was rendered unconscious. In the cross-examination, he was confronted with the statement (Ex.PW-9/DA) where he had not mentioned some facts deposed in the Court. He denied the suggestion that he sustained injuries due to fall from scooter. No material discrepancies emerged in his cross-examination to disbelieve him for the injuries caused by the accused with weapons in their hands. The accused did not deny their presence at the spot. PW-7 (Pawandev Gandhi) another injured on whose statement the present case was lodged proved the version given to the police at the first instance without variation. He also named A-1 to A5 to be the authors of injuries to Raju Gandhi, Ramu and Pinki Gandhi. In the cross-examination, he admitted that none of them sustained injuries with knife. He elaborated that he removed his brother to the hospital. Again, material facts regarding the role attributed to the accused remained unchallenged in the cross-examination. PW-6 (Pinki Gandhi) also corroborated PW-7 on all material facts. PW-8 (Ramu) an independent witness employed at Pawan Gandhi's shop is a crucial witness. Initial quarrel took place with him when A-4 abused him for making noise while preparing chowmin. He also deposed that injuries were caused to Pawandev Gandhi and Raju Gandhi with 'danda' and knife. No ulterior move was assigned to this witness who had no prior animosity with the accused to falsely implicate them. PW-10 (Onkar) also deposed on similar lines. These independent witnesses had no axe to grind to falsely implicate the accused for the injuries caused to them and to spare the real culprits. The altercation initially took place when A-4 objected to the noise created by PW-8 (Ramu) while preparing chowmin. When Pawandev Gandhi objected to that, A-1 to A-5 went to the shop and picked up quarrel with Pawan Dev Gandhi. PW-9 (Raju Gandhi) on hearing the commotion went to the spot and intervened. He was inflicted 'dangerous' injuries. The accused persons were armed with various weapons/ articles used in the shop (like iron weight, iron palta, vegetable knife, khapcha). The injured were unarmed and in retaliation, they did not harm the appellants and caused injury to them. Apparently, the appellants were aggressors and authors of the injuries inflicted to the victims.

6. MLCs (Ex.PW-3/B, 3/C and 3/D) reveal that Pawan Dev Gandhi, Ramu and Pinki Gandhi sustained simple injuries with blunt objects. In the MLC of Raju Gandhi (Ex.PW-2/A) six Clean Lacerated Wounds were found on his body. None of the injury was caused with 'sharp' weapon

as alleged. The MLC did not reveal if any tooth was broken. It appears that PW-9 (Raju Gandhi) has made improvements in this regard and has exaggerated his version. However, exaggerations per se do not render the evidence brittle. Minor contradictions, inconsistencies, embellishments or improvements on trivial matter without diluting the core of the prosecution case cannot be made a ground to reject the evidence in its entirety. After going through the entire evidence it stands established that A-1 to A-5 inflicted injuries to him in furtherance of their common intention. After the initial confrontation with A-4, they went to the shop of the complainant with various weapons/ articles available to them. Repeated blows with 'lathi'/ blunt object were caused on Raju Gandhi's body. It is well settled that the testimony of a stamped witness has its own relevance and efficacy. The injury to a witness is an inbuilt guarantee of his presence at the scene of crime and he will not want to let his actual assailant go unpunished merely to falsely implicate a third person.

7. The incident happened over a trivial issue when A-4 objected to noise by PW-8 (Ramu) while preparing 'chowmin' in his employer's shop and there was a hot exchange of words. There was no history of previous quarrels between the neighbours. PW-9 (Raju Gandhi) was not at the crime scene at the time of initial confrontation. A-1 to A-5 went to the shop with articles in their possession and inflicted injuries to Ramu, Pawandev Gandhi and Pinki Gandhi. Raju Gandhi went to the spot on hearing the commotion and intervened. Apparently, the appellants did not expect and anticipate his arrival at the spot. They had no pre-plan to cause injuries to him. They were not armed with deadly weapons. Though A-4 allegedly had a knife, it was not used to cause injury on any vital organ of the complainant/ victim. Other victims suffered only 'simple' injuries by blunt objects. To justify a conviction under Section 307, it is sufficient if there is present an intent coupled with some overt act in execution thereof. The Court has to see whether the act, irrespective of its result was done with the intention or knowledge and under circumstances mentioned under Section 307. It depends upon the facts and circumstances of the each case whether the accused had the intention to cause death or knew in the circumstances that his act was going to cause death. In the instant case, altercation took place on a trivial issue with Pawandev Gandhi and Ramu. The medical examination showed that the injury was 'dangerous' being situated on a vital part. The injuries however were not described sufficient in the ordinary course of nature to cause death. These circumstances rule out that the appellants were

inspired by the intention to commit murder of their neighbour Raju Gandhi. They however, are liable for committing offence under Section 308 IPC. If an accused does not intend to cause death or any bodily injury, which he knows to be likely to cause death or even to cause such bodily injury as is sufficient, in the ordinary course of nature to cause death, Section 308 would apply. In **'Sushil Kumar vs. NCT of Delhi',** 1998 SCC (Crl.) 1552, Supreme Court held that offence punishable under Section 308 postulates doing of an act with such intention or knowledge and under such circumstances that if one by that act caused death, he would be guilty of culpable homicide not amounting to murder. An attempt of that nature may actually result in hurt or may not. In the instant case, there was no previous animosity between the appellants and the victims. There was no pre-meditation. The appellants in a sudden scuffle injured the intervener with the articles/ instruments ordinarily used in their shop. The appellants could only be attributed knowledge that by inflicting those injuries described in MLC (Ex.PW-2/A) they were likely to cause death and did not have the intention of causing death.

8. The appellants (A-1 to A-5) have been sentenced to undergo RI for three years with fine. Considering the specific role attributed to A-1 who was armed with a 'lathi' and was instrumental in inflicting vital injuries on PW-9's body, the sentence awarded to him is commensurate with the offence committed by him and needs no intervention. However, considering the participation of A-2 to A-5 and the role played by them in inflicting injuries, they deserve lesser sentence. No injuries with knife was inflicted by A-4 (Anand Sharma). A-2 and A-5 also did not cause any injury with 'iron palta' and 'khapcha' with their sharp ends. Iron weight in A-2's possession was not used to break victim's tooth as alleged. They are not previous convicts and are not involved in any other criminal case. The substantive sentence of RI for three years deserves to be modified to one year each (A-2 to A-5).

9. I find no valid reasons to accept Criminal Revision Petition No. 601/2007 filed by the victim for enhancement of the sentence for the reasons detailed above. Crl.Rev.P.601/2007 is accordingly dismissed.

10. In the light of above discussion, A-1 to A-5 are convicted for committing offence punishable under Section 308/34 IPC instead of 307/34 IPC. Sentence to undergo RI for three years for A-1 is left undisturbed. The substantive sentence of the appellants A-2 to A-5 is reduced to one year under Sections 308 and 452 IPC. The sentences shall run concurrently

and the appellants shall have benefit under Section 428 Cr.P.C. Needless to say, the appellants shall pay the fine imposed by the Trial Court and the victim shall be entitled to Rs. 50,000/-as compensation awarded by the Trial Court.

11. The appeal stands disposed of in the above terms. The appellants are directed to surrender and serve the remainder of their sentence. For this purpose, they shall appear before the Trial Court on 12th August, 2013, The Registry shall transmit the Trial Court records forthwith to ensure compliance with the judgment.

ILR (2013) V DELHI 3414
W.P. (C)

SURENDER PAL SINGH ....PETITIONER

VERSUS

UNION OF INDIA & ANR. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 8692/2006 DATE OF DECISION: 05.08.2013

Service Law—Commuted Leave—FRSR Part III Leave Rules—Rules 7 (2), 24(3) & 30—Brief Facts—Petitioner joined the Border Security Force as Sub-Inspector retired as Deputy Commandant on 31st December, 2005 at the age of 57 years—When he was posted at Barmer, Rajasthan, he availed 30 days earned leave from the period 11th February, 2005 to 13th March, 2005 and came to Delhi—Petitioner while on earned leave in Delhi fell ill and he reported to BSF hospital, Tigri (Delhi) and was referred to Safdarjung Hospital where he continued treatment first for his Urological problem and thereafter his heart ailment and underwent Angiography also—CMO (SG) I/C STS

Hospital, Tigri (Delhi) who was apprised of the medical condition of the petitioner had sent telegrams dated 7th May, 2005 19th May, 2005, 26th May, 2005, 8th June, 2005, 10th June, 2005, 15th June, 2005 regularly apprising the respondent of Medical conditions of petitioner—No issue was raised by the respondents—Vide his application dated 10th May, 2005 the petitioner had informed the respondents about his treatment and inability to join his duty—Respondents made no objection and accepted the correctness of this position—Petitioner joined duty at Barmer (Rajasthan) on 23rd June, 2005 and submitted an application to the Respondents for sanctioning 102 days commuted leave on 25th June, 2005—On 15th July, 2005 the respondent no.2 through the petitioner's Commandant passed an order converting the petitioner's request of 102 days commuted leave into earned leave and so informed the petitioner—Petitioner's request dated 17th August, 2005 for reconsideration of the matter to the Commandant was also not favourably considered—Hence the present Petition.

Held—Sole requirement of Rule 30 FRSR Part III Leave Rules in that the government servant is required to furnish a medical certificate for sanction of commuted leave on medical grounds—This is obviously because the employer is to be satisfied that the employee was prevented by sickness from performing duties—Cardiology department of Safdarjung Hospital refused to initially issue the medical and fitness certificate on the ground that petitioner was still undergoing treatment in the hospital—Cadiology department of Safdarjung Hospital however, subsequently issued a medical certificate of 50 days from 2nd May, 2005 to 20th May, 2005 which was duly submitted by petitioner along with his review application dated 22nd November, 2005—It however, was not given any weightage by the reviewing authorities—Even though the petitioner

could not produce the medical certificate for the entire period of his absence, contemporaneous documents, including information from the BSF Hospital, were regularly given to them—Petitioner has stated that he had submitted necessary documents with his leave application as well—In this background though, not in prescribed form, there was substantive compliance with the requirement of the respondents—The above document clearly show that the petitioner could not produce the medical certificate to the respondents while applying for commuted leave only because the concerned hospital refused to issue the same—In Rule 24 (3) which requires production of a medical certificate of fitness, the rule making authority has used the expression "may" not return without a fitness certificate suggesting that the requirement of production of the medical certificate was directory and not mandatory—Failure on the part of the petitioner to submit the requisite medical certificate in prescribed format along with commuted leave application cannot be held to be fatal for the petitioner's request because of any fault attributable to him—Respondents do not dispute that the petitioner had been unwell and that his absence was on account of the ongoing medical treatment—The progress thereof was regularly informed to the respondents by the BSF Hospital—Petitioner has produced the medical certificate for the treatment which he had undergone at the Department of Cardiology as well—Evidence of the petitioner being treated at the Department of Urology was available with the respondents—It is well settled that rules of procedure are merely handmaiden to the ends of justice—Mere format cannot be permitted to thwart the petitioner's application—Matter when looked at from the aspect of substantive compliance with the aforenoticed requirement of the production of the medical certificates amply supports the petitioner's contention that all information, required

in the prescribed form, had been made available to the respondents—Petitioner retired from service on 31st December, 2005—As per his service conditions, also entitled for encashment of the earned leave—Respondents had wrongly made to suffer a monetary loss—Petitioner's claim for commuted leave was within the prescribed rules and there was substantive compliance thereof on his part—Act of the respondents of converting his commuted leave to earned leave was unjustified and against the ruled—Petitioner was entitled to grant of his application for his leave being treated as commuted leave—Impugned orders dated 15th July, 2005 and 17th December, 2005 are set aside and quashed.

The sole requirement of Rule 30 FRSR Part III Leave Rules that the government servant is required to furnish a medical certificate for sanction of commuted leave on medical grounds. This is obviously because the employer is to be satisfied that the employee was prevented by sickness from performing duties. **(Para 29)**

As noted above, the Cardiology department of Safdarjung Hospital refused to initially issue the medical and fitness certificate on the ground that petitioner was still undergoing treatment in the hospital. The Cardiology department of Safdarjung Hospital however, subsequently issued a medical certificate of 50 days from 2nd May, 2005 to 20th May, 2005 which was duly submitted by petitioner along with his review application dated 22nd November, 2005. The same, however, was not given any weightage by the reviewing authorities. **(Para 30)**

The petitioner had also applied for issuance of medical certificate to Urology department at Safdarjung hospital. Vide their letter dated 9th August, 2005, they have informed as under:-

"...

Reference your letter No. nil dated 29-7-05 on the subject cited above. The remarks of Dr. N.K. Mohanty, Professor & H.O.D. Urology Deptt. of this hospital are given below.

"OPD treatment slip should be submitted as proof for attendance of Urology OPD for treatment which is valid."

xxx xxx xxx" **(Para 31)**

Even though the petitioner thus could not produce the medical certificate for the entire period of his absence, contemporaneous documents, including information from the BSF Hospital, were regularly given to them. The petitioner has stated that he had submitted necessary documents with his leave application as well. In this background though, not in prescribed form, there was substantive compliance with the requirement of the respondents. The above document clearly show that the petitioner could not produce the medical certificate to the respondents while applying for commuted leave only because the concerned hospital refused to issue the same. The petitioner was referred for treatment to Safdarjung Hospital on 7th March, 2005. He remained under continuous treatment at the BSF Hospital, Tigri (Delhi) Hospital. The petitioner was on earned leave till 13.3.2005. **(Para 32)**

We may note in the examination the respondent's requirement for production of fitness certificate by the petitioner. In this regard learned counsel for the petitioner has also drawn our attention to the stipulation made in Rule 24(3)(a) of the FRSR Leave Rules which reads as follows:-

"24. Return from leave

(1) - (2) xxx xxx xxx

(3)(a) A Government servant who has taken leave on medical certificate may not return to duty until he has

produced a medical certificate of fitness in Form 5." A

(underlining by us) **(Para 33)**

In Rule 24(3) which requires production of a medical certificate of fitness, the rule making authority has used the B expression "may" not return without a fitness certificate suggesting that the requirement of production of the medical certificate was directory and not mandatory. **(Para 34)**

The above rule position shows that the fitness certificate C may be required to be produced upon returning to duty after medical leave. In the instant case, the petitioner was permitted to resume duties without necessity of any fitness certificate by the respondents. The respondents themselves have D therefore, not treated the requirements of the fitness certificate as mandatory and cannot be now permitted to urge the requirement thereof as binding the petitioner for consideration of his application for grant of commuted leave. E The petitioner was permitted to resume duties admittedly without production of any medical certificate of fitness. **(Para 35)**

In any event, it is apparent that the failure on the part of the F petitioner to submit the requisite medical certificate in prescribed format along with commuted leave application cannot be held to be fatal for the petitioner's request because of any fault attributable to him. The Cardiology G Department refused to issue such certificate because the petitioner was still under treatment with them. It later issued the medical certificate for 50 days. The Urology department of Safdarjung Hospital refused to do it on account of non H submission of OPD treatment slip as proof for attendance of Urology OPD. **(Para 36)**

This aspect can be examined from yet another angle. In the instant case, the respondents do not dispute that the I petitioner had been unwell and that his absence was on account of the ongoing medical treatment. The progress thereof was regularly informed to the respondents by the

A BSF Hospital. The petitioner has produced the medical certificate for the treatment which he had undergone at the Department of Cardiology as well. The petitioner was referred by the BSF Hospital for treatment to the Safdarjung Hospital B where he was referred to the Urology Department. Evidence of the petitioner being treated at the Department of Urology was available with the respondents. It is well settled that rules of procedure are merely handmaiden to the ends of justice. Mere format cannot be permitted to thwart the C petitioner's application.

The matter when looked at from the aspect of substantive compliance with the aforenoticed requirement of the D production of the medical certificates amply supports the petitioner's contention that all information, required in the prescribed form, had been made available to the respondents. **(Para 37)**

E It is also evident that the respondents had allowed the petitioner to join his duties and he continued on duty till his retirement. He was permitted to do so despite his failure to submit fitness certificate. This fact by itself manifests that F the respondents treated the petitioner as fit to join and perform all duties. **(Para 38)**

The petitioner had retired from service on 31st December, 2005. As per his service conditions, he was also entitled for G encashment of the earned leave due to him on the date of his retirement. The respondents had wrongly treated his 102 days of commuted/medical leave as earned leave which is in violation of the applicable rules. Due to this loss has H accrued to the petitioner as he has been precluded from encashing the earned leave which were deducted from his account of earned leave. **(Para 39)**

It therefore is clear that due to no fault on his part, the I petitioner has been wrongly made to suffer a monetary loss. **(Para 40)**

From the above discussion, it follows that petitioner's claim

for commuted leave was within the prescribed rules and there was substantive compliance thereof on his part. We hold that the act of the respondents of converting his commuted leave to earned leave was unjustified and against the rules. The claim of the petitioner for commuted leave was justified. Indisputably there were adequate commuted leaves in his account. The petitioner is seeking adjustment of 102 days commuted leave only. It is held that the petitioner was entitled to grant of his application for his leave being treated as commuted leave. **(Para 41)**

We, therefore, set aside and quash the impugned orders dated 15th July, 2005 and 17th December, 2005 and direct as follows:-

(i) the respondents shall consider the matter and pass an order afresh on the petitioner's application for sanction of commuted leave in the light of the above position within four weeks from today. The same shall be forth with communicated to the petitioner.

(ii) all consequential benefits shall be released to the petitioner within eight weeks from the date of order.

(iii) in case the respondent fails to release the consequential benefits, the petitioner shall be entitled to interest thereon at the rate of 9% per annum from the date of this order till its release. **(Para 42)**

Important Issue Involved: Commuted Leave, FRSR Part III Leave Rules—Rules 7 (2), 24 (3) & 30—Failure on the part of the Petitioner to submit the requisite medical certificate in prescribed format along with commuted leave application cannot be held to fatal for the petitioner's request because of any fault attributable to him when evidence of the petitioner being treated at the Department of Urology was available with the respondents.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Rajeshwar Kumar Gupta, Ms. Sumati Sharma & Ms. Ramandeep Kaur Chawla, Advocates.

FOR THE RESPONDENT : Ms. Saroj Bidawat, Advocate.

RESUTL: Writ Petition Allowed.

DEEPA SHARMA, J.

1. The undisputed facts of the case are that the petitioner had joined the Border Security Force as Sub-Inspector and had retired as Deputy Commandant on 31st December, 2005 at the age of 57 years. When he was posted at Barmer, Rajasthan, he availed 30 days earned leave from the period 11th February, 2005 to 13th March, 2005 and came to Delhi.

2. The case of the petitioner is that during this period he had fallen sick on 7th March, 2005 and reported at the BSF Hospital, Tigri Camp, Delhi. The hospital noted on examination that he had a mild enlarged prostate gland apart from other clinical observations. He was, therefore, referred to the Surgical Specialist, Safdarjung Hospital for *"thorough check-up and management"* (page 12). On the 9th of March, 2005, the petitioner reported at the Safdarjung Hospital General Surgery Department for check up which referred him to the OPD of Department of Urology.

3. The petitioner remained on treatment at the Safdarjung Hospital thereafter and has placed copies of his OPD card, medical treatment and the reports of the radiology and pathology test performed on him on record. Information with regard to his illness was given to Shri Hoshiyar Singh, Deputy Commandant who was the adjudant in the petitioner's unit on 13th of March, 2005 and thereafter again on 7th of April, 2005.

The petitioner has supported these with receipts of the telephone calls made from the STD Booth. This fact is also not disputed by the respondents before us.

4. On 27th April, 2005, the respondent no.2 wrote a letter to the petitioner referring to the petitioner's letter of 23rd April, 2005. The petitioner was directed by this letter to submit a certificate issued by the BSF Hospital, R.K. Puram, New Delhi or by the Medical Officer of the 25th Battalion, BSF to the effect that he was unable to travel failing which he should present himself on duties at the headquarter.

By a second letter, also dated 27th April, 2005, the respondents directed the petitioner to report for further treatment to the CMO(SG) I/C STS Hospital and a medical certificate issued by the Medical Officer of the force as well as medical card be sent to the office.

5. On receipt of the first letter, the petitioner claimed that he reported to the CMO (SG) I/C STS Hospital. He was advised not to travel and, therefore, he could not attend to his duties.

6. The petitioner was still undergoing urology treatment when on 2nd of May, 2005 he complained of heart problem and he was therefore referred to Cardiology Department of the Safdarjung Hospital by the CMO(SG) I/C STS Hospital, Tigri Delhi. The petitioner was thereafter undergoing treatment for his cardiology condition in the Department of Cardiology, Safdarjung Hospital as well from the 2nd of May, 2005 onwards. On the 18th of May, 2005, the petitioner was referred to undergo several tests including TMT; eco Cardiogram, etc. which were performed on him.

7. The petitioner appears to have undergone several pathology and radiology investigation, both at the Urology Department as well as Cardiology Department of the Safdarjung Hospital. He was also admitted in the Department of Cardiology, Safdarjung Hospital between 24th May, 2005 to 25th May, 2005 for undergoing CAG and asked to report to the Cardiology OPD after four weeks. Photocopy of the complete record of the Safdarjung Hospital from the departments where the petitioner underwent treatment or investigation have been placed before us. On 8th June, 2005, the petitioner underwent a stress thallium test and again reported to the hospital on 13th June, 2005 and 20th June, 2005 with chest pain. On 16th May, 2005, the petitioner undergone a TMT and was reported that it was positive for provocative ischaemia. On 28th May, 2005, the petitioner undertook stress myocardial perfusion scan.

8. So far as information of the petitioner's health to his employer is concerned, it is an admitted position that the BSF STS Hospital, Tigri Delhi sent regular telegrams to the petitioner's battalion i.e., 120th Battalion, B'S.F. keeping them informed of the petitioner's treatment and condition. Vide a telegram dated 7th may, 2005, the BSF Hospital informed the petitioner's battalion that he had been directed to report to the hospital on 7th May, 2005 and that his TMT is scheduled for 9th May, 2005 at the Safdarjung Hospital.

9. This telegram was followed by telegram dated 19th May, 2005 sent by the BSF Hospital intimating the 120th Battalion that the petitioner had undergone TMT at Safdarjung Hospital on 16th May, 2005, had been found positive and that the officer had been advised admission at the Safdarjung Hospital on the 24th May, 2005 for undergoing angiography.

10. On the 26th May, 2005, BSF Hospital again telegraphically informed 120 Battalion that the petitioner had undergoing ordinary angiography at AIIMS and that he had been further advised to undergo the stress thallium test. In the telegram dated 8th June, 2005, the BSF STS Hospital, Tigri intimated 120th Battalion that the petitioner had undergone the stress thallium test and that he had been advised treatment for seven days and review thereafter. Copies of the medical record of the petitioner as well as the telegrams have also been placed before us are undisputed.

11. The respondents have complained that the petitioner was on 30 days earned leave with effect from 11th February, 2005 to 13th March, 2005 and that he did not join duty on expiry of the said leave. Vide letter dated 2nd April, 2005, he was directed to join duty forthwith or submit an application for extension of leave vide letter dated 2nd April, 2005. This was followed with the communication dated 22nd April, 2005 asking him to forward medical documents and a medical certificate of his illness. The respondents state that the petitioner had intimated that he would join duty after his treatment vide an application dated 10th May, 2005 with his medical prescription. However, he did not join duty despite letters dated 17th May, 2005 and June, 2005.

12. The petitioner joined duty at Barmer (Rajasthan) on 23rd June, 2005 and submitted an application to the respondents for sanctioning 102 days commuted leave on 25th June, 2005.

13. The respondents do not dispute the petitioner's submission that he had enclosed all requisite medical records with his application. The respondents however did not consider the petitioner's request favourably.

14. On 15th July, 2005, the respondent no.2 through the petitioner's Commandant passed an order converting the petitioner's request of 102 days commuted leave into earned leave and so informed the petitioner. The petitioner's request dated 17th August, 2005 for reconsideration of the matter to the Commandant was also not favourably considered. The

petitioner had pointed out that he was to retire on 31st December, 2005; that he was losing amount of Rs.74,500/- approximately in case the respondent regularized his 102 days leave as earned leave and that he would never be able to get the loss compensated to him. The petitioner points out that in the period of 33 years of service, he was able to have credited only 224 days of leave; that he was a heart patient and at that stage of his life needed cooperation.

15. The petitioner was informed by the respondents that to process his overstayal case on priority as per Leave Rules 24(3)(a) and 30 of CCS (Pension) Rules, 1972, he was required to submit a sickness and fitness certificate with regard to his illness along with original medical record to the office of the Commandant 120th Battalion, BSF.

The petitioner had consequently approached the Safdarjung Hospital for the necessary certificates. It appears that prior thereto, the Department of Cardiology of the Safdarjung Hospital had issued a medical certificate in Form 3 certifying that the petitioner was suffering from TMT and CD and absence from duty of 50 days with effect from 2nd May, 2005 to 20th June, 2005 was absolutely necessary for restoration of his/her health. This related to the Cardiology treatment which the petitioner had undergone. However, so far as the Urology treatment was concerned, the CMO of the Safdarjung Hospital sent a letter dated 9th August, 2005 to the petitioner communicating the remarks of the Head of the Urology Department to the effect that the petitioner should submit his OPD treatment slip as proof of attendance of the Urology OPD for treatment which is still valid.

16. On 24th October, 2005, the petitioner personally appeared before the Deputy Inspector General of respondent no.2 to explain the above position but his request for reconsideration of the order was rejected.

17. On 10th November, 2005, the petitioner appeared before the Directorate General of the BSF who sent him to the DIG with comments to examine the case. The petitioner again met the DIG on the 16th of December, 2005 who by an order dated 17th December, 2005 rejected the petitioner's request for treating his leave as commuted leave.

18. Before us, petitioner points out that he has been granted medical leave of 109 days for the treatment period with effect from 22nd November, 2002 to 10th March, 2003 which was regularized as medical

leave by an order dated 16th April, 2001. Similarly 39 days treatment period between 8th July, 2001 to 15th August, 2001 was again regularized by converting 78 days HPL as medical leave by an order passed on 28th September, 2001. It is contended that the refusal to regularize the absence of the petitioner as commuted leave is arbitrary, illegal and unjustified compelling the petitioner to invoke the extraordinary jurisdiction of this court by way of the present petition. The petitioner has contended that he was denied any opportunity to represent against the action taken by the respondents.

19. In their counter affidavit, the respondents have controverted the case of the petitioner on the sole ground that the petitioner had failed to submit a medical certificate and the fitness certificate which is a sine qua non before sanctioning the commuted leave on medical grounds and that the act of the respondent is as per the rules and provisions.

20. It is submitted by the respondents that a sympathetic view was taken in favour of petitioner since he was retiring with effect from 31st December, 2005. As the petitioner was on the verge of retirement, his overstaying on leave without information, was condoned and his commuted leave was simply converted into the earned leave and his absence was regularised. It is pointed out that that during the year 2004-2005, the officer has availed leave as under:-

(i) 60 days EL with effect from 01 May, 2005 to 29 Jun, 2004.

(ii) 15 days EL with effect from 25 Sep to 09 Oct 2004 and extended 14 days EL with effect from 10 Oct to 23 Oct 2004.

(iii) 08 days CL with effect from 10 Dec to 17 Dec 2004

(iv) 30 days EL with effect from 11 Feb to 13 Mar, 2005 and overstayed from the leave for 102 days which has been later on converted into EL upto 23 Jun, 2005.

21. Before us, the petitioner's request for granting commuted leave for 102 days was turned down by the DIG BSF Barmer only due to non production of medical documents as required under CCS (Leave) Rules 19 (1) (i) in Form 3 and fitness certificate as per leave rule 24 (3) (a) in Form No.5. The respondents have taken the stand that he had taken treatment from the Safdarjung Hospital as OPD patient for which no rest/ leave was recommended by the Medical Officer of the said hospital. The

respondents point out that the petitioner had himself stated in his application dated 4th July, 2005 that the hospital authorities were reluctant to issue the medical fitness certificate to him. The respondents have stated that on 22nd November, 2005, the officer had submitted an application along with his medical certificate of Safdarjung Hospital for 50 days, sick leave by putting back date i.e. 20th June, 2005. However, as no fitness certificate was submitted along with so the same was not considered. It is submitted that there is no violation of any principle of natural justice and due hearing at all stages had been given to the petitioner. It is submitted that the petition has no merit and is liable to be dismissed.

22. We have heard the learned counsels for the parties and have given due consideration to their submissions and documents on record.

23. The sole question for consideration before us is whether the respondents can suo moto convert commuted leave into earned leave?

24. In this regard, both parties have drawn our attention to **Rule 7 (2) of FRSR Part III Leave Rules** which stipulates as under:

> "7. Right to leave (1) ....
>
> (2) When the exigencies of public service so require, leave of any kind may be refused or revoked by the authority competent to grant it, but it **shall not be open to that authority to alter the kind of leave due and applied for except at the written request of the Government servant."**
>
> (emphasis supplied)

From a bare reading of this provision it is apparent that the authorities i.e. the respondents have no authority to alter any kind of leave due and applied for except at the written request of the government servant. The expression used in Rule 7(2) aforestated is "shall not", leaving no discretion to alter the leave sought with the authorities. If the petitioner's application was not finding favour, the respondents' only option was to refuse the applied for leave. In the present case, the petitioner has admittedly not made any written request for conversion of his commuted leave (applied for) into earned leave. In the absence of written request of petitioner for conversion of his commuted leave to earned leave, the respondents had no authority to sanction earned leave on the application which specifically sought commuted leave. The act of so altering by the respondents,

therefore, is, violative of the Rule 7 (2) of FRSR Part III Leave Rules.

25. The second question which arises is whether the petitioner was entitled to commuted leave under the present circumstances when he could not submit a medical certificate and fitness certificate as per the prescribed format along with his application for commuted leave. Commuted leave are dealt with in **Rule 30 (1) (a) and (d) of FRSR Part III Leave Rules** which reads as under:

> **30. Commuted leave**
>
> (1) Commuted leave not exceeding half the amount of half pay leave due may be granted on medical certificate to a Government servant (other than a military officer), subject to the following condition:-
>
> (a) the authority competent to grant leave is satisfied that there is reasonable prospect of the Government servant returning to duty on its expiry:
>
> (b) Deleted
>
> (c) Deleted
>
> (d) when commuted leave is granted, twice the amount of such leave shall be debited against the half pay leave due;
>
> (e) Deleted"

From the bare reading of this rule, it is apparent that commuted leave can be granted to a government servant on submission of a medical certificate.

26. The indisputable facts are that the petitioner while on earned leave in Delhi had fallen ill and he reported to BSF hospital, Tigri (Delhi) and was referred to Safdarjung Hospital where he continued treatment first for his Urological problem and thereafter his heart ailment and underwent Angiography also. When the petitioner was asked by the respondents vide letter dated 27th April, 2005 to report to CMO, (SG) I/C STS Hospital, Tigri (Delhi) and to send medical document in case of his inability to travel due to illness, he did so. The CMO (SG) I/C STS Hospital, Tigri (Delhi) who was apprised of the medical condition of the petitioner had sent telegrams dated 7th May, 2005, 19th May, 2005, 26th May, 2005, 8th June, 2005, 10th June, 2005 and 15th June, 2005 regularly apprising the respondent of medical conditions of petitioner. No issue

was raised by the respondents.

27. It is also the admitted fact that vide his application dated 10th May, 2005, the petitioner had informed the respondents about his treatment and inability to join his duty. The respondents made no objection and accepted the correctness of this position.

28. The petitioner was asked by the respondent vide letter dated 26th June, 2005 of 120 Bn BSF office, to submit the sickness and fitness certificate of his illness along with original medical documents. The petitioner replied to the letter vide his application dated 4th July, 2005 under a covering letter stating therein that he had requested the Safdarjung Hospital for issuing fitness certificate but the hospital was reluctant to issue the same for the reason that the petitioner was still under their treatment. Thus it was the hospital which refused to issue the fitness certificate on the ground that the petitioner was still undergoing treatment with the hospital. Under these circumstances, the petitioner obviously could not have submitted his fitness certificate while joining his duty. The issuance of the fitness certificate was not in the hands of the petitioner.

29. The sole requirement of Rule 30 FRSR Part III Leave Rules that the government servant is required to furnish a medical certificate for sanction of commuted leave on medical grounds. This is obviously because the employer is to be satisfied that the employee was prevented by sickness from performing duties.

30. As noted above, the Cardiology department of Safdarjung Hospital refused to initially issue the medical and fitness certificate on the ground that petitioner was still undergoing treatment in the hospital. The Cardiology department of Safdarjung Hospital however, subsequently issued a medical certificate of 50 days from 2nd May, 2005 to 20th May, 2005 which was duly submitted by petitioner along with his review application dated 22nd November, 2005. The same, however, was not given any weightage by the reviewing authorities.

31. The petitioner had also applied for issuance of medical certificate to Urology department at Safdarjung hospital. Vide their letter dated 9th August, 2005, they have informed as under:-

"...

Reference your letter No. nil dated 29-7-05 on the subject cited above. The remarks of Dr. N.K. Mohanty, Professor & H.O.D. Urology Deptt. of this hospital are given below.

"OPD treatment slip should be submitted as proof for attendance of Urology OPD for treatment which is valid."

xxx xxx xxx"

32. Even though the petitioner thus could not produce the medical certificate for the entire period of his absence, contemporaneous documents, including information from the BSF Hospital, were regularly given to them. The petitioner has stated that he had submitted necessary documents with his leave application as well. In this background though, not in prescribed form, there was substantive compliance with the requirement of the respondents. The above document clearly show that the petitioner could not produce the medical certificate to the respondents while applying for commuted leave only because the concerned hospital refused to issue the same. The petitioner was referred for treatment to Safdarjung Hospital on 7th March, 2005. He remained under continuous treatment at the BSF Hospital, Tigri (Delhi) Hospital. The petitioner was on earned leave till 13.3.2005.

33. We may note in the examination the respondent's requirement for production of fitness certificate by the petitioner. In this regard learned counsel for the petitioner has also drawn our attention to the stipulation made in Rule 24(3)(a) of the FRSR Leave Rules which reads as follows:-

"24. Return from leave

(1) - (2) xxx xxx xxx

(3)(a) A Government servant who has taken leave on medical certificate may not return to duty until he has produced a medical certificate of fitness in Form 5."

(underlining by us)

34. In Rule 24(3) which requires production of a medical certificate of fitness, the rule making authority has used the expression "may" not return without a fitness certificate suggesting that the requirement of production of the medical certificate was directory and not mandatory.

35. The above rule position shows that the fitness certificate may be required to be produced upon returning to duty after medical leave. In the instant case, the petitioner was permitted to resume duties without necessity of any fitness certificate by the respondents. The respondents themselves have therefore, not treated the requirements of the fitness certificate as mandatory and cannot be now permitted to urge the requirement thereof as binding the petitioner for consideration of his application for grant of commuted leave. The petitioner was permitted to resume duties admittedly without production of any medical certificate of fitness.

36. In any event, it is apparent that the failure on the part of the petitioner to submit the requisite medical certificate in prescribed format along with commuted leave application cannot be held to be fatal for the petitioner's request because of any fault attributable to him. The Cardiology Department refused to issue such certificate because the petitioner was still under treatment with them. It later issued the medical certificate for 50 days. The Urology department of Safdarjung Hospital refused to do it on account of non submission of OPD treatment slip as proof for attendance of Urology OPD.

37. This aspect can be examined from yet another angle. In the instant case, the respondents do not dispute that the petitioner had been unwell and that his absence was on account of the ongoing medical treatment. The progress thereof was regularly informed to the respondents by the BSF Hospital. The petitioner has produced the medical certificate for the treatment which he had undergone at the Department of Cardiology as well. The petitioner was referred by the BSF Hospital for treatment to the Safdarjung Hospital where he was referred to the Urology Department. Evidence of the petitioner being treated at the Department of Urology was available with the respondents. It is well settled that rules of procedure are merely handmaiden to the ends of justice. Mere format cannot be permitted to thwart the petitioner's application.

The matter when looked at from the aspect of substantive compliance with the aforenoticed requirement of the production of the medical certificates amply supports the petitioner's contention that all information, required in the prescribed form, had been made available to the respondents.

38. It is also evident that the respondents had allowed the petitioner to join his duties and he continued on duty till his retirement. He was

permitted to do so despite his failure to submit fitness certificate. This fact by itself manifests that the respondents treated the petitioner as fit to join and perform all duties.

39. The petitioner had retired from service on 31st December, 2005. As per his service conditions, he was also entitled for encashment of the earned leave due to him on the date of his retirement. The respondents had wrongly treated his 102 days of commuted/medical leave as earned leave which is in violation of the applicable rules. Due to this loss has accrued to the petitioner as he has been precluded from encashing the earned leave which were deducted from his account of earned leave.

40. It therefore is clear that due to no fault on his part, the petitioner has been wrongly made to suffer a monetary loss.

41. From the above discussion, it follows that petitioner's claim for commuted leave was within the prescribed rules and there was substantive compliance thereof on his part. We hold that the act of the respondents of converting his commuted leave to earned leave was unjustified and against the rules. The claim of the petitioner for commuted leave was justified. Indisputably there were adequate commuted leaves in his account. The petitioner is seeking adjustment of 102 days commuted leave only. It is held that the petitioner was entitled to grant of his application for his leave being treated as commuted leave.

42. We, therefore, set aside and quash the impugned orders dated 15th July, 2005 and 17th December, 2005 and direct as follows:-

(i) the respondents shall consider the matter and pass an order afresh on the petitioner's application for sanction of commuted leave in the light of the above position within four weeks from today. The same shall be forth with communicated to the petitioner.

(ii) all consequential benefits shall be released to the petitioner within eight weeks from the date of order.

(iii) in case the respondent fails to release the consequential benefits, the petitioner shall be entitled to interest thereon at the rate of 9% per annum from the date of this order till its release.

43. The writ petition is allowed accordingly.

C.M.No.6299/2006

This application has become infructuous and is disposed of as such.

ILR (2013) V DELHI 3433
CRL.

JAGMOHINI ....APPELLANT

VERSUS

STATE (GNCT OF DELHI) & ORS. ....RESPONDENTS

(G.S. SISTANI & G.P. MITTAL, JJ.)

CRL.A. NO. : 876/2012 DATE OF DECISION: 06.08.2013

Code of Criminal Procedure, 1973—Section 372—Appeal against acquittal—Complaint for rape and threat—FIR under section 376/506/34 IPC registered on the statement of the complainant/appellant—Her statement under section 164 Cr. P.C. recorded—Section 377/511, 342,452 IPC also added—Prosecution examined 16 witnesses—Statements of the accused persons recorded u/s. 313 Cr. P.C.—Stated to be falsely implicated and lodging of complaints against the appellant and husband—Examined three witnesses in their defence—Observing that the incident as alleged could not have taken place, respondents acquitted—Aggrieved complainant/appellant preferred appeal—Contended—telephonic information given to police cannot be FIR—Sole testimony of prosecutrix sufficient to base conviction—Testimony convincing and reliable—Absence of injury on the person of

prosecutrix will not negate rape—Defect in investigation will not enure for benefit of the accused—Respondents contended—False case levelled as the were hindrance in the land grabbing by prosecutrix and her husband—Testimony of prosecutrix full of contradiction, improvements and improbabilities—False case registered—Acquittal based on sound legal principles—Held—Made three calls to PCR which defy all logic and human conduct—Information to PCR not a substitute to FIR—Information to PCR given by appellant herself—Name of the culprit though known to her not disclosed—Defence can always rely on the documents filed with the charge sheet—Three reports admitted by prosecutrix—No mention of having been raped in the three reports—Not to the police officer reached the spot to attend to the information given to the control room—Prosecutrix a well educated lady of 37-38 years running a school—Gave evasive answers—Contradicted her statement and consistently made improvements—Declined to undergo polygraphic test—Medically examined immediately after the incident—No semen stains found on the clothes or the vaginal swab—Absence of semen in the event of ejaculation strengthens false allegation of rape—Rightly concluded that the incident as alleged could not have taken place—Appeal dismissed with cost of Rs.10,000/-.

Important Issue Involved: A prosecutrix complaining of rape is a victim of a sexual assault and not an accomplice to the crime. Her evidence if found to be reliable and trustworthy is by itself sufficient to base conviction of an accused without any corroboration.

There is no rule of law that the testimony of a prosecutrix cannot be acted after the crime, there is no rule of law that her testimony cannot be acted without corroborated in material particulars.

Testimony of a prosecutrix has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the court of facts may find it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony.

Absence of injuries either as a mark of resistance to the advances allegedly made by the accused or as internal injuries by itself would not be sufficient to discard the testimony of prosecutrix.

Each case has to be examined on its own facts to find out whether there should have been some injuries on the person of the prosecutrix in view of the manner the offence is alleged against the accused persons.

Information to the PCR is not a substitute to the FIR and the defence cannot be permitted to attack the prosecution version because of some contradiction in the information given to the PCR.

The defence can always rely upon the documents filed with the charge sheet by the prosecution.

Though the sole testimony of prosecutrix is sufficient to base conviction of an accused but the prosecution is under obligation to prove the offence of rape like any other offence.

The testimony of the victim of a rape cannot be presumed to be a gospel truth as false allegation of rape can cause equal distress, limitation and damage to the accused as well.

Absence of injury on the person of the prosecutrix by itself will not negate the offence of rape on her yet the facts and circumstances of each case have to be considered individually.

Absence of semen on the vaginal swab or on the clothes of the prosecutrix may negate the offence of rape in view of the specific statement of ejaculation and immediate medical examination.

[Vi Gu]

APPEARANCES:

FOR THE APPELLANT : Mr. Lokesh Upadhyay, Advocate with Mr. Manish Kumar, Advocate.

FOR THE RESPONDENTS : Ms. Rajdipa Behura, APP for the State. Respondent no.2 and 3 in person.

CASES REFERRED TO:

1. *Mohd. Imran Khan* vs. *State Govt. (NCT of Delhi)* (2011) 10 SCC 192.
2. *Abbas Ahmed Choudhury* vs. *State of Assam* (2010) 12 SCC 115.
3. *Ram Singh @ Chhaju* vs. *State of Himachal Pradesh* (2010) 2 SCC 445.
4. *State of Andhra Pradesh* vs. *V.V. Panduranga Rao* (2009) 15 SCC 211.
5. *Raju* vs. *State of Madhya Pradesh* (2008) 15 SCC 133.
6. *State of Rajasthan* vs. *N.K.* 2000 SCC (Cri.) 898.

RESULT: Appeal Dismissed.

G.P. MITTAL J. (ORAL)

1. This appeal under Section 372 of the Code of Criminal Procedure against an order of acquittal for offences under Sections 452/342/376 (2) (g) /377/511/506/34 IPC by a victim brings to the fore a classic case

where false allegations of rape and attempt to carnal intercourse against the order of nature have been levelled by a lady to settle a personal score with her neighbour without caring for the disrepute it brings to a lady and the harassment a person is put to because of all such serious allegations. Such case when is included in the rapes allegedly committed in this capital brings shame to the city as also to the residents who have to hear of this city being termed as the rape capital of the country. There are numerous cases filed in this Court for quashing the FIRs for an offence under Section 376 IPC; the story put forth in some of these cases is so illogical and a blatant lie that the society will have to ponder as to what should be the moral punishment to the lady indulging in a false accusation of this nature.

2. Respondent Puran Chand Kaushal who is alleged to have caught hold of the hands of the prosecutrix (a young lady of 38 years weighing about 100 kg.) to facilitate his co-accused in raping her, was aged 62 years at the time of alleged incident (and over 68 years now). He had happily retired from his service with the Govt. of India. Respondent Onkar Nath Tiwari was working as a Customs Officers in Government of India and was in mid 50s. Both of them remained in prison; Onkar Nath Tiwari for 27 months and Puran Chand Kaushal for almost 2 months before their applications for grant of bail were allowed by this court.

3. Facts of the case as noted by the trial court are extracted from Para 2 of the impugned judgment hereunder:-

> "2. In brief the case of the prosecution is that on 16-06-07 three calls were received in the PCR within a period of about 12 minutes. PCR van reached the spot where the complainant was found who alleged that their neighbour O.L. Tiwari came there along with two other boys and ran away after beating her. PCR van took her for her medical examination. FIR was registered on 18-06-07 on her statement wherein the complainant alleged that on 16-06-07 her children had gone to their grandmother's house and her husband had gone to Gurgaon. At around 1.30 pm when she was alone at home both accused who were also her neighbours entered her house and bolted the door from inside. They both pushed her to the ground. While accused Puran Chand Kaushal caught hold of her hands, the other accused Onkar Nath Tiwari

> raped her against her wishes. They also tore her clothes and threatened to eliminate her and her family. FIR u/s 376/506/34 IPC was registered. The torn clothes of the victim worn at the time of the incident were seized. Site plan was prepared. Accused Puran Chand was arrested. Proceedings u/s 82 Cr.PC were initiated against Onkar Nath Tiwari. Statement of the complaint u/s 164 Cr.PC was recorded wherein she had given the details of the manner in which she was raped by the accused persons. In her statement she made further allegations of attempt of sodomy (which was not stated by her before the doctor who examined her on 16-06-07 and she was not examined for the act of sodomy on her). Sections 377/511, 342, 452 IPC were also added."

4. In order to establish its case the prosecution examined 16 witnesses. The prosecutrix (PW-2) is the star witness of the prosecution as in such cases the fate of the case hinges upon her credibility and trustworthiness. She deposed about the manner of assault committed on her.

5. In order to afford an opportunity to the respondents to explain the incriminating evidence produced by the prosecution they were examined under Section 313 Cr.P.C. Respondent Puran Chand stated that he was innocent and was falsely implicated in the case by the prosecutrix and her husband as he was a stumbling block to the illegal land grabbing committed by the prosecutrix and her husband. He stated that on 29th October, 2006, the prosecutrix and her husband had encroached the public passage as a result of which people were aggrieved as their right of way was totally blocked. After his arrest a complaint was made by his family to the Police Commissioner who ordered a vigilance inquiry against the police officials. The IO of the case, Achla Ram Pal was suspended. The inquiry report revealed that a false case was lodged by the prosecutrix against him and his co-accused. Similarly, respondent Onkar Nath Tiwari also claimed that he was falsely implicated in the case. He informed the court that on the fateful day he and his co-accused were in the Police Station from 1:10 P.M. He (Onkar Nath Tiwari) had gone to the PS to check on his earlier complaint against prosecutrix's husband. His co-accused Puran Chand Kaushal had gone to the Police Station to lodge a complaint under the SC/ST Act against the prosecutrix's husband. W/ASI Asha Rani was present in the Police Station as duty officer which was known to the prosecutrix. She (duty officer) had

informed the prosecutrix that the accused persons were in the PS to lodge a complaint against her and her husband. The duty officer was trying to pass the time while not recording their complaint. In the meantime, the prosecutrix made calls to the PCR at 2:05 P.M., 2:14 P.M. and 2:19 P.M. In the information given to the control room the prosecutrix gave Respondent O.N.Tiwari's name as he had left the PS by that time. The prosecutrix did not give the name of his co-accused Puran Chand as he was still in the PS and this fact was known to her. Respondent O.N. Tiwari stated that in the year 1997 he was General Secretary of Naroda Welfare Association. The prosecutrix and her husband had encroached upon public land while raising construction. He made a complaint in respect of same which was against the liking of the prosecutrix and her husband. In the year 2006 the prosecutrix again encroached on public land from either side of the road with a gate to encompass the land into her school. He and his co-accused Puran Chand Kaushal had played an active role in opposing the said construction as a result the prosecutrix and her husband were nursing a grudge against them. He and his co-accused (Puran Chand Kaushal) were aggrieved by the encroachment as they had also jointly purchased a plot adjoining to her plot. On 28.05.2007 Puran Chand Kaushal went to the plot to erect a boundary wall. The prosecutrix and her husband along with their associate had beaten him badly. They lodged a complaint with the police as a result of which prosecutrix's husband was arrested and his bail was rejected. When prosecutrix's husband was released from jail on 02.06.2007 he threatened to falsely implicate him (O.N. Tiwari). He stated that he (O.N.Tiwari) lodged a complaint with the police against the prosecutrix and her husband apprehending false implication.

6. Respondents examined three witnesses in their defence. DW-1 HC Hari Kishan testified that on 16.06.2007 at 2:10 P.M. he received a call regarding a quarrel. He went to school at LB Block. A lady whose name was disclosed as Jagmohini was sitting outside. She informed him that 2/3 persons had left after giving beatings to her. He testified that there was no visible injury on the person of the said Jagmohini. She went inside for 3-4 minutes while they were informing the control room about the situation. At about 2:19 P.M. they again received a call from the control room. They informed the control room that they were already at the spot. The said lady (Jagmohini) wanted her medical examination to be conducted. They took her to Safdarjung hospital. On the way they

also took a lady Constable from the PS Vasant Kunj.

7. Similarly, DW-2 Constable Ravinder Singh deposed that on 16.06.2007 he was posted as Constable at PCR South-West zone. At 2:05 P.M. he received a call regarding a quarrel at RJ school, Mahipalpur. They reached there in about ten minutes. He was the driver of the PCR. A lady namely Jagmohini told the staff that her neighbour O.N.Tiwari along with 2-3 unknown persons had given beatings to her and had ran away. They first took the earlier said lady to the PS. One lady Constable and a Head Constable accompanied them from PS to Safdarjung hospital.

8. DW-3 Vinay Kumar deposed about the presence of the two respondents in PS Vasant Kunj from 12:30 -1:00 P.M. to 2:30 P.M., as he had gone to the PS to lodge his report which was recorded vide DD No.36-B.

9. The offence of rape is usually committed in close doors hence there is hardly any eye witness to support the prosecutrix or the prosecution version. This is the reason that the courts do not insist on corroboration to the testimony of the prosecutrix who is treated like a witness injured in the incident. The Supreme Court has consistently held that a prosecutrix complaining of rape is the victim of a sexual assault and not an accomplice to the crime. Her evidence if found to be reliable and trustworthy is by itself sufficient to base conviction of an accused without any corroboration.

10. On analysis of the evidence led by the prosecution and the defence produced by the respondents the learned ASJ opined that the prosecutrix made improvements in her case right from the first call made to the PCR upto her deposition in the court. The learned ASJ held that in the three complaints lodged with the PCR at 2:08, 2:15 and 2:19 P.M. on 16.06.2007 there was not even a whisper of the offence of rape committed upon her. The learned ASJ observed that the prosecutrix changed her stand even after her statement Ex.PW-2/A was recorded by W/ASI Saroj on the basis of which the instant case was registered, in as much as allegations of carnal intercourse against the order of nature were neither made in the statement Ex. PW-6/DA recorded on 16.06.2007 or even in the MLC Ex. PW-1/A of the prosecutrix prepared on 16.06.2007. It was for the first time on 28.06.2007 that the allegations of attempt to commit carnal intercourse against the order of nature were levelled when prosecutrix's statement under Section 164 Cr.P.C. Ex.PW-

12/A was recorded by the learned Metropolitan Magistrate after 12 days of the alleged incident. The learned ASJ concluded that the incident as alleged could not have taken place thus the respondents were acquitted of the charge framed against them.

11. We have heard Mr. Lokesh Upadhyay learned counsel for the appellant and the respondents who have addressed arguments in person.

12. Referring to the judgment of the Supreme Court in **State of Andhra Pradesh v. V.V. Panduranga Rao** (2009)15 SCC 211 learned counsel for the appellant urges that the learned ASJ was swayed by information recorded by the PCR at the instance of the prosecutrix who held that the prosecutrix did not disclose the offence of rape in the first report made to the police. The learned counsel argues that a telephonic information given to the police regarding commission of an offence cannot take the place of an FIR and thus the prosecutrix was unnecessarily criticized for making improvements in her version.

13. The learned counsel for the appellant heavily relies on the Supreme Court judgment in **State of Rajasthan v. N.K.** 2000 SCC (Cri.) 898 and **Mohd. Imran Khan v. State Govt. (NCT of Delhi)** (2011) 10 SCC 192 to canvass that sole testimony of the prosecutrix is sufficient to base conviction of the accused. The learned counsel argues that thus the learned ASJ erred in disbelieving the prosecutrix simply on the ground that her testimony was not corroborated from any evidence. While submitting that absence of injury on the person of the prosecutrix will not negate the offence of rape, the learned counsel draws support from the judgment of the Supreme Court in **Ram Singh @ Chhaju v. State of Himachal Pradesh** (2010) 2 SCC 445.

14. The learned counsel contends that the police was hand in glove with the accused persons (the respondents herein) and therefore defect in the investigation will not enure for the benefit of the accused. He submits that the prosecutrix's testimony was convincing and reliable and the trial court erred in disbelieving her and acquitting the respondents. On the other hand, the respondents arguing their case in person submit that a false charge of rape and attempt to sodomy was levelled against them as they were a hindrance in the land grabbing indulged by the prosecutrix and her husband. Supporting the trial court judgment the respondents urge that the order of acquittal is based on the sound legal principles as conviction can be based on the sole testimony of the prosecutrix when

the same is free of any blemishes and is worthy of reliance. They argue that the prosecutrix testimony is full of contradictions, improvements and improbabilities which clearly depict that a false case was got registered by the prosecutrix.

15. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice. *There is no rule of law that her testimony cannot be acted after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject-matter being a criminal charge. However, if the court of facts may find it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. (See* ***State of Rajasthan v. N.K.*** *(supra)).*

16. Similarly, absence of injuries either as a mark of resistance to the advances allegedly made by the accused or as internal injuries by itself would not be sufficient to discard the testimony of prosecutrix. Each case shall have to be examined on its own facts to find out whether there should have been some injuries on the person of the prosecutrix in view of the manner the offence is alleged against the accused persons.

17. The prosecutrix who appeared as PW-2 is the most crucial witness in this case. We would like to extract some portions of her testimony herein to analyze whether the learned ASJ was justified in returning the finding that the incident did not take place as claimed by the prosecutrix. In cross-examination the prosecutrix stated:-

> "It is incorrect to suggest that I had placed barricades on both sides of my plot, which was objected by neighbours, who then lodged a complaint with the SDM on which a kalandra U/s 133 CrPC was framed against me. Vol. The Kalandra U/s 133 CrPC was framed upon me on the complaint of Mahender and not of any neighbour. It is correct that the SDM has padded an order for removing encroachment from the road in those proceedings.. (Page 14 of compilation).
>
> x x x x x x x x x x
>
> "Q. You did not remove the encroachment after that order. A.

There was no encroachment before the said proceedings or even thereafter. I do not know if accused O.N. Tiwari, had lodged a complaint dated 22.06.1997 against my alleged encroachment, being the secretary of Narmada Welfare association, L-Block, Mahipal Pur Extension, New Delhi. It is incorrect to suggest that the Hon'ble High Court had passed any directions for removing the encroachment. Vol. I did not receive any such order. I had lodged a complaint against Mahender and others U/s 341/354/323/325/506/34 IPC in the court regarding the incident dated 10.06.1997, on whose directions the FIR was registered against them. It is incorrect to suggest that I had lodged complaint against Mahender and Ors on similar lines as in the present case." (Page 14 & 15 of compilation).

x x x x x x x x x x

"....I do not know if both the accused present in court had purchased the land in that Khasra from Mahender. It is incorrect to suggest that I and my husband used to quarrel with the accused persons whenever they tried to raise the boundary wall. It is incorrect to suggest that I had quarrel with the accused persons on 31.05.2007. It is correct that a case was registered against my husband alleging that he had broken the arm of accused Puran Chand. Vol. It was a false case. It is incorrect to suggest that we had started nursing further grudge against the accused persons as they had both appeared in the court to oppose the bail of my husband in that case. It is incorrect to suggest that my husband has threatened accused O.N. Tiwari after being released from the Jail. I do not know if O.N. Tiwari had lodged complaint in this respect vide DD No.38-B, dated 03.06.2007, PS Vasant Kunj. It is incorrect to suggest that I and my husband used to address accused Puran Chand abusively on his caste. It is correct that FIR No.451/07 dated 25.06.2007 u/s 3 SC/ST Act was registered against me and my husband on these allegations. It is incorrect to suggest that my husband had also threatened accused Puran Chand who had gone to the Police Station alongwith O.N. Tiwari on 16.06.2007 at 01:00 pm." (Page 15 of compilation).

x x x x x x x x x x

"I had called the police after the rape was committed on me. I do not remember if I had given the name of the person who committed the rape on me, or the fact of the rape having been committed on me to the PCR at No.100. Vol. I was not in a fit state at that time. I do not remember at what time I had first called the police at No.100 as I was not in a proper mental state. I do not know what time the police reached the spot. Police did not make any inquiries from me at the spot. Vol. They took me to the PS from there and after taking a lady police official with them, they took me to hospital. There are no security guard in the school. There are CCTV cameras in my school. Vol. These are to check the cheating instances and other activities of the children. I do not remember how many calls I made to the police from my landline number on that day. I had also intimated my husband about this incident from the said landline number, but I do not remember the time. I had given him the names of both the accused having committed rape on me. I do not recall if HC Hari Krishan and Ct. Rabinder Singh had first come to the spot. I had not told them about the rape having been committed on me, but only of the molested. Vol. I could not give the details to an unknown persons as they were only from the PCR and not from the PS. There was no one else in my house/school at that time, when I called the police. I cannot admit or deny if I had made three calls to the police that time." (Page 16 of compilation).

x x x x x x x x x x

"I cannot admit or deny that I made the first complaint to the police at No.100 at 02:08 pm or that I had stated therein at one person was misbehaving with a lady near R.J. Public School. I do not remember if police had reached there at 02:15 pm. It is incorrect to suggest that I had informed the police that O.N. Tiwari had come there with two u/k(unknown) persons and had beaten her and had run away. I may have made a second call to the PCR at No.100 at 02:14 pm from the same telephone no. I cannot say if I had stated that a person had come our house and was quarrelling and abusing me. I cannot say if the third call was made by me to the police at no.100 at 14:19 pm by the same telephone no. I do not remember if I stated in that call that three persons had forcibly entered my house abusing and quarrelling

with me and had also torn my clothes. I do not know if my husband made call to the police at no.100." (Page 17 of compilation).

x x x x x x x x x x

"I did not disclose the names of all the accused to the doctor in the hospital vol. as no one asked me for the same. Then said, I had given the names in the gynae department when I was referred there from the general OPD. The doctor did not seize my torn clothes as I did not have any alternatives set of clothes to wear." (Page 18 of compilation).

x x x x x x x x x x

"It is correct that I had dislcosed the alleged history to the doctors in the hospital on my own free will and that I was not under pressure at that time. I had not disclosed about the carnal intercourse to the doctors as I thought that they would be able to check the same while conducting my gynaecological examination." (page 18-19 of compilation).

x x x x x x x x x x

"It is incorrect to suggest that I knew both the accused present in court today, even before the incident. It is correct that I had made a complaint against accused Puran Chand Kaushal and one Jai Bhagwan Bhardwaj prior to this incident. That way, I knew accused Puran Chand before the incident as he was residing in the same gali...." (Page 19 of compilation).

x x x x x x x x x x

"I had not disclosed the name of Puran Chand to the doctor in the hospital as I was not in a fit state of mind. I had disclosed the name of Puran Chand in my complaint to the police after I returned to the police station from the hospital." (Page 20 of compilation).

x x x x x x x x x x

"It is correct that a quarrel had taken place between my husband and Puran Chand on 28.05.2007. However I do not know if

accused Puran Chand had sustained fracture on his fingers in the said quarrel." (Page 20 of compilation).

x x x x x x x x x x

"I cannot say who was that lady, then said I was referring about myself when I informed the PCR that a lady was being mishandled. It is correct that I had made this call to PCR while I was trying to save myself. The incident of misbehaviour, molestation and rape was continuing with me for all this while, while I made these calls only the two accused present in court were misbehaving with me and the other two or three boys were standing outside. I did not mention the presence of two-three boys outside, either to the police or to the doctor in the hospital or to the Ld. MM vol. as I could not complain about passersby in the gali." (Page 20 & 21 of compilation).

x x x x x x x x x x

"I was thrown on the ground at point A of Ex.PW2/DC-2. I do not know if the crime team had lifted any semen stains or had found any semen stains at the spot. Vol. as we had come subsequently. It is incorrect to suggest that no semen stains were found at the spot as no such incident took place. It is incorrect to suggest that I refused to undergo the polygraphic test as I had made out a false case against the accused persons. It is incorrect to suggest that the police had wanted to get my polygraphic test done as I was giving a different statement on each occasion vol. I refused as I was under depression for which I am taking treatment even now. It is correct that police had asked me to undergo polygraphic test much after the incident and it may be about 10 months from the incident. I have done a diploma in sanitation health and technology. I understand the meaning of penetration and ejaculation. I did not notice if there were semen stains in my salwar after the incident." (Page 22 & 23 of compilation).

x x x x x x x x x x

"It is correct that I had earlier stated that I did not know the accused persons. Vol. that is because I did not know them personally but knew that they were there in the neighbourhood.

I knew the accused as Tiwari and did not know his full name. Vol. Everyone used to address him as Tiwari..." (Page 24 of compilation).

x x x x x x x x x x

"... It is correct that my husband was arrested under section 107/151 Cr.P.C. vide DD 33 A dated 9.03.2002 PS Vasant Kunj. I do not know if wife of O.N. Tiwari had stood surety for my husband in that case. Vol. accused forced us to accept the surety of his wife though I kept saying that there were number of persons who wanted to give surety for my husband...." (Page 24 & 25 of compilation).

x x x x x x x x x x

"....It is correct that I had two pet dogs during the year 2007...." (Page 29 of compilation).

x x x x x x x x x x

"... I cannot say that more than 2 people had attacked me at the time of incident. Only these two accused persons had attacked me on that day. It is correct that the accused had ran away when the PCR reached at the spot. I cannot tell the duration between the running away of the accused and arrival of the PCR at the spot. I could not gain my full consciousness till the police arrived at spot and even I do not remember what I had told to the police at first instance. It is correct that police had asked me on arrival about what had happened to me. When the police came and inquired from me at the spot, I informed that there was a quarrel...." (Page 29 of compilation).

x x x x x x x x x x

"..... It is correct that the SDM of the area had given directions on 1.05.99 to remove the encroachment. Vol. we had filed an appeal against the said order. But the matter was compromised between the parties and we had removed the stairs (encroachment) in view of the said compromise. "I do not know till date that the wife of accused Puran Chand had filed any writ against me alleging that I had not removed the encroachment despite the

orders of SDM. Then said, I had received some papers from the Hon'ble High Court from the wife of accused Puran Chand in which several departments were arrayed as party. My lawyer had attended those proceedings. It is correct that I had received the papers from the Hon'ble High Court in WP(C) 6129/2008. I had not given any undertaking to the SDM that I shall remove the encroachment. I cannot say whether the Mark PW-2/DX is the true certified copy of the order passed by Hon'ble High court in the aforesaid writ petition....." (Page 31 & 32 of compilation).

x x x x x x x x x x

"... It is correct that a vigilance inquiry was initiated with respect to this incident in which I had appeared before the ACP vigilance as a witness. I do not know about the findings of the said vigilance inquiry. My lawyer may have the order about the same. I cannot say whether mark 'Y' (colly) shown to me today is the copy of the findings of the vigilance inquiry. I cannot admit or deny if it has been held in the said vigilance inquiry that my case was full of contradictions and apparently seems to be false. It is incorrect to suggest that after receipt of this report of the vigilance inquiry, the police had called me for a Polygraph test but I refused. Vol. my husband had told the police that I could undergo the said test if they were willing to risk the consequences in case of any eventuality to me during the said test due to my mental state. I do not know if my husband had also given this fact in writing....(Page 36 of compilation).

x x x x x x x x x x

".... I cannot say if I also named Puran Chand in the call made to the police on 100 number. I do not remember if I had informed the police that O.N. Tiwari and 2-3 other persons had assaulted me. It is incorrect to suggest that I had not named Puran Chand as one of the assailants to the police or the doctor or any other authority that I met relating to this incident. I do not know if Puran Chand had given the complaint in the PS Vasant Kunj vide DD no.36B on 16.06.2007. It is incorrect to suggest that I had cooked up this incident falsely after I received the information from the PS about this FIR under SC/ST Act against me and my husband..(Page 37 of compilation).

18. Admittedly, the first information regarding the incident was given to the PCR on 16.06.2007 at 2:08 P.M. The same was to the effect that a person was misbehaving with a lady. The second information was given to the control room at 2:14 P.M. which was to the effect that one person had entered her (Jagmohini) house and was hurling abuses. The third information was given just after five minutes at 2:19 P.M., wherein it was stated that three persons had entered house No.489, Street No.15 in N block and were misbehaving with her and her clothes had been torn. The name of the informant in the first and the third report is Jagmohini whereas the name of the informant in the second report is Mohini; it is possible that there could be some error in recording the name as Mohini instead of Jagmohini in the second report made to the PCR.

19. The learned counsel for the appellant submits that the prosecution had not led any evidence as to who had given these information to the PCR. The learned ASJ ought not to have ascribed the same to the prosecutrix. He states that these three reports even if accepted as it is, do not bely the case of the prosecution. The contention raised is fallacious. The prosecutrix was cross-examined in respect of these three information sent to the PCR. Initially, she feigned her ignorance about the contents of the information lodged by her in spite of the fact that contents were specifically put to her. At no stage she came forward with the plea that these three information were not got recorded by her. In the end (at page 21-22 of the compilation) she admitted the three DDs. She stated, *"I cannot say who was that lady, then said I was referring about myself when I informed the PCR that a lady was being mishandled. It is correct that I had made this call to PCR while I was trying to save myself. The incident of misbehaviour, molestation and rape was continuing with me for all this while, while I made these calls. Only the two accused present in court were misbehaving with me and the other two or three boys were standing outside. I did not mention the presence of two-three boys outside, either to the police or to the doctor in the hospital or to the Ld. MM vol. As I could not complaint about passersby in the gali." (Page 20-21 of the compilation).*

20. It is important to note that the names of PCR officials who visited the spot and met her were confronted to her in cross-examination. Not only that two PCR officials Head Constable Hari Kishan (DW-1) and Constable Ravinder Singh (DW-2) were examined in defence by the respondents. The version as given by the prosecution and as deposed by

these two witnesses was not challenged by the prosecutrix in cross-examination of DWs 1 and 2. It is very intriguing to note that in order to justify the three telephonic calls to the PCR made by the prosecutrix from her landline No.26781755, the prosecutrix stated that calls were being made while the incident of misbehaviour, molestation and rape was continuing with her. Thus, the prosecutrix wanted the court to believe that initially there was misbehaviour and she lodged information in this regard, when the molestation started she again lodged a report regarding molestation and thereafter she was raped. As per the information given to the control room at 2:19 P.M. there were three persons who were misbehaving with the prosecutrix. Even if, that is left apart, as per the prosecutrix rape was committed upon her by respondent O.N. Tiwari whereas respondent Puran Chand held her by her hands. It is humanly impossible that two persons who are misbehaving, molesting or one of them is committing rape while the other holds her, would allow the victim to telephone the PCR. First thing a culprit would do is to snatch the telephone (in this case a landline apparatus) from the lady and then continue with the act of sexual assault. The prosecutrix's statement that the incident of misbehaviour, molestation and rape was continuing while she made these three calls to the control room defies all logic and human conduct. Moreover, if any act of rape had been committed by the respondent O.N.Tiwari the prosecutrix would have definitely mentioned his name in the calls to the PCR. Not only this, the name of the associate respondent Puran Chand Kaushal who allegedly helped O.N. Tiwari to commit rape would have also been mentioned in the information sent to the PCR particularly when both the respondents were admittedly well known to the prosecutrix.

21. It is true that information to the PCR is not a substitute to the FIR and defence cannot be permitted to attack the prosecution version because of some contradictions in the information given to the PCR yet, where the information to the control room is given by the victim herself about the offence and name of the culprit if known to her it is bound to be disclosed, which was not done by the prosecutrix in this case which belies the case of the prosecution.

22. All the more as per PCR form ASI Mahender Singh had reached the spot in pursuance of the first call made to the control room at 2:18 P.M., that is, immediately after the incident. The prosecutrix informed the ASI that her neighbour O.N. Tiwari had visited her house along with

two unknown boys, had given her beatings while her husband was away and she had suffered some injury. It is also mentioned in the PCR form that there was quarrel between them regarding the matter of raising a wall on 31st May.

23. The learned counsel for the appellant urges that the defence cannot take advantage of the PCR forms as the same were not legally proved. We do not agree with the learned counsel for the appellant because the defence can always rely upon the documents filed with the charge sheet by the prosecution. All the more, the factum of making three reports was specifically put to the prosecutrix, who in spite of her initial reluctance not only admitted the same but tried to explain the improvements in the versions since the first information to the control room. The three reports were recorded in the control room at a time when there could not be any allegation of any manipulation at the behest of the respondents. It is thus evident that although the prosecutrix alleged that she was raped at about 1:30 P.M. but there was no mention thereof not only in the three reports made to the control room but also to ASI Mahender who had reached the spot to attend to the information given to the control room. This by itself is sufficient to demolish the prosecutrix's case that she was raped by respondent O.N. Tiwari while respondent Puran Chand Kaushal held her. Apart from this, we have earlier extracted the excerpts of prosecutrix's cross-examination. Admittedly, she is Principal of RJ School, independently run and owned by her and her husband. She did not make a mention of respondent Puran Chand Kaushal as an accomplice in the rape committed by respondent O.N. Tiwari while her history was being recorded on the MLC. Her statement Ex. PW-6/DA was recorded by the police in the evening of 16.06.2007 itself wherein she did not level any allegation of carnal intercourse or attempt to carnal intercourse against respondent O.N. Tiwari. These allegations were made for the first time only on 28.06.2007 without any explanation being offered by the prosecutrix, who as stated above, was a well educated lady aged 37-38 years running a school.

24. Various portions of prosecutrix's cross-examination extracted earlier reveals that she gave evasive answers, contradicted her statement and consistently made improvements. This was obviously to cover up false accusation of rape levelled against the respondents. In view of her vacillating stand the prosecutrix was required to undergo a polygraphic test which she declined on medical grounds without producing any

document in support of her illness. It has to be borne in mind that rape is the most heinous crime and the culprit must be given the severest punishment. Law provides for imprisonment for life or imprisonment which may extend to ten years as punishment for the offence of rape. In case of gang rape as in the instant case the minimum punishment provided is imprisonment for ten years and fine. But, of late registration of false cases of rape is on the rise. The cross-examination of the prosecutrix is the only weapon with a person accused of false charge of rape to defend himself. It is true that sole testimony of prosecutrix is sufficient to base conviction of an accused but the prosecution is under obligation to prove the offence of rape like any other offence.

25. In **Abbas Ahmed Choudhury v. State of Assam** (2010) 12 SCC 115, the Hon'ble Supreme Court has held that:

> *"Though the statement of prosecutrix must be given prime consideration, at the same time, broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there could be no presumption that a prosecutrix would always tell the entire story truthfully. In the instant case, not only the testimony of the victim woman is highly disputed and unreliable, her testimony has been thoroughly demolished by the deposition of DW-1."*

26. In **Raju v. State of Madhya Pradesh** (2008) 15 SCC 133, the Hon'ble Supreme Court has held that testimony of the victim of a rape cannot be presumed to be a gospel truth and observed that false allegations of rape can cause equal distress, humiliation and damage to the accused as well. In para 11, the Supreme Court echoed the sentiments as under:-

> "11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any

embellishment or exaggeration."

27. A report Ex.PW-3/DA was lodged by respondent Puran Chand Kaushal against the prosecutrix and her husband on 16.06.2007 at 2:30 P.M. DD No.36-B (Ex.PZ-1) was recorded in the PS at 2:30 P.M. W/ ASI Asha Rani admitted that the report Ex.PW-3/DA was received vide DD entry 36-B (Ex.PZ-1) by her in the PS. The distance between the PS and the house of the prosecutrix as mentioned in the FIR is 2.5 kms. It is highly improbable that respondent Puran Chand Kaushal will indulge in the offence as alleged, will leave the spot after 2:19 P.M. and would promptly reach the PS to create a plea of alibi by presenting a complaint which was admittedly received in the PS at 2:30 P.M. This sufficiently proves the defence version that the accused persons were present in the PS since at least 1:00/1:15 P.M. and their report was entertained only at 2:30 P.M.

28. Plea of alibi is otherwise of no importance as on the basis of evidence produced by the prosecution and on analysis of the prosecutrix's testimony which is full of improvements and contradictions it cannot be said that the offence as alleged against the respondents was committed by them.

29. It is well settled that absence of injury on the person of the prosecutrix by itself will not negate the offence of rape on her yet the facts and circumstances of each case have to be considered individually. In the instant case as per the prosecution version the prosecutrix was thrown on the ground (in the room), i.e., a hard surface. She was held by respondent Puran Chand while respondent Onkar Nath Tiwari committed rape on her. The prosecutrix who was a grown up lady aged 38 years and weighing about 100 kg. put up immense resistance to the alleged offence. Not only this, as per the allegations of the prosecution, after committing rape respondent Onkar Nath Tiwari attempted to sodomize her. In the process the prosecutrix must have received injuries while she was thrown on the ground and while she offered resistance. In the OPD card Ex.PW-2/D1 there was no external or internal injury on her except scratch marks over both her arms. It may be noted that as per the prosecutrix the respondents had bitten the prosecutrix on her upper left arm. PW-1 Dr. Richa Arora, when she was cross examined stated that the injury marks at 'B' were not possible by any teeth bites. She also stated that if a well build lady resists sexual assault, there would be

external marks of injury on her body as well as on the body of the assailant. In the instant case, the alleged teeth bites on the upper left arm of the prosecutrix (as claimed by her) were missing. Moreover, there was no external injury which should have been normally present taking into consideration the manner in which the rape was allegedly committed.

30. Moreover, as per prosecution version (statement of the prosecutrix recorded by the IO) there was penetration and ejaculation. The prosecutrix was medically examined immediately after the incident but no semen stains were found either on the vaginal swab or on the clothes of the prosecutrix. We are conscious of the fact that absence of semen by itself will not negate the offence of rape but in view of the specific statement of ejaculation and immediate medical examination, absence of semen strengthens our view of false allegation of rape levelled by the prosecutrix.

31. The learned ASJ rightly concluded that the incident as alleged could not have taken place and thus acquitted the respondents of the charges levelled against them.

32. The appeal preferred is groundless; the same is accordingly dismissed with costs of Rs. 10,000/- to be deposited with Delhi High Court Legal Services Committee within eight weeks.

33. The appeal is dismissed in above terms.

ILR (2013) V DELHI 3455
RFA (OS)

KHODAY INDIA LTD. & ANR. ....APPELLANTS

VERSUS

RAKESH GUPTA ....RESPONDENT

(REVA KHETRAPAL & PRATIBHA RANI, JJ.)

RFA (OS) : 30/2013 DATE OF DECISION: 12.08.2013

Code of Civil Procedure, 1908—Order XXXVII—Appellant no. 1 Company through its Managing Director, Appellant no.2 entered into an agreement with the respondent vide which the respondent was to provide consultancy services to the appellant company—Disputes arose between the parties with regard to the payment of consultancy fee and during the pendency of a winding up petition filed by the respondent against the appellant company, two settlement agreement were executed between the parties in April, 2005 and vide the said agreements, the appellants acknowledged a liability amounting to Rs. 2,40,31,800/- and undertook to pay the same by way of monthly installments and issued 19 post dated cheques for the same. Some of the cheques got dishonoured and the respondent then instituted a suit under Order XXXVII CPC for recovery of Rs. 1,80,81,800/- alongwith interest—On the issuance of summons for judgment, though no application for leave to defend was filed, an affidavit of one K.L. Swami, Director of appellant company was filed which was treated as an application for leave to defend by the Ld. Single Judge—Vide the impugned judgment dated 07.11.2012 leave to defend was denied and the suit was decreed in favour of the respondent and both the appellants were directed to pay the suit amount with interest at the rate of 24% - Appellants in

the RFA filed contended that the suit is barred by limitation and that the Court did not have the territorial jurisdiction to entertain the suit and no cause of action had accrued against appellant no.2. Held: The execution of the settlement agreements dated 02.04.2005 has been admitted and by necessary inference, the applicants has admitted their liability for payment in April, 2005 and had issued cheques. The last of the cheques in pursuance of the agreements handed over by the appellants to the respondent admittedly is dated 09.10.2007 and the present suit having been filed on 07.10.2010 is within limitation. Limitation will run only from the date of the said cheque for the same could have been presented for encashment only on or after the said date. Merely because the appellants are carrying on business at Bangalore and had signed the cheques therein, will not take away the jurisdiction of the Delhi Court, more so when appellants not having controverted that the agreements were executed in New Delhi, had infact made payments to the respondents at New Delhi. The agreement between the parties also revealed that appellant no.2 had signed the agreement on behalf of appellant no.1, company and had agreed to become personally liable for the dues of appellant no.1, company and therefore is now estopped from contending that no cause of action had accrued against him Findings of Ld. Single Judge therefore affirmed, however the rate of pendilite interest granted stands reduced from 24% to 8% per annum, for in the absence of any agreement or statutory provision or on mercantile usage, interest payable can only be at a market rate.

We have carefully examined the aforesaid contentions of the counsel for the Appellants in support of his plea that the suit is barred by limitation and we find the same to be wholly misconceived. The execution of the Agreement dated 2nd April, 2005 has been admitted by the Appellants and by

necessary inference the Appellants have admitted their liability for payment and the issuance of post-dated cheques mentioned therein on the said date to the Respondent. The Appellants have further admitted the payments made thereafter as detailed in **"Annexure B"** to the plaint, though have sought to explain away the same by raising a plea which appears to us to be ex facie false that the said payments were made on a separate and distinct understanding. The said plea, in our opinion, has been rightly rejected by the learned Single Judge as 'moonshine' and 'illusory defence'. The Appellants by admission of Agreement dated 2nd April, 2005, admission of debt due to the Respondent and admission of the payments admittedly made by them to the Respondent thereafter, and by their failure to give the details of the separate and distinct understanding whereunder payments were subsequently made, must be deemed to have acknowledged the debt due to the Respondent and as such the suit is clearly within time. Assuming arguendo that the payments reflected in **"Annexure B"** were made by way of cheques as alleged by the Appellants, the suit would still be within time. It is trite that Section 19 provides for a fresh period of limitation to be computed from the date when payment on account of a debt is made before the expiry of the prescribed period by the person liable to pay the debt. In the present case, even according to the Appellants, the last of the cheques handed over by the Appellants to the Respondent was dated 9.10.2007. The present suit was filed on 7.10.2010 as is evident from the endorsement on the plaint and, therefore, cannot be said to be barred by limitation. As regards the reliance placed by the Appellants on the judgment in **Jiwanlal Achariya Vs. Rameshwarlal Agarwalla** AIR 1967 SC 1118 to contend that limitation will run from the date when the cheque was handed over to the Respondent, that is, 21st August, 2007, suffice it to note that it has been categorically laid down in the aforesaid decision that it is the *"earliest date on which the payment could be made that would be the date where the conditional acceptance of a post-dated*

cheque becomes actual payment when honoured". It stands to reason that a creditor can present the cheque for payment only after it is delivered to him. It equally stands to reason that a creditor cannot present a post-dated cheque for encashment on a date prior to the date of the cheque. The appellants in the instant case have not disputed that the last of the cheques is dated 9.10.2007. Thus, even assuming (though there is no authentic document placed on record in this regard) that the cheque dated 9.10.2007 was delivered to the Respondent on 21.08.2007, he could not have presented the same for payment prior to 9.10.2007. We are, therefore, of the opinion that a fresh period of limitation began on 9th October, 2007 which was the date of post-dated cheque. This is also perfectly in consonance with the ratio of the judgment of the Supreme Court in **Jiwanlal Achariya Vs. Rameshwarlal Agarwalla** (Supra), the relevant extract whereof is reproduced hereunder:-

> "It has been held by the High Court that the acceptance of the post-dated cheque on February 4, 1954 was not an unconditional acceptance. Where a bill or note, is given by way of payment, the payment may be absolute or conditional, the strong presumption being in favour of conditional payment. It follows from the finding of the High Court that the payment was conditional i.e. that the payment will be credited to the person giving the cheque in case the cheque is honoured. In the present case the cheque was realised and the question is what is the date of payment in the circumstances of this case for the purpose of S. 20 of the Limitation Act. S. 20 inter alia lays down that where payment on account of debt is made before the expiration of the prescribed period by the person liable to pay the debt, a fresh period of limitation shall be computed from the time when the payment was made. Where therefore the payment is by cheque and is conditional, the mere delivery of the cheque on a particular date does not mean that the payment was made on that date unless the cheque was accepted

as unconditional payment. Where the cheque is not accepted as an unconditional payment, it can only be treated as a conditional payment. In such a case the payment for purposes of S.20 would be the date on which the cheque would be actually payable at the earliest, assuming that it will be honoured. Thus if in the present case the cheque which was handed over on February 4, 1954 bore the date February 4, 1954 and was honoured when presented to the bank the payment must be held to have been made on February 4, 1954, namely, the date which the cheque bore. But if the cheque is post-dated as in the present case it is obvious that it could not be paid till February 25, 1954 which was the date it bore. As the payment was conditional it would only be good when the cheque is presented on the date it bears, namely, February 25, 1954 and is honoured. The earliest date therefore on which the respondent could have realised the cheque which he had received as conditional payment on February 4, 1954 was 25th February, 1954 if he had presented it on that date and it had been honoured. The fact that he presented it later and was then paid is immaterial for it is the earliest date on which the payment could be made that would be the date where the conditional acceptance of a post-dated cheque becomes actual payment when honoured. We are therefore of opinion that as a post-dated cheque was given on February 4, 1954 and it was dated February 25, 1954 and as this was not a case of unconditional acceptance, the payment for the purpose of S. 20 of the Limitation Act could only be on February 25, 1954 when the cheque could have been presented at the earliest for payment. As in the present case the cheque was honoured it must be held that the payment was made on February 25, 1954. It is not in dispute that the proviso to S. 20 is complied with in this case, for the cheque itself is an acknowledgment of the payment in the handwriting of the person giving the

cheque. We are therefore of opinion that a fresh period of limitation began on February 25, 1954 which was the date of the post-dated cheque which was eventually honoured." **(Para 10)**

Adverting next to the plea of territorial jurisdiction, it is asserted in the plaint that the agreement between the parties was executed at New Delhi and the Defendants had agreed to make the payments and had in fact made the payments to the Plaintiff at New Delhi. These facts have not been controverted in the affidavit seeking leave to defend by the Appellants, as indeed they could not have been. The Appellants, however, seek to challenge the territorial jurisdiction of this Court by contending that the Appellants are carrying on business at Bangalore and had signed the cheques at Bangalore and received legal notice from the Respondent at Bangalore. It may be noted that in the additional affidavit filed today, that is, 12th August, 2013, the Appellants have further sought to urge that the last two payments were made to the Respondent at Bangalore. This assertion is made on the basis of photocopy of an airline ticket purporting to show that the Respondent had travelled to Bangalore by air on 21st August, 2007. We do not see how the aforesaid airline ticket dated 21st August, 2007 can advance the case of the Appellants, as the Appellants have placed nothing on record to show that the cheques dated 21st August, 2007 and 9.10.2007 were handed over to the Respondent at Bangalore. In any event, in our opinion, this fact even if assumed to be correct does not establish lack of jurisdiction in this Court. This being so, the plea of the Appellants that this Court lacks territorial jurisdiction also fails. **(Para 12)**

The plea with regard to cause of action advanced by the Appellants is also untenable. A bare look at the agreement dated 2nd April, 2005 shows that the said Agreement was signed by the Respondent wherein the Respondent was made personally liable by the Appellant No.2 for any claims thereunder. It may be noted that the Appellant No.2 too had

signed the Agreement on behalf of the Appellant No.1/ Company and had also agreed to become personally liable for the dues of the Appellant No.1. The Appellants are, thus, estopped from contending that no cause of action had accrued in favour of the Respondent. Thus, all the three pleas of the Defendants must necessarily fail. **(Para 13)**

Resultantly, we affirm the findings of the learned Single Judge dismissing the application for leave to defend and uphold the decree passed by him in the sum of Rs. 1,80,81,800/- (Rupees One Crore Eighty Lakhs Eighty One Thousand and Eight Hundred only) with interest. We, however, modify the rate of interest and reduce the same from **24 per cent to 8 per cent per annum from the date of the institution of the suit till the date of recovery**. The reduction of the interest has been made by us in view of the fact that the Supreme Court has from time to time laid down that in the absence of any agreement or statutory provision or a mercantile usage, interest payable can be only at the market rate. We also note that in the connected Suit being CS(OS) No. 1367/2010, which also relates to the agreement dated 2nd April, 2005 between the same parties, the rate of interest awarded is 8 per cent, which has been upheld in Appeal by the Division Bench in its judgment dated May 07, 2012 passed in RFA No.47/2012 titled **"Khoday India Ltd. & Anr. Vs. Astra Netcom India Pvt. Ltd."** **(Para 14)**

Important Issue Involved: (a) In a summary suit filed on the basis of a dishonoured cheque, the limitation will run only form the date of the said cheque and not before.

(b) In the absence of any agreement or statutory provision or on mercantile usage, interest from the date of the institution of the suit till the recovery of the decreed amount can only be directed to be paid at the market rate.

[An Gr]

APPEARANCES:

FOR THE APPELLANTS : Mr. Gopal Jain, Advocate.

FOR THE RESPONDENT : Mr. Sanjay Jain, Sr. Advocate with Mr. Lalit Asthana, Advocate.

CASES REFERRED TO:

1. *Gannmani Anasuya* vs. *Parvatini Amarendra Chowdhary* (2007) 10 SCC 296.
2. *Ashok K. Khurana* vs. *M/s Steelman Industries* AIR 2000 Delhi 336.
3. *Jiwanlal Achariya* vs. *Rameshwarlal Agarwalla* AIR 1967 SC 1118.
4. *Jiwanlal Chariya* vs. *Rameshwarlal Agarwalla* AIR 1967SC 1118.

RESULT: Appeal Dismissed.

REVA KHETRAPAL, J.

1. This appeal seeks to assail the judgment dated 07.11.2012 passed by the learned Single Judge whereunder the learned Single Judge rejected the application for leave to defend filed by the Appellant No.2 and decreed the suit in favour of the Respondent and against the Appellants No.1 and 2 jointly and severally in the sum of Rs. 1,80,81,800/- (Rupees One Crore Eighty Lakhs Eighty One Thousand and Eight Hundred only) with interest at the rate of 24% per annum from the date of the institution till the date of recovery.

2. The background facts are that the Appellant no.1, Khoday India Limited had entered into an agreement with the Respondent dated 13.11.2000, which was subsequently amended on 5.5.2001 to change the name of the Appellant No.1. The agreement envisaged that the Respondent/Plaintiff would provide consultancy services to the Appellant No.1 Company of which the Appellant No.2 is the Managing Director. The said consultancy services were to be provided by the Respondent through M/s Astra Netcom Private Limited, a Company controlled by the Respondent.

3. Pursuant to the agreement, the Respondent through its Company, M/s Astra Netcom Private Limited provided the consultancy services to

the Appellants till a dispute arose between the parties with regard to the payment of the consultancy fee and certain cases were filed by the Respondent including a Company Petition bearing C.P.No. 88/2004 before the High Court of Karnataka, Bangalore for winding up of the Appellant/ Company on account of non-payment of dues amounting to Rs. 4,63,02,424/- (Rupees Four Crores Sixty Three Lakhs Two Thousand Four Hundred and Twenty Four only) to the Respondent. During the pendency of the winding up proceedings, however, two Settlement Agreements were executed between the parties at New Delhi on the 2nd day of April, 2005, one in the name of M/s Astra Netcom Private Limited and the other in the name of Mr. Rakesh Gupta, the Respondent herein. The Appellants admittedly came to Delhi and the Agreements dated 2nd April, 2005 were signed by the parties in the office of the Respondent at New Delhi. By the Agreement dated 2nd April, 2005 entered into between the Appellants and the Respondent, with which we are concerned, the Appellants admitted liability/dues on account of consultancy fees, which were settled at Rs. 2,09,00,000/- (Rupees Two Crores and Nine Lacs only), Rs. 10,00,000/- (Rupees Ten Lacs only) were settled on account of out of travelling expenses and Rs. 21,31,800/- (Rupees Twenty One Lacs Thirty One Thousand and Eight Hundred only) for payment of service tax. Thus, the total liability amounting to Rs. 2,40,31,800/- (Rupees Two Crore Fourty Lacs Thirty One Thousand and Eight Hundred only) was admitted by the Appellants, which the Appellants agreed to pay to the Respondent. It was further agreed that the total liability would be paid by the Appellant No.1 to the Respondent, Mr. Rakesh Gupta by way of monthly instalments. The following payments were accordingly made by the Appellant No.1 by means of cheques of Punjab National Bank, M.G. Road, Bangalore in favour of the Respondent in full and final settlement of the accounts:-

Sl.No.	Chq.No.	Chq.Date	Chq.Amount
1.	390980	23.04.2005	8,50,000
2.	390981	23.05.2005	8,50,000
3.	390982	23.06.2005	8,50,000
4.	390983	23.07.2005	13,50,000
5.	390984	23.08.2005	13,50,000

6.	390985	23.09.2005	13,50,000
7.	390986	23.10.2005	13,50,000
8.	390987	23.11.2005	13,50,000
9.	390988	23.12.2005	13,50,000
10.	390989	23.01.2006	13,50,000
11.	390990	23.02.2006	13,50,000
12.	390991	23.03.2006	13,50,000
13.	390992	23.04.2006	13,50,000
14.	390993	23.05.2006	13,50,000
15.	390994	23.06.2006	13,50,000
16.	390995	23.07.2006	13,50,000
17.	390996	23.08.2006	13,50,000
18.	390997	23.09.2006	20,00,000
19.	390998	23.10.2006	5,81,800
		Total	**2,40,318.00**

4. The aforesaid payments are duly reflected in the Agreement itself (Clause 5 of the Agreement). Further vide Clause 10 of the Agreement, the Respondent, Mr. Rakesh Gupta duly acknowledged the receipt of aforesaid cheques and in his individual personal capacity indemnified Khoday India Limited (Appellant No.1) against any future claims by whomsoever relating to the subject matter of the Agreement. Similarly, Khoday India Limited (Appellant No.1) and Mr. Srihari Khoday (Appellant No.2) indemnified the Respondent, Mr. Rakesh Gupta against any claims relating to the subject matter of the Agreement. Subsequently, however, it transpired that some of the cheques were dishonoured on account of insufficiency of the funds in the bank accounts of the Appellants and the Appellants upon being informed about the dishonor of the said cheques made part payments to the Respondent in New Delhi in the office of the Respondent on different occasions, that is, between April, 2005 to October, 2007. In this regard, the Respondent/Plaintiff has given the details of the part payments aforesaid in "Annexure B" of the plaint as under:-

Date	Amount Rs.	Demand Draft	In favour
29.04.2005	6,00,000/-	ICICI Bank	Rakesh Gupta
27.12.2005	13,50,000/-	ICICI Bank	Rakesh Gupta
27.04.2006	10,00,000/-	220254	Rakesh Gupta
13.03.2007	20,00,000/-	542850	Rakesh Gupta
28.08.2007	5,00,000/-	563091 Citibank	Rakesh Gupta
09.10.2007	5,00,000/-	563092 Citibank	Rakesh Gupta

5. The Appellants admit the aforesaid payments as having been made by them to the Respondent. There is however a dispute with regard to the mode of payment. While it is alleged by the Respondent that the said payments were made by demand drafts to him, according to the Appellants the same were paid vide cheques. Be that as it may, the Appellants having failed to pay the balance amount of Rs. 1,80,81,800/- (Rupees One Crore Eighty Lakhs Eighty One Thousand and Eight Hundred only), the Respondent instituted a suit under Order XXXVII of the Code of Civil Procedure, 1908 for recovery of the said amount with future and *pendente lite* interest at the rate of 24 per cent per annum from the Appellants from the due date till the date of realization of the amount.

6. Summons for appearance were issued and thereafter summons for judgment to the Appellants, who sought leave to defend by filing an affidavit of one Mr. K.L. Swamy working as Director of the Appellant/ Company. It may be noted that no application for leave to defend was filed by the Appellants nor any document was filed to show that the said Mr. K. L. Swamy was authorized by the Appellant/Company to seek leave to defend. Notwithstanding, the learned Single Judge treated the affidavit filed by the said Mr. K.L. Swamy as an application for leave to defend.

7. It appears from the impugned judgment that three contentions were raised by the counsel for the Appellants before the learned Single Judge. The very same contentions are sought to be raised before us. The first is that the suit is barred by limitation; the second plea which is urged is that this Court does not have territorial jurisdiction to entertain the suit; and finally it is contended that no cause of action has accrued against the

Appellant No.2, Mr. Srihari Khoday. The learned Single Judge after noting that in the affidavit seeking leave to defend no plea of limitation had been raised, nevertheless proceeded to adjudicate upon the said plea in the light of the judgment of the Supreme Court rendered in **Gannmani Anasuya Vs. Parvatini Amarendra Chowdhary** (2007) 10 SCC 296, in which it is laid down that Section 3 of the Limitation Act, 1963 predicates that the plea of limitation can always be raised and the Court while decreeing a suit is obliged to look into the question as to whether the claim in suit is within time or not. The learned Single Judge, however, found no merit in the plea of the Appellants of the claim in the suit of the Respondent being barred by limitation.

8. Adverting to the aspect of limitation, the counsel for the Appellants has argued before us that the last payment as per the Agreement dated 2nd April, 2005 was under a cheque dated 23rd October, 2006 and the suit filed on 7th October, 2010 was well beyond the prescribed period of limitation. It has also been contended by the counsel for the Appellants that the part payments, reflected in "Annexure B" to the plaint, alleged to have been made on different dates between 29.04.2005 and 9.10.2007, were made as per a separate and distinct understanding between the parties and cannot provide any benefit to the Respondent for the purpose of extending the period of limitation. In any event, for part payment to extend the period of limitation, as per the proviso to Section 19 of the Limitation Act, there has to be an acknowledgment of payment in the hand-writing of, or in a writing signed by, the person making the payment. There is no such acknowledgment by the Appellants in the present case and, thus, the said payments are of no avail to the Respondent.

9. The counsel for the Appellants further contended relying on **Ashok K. Khurana vs. M/s Steelman Industries** AIR 2000 Delhi 336 and **Jiwanlal Chariya Vs. Rameshwarlal Agarwalla** AIR 1967SC 1118 that the relevant date for the purpose of calculating limitation would be the date of cheque and not the date when the payment was realized thereunder. An additional affidavit on behalf of the Appellants is filed in the course of hearing of the Appeal which is dated 12th August, 2013 (i.e. today). In this affidavit, it is stated that the cheque No. 563092 i.e. the last cheque, was handed over to the Respondent on 21.08.2007 in Banglore as is evident from the acknowledgment of the receipt of the cheque and an air-ticket to Banglore filed with the Additional Affidavit. It is argued that this leaves no room for doubt that the limitation period

commenced from 21.8.2007 and came to an end on 20.8.2010. The suit, which was filed on 7th October, 2010 is therefore clearly time barred. It is further asserted in the Additional Affidavit that another cheque was handed over to the Respondent on the same day, that is, 21st August, 2007 being Cheque No. 563091, which was realized on 28.08.2007, and this further showed that the suit was time barred and should have been dismissed as such. The counsel for the Appellants also sought to contend that suit was not filed on 7th October, 2010 but on 21st October, 2010.

10. We have carefully examined the aforesaid contentions of the counsel for the Appellants in support of his plea that the suit is barred by limitation and we find the same to be wholly misconceived. The execution of the Agreement dated 2nd April, 2005 has been admitted by the Appellants and by necessary inference the Appellants have admitted their liability for payment and the issuance of post-dated cheques mentioned therein on the said date to the Respondent. The Appellants have further admitted the payments made thereafter as detailed in **"Annexure B"** to the plaint, though have sought to explain away the same by raising a plea which appears to us to be ex facie false that the said payments were made on a separate and distinct understanding. The said plea, in our opinion, has been rightly rejected by the learned Single Judge as 'moonshine' and 'illusory defence'. The Appellants by admission of Agreement dated 2nd April, 2005, admission of debt due to the Respondent and admission of the payments admittedly made by them to the Respondent thereafter, and by their failure to give the details of the separate and distinct understanding whereunder payments were subsequently made, must be deemed to have acknowledged the debt due to the Respondent and as such the suit is clearly within time. Assuming arguendo that the payments reflected in **"Annexure B"** were made by way of cheques as alleged by the Appellants, the suit would still be within time. It is trite that Section 19 provides for a fresh period of limitation to be computed from the date when payment on account of a debt is made before the expiry of the prescribed period by the person liable to pay the debt. In the present case, even according to the Appellants, the last of the cheques handed over by the Appellants to the Respondent was dated 9.10.2007. The present suit was filed on 7.10.2010 as is evident from the endorsement on the plaint and, therefore, cannot be said to be barred by limitation. As regards the reliance placed by the Appellants on the judgment in **Jiwanlal Achariya Vs. Rameshwarlal Agarwalla** AIR 1967 SC 1118 to contend

that limitation will run from the date when the cheque was handed over to the Respondent, that is, 21st August, 2007, suffice it to note that it has been categorically laid down in the aforesaid decision that it is the *"earliest date on which the payment could be made that would be the date where the conditional acceptance of a post-dated cheque becomes actual payment when honoured"*. It stands to reason that a creditor can present the cheque for payment only after it is delivered to him. It equally stands to reason that a creditor cannot present a post-dated cheque for encashment on a date prior to the date of the cheque. The appellants in the instant case have not disputed that the last of the cheques is dated 9.10.2007. Thus, even assuming (though there is no authentic document placed on record in this regard) that the cheque dated 9.10.2007 was delivered to the Respondent on 21.08.2007, he could not have presented the same for payment prior to 9.10.2007. We are, therefore, of the opinion that a fresh period of limitation began on 9th October, 2007 which was the date of post-dated cheque. This is also perfectly in consonance with the ratio of the judgment of the Supreme Court in **Jiwanlal Achariya Vs. Rameshwarlal Agarwalla** (Supra), the relevant extract whereof is reproduced hereunder:-

> "It has been held by the High Court that the acceptance of the post-dated cheque on February 4, 1954 was not an unconditional acceptance. Where a bill or note, is given by way of payment, the payment may be absolute or conditional, the strong presumption being in favour of conditional payment. It follows from the finding of the High Court that the payment was conditional i.e. that the payment will be credited to the person giving the cheque in case the cheque is honoured. In the present case the cheque was realised and the question is what is the date of payment in the circumstances of this case for the purpose of S. 20 of the Limitation Act. S. 20 inter alia lays down that where payment on account of debt is made before the expiration of the prescribed period by the person liable to pay the debt, a fresh period of limitation shall be computed from the time when the payment was made. Where therefore the payment is by cheque and is conditional, the mere delivery of the cheque on a particular date does not mean that the payment was made on that date unless the cheque was accepted as unconditional payment. Where the cheque is not accepted as an unconditional payment, it can

only be treated as a conditional payment. In such a case the payment for purposes of S.20 would be the date on which the cheque would be actually payable at the earliest, assuming that it will be honoured. Thus if in the present case the cheque which was handed over on February 4, 1954 bore the date February 4, 1954 and was honoured when presented to the bank the payment must be held to have been made on February 4, 1954, namely, the date which the cheque bore. But if the cheque is post-dated as in the present case it is obvious that it could not be paid till February 25, 1954 which was the date it bore. As the payment was conditional it would only be good when the cheque is presented on the date it bears, namely, February 25, 1954 and is honoured. The earliest date therefore on which the respondent could have realised the cheque which he had received as conditional payment on February 4, 1954 was 25th February, 1954 if he had presented it on that date and it had been honoured. The fact that he presented it later and was then paid is immaterial for it is the earliest date on which the payment could be made that would be the date where the conditional acceptance of a post-dated cheque becomes actual payment when honoured. We are therefore of opinion that as a post-dated cheque was given on February 4, 1954 and it was dated February 25, 1954 and as this was not a case of unconditional acceptance, the payment for the purpose of S. 20 of the Limitation Act could only be on February 25, 1954 when the cheque could have been presented at the earliest for payment. As in the present case the cheque was honoured it must be held that the payment was made on February 25, 1954. It is not in dispute that the proviso to S. 20 is complied with in this case, for the cheque itself is an acknowledgment of the payment in the handwriting of the person giving the cheque. We are therefore of opinion that a fresh period of limitation began on February 25, 1954 which was the date of the post-dated cheque which was eventually honoured."

11. We, thus, affirm the finding of the learned Single Judge that the suit as aforesaid has been instituted within the prescribed period from the last date of the payment made by the Appellants. It may be noted at this juncture that learned counsel for the Appellants in a desperate bid to defeat the suit sought to contend that the suit was filed not on 7.10.2010

but on 21.10.2010. This argument is being noted to be rejected. There is an endorsement made by the Registry on the plaint itself which shows that the suit was filed on 7th October, 2010. It was refiled on 21st October, 2010 after removal of office objection and it is this date of refiling which is sought to be pressed into service by the Appellants.

12. Adverting next to the plea of territorial jurisdiction, it is asserted in the plaint that the agreement between the parties was executed at New Delhi and the Defendants had agreed to make the payments and had in fact made the payments to the Plaintiff at New Delhi. These facts have not been controverted in the affidavit seeking leave to defend by the Appellants, as indeed they could not have been. The Appellants, however, seek to challenge the territorial jurisdiction of this Court by contending that the Appellants are carrying on business at Bangalore and had signed the cheques at Bangalore and received legal notice from the Respondent at Bangalore. It may be noted that in the additional affidavit filed today, that is, 12th August, 2013, the Appellants have further sought to urge that the last two payments were made to the Respondent at Bangalore. This assertion is made on the basis of photocopy of an airline ticket purporting to show that the Respondent had travelled to Bangalore by air on 21st August, 2007. We do not see how the aforesaid airline ticket dated 21st August, 2007 can advance the case of the Appellants, as the Appellants have placed nothing on record to show that the cheques dated 21st August, 2007 and 9.10.2007 were handed over to the Respondent at Bangalore. In any event, in our opinion, this fact even if assumed to be correct does not establish lack of jurisdiction in this Court. This being so, the plea of the Appellants that this Court lacks territorial jurisdiction also fails.

13. The plea with regard to cause of action advanced by the Appellants is also untenable. A bare look at the agreement dated 2nd April, 2005 shows that the said Agreement was signed by the Respondent wherein the Respondent was made personally liable by the Appellant No.2 for any claims thereunder. It may be noted that the Appellant No.2 too had signed the Agreement on behalf of the Appellant No.1/Company and had also agreed to become personally liable for the dues of the Appellant No.1. The Appellants are, thus, estopped from contending that no cause of action had accrued in favour of the Respondent. Thus, all the three pleas of the Defendants must necessarily fail.

14. Resultantly, we affirm the findings of the learned Single Judge

dismissing the application for leave to defend and uphold the decree passed by him in the sum of Rs. 1,80,81,800/- (Rupees One Crore Eighty Lakhs Eighty One Thousand and Eight Hundred only) with interest. We, however, modify the rate of interest and reduce the same from **24 per cent to 8 per cent per annum from the date of the institution of the suit till the date of recovery**. The reduction of the interest has been made by us in view of the fact that the Supreme Court has from time to time laid down that in the absence of any agreement or statutory provision or a mercantile usage, interest payable can be only at the market rate. We also note that in the connected Suit being CS(OS) No. 1367/2010, which also relates to the agreement dated 2nd April, 2005 between the same parties, the rate of interest awarded is 8 per cent, which has been upheld in Appeal by the Division Bench in its judgment dated May 07, 2012 passed in RFA No.47/2012 titled **"Khoday India Ltd. & Anr. Vs. Astra Netcom India Pvt. Ltd."**

15. The inevitable conclusion is that the Appeal is dismissed with the aforesaid modification in the rate of interest payable by the Appellants. There will be no order as to costs.

ILR (2013) V DELHI 3471
CRL. A.

CHANDAN @ MANJIT ....APPELLANT

VERSUS

STATE ....RESPONDENT

(S.P. GARG, J.)

CRL. A. NO. : 1384/2011 DATE OF DECISION: 12.08.2013

Specific Performance—Indian Penal Code, 1860—Section 307—Attempt to murder—Appellant/accused working with the victim—Victim made a complaint against the appellant/accused—Inflicted injuries with

Sambal—Fled after inflicting injuries—Victims removed to the hospital—Medically examined—Unfit for statement injuries opined to be grievous—Complaint lodged—FIR No. 245/2007 under section 307 IPC PS Kalyanpuri recorded—Statement of the injured recorded—Investigation completed charge sheet filed—Charge for offence under section 307 IPC framed 10 witnesses examined by prosecution—Convicted vide judgment dated 20.08.2011—Aggrieved accused preferred appeal contended appellant/accused not author of the injuries—Injuries caused by the employer—Witnesses are interested witnesses their testimonies cannot be relied upon—Statement of injured was recorded after considerable delay—No explanation furnished for the delay—Complainant is a planted witness was not present at the spot at the time of incident version given by injured is in consultation with complainant—Appellant had no motive to inflict injuries—No independent public witnesses associated in recovery—Recovery of weapon highly doubtful—Complainant himself caused injuries to the victim as injured was repeatedly demanding dues—APP contended—The role played by the appellant proved—No reason to disbelieve no variance between ocular and medical evidence—Held—No evidence to substantiate plea of injuries being caused by the employer—No material discrepancy emerged in cross examination of the injured—Victim had got employment for appellant not expected to spare real culprit and falsely implicate the accused—No prior animosity Complaint lodged by victim was the immediate provocation Injured gave graphic details of infliction of injuries no ulterior motive assigned to victim—No conflict between the ocular and medical evidence—No plausible explanation to incriminating evidence in statement recorded under Section 313 Cr.P.C. —No witness examined in defence—Conviction under section 307 IPC cannot be faulted—appeal

unmerited—Dismissed.

Important Issue Involved: Where the victim has categorically stated that none else was present at that time, non examination of independent public witness is not fatal in the case.

Minor inconsistencies, contradictions in the statements of Prosecution witness do not go to the root of the case to throw the prosecution version in its entirety.

Cogent and reliable testimony of the injured cannot be discredited merely because the individual who took the victim to the hospital was not examined.

The testimony of a stamped witness has its own relevance and efficacy. The testimony of the injured witness is accorded a special status in law. This is a consequence of the fact that the injury to the witness is an in-built guarantee of his presence at the scene of crime and because the witness will not want to let the actual assailant to go unpunished merely to falsely involve a third party for the commission of the offence.

For Section 307 IPC it is not essential that bodily injury capable of causing death should have been inflicted.

It is not necessary for Section 307 IPC that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in Section 307 IPC. It is sufficient by law, if there is present an intent coupled with some over act in execution thereof.

The nature of the weapon used, the intention expressed by the accused at the time of the act, the motive for commission of offence, the nature and the size of the injuries, the parts of the body of the victim selected for causing the injury and the severity of the blow(s) are important factors to determine if an accused can be convicted of an attempt murder.

[Vi Gu]

APPEARANCES:

FOR THE APPELLANT : Mr. Subhash Gosain, Advocate.

FOR THE RESPONDENT : Mr. M.N. Dudeja, APP. SI Sandeep Kumar, P.S. Kalyanpuri.

CASES REFERRED TO:

1. *State of Uttar Pradesh* vs. *Naresh and Ors.,* (2011) 4 SCC 324.
2. *Abdul Sayed* vs. *State of Madhya Pradesh,* (2010) 10 SCC 259.

RESULT: Appeal dismissed.

S.P. GARG, J.

1. Chandan @ Manjit (the appellant) challenges a judgment dated 26.08.2011 of learned Additional Sessions Judge in Sessions Case No. 17/2009 arising out of FIR No. 245/2007 PS Kalyanpuri by which he was convicted for committing offence punishable under Section 307 IPC. By an order dated 27.08.2011, he was sentenced to undergo RI for five years with fine Rs. 10,000/-.

2. Daily Diary (DD) No. 22A (Ex.PW-3/A) was recorded at 14.40 hours at PS Kalyanpuri on getting information that an individual has been injured near Electricity House, GDE Cremation Ground. The investigation was assigned to ASI Rajbir Singh who with Const. Yadram went to the spot. He came to know that the injured had been taken to Lal Bahadur Shastri Hospital. He went there and collected the MLC of injured Dara Singh who was unfit to make statement. On reaching the spot, Mohd.Iqbal met him and after recording his statement, he lodged First Information Report. During the course of investigation, statement of the injured Dara

Singh was recorded and he disclosed that Chandan who was working with him at the dairy inflicted injuries with *'Sambal'* and attempted to murder him. The Investigating Officer also recorded the statements of the witnesses conversant with the facts. Chandan was arrested and at his instance, the crime weapon was recovered. After completion of investigation, a charge-sheet was submitted in the Court against him. He was duly charged and brought to trial. The prosecution examined ten witnesses to establish his guilt. In 313 statement, the appellant pleaded false implication. After hearing the counsel for the parties and on appreciation of the evidence, the Trial Court, by the impugned judgment, convicted him for the offence mentioned previously. Being aggrieved, he has preferred the appeal.

3. Appellant's counsel urged that the Trial Court did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the testimonies of interested witnesses. Injured's statement was recorded after a considerable delay of six days which remained unexplained. PW-7 (Mohd.Iqbal) is a planted witness and was not present at the spot at the time of incident. It is unclear how he was aware of the minute details of the incident which were spoken after six days by the injured. The version given by the injured apparently is in consultation with the complainant-Mohd.Iqbal. The appellant had no motive to inflict injuries upon the victim. Recovery of the weapon is highly doubtful as no independent public witness was associated. PW-7 (Mohd.Iqbal) himself was a culprit who caused injuries to Dara Singh as he was repeatedly demanding his dues. He prevailed upon the complainant and the appellant was falsely implicated in the case. Learned APP urged that the injured categorically proved the role played by the appellant in causing injuries to him and there are no sound reasons to disbelieve him. There is no variance between the ocular and medical evidence.

4. I have considered the submissions of the parties and have examined the record. Injuries on the victim's body are not under challenge. The appellant has claimed that he is not the author of the injuries and these were caused by his employer. However, there is no evidence on record to substantiate this plea. The victim was taken to Lal Bahadur Shastri Hospital, Khichripur at 03.00 P.M. with the alleged history of assault. PW-1 (Const.Bhanu Pratap), duty constable informed the police station and got the victim medically examined. PW-3 (Dr.Rajni) examined him and prepared his MLC (Ex.PW-3/A). He was referred to Sr.Surgery

for detailed examination, management and opinion. PW-5 (Dr.Shishir Pritam Guria) was of the opinion that the nature of injuries suffered by the victim was grievous.

5. Star witness to establish the appellant's complicity is PW-8 (Dara Singh) who was injured in the incident. He testified that in the morning, he had apprised his employer that Chadan was in the habit of shirking work. Chandan threatened him to teach lesson for lodging complaint against him. After taking lunch, when he was taking rest on a cot underneath a peepal tree, Chandan came there and sat on the cot with him. When he started drowsiness, he (the accused) took out a 'Sambal'and hit him on his head. He tried to save himself with his right hand. The accused again gave 'Sambal' blow on his right hand and head and fled the spot. He started bleeding and became unconscious. He regained senses on 19.04.2007 and his statement was recorded by the police. In the cross-examination, he denied the suggestion that he had committed rape upon Chandan's sister. The incident took place at about 02.00 P.M. No public person was present when he was assaulted by the accused. He was taken to hospital by one Ballu Bhai who informed Mohd. Iqbal about the assault. He was hit with iron rod on his head, nose, eyes and hands. The accused had given five blows on his body. Two were on his head and three were on his head and nose. He denied that there was money dispute with Anwar and Mohd. Iqbal or that he was assaulted by them.

6. Overall testimony of this witness reveals that no material discrepancies have emerged in his cross-examination to disbelieve his version. PW-8 (Dara Singh) sustained grievous injuries on his body and was unfit to make statement. He became unconscious at the spot after he suffered multiple injuries on his vital organs. The accused was known to him as both were from the same village. The victim had got employment for him. The victim was not expected to spare the real culprit and to falsely implicate the accused with whom he had no prior animosity. The immediate provocation for the accused to inflict injuries upon the victim was that he had lodged complaint with his employer for avoiding work and it was resented by him. PW-8 (Dara Singh) gave graphic details as to how and under what circumstances, the accused caused injuries to him. PW-7 (Mohd. Iqbal) has corroborated his version that in the morning when he went to the dairy of his brother on 15.04.2007, Dara Singh had complained to him about Chandan for not doing his work properly. He

had told Dara Singh that they would employ someone else and would remove Chandan from the job. Chandan was scolded by him. At about 02.30 / 03.00 P.M., he received a phone call about injuries sustained by Dara Singh. He fairly admitted that he was not informed that time as to who had caused injuries to Dara Singh. No ulterior motive was assigned in the cross-examination to this witness to favour Dara Singh.

7. There is no conflict between the ocular and medical evidence. The prosecution has established the motive of the accused to cause injuries. After the arrest, the weapon of offence, iron rod (Ex.P1) was recovered vide seizure memo Ex.PW-2/E. In his 313 statement, the accused did not give plausible explanation to the incriminating evidence appearing against him. He did not examine any witness in defence to show that he was not the author of the injuries and these were caused by Anwar and Iqbal. He also did not examine any witness including her sister to prove if the victim had ever sexually assaulted her. Non-examination of independent public witness is not fatal in the case as the victim categorically stated that none else was present at that time. Minor inconsistencies, contradictions highlighted by counsel do not go to the root of the case to throw the prosecution version in its entirety. Merely because the individual who took the victim to the hospital was not associated in the investigation, cogent and reliable testimony of the injured cannot be discredited.

8. The testimony of a stamped witness has its own relevance and efficacy. The fact that the witness had sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. The testimony of the injured witness is accorded a special status in law. This is a consequence of the fact that the injury to the witness is an in-built guarantee of his presence at the scene of crime and because the witness will not want to let the actual assailant to go unpunished merely to falsely involve a third party for the commission of the offence. In the case of **'State of Uttar Pradesh vs.Naresh and Ors.'** (2011) 4 SCC 324, the Supreme Court held:

> ''The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence. Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein.''

9. In the case of **'Abdul Sayed Vs.State of Madhya Pradesh',** (2010) 10 SCC 259, the Supreme Court held :

> ''The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness".

10. The appellant apparently had attempted to murder Dara Singh. He had repeatedly hit him on his vital organs with a heavy iron object i.e. 'Sambal'. The injuries on his body were opined grievous in nature. The appellant fled the spot after inflicting injuries. Conviction under Section 307 IPC cannot be faulted as the appellant was aware that the injuries inflicted by him could cause his death. As per MLC (Ex.PW3/A), PW-8 sustained following injuries :

(1) Incised wound over middle of Rt. Side forehead with depressed bone felt from wound 8 cm X 1 cm X bone deep.

(2) Incised wound over Rt. Frontal region 6 cm X 1 cm X bone deep with active bleeding.

(3) V shaped lacerated wound over Rt.malar region 0.5 cm X 0.5 cm.

11. To justify 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 of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in Section 307 IPC. It is sufficient by law, if there is present an intent coupled with some overt act in execution thereof. The nature of weapon used, the intention expressed by the accused at the time of the act, the motive for commission of offence, the nature and the size of the injuries, the parts of the body of the victim selected for causing the injuries and the severity of the blow or blows are important factors to determine if an accused can be convicted of an attempt murder.

12. In the light of above discussion, the appeal filed by the appellant is unmerited and is dismissed. Trial Court record be sent back forthwith.

ILR (2013) V DELHI 3479
EFA (OS)

GOPAL KAMRA **....APPELLANT**

VERSUS

KARAN LUTHRA **....RESPONDENT**

(REVA KHETRAPAL & PRATIBHA RANI, JJ.)

EFA (OS) NO. : 15/2013 **DATE OF DECISION: 14.08.2013**

Suit for Specific performance—Compromise Decree in Favour of DH passed on 15.04.1998—JD executed a GPA in favour of DH and also executed Possession Letter on 11.05.2000—JD failed to execute Sale Deed—Execution filed on 09.04.2012—Objections filed by JD before Executing Court—Objections dismissed by Single Judge—In the appeal, issue of limitation raised—

Held that since JD had himself set the time at large by executing a GPA in favour of DH and also executed Possession Letter on 11.05.2000, it cannot be argued that DH had at any point of time by his conduct waived the obligation of JD to execute Sale Deed. Also the compromise decree had the imprimatur of the Court, therefore, it was enforceable—Appeal dismissed.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT **:** Mr. Lokesh Kumar, Advocate.

FOR THE RESPONDENT **:** Mr. Subhiksh Vasudev, Advocate.

CASES REFERRED TO:

1. *Shri M.R. Malhotra (since Deceased) Thr. LRs & Ors.* vs. *Competent Builders Pvt. Ltd.,* 192 (2012) DLT 295.
2. *Raghunath Rai Bareja and Anr.* vs. *Punjab National Bank and Ors.,* (2007) 2 SCC 230.
3. *P. D'Souza* vs. *Shondrilo Naidu* (2004) 6 SCC 649.
4. *India House* vs. *Kishan N. Lalwani* [(2003) 9 SCC 393].
5. *Antonysami* vs. *Arulanandam Pillai(D) by LRs & Anr.,* (2001) 9 SCC 658.
6. *Ratansingh* vs. *Vijaysingh & Ors.,* (2001) 1 SCC 469.
7. *Smt. Periyakkal* vs. *Smt. Dakshyani,* (1983) 2 SCC 127.

RESULT: Appeal Dismissed.

REVA KHETRAPAL, J.

1. The present Appeal seeks to assail the judgment of the learned Single Judge dated 12.7.2013 dismissing the objections of the Judgment Debtor registered as E.A. No.675/2012 to the Execution Petition filed by the Decree Holder on 9.4.2012.

2. The facts necessary for adjudicating upon the present Appeal are briefly delineated below. A suit for specific performance, being CS(OS) No.1507/1989 was preferred by one Deepak Talwar against the Defendant - Shri Satish Chand Kalra in respect of an Agreement to Sell dated

31.8.1986 pertaining to property bearing No.D-82, Malviya Nagar Extension (Saket), New Delhi constructed on a plot of land measuring 358 sq. yds. During the pendency of the suit, the parties entered into a compromise and the suit was disposed of in terms of the said compromise. The compromise arrived at between the parties was that in terms of the Agreement to Sell Shri Deepak Talwar nominated Shri Karan Luthra (the Respondent herein) as his nominee under the Agreement to Sell. Shri Karan Luthra was, therefore, impleaded on the Plaintiff's filing IA No.3139/1998 under Order I Rule 10 CPC with no opposition to his impleadment as Plaintiff No.2. Further, under the compromise, the Agreement to Sell was to be given effect to and a joint application was accordingly moved by the parties, being IA No.3138/1998 under Order XXIII Rule 3 read with Section 151 CPC for recording of the terms of the compromise, the relevant portion of which is as under:-

> "1. That the suit of the plaintiff be decreed and decree for specific performance directing the defendant to execute a Sale Deed in respect of property No.D-82, Malviya Nagar Extension (Saket), New Delhi, constructed on a plot of land measuring 358 Sq. Yards, in favour of the plaintiff No.2 as the plaintiff No.1 has appointed Plaintiff No.2 to be his nominee in terms of the Agreement to Sell dt. 31.8.86.
>
> 2. That the defendant has received today before this Hon'ble Court a sum of Rs.21 lacs (Rupees Twenty-one lacs only) by means of a Pay Order bearing No.012587 dated 15.4.98 issued by Jammu & Kashmir Bank Ltd. in favour of defendant in full and final settlement of the sale price of the suit property.
>
> 3. That the defendant undertakes to take all permissions which are required to be obtained for execution of the Sale Deed and the defendant shall execute the Sale Deed within three months from the date of grant of the permission or within 6 months from today and in case he fails to do so, then the plaintiff No.2 shall have the right to get the Sale Deed executed through the Registrar of this Hon'ble Court.
>
> 4. That the defendant has placed the plaintiff No.2 in possession of the property in suit, i.e. property No.D-82, Malviya Nagar Extension (Saket), New Delhi, situated in Saket, constructed on a plot of land measuring 358 sq. yards of land in part performance of the Agreement to Sell dated 31st August, 1986, and have also handed over available original documents of title of the property i.e. (i) Original Sanctioned Plan (ii) Auction letter dated _____ (iii) Possession Letter dated 14.6.1976 (iv) Form 'C' (v) Receipts of the payment made to D.D.A. and (vi) Certified copy of the perpetual lease dated 19.4.1977."

3. Pursuant to the disposal of the suit in terms of the compromise, the Judgment Debtor (the Appellant herein) executed a General Power of Attorney in favour of the Decree Holder on 29.3.2000 appointing the Decree Holder Shri Karan Luthra (the Plaintiff No.2) as his General Attorney in respect of the suit property. The said General Power of Attorney was duly registered in the office of the Sub-Registrar. On 11.5.2000, the Judgment Debtor executed a possession letter in favour of the Decree Holder acknowledging the receipt of the entire sale price of the property and handing over the vacant possession of the property to the Decree Holder with liberty to the Decree Holder to use the same in whatever manner he liked.

4. After 11.5.2005, there was a complete lull and admittedly no effort was made by the Decree Holder to have the Sale Deed executed nor the Judgment Debtor took any steps in that direction. On 9.4.2012, the Decree Holder preferred an Execution Petition, to which the Judgment Debtor filed objections, registered as EA No.675/2012 which were dismissed by the learned Single Judge as stated hereinabove. The learned Single Judge after rejecting the objections preferred by the Judgment Debtor passed the following directions:-

> "The judgment debtor is directed to proceed to complete the transaction by executing the sale deed in favour of the decree-holder, in terms of the compromise decree. The judgement debtor shall, within two weeks of the decree holder calling upon him to execute and register the sale deed, do so. In case the judgement debtor does not comply with this direction upon being asked by the decree holder to do so, the same shall be done by a Local Commissioner appointed by this Court. To meet that eventuality, I appoint Shri Babu Ram, an official of this Court (Mobile

No.9910390858) as the Local Commissioner, with the authority and mandate to execute the sale deed in respect of the suit property in favour of the decree holder on behalf of the owner/ judgement debtor. The fee of the Local Commissioner is fixed at Rs. 35,000/-, to be paid by the decree holder. It shall be the obligation of the decree holder to obtain all the requisite permissions from the DDA in advance, since the property is a leasehold property and to bear all the expenses in that respect."

5. Aggrieved from the rejection of the objections filed by him, the Appellant/Judgment Debtor has preferred the present Appeal wherein a two-fold submission is sought to be put forth. The first limb of the argument of learned counsel for the Appellant is that the Execution Petition was not maintainable on the ground of the same being barred by limitation. It was contended that Article 136 of the Schedule to the Limitation Act prescribed a period of 12 years to be the period within which execution of any decree or order of any Civil Court could be sought by the Decree Holder, and the time from which the said period begins to run is when the decree or order becomes enforceable. It was submitted that under the terms of the compromise between the parties dated 15.4.1998, the Judgment Debtor was obliged to execute the Sale Deed in favour of the Decree Holder latest within six months, i.e., by 15.10.1998 (Clause 3). Hence, the decree became enforceable on the said date and the period of limitation consequently expired on 14.10.2010. The present Execution Petition was preferred on 9.4.2012, much after the lapse of the statutory period of limitation and was, therefore, barred by limitation. In support of this submission, learned counsel for the Appellant has placed reliance on the decisions of the Supreme Court in **Antonysami vs. Arulanandam Pillai(D) by LRs & Anr.,** (2001) 9 SCC 658, **Ratansingh vs. Vijaysingh & Ors.,** (2001) 1 SCC 469 and **Raghunath Rai Bareja and Anr. vs. Punjab National Bank and Ors.,** (2007) 2 SCC 230. He also relied upon the decision of the Supreme Court in the case of **Smt. Periyakkal vs. Smt. Dakshyani,** (1983) 2 SCC 127 to urge that time beyond 30 days could not be extended by the Court even under the provisions of Section 148 of the Code of Civil Procedure. The second limb of the argument of learned counsel for the Appellant is that by virtue of provisions of Sections 62 and 63 of the Contract Act the agreement between the parties stood novated, the Respondent having accepted the execution of the General Power of

Attorney dated 29.3.2000 in satisfaction of the obligations of the Appellant, thereby relieving the Appellant from the obligation of executing the Sale Deed in favour of the Respondent.

6. *Per contra,* learned counsel for the Respondent contended that the aforesaid decisions rendered by the Supreme Court had no application to the facts of the present case and were clearly distinguishable. The decree in question is a compromise decree bearing the imprimatur of the Court and as is borne out by the subsequent conduct of the parties, the parties did not consider time to be of the essence for the execution of the Sale Deed. As a matter of fact, the Judgment Debtor had himself set the time at large since he executed a General Power of Attorney in favour of the Decree Holder not within the stipulated period of six months, but on 29.3.2000 and thereafter executed a letter of possession in favour of the Respondent on 11.5.2000. Placing reliance upon a decision of the Division Bench of this Court in **Shri M.R. Malhotra (since Deceased) Thr. LRs & Ors. vs. Competent Builders Pvt. Ltd.,** 192 (2012) DLT 295 in support of his aforesaid submission, learned counsel for the Respondent contended that in such circumstances it could not be said that the limitation for preferring the present Execution Petition expired on 14.10.2010.

7. Adverting to the second limb of the argument of the Appellant's counsel, it was submitted by the Respondent's counsel that no question of novation of the contract had arisen or possibly could have arisen at any point of time merely because the General Power of Attorney in favour of the Respondent was executed by the Appellant beyond the period prescribed by the Compromise Agreement, i.e., on 29.3.2000, and the letter of possession was issued on 11.5.2000 does not mean that the agreement between the parties stood novated. He contended that at no point of time did the Respondent waive the Appellant's obligation to execute the Sale Deed in his favour. The entire sale consideration had been paid by the Respondent who was in possession of the suit property at the time of the Compromise Agreement and had also been handed over the available original documents of title and as such the Appellant was not left with even a vestige of right, title or interest in the suit property. The Appellant himself had set time at large by executing the General Power of Attorney on 29.3.2000 well beyond the period of six months prescribed in the compromise decree. This was done voluntarily by the Appellant without resort to legal proceedings including execution and clearly showed

that the Appellant never understood time to be of the essence in respect of the Compromise Agreement. Had it not been so, the Appellant would have raised objection to the execution of the Power of Attorney in the year 2000 itself by refusing to execute the same.

8. Learned counsel for the Respondent further contended that the reliance placed by the Appellant upon the judgment of the Supreme Court in the case of **Smt. Periyakkal** (supra) was also misplaced. In the said case, the Court in fact accepted the argument raised on behalf of the Appellant that there was no limitation on the power of the Court to extend time, more so in a case where the parties had entered into a compromise and invited the Court to make an order in terms of the compromise, which the Court did.

9. Learned counsel for the Respondent heavily relied upon the judgment of the Division Bench of this Court in **Shri M.R. Malhotra (since Deceased) Thr. LRs & Ors.** (supra). The relevant extracts from the said judgment which were referred to by learned counsel for the Respondent are for the sake of ready reference extracted hereinbelow:-

> "26. It is trite law that the compromise decree is an imprimatur of the court on what has been agreed by the parties in the agreement. The court has to thus see decree as an agreement entered into by the parties and has to find out the intention of the parties from the agreement or otherwise.
>
> 29. The said terms in the agreement nowhere provided the consequences for non completion of the said transaction in the event the same is not completed within a stipulated time frame. Thus, it is not easy to assume on a priori basis that by mere specification of time in the agreement, the parties agreed and intended to have time as an essence to the contract.
>
> 38. All the events subsequent to passing of the decree especially in the year 2001 are indicative of the intention of the parties, which was not to treat the time as essence of the contract or agreement. It is altogether different matter that the time was mentioned in the agreement to comply the obligation under the agreement. The communication exchanged between the parties in the year 2001 reflects that till the year 2001, the intention of the parties was to comply with the agreement and not to repudiate

the agreement on the ground of time as essence. What follows from the same is that the parties never understood the compromise agreement or decree as time bound till 2001, which is prior to appellant's approaching this court in the year 2003.

39. It is well settled law that whether time is intended to be an essence of the contract can be discerned by examining the intent of the parties at the time of entering the agreement, contents of the agreement and events subsequent thereto the agreement. The subsequent conduct of the parties is relevant to infer the intent of the parties as to whether the parties intended to treat the time as an essence or not. Sometimes, in the contract or the agreement where initially time was not of much importance can become essence of the agreement later on the basis of the subsequent conduct of the parties. Similar are the cases wherein the time is stipulated under the agreement, but the later conduct of the parties may reveal that the time was never understood to be the essence of the agreement. Thus, subsequent conduct plays a significant role in evaluating as to whether the time was treated to be an essence of the contract.

40. In the decision of (2004) 6 SCC 649 **P. D'Souza vs. Shondrilo Naidu** the Supreme Court discussed the similar proposition wherein the time as an essence of the contract was waived by the party by way of the subsequent conduct. The Supreme Court observed thus:

> "The contention raised on behalf of the appellant to the effect that the plaintiff had failed to show her readiness and willingness to perform her part of contract by 5.12.1978 i.e. Time stipulated for performance of contract is rejected inasmuch as the defendant himself had revived the contract at a later stage. He, as would appear from the findings recorded by the High Court, even sought for extension of time for registering the sale deed till 31.12.1981. It is, therefore, too late in the day for the defendant now to contend that it was obligatory on the part of the plaintiff to show readiness and willingness as far back as 5.12.1978. Time, having regard to the fact situation obtaining herein, cannot, thus, be said to be of

the essence of the contract. In any event, the defendant consciously waived his right. He, therefore, now cannot turn around and contend that the time was of the essence of the contract and the plaintiff was not ready and willing to perform her part of contract in December 1978."

53. The Supreme Court however, in the case of Periyakkal (supra) has observed that the time fixed in the agreement or compromise decree is no different from the time allowed by the court once the parties invited the compromise decree where the court is also the party. Thus, the court can extend the time to avoid injustice. The Hon'ble Apex Court observed thus:

"The parties, however, entered into a compromise and invited the court to make an order in terms of the compromise, which the court did. The time for deposit stipulated by the parties became the time allowed by the court and this gave the court the jurisdiction to extend time in appropriate cases. Of course, time would not be extended ordinarily, nor for the mere asking. It would be granted in rare cases to prevent manifest injustice. **True the court would not rewrite a contract between the parties but the court would relieve against a forfeiture clause; And, where the contract of the parties has merged in the order of the court, the court's freedom to act to further the ends of justice would surely not stand curtailed.** Nothing said in Hukamchand's case militates against this view. We are, therefore, of the view that the High Court was in error in; thinking that they had no power to extend time."

(Emphasis Supplied)

10. We may note that the facts in the case of **Shri M.R. Malhotra (since Deceased) Thr. LRs & Ors.** (supra) are pari materia to the facts in the present case. The parties in the said case arrived at a Compromise Agreement in a pending suit and moved an application under Order XXIII Rule 3 of the Code of Civil Procedure, 1908. The said application came up before the Court on 21st March, 1991 when the learned Single Judge decreed the suit in terms of the compromise by allowing the application. The Appellants filed an Execution Petition in February, 2003 seeking

relief from the Court to dispossess the Judgment Debtor/Respondent from the property in question and to put the Decree Holder/Appellant in possession of the property to satisfy the decree, i.e., after a lapse of 12 years. It was in such circumstances that it was held that it was not possible to assume on a priori basis that by mere specification of time in the agreement parties had agreed and intended to have time as an essence of the contract. Moreover, subsequent conduct of the parties revealed that the parties never understood the agreement in the sense that time should be the essence. The Respondent by not repudiating the agreement in the year 2001 itself and rather insisting on succession certificate for handing over possession implicitly waived the right to urge that time was an essence of contract.

11. Applying the ratio of the aforesaid case to the present case, it can safely be said that the Appellant in the instant case implicitly waived the right to urge that time was the essence of the contract when it issued the General Power of Attorney on 29.3.2000 without demur or protest and subsequently even issued a possession letter on 11.5.2000. Moreover, we find that there is nothing on the record to suggest nor is it even the assertion of the Appellant that the Respondent at any point of time had by his conduct waived the obligation of the Appellant to execute the Sale Deed or in any manner relieved him from the said obligation.

12. So far as the reliance placed by the Appellant on the judgment of the Supreme Court in the case of **Smt. Periyakkal** (supra) is concerned, the said decision in fact clearly states that where a compromise has been arrived at between the parties which bears the imprimatur of the Court, it is always open to the Court to extend the time to avoid manifest injustice. This decision has in fact been heavily relied upon by the Division Bench of this Court in the case of **Shri M.R. Malhotra (since Deceased) Thr. LRs & Ors.** (supra) in arriving at the conclusion that there would be manifest injustice to the Appellant if the compromise decree as it stood and was understood by the parties was not allowed to be executed by the Court. The present case, in our opinion, stands on a better footing than the case of **Shri M.R. Malhotra (since Deceased) Thr. LRs & Ors.** (supra) and we may safely state that to allow the Appellant in the present case to wriggle out of the compromise decree arrived at before this Court would be manifestly unjust. We may also note that the learned Single Judge has rightly observed that the Respondent may have been somewhat laid back in his approach but was shaken into

action after the Supreme Court rendered its decision in **Suraj Lamp & Industries Pvt. Ltd. vs. State of Haryana & Anr.,** AIR 2012 SC 206. In this decision, the Supreme Court held that all transactions of the nature of General Power of Attorney or sales do not amount to transfer of property nor can they be recognized as a valid mode of conveyance, except to the limited extent of Section 53A of the Transfer of Property Act. That the Respondent in the light of this judgment rendered by the Supreme Court now wants to perfect its title, therefore, in our view, is perfectly understandable. However, the fact that the Appellant at this juncture is trying to wriggle out of a commitment made by him before this Court by signing the Compromise Agreement, which has the imprimatur of this Court appears to us to be both inequitable and unjust, to say the least.

13. Adverting to the decisions relied upon by learned counsel for the Appellant in the cases of **Antonysami, Ratansingh** and **Raghunath Rai Bareja** (supra), none of the aforesaid was a case dealing with the compromise decree. **Antonysami** (supra) was a case where the decree holder had obtained a decree for specific performance of the contract of sale, which was not arrived at by compromise. A question arose as to whether the execution petition had been preferred within the period of limitation prescribed under Article 136 in the Schedule to the Limitation Act, 1913. The judgment debtor contended that the decree became enforceable on 23.9.1966 (which was the date on or before which date the judgment debtor was required to measure and demarcate the boundaries of the property in question) and the period of limitation had to be reckoned from that date. The contention of the decree holder, on the other hand, was that since the land had been demarcated only in 1973, the period of limitation was to be computed from the said date. The Supreme Court, on examination of the terms and conditions of the decree, upheld the contention of the judgment debtor in para 18 of its judgment, which is extracted below:-

> "18. In the case in hand a specified date was mentioned in the decree for the judgment-debtor to carry out the aforementioned direction i.e. 23-9-1966 and if he failed to carry out the direction it was open to the decree-holder to seek help of the executing court for measurement and demarcation of the land, and thereafter, to get the sale deed executed by the judgment-debtor if possible or by the Court if necessary. The decree-holder for

> reasons best known to him did not choose to execute the decree till April 1980. In the facts and circumstances of the case and on a fair reading of the decree in the context of the provisions of Article 136 of the Limitation Act the conclusion is inescapable that the execution petition was filed after expiry of the period of limitation prescribed under the Act. The Appellate Court was right in dismissing the execution petition as time-barred and the High Court committed no illegality in confirming the said order."

14. The second case sought to be relied upon by the Respondent is the case of **Ratansingh** (supra). This was a case where a decree of possession of the suit property had been passed by the Court on 14.12.1970. An execution petition filed on 24.3.1998 by the decree holder was held to be beyond the time fixed under the Limitation Act, and the reliance of the decree holder upon an order dated 31.3.1976 whereby the High Court rejected the second Appeal preferred by the judgment debtor was held by the Supreme Court to be misplaced. Suffice it to state that in this case also the Supreme Court was not dealing with the execution of a compromise decree.

15. Raghunath Rai Bareja (supra) relied upon by the Appellant's counsel was also not a case in which a compromise decree was passed. The Supreme Court in the said case was dealing with a case where a decree was passed in favour of the Bank for recovery of money advanced by it. The said decree became enforceable on 15.1.1987. The Bank filed the first execution petition, which was dismissed on technical grounds on 8.11.1990. A second execution petition filed by the Bank in 1994 met with a similar fate and was dismissed by a learned Single Judge of the High Court on 18.8.1994. The decree holder - Bank then filed a third Execution Petition dated 11.1.1999, which too was dismissed on the statement made by the Official Liquidator that no assets of the Company, movable or immovable, were available with the Official Liquidator and as such there could be no execution against the Company. Thereafter, on 7.4.1999, the decree holder Bank instead of filing a petition as directed by the High Court against the other judgment debtors in accordance with law, since they had not been impleaded as parties, filed an application for restoration of the execution petition. The High Court after restoring the execution petition transferred the same to the Debts Recovery Tribunal, Chandigarh by an order dated 26.5.2005 passed on an application filed by the decree holder - Bank. The Supreme Court on Appeal held that the

execution petition had been wrongly transferred by the High Court to the Debts Recovery Tribunal and on the bar of limitation to the execution of the decree made the following observations:-

> "29. Learned counsel for the respondent Bank submitted that it will be very unfair if the appellant who is a guarantor of the loan, and Director of the Company which took the loan, avoids paying the debt. While we fully agree with the learned counsel that equity is wholly in favour of the respondent Bank, since obviously a bank should be allowed to recover its debts, we must, however, state that it is well settled that when there is a conflict between law and equity, it is the law which has to prevail, in accordance with the Latin maxim "dura lex sed lex", which means "the law is hard, but it is the law". Equity can only supplement the law, but it cannot supplant or override it.
>
> 36. In **India House v. Kishan N. Lalwani** [(2003) 9 SCC 393] (vide SCC p. 398, para 7) this Court held that:
>
> > "The period of limitation statutorily prescribed has to be strictly adhered to and cannot be relaxed or departed from for equitable considerations."
>
> 37. In the present case, while equity is in favour of the respondent Bank, the law is in favour of the appellant, since we are of the opinion that the impugned order of the High Court is clearly in violation of Section 31 of the RDB Act, and moreover the claim is time-barred in view of Article 136 of the Limitation Act read with Section 24 of the RDB Act. We cannot but comment that it is the Bank itself which is to blame because after its first execution petition was dismissed on 23-8-1990 it should have immediately thereafter filed a second execution petition, but instead it filed the second execution petition only in 1994 which was dismissed on 18-8-1994. Thereafter, again the Bank waited for 5 years and it was only on 1-4-1999 (sic 11-1-1999) that it filed its third execution petition. We fail to understand why the Bank waited from 1990 to 1994 and again from 1994 to 1999 in filing its execution petitions. Hence, it is the Bank which is responsible for not getting the decree executed well in time."

16. The Supreme Court concluded by saying that the recovery in question was time barred and the impugned order of the High Court was accordingly set aside. We are, however, unable to see as to how this decision comes to the aid of the Appellant. This was not a case where any compromise was arrived at between the parties and recorded by the Court. It was a suit simplicitor for the recovery of a debt due to the Bank and we do not see how the Appellant can derive any advantage from the findings recorded in this judgment, which, we may note was not even cited before the learned Single Judge.

17. The only other aspect of the matter which remains to be considered is the submission of learned counsel for the Appellant with regard to novation of the Compromise Agreement. As already noted by us, no material has been shown to this Court that when the General Power of Attorney dated 29.3.2000 was executed by the Appellant in favour of the Respondent, the Respondent had relieved the Appellant of his obligation to execute the Sale Deed. There is also no material on record suggestive of the fact that at any point of time even thereafter the Respondent had by his conduct, expressly or impliedly, represented to the Appellant that the Appellant on account of his having executed the General Power of Attorney was no longer under an obligation to execute the Sale Deed. We, therefore, do not see any merit in the contention of the Appellant that the Compromise Agreement stood novated on the execution of the General Power of Attorney by the Appellant.

18. For the aforesaid reasons, we find no merit in the present Appeal, which is accordingly dismissed with the direction to the Appellant to comply with its obligation of executing the Sale Deed in terms of the judgment and order of the learned Single Judge.

ILR (2013) V DELHI 3493
CS (OS)

S.V. CONSTRUCTION COMPANY ....PLAINTIFF

VERSUS

PARSHURAM BHARDWAJ ....DEFENDANTS

(JAYANT NATH, J.)

CS (OS) NO. : 3060/2011 DATE OF DECISION: 14.08.2013

Code of Civil Procedure, 1908—O. 37 R 3(5)—suit filed seeking a decree for a sum of Rs.28 Lacs with interest-Plaintiff contends to have an agreement to sell between the parties for a total sum of Rs.1.5 crores and an advance of Rs. 28 Lacs was paid to the defendant as advance money—Plaintiff further contends that huge dues were pending against the property and tenant was sitting on the property-Plaintiff sought cancellation of the deal and refund of the amount paid, which was refused—Hence, the present suit. Defendant denies liability and submits that the agreement to sell is a forged document—That the tenant of the Suit Property, being plaintiff's father was interested in the suit property—An oral agreement to sell was entered into and plaintiff was to pay Rs. 15 lacs as advance- However, only Rs.5 lacs was realised by cheque with the plaintiff promising to pay the remainder with the full balance of the sale amount-However, due to such non payment, amount of Rs. 5 lacs stands forfeited. Held: Defendant accepts receipt of Rs. 5 Lakhs. Proof of balance payment of Rs. 23 lakhs in cash is agreement to sell which is denied by the Defendant. Since father of the plaintiff is the tenant of the suit property, Submission of the plaintiff that defendant had misled the plaintiff with regard to suppressing the existence of a tenant is totally false-

Plaintiff has to prove validity of agreement to sell-Defendant has raised triable issues with regard to a fair and bonafide defence—Application allowed, defendant granted unconditional leave to defend.

The facts as narrated above by the parties demonstrate that there is an agreement to sell. The defendant accepts receipt of only a sum of Rs. 5 lacs. Admittedly, the balance sum of Rs. 23 lacs has been paid in cash. The only proof of the cash payment is agreement to sell dated 06.10.2008 which has been filed by the plaintiff. The defendant categorically denies the agreement to sell and also claims that apart from forging the signatures of the defendant, the plaintiff has manipulated different agreements and photocopies of different agreements have been placed on record which show that in one copy the witnesses and the defendant has signed on all the pages as well. In the second copy, the witnesses have not signed the document and the defendant has signed only on the last two pages. Clearly, the plaintiff has to prove the execution of the written agreement to sell dated 06.10.2008 by the defendant. He has to also prove that he paid a sum of Rs.23 lacs in cash to the defendant on or around the time when the said agreement to sell was allegedly executed by the parties.

(Paras 10)

Further, apart from proving execution of the agreement to sell dated 06.10.2008 and receipt of a total of Rs. 28 lacs by the defendant (Rs. 23 lacs in cash and Rs. 5 lacs in cheque), the issue would further arise as to whether the plaintiff is entitled to refund of the same in terms of the agreement to sell dated 06.10.2008. The plaintiff contends that the defendant was guilty on three counts, namely, (a) title to the suit property was not clear, (b) there were huge arrears of L& DO & (c) he had to convert the property into freehold. None of the above contentions has really been elaborated or even sought to be established. The plaintiff admits receipt of some of the title documents given to him by the defendant but states that later on, he realised that

these documents do not give the complete picture regarding the title of the defendant. However, none of these documents are placed on record. Regarding arrears of L&DO, a question was posed to the learned counsel for the plaintiff that as to whether, there is anything on record to show that any money is payable by the defendant to the L&DO. The reply to the said question was that there is no document but the plaintiff has learnt about it orally. Regarding the third contention of the plaintiff that the defendant had to convert the property into freehold, before the sale transaction could be completed, I do not see any such clause in the agreement to sell dated 06.10.2008 which is filed by the plaintiff. I also cannot help noting the submission made in the plaint by the plaintiff that the defendant had mislead the plaintiff inasmuch as a tenant is sitting over the property. In the course of the arguments, it transpired that one shop in the property concerned is in possession of the plaintiff's father who is the tenant for the last 20 years. Clearly, the averment made by the plaintiff in the plaint about the fact that the defendant has suppressed the existence of a tenant is a totally false contention. **(Paras 11)**

A further issue that would also arise is about the status of the alleged advance paid. The agreement to sell dated 06.10.2008 which has been placed on record by the plaintiff merely stipulates that an advance has been paid for a sum of Rs. 28 lacs. Clause 6 stipulates that in case any of the parties fails to complete the transaction, the aggrieved party shall get it enforced through the court of law and the defaulting party shall be liable for all the expenses, costs incurred and damages suffered. The defendant accepts receipt of Rs. 5 lacs as Bayana/earnest deposit. **(Paras 12)**

A perusal of the above would show that the defendant has raised triable issues indicating that he has a fair or bona fide or a reasonable defence. The plaintiff has to prove the validity and authenticity to agreement to sell, the plaintiff would also have to prove his contentions regarding (a)

defendant having no title of the property (b) proof of arrears being payable to L& DO and (c) that the defendant had to convert the property into freehold which has not been done. The issue would also be as how much advance was made by the plaintiff in the form of earnest deposit and if it was earnest deposit, whether it is liable to be forfeited? These matters would have to be adjudicated upon in trial. Clearly, the defendant has in this application raised issues which are triable.

Hence, the present suit is not to recover a debt or liquidated demand based on a written agreement. In fact there is a serious dispute regarding the existence of a written agreement itself. **(Paras 14)**

[An Ba]

APPEARANCES:

FOR THE PLAINTIFF : Mr. A.K. Bajpai and Mr. M.F. Khan, Advs.

FOR THE DEFENDANT : Mr. Neeraj Kumar and Mr. Manoj Kumar, Advs.

CASES REFERRED TO:

1. *Pritam Singh Dhingra* vs. *Smt. Ambadipudi Uma Sambarmurthy* reported in 1984 (7) DRJ 150.
2. *M/s Mechalec Engineers & Manufacturers* vs. *M/s Basic Equipment Corporation* AIR 1977 SC 577.
3. *Shree Hanuman Cotton Mills & Anr.* vs. *Tata Air Craft Ltd.* reported in AIR 1970 SC 1986.
4. *Smt. Kiranmoyee Dassi and Anr.* vs. *Dr. J. Chatterjee* 49 C.W.N. 246.

RESULT: Application allowed to grant defendant unconditional leave to defend.

JAYANT NATH, J.

IA No. 17034/2012 (u/S 5 of the Limitation Act)

1. This is an application under Section 5 of the Limitation Act for

condonation of delay in re-filing the application under Order 37 Rule 3 (5) CPC. There is no serious opposition to this application. The same is allowed and the delay in re-filing the application under Order 37 Rule 3 (5) CPC is condoned.

2. The application is disposed of.

IA No. 17033/2012 [u/O 37 R 3(5) CPC]

3. This is an application filed on behalf of the defendant under Order 37 Rule 3 (5) of the Code of Civil Procedure seeking leave to defend the present suit. The plaintiff has filed the present suit under Order 37 CPC seeking a decree for a sum of Rs. 28 lacs against the defendant along with interest at the rate of 12% per annum till the date of realisation. It is the contention of the plaintiff that on 06.10.2008, the plaintiff had entered into an agreement with the defendant in respect of sale of ground floor of property bearing No. 23, Prem Nagar Market, Tyagraj Market, New Delhi. It is stated that a sum of Rs. 28 lacs was paid in advance. It is claimed that Rs.15 lacs was paid in cash on 04.10.2008, Rs. 8 lacs was paid in cash on 06.10.2008 and Rs. 5 lacs was paid by cheque on 06.10.2008. The total sale consideration was Rs. 1.50 crores.

4. It is the further contention of the plaintiff that at the time of the agreement to sell, the defendant had claimed to be the absolute owner of the suit property. However, it is stated that subsequently, the plaintiff realised that though the defendant had supplied photo copies of some documents pertaining to the chain of ownership of the suit property but the complete chain of ownership has not been supplied by the defendant. It is further stated that on enquiry from the concerned authorities, it was found that there are huge dues pending against the property. It is further stated that even a tenant is sitting on the property. Hence, the plaintiff submits that on 05.02.2009, 13.03.2009 and 01.09.2009 request was made to the defendant to perform his part of the agreement or to refund the advance payment of Rs.28 lacs. Hence, it is stated that the plaintiff has cancelled the deal and demanded back the amount. Hence, the present suit has been filed for the recovery of said sum of Rs. 28 lacs.

5. In the application for leave to defend, the defendant has denied his liability to pay any amount whatsoever. It is contended that the defendant has not entered into any agreement with the plaintiff and the

alleged agreement to sell dated 06.10.2008 is a forged and fabricated document. The defendant has along with the present application attached photocopies of two documents being agreement to sell and purchase dated 06.10.2008 as Annexure A and B. He submits that in Annexure A has the same stamp paper number as Annexure B. In the first agreement, Annexure A there are forged signatures of the defendant on all pages and witnesses have also signed on the last page. It is further stated that the other agreement being Annexure B does not bear the signatures of the witnesses and the column of the signature of the witnesses is blank. It is further stated that first three pages of the said agreement to sell do not bear the signatures of the defendant and on the last two pages of the alleged agreement, signatures of the defendant has been forged. It is stated that both the agreements are forged and fabricated just to give a false story.

6. It is further stated that the plaintiff's father has been a tenant in the suit property for the last 20 years and it was he who showed the willingness to purchase the suit property in the name of his son i.e. the plaintiff. Hence, it is stated that it was orally agreed between the parties after satisfaction of the parties in all respect and scrutinizing the title document of the defendant to enter into an oral agreement to sell and the plaintiff had agreed to give Rs. 15 lacs as Bayana out of total sale consideration of Rs. 1.50 crores. It is stated that the plaintiff had only paid Rs. 5 lacs through cheque dated 06.10.2008. On presentation, the cheque was dishonoured on 10.10.2008 and was returned by the defendant. However, it appears that the plaintiff had himself deposited the bounced cheque in the account of the defendant and the said amount was subsequently credited to the account of the defendant. It is stated that the plaintiff pleaded that the balance Bayana need not be paid now and the plaintiff promised to pay the same along with the full balance of sale amount. It is also stated that the sale deed was to be completed on 06.02.2009. It is stated that on 03.02.2009, the defendant sent a letter to the plaintiff calling upon the plaintiff to get executed the necessary documents on 06.02.2009 and that the defendant would reach the Sub-Registrar accordingly. However, it is stated that the defendant reached the office of the Sub-Registrar on 06.02.2009 but none was there on behalf of the plaintiff. It is stated that due to non-fulfilment of the commitment on the part of the plaintiff, the partial 'Bayana' amount of Rs.5 lacs stands forfeited.

7. I have heard learned counsel for the parties. Learned counsel for the plaintiff has stressed that in terms of the agreement to sell dated 06.10.2008, it is clear that the defendant has received a sum of Rs. 28 lacs. He, however, submits that it became clear later on that the title of the defendant to the property in question is not clear. There are arrears and large dues payable by the defendant to L&DO and further that the defendant had to convert the property into freehold which has not been done. Hence, it is stated that as there is a default on the part of the defendant, the plaintiff is entitled to refund of the sum of Rs. 28 lacs paid to the defendant. He claims that the same represents liquidated demand. Learned counsel for the plaintiff relies upon a judgment of this Court in the case of **Pritam Singh Dhingra vs. Smt. Ambadipudi Uma Sambarmurthy** reported in 1984 (7) DRJ 150 to contend that the present suit based on an agreement to sell would lie.

8. On the other hand, the learned counsel for the defendant has submitted that there is no written agreement to sell between the parties. The defendant admits existence of an oral agreement to sell and accepts the sale consideration to be Rs. 1.50 crores. He also admits receipt of advance of Rs.5 lacs as an earnest money. He submits that the balance payment was to be made on 06.02.2009 when the sale deed was to be executed and that the plaintiff has failed to do the same. He relies on the letter dated 03.02.2009 sent by the defendant copy of which has been placed on record as Annexure to this application along with along with original postal receipt as proof of dispatch of the said letter to submit that the letter was dispatched asking the plaintiff to appear before the Sub-Registrar so that the transaction could be completed. He further stresses that the written agreement was forged as is apparent from the two different copies of the said agreement which the defendant has placed on record as Annexure A and B to the present application. He also submits that the father of the plaintiff has been a tenant in a portion of the concerned property for the last 20 years and he was fully aware of the facts and circumstances. He submits that the issue about the defendant's title to the property being not clear, arrears being payable to L&DO, etc. i.e. the contentions being raised by the plaintiff are absolutely false and are denied.

9. 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.

10. The facts as narrated above by the parties demonstrate that there is an agreement to sell. The defendant accepts receipt of only a sum of Rs. 5 lacs. Admittedly, the balance sum of Rs. 23 lacs has been paid in cash. The only proof of the cash payment is agreement to sell dated 06.10.2008 which has been filed by the plaintiff. The defendant categorically denies the agreement to sell and also claims that apart from forging the signatures of the defendant, the plaintiff has manipulated different agreements and photocopies of different agreements have been placed on record which show that in one copy the witnesses and the defendant has signed on all the pages as well. In the second copy, the witnesses have not signed the document and the defendant has signed only on the last two pages. Clearly, the plaintiff has to prove the execution of the written agreement to sell dated 06.10.2008 by the defendant. He has to also prove that he paid a sum of Rs.23 lacs in cash to the defendant on or around the time when the said agreement to sell was allegedly executed by the parties.

11. Further, apart from proving execution of the agreement to sell dated 06.10.2008 and receipt of a total of Rs. 28 lacs by the defendant (Rs. 23 lacs in cash and Rs. 5 lacs in cheque), the issue would further arise as to whether the plaintiff is entitled to refund of the same in terms of the agreement to sell dated 06.10.2008. The plaintiff contends that the defendant was guilty on three counts, namely, (a) title to the suit property was not clear, (b) there were huge arrears of L& DO & (c) he had to convert the property into freehold. None of the above contentions has really been elaborated or even sought to be established. The plaintiff admits receipt of some of the title documents given to him by the defendant but states that later on, he realised that these documents do not give the complete picture regarding the title of the defendant. However, none of these documents are placed on record. Regarding arrears of L&DO, a question was posed to the learned counsel for the plaintiff that as to whether, there is anything on record to show that any money is payable by the defendant to the L&DO. The reply to the said question was that there is no document but the plaintiff has learnt about it orally.

Regarding the third contention of the plaintiff that the defendant had to convert the property into freehold, before the sale transaction could be completed, I do not see any such clause in the agreement to sell dated 06.10.2008 which is filed by the plaintiff. I also cannot help noting the submission made in the plaint by the plaintiff that the defendant had mislead the plaintiff inasmuch as a tenant is sitting over the property. In the course of the arguments, it transpired that one shop in the property concerned is in possession of the plaintiff's father who is the tenant for the last 20 years. Clearly, the averment made by the plaintiff in the plaint about the fact that the defendant has suppressed the existence of a tenant is a totally false contention.

12. A further issue that would also arise is about the status of the alleged advance paid. The agreement to sell dated 06.10.2008 which has been placed on record by the plaintiff merely stipulates that an advance has been paid for a sum of Rs. 28 lacs. Clause 6 stipulates that in case any of the parties fails to complete the transaction, the aggrieved party shall get it enforced through the court of law and the defaulting party shall be liable for all the expenses, costs incurred and damages suffered. The defendant accepts receipt of Rs. 5 lacs as Bayana/earnest deposit.

13. In **Shree Hanuman Cotton Mills & Anr. Vs. Tata Air Craft Ltd.** reported in AIR 1970 SC 1986, the Hon'ble Supreme Court has held that the earnest money represents a guarantee that the contract would be fulfilled. It is part of the purchase price when the transaction is carried out. It is forfeited when the transaction fails through by reasons of default or failure of the purchaser. Unless there is anything to the contrary in terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest money. The defendant states that having received Rs. 5 lacs as earnest money and in view of the failure of the plaintiff to complete the transaction, he has forfeited the said earnest money. In view of the law regarding earnest money this could be a plausible contention.

14. A perusal of the above would show that the defendant has raised triable issues indicating that he has a fair or bona fide or a reasonable defence. The plaintiff has to prove the validity and authenticity to agreement to sell, the plaintiff would also have to prove his contentions regarding (a) defendant having no title of the property (b) proof of arrears being payable to L& DO and (c) that the defendant had to convert the property

into freehold which has not been done. The issue would also be as how much advance was made by the plaintiff in the form of earnest deposit and if it was earnest deposit, whether it is liable to be forfeited? These matters would have to be adjudicated upon in trial. Clearly, the defendant has in this application raised issues which are triable.

Hence, the present suit is not to recover a debt or liquidated demand based on a written agreement. In fact there is a serious dispute regarding the existence of a written agreement itself.

15. The judgment cited by the learned counsel for the plaintiff, namely, the case of **Pritam Singh Dhingra** (supra) also does not help the case of the plaintiff. In that case the agreement to sell between the parties contains a clause which provided that in case of default by the seller, the seller would be liable to liquidate damages of Rs. 10,000/-. There is no such clause in the agreement to sell in question. That was also a case in which there was delay on the part of the defendant to enter appearance and there was no request put to the trial court for condonation of delay. Hence the suit had been decreed in that case as the defendant had entered appearance beyond the prescribed period of 10 days.

16. In view of the above, the present application is allowed and the defendant is granted unconditional leave to defend.

IA 10929/2012 [u/O 37 R 3(4) CPC]

17. This is an application filed by the plaintiff for issuance of summons of the judgment.

18. In view of the above order, the present application has become infructuous and is disposed of accordingly.

CS(OS) 3060/2011 and 19606/2011 (u/O 39 R 1 & 2 CPC)

19. In view of the above, the defendant may file written statement within four weeks. Replication may be filed by the plaintiff within four weeks thereafter.

20. List before the Joint Registrar on 4th October, 2013.

ILR (2013) V DELHI 3504
LPA NO.

UNION OF INDIA & ANR. .....APPELLANTS

VERSUS

SATISH JOSHI ....RESPONDENT

(BADAR DURREZ AHMED, ACJ. VIBHU BAKHRU, J.)

LPA NO. : 197/2013 DATE OF DECISION: 14.08.2013

Contract of Employment—The principal question which came to be considered by the court was whether the respondent had any vested right in continuing with his employment despite his contract of employment having come to an end by efflux of time. Held the contract leaves on doubt as to the terms of the employment and there is no right in favour of the respondent entitling him to insist for extension of contract despite the performance of the respondent found wanting—Respondent cannot contend that his services were liable to be continued de-hors the contract which he had voluntarily signed—Services of persons employed for a project cannot be co-terminous with the project in question- No show cause notice was necessary to hear the respondent in the event of decision not to extend a contract which cameo end by efflux of time. The decision not to extend the contract of employment cannot be considered to be a dismissal from service by way of punishment—It is discharged simplicitor on the employment contract coming to an end by efflux of time—An employee will have no right to be heard where an enquiry is made merely for the purposes of considering the suitability for extending the contract of employment—Respondent a qualified chartered accountant and was aware that his employment with

the project was only for a fixed term—He had no vested right to insist that his contract of service be extended beyond the aggrieved period.

[Di Vi]

APPEARANCES:

FOR THE APPELLANTS : Mr. Rakesh Munjal, Sr. Advocate with Ms. Anita Pandey and Mr. Rakesh Tiwari.

FOR THE RESPONDENT : Respondent in Person.

1. *Gridco Limited and Anr.* vs. *Sri Sadananda Doloi and Ors.*: AIR 2012 SC 729.
2. *Vidyavardhaka Sangha and Another* vs. *Y.D. Deshpande and Others:* (2006) 12 SCC 482.
3. *Secretary, State of Karnataka and Ors.* vs. *Umadevi & Anr.*: (2006) 4 SCC 1.
4. *Director, Institute of Management Development, U.P.* vs. *Smt. Pushpa Srivastav*: (1992) 4 SCC 33.
5. *State of Uttar Pradesh and Anr.* vs. *Kaushal Kishore Shukla*: (1991) 1 SCC 691.
6. *Central Inland Water Transport Corporation India Limited and Anr.* vs. *Brojo Nath Ganguly & Anr.*: (1986) 3 SCC 156.

RESULT: Appeal allowed.

VIBHU BAKHRU, J.

1. This is an appeal preferred by the Government of India through Joint Secretary, Ministry of Steel and National Project Coordinator, Project Management Cell, UNDP/GEF Project. The present appeal is directed against the order dated 20.03.2013 passed by a learned Single Judge of this Court in Writ Petition being W.P.(C) 3215/2012 preferred by the respondent. The controversy in the present matter relates to the employment of the respondent as Manager (Finance and Administration) with a project being undertaken by the Ministry of Steel, Government of India in Collaboration with United Nations Development Programme

(UNDP). The brief outline of facts relevant for considering the controversy in the present matter are stated as under.

2. The Ministry of Steel, Government of India in collaboration with United Nations Development Programme and Global Environmental Facility (GEF) initiated a project titled "Removal of Barriers to Energy Efficiency Improvement in the Steel Re-rolling sector in India". The said project is funded by an International Grant from Global Environment Fund (GEF) and Steel Development Fund. The Project was initiated in September 2004 and was initially for a duration of five years but the same has been extended from time to time and the Project is now scheduled to end on 31.12.2013.

3. The appellants had advertised for a post of Manager (Finance and Administration) which was published in a daily "Times of India" on 02.07.2008. The advertisement indicated the qualification criteria for candidates to be a qualified Chartered Accountant with 10-15 years experience. The advertisement disclosed that the duration of the employment contract would be as under:" Duration of Contract : One year with provision of extension if the project period gets extended beyond September, 2009."

4. The respondent fulfilled the qualification criteria and after an interview was selected for the said post. An appointment letter dated 05.08.2008 was issued to the respondent which is quoted below:-

"UNDP/GEF/302/06/1919

5th August, 2008

Mr Satish Joshi
237 A, Pocket J & K
Dilshad Garden
Delhi – 110095

Sub: UNDP/GEF Project (Steel)
Appointment Letter for the post of Manager (Finance & Administration)

Dear Sir,

This has reference to your application for the above post and subsequent interview held in Ministry of Steel on 30th July, 2008 by the Appointment Sub-committee of Project Advisory

Committee (PAC). We are pleased to inform you that you have been selected for the above post and the terms & conditions of appointment are as follows:

1) Pay Scale (lump sum)	:	Rs. 54,000 -79,000/-
2) Starting Consolidated Salary	:	Rs. 65,000/- per month
3) Period of Appointment	:	Contract basis till September, 2009 (With provision of extension, if project period gets extended beyond September, 2009)
4) Probation Period	:	6 months
5) Confirmation	:	Subject to satisfactory performance during the probation period
6) Other benefits	:	A per approved Project Operation Manual

You will be required to sign a General Service Agreement at the time of your joining. Please confirm the acceptance of this offer by return mail and inform us the likely date of your joining, which should be latest by 1st September, 2008.

Thanking you,

Yours faithfully
Sd/
G. Mishra
National Project Coordinator (I/c)"

5. In terms of the appointment, the respondent and appellant no. 2 executed an agreement which contained the relevant terms of employment. The relevant extract from the said agreement is quoted below:

"GENERAL SERVICE AGREEMENT

MEMORANDUM OF AGREEMENT MADE THIS lst day of September, 2008 between Project Management Cell (PMC), UNDP / GEF Project (Steel), Ministry of Steel (MOS), Project on "Energy

Efficiency Improvement in Steel Rerolling Sector in India IND/ 03/G31, currently at 301-306, Aurobindo Place, Hauz Khas, New Delhi -110016, hereinafter referred to as **"PMC"** and **Mr. Satish Joshi,** 237-A, Pocket J&K, Dilshad Garden, Delhi -110095 hereinafter referred to as the "Manager **(Finance & Administration), (National Project Personnel (NPP))"**.

WHEREAS PMC desires to engage the service of the NPP on the terms and conditions hereinafter set forth, and

WHEREAS the NPP is ready and willing to accept this engagement of service with PMC on the terms and conditions the parties here to agree as follows:

1. NATURE OF SERVICES

As per Terms of Reference (TOR) -Annexure -I

2. DURATION OF AGREEMENT

The GSA shall be effective from the 1st day of September, 2008 till September, 2009. The GSA shall be in force except subject to the provision of Article 8 below. The agreement shall be extended for the desired period subject to performance, requirement and extension of the project period beyond September, 2009.

xxxxx xxxxx xxxxx xxxxx xxxxx

5. STATUS OF THE NPP

The NPP shall be considered as being an Expert on Mission for the purposes of providing services as per the terms of this agreement. The NPP shall not be considered in any respect as being a staff member of UNDP/ Ministry of Steel.

xxxxx xxxxx xxxxx xxxxx xxxxx

8. TERMINATION

a. Either party may terminate this agreement at any time by giving one month notice in writing of its intention to do so. PMC has also the option to pay the NPP his pay and allowance for the period of one month or the period by which such notice falls short of one month and terminate

his service immediately. On the other hand, the NPP has no such option, but has necessarily to give one month notice, so that action may be taken to recruit his / her successor. NPP shall be released in normal situation, within one month of notice period. However, if the job demands, NPP must stay and complete the urgent / important assignment in hand prior to seeking release.

b. PMC in consultation with Ministry of Steel and UNDP India, shall have the right to withhold a reasonable amount of payment due to the NPP, if PMC has to incur additional costs resulting from termination of this agreement by the NPP in a manner, contrary to the preceding subsection, or from failure by the NPP to complete the terms of this agreement to the satisfaction of PMC / Ministry of Steel / UNDP."

6. The contract of employment of the respondent came to an end in September 2009. However, the same was extended by the appellant, by a communication dated 16.11.2009, for a further period upto 31.08.2010. The contract of employment was further extended for the second time on 30.08.2010 for a further period till 31.08.2011 which was again extended till 31.12.2011. In the meantime, the appellant no. 2 alongwith officers of UNDP decided to appoint a second manager, in addition to the respondent, to speed up the pending activities of the project. Accordingly, the appellants appointed another person as Manager (Finance & Administration), however, the same was challenged by the respondent by way of a writ petition being W.P.(C) No. 3382/2011 filed in this court. The said writ petition was disposed off by an order dated 19.05.2011, wherein it was observed that the respondent had made a representation against the appointment of the second Manager (Finance & Administration) but has not received any response with respect to the same. This Court accordingly directed appellant no. 2 to dispose of the representation of the respondent and with this direction disposed off the writ petition.

7. The appellant no. 2 made some internal noting with regard to the performance of respondent no. 1 from time to time. At a meeting held on 28.12.2011 the Steering Committee of the Project decided to form a committee to review the performance of National Project Personnel (NPP)

and other staff employed with the Project and recommend extension of their contract and increment based on their performance review. The relevant extract of the minutes of the said meeting are as under:

"5.2 Performance appraisal system and extension/increment to staff NPC informed that as decided in 16th PSC, a system is designed for reviewing performance of staff/NPPs for extension andincrement as below:

- A self performance form will be designed based on UNDP format for self assessment.
- The same will be filled out by staff/NPP and will be commented by respective supervisor
- Review of performance will be done by an external committee. Committee may ask for further information/ report from concerned NPP or Personnel 1/c if required
- The committee will recommend extension & increment.
- The committee constitution will be decided by NPD (for NPPs) and NPC (for support staff)
- On approval of above, detailed procedure will be put up for approval by NPD and implemented.

The Chairman appreciated the efforts taken by NPC and approved the above regulations."

8. Pursuant to the decision of the Steering Committee an external evaluation committee was formed on 03.01.2012 to review the performance of personnel and to recommend their extension. The said committee consisted of one representative each from the Ministry of Steel, UNDP and National Institute of Secondary Steel Technology. The external evaluation committee met on 28.03.2012 and decided not to recommend further extension of the employment contract with the respondent. This recommendation was accepted and the appellant no.2 issued a letter dated 17.04.2012 extending the contract only till 17.4.2012 and further communicating the decision not to extend the contract any further. Thus the services of the respondent came to an end on 17.4.2012. The letter dated 17.04.2012 also communicated that the respondent would be paid one month's fees in lieu of the notice period. The letter dated 17.04.2012 is extracted below:

"To Date: 17th April 2012

Mr. Satish Joshi
Manager (F&A-NEX)
Project Management Cell
UNDP/GEF Steel Project
39, Tughlakabad Institutional Area
M B Road
New Delhi

Subject: Discontinuation of service in Project Management Cell (PMC).

The undersigned is directed to refer to the aforesaid subject and to convey the decision of the competent authority that your service contract engagement with PMC which expired on 31-12-2011, has been extended up to 17-4-2012 and the competent authority has decided not to extend the service contract further.

The undersigned is also directed to convey that, as per decision taken by competent authority, PMC will pay you one month's professional fees in lieu of one month's notice period on handing over all the official documents, computers, cheque books, pass books, keys etc. to administration I/c and the same should be done immediately before close of business hours today.

Further, as decided by competent authority, the task of handing over/taking over will be coordinated by Ms. Manisha Sanghani, Administration I/c alongwith Shri Arindam Mukherjee, Deputy Manager (Implementation).

Sd/
ACR Das
Industrial Advisor, Ministry of Steel &
National Project Coordinator"

9. Aggrieved by the non-extension of his contract of employment, the respondent preferred a writ petition being W.P.(C) No. 3215/2012. The said writ petition was disposed off by an order dated 20.03.2013 which is impugned in the present appeal. The learned Single Judge set aside the letter dated 17.04.2012 and further held that the respondent could not be removed from service without following principles of natural

justice. The learned Single Judge referred to the decision of the Supreme Court in the case of **Secretary, State of Karnataka and Ors. v. Umadevi & Anr.:** (2006) 4 SCC 1 and held that contractual appointment for a project are ordinarily for a period of the project and the services of the employees have to be co-terminus with the project. The learned Single Judge further held that principles of natural justice had been violated inasmuch as the respondent had been removed without calling any explanation from the respondent. The learned Single Judge also noted that the issue regarding inadequate performance of the respondent had not been brought to the notice of the respondent and the letter dated 17.04.2012 did not provide any reasons for termination of the services of the respondent.

10. We have heard the counsel for the appellant and the respondent in person. In the present case, the principal question to be considered is whether the respondent has any vested right in continuing with his employment despite his contract of employment having come to an end by efflux of time.

11. Indisputably the contract of employment of the respondent had come to an end on 31.12.2011. The same was extended by the letter dated 17.04.2012 till that date and the appellant had decided not to extend the same any further. The General Service Agreement entered into between appellant no. 2 and the respondent expressly provided that the respondent would not be considered in any respect as being a staff member of UNDP/Ministry of Steel but would be considered as an expert on mission for the purpose of providing services. The agreement further provided that it would be effective till September 2009 but would be extended for the desired period subject to "performance, requirement and extension of the project period beyond September 2009". We do not think that the contract leaves any doubt as to the terms of the employment and we find it difficult to read in the agreement any right in favour of the respondent which would entitle him to insist that the contract be extended beyond the period specified if the performance of the respondent was found wanting by the appellants. It is also relevant to note that the General Services Agreement contains a termination clause entitling either party to terminate the agreement by giving one month's notice of its intention to do so. It has been expressly agreed that appellant no. 2 would have the option to pay the respondent his salary and allowance for the period by which the notice of termination falls short of one month and terminate

the services with immediate effect. Having agreed to the terms of the contract it would not be open for the respondent to contend that his services were liable to be continued de-hors the contract which he had voluntarily signed.

12. We are also unable to agree with the decision of the learned Single Judge that the services of persons employed for a project have to be co-terminus with the project in question. We are unable to interpret the decision of the Supreme Court in the case of **Umadevi** (supra) to support the view that persons employed on a contractual basis for a project have a right to continue in employment for the complete tenure of the project notwithstanding their contract having come to an end with efflux of time. In that case, the Supreme Court was considering the question of whether persons employed on ad hoc basis without following the regular process of selection and appointment, could be regularised. The court held that unless an appointment was in terms of the relevant rules after a proper competition among qualified persons, the same would not confer any right on the employees so appointed. Although the said decision may not be applicable on the facts of the present case, the following observations made by the court are relevant:

> "43. .....If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules."

13. The respondent has relied upon the judgment of a Division Bench of the Calcutta High Court in the case of **Union of India & Ors. V. Subhojit Dutta & Ors.:** delivered on 17.04.09 in W.P.(C) No.936/ 2008. A copy of the said judgment has been handed over by the respondent. The said decision also does not further the case of the respondent. In that case, the respondent therein, had filed a writ petition

as he was denied the benefit of increase in the age of superannuation from 58 years to 60 years. It was contended on behalf of the appellant therein that the respondent was appointed as a Director (Project Management) in Bridge & Roof Company Ltd., which was a public sector undertaking. The appointment was on the basis of a contract which specified the term of the respondent as "till the date of his superannuation or until further orders". The contract also specified the term of employment could be terminated by either side on three months notice or on payment of three months salary in lieu thereof. At the time of appointment of the respondent, the age of superannuation for the employees of M/s Bridge & Roof Company Ltd. was 58 years. It was, thus, contended on behalf of the appellant that the contractual employment of the respondent came to an end on his attaining the age of 58 years. The Court held that there was no valid reason why the petitioner should be denied the benefit of the increase in the age of superannuation especially since all other employees have been granted this benefit. The Court further held that even in contractual matters where the state or its instrumentalities exercise contractual power a judicial review could not be denied. The facts of the present case are completely different. It is not the case of the respondent that he has been excluded from the benefit of a policy which is universally being applied to other employees. In the present case, the term of employment of the respondent has come to an end by efflux of time and the External Committee has not recommended extension of the same. We do not find that the decision of the appellant in not extending the term of the respondent by accepting the recommendation of the External Committee to be arbitrary.

14. In the case of **Director, Institute of Management Development, U.P. v. Smt. Pushpa Srivastav:** (1992) 4 SCC 33, the Supreme Court while considering the case of an employee appointed on a contractual basis held as under:-

> "20. .....To our mind, it is clear that where the appointment is contractual and by efflux of time, the appointment comes to an end, the respondent could have no right to continue in the post. Once this conclusion is arrived at, what requires to be examined is, in view of the services of the respondent being continued from time to time on 'ad hoc' basis for more than a year whether she is entitled to regularisation? The answer should be in the negative."

15. In the case of **Vidyavardhaka Sangha and Another v. Y.D. Deshpande and Others:** (2006) 12 SCC 482 This court held as under:

> "4. It is now well-settled principle of law that the appointment made on probation/ad hoc basis for a specific period of time comes to an end by efflux of time and the person holding such post can have no right to continue on the post. In the instant case as noticed above, the respective respondents have accepted the appointment including the terms and conditions stipulated in the appointment orders and joined the posts in question and continued on the said post for some years. The respondents having accepted the terms and conditions stipulated in the appointment order and allowed the period for which they were appointed to have been elapsed by efflux of time, they are not now permitted to turn their back and say that their appointments could not be terminated on the basis of their appointment letters nor they could be treated as temporary employee or on contract basis. The submission made by the learned Counsel for the respondents to the said effect has no merit and is, therefore, liable to be rejected. It is also well-settled law by several other decisions of this Court that appointment on ad hoc basis/temporary basis comes to an end by efflux of time and persons holding such post have no right to continue on the post and ask for regularisation etc."

16. It is settled law that even in matters of contract, a State cannot act whimsically and capriciously or in an arbitrary manner. However, this principle cannot be extended to support the view that in every case it would be incumbent upon the State to extend a contract of employment on its expiry. We find it difficult to accept the proposition that a State has to give a show cause notice or hear a party in the event it decides not to extend a contract which has come to an end by efflux of time. A party to a contract has no right to claim that the contract with him be extended even if such right is not afforded to the party by the terms of the contract. Once the terms of the contract have been duly performed and the contract has come to an end, there would be no obligation on the part of the State to extend the same. In the present case, the contract of employment came to an end on 31.12.2011. The respondent continued to render services during the period pending consideration of extension of contract by the appellants. The Committee formed to consider the

issue regarding extension of contracts of NPPs and staff decided not to recommend extension of the employment contract with the respondent after considering his performance. This recommendation of the external committee was accepted and it was decided not to extend the contract of service of the respondent. In proceedings under Article 226 of the Constitution of India, this Court is not required to examine the merits of the decision of the appellants or to evaluate the performance of the respondent in discharge of his services under the service agreement. It is sufficient to note that a committee considered the aspects which were relevant for the purpose of deciding whether the contract of service of respondent should be extended or not. Having noted the same, it is not possible to conclude that the decision of the appellant not to extend the contract of respondent was arbitrary or offends Article 14 of the Constitution of India.

17. While considering the contention that principles of natural justice have been violated by not affording the respondent, an opportunity of making any representation with regard to his performance, it would be important to bear in mind that the performance review conducted by the external committee on 28.12.2011 was not for the purposes of inflicting any punitive measure on the respondent but to only consider the suitability of his contract being extended. The decision to not extend the contract of employment of the respondent cannot be considered to be a dismissal from service by way of a punishment. It is a discharge simplicitor on the employment contract coming to an end by efflux of time. An employee will not have a right to be heard where an inquiry is made merely for the purposes of considering the suitability for extending the contract of employment.

18. In the case of **State of Uttar Pradesh and Anr. v. Kaushal Kishore Shukla:** (1991) 1 SCC 691, the Supreme Court considered the case of an employee who was appointed on an adhoc basis for a fixed period as an Assistant Auditor under the Local Funds Audit Examiner of the State of Uttar Pradesh. The order of appointment stated that the appointment was adhoc, temporary for a fixed term and his services were liable to be terminated at any time without assigning any reason. The adhoc appointment of the employee was extended from time to time. During the course of his employment, it was alleged that the employee had acted in excess of his authority while conducting an audit of the "Boys Fund Account". After a preliminary inquiry into the said allegation,

the respondent employee was relieved of his duties from his current posting at Sitapur and was directed to join his duties at Allahabad. He failed to do join his duties and his services were terminated. The employee preferred a writ petition challenging his termination orders as being illegal and in violation of Article 311 of the Constitution of India. A Division Bench of the Allahabad High Court at Lucknow allowed the writ petition. A Special Leave Petition was preferred on behalf of the State of Uttar Pradesh before the Supreme Court. The Supreme Court granted leave and held as under:-

> "6. .....Under the service jurisprudence a temporary employee has no right to hold the post and his services are liable to be terminated in accordance with the relevant service rules and the terms of contract of service. If on the perusal of the character roll entries or on the basis of preliminary inquiry on the allegations made against an employee, the competent authority is satisfied that the employee is not suitable for the service whereupon the services of the temporary employee are terminated, no exception can be taken to such an order of termination.
>
> 7. A temporary government servant has no right to hold the post, his services are liable to be terminated by giving him one month's notice without assigning any reason either under the terms of the contract providing for such termination or under the relevant statutory rules regulating the terms and conditions of temporary government servants. A temporary government servant can, however, be dismissed from service by way of punishment. Whenever, the competent authority is satisfied that the work and conduct of a temporary servant is not satisfactory of that his continuance in service is not in public interest on account of his unsuitability, misconduct or inefficiency, it may either terminate his services in accordance with the terms and conditions of the service or the relevant rules or it may decide to take punitive action against the temporary government servant. If it decides to take punitive action it may hold a formal inquiry by framing charges and giving opportunity to the government servant in accordance with the provisions of Article 311 of the Constitution. Since, a temporary government servant is also entitled to the protection of Article 311(2) in the same manner as a permanent government servant.....

8. Learned Counsel for the respondent urged that the allegations made against the respondent in respect of the audit of Boys Fund of an educational institution were incorrect and he was not given any opportunity of defence during the inquiry which was held ex-parte. Had he been given the opportunity, he would have placed correct facts before the inquiry officer. His services were terminated on allegation of misconduct founded on the basis of an ex-parte enquiry report. He further referred to the allegations made against the respondent in the counter-affidavit filed before the High Court and urged that these facts demonstrate that the order of termination was in substance, an order of termination founded on the allegations of misconduct, and the ex parte enquiry report. In order to determine this question, it is necessary to consider the nature of the respondent's right to hold the post and to ascertain the nature and purpose of the inquiry held against him. As already observed, the respondent being a temporary government servant had no right to hold the post, and the competent authority terminated his services by an innocuous order of termination without casting any stigma on him. The termination order does not indict the respondent for any misconduct. The inquiry which was held against the respondent was preliminary in nature to ascertain the respondent's suitability and continuance in service. There was no element of punitive proceedings as no charges had been framed, no inquiry officer was appointed, no findings were recorded, instead a preliminary inquiry was held and on the report of the preliminary inquiry the competent authority terminated the respondent's services by an innocuous order in accordance with the terms and conditions of his service. Mere fact that prior to the issue of order of termination, an inquiry against the respondent in regard to the allegations of unauthorised audit of Boys Fund, was held does not change the nature of the order of termination into that of punishment as after the preliminary inquiry the competent authority took no steps to punish the respondent instead it exercised its power to terminate the respondent's services in accordance with the contract of service and the Rules."

19. The Court further held that an employee has no right to be heard in respect of an inquiry which is held for the purposes of collection

of facts in regard to the conduct and work of a Government servant, since the inquiry is only for the purposes of satisfaction of the Government. It is only when the Government decides to hold a regular inquiry for purposes of inflicting punishment that a Government servant gets a protection of Article 311 of the Constitution of India. A hearing is required to be afforded only in cases where an adverse or punitive action is contemplated. In the present case, indisputably the action of the appellant in not extending the contract of service cannot be taken as a punitive measure. The review undertaken by the external committee on 28.12.2012 is only for the purposes of considering extension of contract of NPPs and staff and further considering payment of increments, if any. The said review also cannot be stated to have been undertaken for the purposes of inflicting any punishment. Thus, granting a hearing or a right of representation with respect to such review is not warranted by principles of natural justice and, in our view, the learned Single Judge erred in coming to a conclusion that in the present case principles of natural justice had been violated.

20. It is now settled that a contract of employment stands on a different footing than a commercial contract and an unfettered right of hire and fire is not available to the State as the same would violate Article 14 of the Constitution of India. However, this is not a case of a permanent employee whose services are being terminated but a temporary employee whose contract of service has come to an end on account of efflux of time. The Supreme Court in the case of **Central Inland Water Transport Corporation India Limited and Anr. v. Brojo Nath Ganguly & Anr.:** (1986) 3 SCC 156 struck down Rule 9(i) of Central Inland Water Transport Corporation Limited (Service, Discipline and Appeal) Rules, 1979 as being unconscionable as it provided an unfettered right on the Government to terminate the employment of a permanent employee by giving three months notice. However, this is not a case where the contract of employment has been challenged as being unconscionable or arbitrary as giving an unfettered right of hire and fire to the state. In the present case, there is nothing unconscionable about the contract entered into between the appellant and the respondent and thus, non-extension of contract cannot be stated to be unreasonable or an act which falls foul of Article 14 of the Constitution of India.

21. The Supreme Court in the case of **Gridco Limited and Anr. v. Sri Sadananda Doloi and Ors.:** AIR 2012 SC 729, while considering

the applicability of the principles enunciated in the case of **Brojo Nath Ganguly** (supra) in relation contractual employees held as under:-

> "27. Applying the above principles to the case at hand, we have no hesitation in saying that there is no material to show that there is any unreasonableness, unfairness, perversity or irrationality in the action taken by the Corporation. The Regulations governing the service conditions of the employees of the Corporation, make it clear that officers in the category above E-9 had to be appointed only on contractual basis.
>
> 28. It is also evident that the renewal of the contract of employment depended upon the perception of the management as to the usefulness of the Respondent and the need for an incumbent in the position held by him. Both these aspects rested entirely in the discretion of the Corporation. The Respondent was in the service of another employer before he chose to accept a contractual employment offered to him by the Corporation which was limited in tenure and terminable by three months' notice on either side. In that view, therefore, there was no element of any unfair treatment or unequal bargaining power between the Appellant and the Respondent to call for an over-sympathetic or protective approach towards the latter. We need to remind ourselves that in the modern commercial world, executives are engaged on account of their expertise in a particular field and those who are so employed are free to leave or be asked to leave by the employer. Contractual appointments work only if the same are mutually beneficial to both the contracting parties and not otherwise."

22. In the present case also the respondent is a qualified chartered accountant and was aware that his employment with the project was only for a fixed term. The respondent has no vested right to insist that his contract of service be extended beyond the agreed period. Thus, any interference by this Court under Article 226 of the Constitution of India would not be warranted.

23. For the reasons stated above, we set aside the order dated 20.3.2013 passed by the learned Single Judge in Writ Petition (C) No. 3215/2012. The parties are left to bear their own costs.

ILR (2013) V DELHI 3521
CO. PET.

ASHUTOSH SHARMA ....PETITIONER

VERSUS

TORQUE CABLES PVT. LTD. ....RESPONDENT

(R.V. EASWAR, J.)

CO. PET. NO. : 413/2013 DATE OF DECISION: 19.08.2013
CO. APPL. NO. : 1379/2013

The Companies Act, 1956—Sec. 433(f) See. 439(c)—Winding up—Work of company divided between three directors—The petitioner was denied access to the companies records, factory etc. and he was to look after the sales and thus was made non-functional—Petitioner resigned but the resignation of petitioner not filed with ROC—It was argued by the petitioner that it was just an equitable to went up the company. Held, clause (f) of Section 433 uses the expression "just and equitable". This expression is not to be construed ejusdem generis with the other clauses of the section, as held by the Supreme Court in *Rajamundry Electric Supply Corporation Ltd. v. A. Nageswara Rao,* (1955) 2 SCR 1066. The facts alleged in the petition and elaborated show that this is a case to which the provisions of Sections 397-398 may be attracted. It is well-settled that winding-up proceedings have to be used as a last resort. In a case such as the present one, there are preventive provisions in the Act safeguarding against oppression and mismanagement. If some other remedy is available to the petitioner that should be exhausted first. The winding-up petition is premature and is not maintainable. It is dismissed at the admissions stage itself along with the connected application.

[Di Vi]

APPEARANCES:

FOR THE PETITIONER : Mr. Ashish Middha, Advocate.

FOR THE RESPONDENT : None.

CASES REFERRED TO:

1. *Laguna Holdings Pvt. Ltd. & Ors.* vs. *Eden Park Hotels Pvt. Ltd. & Ors.,* (2013) 176 Com. Cas. 118 (Del.)
2. *Bhaskar Stoneware Pipe (P) Ltd.* vs. *Rajinder Nath Bhaskar,* (1988) 63 Com.Cases 184.
3. *Hind Overseas Private Limited* vs. *Raghunath Prasad Jhunjhunwalla and Others,* (AIR 1976 SC 565).
4. *Rajamundry Electric Supply Corporation Ltd.* vs. *A. Nageswara Rao,* (1955) 2 SCR 1066.

RESULT: Petition Dismissed.

R.V. EASWAR, J.

1. This is a petition filed by Mr. Ashutosh Sharma under section 433(f) read with Section 439(c) of the Companies Act, 1956, seeking winding up of M/s. Torque Cables Pvt. Ltd.

2. The petitioner and one Mr. Satish Kumar were the promoters of the respondent-company and signatories to the memorandum and articles of association. The company was incorporated on 27.08.2010 for the manufacture of cables. The authorised capital of the company was Rs. 1 crore divided into 10 lakh equity shares of Rs. 10 each. The paid-up capital was Rs.10 lakhs. The petitioner initially appears to have taken 75000 shares, with Satish Kumar taking 25,000 shares; later, the petitioner sold 30,000 shares to one Mohit Kathuria. The shares were transferred to Mohit Kathuria on 25.11.2011. The petitioner and Satish Kumar were appointed the first directors. Mohit Kathuria and Arvind Kumar Sharma were later appointed as directors.

3. The work of the company was divided between the three directors: the petitioner was to look after the sales, Mohit Kathuria and Satish Kumar, the manufacturing operations. Arvind Kumar Sharma was only a "sleeping" director. Initially the company did well, but later on started

facing financial problems for various reasons. Soon the manufacturing operations stopped and the factory became dysfunctional; the factory land had been mortgaged to the bank for loan purposes and interest burden started increasing every day. Losses started mounting.

4. According to the petitioner, he was requesting the other two directors to maintain proper statutory records, to hold board meetings, annual general meetings etc. but to no avail. Disputes arose between the petitioner on the one hand and the other two directors, Satish Kumar and Mohit Kathuria, on the other hand. The petitioner was denied access to the company's records, factory etc. and was made non-functional. He submitted his resignation, but the other two directors, according to the petitioner, did not file the same with the Registrar of Companies in the prescribed form. On 23.05.2013 the petitioner wanted to visit the factory but was refused entry by the security guards.

5. In the above situation, the petitioner sent a legal notice to the respondent-company and the other two directors Satish Kumar and Mohit Kathuria; another resignation was also submitted in the legal notice. According to the petitioner, the other two directors also shifted the books and records from the registered office without any intimation to the ROC. The profit and loss account, balance sheet etc. were not given to the petitioner. Generally, the petitioner was kept out of the affairs of the company.

6. It is in the above circumstances that the present petition for winding up has been filed.

7. The learned counsel for the petitioner submits that in the above circumstances it is just and equitable that the company is wound up. He also contends that the company has been continuously incurring losses and the capital has been eroded. He urges that since the other two directors Satish Kumar and Mohit Kathuria have made it impossible for the petitioner to take part in the company's affairs, the company should be wound up.

8. Clause (f) of section 433 uses the expression "just and equitable". This expression is not to be construed ejusdem generis with the other clauses of the section, as held by the Supreme Court in **Rajamundry Electric Supply Corporation Ltd. v. A. Nageswara Rao,** (1955) 2 SCR 1066, reiterated in **Hind Overseas Private Limited v. Raghunath Prasad Jhunjhunwalla and Others,** (AIR 1976 SC 565). The facts alleged in the petition and elaborated before me prima facie show that this is a case to which the provisions of Sections 397-398 may be attracted; I am not expressing any final opinion on the point, but it is only a prima facie view. It is well-settled that winding-up proceedings have to be used as a last resort. In a case such as the present one, there are preventive provisions in the Act safeguarding against oppression and mismanagement. If some other remedy is available to the petitioner, that should be exhausted first: (see observations of the Supreme Court in **Hind Overseas Private Ltd.,** supra). These principles have been applied by a Division Bench of this Court (Ranganathan, J. and S.B. Wad, J.) in **Bhaskar Stoneware Pipe (P) Ltd. v. Rajinder Nath Bhaskar,** (1988) 63 Com.Cases 184. The judgment of a learned single judge of this court (Indermeet Kaur, J.,) in **Laguna Holdings Pvt. Ltd. & ors. v. Eden Park Hotels Pvt. Ltd. & Ors.,** (2013) 176 Com. Cas. 118 (Del.) is also to the same effect. This petition is thus premature.

9. Learned counsel for the petitioner draws my attention to the accounts to show that for three continuous years the company has been incurring losses which exceed the paid-up capital. In my opinion, this by itself is not decisive of the question whether it is just and equitable to wind up the company. Once the differences between the directors are sorted out – for which no attempt appears to have been made so far – the possibility of the company reviving its operations and making profits cannot be ruled out.

10. For the aforesaid reasons, I am of the view that the winding-up petition is premature and is not maintainable. It is dismissed at the admission stage itself along with the connected application.

ILR (2013) V DELHI 3525
CS (OS)

DEEPA DUA .... PLAINTIFF

VERSUS

TEJINDER KUMAR MUTENEJA ....DEFENDANT

(JAYANT NATH, J.)

I.A. NO. : 19136 IN CS(OS) NO. : 1363/2012 **DATE OF DECISION: 22.08.2013**

Code of Civil Procedure, 1908—Order 2 Rule 2, Order 7 Rule 11, Order 23 Rule 1—Suit filed for partition, declaration and permanent injunction by plaintiff who claims to be co-owner of the suit property, against her brother, Defendant. Owner of the suit property, parents of the plaintiff and defendant, died without leaving behind any will. Property was a Joint property and plaintiff claims to be a co-sharer. Defendant contends that relinquishment deed in favour of the defendant has been signed by the Plaintiff. Plaintiff denies the same, claiming that the Defendant had fraudulently obtained her signatures on the relinquishment deed. Defendant filed an application U/O 7 R 11 for rejection of plaint, since plaintiff had earlier filed a suit for permanent injunction in the court of the Senior Civil Judge, which was withdrawn after filing the present suit without taking any liberty to file the fresh suit. Plaintiff contends that the cause of action in the present suit differs from the earlier one, since the relinquishment deed wasn't in the knowledge of the plaintiff while filing the earlier suit. Held: On a joint reading of both the plaints, held that both are based on the same cause of action. O. 23 R. 1 CPC held not applicable since the present suit was filed by the plaintiff during the pendency of the previous suit. Suit

is dismissed as being barred under O2 R. 2.

A perusal of the plaint of this suit shows that the plaintiff has filed the present suit seeking the following reliefs:

> "a. Pass a decree of partition, thereby dividing the property half in between plaintiff and defendant.
>
> b. Pass a decree of declaration, declaring the relinquishment deed dated 12.08.2009 and also declare the conveyance deed dated 05.11.2009 being null and void.
>
> c. Pass a Decree for permanent injunction in favour of the plaintiff and against the defendant thereby restraining the defendant, his agents, representatives, attorneys etc. and any other person who is claiming to be working on behalf of the defendant from transferring, alienating, mortgaging or creating third party interest and parting with possession in respect of property bearing No. E-134, Preet Vihar, Near Durga Mandir, Delhi-1100092.
>
> d. Cost of the suit may also be awarded in favour of the plaintiff and against the defendant.
>
> e. Pass any other and further relief, which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case in favour of the plaintiff and against the defendant." **(Para 10)**

In contrast, in the suit filed earlier before the Karkardooma Courts, the plaintiff filed the suit seeking following reliefs:

> "a decree of permanent injunction in favour of the plaintiff and against the defendant, thereby restraining the defendants, their agents, nominees, assignees, attorneys, servants, family members etc. from interfering or selling or creating third party interest in the suit property, bearing House no. E-134, Preet Vihar, Near Durga Mandir, Delhi specifically shown in

Red Colour in the annexed site plan or selling, alienating, creating any third party interest qua the suit property." **(Para 11)**

A comparison of the two plaints would show that paras 1 to 7 of the two plaints are exactly identical. Similarly, para 8 and 11 of the present plaint are identical to para 9 and 15 respectively of the plaint filed in the Karkardoom Courts. Similarly, the relief sought in the Karkardooma Courts is identical to the relief prayed in para (c) of the prayer clause in the present suit. The issue is are the two plaints based on the same cause of action. **(Para 12)**

A cause of action is a bundle of facts. It is on the basis of this bundle of facts that the relief is claimed. Merely because different reliefs are claimed in different proceedings would not necessarily mean that the cause of action would be different. In the first case filed in District Courts by the plaintiff, the bundle of facts on the basis of which the title was pleaded is that the parents of the parties died intestate and hence the plaintiff claims rights to the suit property based on non-testamentary succession. In the present suit that is filed now before this Court, the foundation facts are substantially identical, namely, the death of the parents intestate and the plaintiff claiming rights based on non-testamentary succession. The only difference here is that in the present suit, the plaintiff has added relief of partition and declaration that the Relinquishment Deed executed by the plaintiff in favour of the defendant is void. The cause of action of the two suits in substance is identical. Merely, adding the relief of partition and declaration regarding the Relinquishment Deed executed by the plaintiff would not change the basic facts which are necessary for the plaintiff to traverse to be entitled to claim relief. **(Para 16)**

The judgments cited by the learned counsel for the plaintiff have no application to the facts of the present case. **Vallabh Dass** (supra) is a case where the first suit was filed seeking to enforce the rights of the parties to separate

possession. The second suit was filed to get possession of the suit properties from a tress-passer on the basis of his title. The cause of action was obviously different. The other judgment referred to by the learned counsel for the plaintiff, namely, **Sidramappa** (supra) also does not help the case of the plaintiff because in that case on fact the Hon'ble court had come to the conclusion that the cause of action on the basis of which the suit was brought is not the same as that of the previous suit. Hence, as I hold that the cause of action in the two suits is substantially identical, the present suit is held to be barred under Order II Rule 2 CPC. **(Para 17)**

In the absence of a specific order to the said effect, it is clear that no permission under Order 23 Rule 1 CPC was given to the plaintiff to withdraw the earlier suit. **(Para 23)**

The plaintiff is clearly indulging in multiple litigations.. After having executed and registered a relinquishment deed, she filed the initial suit in Karkardooma Courts. Her application for injunction was dismissed by the Karkardooma Court on 12.09.2011. Thereafter, it appears that she has gone and filed the present suit pleading ignorance of having executed the registered the relinquishment deed. Having filed the present Suit, she has withdrawn the earlier suit filed at Karkardooma Courts. **(Para 24)**

In view of the above, the present application is allowed. The suit is dismissed as being barred under Order II Rule 2 CPC. All pending applications are also disposed of. **(Para 25)**

[An Ba]

APPEARANCES:

FOR THE PLAINTIFF	**:**	Mr. Sanjeev Madaan and Mr. Amresh Mathur, Advs. alongwith husband of the Plaintiff
FOR THE DEFENDANT	**:**	Mr. Anjali J. Manish, adv.

CASES REFERRED TO:

1. *Virgo Industries (Eng.) Private Limited* vs. *Venturetech Solutions Private Limited* (2013) 1 SCC 625.
2. *Y.A. Ajit* vs. *Sofana* AIR 2007 SC 3151.
3. *Madan Lal Arora* vs. *Shiv Kumar* 2007 (95) DRJ 395 (DB).
4. *Vallabh Das* vs. *Dr. Madan Lal & Ors.* (1971) 1 SCR 212.
5. *Sidramappa* vs. *Rajashetty and Ors.* (1970) 3 SCR 320.
6. *Mohammad Khalil Khan* vs. *Mahbub Ali Mian,* 1949 (51) BOMLR 9.

RESULT: Application allowed.

JAYANT NATH, J.

1. This is an application filed by the defendant under Order 7 Rule 11 of the Code of Civil Procedure for dismissal of the suit. The plaintiff and defendant are brother and sister. The present suit is filed for partition, declaration and permanent injunction by the plaintiff who claims to be a co-owner of property No. E-134, Preet Vihar, Near Durga Mandir, Delhi110092.

2. It is the contention of the plaintiff that the property was owned by her late father and mother. The father of the plaintiff and defendant died on 27th January, 1992 without leaving any Will. The mother of the parties died on 9th January, 2006. Hence it is contended that the said property was joint property and the plaintiff is a co-sharer.

3. The plaintiff further states that the defendant came to the residence of the plaintiff on 20.04.2010 and asked her to sign some papers for the transfer of the said property in the name of the defendant but the plaintiff refused to sign the papers. The plaintiff further admits that she had earlier filed a suit for permanent injunction in the Court of Senior Civil Judge, Karkardooma, Delhi on 15.05.2010. It is further stated that when the defendant appeared, a new fact came into the picture when the defendant told the Court that the plaintiff had already executed a relinquishment deed in favour of the defendant on 12.08.2009 which deed, the plaintiff states, is not admitted. The plaintiff further submits

that defendant has fraudulently and by misguiding her taken her signature on the said documents. Nothing further is mentioned about the earlier suit filed in the Court of Senior Civil Judge, Karkardooma Court, Delhi.

4. In view of the above averments, the defendant has filed the present application under Order VII Rule 11, CPC stating that the present suit is barred under Order II Rule 2 CPC. It is pointed out in the application that the plaintiff has previously instituted a suit in the Court of Senior Civil Judge, Karkardooma Courts, Delhi and has withdrawn the said suit after filing the present suit without taking any liberty whatsoever for filing a fresh suit.

5. Learned counsel for the defendant/applicant has submitted that the cause of action of the earlier suit and that of the present suit is identical namely the plaintiff's seeking rights in the suit property. The counsel further submits that the first suit filed in the Karkardooma Courts was filed prior to 'in time' and without withdrawing that suit, the present suit was filed in Delhi High Court. After having filed the present suit, the plaintiff is stated to have withdrawn the suit in Karkardooma Courts without seeking any liberty to file a fresh suit. Learned counsel also further submits that no leave to withdraw the case was sought from the Court under Order 23 Rule 1 CPC and hence, even otherwise, the present suit is barred under Order XXIII Rule 1 CPC.

6. Learned counsel for the defendant relies upon **Virgo Industries (Eng.) Private Limited v. Venturetech Solutions Private Limited** (2013) 1 SCC 625 and **Madan Lal Arora v. Shiv Kumar** 2007 (95) DRJ 395 (DB) to state that in view of provisions of Order II Rule 2, CPC the present suit filed by the plaintiff before this Court is barred. 7. Learned counsel for the plaintiff on the other hand contends that when the first suit was filed, the plaintiff was not aware about the relinquishment deed dated 12.08.2009 allegedly executed by her and which is a registered document. It is stated that only in the course of proceedings before the Karkardooma Courts, on the basis of pleas raised by the defendant, it came to light that the defendant has fraudulently obtained signature of the plaintiff on the said relinquishment deed. Hence the necessity to file the present suit arose. It is further contended that the preset suit is based on a different cause of action. The learned counsel for the plaintiff relies upon **Vallabh Das v. Dr. Madan Lal & Ors.** (1971) 1 SCR 212 and **Sidramappa v. Rajashetty and Ors.** (1970) 3 SCR 320 to submit that

the present suit is not barred under Order II Rule 2 CPC.

8. The issue is whether Order II Rule 2 or Order 23 Rule 1 (iv) CPC would apply to the facts of this case. Order II Rule 2 CPC reads as follows:

> **"2. Suit to include the whole claim.** -(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.
>
> (2) **Relinquishment of part of claim**-Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished.
>
> (3) **Omission to sue for one of several reliefs**-A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.
>
> *Explanation*-For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action."

9. Reference may be had to the judgment cited by the learned counsel for the defendant in the case of **Virgo Industries (Eng.) Private Limited vs. Venturetech Solutions Private Limited** (supra). In that case a suit was filed by the plaintiff seeking a decree of permanent injunction to restrain the defendants from alienating, encumbering or dealing with the suit property. Relief was claimed on the basis of agreement to sell. Relief of specific performance was not sought as according to the plaintiff the time for performance had not arisen. Liberty was sought to seek relief of specific performance later. Subsequently, the plaintiff filed another suit seeking a decree against the defendant for execution and registration of the sale deed and delivery of possession of the same property. The Hon'ble Supreme Court in para 9, held as under:

> "9. Order 2 Rule 1 requires every suit to include the whole of the claim to which the plaintiff is entitled in respect of any particular cause of action. However, the plaintiff has an option to relinquish any part of his claim if he chooses to do so. Order 2 Rule 2 contemplates a situation where a plaintiff omits to sue or intentionally relinquishes any portion of the claim which he is entitled to make. If the plaintiff so acts, Order 2 Rule 2 CPC makes it clear that he shall not afterwards, sue for the part or portion of the claim that has been omitted or relinquished. It must be noticed that Order 2 Rule 2(2) does not contemplate omission or relinquishment of any portion of the plaintiff's claim with the leave of the court so as to entitle him to come back later to seek what has been omitted or relinquished. Such leave of the court is contemplated by Order 2 Rule 2 (3) in situations where a plaintiff being entitled to more than on relief on a particular cause of action, omits to sue for all such reliefs. In such a situation, the plaintiff is precluded from bringing a subsequent suit to claim the relief earlier omitted except in a situation where leave of the court had been obtained. ."

The Hon'ble Supreme Court, in the light of the above, held that the foundation for the suit for relief of permanent injunction claimed in the prior suit furnished a complete cause of action to the plaintiff to also sue for specific performance, yet the relief was omitted and no leave in this regard was obtained from the Court. Hence it was held that the subsequent suit was barred under Order II Rule 2 CPC.

10. A perusal of the plaint of this suit shows that the plaintiff has filed the present suit seeking the following reliefs:

> "a. Pass a decree of partition, thereby dividing the property half in between plaintiff and defendant.
>
> b. Pass a decree of declaration, declaring the relinquishment deed dated 12.08.2009 and also declare the conveyance deed dated 05.11.2009 being null and void.
>
> c. Pass a Decree for permanent injunction in favour of the plaintiff and against the defendant thereby restraining the defendant, his agents, representatives, attorneys etc. and any other person who is claiming to be working on behalf of the defendant from transferring, alienating, mortgaging or creating third party interest

and parting with possession in respect of property bearing No. E-134, Preet Vihar, Near Durga Mandir, Delhi-1100092.

d. Cost of the suit may also be awarded in favour of the plaintiff and against the defendant.

e. Pass any other and further relief, which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case in favour of the plaintiff and against the defendant."

11. In contrast, in the suit filed earlier before the Karkardooma Courts, the plaintiff filed the suit seeking following reliefs:

"a decree of permanent injunction in favour of the plaintiff and against the defendant, thereby restraining the defendants, their agents, nominees, assignees, attorneys, servants, family members etc. from interfering or selling or creating third party interest in the suit property, bearing House no. E-134, Preet Vihar, Near Durga Mandir, Delhi specifically shown in Red Colour in the annexed site plan or selling, alienating, creating any third party interest qua the suit property."

12. A comparison of the two plaints would show that paras 1 to 7 of the two plaints are exactly identical. Similarly, para 8 and 11 of the present plaint are identical to para 9 and 15 respectively of the plaint filed in the Karkardoom Courts. Similarly, the relief sought in the Karkardooma Courts is identical to the relief prayed in para (c) of the prayer clause in the present suit. The issue is are the two plaints based on the same cause of action.

13. What is "cause of action"? Reference for this may be had to the judgment of the Hon'ble Supreme Court in the case of **Y.A. Ajit vs. Sofana** (AIR 2007 SC 3151) where the Hon'ble Supreme Court in para 4 held as under:-

4."It is settled law that cause of action consists of bundle of facts, which give cause to enforce the legal inquiry for redress in a court of law. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the allegedly affected party a right to claim relief against the opponent. It must include some act done by the latter since in the absence of such an act no cause of action would possibly accrue or would arise.

The expression "cause of action" has acquired a judicially settled meaning. In the restricted sense cause of action means the circumstances forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of the proceeding including not only the alleged infraction, but also the infraction coupled with the right itself. Compendiously the expression means every fact, which it would be necessary for the complainant to prove, if traversed, in order to support his right or grievance to the judgment of the Court. Every fact, which is necessary to be proved, as distinguished from every piece of evidence which is necessary to prove such fact, compromises in "cause of action".

14. Reference may be had to the judgment of the Bombay High Court in the case of **Mohammad Khalil Khan vs. Mahbub Ali Mian,** 1949 (51) BOMLR 9 wherein para 61 the court held as follows:-

"61. The Principles laid down in the cases thus far discussed may be thus summarised:

(1) The correct test in cases falling under Order II Rule 2, is "whether the claim in the new suit is in fact founded upon a cause of action from that which was the foundation for the former suit." (**Moonshee Buzloor Ruheem v. Shumsunnisssa Begum**, supra.)

(2) The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment. (Read v. Brown, Supra.)

(3) If the evidence to support the two claims is different, then the causes of action are also different. (**Brunsden v. Humphrey**, supra.)

(4) The causes of action in the two suits may be considered to be the same if in substance they are identical. (Brunsden vs. Humphrey, supra.)

(5) The cause of action has no relation whatever to the defence that may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers to the media upon which the plaintiff asks the Court to arrive at a

conclusion in his favour. (**Musst. Chandkour vs. Partab Singh,** supra). This observation was made by Lord Watson in a case under Section 43 of the Act of 1882 (corresponding to Order II Rule 2), where the plaintiff made various claims in the same suit.

15. It will be useful to refer to the facts of the above case of **Mohammad Khalil Khan vs. Mahbub Ali Mian** (supra.). In that case the first Suit being 8 of 1928 in respect of the Oudh property was filed by Mohammad Khalil Khan and Fida Ali Khan. Title was claimed on the ground that Rani Barkatunnissa was a sunni and under Muslim law they were the legal heirs. The second Suit being Suit No.2/1988 was filed by the said plaintiff claiming possession of property in Shahjahanpur. The plaintiffs in both the properties claimed that the plaintiffs are heirs of Rani Barkatunnissa who belonged to the sunni sect. The Court held that the facts with respect to both the properties to which title is claimed by the plaintiffs are identical, namely, that they are the heirs of Rani Barkatunnissa who was the owner of the properties and that she was a sunni by faith and that they are the heirs under mohammadan law substantiating some facts constituted the title of the plaintiffs to the two properties. It was in this background that the Court dismissed the second Suit under Order II Rule 2 CPC. In my opinion, the ratio as laid down in this case would apply to the facts of the present case.

16. A cause of action is a bundle of facts. It is on the basis of this bundle of facts that the relief is claimed. Merely because different reliefs are claimed in different proceedings would not necessarily mean that the cause of action would be different. In the first case filed in District Courts by the plaintiff, the bundle of facts on the basis of which the title was pleaded is that the parents of the parties died intestate and hence the plaintiff claims rights to the suit property based on non-testamentary succession. In the present suit that is filed now before this Court, the foundation facts are substantially identical, namely, the death of the parents intestate and the plaintiff claiming rights based on non-testamentary succession. The only difference here is that in the present suit, the plaintiff has added relief of partition and declaration that the Relinquishment Deed executed by the plaintiff in favour of the defendant is void. The cause of action of the two suits in substance is identical. Merely, adding the relief of partition and declaration regarding the Relinquishment Deed executed by the plaintiff would not change the basic facts which are necessary for the plaintiff to traverse to be entitled to claim relief.

17. The judgments cited by the learned counsel for the plaintiff have no application to the facts of the present case. **Vallabh Dass** (supra) is a case where the first suit was filed seeking to enforce the rights of the parties to separate possession. The second suit was filed to get possession of the suit properties from a tress-passer on the basis of his title. The cause of action was obviously different. The other judgment referred to by the learned counsel for the plaintiff, namely, **Sidramappa** (supra) also does not help the case of the plaintiff because in that case on fact the Hon'ble court had come to the conclusion that the cause of action on the basis of which the suit was brought is not the same as that of the previous suit. Hence, as I hold that the cause of action in the two suits is substantially identical, the present suit is held to be barred under Order II Rule 2 CPC.

18. We may now come to Order XXIII Rule 1 CPC. Order XXIII Rule 1 (3) & (4) reads as follows:-

> **"1. Withdrawal of suit or abandonment of part of claim.** – * * *
>
> (3) Where the Court is satisfied,
>
> (a) that a suit must fail by reason of some formal defect, or
>
> (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.
>
> (4) Where the plaintiff – (a) abandons any suit or part of claim under sub-rule (1), or
>
> (b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim."

19. Strictly provisions of Order XXIII Rule 1 CPC could not be applicable as the second suit herein has been filed by the plaintiff during pendency of the first suit itself. The present suit has been filed by the

plaintiff on 03.05.2012 whereas the earlier suit filed in the district court has been withdrawn on 04.07.2012. However, the submission of the plaintiffs that the present Suit has been filed after seeking permission of the Karkardooma Courts to withdraw with liberty to file a fresh suit cannot be accepted if one peruses the ordersheet of the proceedings before the Karkardooma Courts.

20. Reference may be had to the order permitting the plaintiff to withdraw the suit. The present suit is filed on 03.05.2012. The suit in the Karkardooma Courts is withdrawn on 04.07.2012 where the Court held as follows:-

> "Pre: None for plaintiff.
>
> Defendant with counsel Sh. Satish Sharma.
>
> Ld. Counsel for defendant has been appraised with proceedings held on 01.06.2012 whereby plaintiff moved an application for withdrawal of the suit and her statement was recorded on the very same day.
>
> Ld. Counsel for defendant stated that defendant has no objection if the present suit of plaintiff is dismissed as withdrawn in view of statement of plaintiff. Let the statement of defendant be recorded separately. Statement of defendant has been recorded vide separate sheet.
>
> In view of statement made by plaintiff on 01.06.2012, present suit is dismissed as withdrawn.
>
> File be consigned to record room after necessary compliance."

21. The statement of plaintiff and defendant was also recorded on different dates which reads as follows:-

> "Statement of Ms Deepa Dua, Age-about 40 years W/O Sh. Jawahar Dua R/O R-Block, 53-B, Dilshad Garden, Delhi-10095. On SA
>
> I am plaintiff in the present suit. I want to withdraw present suit as I have already filed a suit for partition, declaration and permanent injunction against defendant before the Hon'ble High Court. My application u/S 151 CPC for withdrawn of present suit is Ex.P1 and the supporting affidavit to the application is Ex.P2. Ex.P1 & P2 bears my signatures at point A. I may be allowed to withdraw the present suit and my suit be dismissed as withdrawn."
>
> "Statement of Sh. Tajender Kumar Muthleja S/O Late S.P. Muthleja R/O E-134, Preet Vihar Delhi.
>
> On SA
>
> I am defendant in the present suit. I have no objection if the suit of plaintiff is dismissed as withdrawn without prejudice to my rights."

22. The plaintiff has not placed on record a copy of the application filed by the plaintiff to withdraw the suit in the Karkardooma Courts. Hence I am not aware what relief was sought by plaintiff in the said application. A perusal of the order dated 04.07.2012 clearly indicates that no permission to withdraw the suit under Order XXIII Rule 1 CPC has been given by the Court. There is no application of mind by the court of being satisfied with the ingredients of Order XXIII Rule 1 (3) CPC, namely, that the suit must fail by reasons of some formal defect or there is sufficient ground for allowing the plaintiff to institute fresh suit for the subject matter of the suit or part of the plaint.

23. In the absence of a specific order to the said effect, it is clear that no permission under Order 23 Rule 1 CPC was given to the plaintiff to withdraw the earlier suit.

24. The plaintiff is clearly indulging in multiple litigations.. After having executed and registered a relinquishment deed, she filed the initial suit in Karkardooma Courts. Her application for injunction was dismissed by the Karkardooma Court on 12.09.2011. Thereafter, it appears that she has gone and filed the present suit pleading ignorance of having executed the registered the relinquishment deed. Having filed the present Suit, she has withdrawn the earlier suit filed at Karkardooma Courts.

25. In view of the above, the present application is allowed. The suit is dismissed as being barred under Order II Rule 2 CPC. All pending applications are also disposed of.

ILR (2013) V DELHI 3539
LPA

THE YACHTING ASSOCIATION OF INDIA ....APPELLANT

VERSUS

BOARDSAILING ASSOCIATION OF INDIA & ORS. ....RESPONDENTS

(BADAR DURREZ AHMED, ACJ. & VIBHU BAKHRU, JJ.)

LPA NO. : 523/2013 DATE OF DECISION: 22.08.2013

Election Process—Question arose whether election process ought to have been interdicted once it has commenced. Held once an election process has commenced it must be concluded expeditiously as per its schedule and any legal challenge to the election must await the conclusion of the election. The courts would normally Pass orders only to assist completion of the elections and not to interdict the same.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. Sandeep Sethi, Advocate with Mr. Amit Sinha, Mr. Ajit Warrier, Mr. Aman Gandhi Ms. Tarunima & Ms. Salmoli Choudhuri.

FOR THE RESPONDENTS : Mr. Rahul Mehra for R-1 to 12 Mr. Amrit Pal Singh, CGSC for R-13

CASES REFERRED TO:

1. *Supreme Court Bar Association and Ors.* vs. *B.D. Kaushik:* (2011) 13 SCC 774.
2. *Utpadak Sanstha and Another* vs. *State of Maharashtra and Others:* (2001) 8 SCC 509.

3. *Election Commission of India through Secretary* vs. *Ashok Kumar & Ors:* (2000) 8 SCC 216.
4. *N.P. Punnuswami* vs. *Returning Officer, Namakkal Constituency, Namakkal, Salem Dist. And Others:* AIR 1952 SC 64.

RESULT: Appeal Allowed.

VIBHU BAKHRU, J.

1. The appellant has preferred the present appeal challenging the interim order dated 15.07.2013 passed by a learned Single Judge in CM No. 5409/2013 in W.P.(C) No. 2062/2013. The appellant is aggrieved by the impugned order as the learned Single Judge has stayed the process for the election of Council members of the appellant association and has directed that the ballot box be preserved without opening the same or processing the ballots. The counting of the votes already cast and declaration of the consequent election result have been interdicted till further orders.

2. The writ petition was filed by the respondent nos. 1 to 12, who are all members of the appellant association, inter-alia, challenging the functioning of the appellant association including extension of the term of the Council Members beyond the maximum as specified under the Constitution of the Association. One of the principal concerns expressed in the writ petition by the writ petitioners is for conduct of elections for appointment of the Council members and office bearers of various committees of the appellant association in accordance with the model election guidelines stipulated in the Government Sports Code.

3. While the writ petition was pending consideration, the appellant announced the holding of election of its Council members/office bearers. The procedure for holding of elections disclosed that the same were to be held by postal ballots. Aggrieved by the holding of the elections in the manner as sought to be done by the appellant association, the writ petitioners filed an application being CM No. 5409/2013 in the pending writ petition, *inter-alia,* praying for an order restraining the appellant from holding fresh election of its office bearers, Councils and Committees. It was alleged that the elections being conducted were in violation of the model election guidelines contained in the Government Sports Code. Several other prayers were also made in the said application and the said

application is pending consideration.

4. The controversy before us is limited to the question whether the learned Single Judge ought to have stayed the election process once the same had commenced. The brief facts relevant for considering the controversy before us are as under.

5. The appellant is a society registered under the West Bengal Societies Registration Act, 1961 and is one of the 52 National Sports Federations in India who are recognized by the Ministry of Youth Affairs and Sports, Government of India. The appellant association is the recognized body in relation to the sport of sailing in India and is affiliated with International Sailing Federation. The appellant is also affiliated to Asian Sailing Federation which is recognized by the Olympic Council of Asia as the apex body for conducting the sport of sailing in Asia. The affairs of the appellant are to be conducted in accordance with the provisions of its Constitution. The appellant has 69 clubs as members who are involved in the sport of sailing and other related sports. It is asserted that out of 69 member clubs, 44 member clubs have voting rights and other 25 member clubs are only provisional members who do not have any voting rights. Further, out of the 44 voting member clubs, 34 member clubs are formed/incorporated and/or are supported by the Indian Armed Forces.

6. As per the Constitution of the appellant, election to the appellant's council are to be held every four years and the last such elections were held in 2008 by way of postal ballots which, it is contended, is permissible under the constitution of the appellant.

7. The respondent nos. 1 to 12 were aggrieved by the functioning of appellant association and, thus, filed a writ petition being W.P.(C) 2062/2013, inter-alia, seeking the following prayers:-

> "(a) Issue suitable writs in the nature of Mandamus and any other appropriate writ, order or direction directing / Respondent No. 1 MYAS to withdraw the recognition granted to Respondent No. 2 YAI forthwith for failing to hold fresh elections; which have been overdue since November 2012, for its various post of Office Bearers and the Council in accordance with the "Model Election Guidelines" stipulated in the Government Sports Code as also its own Constitution and further to implement / enforce

> all the *"consequence of such derecognition"* as mandated in ANNEXURE – III (pages 3839) and clause 3.6 (Pages 5 to 7) read with paragraph 9 of May 1, 2010 letter (Page 72) of the Sports Code so as to ensure that the Respondent No. 2 YAI ceases to exercise the functions of an NSF for the discipline of "Sailing" in India, forgoes its right to regulate & control Sailing in India, forgoes the right to select the national teams & represent India in international sports events & forums, ceases to be eligible to use "India" in its name or to receive any financial aid, funds, grants, largesse or other forms of assistance from the Respondent No. 1 MYAS or ceases to make use of any benefit or concession including but not limited to usage of various infrastructure facilities / SAI Centre's meant for training, preparation & other purposes, etc;
>
> (b) Issue suitable writs in the nature of Mandamus/ Certiorari and any other appropriate writ, order .or direction staying / quashing / setting aside the decision dated January 1, 2013 taken by the Respondent No. 2 YAI to unilaterally extend the tenure of its Office Bearers and the Council being illegal, null & void, non est, and unconstitutional;
>
> (c) Issue suitable writs in the nature of Mandamus / Certiorari and any other appropriate writ, order or direction setting aside any and all decisions and actions taken jointly or severally by the Council of the Respondent No. 2 YAI since the expiry of its term;
>
> (d) Issue suitable .writs in the nature of Mandamus and any other appropriate writ, order or direction to Respondent No. 1 MYAS to appoint an ad-interim adhoc Committee of five or more Arjuna Awardees to run and manage the, day-to-day affairs of the Respondent No. 2 YAI till the conclusion of latter's fresh elections;
>
> (e) Issue suitable writs in the nature of Mandamus and any other appropriate writ, order or direction directing Respondent No. 1 MYAS to ensure that the Office Bearers, Council Members, subordinate officers, servants and agents of Respondent No. 2 YAI do not, in any way, alter the list of provisional and/or regular. Member Clubs of Respondent No. 2 YAI;

(f) Pass such other and further orders as this Hon'ble Court may deem fit in the facts and circumstances of the case and in the interest of justice."

8. While the said petition was pending, the appellant association decided on 18.04.2013 that elections be held by postal ballots. Prior to the decision to hold elections, the appellant had issued a notice dated 10.04.2013 to its various members, inter-alia, seeking the names of the authorized signatories for the purposes of elections.

9. The time period for submission of the authorized signatories by its member clubs was extended by the appellant till 30.04.2013 and, subsequently, again extended till 15.05.2013. The same was also published on its website. In the meantime, it is stated, that the Asian Sailing Federation was informed about the decision to hold elections through postal ballot. Further, on the suggestion of the Asian Sailing Federation, that an independent election commissioner be appointed, the appellant association had confirmed to the Asian Sailing Federation that a former Supreme Court/High Court Judge would be appointed for the purpose of conducting the proposed elections. Pursuant to the decision, the appellant association approached Ms. Usha Mehra, a former Judge of this Court for overseeing the conduct of the ensuing elections. On 25.04.2013, the appellant notified the proposed schedule of elections to respondent no.13 and sought its approval for conduct of the elections.

10. On 30.04.2013, the appellant notified its members that the election would be held to the posts mentioned in the notice. The notice further prescribed the procedure for conducting of the election by postal ballot. The election schedule was also published on the website of the appellant association on 30.04.2013.

11. The notice dated 30.04.2013 is quoted below for ready reference:-

"NOTICE FOR ELECTION ù YAI COUNCIL

1. Consequent to expiry of the term of the present YAI Council, the elections will now be conducted to the under-listed positions on the YAI Council:-

(a) President

(b) Vice President

(c) Treasurer

(d) Chairman Sailing and Club Development Committee.

(e) Chairman Youth Classes Committee.

(f) Chairman National (Asian Games and Olympic) Classes Committee.

(g) Chairman National Classes Committee.

(h) Chairman Offshore and Motor Boating Committee.

(i) Chairman Sailing Performance Development Committee.

(j) Chairman Events Committee.

(j) Chairman Fund Raising and Publicity Committee.

(k) Chairperson Women Sailing Committee.

2. **Eligibility Conditions**:-In order to be eligible as a candidate for the above elected posts, a candidate must be nominated by minimum one member club / class association in terms of Article 8 (e) of the YAI Constitution. There is no requirement that the candidate is nominated by his own club / class association. In accordance with Article 9(c) of the YAI Constitution, only Life Associate Members of the YAI shall be eligible for election to or to serve on, the Council and/or on any .of the Committees approved by the Council (a copy of Life Membership card issued by the YAI is required to be attached.)

3. **Balloting Committee**:-Since Lt. Gen Vijai Sharma, PVSM, AVSM, Vice President YAI is also officiating as the President YAI, he has appointed Justice (Retd) Ms Usha Mehra, Delhi High Court as the Chairperson of the Balloting Committee for conduct of the elections to ensure transparency in conduct of elections. The Committee will comprise of following:-

(a) Justice (Retd) Ms Usha Mehra, Delhi High Court -Chairperson.

(b) Cmde Dhiren Vig, HSG YAI -Member

(c) Cdr KD Singh, HJSG YAI -Member

(d) Lt Col Milind Desai -Member

4. The Committee will be responsible for:-

(a) Determining that the election process is conducted in accordance with the YAI Constitution.

(b) Determining that the procedure on postal ballot is conducted in accordance with the regulation on postal balloting as approved by the YAI Council during its meeting No 02 / 2004 held on 16 Nov 2004. Copy placed at Annexure I alongwith sample ballot paper and envelopes A and B.

(c) Determining whether or not the nominated candidate is eligible for election.

(d) Publishing a list of eligible candidates together with the names of nominating members for distribution. (e) Conduct of the elections and counting of votes taken for the candidates through the postal balloting system.

(f) Announcement of results.

5. **Schedule:**-The schedule for election process is as follows:-

(a) 01-30 May 2013	Nominations for various posts.
(b) 15 May 2013	Last Date of receiving names of authorized signatories of affiliated "member clubs".
(c) 31 May 2013	Preparation of Nominations & Publication of list of nominees.
(d) 01 – 04 Jun 2013	Withdrawal of Nominations.
(e) 05 Jun 2013	Scrutiny of Nomination forms.
(f) 06 Jun 2013	Final Publication of Nominations for Various Posts.
(g) 17 Jun 2013	Dispatch of postal ballot forms to all 'Member Clubs'.
(h) 16 Jun 2013	Last date for receipt of postal ballot forms.
(i) 17 Jun 2013	Declaration of Results.

6. **Nomination Form**:- A form to be used for nomination of candidates is placed at **Annexure II**. Additional copies may be made and distributed amongst candidates. The nomination letter must be signed by the Authorised signatory of the nominating member club.

7. In accordance with Deptt of Sports, Ministry of Youth Affairs & Sports letter No. 14-82/2009-SP.IV dated 04 February, 2010 all personnel belonging to Central Govt., State Govt., Armed Forces or any other statutory body are required to obtain prior approval of the Government for seeking elective positions in National / State / District sports bodies. **Copy placed at Annexure III**. Accordingly, all such personnel seeking elective positions on the YAI Council are required to attach a copy of the letter issued by respective competent authority permitting them to seek elective positions on the YAI Council with their nomination forms.

8. In the past, a large number of serving defence officers had been elected to the YAI Council. A copy of the Ministry of Defence, Government of India letter No. 19(11)/2013-D (MS) dated 14 Mar 2013 is placed at **Annexure IV**.

9. It is requested that wide publicity be accorded to this notice."

12. In the meantime, prior to issue of the notice dated 30.04.2013, the respondent filed an application bearing CM No. 5409/2013 in W.P.(C) 2062/2013, on 26.04.2013. The matter was considered by a learned Single Judge on 03.05.2013 and the learned Single Judge passed an order, *inter-alia,* directing that certain concerns of respondent nos. 1 to 12 which were expressed before the Court be placed before the Balloting Committee and further, permitted respondent nos. 1 to 12 (writ petitioners) to appear before the Balloting Committee on 08.05.2013.

13. Pursuant to the directions given by the learned Single Judge, the representatives of the respondent nos. 1 to 12 appeared before the Balloting Committee and articulated their concerns. On 15.05.2013, the learned Single Judge passed another order requesting the Chairperson of the Balloting Committee to place the minutes of the said meeting on record. It was further directed that the stand of the Union of India be placed before the Chairperson, Balloting Committee who would take an appropriate decision having regard to the opinion of the other members of the Balloting

Committee and the matter was posted to 01.07.2013.

14. On 30.05.2013, the Balloting Committee submitted a report wherein the Committee concluded as under:-

> "For these reasons stated above, the Balloting Committee is of the considered view that election schedule fixed by the YAI is neither against the Model Election guidelines nor against the association's constitution."

15. On 05.06.2013, the scrutiny of nominations was completed under the supervision of the Chairperson of the Balloting Committee and on 19.06.2013, the keys of the ballot box were also handed over to the Chairperson of the Balloting Committee. It is stated that the ballots have since been received from various member clubs.

16. The principal controversy pending consideration by the learned Single Judge is whether the election should be held by postal ballots or whether the ballots should be cast in person. Whilst it is contended on behalf of the appellant that casting of ballots is permissible under its constitution and that elections have been held by postal ballots in the past, the respondent nos. 1 to 12 have contended that elections by postal ballots is not permissible under the sports code. It is further contended by respondent nos. 1 to 12 that it is also mandatory to hold an Annual General Meeting and that election by casting votes in person by members could be held simultaneously with the Annual General Meeting since all members who have the right to vote are obliged to attend the meeting. Pending consideration of the rival contentions, the learned Single Judge has passed the impugned order, *inter-alia,* directing as under:-

> "Under these circumstances, the Balloting Committee and Chairman are directed not to proceed further in the matter and to preserve the ballot box intact without opening the same or processing the ballot cast. It shall not commence counting of the votes cast or declared the result of the elections till further orders from this court.
>
> List on 26.09.2013 for further consideration."

17. It has been stated before us that there were only single nominations to 10 out of 12 posts and, thus, there is no opposition to the election of 10 office bearers out of 12 posts for which elections are

being held. It is further contended that there are only 44 club members who constitute the Electoral College and majority of these club members are supported or incorporated by Indian Army/Navy. Most of the members of such member clubs are Armed Forces Personnel who are posted at various locations in India. It is, thus, contended by the appellant that it is not expedient for these member clubs to cast their ballot in person. It is only to accommodate its constituent members that election is being held by postal ballots. It is further contended that the constitution of the appellant association permits casting of postal ballots and that has been the practice in the past since the inception of the appellant association in 1960. It is, thus, contended that the election process ought not to be interdicted.

18. The learned counsel appearing for the appellant has also contended that it is well settled that once an election process has started, it should be conducted as scheduled and any challenge to the election should be considered only after the election process is over. In support of his contention, the learned counsel for the appellant had placed reliance on the decision of the Supreme Court in the case of Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha **Utpadak Sanstha and Another v. State of Maharashtra and Others:** (2001) 8 SCC 509.

19. We have heard the learned counsel for the parties at length.

20. The only question before us is whether the election process ought to have been interdicted once it has commenced. It is not necessary for us to examine the merits of the dispute between the parties. It is also not essential for us consider whether the Government Sports Code is mandatory or whether the elections being conducted conform to the sports code or not since those issues are pending consideration before the learned Single Judge.

21. The law in regard to interference by Courts with an election process is now well settled. Once an election process has commenced it must be concluded expeditiously as per its schedule and any legal challenge to the election must await the conclusion of the election. The courts would normally pass orders only to assist completion of the elections and not to interdict the same. In the case of **Election Commission of India through Secretary v. Ashok Kumar & Ors:** (2000) 8 SCC 216, the Supreme Court, inter-alia, held as under:-

"32. For convenience sake we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already said and then adding by clarifying what follows there from in view of the analysis made by us hereinabove:

1) If an election, (the term 'election' being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceedings in elections.

2). Any decision sought and rendered will not amount to ''calling in question an election'' if it subserves the progress of the election and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.

3). Subject to the above, the action taken or orders issued by Election Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.

4). Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the Court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking the jurisdiction of the Court.

5). The Court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but brought to it during the pendency of election proceedings. The Court must guard against any attempt at regarding, interrupting, protracting or stalling of the election

proceedings. Care has to be taken to see that there is no attempt to utilise the court's indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the Court would act with reluctance and shall not act except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material."

22. In the case of **N.P. Punnuswami v. Returning Officer, Namakkal Constituency, Namakkal, Salem Dist. And Others:** AIR 1952 SC 64, the Supreme Court, inter-alia, considered the meaning of the word 'election' as used in Article 329(b) of the Constitution of India which provided that no election to the Parliament would be called in question except by a election petition. The Supreme Court observed that the word 'election' had acquired a wide and a narrow meaning. While in the narrow sense it could mean the election of a candidate. In the wider sense, the word 'election' could encompass the entire electoral process culminating in declaring the election of a candidate. The Court summed up its conclusions as under:-

"16. The conclusions which I have arrived at may be summed up briefly as follows:

(1). Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognized to be a matter of first importance that elections should be concluded as early as possible according to time-schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.

(2). In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to "anything which does not affect the election; "and if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the "election" and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute

before any Court while the election is in progress."

In the case of **Supreme Court Bar Association and Ors. v. B.D. Kaushik:** (2011) 13 SCC 774, the Supreme Court has expressed a similar view as under:

> "43. It hardly needs to be emphasized that in any Body once governed by democratic principles, no member has a right to claim an injunction so as to stall the formation of the governing body of the Association. No such right exists in election matters since exercise of a right conferred by a rule is always subject to the qualifications prescribed and limitations imposed thereunder. .....
>
> xxxx xxxx xxxx xxxx
>
> "60. Further, the appellants had rightly pointed out to the learned Judge that election process had already started and, therefore, injunction, as claimed, should not be granted. Since this Court has authoritatively laid down that election process has started the courts should not ordinarily interfere with the said process by way of granting injunction. The argument advanced by the appellants that election process having started, the injunction should not be granted is dealt the plaintiffs have not prayed for injunction against the election process."

23. The principles of law relating to election of candidates under the Representation of People Act, 1951 have been extended to elections in general also. In the case of **Shri Sant Sadguru** (supra), the Supreme Court while considering a case of elections to the Managing Committee of a society registered under the Maharashtra Cooperative Societies Act, 1960 reiterated the settled law as under:-

> "12. In view of our finding that preparation of the electoral roll being an intermediate stage in the process of election of the Managing Committee of a specified society and the election process having been set in motion, it is well settled that the High Court should not stay the continuation of the election process even though there may be some alleged illegality or breach of rules while preparing the electoral roll. It is not disputed that the election in question has already been held and the result thereof has been stayed by an order of this Court, and once the result

> of the election is declared, it would be open to the appellants to challenge the election of the returned candidate, if aggrieved, by means of an election petition before the Election Tribunal."

24. In light of the aforesaid judgments, we are inclined to accept the contention urged on behalf of the appellant that the election process having commenced, the same ought not to have been interdicted and any challenge to the election could be pursued only after the elections are over. We further do not find that any irreparable loss or prejudice would be caused to respondents Nos. 1 to 12, if the election process as commenced is concluded. Accordingly, the directions contained in the impugned order restraining the opening of the ballot boxes and counting of the votes are set aside. The appellant would be at liberty to complete the election process and declare the results.

25. We further clarify that we have not expressed any opinion as to the merits of the disputes between the parties and it shall be open for the respondent nos. 1 to 12 to pursue their challenge to the elections in the pending writ petition.

26. The parties are left to bear their own costs.

ILR (2013) V DELHI 3552
LPA

TULSI RAM ARYA **....APPELLANT**

VERSUS

THE CHAIRMAN DELHI TRANSCO LIMITED & ORS. **....RESPONDENTS**

(BADAR DURREZ AHMED, ACJ. & VIBHU BAKHRU, J.)

LPA NO. : 219/2013 **DATE OF DECISION: 22.08.2013**

Service Law—Question arose was whether the retirement benefits by way of pension and gratuity can

be withheld in terms of rule 9 r/w rule 69 of CCS (pension) Rule—During employment, a case U/s 498A IPC and Sec. 3 & 4 of Dowry Prohibition Act, 1961 registered against the employee by his daughter-in-law—Meanwhile, the employee superannuated but his entire retirement benefits not paid—Ld. Single Judge held that since there was no charge of misconduct or negligence of the employee in performance of his service with employer, therefore, Sec. 498A IPC had noting to do with the misconduct of the employee in performing services and no pecuniary loss occurred to the employer on account of judicial proceedings/ criminal case going on against the petitioner. Held, Rule 9(1) of CCS (Pension) Rules would not indicates that it is applicable only in cases where a pensioner has been found guilty of grave misconduct or negligence in any departmental or judicial proceedings—The criminal case filed against the employee fall within the scope of expression judicial proceedings—However, no court or authority has found the employee guilty of "grave misconduct or negligence"—However, Rule 9(4) would be applicable as it applies where judicial proceedings are instituted a government servant and provisional pension as provided in Rule 69 would be sanctioned. Under Rule 69(1)(c) of Rules, no gratuity shall be paid to the government servant until conclusion of department or judicial proceedings and issue of final orders thereon. Held power under Rule 9(1) cannot be limited to only those cases where the government has suffered any pecuniary loss—Held Rule 13A of CCS (Conduct) Rules prohibits a government servant from taking or demanding directly or indirectly any dowry from parent or guardian of bride. Thus. harassment of a woman on account of demand of dowry would undoubtly constitute misconduct as per CCS (Conduct) Rules.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. H.D. Sharma & Mr. Dev P. Bhardwaj.

FOR THE RESPONDENTS : Mr. Anupam Varma & Mr. Nikhil Sharma for R-3/BYPL. Mr. Sumeet Pushkarna for R4/Pension Trust.

CASES REFERRED TO:

1. *North Delhi Power Limited* vs. *Government of National Capital Territory of Delhi and Ors.*: AIR 2010 SC 2302.
2. *Union of India & Ors.* vs. *B. Dev*: 1998 (7) SCC 691.

RESULT: Appeal disposed of.

VIBHU BAKHRU, J.

1. These cross appeals are directed against the judgment dated 31.01.2013 passed by a learned Single Judge of this Court in W.P.(C) No. 618/2001. The appellant in LPA No. 219/2013 (hereinafter referred to as the "writ petitioner") had preferred the Writ Petition No.618/2001, *inter-alia,* challenging the action of the respondent in withholding the retirement benefits payable to him and had made the following prayers:-

"a) issue a writ/order or direction in the nature of mandamus to release the gratuity with pendentelite and future interest.

b) issue a writ/order or direction in the nature of mandamus to award full pension alongwith commuted value of pension with pendentelite with future interest.

c) Issue a writ/order or direction for adding one increment in basic pay-scale withheld during the period of suspension.

d) Issue a writ/order or direction to provide any other retirement and incidental benefit payable lawfully to the petitioner.

e) Any other relief or orders which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

2. The aforesaid writ petition was allowed by the judgment dated

31.01.2013 which is impugned in the present appeals. By the impugned judgment, the appellant in LPA No. 495/2013, BSES Yamuna Power Limited was directed to release the service dues including dues towards terminal benefits payable to the writ petitioner. BSES Yamuna Power Limited was further directed to pay simple interest @ 9% per annum on the amount payable from the date of filing the writ petition till the date of payment. It was further directed that in the event the amount due was not paid within a period of four months from the date of the judgment then the writ petitioner would be entitled to interest @ 12% per annum thereafter. The writ petitioner is aggrieved by the impugned judgment in respect of the quantum of interest as directed to be paid by the learned Single Judge and is seeking both enhancement of the rate of interest as well as the period for which interest is payable. It is contended that the interest should be payable from the date when the retirement benefits became due and not from the date of the filing of the writ petition as directed by the learned Single Judge.

3. The appellant in LPA 495/2013 (BSES Yamuna Power Limited) was impleaded as respondent no. 3 in the writ petition. It is contended on behalf of the BSES Yamuna Power Limited that in terms of the CCS (Pension) Rules, the writ petitioner is not entitled to gratuity or pension till the conclusion of the judicial proceedings pending against him. The writ petitioner superannuated prior to the unbundling of the erstwhile Delhi Vidyut Board (DVB). It is further contended that the obligation to pay terminal benefits payable to the employees of DVB who superannuated prior to the unbundling of DVB would lie with the Delhi Vidyut Board Employees Terminal Benefits Fund, 2002 and BSES Yamuna Power Limited has no role to play with regard to the payment of pension or terminal benefits to the writ petitioner.

4. The principal controversy that arises in the present appeals revolves around the question whether the retirement benefits by way of pension and gratuity can be withheld from the writ petitioner in terms of Rule 9 read with Rule 69 of the CCS (Pension) Rules.

5. The writ petitioner joined Delhi Vidyut Board (then known as the Delhi Electric Supply Undertaking) as a Mazdoor w.e.f. 09.05.1975. While the writ petitioner was in service, the daughter-in-law of the writ petitioner made a criminal complaint against the writ petitioner and other members of his family and a criminal case under Section 498A of the

Indian Penal Code, 1860 and under. Sections 3 & 4 of the Dowry Prohibition Act, 1961 was registered against the writ petitioner. Pursuant to the criminal case, the writ petitioner was also arrested by the U.P. Police on 02.01.1997. As the writ petitioner was remanded to custody for a period exceeding 48 hours, he was placed under suspension by the DVB by an order dated 07.04.1997 w.e.f. 02.01.1997 (the date of his detention). The suspension of the writ petitioner from services on account of the criminal case was revoked on 11.12.1997. On attaining the age of superannuation, the writ petitioner retired from the services of DVB on 31.05.1999 and the following terminal benefits were released to him:-

(a) Provisional pension @ Z1726 plus DA per month.

(b) Accumulated credit with GPF.

(c) Leave Encashment.

However, the gratuity and commuted pension were withheld as per Rule 69 of the CCS (Pension) Rules.

6. Since the writ petitioner was not paid the entire retirement benefits allegedly due to him, he filed a writ petition against the DVB. After unbundling of the DVB, the writ petitioner filed an application seeking to implead Delhi Transco and Delhi Power Limited. Subsequently, an affidavit was filed on behalf of the Delhi Vidyut Board Employees Terminal Benefits Fund, 2002 (respondent no. 4), wherein it was stated that the assets and liabilities of the erstwhile DVB have been transferred to the transferee companies including BSES Yamuna Power Limited and as per the transfer scheme, the obligation to discharge the liability of the erstwhile DVB was the responsibility of the transferee companies and as the writ petitioner was working as an Assistant Line Manager at Yojna Vihar an area which fell within the jurisdiction of BSES Yamuna Power Limited, the liability to pay the retirement benefits to the writ petitioner also devolved on BSES Yamuna Power Limited. Thereafter, the writ petitioner impleaded BSES Yamuna Power Limited (the appellant in LPA 495/2013 and the respondent no. 3 in LPA 219/2013) as respondent no. 3 in the writ petition.

7. The Single Judge examined the question whether gratuity and other retirement benefits could be withheld from the writ petitioner on account of the criminal case which had been instituted and was pending against the writ petitioner. The learned single judge considered Rule 9 of

the CCS (Pension) Rules and held as under:-

> "4. When we read sub Rule 1 of Rule 9 it becomes clear that entitlement to withhold pensionary benefits or other terminal benefits as stated in Rule 9 only arises if "pecuniary loss is caused to the Government", and that too on account of "the pensioner is found guilty of grave misconduct or negligence during the period of service". A reading of this sub-Rule 1 of Rule 9 makes it clear that object of withholding of pensionary benefit is for adjusting the pecuniary loss caused to the employer on account of grave misconduct or negligence of the employee while performing his service. Therefore, the departmental proceedings or judicial proceedings which are talked of under Rules 9 and 69 are such departmental proceedings or judicial proceedings wherein after adjudication against the employee, if he is found guilty of grave misconduct or negligence which causes pecuniary loss to the employer, only then the employer would be entitled to adjust the same from the pensionary benefits to the employee.
>
> 5. Admittedly in the present case, there is no charge of misconduct or negligence of the petitioner in the performance of his service with the employer. The criminal case which is pending against the petitioner is under Section 498A IPC and therefore nothing to do with any misconduct of the petitioner performing service as an employee of the employer. Therefore, there does not arise any issue of pecuniary loss to the employer/DVB/BYPL 011 account of the judicial proceedings/criminal case going on against the petitioner."

8. With regard to the question whether BSES Yamuna Power Limited would be liable for discharge of the dues of the erstwhile DVB, the learned Single Judge following the decision of the Supreme Court in **North Delhi Power Limited v. Government of National Capital Territory of Delhi and Ors.:** AIR 2010 SC 2302 held that BSES Yamuna Power Limited being the relevant transferee company would be liable to pay the dues payable to the writ petitioner.

9. Mr Sethi, the learned senior counsel appearing on behalf of BSES Yamuna Power Limited contended that Rule 9(1) of the CCS (Pension) Rules cannot be interpreted to be applicable only in those cases where

the act of misconduct or negligence on the part of the erstwhile employee results in a pecuniary loss to the Government. It is contended that the power to withhold pension would also be available in cases where an employee is guilty of grave misconduct or negligence even though a pecuniary loss cannot be attributed to such misconduct or negligence on the part of the erstwhile employee during the course of his employment. He has placed reliance on the decision of the Supreme Court in the case of **Union of India & Ors. v. B. Dev:** 1998 (7) SCC 691, in support of his contention. Mr Sethi has further placed reliance on Rule 13A of the CCS (Conduct) Rules which prohibits any government servant from taking or abetting, giving or taking of any dowry. The relevant Rule 13A of CCS (Conduct) Rules is quoted below:-

> "13-A. Dowry
>
> No Government servant shall
>
> (i) give or take or abet the giving or taking of dowry; or
>
> (ii) demand directly or indirectly, from the parent or guardian of a bride or bridegroom, as the case may be, any dowry.
>
> EXPLANATION.-For the purposes of this rule, 'dowry' has the same meaning as in the Dowry Prohibition Act, 1961 (28 of 1961)."

10. We have heard the learned counsel for the parties.

11. Rule 9 & Rule 69 of the CCS (Pension) Rules are relevant for considering the present controversy. The relevant provisions of Rule 9 & Rule 69 are quoted below:-

> **"Rule 9:-Right to President to withhold or withdraw pension**
>
> (1) The President reserves to himself the right of withholding a pension or gratuity, or both, either in full or in part, or withdrawing a pension in full or in part, whether permanently or for a specified period, and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the Government, if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of service, including service rendered upon re-employment after

retirement:

Provided that the Union Public Service commission shall be consulted before any final orders are passed:

Provided further that where a part of pension is withheld or withdrawn, the amount of such pensions shall not be reduced below the amount of rupees three hundred and seventy-five (Rupees Three thousand five hundred from 1-12006-see GID below Rule 49) per mensem.

xxxx xxxx xxxx xxxx

(4) In the case of Government servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued under sub-rule (2), a provisional pension as provided in Rule 69 shall be sanctioned.

(5) Where the President decides not to withhold or withdraw pension but orders recovery of pecuniary loss from pension, the recovery shall not ordinarily be made at a rate exceeding one-third of the pension admissible on the date of retirement of a Government servant.

(6) For the purpose of this rule,-

(a) departmental proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the Government servant or pensioner, or if the government servant has been placed under suspension from an earlier date, on such date; and

(b) judicial proceedings shall be deemed to be instituted

(i) in the case of criminal proceedings, on the date on which the complaint or report of a Police Officer, of which the Magistrate takes cognizance, is made, and

(ii) in the case of civil proceedings, on the date the plaint is presented in the Court.

XXXX XXXX XXXX XXXX XXXX

Rule 69. Provisional pension where departmental or judicial proceedings may be pending.

(1) (a) In respect of a Government servant referred to in sub-rule (4) of Rule 9, the Accounts Officer shall authorize the provisional pension equal to the maximum pension which would have been admissible on the basis of qualifying service up to the date of retirement of the Government servant, or if he was under suspension on the date of retirement up to the date immediately preceding the date on which he was placed under suspension.

(b) The provisional pension shall be authorized by the Accounts Officer during the period commencing from the date of retirement up to and including the date on which, after the conclusion of departmental or judicial proceedings, final orders are passed by the Competent Authority.

(c) No gratuity shall be paid to the Government servant until the conclusion of the departmental or judicial proceedings and issue of final orders thereon:

Provided that where departmental proceedings have been instituted under Rule 16 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, for imposing any of the penalties specified in Clauses (i), (ii) and (iv) of Rule 11 of the said rules, the payment of gratuity shall be authorized to be paid to the Government servant.

(2) Payment of provisional pension made under sub-rule (1) shall be adjusted against final retirement benefits sanctioned to such Government servant upon conclusion of such proceedings but not recovery shall be made where the pension finally sanctioned is less than the provisional pension or the pension is reduced or withheld either permanently or for a specified period."

12. In our view, sub-rule (1) of Rule 9 of the CCS (Pension) Rules would not be applicable to the facts of the present case. A plain reading of sub-rule (1) of Rule 9 indicates that it is applicable only in cases where a pensioner has been found guilty of grave misconduct or negligence in any departmental or judicial proceedings. Indisputably, the criminal case filed against the petitioner would fall within the scope of the expression judicial proceedings. In the present case, the criminal case against the

writ petitioner is still pending and the said judicial proceedings have not culminated in any finding against the writ petitioner. No court or authority has found the writ petitioner guilty of "grave misconduct or negligence". However, sub-rule (4) of Rule 9 of the CCS (Pension) Rules would be applicable inasmuch as the same provides that in cases where judicial proceedings are instituted against a government servant who had retired on attaining the age of superannuation, provisional pension as provided in Rule 69 would be sanctioned. Thus, in the present case, Rule 69 of the CCS (Pension) Rules would be relevant and in particular Rule 69 (1)(a) which provides that in cases mentioned under sub-rule (4) of Rule 9 of the (Pension) Rules, the Accounts Officer would authorize payment of provisional pension. In the present case, admittedly provisional pension as per Rule 69(1)(a) is being paid to the writ petitioner. Rule 69(1)(c) of the CCS (Pension) Rules expressly provides that no gratuity shall be paid to the government servant until the conclusion of the departmental or judicial proceedings and issue of final orders thereon. Admittedly, in the present case, the criminal case filed against the writ petitioner is still pending and, thus, in terms of Rule 69(1)(c), no gratuity would be payable to the writ petitioner.

13. In our view, the learned Single Judge has erred in proceeding on the basis that Rule 9(1) is applicable on the facts of this case. Further, the interpretation placed by the learned Single Judge on Rule 9(1) is also erroneous. The power under Rule 9(1) to withhold the pension due where a pensioner is found guilty of grave misconduct or negligence cannot be limited to only those cases where the Government has suffered any pecuniary loss. This has been explained by the Supreme Court in the case of **Union of India v. B. Dev** (supra) as under:-

> "11. Rule 9 gives to the President the right of -(1) withholding or withdrawing a pension or part thereof, (2) either permanently or for a specified period, and (3) ordering recovery from a pension of the whole or part of any pecuniary loss caused to the Government. This power can be exercised if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service. The power, therefore, can be exercised in all cases where the pensioner is found guilty of grave misconduct or negligence during the period of his service. One of the powers of the President is to recover from pension, in a case where any pecuniary loss is caused to the Government, that loss. This is an independent power in addition to the power of withdrawing or withholding pension. The contention of the respondent, therefore, that Rule 9 cannot be invoked even in cases of grave misconduct unless pecuniary loss is caused to the Government, is unsustainable."

14. We are also not in agreement with the view of the learned Single Judge that a criminal case pending against the writ petitioner under Section 498A of IPC has nothing to do with misconduct as an employee. Rule 13A of the CCS (Conduct) Rules which is quoted hereinbefore, inter-alia, proscribes a government servant from taking or demanding directly or indirectly any dowry from a parent or a guardian of a bride. The allegation against the writ petitioner is of an offence under Section 498A of IPC which relates to subjecting a woman to cruelty and in terms of explanation (b) to Section 498A of IPC, the expression cruelty includes harassment of a woman with a view to coerce her or any person related to her to meet any unlawful demand for any property or valuable security or where the harassment is on account of failure by her or any of her relatives to meet such demand. Thus, harassment of a woman on account of a demand of dowry would undoubtedly constitute misconduct as per CCS (Conduct) Rules. In the event the writ petitioner is found guilty of harassing his daughter-in-law on account of demand of dowry, he would indisputably be guilty of misconduct as per the relevant conduct rules. It is also admitted that the criminal case against the writ petitioner had been filed during the period when he was employed with the DVB.

15. Having held that the pension and gratuity of the writ petitioner can be withheld under Rule 9(4) read with Rule 69 of the CCS (Pension) Rules, it is not necessary for us to examine the question whether BSES Yamuna Power Limited is liable to discharge the dues of the erstwhile DVB with respect to the retirement benefits payable to employees who have superannuated prior to the unbundling of DVB.

16. In view of the above discussion, the impugned judgment dated 31.01.2013 is set aside. LPA No.219/2013 is dismissed and LPA No.495/2013 is allowed as above. The writ petitioner would be at liberty to approach this court in the event he is entitled to the other retirement benefits and the same are not paid to him in case the criminal case is decided in his favour.

17. The parties are left to bear their own costs.

ILR (2013) V DELHI 3563
LPA

SHRI RAJAN SHARMA ....APPELLANT

VERSUS

UNION OF INDIA & ANR. ....RESPONDENTS

(BADAR DURREZ AHMED, ACJ. & VIBHU BAKHRU, J.)

LPA NO. : 300/2013 DATE OF DECISION: 23.08.2013
C.M. NO. : 7637/2013

Service Law—Appellant having completed his term as a Member of the Railway Claims Tribunal, reapplied for another term and got selected but denied appointment on account of Sec. 10 of the Railway Claims Tribunal Act, 1987—His Writ petition dismissed by Single Judge. Held a conjoint reading of the Clauses (a) (b) (c) of Section 10 of the Act indicates that the appointment for second term is possible, for the constituents of the Railway Claims Tribunal, only on a higher post of the tribunal—A member of tribunal can be appointed as a Chairman or Vice Chairman but not as a member. Similarly, a Vice President can be appointed as a Chairman but not as a Vice Chairman or a member—Chairman being the highest post of the tribunal is ineligible for being appointed to the tribunal on his ceasing to hold office by virtue of Sec. 10(a) of the Act.

Also held that it is well settled that a statute must be interpreted by giving the words of the statue there

ordinary and plain meaning.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. Maninder Singh, Sr. Advocate with Mr. R.K. Saini.

FOR THE RESPONDENTS : Mr. V.S.R. Krishna with Mr. Abhishek Yadav for R-1 and 2. Mr. Sibo Sankar Mishra with Mr. A. Pathak for R-3.

CASES REFERRED TO:

1. *Union of India* vs. *R. Gandhi, President, Madras Bar Association:* (2010) 11 SCC 1.
2. *Harbhajan Singh* vs. *Press Council of India & Ors.:* (2002) 3 SCC 722.
3. *Dental Council of India and Anr.* vs. *Hari Prakash and Ors.:* (2001) 8 SCC 61.
4. *S.P. Sampath Kumar* vs. *Union of India:* (1987) 1 SCC 124.
5. *Suthendran* vs. *Immigration Appeal Tribunal,* (All ER at p.616) (1976) 3 All ER 611, 616.

RESULT: Appeal Dismissed.

VIBHU BAKHRU, J.

1. The present appeal impugns the order dated 04.03.2013 passed by a Single Judge of this court in writ petition being W.P.(C) No.1761/2012. The learned Single Judge has interpreted the provisions of Sections 5, 7 and 10 of the Railway Claims Tribunal Act, 1987 (hereinafter referred as the 'Act') and held that as per the said provisions, a person who has completed his term as a member of the Railway Claims Tribunal would not be eligible for being appointed for a second term at the same post. The appellant is aggrieved by the impugned judgment inasmuch as he having completed his term as a member of the Railway Claims Tribunal had reapplied for another term and had been selected for the same. However, subsequent to his selection, the appellant has been denied the

appointment to the post on account of the eligibility condition contained in Section 10 of the Act.

2. The short question before us is whether the provisions of the Act, in particular Section 10, renders a member of the Railway Claims Tribunal ineligible for being appointed for a second term as a member of the Tribunal.

3. The learned Single Judge considered the provisions of the Act and concluded as under:-

> "9. From the aforesaid discussion, the following conclusions emerge:
>
> (i) Though it is undisputed that the petitioner was put at No.1 in the selection list by the committee of appointments, the petitioner is being denied appointment on the ground of the bar contained in Section 10(c) of the Act
>
> (ii) Section 10(c) with its various sub-Sections provide for the avenues which are open, and thus also the avenues which are not open, after a person's term of appointment either as a member or Vice-Chairman or Chairman of the Railway Claims Tribunal comes to an end. With respect to a Chairman, there is a bar for appointment under the Government of India or Government of State. With respect to Vice-Chairman besides the afore-stated bar, there is an additional bar for being appointed as a Vice-Chairman or Member of the Railway Claims Tribunal, and, with respect to a Member, there is a bar for being appointed under the Government of India or Government of State and also as a Member of the Railway Claims Tribunal."

4. The learned counsel appearing for the appellant has contended before us that provisions of Section 10 of the Act do not expressly bar a person from being appointed as a member of the Railway Claims Tribunal on account of his having held the said post earlier. It is contended that in order to disqualify a member of a Tribunal who has completed his term from being re-appointed the same must be expressly provided by the words of the statute and in absence of express language to this effect such disqualification cannot be read into the statute. It is contended that clause (c) of Section 10 of the Act only provides that a member would be eligible for being appointed as the Chairman or Vice Chairman

of the Railway Claims Tribunal but does not expressly state that a member on ceasing to hold his office would not be eligible for being appointed as a member of the said Tribunal. It is contended that in absence of such express bar under the Act, no such disqualification should be read in Section 10 of the Act. In support of his contention, the appellant has relied upon the decision of the Supreme Court in the case of **Harbhajan Singh v. Press Council of India & Ors.:** (2002) 3 SCC 722.

5. It has also been contended on behalf of the appellant that restricting the appointment of the appellant as a member to only one term would also be unconstitutional. In support of this contention the appellant has relied upon the decision of a Constitution Bench of the Supreme Court in the case of **S.P. Sampath Kumar v. Union of India:** (1987) 1 SCC 124. Our attention has been drawn to paragraph 22 of the said judgment which reads as under:-

> "..... We would, however, like to indicate that appointment for a term of five years may occasionally operate as a disincentive for well qualified people to accept the offer to join the Tribunal. There may be competent people belonging to younger age groups who would have more than five years to reach the prevailing age of retirement. The fact that such people would be required to go out on completing the five years period but long before the superannuation age is reached is bound to operate as deterrent. Those who come to be Chairman, Vice Chairman or Members resign appointments, if any, held by them before joining the Tribunal and, as such there would be no scope for their return to the place or places from where they come. A five years period is not a long one. Ordinarily sometime would be taken for most of the members to get used to the service jurisprudence and when the period of only five years, many would have to go out by the time they are fully acquainted with the law and have good grip over the job. To require retirement at the end of five years is thus neither convenient to the person selected for the job nor expedient to the scheme....."

6. The appellant has also placed another decision of a Constitution Bench of the Supreme Court in the case of **Union of India v. R. Gandhi, President, Madras Bar Association:** (2010) 11 SCC 1 before us, in support of the contention that restricting the appointment of a

member of the Railway Claims Tribunal to only one term would render the provisions of Section 10 of the Act as unconstitutional and, thus, the same ought to be read down. He has relied upon the directions contained in paragraph 120 (ix) of the said judgment, which reads as under:-

> "(ix) The term of office of three years shall be changed to a term of seven or five years subject to eligibility for appointment for one more term. This because considerable time is required to achieve expertise in the field concerned. A term of three years is very short and by the time the members achieve the required knowledge, expertise and efficiency, one term will be over. Further, the said term of three years with the retirement age 65 years is perceived as having been tailor made for persons who have retired or shortly to retire and encourages these tribunals to be treated as post retirement heavens. If these tribunals are to function effectively and efficiently they should be able to attract younger members who will have a reasonable period of service."

7. We have heard the learned counsel for the parties at length.

8. The appellant who was a practicing advocate was selected as a Judicial Member, Railway Claims Tribunal, for a term of 5 years from 14.03.2005 to 13.03.2010. It is asserted that during the course of his tenure as a member of the Tribunal, the appellant discharged his functions diligently and performed exceedingly well.

9. Since, the term of the appellant was coming to an end on 13.03.2010, he responded to an advertisement, issued in December, 2009, for a post of a Judicial Member of the Railway Claims Tribunal and applied for reappointment at the said post. The appellant was interviewed on 07.05.2011 and was placed at first position in the select list. The select list prepared by the Selection Committee was approved by the Appointment Committee of the Cabinet (ACC). Thereafter on 13.05.2011, the appellant was called upon to furnish the attestation form, for the purposes of verification of his character and antecedents, which he did and it is stated that his character verification was also carried out.

10. Thereafter, apparently a complaint was received from one Shri Mahinder Sharma (who is asserted to be non-existent) and on the basis of that complaint a legal opinion was sought wherein it was opined that the appellant would not be eligible for the second term as a member of

the Railways Claims Tribunal by virtue of clause (c) of Section 10 of the Act. It is contended that on the basis of this opinion, the appellant was not issued an appointment letter and persons placed below him in the select list were appointed instead. Aggrieved by the same, the appellant preferred the writ petition wherein, the following prayers were made:-

> "a) A writ of Certiorari calling for the records of the case & peruse the same.
>
> b) A writ of Certiorari quashing the action on part of the respondent No.1 in ignoring the name of the petitioner for appointment as Member (Judicial) Railway Claims Tribunal as per selection held on 07.05.2011 and not issuing him the appointment letter, being illegal arbitrary, malafide, unjust without jurisdiction and in violation of the principles of natural jusice and estoppel.
>
> c) A Writ of Mandamus commanding the respondent to forthwith issue appointment letter to the petitioner as Member (Judicial) Railway Claims Tribunal, being the candidate having been placed at No.1 in the Select List of selection held for the purpose on 07.5.2011.
>
> d) A Writ of Mandamus commanding the Respondent to pay the costs of this petition to the Petitioner."

11. The said writ petition was dismissed by the impugned order as being without merit.

12. Although, it has been argued before us that the denial of appointment for a second term as a member of the Railways Claim Tribunal would be unconstitutional and, accordingly, the provisions of Section 10 of the Act should be read down, we are not inclined to entertain this challenge as the same was not the subject matter of the writ petition filed by the appellant. A perusal of the writ petition indicates that the appellant had not challenged the constitutional vires of the Act and, further, no prayer seeking to declare Section 10 of the Act as unconstitutional or read down that provision had been advanced before the learned Single Judge. There is also no material before us to examine the question whether the policy to deny appointment as a member for a second term is based on any intelligible criteria. We, therefore, refrain from entertaining this controversy which is sought to be raised for the

first time before us. Thus, the only question to be considered in the present petition is whether the language of the Act and, in particular Section 10, disqualifies a member of the Railway Claims Tribunal for being appointed for a second term at the same post.

13. The provisions of Section 5, 7 and 10 of the Act are relevant for the purposes of considering whether the same contain a bar for a member of the LPA No.300/2013 Page 7 of 18 Railway Claims Tribunal for being re-appointed as such for a second term. These Sections being relevant are reproduced hereunder:-

"5. Qualifications for appointment as Chairman, Vice-Chairman or other Member. -(1) A person shall not be qualified for appointment as the Chairman unless he

(a) is, or has been, a Judge of a High Court; or

(b) has, for at least two years, held the office of a Vice-Chairman.

(2) A person shall not be qualified for appointment as the Vice-Chairman unless he

(a) is, or has been, or is qualified to be, Judge of a High Court; or

(b) has been a member of the Indian Legal Service and has held a post in Grade I of that service or any higher post for at least five years; or

(c) has, for at least five years, held a civil judicial post carrying a scale of pay which is not less than that of a Joint Secretary to the Government of India; or

(d) has, for at least five years, held a post under a railway administration carrying a scale of pay which is not less than that of a Joint Secretary to the Government of India and has adequate knowledge of rules and procedure of, and experience in, claims and commercial matters relating to railways; or

(e) has, for a period of not less than three years, held office as a Judicial Member or a Technical Member.

(3) A person shall not be qualified for appointment as a Judicial Member unless he-LPA No.300/2013 Page 8 of 18

(a) is, or has been, or is qualified to be, a Judge of a High Court; or

(b) has been a Member of the Indian Legal Service and has held a post in Grade I of that service for at least three years;or

(c) has, for at least three years, held a civil judicial post carrying a scale of pay which is not less than of a Joint Secretary to the Government of India.

(4) A person shall not be qualified for appointment as a Technical Member unless he has, for at least three years, held a post under a railway administration carrying a scale of pay which is not less than that of a Joint secretary to the Government of India and has adequate knowledge of rules and procedure of, and experience in, claims and commercial matters relating to railways.

(5) Subject to the provisions of sub-section (6), the Chairman, Vice-Chairman and every other Member shall be appointed by the President.

(6) No appointment of a person as the Chairman shall be made except after consultation with the Chief Justice of India.

xxxx xxxx xxxx xxxx xxxx

7. Term of office.-The Chairman, Vice-Chairman or other Member shall hold office as such for a term of five years from the date on which he enters upon his office or until he attains,

(a) in the case of the Chairman, the age of sixty-five years; and

(b) in the case of the Vice-Chairman or any other Member, the age of sixty-two years;

whichever is earlier.

xxxx xxxx xxxx xxxx xxxx

10. Provision as to the holding of offices by Chairman, Vice-Chairman etc., on ceasing to be such Chairman or Vice-Chairman, etc.-On ceasing to hold office

(a) the Chairman of the Claims Tribunal shall be ineligible for

further employment either under the Government of India or under the Government of a State;

(b) a Vice-Chairman shall, subject to the other provisions of this Act, be eligible for appointment as the Chairman of the Claims Tribunal, or as the Chairman, Vice-Chairman or member of any other Tribunal established under any law for the time being in force, but not for any other employment either under the Government of India or under the Government of a State;

(c) a Member (other than the Chairman or Vice-Chairman) shall, subject to the other provisions of this Act, be eligible for appointment as the Chairman or Vice-Chairman or as the Chairman, Vice-Chairman or member of any other Tribunal established under any law for the time being in force, but not for any other employment either under the Government of India or under the Government of a State;

(d) the Chairman, Vice-Chairman or other Member shall not appear, act or plead before the Claims Tribunal."

14. In the case of **Harbhajan Singh** (supra), the Supreme Court quoted the following passage from Cross in Statutory Interpretation (3rd Edn., LPA No.300/2013 Page 10 of 18 1995) and applied the law explained therein in for interpreting the provisions of Section 6 of the Press Council Act, 1978:

> "9. The governing idea here is that if a statutory provision is intelligible in the context of ordinary language, it ought, without more, to be interpreted in accordance with the meaning an ordinary speaker of the language would ascribe to it as its obvious meaning, unless there is sufficient reason for a different interpretation. . . . Thus, an 'ordinary meaning' or 'grammatical meaning' does not imply that the Judge attributes a meaning to the words of a statute independently of their context or of the purpose of the statute, but rather that he adopts a meaning which is appropriate in relation to the immediately obvious and unresearched context and purpose in and for which they are used. By enabling citizens (and their advisers) to rely on ordinary meanings, unless notice is given to the

> contrary, the legislature contributes to legal certainty and predictability for citizens and to greater transparency in its own decisions, both of which are important values in a democratic society." (p.32 ibid).

The learned author cites three quotations from speeches of Lord Reid in House of Lords cases, the gist whereof is: (i) in determining the meaning of any word or phrase in a statute, ask for the natural or ordinary meaning of that word or phrase in its context in the statute and follow the same unless that meaning leads to some result which cannot reasonably be supposed to have been the legislative intent; (ii) rules of construction are our servants and not masters; and (iii) a statutory provision cannot be assigned a meaning which it cannot reasonably bear; if more than one meanings are capable you can choose one but beyond that you must not go (p.40, ibid). Justice G.P. Singh in his celebrated work -Principles of Statutory Interpretation (8th Edn., 2001) states (at page 54)

> "The intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence a construction which requires for its support addition or substitution of words or which results in rejection of words as meaningless has to be avoided."

The learned author states at another place (at p. 74, ibid) that the rule of literal construction whereby the words have to be assigned their natural and grammatical meaning can be departed from but subject to caution. The golden rule is that the words of statute must prima facie be given their ordinary meaning. A departure is permissible if it can be shown that the legal context in which the words are used or the object of the statute in which they occur requires a different meaning. To quote,

> "Such a meaning cannot be departed from by the Judges 'in the light of their own views as to policy' although they can 'adopt a purposive interpretation if they can find in the statute read as a whole or in material to which they are permitted by law to refer as aids to interpretation an

expression of Parliament's purpose or policy'. A modern statement of the rule is to be found in the speech of Lord Simon of Glaisdale in **Suthendran v. Immigration Appeal Tribunal,** (All ER at p.616) (1976) 3 All ER 611, 616 to the effect-'Parliament is *prima facie* to be credited with meaning what is said in an Act of Parliament. The drafting of statutes, so important to a people who hope to live under the rule of law, will never be satisfactory unless courts seek whenever possible to apply ''the golden rule" of construction, that is to read the statutory language, grammatically and terminologically, in the ordinary and primary sense which it bears in its context, without omission or addition. Of course, Parliament is to be credited with good sense; so that when such an approach produces injustice, absurdity, contradiction or stultification or statutory objective the language may be modified sufficiently to avoid such disadvantage, though no further'."

15. It is well settled that a statute must be interpreted by giving the words of the statute their ordinary and plain meaning. The Supreme Court in the case of **Dental Council of India and Anr. v. Hari Prakash and Ors.:** (2001) 8 SCC 61, stated the said principle as under:-

"7. The intention of the legislature is primarily to be gathered from the language used in the statute, thus paying attention to what has been said as also to what has not been said. When the words used are not ambiguous, literal meaning has to be applied, which is the golden rule of interpretation."

16. Applying the aforesaid principle of statutory interpretation, a plain reading of Sections 5 and 10 of the Act indicates that Section 5(3) of the Act provides for the qualifications required to be appointed as a judicial member of the Railways Claim Tribunal and Section 10 of the Act provides for the eligibility of a appointee to the Railway Claims Tribunal to take up further employment on his ceasing to hold office as a constituent of the Tribunal. While, Section 5 of the Act operates to specify the qualifications required of any person to be appointed as Member, Vice-Chairman or a Chairman of the Tribunal, the field of operation of Section 10 of the Act is restricted to appointees of the

Railways Claim Tribunal who have already served a term on the Tribunal.

17. It is apparent from the language of clause (c) of Section 10 of the Act that the eligibility of a member ceasing to hold office to be re-appointed is restricted to being appointed as a Chairman or a Vice Chairman of the Tribunal. Clause (c) of Section 10 of the Act is couched both in positive and negative terms. In a positive manner, a member of the Railways Claim Tribunal on ceasing to hold office as such can be appointed as:

(i) Vice Chairman of the Railways Claim Tribunal.

(ii) Chairman of the Railways Claim Tribunal

(iii) Member, Vice Chairman, Chairman of any other Tribunal other than Railways Claim Tribunal.

In a negative manner, the member would not be eligible for any other employment under the Government of India or under the Government of a State. Since, the eligibility of a member ceasing to hold office as a member Railway Claims Tribunal for appointment to the Railways Claims Tribunal is restricted only to the post of Vice Chairman or Chairman, the appointment as a member to the said Tribunal is clearly excluded. A conjoint reading of the clauses (a), (b), (c) of Section 10 of the Act indicates that the appointment for second term is possible, for the constituents of the Railway Claims Tribunal, only on a higher post of the Tribunal. A member of the Railways Claim Tribunal, thus, can be appointed as a Chairman or a Vice Chairman but not as a member of the Tribunal. Similarly, a Vice President can be appointed as a Chairman of the Railway Claims Tribunal but cannot be appointed as a Vice Chairman or a Member of the Tribunal. The Chairman being the highest post of the Tribunal, an incumbent on this post is ineligible for being appointed to the Railways Claims Tribunal on his ceasing to hold office as such by virtue of clause (a) of Section 10 of the Act. We are unable to read the provisions of Section 10 in any other manner.

19. The decision of the Supreme Court in the case of **Harbhajan Singh** (supra) does not support the case of the appellant in any manner. On the contrary it is clearly held by the Supreme Court that words of a statute must be given their ordinary grammatical and full meaning. In that case, the Supreme Court was concerned with the provisions of Section 6(7) of the Press Council Act, 1978 which read as under:-

"6(7). A retiring member shall be eligible for renomination for not more than one term."

20. The Court held that the language of Section 6(7) of the Press Council Act can be read as conferring a right on the retiring member to seek renomination as well as in an negative manner so as to make a retiring member not eligible for re-nomination for more than one term. The Court interpreted the provisions of Section 6(7) of the Press Council Act as under:-

"7. Clearly, the language of Sub-section (7) of Section 6 abovesaid, is plain and simple. There are two manners of reading the provision. Read positively, it confers a right on a retiring member to seek renomination. Read in a negative manner, the provision speaks of a retiring member not being eligible for re-nomination for more than one term. The spell of ineligibility is cast on "renomination" of a member who is "retiring". The event determinative of eligibility or ineligibility is "renomination", and the person, by reference to whom it is to be read, is "a retiring member". "Retiring member" is to be read in contradistinction with a member/person retired some time in past, and so, would be called a retired or former member. "Re" means again, and is freely used as prefix. It gives colour of "again" to the verb with which it is placed. "Renomination" is an act or process of being nominated again. Any person who had held office of member sometime in the past, if being nominated now, cannot be described as being "again nominated". It is only a member just retiring who can be called "being again nominated" or "renominated". No other meaning can be assigned except by doing violence to the language employed. The Legislature does not waste its words. Ordinary, grammatical and full meaning is to be assigned to the words used while interpreting a provision to honour the rule -the Legislature chooses appropriate words to express what it intends, and therefore, must be attributed with such intention as is conveyed by the words employed so long as this does not result in absurdity or anomaly or unless material -intrinsic or external -is available to permit a departure from the rule.

8. The provision is cast in present tense. A retiring member is ineligible for renomination. "Not more than one term" qualifies

"renomination". The words "retiring", used in present tense, and "renomination" speak aloud of the intention of the legislature. If the word "retiring" was capable of being read as "retired" (sometime in the past) then there would have been no occasion to use "renomination" in the construction of the sentence. If the intention of law-framers would have been not to permit a person to be a member of Council for more than two terms in his lifetime then a different, better and stronger framing of the provision was expected. It could have been said : "no member shall be eligible for nomination for more than two terms", or it could have been said : "a retired member shall not be eligible for nomination for more than two terms".

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16. We are clearly of the opinion that sub-Section (7) of Section 6 of the Press Council Act must be assigned its ordinary, grammatical and natural meaning as the language is plain and simple. There is no evidence available, either intrinsic or external, to read the word "retiring" as "retired". Nor can the word "renomination" be read as nomination for an independent term detached from the previous term of membership or otherwise than in succession. The provision on its plain reading does not disqualify or make ineligible a person from holding the office of a member of the Council for more than two terms in his life. The use of the words "retiring" as qualifying "member" coupled with the use of word "renomination" clearly suggests that a member is disqualified for being a member for the third term in continuation in view of his having held the office of membership for more than two terms just preceding, one of which terms, the later one, was held on renomination. Such an interpretation does not lead to any hardship, inconvenience, injustice, absurdity or anomaly and, therefore, the rule of ordinary and natural meaning being followed cannot be departed from."

(Underlining added)

21. In the case of **Harbhajan Singh** (supra), the Supreme Court reiterated the well settled rule of statutory interpretation that the language of a statute must be assigned its ordinary and natural meaning unless such an interpretation leads to some absurdity or anomaly and, applying

the said rule, interpreted Section 6(7) of the Press Council Act as per the plain meaning of the language used. In the present case, the language of clause (c) of Section 10 of the Act is also plain and clear. There is no ambiguity in the language of clause (c) of Section 10 of the Act. Intention of the Legislature has been clearly spelled out by the language itself. It is expressly provided that a member on ceasing to hold office would be eligible for appointment as a Chairman or Vice Chairman of the Railways Claim Tribunal or as a Chairman, Vice Chairman or Member of any other Tribunal. We are unable to read clause (c) of Section 10 the Act in any other manner except to mean that the eligibility of a member to be reappointed on ceasing to hold office as a member of the Railways Claims Tribunal is restricted to being appointed only as a Vice Chairman or Chairman of the Railway Claims Tribunal and thus the appellant would be ineligible for being reappointed as a member of the Railways Claim Tribunal for a second term.

22. We find no merit in the present appeal. The appeal and the pending application are dismissed with no order as to costs.

ILR (2013) V DELHI 3577
LPA

S. RAJU AIYER ....APPELLANT

VERSUS

JAWAHARLAL NEHRU UNIVERSITY & ORS. ....RESPONDENTS

(BADAR DURREZ AHMED, ACJ. & VIBHU BAKHRU, J.)

LPA NO. : 330/2013 DATE OF DECISION : 23.08.2013

Service Law—Compulsory Retirement—Appellant compulsarily retired on account of being found guilty of sexual harassment—Writ petition filed before Ld. Single Judge dismissed. Held in proceedings under Article 226 of the Constitution of India, the court is not

required to re-appreciate the evidence on the basis of which findings return in a domestic disciplinary proceedings—Court is not called upon to re-examine the material considered by the Inquiry Committee and the Appeals Committee -All that Court is required to examine is whether there is any material on the basis of which the inquiry committee could have come to a conclusion that the appellant was guilty of harassing respondent no.5 and whether the required procedure was followed—Held, no perversity in the findings arrived at by the inquiry committee and the appeals committee. Also held that the penalty imposed by the Registrar approved by the Vice Chancellor as well as Executive Counsel of the University and the Registrar being a University functionary as per Rule III (ix) of the GSCASH Rules there is no infirmity in his acting on behalf of the university for the purposes of disciplinary proceedings.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Ms. S. Janani.

FOR THE RESPONDENTS : Mr. Mohinder J.S. Rupal.

CASES REFERRED TO:

1. *Vishakha* vs. *State of Rajasthan:* (1997) 6 SCC 241.
2. *Union of India* vs. *H.C. Goel:* AIR 1964 SC 364.

RESULT: Appeal Dismissed.

VIBHU BAKHRU, J.

1. The present appeal impugns the order dated 13.03.2013 passed by a learned Single Judge of this Court in W.P.(C)2541/2011. The learned Single Judge has dismissed the writ petition filed by the appellant whereby the appellant had, *inter-alia,* challenged the punitive measure of compulsory retirement imposed on the appellant on account of him being found guilty of sexual harassment.

2. It is contended before us that the findings of guilt returned by the Enquiry Committee, Disciplinary Authority and the Appeals Committee are based on no evidence and are, thus, perverse. It is also contended on behalf of the appellant that the Registrar of the respondent is not the Competent Authority to impose the penalty and, therefore, the order imposing penalty is without jurisdiction and is liable to be set aside.

3. The learned Single Judge has rejected the contentions urged on behalf of the appellant and has held that the findings arrived at by the Enquiry Committee, which conducted the inquiry into the allegations levelled against the appellant, are correct and there is no perversity in the finding of guilt returned by the authority. The learned Single Judge has also rejected the contention that the Registrar of respondent no. 1 university is not competent to impose penalty as the same could have been imposed only by the Vice Chancellor.

4. The appellant was employed with the respondent no. 1 university as a Personal Assistant. A complaint was made by respondent no. 5, who is working as an Associate Professor at the Centre for South, Central, Southeast Asian and Southwest Pacific Studies, that she was harassed by the appellant. The substance of the allegations made in the complaint are as under:-

> 1. The appellant made frequent calls at the residence of respondent no. 5 on 10.4.2008, 12.4.2008 and 15.4.2008 and had consequently harassed her unnecessarily;
>
> 2. The appellant had sent two emails to respondent no. 5 on 11.4.2008 and 12.4.2008, which carried vulgar and filthy contents and were graphic in nature and were explicitly sexual asking for oral sexual favours etc. The said e-mails are stated to have been deleted by respondent no.5;
>
> 3. The appellant had followed and stalked respondent no.5 during her evening walks and thereby had created an overbearing and intimidating situation for her. It is also alleged that while crossing her at her evening walk on 28.9.2008, the appellant was touching himself in an obscene manner. All his actions of passive intimidation had seriously hampered respondent no. 5 in her routine.

5. The respondent no.1 University has constituted a Gender Sensitisation Committee against Sexual Harassment by a notification dated 16th April, 1999. The Committee so constituted is charged with the function of implementing the policy of respondent no.1 against sexual harassment and also the guidelines as laid down by the Supreme Court in the case of **Vishakha v. State of Rajasthan:** (1997) 6 SCC 241. The respondent no.1 University has also published Rules and Procedures of the Gender Sensitization Committee, which are applicable to the complaints of sexual harassment made on the campus of the respondent no. 1 university. The said Rules and Procedures are hereinafter referred to as "GSCASH Rules".

6. On receipt of the complaint, the Gender Sensitisation Committee Against Sexual Harassment (hereinafter referred to as "GSCASH Committee") of respondent no. 1 issued a restraint order dated 30.09.2008 against the appellant. The complainant (respondent no.5) reported a violation of this restraint order and, thus, a second restraint order was issued to the appellant on 26.02.2009. In terms of the GSCASH Rules, the complaint made by respondent no. 5 was examined by the Complaint Screening Committee and based on the recommendations of the Complaint Screening Committee, an Enquiry committee was formed on 12.03.2009 to inquire into the allegations made against the appellant. The Enquiry Committee framed the following charges:-

> "Whereas you have been charged with:
>
> 1. sending obscene emails to the complainant through fictitious identity in April 2008 and simultaneously making unnecessary phone calls at untimely hours to harass her even using derogatory language, And
>
> 2. that you have been passively intimidating the complainant by stalking her in August-September 2008 and have also used vulgar gestures by touching yourself in obscene manner on September 28, 2008."

7. The appellant denied the charges. The Enquiry Committee recorded the statement of respondent no. 5 (complainant) and examined 8 (eight) witnesses. The evidence of the 8 witnesses was also provided to the appellant although their identities were not disclosed. Although, the appellant was given full opportunity to submit questions for cross-examination of

the witnesses in accordance with the GSCASH Rules, the appellant did not avail of the said opportunity and did not submit any questions for any of the complainant's witnesses. However, the appellant did submit questions for the complainant and answers with respect to them were duly recorded. It is recorded that the conduct of the appellant before the Enquiry Committee was rude and that he also tried to intimidate the members of the Enquiry Committee. The tone and tenor of the letters written by the appellant to the Enquiry Committee is also rude and offensive. The learned counsel appearing on behalf of the appellant has fairly conceded that the complainant had misbehaved with the Enquiry Committee and his conduct was offensive and most undesirable. Be that as it may, the Enquiry Committee proceeded with the inquiry and after examining the witnesses and collecting the evidence arrived at the following findings"

> "18. After analyzing the allegations in the Complaint, perusing the available evidentiary material on record including statements of the witnesses, Complainant's and Defendant's depositions, report by the Cyber Cell, the email dated 08.10.2008 on the password verification request dated 3.10.2008 and the net searched documents dated 22.10.2008 and 24.10.2008 etc., it is proved that:
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> i. The Defendant has sent the two alleged obscene sexual emails to the Complainant through fictitious identity in April 2008, as alleged in the Complaint.
>
> ii. The Complainant had complained the issue of harassment by unnecessary phone calls at untimely hours by the Defendant to the respective Chairpersons and that they had a meeting with the two Chairpersons when the Defendant was advised to keep himself away from the Complainant. iii. Defendant had made unnecessary phone calls to the Complainant at untimely hours to harass her even using derogatory language.
>
> iv. The Defendant had been following and stalking the Complainant in August-September 2008 and had used vulgar gesture on 28.9.2008. It becomes clear in the light of the above mentioned facts that the Defendant had enough motives to sexually target the Complainant and further harass her which led her to even stop her evening walks, passively intimidated her and forced her

> to schedule her walks at an earlier time only to avoid any mishappening due to Defendant's deliberate moves. Complainant has proved all the later misdeeds of the Defendant with sufficient evidence.
>
> v. That apart, the Committee also views the repeated Restraint Order violations by the Defendant as also threats and intimidation tricks used by him to interfere with the Enquiry as also violation of the Office Memo issued by the appropriate authority dated 21.10.2009, seriously and therefore takes into consideration while recommending appropriate action against the Defendant."

8. In view of their findings, the Enquiry Committee recommended that the appellant be imposed the penalty of compulsory retirement without reduction of any financial benefits. The enquiry report dated 19.02.2010, was forwarded to the GSCASH Committee.

9. The Registrar of respondent no. 1 university issued a memorandum dated 25.06.2010 intimating the appellant that the Enquiry Committee had submitted a report wherein the appellant was found guilty of sexual harassment and that report and the recommendations made therein, had been accepted. The appellant was informed that a major penalty of compulsory retirement from the university without any reduction in financial benefits was proposed to be imposed and he could make any representation with respect to the same which would be considered by the Competent Authority. The contents of said Memorandum dated 25.06.2010 are reproduced as under:-

> "MEMORANDUM
>
> WHEREAS an Enquiry Committee was constituted by the GSCASH to enquire into the complaints of sexual harassment received from Dr. Shankari Sundararaman, Associate Professor, CSCSEASWPS/SIS against Sh. S. Raju Aiyer, Personal Assistant, CSPILAS/ SLL&CS.
>
> AND WHEREAS the GSCASH Committee served the charges against Sh. S.Raju Aiyer based on the report of the GSCASH Complaint Screening Committee and whereas the said Enquiry Committee has conducted a formal enquiry on the charges leveled against Sh. Raju Aiyer as per GSCASH norms.

AND WHEREAS the Enquiry Committee submitted the report of the enquiry vide its report dated 19th February 2010.

AND WHEREAS the Enquiry Committee, having inquired into the charges, has found him guilty of the charges framed against him.

AND WHEREAS the undersigned, after careful consideration of the report of the Enquiry Committee, has accepted the report and its recommendations and proposes to impose upon him the major penalty of Compulsory Retirement from the University service without any reduction in financial benefit.

Now, Therefore, Sh. S. Raju Aiyer is hereby given an opportunity of making representation on the penalty so proposed. Any representation that he may wish to make on the penalty proposed will be considered by the competent authority. Such representation, if any, should be made in writing and submitted so as to reach the undersigned not later than fifteen days from the date of receipt of this Memorandum, falling which the penalty as proposed above is liable to be imposed on him without any further notice.

The receipt of this Memorandum should be acknowledged.

Sd/
(V.K. JAIN)
Registrar"

10. The appellant sent various letters seeking certain documents and also informed that he would be exercising his right to appeal, to an Appeals Committee, against the penalty being imposed on him.

11. On 29.07.2010, the Registrar of the respondent no. 1 issued another memorandum informing the appellant that the Vice Chancellor had accepted the report submitted by the GSCASH Committee and after considering the representation of the appellant was satisfied that the charges levelled against the appellant were correct. Consequently, a penalty of compulsory retirement without any reduction in financial benefits was imposed on the appellant and his name was struck off from the rolls of the university. The said memorandum dated 29.07.2010 reads as under:-

"MEMORANDUM

WHEREAS an Enquiry Committee was constituted by the GSCASH to enquire into the complaints of sexual harassment received from Dr. Shankari Sundararaman, Associate Professor, CSCSEASWPS, SIS against Sh. S. Raju Aiyer, Personal Assistant, CSPILAS, SLL&CS.

AND WHEREAS the GSCASH Committee served the charges against Sh. S. Raju Aiyer based on the report of the GSCASH Complaint Screening Committee and whereas the said Enquiry Committee has conducted a formal enquiry on the charges leveled against Sh. Raju Aiyer as per GSCASH norms.

AND WHEREAS the Enquiry Committee having enquired into the charges submitted the report of the enquiry vide its report dated 19th February 2010.

AND WHEREAS the Enquiry Committee has found him guilty of the charges framed against him.

AND WHEREAS the Vice-Chancellor has accepted the Report submitted by the GSCASH Committee.

AND WHEREAS the undersigned vide memorandum dated 23rd June 2010 informed Sh Raju Aiyer of the proposal to impose upon him the major penalty of Compulsory Retirement without any reduction in financial benefit from the University service. He was given an opportunity of making representation on the penalty so proposed.

AND WHEREAS the undersigned after careful consideration of the representation submitted by Sh. Raju Aiyer in response to memorandum dated 23rd June 2010 and the comments of the Chairperson, GSCASH on the said representation and after taking into account the circumstances of the case, is satisfied that the charges against Sh. Raju Aiyer are correct.

NOW, THEREFORE the penalty of "Compulsory Retirement without any reduction in financial benefit" is hereby imposed on Sh. S. Raju Aiyer with immediate effect and accordingly his name stands struck off from the rolls of the University.

The receipt of this Memorandum should be acknowledged.

Sd/-
(V.K. JAIN)
REGISTRAR"

12. Aggrieved by the memorandum dated 29.7.2010, the appellant preferred a writ petition being W.P.(C) No. 5791/2010, which was disposed of by an order dated 22.09.2010 passed by a learned Single Judge of this Court, permitting the appellant to file an appeal and to raise all contentions before the Appeals Committee. Liberty was granted to the appellant to approach the Court again in the event the appellant was aggrieved by the decision of the Appeals Committee. The learned single judge further directed that "in the event an appeal was filed the same would be disposed of expeditiously, preferably within a period of 3 months from the date of filing of the appeal".

13. The appellant filed an appeal under the GSCASH Rules on 03.08.2010 which was considered by the Appeals Committee as constituted by the Vice Chancellor of the respondent no. 1 university. The Appeals Committee considered the entire matter and also separately met with the appellant and the complainant. The Appeals Committee after examining the matter concluded that the penalty of compulsory retirement without any reduction in financial benefits was adequate. A copy of the report dated 29.11.2010 of the Appeals Committee was forwarded to the Vice Chancellor who accepted the same in his capacity as the Chairman of the Executive Council. A memorandum dated 15.12.2010 along with a copy of the report of the Appeals Committee was forwarded to the appellant. The said memorandum reads as under:-

"MEMORANDUM

WHEREAS, Sh. S. Raju Aiyer has submitted an appeal dated 3rd August 2010 under GSCASH rules, as he is dissatisfied with the disciplinary action taken against him;

And Whereas, the Vice-Chancellor constituted an Appeals Committee, as per GSCASH rules, consisting of Prof. Nandu Ram -EC's nominee, Prof. Vidhu Verma -Chair and Prof. Saraswati Raju -Centre for Women Studies/SSS to consider his appeal against the imposition of penalty of Compulsory Retirement on him without any reduction in financial benefit vide memorandum

dated 29th July 2010.

And Whereas, the Appeals Committee was informed of the Hon'ble Court's order/22.9.2010 conveyed vide Dasti. No.28537-A/DHC/WRITS/D-82010 dated 28th September 2010.

And Whereas, The Chairperson of Appeals Committee vide letter dated 29th November 2010, has submitted the report of the Appeals Committee to the Vice-Chancellor;

And Whereas, the Appeals Committee interviewed the defendant and the complainant and discussed the matter separately at length with both of them;

And Whereas, the Appeals Committee is of the view that 'compulsory retirement' without any reduction in financial benefits imposed on Mr. Raju Aiyer is adequate.

Now, therefore, Whereas, considering the time-frame of the Hon'ble High Court's direction to dispose of the case within three months which is expiring on 22nd December 2010 and as it is not likely to hold a meeting of Executive Council before 22nd December 2010, the Vice-Chancellor, in his capacity as Chairman of the Executive Council, has accepted the report of the Appeals Committee, and the matter will be reported to the Executive Council at its next meeting.

A copy of the report of Appeals Committee is enclosed.

The receipt of this memorandum should be acknowledged.

Sd/-
(V.K. JAIN)
REGISTRAR"

14. Aggrieved by the decision of the Appeals Committee, the appellant preferred yet another writ petition being W.P.(C) No. 62/2011. It was contended on behalf of the appellant that the acceptance of the report of the Appeals Committee by the Vice Chancellor is bad in law as the recommendations of the Appeals Committee are to be placed before the Executive Council as per Rule X(3)(iv) of the GSCASH Rules which reads as under:-

"The Appeals Committee shall report to the Executive Council of Jawaharlal Nehru University its findings and recommendations on the nature of the action to be taken on the appeal"

15. The contention of the appellant that Rule X(3)(iv) of the GSCASH Rules had been violated was accepted by a learned single judge of this court and the writ petition being W.P.(C) no. 62/2011 was disposed of by an order dated 06.01.2011, the operative part of which, reads as under:-

"Having regard to what has been noticed above, I direct respondent No.1 to convene a meeting of the Executive Council within three months and place the recommendation of the Appeals Committee before it for its decision. In the meanwhile, the petitioner shall be allowed to retain the official accommodation on normal licence fee and in the event of an unfavourable order against the petitioner, he shall not be evicted from the accommodation till the expiry of a period of 15 days after the decision of the Executive Council.

Needless to say that in case, the decision of the Executive Council goes against the petitioner, he shall be at liberty to approach the Court again.

With this direction, the writ-petition is disposed of."

16. In compliance with the directions issued in W.P.(C) 62/2011, the recommendations of the Appeals Committee, disposing of the appeal filed by the appellant against the penalty imposed on him by the memorandum dated 29.07.2010, was placed before the Executive Council of the respondent no. 1 university. The Executive Council considered the same at a meeting held on 05.04.2011 and passed the following resolution:-

"Resolved to accept the recommendations of the Appeals Committee that the penalty of compulsory retirement without any reduction in financial benefits imposed on him will stand."

17. Aggrieved by the rejection of his appeal, the appellant preferred the writ petition being W.P.(C) 2541/2011 which has been dismissed by the order dated 13.03.2013 impugned in the present appeal.

18. It is contended before us that there is no evidence to hold the appellant guilty of the charges levelled against him. In particular, the

learned counsel appearing for the appellant has contended that the emails alleged to have been sent by the appellant, have not been produced as the same are stated to have been deleted. The appellant has also drawn our attention to the report obtained by the Cyber Cell of Delhi Police, which indicates that the appellant did not access his email account on 11/12.04.2008 i.e. the dates on which the alleged offending emails to the complainant were alleged to have been sent.

19. We are unable to accept the contention urged on behalf of the appellant that there is no material or evidence against the appellant in respect of the charges levelled against him. The Enquiry Committee had examined 8 witnesses and after considering the evidence available and the depositions received, the Enquiry Committee was satisfied that the appellant was guilty of the charges levelled against him. In our view, there is sufficient material to indicate that the appellant had been intimidating respondent no. 5 and had used vulgar gestures. It is also an admitted case that the appellant had made telephone calls to respondent no. 5 and respondent no. 5 had given her evidence that appellant had used derogatory language during those calls. Thus, even if the emails which are alleged to have been sent by the appellant in April 2008 are ignored, there is sufficient material available on record to find the appellant guilty of sexual harassment. Even, in respect of the emails alleged to have been sent in April 2008, the complainant has given evidence with regard to the same and this is not a case where evidence with regard to the said emails is completely absent. A Constitution Bench of Supreme Court, in the case of **Union of India v. H.C. Goel:** AIR 1964 SC 364, has held as under:-

"23. .....In exercising its jurisdiction under Art. 226 on such a plea, the High Court cannot consider the question about the sufficiency or adequacy of evidence in support of a particular conclusion. That is a matter which is within the competence of the authority which dealt with the question; but the High Court can and must enquire whether there is any evidence at all in support of the impugned conclusion. In other words, if the whole of the evidence led in the enquiry is accepted as true, does the conclusion follow that the charges in question is proved against the respondent? This approach will avoid weighing the evidence. It will take the evidence as it stands and only examine whether on that evidence legally the impugned conclusion follows or not."

20. In proceedings under Article 226 of the Constitution of India, the court is not required to re-appreciate the evidence on the basis of which finding have been returned in a domestic disciplinary proceeding. Thus, the evidence on the basis of which the Enquiry Committee has found the appellant guilty cannot be re-appreciated in these proceedings. We are not called upon to re-examine the material considered by the Enquiry Committee and the Appeals Committee as all that we are required to examine is whether there was any material on the basis of which the Enquiry Committee could have come to a conclusion that the appellant was guilty of harassing respondent no.5 and whether the required procedure was followed.

21. The respondent no. 1 university has followed the GSCASH Rules which are in accordance with the guidelines issued by the Supreme Court in the case of **Vishakha v. State of Rajasthan** (supra). Although, the identities of the witnesses have been concealed in accordance with the GSCASH Rules, nonetheless a copy of their depositions was made available to the appellant and the appellant was given due opportunity to submit questions to the witnesses. The appellant was also given full opportunity to lead evidence in his defence. In the circumstances, the appellant has been afforded adequate opportunity to contest the charges levelled against him and we do not find any error in the decision making process.

22. We are in agreement with the view of the learned Single Judge that there is no perversity in the findings arrived at by the Enquiry Committee and the Appeals Committee and, thus, we find no ground to interfere with the penalty imposed on the appellant.

23. The second contention raised on behalf of the appellant is that the Registrar was not authorised to impose the penalty on the appellant. This contention is also without merit. Rule VII (i) provides for the report of the Enquiry Committee to be forwarded to the Vice Chancellor for consideration of the appropriate university authorities. The memorandum dated 29.07.2010 issued by the Registrar indicates that the report of the Enquiry Committee dated 19.02.2010 was submitted by the GSCASH Committee to the Vice-Chancellor of the respondent no. 1 university and he had accepted the same. The report of GSCASH Committee having been accepted by the Vice Chancellor, the procedure of Rule VII of the GSCASH Rules has been indisputably complied with. In the present case,

the appellant had also preferred an appeal and the report of the Appeals Committee was also accepted by the Vice Chancellor in his capacity as the Chairman of the Executive Council and subsequently by the Executive Council of the respondent no. 1 university at its meeting held on 05.04.2011. It is, thus, indisputable that the penalty imposed on the appellant has been approved by the Vice-Chancellor as well as the Executive Council of the respondent no.1 university. The Registrar of the respondent no. 1 is a "university functionary" as per Rule III(ix) of the GSCASH Rules and there is no infirmity in his acting on behalf of the university for the purposes of the Disciplinary Proceedings. In any view of the matter, the grievance that the penalty has been imposed by the Registrar and not the Vice-Chancellor of the university does not survive as the decision to impose the major penalty has been affirmed by the Appeals Committee which has the approval of not only the Vice-Chancellor, but also of the Executive Council of the respondent no. 1 university.

24. We find no merits in the present appeal and the same is dismissed without any order as to costs.

ILR (2013) V DELHI 3590
CO. A. (SB)

S.P. GUPTA **....PETITIONER**

VERSUS

PACKWELL MANUFACTURERS (DELHI) PVT. LTD. **....RESPONDENT**

(R.V. EASWAR, J.)

CO. A. (SB) NO. : 35/2013 & CO. APPL. NOS. 399-1401/2013 **DATE OF DECISION: 26.08.2013**

Companies Act, 1956—Sec. 224(7)/397/398 & 402—Company Preferred an application U/s 224(7) to Central

Government for removal of auditors—Regional Director opined that it would not be proper to issue any order on the application since a petition U/s 397 & 398 was pending before CLB and the company was given option to approach CLB for necessary directions—Instead of the company, one of the promoter directors of the company filed the application before CLB without being authorised by the company and CLB disposed off that application as not filed by authorised person. Held no valid application filed before the CLB as a company is a distinct person in law—Though, a distinct corporate personality can act only through human agency, but that principle is applicable where the company professes to act itself and this principle cannot be pressed into service to support an argument that all the acts done by an individual share holder are those of the company —The principle of piercing the corporate veil cannot also be invoked since that principle is normally invoked only to reveal the true identity of a company and to expose those persons who seek to use the cloak of corporate personality to hide and shun such exposure.—Held, however the CLB in exercise of its powers U/s 402 can take a decision in the pending petition U/s 397/398, regarding the removal of auditors.

[Di Vi]

APPEARANCES:

FOR THE PETITIONER : Mr. Sudhir Nandrajag, Sr. Adv, with Mr. Atul Sharma, Mr. Nitesh Jain, Mr. Sugam Seth and Ms. Sagriti Ahuja, Advocates.

FOR THE RESPONDENT : Mr. U.K. Chaudhary, Sr. Advocate with Mr. Shario Reyaz and Mr. Mohd. Saif Abbasi, Advocates.

CASES REFERRED TO:

1. *M.S.D.C. Radha Ramanan* vs. *M.S.D. Chandrasekara and Anr.,* (2008) 6 SCC 750.
2. *Pearson Education INC* vs. *Prentice Hall India (P) Ltd. and Ors.,* 134 (2006) DLT 450.
3. *Sangramsingh P. Gaekwad* vs. *Shantadevi P. Gaekwad,* (2005) 11 SCC 314.
4. *Prem Lata Bhatia* vs. *Union of India & Ors.,* (2004) 58 CL 217 = (2003) 108 DLT 346.
5. *Cosmosteel P. Ltd. and Ors.* vs. *Jai Ram Das Gupta and Ors.,* AIR 1978 SC 375 = (1978) 48 COMPANY CASES 312.
6. *Shanti Prasad Jain* vs. *Union of India,* 1978 Bom. LR 778.
7. *Shanti Prasad Jain* vs. *Kalinga Tubes Ltd.,* (1965) 35 Company Cases 351.
8. *Tata Engineering and Locomotive Company Ltd.* vs. *State of Bihar,* AIR 1965 SC 40.
9. *United States* vs. *Milwaukee Refrigerator Transit Company,* (1905) 142 F.
10. *Salomon* vs. *Salomon & Co. Ltd.,* (1897) Appeal Cases 22.

RESULT: Appeal allowed.

R.V. EASWAR, J.

1. This is an appeal filed by one S.P. Gupta under Section 10F of the Companies Act, 1956 (hereinafter referred to as 'the Act'). It is directed against the order passed by the Company Law Board ('CLB', for short) on 26.04.2013 in Company Application No.156/2013 [in CO. PET. No.1(ND)/2010]. The contesting respondents are: (i) M/s. Packwell Manufacturers (Delhi) Pvt. Ltd.(R-1); (ii) Mrs. Rajni Gupta, W/o. Late Mr. B.C. Gupta (R-2) and (iii) Ms. Gudiya Gupta, D/o. Late Mr. B.C. Gupta (R-3).

2. The appeal came to be filed in the following circumstances. Respondent No.1 is a company incorporated on 13.03.1970 with an

authorised share capital of '15 lakhs. The appellant and respondent No.2 were the promoter directors of the respondent-company. M/s. Vinod Sanjeev Bindal & Co. Chartgred Accountants, were appointed the statutory auditors of respondent No.1 in 1980's. It would appear that the appellant was removed from the Board of Directors on 20.06.2009 under Section 283(1)(g) of the Act; earlier on 18.11.2008, respondent No.3 had been appointed as director of respondent No.1, allegedly without any meeting of the Board of Directors. Since differences between the appellant on the one hand and respondent No.2 and respondent No.3 on the other had cropped up, a petition under Section 397 and 398 of the Act was filed by the appellant before the CLB against the present respondents. The same was withdrawn on the ground that there were some technical errors and after rectifying them, it was filed again.

3. On 25.01.2010, the company petition came up for hearing before the CLB and *status quo* was granted.

4. On 17.02.2011 an application was filed by respondent No.1 before the Regional Director (NR), Ministry of Corporate Affairs, seeking removal of the statutory auditors M/s. Vinod Sanjeev Bindal & Co. The application was filed under Section 224(7) of the Act which says that the statutory auditors may be removed from office, before the expiry of the term for which they were appointed, by the company in general meeting after obtaining the previous approval of the Central Government in that behalf. The statutory auditors were appointed from the conclusion of the annual general meeting of respondent No.1 held in the year 2008 till the conclusion of the next annual general meeting for audit of the books of accounts for the financial year ended 31.03.2009.

5. On 13.12.2012, an order was passed by the Regional Director on the application for removal of the statutory auditors. This order was passed after considering the objections of the Chartered Accountants submitted through their letters and after giving them an opportunity of personal hearing. After considering the averments in the application setting out the reasons for seeking removal and the submissions of the Chartered Accountants the Regional Director arrived at the following findings: -

> *"i) The applicant company has filed an application under section 224(7) of the Companies Act, 1956 online on 17.02.2011 and physically on 18.02.2011 for removal of M/s. Vinod Sanjeev Bindal & Co., Chartered Accountants, Statutory Auditor of the Company for the audit of financial year 2008-09.*
>
> *ii) The application for removal of auditors was filed after filing of petition under section 397/398 before CLB against the company and others by Shri S.P. Gupta.*
>
> *iii) It is also confirmed that majority share holders have expressed their un-willingness for continuance of the present statutory auditors as they have lost confidence on the auditors.*
>
> *iv) The petition under section 397/398 of the Companies Act, 1956 is pending wherein issue of removal of Auditor is also under consideration before the CLB. The CLB has vast power under section 402 to regulate the affairs of the company including decision on removal of present auditors of the company."*

6. However, the Regional Director did not render any decision on the question of removal of the auditors, but held as follows: -

> *"5. Since the subject matter of removal of Auditor is still under consideration of a superior authority i.e. Company Law Board which is chaired by Judge (retd.) of Hon'ble High Court, the undersigned is of the opinion that it would not be proper to issue any order by this office in the matter till matter is under consideration of the Hon'ble Company Law Board. Therefore, the applicant Company may consider to approach the Hon'ble Company Law Board for necessary direction, if so desire. The present application is accordingly disposed off.*
>
> *However Company may apply again to this office, after obtaining necessary directions from the Hon'ble Company Law Board in the matter."*

7. After the aforesaid order was passed by the Regional Director, respondent No.3 filed an application before the CLB in Company Application No.156/2013 [in CO. PET. No.1(ND)/2010]. The prayers made in this application were (i) for passing directions for removal of the statutory auditors and for directing that the decision of the CLB shall be final and binding in this regard and no further approval from any other authority shall be required; (ii) for passing an order confirming the appointment of M/s. K.N.A. Associates, Chartered Accountants, as the statutory auditors of the company for the financial year 2009-2010 and

(iii) for passing such other orders or directions which the CLB may deem fit and proper. It needs to be noted that though the application for removal of the statutory auditors was filed before the Regional Director by the company (respondent No.1), the application before the CLB in Company Application No.156/2013 was filed not by the company but by respondent No.3. In the affidavit accompanying the application before the CLB, respondent No.3 affirmed that she was competent to swear and file the affidavit on her own behalf and on behalf of the other respondents i.e. the company as well as Mrs. Rajni Gupta (respondent No.2).

8. On 18.04.2013 the company application was taken up for hearing for the first time by the CLB and on this date, the following order was passed:-

> *"Ld. Counsel for the Petitioner accepts notice on CA No.156/13 filed by the Respondents and prays for a short adjournment to seek instructions. The matter is already listed on 22nd May 2013 at 10.30 A.M.*
>
> *Shri U.K. Chaudhary, Ld. Sr. Counsel for the applicants states that this board may hold that it has no jurisdiction to adjudicate on the removal of the Statutory Auditor which lies solely in the domain of the delegatee of the Central Govt., i.e. the Regional Director and dispose off CA 156/13 with a direction to the Respondents to take appropriate steps before the Regional Director.*
>
> *List on 26th April 2013 at 10.30 A.M. as Item No.1.*
>
> *Sd/-*
> *[Justice D.R. Deshmukh]*
> *Chairman"*

9. It is noteworthy that in the application before the CLB praying for orders for removal of the statutory auditors M/s. Vinod Sanjeev Bindal & Co. and for the appointment of M/s. K.N.A. Associates as statutory auditors for the financial year 2009-2010, a request was made on behalf of the applicant before the CLB that the CLB may hold that it has no jurisdiction to adjudicate on the removal of the statutory auditor which power remains with the Central Government under Section 224(7) of the Act.

10. The application was taken up for final hearing on 26.04.2013 by the CLB. After setting out the facts and the decision of the Regional Director, the application was disposed of by the CLB in the following manner:-

> *"5. The sole repository of the power conferred u/s. 224(7) is the Regional Director being the delegatee of the Central Govt. If the Regional Director being the sole repository of the power conferred u/s. 224(7) of the Companies Act has declined to exercise jurisdiction vested in him by law for the reasons stated by him, it is open to R-1 to take appropriate remedial measures as provided in law against such order. It is clarified that pendency of CP No.1(ND) of 2010 before this Board should in no manner be a ground for the Regional Director to decline to exercise jurisdiction vested in him by law under section 224(7) of the Companies Act 1956. Exercising liberty given by the Regional Director the Company may also choose to move a fresh application before the Regional Director under section 224(7) for the said purpose.*
>
> *6. It is also seen that the present application CA No.156/2013 has not been moved by R-1 company but only by R-3 who is not shown to be the authorized by R-1 to file such application. Even the affidavit of R-3 does not reveal that she has been authorized by the company to file the application on behalf of R-1 company.*
>
> *7. With the aforesaid clarification, the application CA No.156/2013 is disposed off.*
>
> *8. The matter is already listed on 22nd May 2013 at 10.30 A.M.*
>
> *Sd/-*
> *[Justice D.R. Deshmukh]*
> *Chairman"*

11. The present appeal has been filed against the aforesaid order passed by the CLB on 26.04.2013 in Company Application No.156/2013.

12. The contention of the appellant mainly is that the appeal raises the question of the power of the CLB to pass orders under Section 402 of the Act and whether, having regard to the pendency of Co. Pet. No.1(ND)/2010, the CLB was justified in law in not exercising the said

powers and in directing the applicant to move a fresh application before the Regional Director under Section 224(7). It is further submitted that having held that respondent No.3 did not have the authority from respondent No.1 to file the application, whether the CLB was right in law in proceeding to entertain and dispose of the application. It is contended that these are important questions of law which arise for consideration and my attention in this behalf was drawn to para 2(a) of the present appeal. It is further contended on behalf of the appellant that the question of removal or continuance of the statutory auditors M/s. Vinod Sanjeev Bindal & Co. was inextricably inter-twined with the proceedings pending before the CLB under Sections 397 and 398 of the Act, a position which was accepted even by the Regional Director and, therefore, it was only the CLB which had the power to deal with the application filed by respondent No.1 before the Regional Director, as rightly held by him. My attention was drawn to the findings of the Regional Director, particularly sub-paragraph (iv) of para 4 of his order in which he has observed that the issue of removal of the auditors is under consideration before the CLB in the pending petition under Sections 397 and 398 and, therefore, it was the CLB, with its vast powers under Section 402, which can regulate the affairs of the company including the question of removal of the statutory auditors. It is pointed out that no steps were taken by the company (respondent No.1), which filed the application before the Regional Director, against the order passed by the Regional Director on 13.12.2012. The application filed before the CLB in Company Application No.156/2013 was not filed by the company, but was filed by a person (respondent No.3) who was admittedly not authorised by the company to do so.

13. On behalf of the respondent, its learned counsel who appeard on advance notice, submitted that respondent No.3 as one of the majority shareholders was aggrieved by the order of the Regional Director passed on 13.12.2012 and therefore could validly move an application before the CLB and for this purpose there was no need to obtain any authorisation from the company. It was submitted that the statutory auditors are removed only by the majority shareholder in the annual general meeting and not by the company and, therefore, if there is any impediment in such removal, the majority shareholders is the person who is aggrieved and who is entitled to agitate the matter before the higher forum. It was submitted in this behalf that though Section 224(7) refers to the removal of the statutory auditors by the company, the company acts only through

human agency, which in this case is the majority shareholders, of which respondent No.3 is one and if this right to remove the statutory auditors is affected in any manner, it is open to the individual shareholder, as part of the majority shareholders, to seek the removal of the statutory auditors before the CLB, even if the company does not take any step in this behalf. It is also argued that the appellant herein cannot be said to be aggrieved by the order passed by the CLB and that whatever objections he has, can be ventilated before the Regional Director who stands seized of the matter, pursuant to the directions given in the impugned order.

14. In the rejoinder, the learned counsel for the appellant drew my attention to paragraph 24 of the application filed before the CLB by respondent No.3 in which it was stated that since the Regional Director had waived his power to grant approval, it was not for the company (respondent No.1) to approach the office of the Regional Director again. Respondent No.3 further stated in the said paragraph that it is open to the CLB to decide the matter and in fact requested the CLB to decide the matter, which decision would be final and binding. The submission is that having exhorted the CLB into rendering a decision, respondent No.3 later changed her mind and requested the CLB not to exercise the jurisdiction but to restore the matter for fresh decision by the Regional Director, on steps being taken by the applicant. It was further pointed out that even though it is true that it is only the shareholders who exercise the right of removing the statutory auditors, that is only an act of the company since a company has to necessarily act through human agency; it is submitted that this principle, however, cannot obliterate the corporate personality conferred upon the company and the act of removal of the statutory auditors is an act of the company, and not that of the majority shareholders.

15. As regards the question as to how the appellant is aggrieved by the impugned order, it is submitted on behalf of the appellant that during the financial year 2008-09 the appellant was undisputedly a director of respondent No.1 and any attempt to remove the statutory auditors of the accounts for the said financial year would act to the prejudice of the rights of the appellant and, therefore, the appellant was rightly aggrieved by the impugned order. It was also pointed out that it was on 24.08.2009 that the respondents and their relatives were allotted 73,170 equity shares which is an act of oppression. It is claimed that there are no minutes of the Board meeting showing this allotment.

16. The first question that falls for decision is whether there was a valid application before the CLB so as to enable it to pass the impugned order. Section 224(7) of the Act enables the company to approach the Central Government for obtaining the previous approval for removal of the auditors. Since it is the company which appoints the auditors, it is the company which can remove them, subject to the prior approval of the Central Government. In the present case, it was the company which made an application to the Central Government (and rightly so) for removal of M/s. Vinod Sanjeev Bindal and Co., Chartered Accountants. The Central Government acting through the Regional Director (NR), Ministry of Corporate Affairs, opined that it would not be proper to issue any order on the application of the company since the petition under Section 397 and 398 was pending consideration before the CLB. Accordingly no decision was taken on the application of the company. However, it was observed by him that the applicant-company may consider approaching the CLB for necessary directions, if it so desired. The company's application before the RD was not kept pending, but was disposed of. The company was advised to apply again, after obtaining the directions from the CLB in the matter. Thus it was the company which was given the liberty to approach the CLB. What, however, happened was that the company did not move any application before the CLB; it was respondent No.3 who filed the application before the CLB in Company Application No.156/2013. She was not authorised by the company to file the application and this fact is not disputed by the respondents. The CLB was also aware of the same and has said so in paragraph 6 of the impugned order. Nevertheless it chose to dispose of the application in the manner it did.

17. The consequence of the company not approaching the CLB and not taking any steps against the decision of the Regional Director can only be that the order of the Regional Director passed on 13.12.2012 became final. Since respondent No.3 was not authorised by the company to file any application on its behalf before the CLB pursuant to the order passed by the Regional Director, there was no valid application by the company before the CLB. There was nothing for the CLB to deal with or dispose of. However, as observed by the Regional Director in paragraph 4(iv) of his order, the petition under Section 397 and 398 was pending before the CLB in which the issue of removal of the auditor was also under consideration. This is also borne out by the pleadings before the

CLB in the said petition. If that is so, it would have been open to the CLB, while disposing of the petition under Section 397/ 398, to also deal with the question of the removal of the auditor by virtue of its powers under Section 402 of the Act. The same result, that is, that it was for the CLB which was seized of the petition under Section 397/398 of the Companies Act to decide the question of removal of the auditors would ensue even if it is assumed that there was a valid application before the CLB seeking permission for the removal of the auditors. Therefore, in both situations, that is to say, where it is assumed that there was a valid application before the CLB or where it is held that there was no valid application by the company before the CLB, the consequence would be the same, viz., that the CLB in exercise of its powers under Section 402 can take a decision in the pending petition under Section 397-398, regarding the removal of the auditors.

18. But then the learned counsel for the respondent submitted that it is the shareholders of a company who appoint the auditors and under Section 224(7) of the Act it is they who are entitled to remove him and not the company. The contention is opposed to the language of the provision which says that subject to the proviso to sub-section (5), any auditor appointed under the Section may be removed from office before the expiry of his term *"only by the company* in general meeting", after obtaining the previous approval of the Central Government in that behalf. The auditors can be removed only by the company but the power has to be exercised in the general meeting of the shareholders. There is always a distinction between the company and its shareholders and this is the effect of registration of a company, under Section 34 of the Act. Upon registration the company is constituted as a distinct and independent person in law and is endowed with special rights and privileges. It is in point of law a person distinct from its members. This well-settled principle emanates from the judgment of the House of Lords in the case of **Salomon vs. Salomon & Co. Ltd.,** (1897) Appeal Cases 22. There it was observed that a company is at law a different person altogether from the subscribers to the memorandum; it is not in law the agent of the subscribers or trustee for them. In **Tata Engineering and Locomotive Company Ltd. vs. State of Bihar,** AIR 1965 SC 40, it was held that a company being distinct from its board of directors, they cannot seek to enforce a right in their individual capacity which belongs to the company. Therefore, appointment of the auditors or their removal is an act of the

company as a distinct and separate entity and cannot be said to be an act of the shareholders merely because the company exercises such a right in the general meeting. Counsel for the respondent would, however, contend that such a distinction between the company and its shareholders cannot be made in the present case since the order of the Regional Director passed on 13.12.2012 affected the rights of the shareholder as shareholder and, therefore, respondent No.3 was entitled to file an application before the CLB, even though the company did not do so. This contention runs counter to the settled principle. If regard is had to the basic principle that the company is distinct from its shareholders, it should follow that the cause of the company cannot be canvassed by a shareholder acting individually and not on behalf of the company. It has been found as a fact, which is not disputed before me, that respondent No.3 was not authorised by the company to file the application before the CLB; if she had been specifically authorised to do so, then perhaps it would have been possible to argue that such filing was an act of the company. The principle that a company, even though a distinct corporate personality, can act only through human agency is applicable where the company professes to act itself and this principle cannot be pressed into service to support an argument that all acts done by an individual shareholder are those of the company. The principle of piercing the corporate veil cannot also be invoked since that principle is normally invoked only to reveal the true identity of a company and to expose those persons who seek to use the cloak of corporate personality to hide and shun such exposure. Traditionally, right from the days of the **United States vs. Milwaukee Refrigerator Transit Company,** (1905) 142 F, where it was observed by Sanborn, J. that *"where the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will disregard the corporate entity and treat it as an association of persons"*, the principle has been invoked only by the law to expose a fraud or a wrong. According to Gower, piercing or lifting the corporate veil is adopted when it is found that the principle of corporate personality is too flagrantly opposed to justice, convenience or the interests of the Revenue. No such situation arises in the present case. It appears that the rule has never been invoked in any case where a shareholder seeks to justify his act by saying that he and the company are one and the same and when he acted, it amounted to the company itself acting. It would be dangerous to accept such a sweeping proposition. In other words where the law requires a company to act or do a particular

thing, it would be no answer for a shareholder, who acts independently of the company, to invoke the doctrine of piercing the corporate veil and contend that his act was actually the act of the company. This position was recognised and invoked by Badar Durrez Ahmed, J. (as he then was) of this court in **Prem Lata Bhatia vs. Union of India & Ors.,** (2004) 58 CL 217 = (2003) 108 DLT 346, and the following observations are pertinent: -

"12. The question therefore is – can the corporate veil be lifted in the present case to reveal the identity of the person or persons behind it? In all cases where courts have permitted the lifting of the corporate veil, it has been so done to reveal the "true" identity of the company and to expose those persons who sought to use the cloak of corporate personality to hide and shun such exposure with a view to "defeat public convenience, justify wrong, protect fraud, or defend crime". I have not come across any case where a shareholder himself seeks to remove the veil and say to the court – "look, it is me, the company is only a facade!" But, this is what the petitioner wants this court to do to enable her to wriggle out of her liability under clause 8. As observed by the Supreme Court in Tata Engineering and Locomotive Co. Ltd. (supra), it would not be possible to evolve a rational, consistent and inflexible principle which can be invoked in determining the question as to whether the veil of the corporation should be lifted or not. Yet, the common thread running through cases where lifting of the veil has been permitted is that such lifting has always been sought by persons outside the company and it has never proceeded from those within and who hide behind the veil. Essentially, lifting of the veil has been permitted to prevent persons from taking refuge behind the veil and thereby take advantage of the separate juristic identity of the company. The doctrine has therefore been employed by the courts to prevent persons from taking advantage of their wrongs using the corporate entity as a shield. It cannot, therefore, be employed for permitting the petitioner to take advantage of her wrong in not taking written consent of the Government before permitting the said company to use the said shop. If the corporate veil canot be lifted, the inevitable conclusion is that the petitioner and the said company are separate and distinct persons. Consequently,

user by the said company of the said shop in the facts narrated above would be in violation of the terms and conditions of the license and, in particular, of clause 8 thereof. Clearly, then, the cancellation of the license would be in order. The 'domino effect' would be that the order of the estate officer and ultimately the judgment of the Additional District Judge upholding the eviction of the petitioner would all be unassailable."

In the light of the above, I am unable to look at the act of respondent No.3 in filing an application before the CLB as an act of the company itself under any principle or authority.

19. It is true that the Regional Director, being the delegatee of the Central Government, is empowered to accord previous approval under Section 224(7) for the removal of the auditors on an application being made to him by the company. However, clause (g) of Section 402 of the Act which deals with the powers of the CLB vis-a-vis an application under Section 397 or 398, confers wide powers upon the CLB while dealing with the application. It states that the CLB may pass any order under Section 397 or 398 providing for any matter, other than those specified in clauses (a) to (f), for which in its opinion it is just and equitable that provision should be made. The powers under clause (g) are very wide and while exercising them the only condition that needs to be satisfied is that there should be a nexus between the order that may be passed under the aforesaid clause and the object sought to be achieved by Sections 397 and 398. In **Shanti Prasad Jain vs. Union of India,** 1978 Bom. LR 778, Tulzapurkar, J. (as he then was) speaking for the Division Bench of the Bombay High Court dealt with the powers of the Court under Section 402 of the Act in extenso. In the opinion of the Division Bench, there are certain provisions in the Companies Act which deal with corporate management of a company through directors in normal circumstances, while Chapter VI of the Act which includes Sections 397 to 409 deals with emergent situations or extraordinary circumstances where the normal corporate management has failed and has run into oppression or mis-management and, therefore, steps are required to be taken to prevent oppression and mis-management in the conduct of the company's affairs. It was held that the powers of the Court under Chapter VI cannot be curtailed by reading them subject to the provisions contained under the other chapters of the Act dealing with normal corporate management. The Court contrasted the provisions of Part-A of Chapter

VI with those of Part-B. Whereas Part-A dealt with the powers of the Court (now Company Law Board), Part-B dealt with the powers of the Central Government to prevent oppression or mis-management. The Court noticed that while dealing with the similar emergent situations or extraordinary circumstances, it has placed restrictions or limitations on the powers of the Government acting under Sections 408 and 409, but no restrictions or limitations of any kind have been prescribed on the powers of the Court. It was observed that if the legislature had desired to place any limitations on the powers of the Court (now CLB) acting under Section 402, it could have stated so, but did not. Moreover, the Court held that the topics or subjects dealt with by Sections 397 and 398 are such that it becomes impossible to read any restriction or limitation on the powers of the Court acting under Section 402. The power of the Court under Section 397 is to make such order as it thinks fit, with a view to bringing an end to the matters complained of. It was held that having regard to the very wide nature of the power conferred on the Court and the object which is sought to be achieved through the exercise of such power, the only limitation that could be impliedly read on the exercise of that power would be that a nexus must exist between the order that may be passed thereunder and the object sought to be achieved by Sections 397 and 398. The Court also noticed from Section 398 read with Section 402 that if the Court is required to provide for the regulation of the conduct of the company's affairs in future because of oppression or mis-management that has taken place in the course of normal corporate management, the Court must have the power to supplant the entire corporate management (or corporate mis-management) by resorting to non-corporate management which may take the form of appointing an administrator or special officer or a committee of advisors to be in charge of the affairs of the company. It was eventually held by the Division Bench of the Bombay High Court that the powers of the Court under Section 402 of the Act cannot obviously have any regard to or be subject to the other provisions dealing with the corporate form of management.

20. The decision of the **Bombay High Court** (supra) highlights the position that Section 402 comes into operation under extraordinary circumstances and, therefore, the other provisions of the Act, which apply under normal circumstances, cannot curtail the powers of the Court exercised under that Section.

21. In **Cosmosteel P. Ltd. and Ors. vs. Jai Ram Das Gupta and Ors.,** AIR 1978 SC 375 = (1978) 48 COMPANY CASES 312, a three Judge Bench of the Supreme Court, speaking through D.A. Desai, J. was confronted with the question whether the direction of the Court under Section 402 of the Act for purchase of its own shares by a company, which involves a reduction in share capital, can be implemented only by following the procedure prescribed by Sections 100 to 104 of the Act. The Supreme Court held that Sections 397 and 402 appear to constitute a code by themselves for granting relief to the oppressed minority shareholders and for granting appropriate relief, the Court has been conferred with a power of widest amplitude, including the lifting of the ban imposed on the company by Section 77 from purchasing its own shares. When the Court exercised this power under Section 402 by directing the company to reduce its share capital by purchasing its own shares, albeit contrary to Section 77 of the Act, it cannot be expected that the power should be made subject to the company following the procedure laid down in Sections 100 to 104. According to the Supreme Court if such a limitation on the Court's power is to be imposed, it would amount to holding that the statutory power of the Supreme Court depends, for its exercise, upon the vote of the members of the company. That would lead to an unacceptable situation where the Court's direction could be defeated by the majority of the shareholders voting against the reduction of the share capital. This would make a mockery of the entire situation and would defeat the relief granted by the Court to the minority shareholders against acts of oppression and mis-management of the majority shareholders. Such a situation, in the opinion of the Supreme Court, cannot be countenanced.

22. The power of the Court under Section 402 can even extend to directing something which is not provided in the Act. For instance it has been held that the Court can direct the introduction of a clause in the articles of association which runs contrary to Section 255 of the Act **(Shanti Prasad Jain vs. Union of India)** (supra). In **Motion Pictures Association in re, 1984 (55) COMPANY CASES 375,** a Division Bench of this Court directed the alteration of the articles of association of the company and modified an article capable of preventing a duly elected representative body from functioning as such. In **Pearson Education INC vs. Prentice Hall India (P) Ltd. and Ors.,** 134 (2006) DLT 450, a learned Single Judge of this Court (A.K. Sikri, J., as he then was) held

that the jurisdiction of the CLB under Sections 397/398 and 402 is much wider and a direction can be given even contrary to the provisions of the articles of association; it even has the right to terminate, set-aside or modify any contractual arrangement between the company and any person. It was further observed that the just and equitable principle embodied in clause (g) of Section 402 is an equitable supplement to the common law of the company which is to be found in its memorandum and articles of association. This judgment has been approvingly cited by the Supreme Court in **M.S.D.C. Radha Ramanan vs. M.S.D. Chandrasekara and Anr.,** (2008) 6 SCC 750.

23. In **Sangramsingh P. Gaekwad vs. Shantadevi P. Gaekwad,** (2005) 11 SCC 314 the Supreme Court held that the Court while exercising its discretion is not bound by the terms contained in Section 402 of the Companies Act if in a particular fact situation any further relief or reliefs, as the Court may deem fit and proper, are warranted.

24. Having regard to the settled legal position as above, I have no hesitation in holding that notwithstanding that Section 224(7) of the Act names the Central Government as the authority competent to accord previous approval for the removal of the auditors on the application of the company, it would still be open to the Company Law Board, to accord or refuse such approval while dealing with a petition under Section 397/398 of the Act provided the exercise of such a power has a nexus with the object sought to be achieved by the ultimate order passed under Section 402. In the case before me the pleadings before the Company Law Board show that the removal of the auditors was specifically raised. The relief claimed in paragraph 35(h) of the petition before the CLB is as follows: -

> *"(h) Removal of the Auditors of the company if they have been changed by the respondent No.2 & 3 and to reappoint the previous Auditors who have been reappointed in the AGM held on 29.9.2009."*

25. The argument on behalf of the respondent that it is open to the appellant to appear before the Regional Director and raise all objections to the change of the auditors appears to me to be no solution; it is only an argument of convenience. The argument is without merit for two reasons. First, it is a question of exercise of the wide powers under Section 402 by the Company Law Board. If the CLB could examine the

question of change of auditors – whether it is an act of oppression or mis-management – while dealing with the petition under Section 397 and 398, I do not think it would be proper to relegate the appellant to the Regional Director; if the CLB can validly exercise a power, it should be permitted, - nay, it is bound - to do so. Secondly, it would be wholly inappropriate to permit two different authorities to deal with what essentially is a single grievance. If, as held by the CLB, the Regional Director is to deal with the question of removal of the auditors, it would result in this situation, namely, that a part of the grievance in the petition under Section 397-398 would be dealt with by the RD, while the other parts of the same grievance would be dealt with by the CLB. This would result in a very anomalous situation. It is well-settled that oppression and mis-management, within the meaning of Sections 397-398, are not constituted by distinct and separate acts, but are constituted by a single continuous act and it is not permissible to dissect the conduct of the alleged oppressor into separate acts of oppression or mis-management. In **Shanti Prasad Jain vs. Kalinga Tubes Ltd.,** (1965) 35 Company Cases 351, the Supreme Court, after a review of leading authorities expressed the opinion that in a petition under Section 397, in addition to showing that there is just and equitable cause for winding-up the company, the petitioner must further show ***"that the conduct of the majority shareholders was oppressive to the minority as members and this requires that events have to be considered not in isolation but as part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members".*** This is also the view in **Halsbury's Laws of England, 4th Edition, Volume 7, Para 1011.** Logically it would be proper that the entire petition under Sections 397 and 398 is dealt with by the CLB.

26. For the aforesaid reasons the impugned order passed by the CLB is set-aside and the appeal is allowed. The CLB will now deal with the question of removal of the auditors while disposing of the appellant's petition under Sections 397 and 398 of the Companies Act.

ILR (2013) V DELHI 3608
MAC. APP.

TARA SHARMA & ANR. ....APPELLANTS

VERSUS

THE NEW INDIA ASSURANCE CO. LTD. & ORS. ....RESPONDENT

(G.P. MITTAL, J.)

MAC. APP. NO. : 185/2009 DATE OF DECISION : 30.08.2013
MAC. APP. NO. : 236, 238/2009

Motor Accident Claim—In a road accident, a bus driven in a rash and negligent manner collided against a two wheeler consequent to which the driver of the scooter Naveen Chander Sharma and its pillion rider, Ajay Popli suffered injuries—Injuries suffered by Naveen Chander Sharma proved to be fatal and two separate claim petitions were filed, one by injured Ajay Popli and the other by the LRs of the deceased Naveen Sharma—Claims Tribunal vide a common judgment awarded compensation in both the said Petitions—Two appeals were filed by the Insurance Company on the ground that the driving license of the offending vehicle was fake and therefore the insurance company is entitled to be exonerated and the third appeal was filed by the LRs of Naveen Sharma for enhancement of the compensation. Held: To avoid its liability towards the insured, insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care regarding use of vehicle by a duly licensed driver or one who was not disqualified to drive. In the facts of the case, the driver of the offending vehicle had in his possession two licenses, out of which one was found out to be fake but it is not a case where the

insured, the owner of the offending vehicle, was aware of the possession of two driving licenses by the driver. On the other hand, the insured has deposed that in pursuance of the notice given by the Insurance Company, he had produced a copy of the driving license before them and that at the time of employing the driver he had also taken his driving test and found him to be a skilled driver. The license furnished by the insured was not got verified by the insurance company and insurance company failed to prove any willful or conscious breach of the terms and conditions of the insurance policy, by the insured and therefore the appeals filed by the insurance company are dismissed. As regards the appeal filed for enhancement of compensation, compensation under the head of loss of dependency enhanced from Rs.5,28,000/- awarded by the Tribunal to Rs.8,36,550/- after taking into consideration that the Tribunal had wrongly rejected an amount of Rs.2,950/- being earned by the deceased from part time employment. The compensation awarded by Claim Tribunal towards loss of love and affection, funeral expenses and loss to estate as Rs.25,000/- in all is also to be enhanced, for Rs.25,000/- is to be awarded under the loss of love and affection alone and therefore in addition to the said sum, Rs. 10,000/- awarded each towards funeral expenses and loss to estate.

I have perused the report of the National Consumer Dispute Redressal Commission in Jai Prakash Goyal. In the said case on facts the State Commission had found that the claimant himself, that is the owner of the vehicle had attached the driving licence No.S/7264/Una/93 in the name of driver Satish Kumar in the claim form filed by him with the claim. The said driving licence on verification was found to be fake. In the instant case in pursuance of the notice given by the Insurance Company, the owner of the offending vehicle (Rakesh Ahuja) produced a copy of the driving

licence Mark A. He stated that he took the driving test and found him (Bachan Singh) to be a skilled driver. The owner also deposed that he had seen the driving licence (Mark A) of Bachan Singh at the time he was employed by him. Thus, it is not a case where the insured was aware of the possession of two driving licences by the driver, thus, Jai Parkash Goyal relied upon by the learned counsel for the Insurance Company is not attracted to the facts of the present case. **(Para 8)**

In the case of **National Insurance Company Limited v. Swaran Singh & Ors.** 2004 (3) SCC 297, it was held that to avoid its liability towards the insured, insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the terms and conditions of the policy regarding use of vehicles by a duly licenced driver or one who was not disqualified to drive at the relevant time. It cannot be said that the Insurance Company has been able to discharge the onus of proving the negligence on the owner's part. On the other hand, there is ample evidence to show that the owner Rakesh Ahuja exercised due care to ensure that the vehicle is driven by a duly licenced driver. As stated above, R1W1's (Rakesh Ahuja's) testimony that he employed Bachan Singh on seeing his driving licence Mark A was not challenged in cross-examination. **(Para 9)**

In the case of **United India Insurance Company Ltd. v. Lehru & Ors.** 2003 (3) SCC 338, it was held by the Supreme Court that owner of a vehicle while hiring a driver is not expected to check the records of the licensing officer to satisfy himself that the driving licence is genuine. If the driver produces a driving licence which on the face of it looks genuine, the owner cannot said to be negligent. I would extract Para 20 of the report hereunder:-

> *"20. When an owner is hiring a driver he will therefore have to check whether the driver was a driving licence. If the driver produces a driving licence which on the*

face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner should then take the test of the driver. If he find that the driver is competent to drive the vehicle, he will hire the driver. We find it rather strange that Insurance Companies expect owners to make enquiries with RTO's, which are spread all over the country, whether the driving licence shown to them is valid or not. Thus where the owner has satisfied himself that the driver has a licence and is driving competently there would be no breach of Section 149(2)(a)(ii). The Insurance Company would not then be above of liability. If it ultimately turns out that the licence was fake the Insurance Company would continue to remain liable unless they prove that the owner/insured was aware or had notice that the licence was fake and still permitted that person to drive. More importantly even in such a case the Insurance Company would remain liable to the innocent third party, but it may be able to recover from the insured. This is the law which has been laid down in Skiandia's Sohan Lal Passi's and Kamla's cases. We are in full agreement with the views expressed therein and see no reason to take a different view." **(Para 10)**

In order to prove the deceased's income the claimants examined Gour Charan Sharma (PW-1) the deceased's father and M.K. Sharma (PW-2) Manager M/s. Parkash Brassware Industries. Income of Rs.5500/- from M/s. Parkash Brassware Industries was accepted by the Claims Tribunal. Income of Rs.2950/- as part time Production Controller from M/s. Aakar Creation was rejected on the premise that no document had been placed on record by the claimants to prove this income. This finding of the Claims Tribunal cannot be accepted as it is contrary to the record. **(Para 16)**

The deceased was a graduate from Punjab University. He had a good track record with his previous employers and

sufficient experience. The claimants were therefore, entitled to an addition of 50% towards future prospects in view of the law laid down in Sarla Verma and approved by the three Judge Bench decision of the Supreme Court in **Reshma Kumari & Ors. v. Madan Mohan & Anr.** 2013 (5) SCALE 160. Although, there were four claimants, that is, two parents and two siblings, no evidence was produced by the claimants that the deceased's father was not working or that the siblings were fully dependant on the deceased. In this view of the matter, there has been deduction of 50% towards personal and living expenses as against one-third made by the Claims Tribunal. The loss of dependency thus comes to Rs.8,36,550/- (5500/- + 2950/- + 50% x 1/2 x 12 x 11) as against Rs. 5,28,000/- awarded by the Claims Tribunal. **(Para 19)**

The Claims Tribunal awarded a sum of Rs.25,000/- in all towards loss of love and affection, funeral expenses and loss to estate. Loss of love and affection can never be measured in terms of money. Thus, uniformity has to be adopted by the Courts while granting non-pecuniary damages. The Supreme Court in **Sunil Sharma v. Bachitar Singh** (2011) 11 SCC 425 and in **Baby Radhika Gupta v. Oriental Insurance Company Limited** (2009) 17 SCC 627 granted only Rs.25,000/- (in total to all the claimants) under the head of loss of love and affection. Thus, I would enhance the compensation under this head to Rs.25,000/- . **(Para 20)**

Important Issues Involved: (A) To avoid its liability towards the insured, insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the terms and conditions of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant time.

(B) Loss of love and affection can never be measured in terms of money and thus uniformity has to be adopted by the court while granting non pecuniary damages.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. Navneet Goyal, Adv. with Ms. Mamta Bhardwaj, Adv.

FOR THE RESPONDENT : Mr. D.D. Singh, Adv. with Mr. Navdeep Singh, Adv. For R-1. Ms. Arati Mahajan, Adv. For R-4/DTC.

CASES REFERRED TO:

1. *Reshma Kumari & Ors.* vs. *Madan Mohan & Anr.* 2013 (5) SCALE 160.
2. *Sunil Sharma* vs. *Bachitar Singh* (2011) 11 SCC 425.
3. *Jai Parkash Goyal* vs. *United India Insurance Company Ltd.* II (2010) CPJ 183 (NC).
4. *Baby Radhika Gupta* vs. *Oriental Insurance Company Limited* (2009) 17 SCC 627.
5. *Sarla Verma (Smt.) & Ors.* vs. *Delhi Transport Corporation & Anr.,* (2009) 6 SCC 121.
6. *Ajay Popli* vs. *New India Assurance Company Limited & Ors.* Suit No.313/2008.
7. *Smt. Tara Sharma & Ors.* vs. *New India Assurance Company Limited & Ors.* Suit No.319/2008.
8. *National Insurance Company Limited* vs. *Swaran Singh & Ors.* 2004 (3) SCC 297.
9. *United India Insurance Company Ltd.* vs. *Lehru & Ors.* 2003 (3) SCC 338.

RESULT: Appeal allowed.

G.P. MITTAL, J.

CM. 7068/2009 (delay) in MAC APP.238/2009

There is a delay of 93 days in filing the Appeal. For the reasons as

stated in the Application, the delay of 93 days in filing the Appeal is condoned. The Application is allowed.

MAC.APP. 185/2009, MAC.APP. 236/2009 & MAC.APP. 238/2009

1. These three Appeals arise out of a common judgment dated 27.11.2008 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) in Suit No.313/2008 titled **Ajay Popli v. New India Assurance Company Limited & Ors.** and Suit No.319/2008 titled **Smt. Tara Sharma & Ors. v. New India Assurance Company Limited & Ors.**

2. MAC APP. 185/2009 is for enhancement of compensation preferred by the legal heirs of the deceased Naveen Chandra Sharma whereas MAC APPs.236/2009 and 328/2009 have been preferred by the New India Assurance Company Limited (the Insurance Company) on the ground that although the driving licence No.7620 held by the respondent Bachan Singh, the driver of the offending vehicle was found to be fake, the Claims Tribunal still made the Insurance Company liable to pay the compensation.

3. On 18.08.1999 at about 12:40 P.M. the deceased Naveen Chandra Sharma and Ajay Popli were driving on a two wheeler No.DL-7SC-4131. The two wheeler was being driven by Naveen Chandra Sharma (the deceased) while respondent (the claimant) Ajay Popli was sitting on the pillion. When the two wheeler reached near Todapur Picket, a bus No.DL-1P-6097 being driven by Bachan Singh in a rash and negligent manner came on the wrong side and collided against the two wheeler. Ajay Popli and Naveen Chandra Sharma suffered injuries. The injuries suffered by Naveen Chandra Sharma proved to be fatal. Two separate claim petitions were filed, that is, one by injured Ajay Popli (Suit No.313/2008) and the other (Suit No.319/2008) by the legal representatives of the deceased Naveen Chandra Sharma.

4. The Claims Tribunal awarded a compensation of Rs. 22,81,825/- towards pecuniary and non-pecuniary damages in favour of Ajay Popli and a sum of Rs. 5,53,000/- for the loss of dependency and the non-pecuniary damages in favour of the legal heirs of the deceased Naveen Chandra Sharma.

MAC.APP. 236/2009 & MAC.APP. 238/2009

5. The only ground of challenge raised in these appeals is that the

driving licence No.7260 held by the driver Bachan Singh and purported to have been issued by Licensing Officer, Pune was proved to be fake by the Insurance Company. Although another driving licence Mark A produced by Rakesh Ahuja, who was the owner of the Bus No. DL-1P-6097 was not got verified by the Insurance Company, yet in view of the provisions of Section 6 of the Motor Vehicles Act, 1932 (the Act) a driver cannot possess two driving licences and thus, the driving licence produced by Rakesh Ahuja, the owner of the bus (the insured) was of no consequence. Referring to **Jai Parkash Goyal v. United India Insurance Company Ltd.** II (2010) CPJ 183 (NC) the learned counsel for the Insurance Company prayed that the impugned order so far as it makes the Insurance Company liable to pay the compensation is liable to be set aside and the Insurance Company is entitled to be exonerated.

6. On the other hand, learned counsel for the claimants argues that the onus is on the Insurance Company to prove that there is a willful and intentional breach of the terms of policy on the part of the insured. Rakesh Ahuja's (insured's) testimony as R1W1 that driver Bachan Singh had produced a driving licence issued by the Transport Authority, Mathura to him and that he had employed Bachan Singh after taking a driving test and finding him to be a skilled driver, was not challenged in cross-examination. The Insurance Company never tried to verify the genuineness of the driving licence Mark A although its copy was produced when the insured received a notice to produce the driving licence. The learned counsel for the claimants, therefore, argues that the Insurance Company cannot be permitted to take a plea of breach of the terms and conditions of the policy to avoid the liability. In support of his contention, the learned counsel placed reliance on **National Insurance Company Limited v. Swaran Singh & Ors.,** (2004) 3 SCC 297 and **United India Insurance Company Ltd. v. Lehru & Ors.,** (2003) 3 SCC 338.

7. It is true that Section 6 of the Act puts restrictions on holding of a second licence by any person while he holds any driving licence which is already in force.

8. I have perused the report of the National Consumer Dispute Redressal Commission in Jai Prakash Goyal. In the said case on facts the State Commission had found that the claimant himself, that is the owner of the vehicle had attached the driving licence No'S/7264/Una/93 in the name of driver Satish Kumar in the claim form filed by him with the

claim. The said driving licence on verification was found to be fake. In the instant case in pursuance of the notice given by the Insurance Company, the owner of the offending vehicle (Rakesh Ahuja) produced a copy of the driving licence Mark A. He stated that he took the driving test and found him (Bachan Singh) to be a skilled driver. The owner also deposed that he had seen the driving licence (Mark A) of Bachan Singh at the time he was employed by him. Thus, it is not a case where the insured was aware of the possession of two driving licences by the driver, thus, Jai Parkash Goyal relied upon by the learned counsel for the Insurance Company is not attracted to the facts of the present case.

9. In the case of **National Insurance Company Limited v. Swaran Singh & Ors.** 2004 (3) SCC 297, it was held that to avoid its liability towards the insured, insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the terms and conditions of the policy regarding use of vehicles by a duly licenced driver or one who was not disqualified to drive at the relevant time. It cannot be said that the Insurance Company has been able to discharge the onus of proving the negligence on the owner's part. On the other hand, there is ample evidence to show that the owner Rakesh Ahuja exercised due care to ensure that the vehicle is driven by a duly licenced driver. As stated above, R1W1's (Rakesh Ahuja's) testimony that he employed Bachan Singh on seeing his driving licence Mark A was not challenged in cross-examination.

10. In the case of **United India Insurance Company Ltd. v. Lehru & Ors.** 2003 (3) SCC 338, it was held by the Supreme Court that owner of a vehicle while hiring a driver is not expected to check the records of the licensing officer to satisfy himself that the driving licence is genuine. If the driver produces a driving licence which on the face of it looks genuine, the owner cannot said to be negligent. I would extract Para 20 of the report hereunder:-

> *"20. When an owner is hiring a driver he will therefore have to check whether the driver was a driving licence. If the driver produces a driving licence which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner should then take the test of the driver. If he find that the driver is competent to drive the vehicle, he will hire the driver. We find*

it rather strange that Insurance Companies expect owners to make enquiries with RTO's, which are spread all over the country, whether the driving licence shown to them is valid or not. Thus where the owner has satisfied himself that the driver has a licence and is driving competently there would be no breach of Section 149(2)(a)(ii). The Insurance Company would not then be above of liability. If it ultimately turns out that the licence was fake the Insurance Company would continue to remain liable unless they prove that the owner/insured was aware or had notice that the licence was fake and still permitted that person to drive. More importantly even in such a case the Insurance Company would remain liable to the innocent third party, but it may be able to recover from the insured. This is the law which has been laid down in Skiandia's Sohan Lal Passi's and Kamla's cases. We are in full agreement with the views expressed therein and see no reason to take a different view."

11. Thus, the Insurance Company failed to prove any willful or conscious breach of the terms and conditions of the policy. It may also be noted that Section 6 of the Act puts restrictions on a person holding a second driving licence while he holds any driving licence which is in force. A fake driving licence cannot be said to be a driving licence for the time being in force. Thus, even if it is assumed that the owner was aware of the driving licence issued by the Licensing Officer, Pune if the same was found to be fake then the said driving licence shall be deemed to be not in force. Therefore, the Claims Tribunal's order making the Insurance Company liable to pay the compensation cannot be faulted.

12. No other ground has been raised by the Insurance Company in these two appeals. Both the appeals are accordingly dismissed.

MAC.APP. 185/2009

13. In this appeal the appellants who are parents and siblings of the deceased Naveen Chandra Sharma seek enhancement of compensation on the following grounds:-

(i) Deceased Naveen Chandra Sharma's income was proved as Rs.8450/- per month, the Claims Tribunal ought to have computed the compensation on this amount after making addition towards future prospects;

(ii) Keeping in view the age of the mother of the deceased, which was about 50 years, the Claims Tribunal ought to have adopted the multiplier of '13' as against '8' applied by it; and

(iii) The compensation awarded towards non pecuniary damages is on the lower side. 14. On the other hand, the learned counsel for the Insurance Company submitted that the compensation awarded is just and reasonable and did not call for any interference.

15. During inquiry before the Claims Tribunal, the claimants put up a case that deceased Naveen Chandra Sharma had an income of Rs.5500/- per month from M/s. Parkash Brassware Industries, in addition he had an income of Rs.2950/- per month from M/s. Aakar Creation where he was doing part time job. The Claims Tribunal believed the deceased's income to be Rs.5500/- per month on the basis of the muster roll Ex.PW-2/1 to Ex.PW-2/3, the extract of entries from the salary register Exs.PW-2/4 to PW-2/6 and the certificate Ex.PW-2/7 issued by the accountant. The Claims Tribunal held that no document had been placed on record by the claimants to prove that the deceased had an income of '2950/- from part time employment with M/s. Aakar Creation.

16. In order to prove the deceased's income the claimants examined Gour Charan Sharma (PW-1) the deceased's father and M.K. Sharma (PW-2) Manager M/s. Parkash Brassware Industries. Income of Rs.5500/- from M/s. Parkash Brassware Industries was accepted by the Claims Tribunal. Income of Rs.2950/- as part time Production Controller from M/s. Aakar Creation was rejected on the premise that no document had been placed on record by the claimants to prove this income. This finding of the Claims Tribunal cannot be accepted as it is contrary to the record.

17. Coming to the oral evidence in his Affidavit dated 20.09.2003 PW-1 swore that the deceased was getting a salary of Rs.2950/- from M/s. Aakar Creation as Production Controller on part time basis. He also proved a certificate Ex.PN issued by its Proprietor Bal Kishan in this regard. Admittedly, Bal Kishan was not produced to prove the certificate Ex.PN but, at the same time, neither the certificate nor PW-1's testimony that the deceased was working as a part time Production Controller was

challenged in cross-examination by the Insurance Company. Thus, on the basis of the preponderance of probabilities the income of Rs.2950/- per month as part time Production Controller was sufficiently proved by the claimants. The same ought to have been taken into account to determine the loss of dependency.

18. Coming to the multiplier to be adopted, in the ration card Ex.PM, the age of Smt. Tara Sharma, mother of the deceased was stated as 50 years. This ration card was issued in the year 1998. Thus, according to the ration card, she was about 51 years at the time of the accident. In his affidavit, PW-1 Gaur Charan Sharma stated the age of Smt. Tara Sharma to be about 58 years on 20.09.2003, that is on the date the Affidavit was sworn in. Thus, according to the ration card either way Smt. Tara Sharma was aged between 51 to 55 years on the date of the accident. As per **Sarla Verma (Smt.) & Ors. v. Delhi Transport Corporation & Anr.,** (2009) 6 SCC 121 in case of death of a bachelor, the age of the mother of the deceased is to be taken into consideration to select the multiplier to compute the loss of dependency. The appropriate multiplier in the age group of 51 to 55 years is '11'.

19. The deceased was a graduate from Punjab University. He had a good track record with his previous employers and sufficient experience. The claimants were therefore, entitled to an addition of 50% towards future prospects in view of the law laid down in Sarla Verma and approved by the three Judge Bench decision of the Supreme Court in **Reshma Kumari & Ors. v. Madan Mohan & Anr.** 2013 (5) SCALE 160. Although, there were four claimants, that is, two parents and two siblings, no evidence was produced by the claimants that the deceased's father was not working or that the siblings were fully dependant on the deceased. In this view of the matter, there has been deduction of 50% towards personal and living expenses as against one-third made by the Claims Tribunal. The loss of dependency thus comes to Rs.8,36,550/- (5500/- + 2950/- + 50% x 1/2 x 12 x 11) as against Rs. 5,28,000/- awarded by the Claims Tribunal.

20. The Claims Tribunal awarded a sum of Rs.25,000/- in all towards loss of love and affection, funeral expenses and loss to estate. Loss of love and affection can never be measured in terms of money. Thus, uniformity has to be adopted by the Courts while granting non-pecuniary damages. The Supreme Court in **Sunil Sharma v. Bachitar Singh**

(2011) 11 SCC 425 and in **Baby Radhika Gupta v. Oriental Insurance Company Limited** (2009) 17 SCC 627 granted only Rs.25,000/- (in total to all the claimants) under the head of loss of love and affection. Thus, I would enhance the compensation under this head to Rs.25,000/-.

21. In addition, the claimants are awarded Rs.10,000/- each towards funeral expenses and loss to estate.

22. The overall compensation is re-computed as under:-

Sl.No.	Compensation under various heads	Awarded by the Claims Tribunal	Awarded by this Court
1.	Loss of Dependency	\Rs.5,28,000/-	Rs.8,36,550/-
2.	Loss of Love & Affection	Rs. 25,000/-	Rs. 25,000/-
	Funeral Expenses Loss	(in all)	Rs. 10,000/-
	to Estate		Rs. 10,000/-
	Total	Rs. 5,53,000/-	Rs. 8,81,550/-

23. The compensation thus stands enhanced by '3,28,550/- which shall carry interest @ 7.5% per annum as awarded by the Claims Tribunal.

24. The New India Assurance Company Limited is directed to deposit the enhanced compensation along with proportionate interest with the Registrar General of this Court within six weeks.

25. The compensation already deposited shall be released in favour of the claimants, if not already released. The enhanced compensation along with proportionate interest shall be equally distributed amongst the parents of the deceased, that is, appellants/claimants no.1 and 2. Since the claimants No.1 and 2 are in the advance stage of their life, 50% of the enhanced compensation shall be deposited in UCO Bank, Delhi High Court Branch, New Delhi in the form of FDR for a period of two years. Rest 50% along with proportionate interest shall be released on deposit.

26. MAC APP.185/2009 is allowed in above terms.

27. The statutory deposit of Rs.25,000/- shall be refunded to the

Appellant Insurance Company in MAC APP.236/2009 and MAC APP.238/2009.

28. Pending Applications also stand disposed of.

ILR (2013) V DELHI 3621
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PRABHAT & ORS. ....APPELLANTS

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(BADAR DURREZ AHMED, ACJ. & VIBHU BAKHRU, J.)

LPA. NO. : 12/2009 DATE OF DECISION: 30.08.2013

Allotment of Alternative Plot—Nodal Officer rejecting the claim of appellant for allotment for an alternative plot—Ld. Single Judge dismissed the writ petition—Question whether appellant eligible for allotment of alternative land as per the scheme framed by the committee constituted for allotment of alternate plot for acquiring lands for expansion of IGI Airport, New Delhi. Held, looking at the purpose for which the two criteria had been adopted in the scheme, the appellants fall within the criteria to be eligible for allotment—Indisputably appellants have been living on the community lands since over 50 years and thus the appellants cannot be held to be ineligible on account of any indiscrepancy between the land records and the land physically occupied by them.

[Di Vi]

APPEARANCES:

FOR THE APPELLANTS : Mr. Kanwar Udai Bhan.

FOR THE RESPONDENTS : Mr. Digvijay Rai for R-2/AAI Mr. Sanjay Kumar Pathak for R-4/Nodal Officer.

CASES REFERRED TO:

1. *Bhoop Singh* vs. *DDA & Ors.*: LPA No.260/2008.
2. *Harijan and Backward Jan Kalyan Samiti* vs. *Union of India and Ors.* Writ Petition (Civil) No. 17778/2006.
3. *Daryao Singh & Ors.* vs. *Union of India & Ors.* W.P.(C) No. 481/1982.

RESULT: Appeal Allowed.

VIBHU BAKHRU, J.

1. The present appeal challenges the order dated 12.02.2008 passed by a learned Single Judge of this Court in W.P.(C) No.1115/2008. The appellants had filed the writ petition challenging the order dated 01.08.2007 passed by the Nodal Officer rejecting the claim of the appellant for allotment of an alternative plot in lieu of the land occupied by them in the village of Nangal Dewat. The learned Single Judge had held that in order to be eligible for allotment of alternative lands, a person must satisfy the two conditions of eligibility as specified in the scheme which was adopted for the purpose of allotment of alternative plots. The two conditions being that a person should be in physical possession of the land in 2007 and the name of the person must be included in the list of original allottees of 1958. The Committee constituted to look into the issue of allotment of alternative land had not found the appellants to satisfy this eligibility criteria and hence, had rejected their claim for allotment of alternative land. The Nodal Officer (Respondent No. 4 herein) also rejected the claim of the appellants on the same basis. The learned Single Judge having found no infirmity in adopting the eligibility criteria dismissed the writ petition filed by the appellants.

2. The scheme for allotment of alternative plots to persons belonging to the communities to whom the land had been allotted earlier and the eligibility criteria framed thereunder has already been upheld by a Division

Bench of this Court in the judgment delivered on 16.04.2013 in the case titled as **Bhoop Singh v. DDA & Ors.:** LPA No.260/2008. It is contended by the learned counsel appearing for the appellants that he is not assailing the scheme but is limiting the challenge in the present appeal to the decision of the Nodal Officer/Committee in finding the appellants not eligible for allotment of an alternative plot. It is contended that the appellants fulfil the specified criteria and, thus, ought to be allotted an alternative plot. Thus, the only question to be considered in the present appeal is whether the appellants are eligible for allotment of alternative land as per the scheme framed by the Committee, constituted for determination of the allotment of plots in lieu of lands recorded in the name of communities, and adopted by the Ministry of Civil Aviation, Union of India.

3. The relevant facts for considering the controversy in the present appeal are as under.

4. A notification under Section 4 of the Land Acquisition Act was issued on 28.04.1972 for acquiring the lands of village Nangal Dewat for the public purpose of expansion of IGI Airport, New Delhi. The notification dated 28.04.1972 was followed by a declaration under Section 6 of the said Act on 22.08.1972. Subsequently, pursuant to the land acquisition proceedings, an award dated 14.08.1986 was passed. The said award was challenged before this Court in W.P.(C) No. 481/1982 titled as **"Daryao Singh & Ors. v. Union of India & Ors."**. The said writ petition was disposed of on 02.08.2001 with Airport Authority of India (Respondent no. 2 herein) making a statement that all persons whose names appeared in the award would be allotted alternative lands in terms of the Rehabilitation Scheme which would be framed within a period of six months. On the said statement being recorded, the petitioners therein gave up their challenge to the proceedings. A review application no. 9312/2001 seeking review of the order dated 02.08.2001 was filed by the Harijan and Backward Jan Kalyan Samiti wherein a grievance was raised that names of several persons had not been included in the list of persons to whom alternative lands were proposed to be allotted by the Nodal Officer. In these proceedings, it was explained by the Nodal Officer that certain lands were recorded in the name of four communities i.e. Makbuja Jullahan, Makbuja Chamaran, Makbuja Kumharan and Makbuja Ahle as the said lands were not allotted to any individual but to the said communities. The Court was of the view that alternative plots should be

allotted to such communities as a group and not to individuals comprised in the group. It would be up to the group to divide the alternative land amongst its constituents. The prayer made by Harijan and Backward Jan Kalyan Samiti for allotment of separate individual plots to persons who were in occupation of the community lands was rejected.

5. Subsequently, Harijan and Backward Jan Kalyan Samiti filed a separate writ petition being Writ Petition (Civil) No. 17778/2006 titled **Harijan and Backward Jan Kalyan Samiti v. Union of India and Ors.** During the pendency of the said petition, a meeting took place in the office of the Joint Secretary (Civil Aviation) on 14.03.2007 wherein it was decided to constitute a Committee to look into the issue of eligibility of alternative plots to persons who are in possession of land recorded in the name of the communities in village Nangal Dewat. During the course of submission before this court on 31.05.2007 in Writ Petition (Civil) No. 17778/2006, the following statement of the learned counsel appearing on behalf of Airport Authority of India was recorded:-

> "The report of the Committee constituted by the Joint Secretary, Civil Aviation to look into the issue of allotment of alternative plots in respect of the land recorded in the name of Committee in Village Nangal Dewat has been accepted by the Ministry. The residents of land recorded in the names of Communities would be considered for allotment of individual plots and such eligibility would be considered on the basis of the list of 122 persons that was prepared in the course of 1958 consolidation proceedings and this list of 122 persons would be the outer limit for examining the eligibility of alternative plots. The eligibility would be considered on the basis of the same criteria which has been evolved for considering the eligibility of other persons in the rehabilitation scheme."

6. The village lands of Nangal Dewat consisted of old abadi as well as extended *abadi* area. Whilst, revenue records had been prepared for the extended *abadi* area. No such record had been prepared for the old *abadi* area. In the present case, the appellants occupied lands in the extended *abadi* area of the village.

7. The Committee constituted, pursuant to the decision taken during the meeting held on 14.03.2007, recommended that individual plots be allotted to persons occupying community lands in the old abadi area on

the basis of the survey conducted in the year 1972-73. However, for the purpose of determining the eligibility of such persons claiming alternative plots on the basis of lands in the extended abadi area, the Committee took the view that the records of 1958 may be considered only as a secondary evidence and a fresh survey be undertaken to ascertain the possession of lands in respect of 122 names that appeared in the records of 1958.

8. The Committee constituted by the Ministry of Civil Aviation adopted the following criteria for determining the eligibility of claimants for occupying the community lands for alternative plots:-

"Criteria for determining the eligibility of alternative plots:-

1. The list of 122 persons shall be the outer limit for examining the claims of individual plots (as contained in the order of Hon'ble High Court).
2. The Allottee in the list of 122 persons should also be in possession of the land in community land. In case of his death, his LRs should be in possession of the allotted land. Merely the allotment of land in the year 1958 should not be the sole basis for allotment of alternative plot.
3. The allotment of alternative plot should be considered on the basis of area shown in the record of 1958. However, if he is in actual possession of more/less area, as per verification report, the plot should be considered against the actual area in possession, but this will not be more than the allotted area.
4. The committee was of the view that the other secondary documents proving his possession in community land at village Nangal Dewat, Electricity Bill etc. may also be seen.
5. The Committee decided that the report submitted by the verification team headed by the Tehsildar consisting officials of different department / branches should be the main basis for examining the claims of the individual persons.
6. The Committee noticed that in the earmarking made in the year 1958, the plots were numbered. However, as on

date, the position differs due to a gap of approximately 50 years. Therefore, it was considered that a person may not be rejected merely because of reason that he is not occupying the same plot. However, he should be in possession of land in community land only, preferably in the same Khasra Number.

9. In order to verify the claims for alternative plots in lieu of land occupied by various claimants, a verification team consisting of seven officials including representatives of Airport Authority of India and the DDA and headed by the Tehsildar was constituted. The said team visited the village Nangal Dewat from 29.06.2007 to 04.07.2007 to verify the land in possession of the residents of village Nangal Dewat including the land in possession of the claimants.

10. The Committee examined the claims on the basis of the eligibility criteria adopted and submitted a report. Annexure-B to the report of the said Committee constituted to examine the eligibility of 122 persons for allotment of alternative land contains the list of claimants who were found to be ineligible for allotment of alternative land. The relevant extract of the said Annexure which relates to the claim of the appellants is extracted below:-

S. No. of the list of 122 persons Name of the Original Allottee Khasra No. Area in Sq. Yards Area in Biswa Name of the claimant Name of the persons found in possession by the Verification Team Relationship AREA Khasra No. Build Up/ Vacant Team

19 Surta S/o 1232/5 101 2 Prabhat, Raj Pal, Exchange 101 1232/5 Built Thoi Rajinder, Ishwar S/o Surta Mahender, Vijay, Sanjay, SS/o Banarsi Up

20 Mawashi S/o Maman 1232/5 101 2 Prabhat Singh S/o Surta S/o Thoi Prabhat Singh, Rajender SS/o Surta Purchase 175 1232/5 Built Up

11. The appellants are sons of one Surta whose name admittedly appears in the list of 122 persons as per the records of 1958. Surta is recorded as occupying an area of 101 sq. yards in Khasra No. 1232/5. The name of Surta (Surta son of Thoi) is placed at serial no. 19 of the list of 122 persons listed as original allottees. The name of one Mawashi

is listed at serial no. 20 of the same list. The appellants are claiming an alternative plot of land on the basis of the land originally recorded in the name of their father (Surta) being his legal heirs and also on the basis of the plot of land acquired by their father Surta from Mawashi who is recorded at serial no. 20 of the said list. The claim of the appellants has been denied as the list annexed as Annexure-B to the aforementioned report of the Committee indicates that some persons other than appellants are in possession of the land which was originally recorded in the name of Surta. Thus, as per the respondents, while the first condition that the appellant's predecessor appears in the list of 122 persons as per record on 1958 is satisfied, the second condition that the said person/his heirs should be in possession of the land is not satisfied with respect to the land originally recorded in the name of Surta. It is relevant to note that the area recorded in the name of Surta in the 1958 list is 101 Sq. yards. The appellants have also been denied an alternative plot in respect of the lands acquired by their father Surta from Mawashi as Annexure-B to the aforesaid report indicates that while the appellants are in possession of the said land neither they nor their father were the original allottee(s) of the said land. It is further indicated in Annexure-B that the area of the land recorded in the name of Mawashi in 1958 was 101 sq. yards in Khasra No. 1232/5. The area of land found to be in possession of the appellants is 175 sq. yards in Khasra No. 1232/5.

12. The appellants have contended that their father was the owner and in possession of 252 sq. yards in Khasra No. 1232/5. Admittedly, the father of the appellants was recorded as the original allottee of a plot of land and it is contended that in addition he had acquired the adjacent plot measuring 126 sq. yards from one Mawashi (who was an original allottee) by a sale deed in 1966. It is submitted by the appellants that they/their father continued to be in possession of the land originally recorded in the name of their father and their father further added to his existing holding by acquiring the adjacent plot in 1966 and thus their right to an alternative plot of land with respect to the original holding as recorded in the 1958 list cannot be denied.

13. In our view, the controversy whether the appellants have fulfilled the eligibility criteria has to be resolved in favour of the appellants for the following reasons:

13.1 It is not in dispute that the name of the father of the appellants

appears in the list of 122 persons, who were original allottees in the record of 1958, at serial no. 19. It is also not in dispute that the appellants were in possession of lands in the same Khasra (i.e Khasra no. 1232/5) in June-July 2007 at the time when physical verification was undertaken by the Verification team. Thus on a strict reading, the eligibility criteria is satisfied. The appellants have been denied allotment of alternative lands because they have been found to be in possession of property which was earlier recorded in the name of Mawashi and was purchased by their father from Mawashi in 1966 and the plot of land which was recorded in the name of Surta in 1958 has been found to be in possession of some other persons. It is relevant to note that the property in possession of the appellants in June-July 2007 was a built up property and the area of the property admittedly exceeded the area recorded in the name of Mawashi (the area in possession of the appellants is found to be 175 sq. yards while the area originally recorded in the name of Mawashi is 101 sq. yards). Thus, indisputably, the appellants were in possession of lands in Khasra No. 1232/5 other than the land standing in the name of Mawashi in the 1958 list. While, the appellants have contended that they not only continued to be in possession of the land standing in the name of Surta (serial no. 19) but also the additional land subsequently purchased from Mawashi (serial no. 20). Both these lands are adjoining and are in the same Khasra namely Khasra No. 1232/5. It is further noteworthy that whereas the properties were described as vacant earlier, the same have been built up and to that extent the character of the property has also changed. If it is accepted that entire land allotted to Surta has been disposed of by him, there is no explanation as to how the appellants are in possession of land which is significantly more than that originally recorded in occupation of Mawashi and subsequently purchased from him. This aspect of the matter has not been considered by the Nodal Officer. The order passed by the Nodal Officer only records that the Committee had not found the appellants eligible for allotment of alternative plots in lieu of land recorded in the name of communities as the appellants did not fulfil the laid down eligibility criteria.

13.2 The Committee was conscious of the fact that the possession on ground would differ from records and had thus expressly provided for this contingency in paragraph 6 of the criteria for determining the eligibility for alternative plots. The Committee had noticed that in the earmarking made in the year 1958, the plots were numbered. However,

the possession as on ground differed due to a gap of approximately 50 years and therefore, the eligibility of a person was not be rejected merely because of the reason that he was not occupying the same plot. However, it was specified that he should be in possession of the land preferably in the same Khasra number. The case of the appellants clearly falls within this contingency as the appellants have been found to be in possession of the lands (which is admittedly larger than that purchased from Mawashi) in the same Khasra number as originally recorded and also the name of their father appears in the list of 122 persons.

13.3 We must also add that the rationale of evolving the twin criteria cannot be lost sight of. The purpose of adopting the twin criteria was to ensure that those persons who had been in continuous possession since 1958 ought to be given alternative plots, since they had been living on the land for over 50 years, which was required for the expansion of IGI Airport, and were required to be rehabilitated. Thus, those persons whose name appeared in the list of 122 persons but had subsequently sold or exchanged their lands and moved out of the area would not be eligible for claiming an alternative plot of land. Similarly, persons who had acquired property in the community lands after 1958 would also not be eligible since they could not be stated to be in possession as original allottees of the community land. This rationale has been explained in the report of the Committee constituted to examine the eligibility of the 122 persons recorded in the list of 1958 as under:-

> **"Cases of Purchase / Exchange / Sale / Allottee / His LRs Not in possession of Community Land:-**
>
> While examining the claims of the affected persons, it has been noticed that many of the claimants are in possession of community land but their names do not figure in the allotment list of year 1958. Such persons are in possession of land on the basis of purchase of such land or having exchanged their lands. Some of the claimants submitted the claims for alternative plots merely on the basis of the name of their Father/Grand Father etc. were figuring in the list of 122 persons but they are not found in actual possession in community land at the time of verification. The Committee is of the view that these persons do not fulfil the **two fold criteria i.e. names in the allotment list of 1958 and possession of community land.** Unless the claimant

> qualifies both conditions, he cannot be considered eligible for allotment of alternative plot."

The purpose of the scheme has also been explained by a Division Bench of this Court in the case of Bhoop Singh (supra) as under:-

> "9. The scheme framed by the Government, in the year 2007, to allot alternative plots to the persons who satisfied the twin requirements of being in possession at the time of preparation of the list of 1958 as well as at the time of inspection in June-July, 2007, was not challenged in the writ petition filed by the appellants. Though the appellant challenged the communication dated 1.8.2007, sent to them by the Nodal Officer, they chose to challenge the scheme on the basis of which their claim was examined and rejected by the Nodal Officer.
>
> Even if we proceed on the basis that challenge to the communication dated 1.8.2007 could also be construed as challenge to the scheme on the basis of which the claim of the appellants was rejected by the Nodal Officer, we find no merit in the challenge to the scheme. In the absence of any legal right vested in the appellants to claim alternative plots from the respondents, it was for the government to decide to what extent and on that basis it wanted to rehabilitate those persons whose names appear in the list of 1958, despite the fact that they had no legal right to obtain alternative plots from the Government by way of their rehabilitation. Unless it is shown that the criteria laid down by the government was irrational, arbitrary or discriminatory, the Court would not be justified in interfering with the decision taken by the government in this regard. We find nothing arbitrary or discriminatory in the government deciding to rehabilitate only those persons who were occupying the community land not only in the year 1958 but also in the year 2007, the purpose being to rehabilitate only those who continued to occupy the aforesaid land throughout since the time it was divided amongst the members of the community. The Government of India, in our view, was not unjustified in deciding not to allot alternative plots to those who had already parted with possession of the community land to others by way of sale, transfer or in some other manner. Having already taken advantage of the

community land by selling or transferring it to outsiders, these persons cannot be allowed to derive yet another advantage from the same community land by way of allotment of alternative plots to them. As regards those whose names did not appear in the list of 1958, we are of the opinion that since these persons did not possess the community land at the time it was divided amongst its members, they cannot claim allotment of alternative plots on the strength of acquisition of the community land from those who were occupying the said land in the year 1958."

Now, examining the case of the appellants from this standpoint, i.e. the purpose for which the twin criteria had been adopted, we find that the case of the appellants falls within the criteria adopted to examine the eligibility of the persons for allotment of alternative lands. Indisputably, the appellants have been living on the community lands since over 50 years and, thus, the appellants cannot be held to be ineligible on account of any discrepancy between the land records and the land physically occupied by them.

14. We accordingly, allow the present appeal and set aside the impugned order dated 12.02.2008 passed by the learned Single Judge and also the order dated 01.08.2007 passed by the Nodal Officer/Additional District Magistrate (South-West). We further remand the matter to the Nodal Officer (respondent no. 4) to consider the allotment of alternative lands to the appellants. However, we clarify that respondent no. 4 will determine the entitlement of the appellants on the basis of only two biswas of land which originally stood recorded in the name of the father of the appellants (i.e. Surta S/o Thoi). We further direct the respondents to allot an alternative plot of land to the appellants as per their entitlement.

15. Parties are left to bear their own costs.

ILR (2013) V DELHI 3632
MAC. APP.

ORIENTAL INSURANCE CO. LTD. ....APPELLANT

VERSUS

SHAHNAWAZ & ORS. ....RESPONDENTS

(G.P. MITTAL, J.)

MAC. APP. NO. : 293/2010 DATE OF DECISION: 30.08.2013

Motor Vehicle Act, 1988—Respondent no. 5 caused a motor vehicle accident on 25/04/2005 which resulted in death of one Abid and the MACT awarded a compensation of Rs.5,05,000/- in favour of respondents 1 to 3, legal heirs of the deceased—Appellant Insurance Company challenged the order of MACT on the ground that the respondent no. 5 possessed a license to drive LMV (NT) and not a commercial vehicle and as the offending vehicle was a commercial transport vehicle the appellant insurance company was not liable to compensate or in any case was not entitled to indemnify the insured and was hence entitled to recovery rights against respondent no. 4, the owner of the vehicle. Held: The owner of the vehicle is liable for breach of the terms of the insurance policy as he willfully allowed a driver to drive a commercial taxi when the driver possessed a license only to drive LMV (NT) The appellant insurance company however cannot avoid its liability towards third party as the liability of the insurance company to satisfy the award in the first instance is statutory and it can recover the amount of compensation paid form the owner and the driver (respondents 4 and 5) in execution of the MACT judgment without having recourse to independent civil proceedings.

Relying on Kusum Rai, this Court in Future General India Insurance Company Limited. v. Mohd. Ibrahim, MAC APP.837/2011, decided on 09.10.2012 held that the owner would be liable for breach of the terms of policy if he willfully allows a driver to drive a taxi when he (the driver) possesses a licence to drive LMV (NT). Para 18 of the report in Mohd. Ibrahim is extracted hereunder:-

> "18. A similar question arose for consideration in **National Insurance Company Limited v. Kusum Rai & Ors.** (2006) 4 SCC 250; where the driver possessed a licence for driving LMV (NT) and the vehicle driven by him was a taxi which was a commercial vehicle. The Supreme Court held that a taxi (a commercial vehicle) could not be driven on the basis of an LMV (NT) licence. Para 11 of the report is extracted hereunder:-
>
> "11. It has not been disputed before us that the vehicle was being used as a taxi. It was, therefore, a commercial vehicle. The driver of the said vehicle, thus, was required to hold an appropriate licence therefor. Ram Lal who allegedly was driving the said vehicle at the relevant time, as noticed hereinbefore, was holder of a licence to drive a light motor vehicle only. He did not possess any licence to drive a commercial vehicle. Evidently, therefore, there was a breach of condition of the contract of insurance. The appellant, therefore, could raise the said defence."
>
> **(Para 5)**

In view of the interpretation of *Swaran Singh* as construed by the Supreme Court in *Kusum Rai* in case of a commercial vehicle taxi involved in the accident, I cannot take a different view. **(Para 6)**

As far as the liability of the Insurance Company to satisfy the award with regard to the third party is concerned, the issue is settled by a three Judge Bench decision of the Supreme

Court in **Sohan Lal Passi v. P. Sesh Reddy,** (1996) 5 SCC 21; where while referring to section 96 (2) (b) (ii) of the Motor Vehicles Act, 1939 (the Act) the Supreme Court held that this Section cannot be interpreted in a technical manner. Section 96 (2) (b) (ii) only enables the Insurance Company to defend the liability to pay the compensation on the grounds mentioned in sub-section (2) including that there has been a contravention of the condition excluding the vehicle being driven by any person who is not duly licensed. It was held that if the person who has got the vehicle insured has allowed the vehicle to be driven by a person who is not duly licensed then only that clause shall be attracted. The Supreme Court held that the insurer has to satisfy the Tribunal that such violation or infringement on the part of the insured was willful. The relevant part of the report is extracted hereunder:-

> *"12. .....According to us, Section 96(2)(b)(ii) should not be interpreted in a technical manner. Sub-section (2) of Section 96 only enables the insurance company to defend itself in respect of the liability to pay compensation on any of the grounds mentioned in sub-section (2) including that there has been a contravention of the condition excluding the vehicle being driven by any person who is not duly licensed. This bar on the face of it operates on the person insured. If the person who has got the vehicle insured has allowed the vehicle to be driven by a person who is not duly licensed then only that clause shall be attracted. In a case where the person who has got insured the vehicle with the insurance company, has appointed a duly licensed driver and if the accident takes place when the vehicle is being driven by a person not duly licensed on the basis of the authority of the driver duly authorised to drive the vehicle whether the insurance company in that event shall be absolved from its liability? The expression 'breach' occurring in Section 96(2)(b) means infringement or violation of a promise or obligation. As such the*

insurance company will have to establish that the insured was guilty of an infringement or violation of a promise. The insurer has also to satisfy the Tribunal or the Court that such violation or infringement on the part of the insured was wilful. If the insured has taken all precautions by appointing a duly licensed driver to drive the vehicle in question and it has not been established that it was the insured who allowed the vehicle to be driven by a person not duly licensed, then the insurance company cannot repudiate its statutory liability under sub-section (1) of Section 96. In the present case far from establishing that it was the appellant who had allowed Rajinder Pal Singh to drive the vehicle when the accident took place, there is not even any allegation that it was the appellant who was guilty of violating the condition that the vehicle shall not be driven by a person not duly licensed. From the facts of the case, it appears that the appellant had done everything within his power inasmuch as he has engaged a licensed driver Gurbachan Singh and had placed the vehicle in his charge. While interpreting the contract of insurance, the tribunals and courts have to be conscious of the fact that right to claim compensation by heirs and legal representatives of the victims of the accident is not defeated on technical grounds. Unless it is established on the materials on record that it was the insured who had wilfully violated the condition of the policy by allowing a person not duly licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgment-debtor in respect of the liability in view of sub-section (1) of Section 96 of the Act....." **(Para 7)**

Since the appellant Insurance Company cannot avoid its liability towards third party, I am of the view that the liability of the Insurance Company to satisfy the award in the first instance is statutory. It is bound to satisfy the same and is

entitled to recover the amount of compensation paid from the owner and the driver (Respondents No.4 and 5) in execution of this very judgment without having recourse to independent civil proceedings. **(Para 8)**

Important Issue Involved: An insurance company even in a case of breach of the terms of the insurance policy by the insured, cannot avoid its liability towards third party, as the liability of the insurance company to satisfy the compensation award in the first instance is statutory.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. Pradeep Gaur, Advocate with Mr. Amit Gaur, Advocate.

FOR THE RESPONDENTS : None.

CASES REFERRED TO:

1. *National Insurance Company Limited* vs. *Kusum Rai & Ors.* (2006) 4 SCC 250.
2. *National Insurance Corpn. Ltd.* vs. *Kanti Devi* (2005) 5 SCC 789.
3. *Swaran Singh; Malla Prakasarao* vs. *Malla Janaki & Ors.,* (2004) 3 SCC 343.
4. *National Insurance Company Limited* vs. *Swaran Singh & Ors.,* (2004) 3 SCC 297.
5. *New India Assurance Co. Ltd.* vs. *Kamla,* 2001 ACJ 843 (SC).
6. *Sohan Lal Passi* vs. *P. Sesh Reddy,* (1996) 5 SCC 21.

RESULT: Appeal Disposed of.

G.P. MITTAL, J.

1. The Appellant Oriental Insurance Company Limited (the Insurance Company) impugns a judgment dated 03.09.2009 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) in Claim Petition No.20/

2008 whereby a compensation of Rs. 5,05,000/- was awarded in favour of the respondents Nos. 1 to 3 for the death of one Aabid who died in a motor vehicle accident which occurred on 25.04.2005.

2. The only ground of challenge raised in the instant appeal is that Ranjeet Singh (Respondent No.5) driver of the offending Tata Sumo bearing registration No.HR-55-AD-9530 possessed a licence to drive LMV (NT); thus he was not entitled to drive a commercial vehicle. The owner Jagar Singh (Respondent No.4) gave the vehicle to be driven by a person who did not possess a valid driving licence to drive a commercial transport vehicle. Thus, the appellant insurance company was entitled to be exonerated, in any case, the appellant was entitled to recovery rights.

3. It is admitted case of the parties that the vehicle involved in the accident, that is, HR-55-AD-9530 a Tata Sumo was registered as a tourist taxi. The Claims Tribunal while dealing with the issue of liability while relying on the judgment of the Supreme Court in **National Insurance Company Limited v. Swaran Singh & Ors.,** (2004) 3 SCC 297 held that every proven breach of the policy will not entitle the insurer to avoid his liability. Whether Tata Sumo was registered as a commercial vehicle or a non-commercial vehicle will not make any difference. Since Tata Sumo was covered within the category of LMV, the Insurance Company will not be entitled to take the plea of the breach of the terms and conditions of the policy. Paras 60 to 64 of the impugned judgment dealing with the issue of liability are extracted hereunder:-

> *"60. Merely because a person was holding a driving licence for a car or any other light vehicle like jeep, is found driving any other vehicle of same category, for which he had no licence, than in view of the observations of Hon'ble Supreme Court, it will not be a valid defence for the insurer to avoid his liability, in case accident takes place in this eventuality.*
>
> *61. In such a case, in order to have itself absolved of its contractual liability, insurance company would have to establish on record that possessing licence by the drive of another type of vehicle, played main role in the cause of accident.*
>
> *62. In the present case, by virtue of deposition of RW-1, it is apparent that respondent no.3 was authorized to drive car and jeep. It is also apparent from the record i.e. from Insurance*

> *Policy as well as from 'registration certificate' of the offending vehicle that TATA Sumo (offending vehicle) which is equivalent to Jeep, was being driven by respondent no.3 in this case. The only difference being, that the TATA Sumo was registered as "Commercial Vehicle". Insurance Company then was under a legal obligation to establish on record that non-possessing of a commercial licence by respondent no.3, was the "main cause" of this accident.*
>
> *63. However from the factual matrix proved on record, it is established that the accident had not taken place only because respondent no.3 was not possessing the licence to drive commercial vehicle or was not having that expert skill, which is required to drive "commercial vehicle". The manner in which the accident had taken place as deposed by PW-4 on record and as discussed while disposing off issue no.1 would not have made any difference, if the offending vehicle would have been a "private vehicle or a commercial vehicle."*
>
> *64. In view of these facts and circumstances, I am of the considered opinion that Insurance Company in such an eventuality cannot be absolved of its liability to indemnify the insured. As the offending vehicle was insured with them. In view thereof, liability to compensate the petitioners remains that of respondent no.1 Insurance Company."*

4. Mr. Pradeep Gaur, learned counsel for the appellant Insurance Company while relying on the judgment of the Supreme Court in **National Insurance Company Limited v. Kusum Rai & Ors.** (2006) 4 SCC 250 argues that Swaran Singh was duly considered by the Supreme Court in Kusum Rai and it was held that since a person possessing a non-transport (NT) licence is not entitled to drive a transport vehicle, the holder of a licence to drive LMV will not be entitled to drive a taxi and the Insurance Company will be entitled to avoid the insurance. In Kusum Rai the offending vehicle, that is, jeep bearing registration No.BR-03-P-9011 was being used as a taxi and thus was a commercial vehicle. Ram Lal, who was driving the earlier said vehicle possessed a driving licence to drive LMV. The taxi caused an accident resulting in death of a girl Anjali Rai, aged 12 years. In Kusum Rai the Claims Tribunal relying on **New India Assurance Co. Ltd. v. Kamla,** 2001 ACJ 843 (SC) held that

the Insurance Company cannot get rid of its third party liability. The appeal preferred by the Insurance Company was dismissed by the High Court. The Supreme Court considered its earlier report in **Swaran Singh; Malla Prakasarao v. Malla Janaki & Ors.,** (2004) 3 SCC 343 and held that in these type of cases the owner cannot be allowed to contend that he had no liability to verify the facts whether the driver possessed a valid driving licence or not. Paras 13 to 16 of the report in Kusum Rai & Ors. are extracted hereunder:-

> *"13. In* ***Swaran Singh*** *(2004) 3 SCC 297 to which one of us was a party, this Court noticed an earlier decision of this Court, namely, Malla Prakasarao v. Malla Janaki (2004) 3 SCC 343 wherein one of the members of the Bench, V.N. Khare, J. (as the learned Chief Justice then was) was a member. In that case, it was held:*
>
> > *"It is not disputed that the driving licence of the driver of the vehicle had expired on 20-11-1982 and the driver did not apply for renewal within 30 days of the expiry of the said licence, as required under Section 11 of the Motor Vehicles Act, 1939. It is also not disputed that the driver of the vehicle did not have driving licence when the accident took place. According to the terms of the contract, the Insurance Company has no liability to pay any compensation where an accident takes place by a vehicle, driven by a driver without a driving licence. In that view of the matter, we do not find any merit in the appeal."*
>
> *14. This Court in Swaran Singh clearly laid down that the liability of the Insurance Company vis-a-vis the owner would depend upon several factors. The owner would be liable for payment of compensation in a case where the driver was not having a licence at all. It was the obligation on the part of the owner to take adequate care to see that the driver had an appropriate licence to drive the vehicle. The question as regards the liability of the owner vis-a-vis the driver being not possessed of a valid licence was considered in Swaran Singh stating:*
>
> > "89. Section 3 of the Act casts an obligation on a driver to hold an effective driving licence for the type of vehicle

> > which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licences for various categories of vehicles mentioned in sub-section (2) of the said section. The various types of vehicles described for which a driver may obtain a licence for one or more of them are: (a) motorcycle without gear, (b) motorcycle with gear, (c) invalid carriage, (d) light motor vehicle, (e) transport vehicle, (f) road roller, and (g) motor vehicle of other specified description. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are 'goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi-cab', 'medium goods vehicle', 'medium passenger motor vehicle', 'motor-cab', 'motorcycle', 'omnibus', 'private service vehicle', 'semi-trailer', 'tourist vehicle', 'tractor', 'trailer' and 'transport vehicle'. In claims for compensation for accidents, various kinds of breaches with regard to the conditions of driving licences arise for consideration before the Tribunal as a person possessing a driving licence for 'motorcycle without gear', [sic may be driving a vehicle] for which he has no licence. Cases may also arise where a holder of driving licence for 'light motor vehicle' is found to be driving a 'maxi-cab', 'motor-cab' or 'omnibus' for which he has no licence. In each case, on evidence led before the Tribunal, a decision has to be taken whether the fact of the driver possessing licence for one type of vehicle but found driving another type of vehicle, was the main or contributory cause of accident. If on facts, it is found that the accident was caused solely because of some other unforeseen or intervening causes like mechanical failures and similar other causes having no nexus with the driver not possessing requisite type of licence, the insurer will not be allowed to avoid its liability merely for technical breach of conditions concerning driving licence."

15. *The matter came up for consideration again before a Division*

Bench of this Court in ***National Insurance Corpn. Ltd. v. Kanti Devi*** *(2005) 5 SCC 789 wherein this Court upon consideration of the observations made in Swaran Singh opined:*

> *"12. The decision in Swaran Singh case was not before either MACT or the High Court when the respective orders were passed. Therefore, we think it proper to remit the matter to MACT for fresh consideration. It shall permit the parties to lead such further evidence as they may intend to lead. The matter shall be decided keeping in view the principle enunciated by this Court in Swaran Singh case."*

16. In a case of this nature, therefore, the owner of a vehicle cannot contend that he has no liability to verify the fact as to whether the driver of the vehicle possessed a valid licence or not."

5. Relying on Kusum Rai, this Court in Future General India Insurance Company Limited. V. Mohd. Ibrahim, MAC APP.837/2011, decided on 09.10.2012 held that the owner would be liable for breach of the terms of policy if he willfully allows a driver to drive a taxi when he (the driver) possesses a licence to drive LMV (NT). Para 18 of the report in Mohd. Ibrahim is extracted hereunder:-

> "18. A similar question arose for consideration in **National Insurance Company Limited v. Kusum Rai & Ors.** (2006) 4 SCC 250; where the driver possessed a licence for driving LMV (NT) and the vehicle driven by him was a taxi which was a commercial vehicle. The Supreme Court held that a taxi (a commercial vehicle) could not be driven on the basis of an LMV (NT) licence. Para 11 of the report is extracted hereunder:-
>
> > "11. It has not been disputed before us that the vehicle was being used as a taxi. It was, therefore, a commercial vehicle. The driver of the said vehicle, thus, was required to hold an appropriate licence therefor. Ram Lal who allegedly was driving the said vehicle at the relevant time, as noticed hereinbefore, was holder of a licence to drive a light motor vehicle only. He did not possess any licence to drive a commercial vehicle. Evidently, therefore, there was a breach of condition of the contract of insurance.

> The appellant, therefore, could raise the said defence."

6. In view of the interpretation of *Swaran Singh* as construed by the Supreme Court in *Kusum Rai* in case of a commercial vehicle taxi involved in the accident, I cannot take a different view.

7. As far as the liability of the Insurance Company to satisfy the award with regard to the third party is concerned, the issue is settled by a three Judge Bench decision of the Supreme Court in **Sohan Lal Passi v. P. Sesh Reddy,** (1996) 5 SCC 21; where while referring to section 96 (2) (b) (ii) of the Motor Vehicles Act, 1939 (the Act) the Supreme Court held that this Section cannot be interpreted in a technical manner. Section 96 (2) (b) (ii) only enables the Insurance Company to defend the liability to pay the compensation on the grounds mentioned in sub-section (2) including that there has been a contravention of the condition excluding the vehicle being driven by any person who is not duly licensed. It was held that if the person who has got the vehicle insured has allowed the vehicle to be driven by a person who is not duly licensed then only that clause shall be attracted. The Supreme Court held that the insurer has to satisfy the Tribunal that such violation or infringement on the part of the insured was willful. The relevant part of the report is extracted hereunder:-

> *"12. .....According to us, Section 96(2)(b)(ii) should not be interpreted in a technical manner. Sub-section (2) of Section 96 only enables the insurance company to defend itself in respect of the liability to pay compensation on any of the grounds mentioned in sub-section (2) including that there has been a contravention of the condition excluding the vehicle being driven by any person who is not duly licensed. This bar on the face of it operates on the person insured. If the person who has got the vehicle insured has allowed the vehicle to be driven by a person who is not duly licensed then only that clause shall be attracted. In a case where the person who has got insured the vehicle with the insurance company, has appointed a duly licensed driver and if the accident takes place when the vehicle is being driven by a person not duly licensed on the basis of the authority of the driver duly authorised to drive the vehicle whether the insurance company in that event shall be absolved from its liability? The expression 'breach' occurring in Section 96(2)(b) means infringement or violation of a promise or obligation. As such the insurance company will*

have to establish that the insured was guilty of an infringement or violation of a promise. The insurer has also to satisfy the Tribunal or the Court that such violation or infringement on the part of the insured was wilful. If the insured has taken all precautions by appointing a duly licensed driver to drive the vehicle in question and it has not been established that it was the insured who allowed the vehicle to be driven by a person not duly licensed, then the insurance company cannot repudiate its statutory liability under sub-section (1) of Section 96. In the present case far from establishing that it was the appellant who had allowed Rajinder Pal Singh to drive the vehicle when the accident took place, there is not even any allegation that it was the appellant who was guilty of violating the condition that the vehicle shall not be driven by a person not duly licensed. From the facts of the case, it appears that the appellant had done everything within his power inasmuch as he has engaged a licensed driver Gurbachan Singh and had placed the vehicle in his charge. While interpreting the contract of insurance, the tribunals and courts have to be conscious of the fact that right to claim compensation by heirs and legal representatives of the victims of the accident is not defeated on technical grounds. Unless it is established on the materials on record that it was the insured who had wilfully violated the condition of the policy by allowing a person not duly licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgment-debtor in respect of the liability in view of sub-section (1) of Section 96 of the Act....."

8. Since the appellant Insurance Company cannot avoid its liability towards third party, I am of the view that the liability of the Insurance Company to satisfy the award in the first instance is statutory. It is bound to satisfy the same and is entitled to recover the amount of compensation paid from the owner and the driver (Respondents No.4 and 5) in execution of this very judgment without having recourse to independent civil proceedings.

9. The statutory deposit of Rs. 25,000/- shall be refunded to the Appellant Insurance Company.

ILR (2013) V DELHI 3644
CO. PET.

GRANDEUR COLLECTION ....PETITIONER

VERSUS

SHAHI FASHIONS PVT. LTD. ....RESPONDENT

(R.V. EASWAR, J.)

CO. PET. NO. : 475/2011 DATE OF DECISION: 03.09.2013

Companies Act, 1956—Sec. 433 (e), 434 & 439—Petition for winding up—Notice U/s 433 (e) r/w 434 of the Act sent by the petitioner at registered office through post received back with remark "left"- Notice also sent by e-mail to e-mail id of the company as intimated to ROC to which no reply sent—held there is no requirement that statutory notice should be served on the respondent company; it was only necessary to send notices to the registered office of the respondent—Contention that earlier communications were made on different e-mail ids not relevant.

[Di Vi]

APPEARANCES:

FOR THE PETITIONER : Mr. Dhruv Wahi with Mr. Ashish Sindhu, Advocates.

FOR THE RESPONDENT : Mr. C. Mukund with Mr. Ashok Jain, Mr. Pankaj Jain, Ms. Ekta Bhasin, Mr. Amit Kesaria and Ms. Firdouse Qutbwani, Advocates.

CASE REFERRED TO:

1. *Hotline Teletubes & Components Ltd.* vs. *A.S. Impex Ltd.* 105 (2003) DLT 762.

RESULT: Petition Allowed.

R.V. EASWAR, J.

1. This is a petition filed under section 433(e), 434 and 439 of the Companies Act by M/s Grandeur Collection seeking winding up of M/s Shahi Fashions Pvt. Ltd. in the following circumstances.

2. The petitioner is a sole proprietorship concern engaged in the business of manufacture and sale of readymade garments. It entered into an arrangement with the respondent company under which it regularly supplied garments on outright sale basis and it was agreed that the respondent company would make payments to the petitioner against the invoices raised. In the course of the business transactions between the petitioner and the respondent, the petitioner raised various invoices upon the respondent company. In response to the e-mails sent by the petitioner, the respondent submitted a statement of account for the period from 1.4.2009 to 31.3.2010 showing an outstanding amount of Rs. 23,60,758/- due to the petitioner. It would appear that certain claims were raised by the respondent company against the petitioner by way of debit notes. Eventually, the petitioner, found that the amount due by the respondent company was not Rs. 23,60,758/- but Rs. 22,71,418/-. In the e-mail dated 27.8.2010, the respondent company admitted the liability to pay the aforesaid amount to the petitioner on account of the transactions between them. The amount was however not paid.

3. On 24.9.2011 the advocate of the petitioner issued a notice for winding up under section 433(e) read with section 434 of the Companies Act to the respondent company. The aforesaid statutory notice was sent to the registered office of the respondent company at G-44, Industrial Area, Lawrence Road, New Delhi-110035. The alternate notice was addressed to A.K.-66-67, Shalimar Bagh, Delhi-110052. Notice was also sent by e-mail to the respondent company at the latter's e-mail ID which was 'support@ragscasuals.com'. Whereas the notice sent to the registered office was returned unserved with the postal remark 'left', there was no reply to the notice sent through e-mail. It is in the aforesaid circumstances that the present petition was filed in this Court.

4. The defence taken by the respondent company is that the garments supplied by the petitioner were not of the desired quality but were of inferior quality about which complaints had been lodged many times but to no effect. It is further submitted that the respondent did not receive any notice sent by the petitioner.

5. I am unable to accept the defence raised by the respondent company. As regards the non-service of the statutory notice, according to the judgment of the learned single judge of this Court (Dr. Mukundakam Sharma, J) in **Hotline Teletubes & Components Ltd. Vs. A.S. Impex Ltd.** 105 (2003) DLT 762, there is no requirement that the statutory notice envisaged by section 434(1)(a) of the Act should be served on the respondent company; it was only necessary to send the notices to the registered office of the respondent. In the light of this judgment, the submission of the respondent company that it did not receive any notice at its registered office is of no consequence. The respondent did not dispute that its registered office was at G-44, Industrial Area, Lawrence Road, New Delhi-110035.

6. The other argument of the respondent company was that the petitioner was earlier communicating with the respondent company in another e-mail ID and only for the purpose of sending statutory notice, the e-mail ID namely "support@ragscasuals.com" was used which was strange and unusual. I do not see the relevance of this argument or how it would advance the case of the respondent company. According to the Form-32 submitted by the respondent-company to the ROC, the e-mail ID of the company was intimated as 'support@ragscasuals.com' and it was to this e-mail ID that the statutory notice was sent by way of attachment. The receipt thereof is not denied. So long as the statutory notice was sent to the e-mail ID of the company as intimated to the ROC, nothing is to be gained by contending that all earlier communications between the petitioner and the respondent company were made through a different e-mail ID.

7. It is further noted that initially the respondent company acknowledged a debt of Rs. 22,60,758/- in favour of the petitioner and this is also supported by a statement for the period 1.4.2009 to 31.3.2010 sent by the respondent itself. However, after adjusting the amount of debit notes issued by the respondent company, the petitioner brought down the outstanding balance to Rs. 22,71,418/-. Responding to this communication from the petitioner, the respondent company sent an e-mail on 27.8.2010 to the petitioner acknowledging the balance of Rs. 22,71,418/- and sent an updated acknowledgment through e-mail to the petitioner.

8. It is not in dispute that no reply was sent to the statutory notice

sent through e-mail to the respondent company. In para 19 of the petition there is a specific averment that the respondent company is unable to make the payment and is commercially insolvent. The defences taken by the respondent company are without any substance and appear to be mere moonshine. In these circumstances, I am satisfied that the respondent company is unable to pay its debts to the petitioner and therefore should be wound up. I accordingly, admit the winding up petition.

9. The OL 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.

10. The Directors of the Respondent are directed to strictly comply with the requirements of Section 454 of the Companies Act, 1956 and Rule 130 of the Rules and furnish to the OL a statement of affairs in the prescribed form verified by an affidavit within a period of 21 days from today. They will also file affidavits in this Court, with advance copies to the OL, within four weeks setting out the details of all the assets, both movable and immovable, of the Respondent company and enclose therewith the balance sheets, profit and loss accounts and copies of the statements of all the bank accounts for the last three years. A report be filed by the OL before the next date of hearing.

11. A copy of this order shall be sent to the official liquidator within three days.

List for further proceedings on 20th November, 2013.

ILR (2013) V DELHI 3648
RFA (OS)

AGARWAL DEVELOPERS PVT. LTD. ....APPELLANT

VERSUS

ICON BUILDCON PVT. LTD. ....RESPONDENT

(REVA KHETRAPAL & PRATIBHA RANI, JJ.)

RFA (OS) NO. : 79/2013 DATE OF DECISION: 03.09.2013

Code of Civil Procedure, 1908—Order XXXVII Rule 3 (6) (b)-Appellant company in the business of developing land entered into an agreement of purchase of certain land, with the Respondent company and in consideration thereof issued six cheques towards the purchase amount and took over the original ownership documents of the land—Cheques issued by the Appellant company dishonoured on presentation and the respondent filed a summary suit and the Ld. Single Judge held the appellant entitled to conditional leave, subject to the appellant depositing 50% of the principal amount in the Court—On appeal, the Division Bench modified the order of the Ld. Single Judge and directed deposit of 25% of the principal amount—As against this order, Special Leave Petition filed by the Appellant in the Hon'ble Supreme Court was dismissed—No amount, however was deposited by the appellant and yet again the Division Bench was approached with a prayer that the requirement of depositing amount be substituted with the requirement of providing security of immovable property for the entire suit amount—Division Bench rejected the said prayer and vide order dated 24/09/2012 held that in case the appellant is unable to deposit 25% of the principal amount within a period of one month of the date of the order, consequences for non depositing

the amount as a condition of leave would follow—Vide the impugned order dated 30/01/2013 the Ld. Single Judge decreed the suit filed by the Respondent after taking into account that no amount was deposited by the appellant within the time granted by the Division bench—The said order challenged on the ground that the interpretation given by the Single Judge with respect to the provisions of Order XXXVII Rule 3(6)(b) CPC contrary to law and that the court was under an obligation to look into the merits of the case before decreeing the suit. Held: Contention of appellant misconceived. The provisions of Order XXXVII Rule 3(6)(b) clearly envisage that on the failure of the Appellant, to deposit the amount required to be deposited by it as a condition to the grant of leave to defend the suit, the Court has no other option but to pass a judgment forthwith.

We find the aforesaid contention of the Appellant's counsel to be wholly misconceived. The provisions of Order XXXVII Rule 3(6)(b) envisage that on the failure of the Appellant to deposit the amount required to be deposited by it as a condition to the grant of leave to defend the suit, the Court has no other option but to pass a judgment forthwith. This is the clear mandate of law and we, therefore, find no merit in the contention of the Appellant that the interpretation given to Order XXXVII Rule 3(6)(b) is contrary to the law. Further, in our opinion, an order passed in a summary suit under the provisions of Order XXXVII Rule 2 CPC cannot be equated to an ex parte order passed in an ordinary suit. As regards compliance with the provisions of Order XXXVII Rule 2, we find that the said aspect has been addressed by the learned Single Judge at length in his order dated April 20, 2012 and only after considering the same, the prayer of the Appellant for grant of unconditional leave to defend the suit was not acceded to by the learned Single Judge. An appeal filed from the order of the learned Single Judge was dismissed by the Division Bench, albeit the Division Bench was

persuaded to reduce the rigors of the order by directing deposit of 25% of the principal amount as against 50% of the principal amount in terms of the order of the learned Single Judge. The Special Leave Petition filed by the Appellant against the order of the Division Bench of this Court was also dismissed during the pendency of the present Appeal. **(Para 8)**

Important Issue Involved: On the failure of an appellant to deposit the amount required to be deposited by it as a condition to the grant of relief to defend a suit filed under the provisions of Order XXXVII CPC, a court has to pass a judgment forthwith in terms of the provisions of Rule 3(6)(b) of Order XXXVIII CPC.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. A. Maitri with Mr. Deepak Khosla, Advocates.

FOR THE RESPONDENT : Mr. Ankit Jain, Advocate.

RESULT: Appeal Dismissed.

REVA KHETRAPAL, J.

1. The Appellant has filed the aforementioned appeal against the judgment and decree dated 30.1.2013 passed by the learned Single Judge in CS(OS) No.2656/2008 whereby the suit of the Respondent under Order XXXVII of the Code of Civil Procedure for recovery of Rs. 4,05,67,347/- was decreed in favour of the Respondent and against the Appellant along with *pendente lite* and future interest @ 18% per annum from the date of its full realization.

2. The factual background in which the learned Single Judge passed the impugned order briefly delineated is that the Respondent/Plaintiff entered into three agreements to purchase land from the original owners whereunder a sum of Rs. 1,92,92,500/- was paid by the Respondent to the original owners/sellers through cheques at the rate of Rs. 1.50 crore per acre. The Appellant Company which develops land entered into an

agreement with the Respondent on 24.2.2007 for the acquisition/purchase of the said land, subject matter of the three agreements with the original owners. After negotiations, the Appellant agreed to purchase the entire land for a sale consideration of Rs. 3,60,59,864/-, i.e., amount of Rs. 1,92,92,500/- plus profit calculated at the rate of Rs. 10 Lacs per acre. Pursuant to the said agreements entered into between the Appellant and the Respondent, the Appellant issued six cheques in favour of the Respondent aggregating to Rs. 3,60,59,864/-, all dated 24.2.2007 to the Respondent. The Appellant also took over the original documents which were handed over by the Respondent to the Appellant being the original agreements which were entered into between the Respondent and the recorded bhumidars. It transpired that all the six cheques deposited were returned unpaid by the bankers vide memos dated 1.3.2007, 8.3.2007 and 29.3.2007 on account of insufficiency of funds when the same were presented on the first occasion. However, when re-presented, the first cheque was returned on account of insufficiency of funds and the remaining five cheques were returned on account of payment having been stopped by the Appellant.

3. After considering the defences raised by the Appellant in its application seeking leave to defend, a learned Single Judge of this Court by a detailed order held the Appellant entitled to a conditional leave, subject to the Appellant depositing 50% of the principal amount in this Court within three months of the date of the order, i.e., April 20, 2012.

4. Aggrieved by the aforesaid judgment and order, the Appellant preferred an appeal to this Court, being FAO(OS) 278/2012, in which notice was issued to the Respondent on the limited aspect of reducing the amount to be deposited as a condition of leave. On 6.7.2012, the Division Bench modified the order of the learned Single Judge and to reduce the rigors of the order directed deposit of 25% of the principal amount as against 50% of the principal amount ordered to be deposited by the learned Single Judge.

5. Against both the aforesaid orders, a Special Leave Petition before the Hon'ble Supreme Court was preferred by the Appellant, which was dismissed on 21.9.2012. No amount was deposited by the Appellant even after the dismissal of the Special Leave Petition. Instead, it was submitted on behalf of the Appellant before the Division Bench that the Appellant was not in a position to deposit even 25% of the principal amount

claimed in the suit as its funds were locked in various immovable properties. The Appellant offered instead that the condition be substituted by the requirement of providing security of immovable property for the entire suit amount. The said request of the Appellant was rejected by the Division Bench on the ground that if the Appellant is possessed of sufficient funds to give security, then it can certainly arrange for the funds to be deposited in this Court as the amount to be deposited was stated to be in the range of less than Rs. 1 Crore and the Respondent claimed to be in possession of assets of over Rs. 6 Crores, albeit of a sister concern. The Division Bench thus disposed of the appeal and the interim application filed with the appeal on September 24, 2012 holding that in case the Appellant is able to deposit 25% of the principal amount within a period of one month from today, the impugned order will stand varied to that extent, failing which the consequences for not depositing the amount as a condition of leave would follow.

6. This led to the passing of the impugned order dated January 30, 2013 by the Learned Single Judge, the relevant extract whereof is reproduced hereinbelow:-

> *"Admittedly, till date no amount has been deposited by the defendant. In fact, today Mr. Sanjay Manchanda, learned counsel for the defendant states that the defendant is willing to deposit the amount directed by the Division Bench within thirty days from today.*
>
> *However, this Court is of the view that it is not open for it to vary the order passed by the Division Bench. Order 37 Rule 3(6)(b) reads as under:-*
>
> *ORDER XXXVII. SUMMARY PROCEDURE*
>
> *xxxx xxxx xxxx xxxx*
>
> *3. Procedure for the appearance of defendant xxxx xxxx xxxx xxxx (6) At the hearing of such summons for judgment:-*
>
> *xxxx xxxx xxxx xxxx*
>
> *(b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such security with the time*

specified by the Court or Judge or to carry out such other directions as may have been given by the Court or judge, the plaintiff shall be entitled to judgment forthwith. (emphasis supplied)

Keeping in view the aforesaid facts and circumstances as well as mandate of law, this Court is of the opinion that it has no other option but to pass a judgment forthwith.

Consequently, present suit is decreed for Rs. 4,05,67,347/- in favour of the plaintiff and against the defendant along with pendent lite and future interest @ 18% per annum from the date of its full realisation."

7. The sole submission made before us by the learned counsel for the Appellant is that the interpretation given by the learned Single Judge regarding Order XXXVII Rule (3)(6)(b) CPC is contrary to the law and consequently the impugned order is liable to be set aside. It is submitted that even in an ex parte case the Court is under an obligation to look into the merits of the case and then give an ex parte judgment. It is further contended that similarly in a case of bonafide requirement under the provisions of Delhi Rent Control Act, even if leave to defend is declined the Court is under an obligation to ascertain the bonafide requirement of the landlord on merits and then to pass an eviction order or dismiss the eviction petition.

8. We find the aforesaid contention of the Appellant's counsel to be wholly misconceived. The provisions of Order XXXVII Rule 3(6)(b) envisage that on the failure of the Appellant to deposit the amount required to be deposited by it as a condition to the grant of leave to defend the suit, the Court has no other option but to pass a judgment forthwith. This is the clear mandate of law and we, therefore, find no merit in the contention of the Appellant that the interpretation given to Order XXXVII Rule 3(6)(b) is contrary to the law. Further, in our opinion, an order passed in a summary suit under the provisions of Order XXXVII Rule 2 CPC cannot be equated to an ex parte order passed in an ordinary suit. As regards compliance with the provisions of Order XXXVII Rule 2, we find that the said aspect has been addressed by the learned Single Judge at length in his order dated April 20, 2012 and only after considering the same, the prayer of the Appellant for grant of unconditional leave to defend the suit was not acceded to by the learned Single Judge. An

appeal filed from the order of the learned Single Judge was dismissed by the Division Bench, albeit the Division Bench was persuaded to reduce the rigors of the order by directing deposit of 25% of the principal amount as against 50% of the principal amount in terms of the order of the learned Single Judge. The Special Leave Petition filed by the Appellant against the order of the Division Bench of this Court was also dismissed during the pendency of the present Appeal.

9. We, therefore, find no merit in the present appeal, which is accordingly dismissed with costs.

CM Nos.110047/2013 and 110048/2013

In view of the aforesaid, CM Nos.110047/2013 and 110048/2013 also stand disposed of.

ILR (2013) V DELHI 3654
MAC. APP.

NEW INDIA ASSURANCE CO. LTD. ....APPELLANT

VERSUS

HARPAL SINGH & ORS. ....RESPONDENT

(G.P. MITTAL, J.)

MAC. APP. NO. : 138, 744 & 143/2011 & 30/2012 **DATE OF DECISION: 06.09.2013**

Motor Vehicle Act, 1988—Motor Accident Claim—A road accident involving a tempo vehicle carrying goods resulted in the death of two of its occupants and injuries to three of its occupants—Compensation awarded by the Tribunal in respect of three injury cases paid by the insurance company however two appeals preferred against the order of the Tribunal by the insurance company challenging its liability and

quantum of compensation to be paid to the LRs of the deceased persons on the ground that the deceased were gratuitous passengers and that even otherwise they were travelling on the top of the tempo and not in the cabin besides the driver and further that the driver of the offending vehicle did not hold a valid and effective license and further the compensation granted was excessive—LRs of the deceased also filed appeals for enhancement of the compensation granted by the Tribunal. Held—On the basis of the evidence adduced it is to be held that the two deceased persons were owners of the goods being transported in the vehicle and hence were not gratuitous passengers and further that both of them were travelling in the cabin of the tempo, alongwith the driver. Copy of certificate of insurance proved on record shows the siting capacity of the tempo to be three and therefore only two persons could have travelled alongwith the driver in the cabin. In case of injury to persons more than carrying capacity in the vehicle, the insurance company is liable to pay the highest compensation payable to the persons as per the carrying capacity and thus in the absence of any appeal filed by the insurance company against the compensation awarded to the three injured which infact was very small, the insurance company cannot shy away from its liability to pay compensation to the LRs of the two deceased. As regards the breach of the terms of the insurance policy, the order of the Tribunal making the insurance company liable to pay the compensation despite it having proved the breach of the terms of the policy, fully justified for an insurer has a statutory liability to pay the compensation to a third party and it simply has a right to recover the same from the insured/tortfeasor. In view thereof insurance company liable to satisfy the award in the first instance but is however entitled to recover the amount of compensation from the driver and the

owner of the vehicle in execution of this very judgment without having recourse to independent civil proceedings. With respect to the quantum of compensation, the Tribunal should have accepted the testimony of the LR of the deceased Naresh s/o Harpal that the deceased had an income of Rs.4500/- per month, for it is not necessary that in every case there must be some documentary evidence to support the income of the deceased. However since the deceased Naresh s/o Harpal was not in permanent or regular employment, no additions can be made towards future prospects. Similarly, since deceased Naresh s/o Kashmira was also having only a temporary job, his LRs would not be entitled to any addition towards future prospects/inflation. However Compensation towards funeral expenses and loss of love and affection liable to be enhanced in view of settled judicial dicta.

It is true that in the case of **National Insurance Co. Ltd. v. Cholleti Bharatamma,** (2008) 1 SCC 423, the Supreme Court held that the risk of the owner of the goods or his representative would be covered only if he travels in the cabin with the driver. I have already observed above that there is ample evidence to show that the two deceased were travelling in the cabin along with the driver. A copy of the certificate of insurance as also a certificate Ex.RW-2/1 has been proved on record which shows the sitting capacity of the vehicle involved in the accident to be three, that is, 1+2. Thus, only two persons could have been carried in the vehicle as owner of the goods. **(Para 18)**

In **National Insurance Co. Ltd. v. Anjana Shyam & Ors.,** (2007) 7 SCC 445 the Supreme Court laid down that where persons more than the carrying capacity of a vehicle are carried by the driver/owner of the vehicle, the liability of the Insurance Company will be limited to the number of passengers which the owner was authorized to carry. It was further held that in case of injury to persons more than the

carrying capacity in a vehicle the Insurance Company will pay the highest compensation payable to the persons as per the carrying capacity which shall be pro rata distributed amongst all the claimants and rest of the compensation would be recoverable from the driver/owner of the vehicle. In the instant case, as stated earlier, the Insurance Company has preferred not to challenge the award of compensation in three injury cases. It is stated that the compensation awarded in those three cases was very small. Thus, in the absence of any Appeal, the Insurance Company cannot shy away from its liability to pay the compensation to the legal representatives of the two deceased as it is proved that the deceased Naresh Kumar @ Setu was travelling as owner of the goods whereas the deceased Naresh Kumar son of Kashmira was travelling as representative of the owner (Ajay Pal) of the goods. **(Para 20)**

BREACH OF THE TERMS OF THE POLICY

The issue of satisfying the third party liability even in case of breach of the terms of insurance policy is settled by a three Judge Bench report in **Sohan Lal Passi v. P. Sesh Reddy,** (1996) 5 SCC 21. As per Section 149(2) of the Motor Vehicles Act (the Act), an insurer is entitled to defend the action on the grounds as mentioned under Section 149(2)(a)(i)(ii) of the Act. Thus, the onus is on the insurer to prove that there is breach of the condition of the policy. It is well settled that the breach must be conscious and willful. Even if a conscious breach on the part of the insured is established, still the insurer has a statutory liability to pay the compensation to the third party and will simply have the right to recover the same from the insured/tortfeasor either in the same proceedings or by independent proceedings as the case may be, as ordered by the Claims Tribunal or the Court. The question of statutory liability to pay the compensation was discussed in detail by a two Judge Bench of the Supreme Court in **Skandia Insurance Company Limited v. Kokilaben Chandravadan,** (1987) 2 SCC 654 where it was held that exclusion clause in the contract of

Insurance must be read down being in conflict with the main statutory provision enacted for protection of victim of accidents. It was laid down that the victim would be entitled to recover the compensation from the insurer irrespective of the breach of the condition of policy. The three Judge Bench of the Supreme Court in Sohan Lal Passi analyzed the corresponding provisions under the Motor Vehicles Act, 1939 and the Motor Vehicles Act, 1988 and approved the decision in Skandia. In **New India Assurance Co., Shimla v. Kamla and Ors.,** (2001) 4 SCC 342, the Supreme Court referred to the decision of the two Judge Bench in Skandia, the three Judge Bench decision in Sohan Lal Passi and held that the insurer who has been made liable to pay the compensation to third parties on account of issuance of certificate of insurance, shall be entitled to recover the same if there was any breach of the policy condition on account of the vehicle being driven without a valid driving licence. The relevant portion of the report is extracted hereunder:

> "21. A reading of the proviso to sub-section (4) as well as the language employed in sub-section (5) would indicate that they are intended to safeguard the interest of an insurer who otherwise has no liability to pay any amount to the insured but for the provisions contained in Chapter XI of the Act. This means, the insurer has to pay to the third parties only on account of the fact that a policy of insurance has been issued in respect of the vehicle, but the insurer is entitled to recover any such sum from the insured if the insurer were not otherwise liable to pay such sum to the insured by virtue of the conditions of the contract of insurance indicated by the policy.
>
> 22. To repeat, the effect of the above provisions is this: when a valid insurance policy has been issued in respect of a vehicle as evidenced by a certificate of insurance the burden is on the insurer to pay to the third parties, whether or not there has been any breach or violation of the policy conditions. But the

amount so paid by the insurer to third parties can be allowed to be recovered from the insured if as per the policy conditions the insurer had no liability to pay such sum to the insured.

23. It is advantageous to refer to a two-Judge Bench of this Court in **Skandia Insurance Company Limited v. Kokilaben Chandravadan,** (1987) 2 SCC 654. Though the said decision related to the corresponding provisions of the predecessor Act (Motor Vehicles Act, 1939) the observations made in the judgment are quite germane now as the corresponding provisions are materially the same as in the Act. Learned Judge pointed out that the insistence of the legislature that a motor vehicle can be used in a public place only if that vehicle is covered by a policy of insurance is not for the purpose of promoting the business of the insurance company but to protect the members of the community who become suffers on account of accidents arising from the use of motor vehicles. It is pointed out in the decision that such protection would have remained only a paper protection if the compensation awarded by the courts were not recoverable by the victims (or dependants of the victims) of the accident. This is the raison d'etre for the legislature making it prohibitory for motor vehicles being used in public places without covering third-party risks by a policy of insurance.

24. The principle laid down in the said decision has been followed by a three-Judge Bench of this Court with approval in **Sohan Lal Passi v. P. Sesh Reddy,** (1996) 5 SCC 21.

25. The position can be summed up thus:

The insurer and the insured are bound by the conditions enumerated in the policy and the insurer is not liable to the insured if there is violation of any

policy condition. But the insurer who is made statutorily liable to pay compensation to third parties on account of the certificate of insurance issued shall be entitled to recover from the insured the amount paid to the third parties, if there was any breach of policy conditions on account of the vehicle being driven without a valid driving licence....." **(Para 22)**

The driver and owner of the offending vehicle have not challenged the finding of the Claims Tribunal granting recovery rights. **(Para 26)**

In view of the above discussion, there is no manner of doubt that the liability of the Insurance Company to satisfy the award in the first instance is statutory; it is bound to satisfy the same and will be entitled to recover the amount of compensation paid from the driver and the owner Sunil Kumar and Mohd. Qayum (Respondents No.2 and 3 in MAC APPs.138/2011 and 143/2011) in execution of this very judgment without having recourse of independent civil proceedings. **(Para 27)**

AMOUNT OF COMPENSATION

MAC APP. 30/2012 & MAC APP.138/2011

To determine the income of the deceased Naresh Kumar @ Setu it would be relevant to refer to the testimony of PW-1 Harpal Singh. He testified that his son was dealing in the supply of guava and was earning Rs. 4500/- per month. This part of PW-1's testimony was not challenged in cross-examination. It is not necessary that in every case there must be some documentary evidence to support the income of the deceased. In every case the Court has to reach to the conclusion on the basis of preponderance of probabilities. Since PW-1's testimony with regard to deceased's income was not challenged and the income of Rs.4500/- was not unreasonable, the same ought to have been accepted by the Claims Tribunal. **(Para 30)**

In view of **Union of India & Ors. v. S.K. Kapoor** (2011) 4 SCC 589+ the three Judge Bench decision in Reshma Kumari shall be taken as binding precedent. Since the deceased was not in permanent or regular employment, he would not be entitled to any addition towards future prospects. The loss of dependency thus comes to Rs. 3,78,000/- (Rs. 4500/- x 1/2 x 12 x 14). **(Para 33)**

In *Rajesh* the three Judge Bench laid down that keeping in view the inflation, unless there is evidence to the contrary for higher expenses, a sum of Rs.25,000/- should be awarded towards funeral expenses. Thus, the Claimant would be entitled to a sum of Rs.25,000/- towards funeral expenses. The compensation of Rs.10,000/- awarded towards loss of company and Rs. 5,000/- towards loss to estate was on the lower side; I would rather award a sum of Rs.25,000/- towards loss of love and affection and Rs.10,000/- towards loss to estate. **(Para 34)**

MAC APP. 744/2011 & MAC APP.143/2011

Admittedly, the deceased was having a temporary job and in view of the observations made earlier, the Claimant would not be entitled to any addition towards future prospects/ inflation. The loss of dependency thus comes to Rs. 1,32,972/- (3166/- x 1/2 x 12 x 7). **(Para 39)**

If a sum of Rs.25,000/- each towards funeral expenses and loss of love and affection and Rs.10,000/- towards loss to estate is added, the overall compensation comes to Rs.1,92,972/-. It may, however, may be noticed that this Court in catena of judgments including **National Insurance Company v. Farzana & Ors.,** 2009 ACJ 2763; **Satender Mahto & Ors. v. Mohd. Sahbir & Ors.,** Manu/DE/3608/ 2012 and **Pardeep Rai & Anr. v. Rajiv Kumar Saini & Anr.,** (MAC.APP.115/2011) decided on 18.11.2011, this Court has held that even in case of death of a minor school going child a total compensation of Rs. 3,75,000/- is to be awarded (Rs.2,25,000/- towards loss of dependency,

Rs.75,000/- towards non-pecuniary damages and Rs. 75,000/- towards future prospects). The compensation in case of death of a young son of the claimant who is a widowed mother cannot be less than that of a school going child. Hence, the compensation stands increased from Rs.2,24,500/- to Rs.3,75,000/-. **(Para 40)**

Important Issue Involved: (A) When persons more than the carrying capacity of a vehicle are carried by the driver/ owner of the vehicle, the liability of the insurance company will be limited to the number of passengers which the owner was authorized to carry.

(B) An insurance company even in a case of breach of the terms of the insurance policy by the insured, cannot avoid its liability towards third party, as the liability of the insurance company to satisfy the compensation award in the first instance is statutory.

(C) It is not necessary that in every case there must be some documentary evidence to support the income of the deceased and in the absence of such evidence, the court can decide on the basis of preponderance of probabilities.

(D) If a deceased was not in permanent or regular employment, no additions can be made towards future prospects.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. K.L. Nandwani, Advocate with Mr. Vaidant Chadha, Advocate.

FOR THE RESPONDENT : Mr. Navneet Goyal, Advocate.

CASES REFERRED TO:

1. *Rajesh & Ors.* vs. *Rajbir Singh & Ors.* 2013 (6) SCALE 563.
2. *Reshma Kumari & Ors.* vs. *Madan Mohan & Anr.* 2013 (5) SCALE 160.
3. *Santosh Devi* vs. *National Insurance Company Ltd. & Ors.,* 2012 (6) SCC 421.
4. *Satender Mahto & Ors.* vs. *Mohd. Sahbir & Ors.,* Manu/DE/3608/2012.
5. *Union of India & Ors.* vs. *S.K. Kapoor* (2011) 4 SCC 589.
6. *Pardeep Rai & Anr.* vs. *Rajiv Kumar Saini & Anr.,* (MAC.APP.115/2011).
7. *Sarla Verma (Smt.) & Ors.* vs. *Delhi Transport Corporation & Anr.,* (2009) 6 SCC 121.
8. *National Insurance Company Limited* vs. *Vidhyadhar Mahariwala & Ors.,* (2008) 12 SCC 701.
9. *Premkumari & Ors.* vs. *Prahalad Dev & Ors.,* (2008) 3 SCC 193.
10. *National Insurance Co. Ltd.* vs. *Cholleti Bharatamma,* (2008) 1 SCC 423.
11. *National Insurance Co. Ltd.* vs. *Anjana Shyam & Ors.,* (2007) 7 SCC 445.
12. *Ishwar Chandra & Ors.* vs. *The Oriental Insurance Company Limited & Ors.,* (2007) 10 SCC 650.
13. *National Insurance Company Limited* vs. *Kusum Rai & Ors.,* (2006) 4 SCC 250.
14. *United India Insurance Company Ltd.* vs. *Lehru & Ors.,* (2003) 3 SCC 338.
15. *New India Assurance Co. Ltd.* vs. *Asha Rani,* (2003) 2 SCC 223.
16. *New India Assurance Co., Shimla* vs. *Kamla and Ors.,* (2001) 4 SCC 342.

17. *New India Assurance Co. Ltd.* vs. *Satpal Singh,* (2000) 1 SCC 237.
18. *Sohan Lal Passi* vs. *P. Sesh Reddy,* (1996) 5 SCC 21.
19. *Skandia Insurance Company Limited* vs. *Kokilaben Chandravadan,* (1987) 2 SCC 654.

RESULT: Appeals Disposed of.

G.P. MITTAL, J.

1. These four Appeals relate to a motor vehicle accident which took place on the night intervening 11-12.09.2005. Five separate Claim Petitions were preferred by the victims/legal representatives of the deceased claiming various amounts of compensation. The accident resulted in death of the two occupants and injuries to three who were travelling in a tempo No.UP-12K-5797. The compensation awarded in respect of three injury cases has been paid by the New India Assurance Company Limited (the Insurance Company) whereas two appeals (MAC APP.138/2011 and MAC APP.143/2011) have been preferred by the Insurance Company challenging its liability and the quantum of compensation. Other two appeals (MAC APP.744/2011 and MAC APP.30/2012) have been preferred by the legal representatives of the deceased Naresh (son of Kashmira) and Naresh Kumar @ Setu (son of Harpal Singh).

2. In the Claim Petition (relating to MAC APP.30/2012) preferred by Harpal Singh father of the deceased Naresh Kumar @ Setu, the Appellant Harpal Singh has claimed that his son Naresh Kumar @ Setu, aged 18 years was travelling in tempo No.UP-12K-5797 as owner of the goods (guava) which were being transported to Keshav Puram for the purpose of sale. His son was earning Rs. 4500/- per month from the business of selling guava.

3. Similarly, in the Claim Petition (MAC APP.744/2011) filed by Smt. Satto Devi she claimed that her son Naresh Kumar aged 21 years was travelling in the earlier said tempo as representative of the owner of the goods and that he was getting a salary of '3300/- per month from the owner Ajay Pal.

4. In both the Claim Petitions it was stated that the Respondent Sunil Kumar was driving the tempo at about 12:00 midnight in a rash and negligent manner. When the tempo reached near Harijan Basti, Bhalasva,

Outer Ring Road, one of its tyre bursted. Because of the high speed on which the tempo was being driven, the driver lost its control and it capsized. A case FIR No.611/2005 was registered under Sections 279/337/304-A IPC in Police Station Jahangirpuri against the driver respondent Sunil Kumar.

5. The Insurance Company contested the claim filed by the Claimants in MAC APPs.744/2011 and 30/2012 by way of filing separate written statements. It disputed its liability to pay the compensation on the ground that the deceased were travelling in the vehicle as gratuitous passengers. The Insurance Company also took up the plea that the driver of the tempo did not possess a valid and effective driving licence to drive the vehicle involved in the accident. Thus, it was stated that it had no liability to pay the compensation. The Insurance Company further took up the plea that the compensation awarded is excessive and exorbitant.

6. On appreciation of evidence, the Motor Accident Claims Tribunal (the Claims Tribunal) found that the accident was caused on account of rash and negligent driving of the tempo by its driver respondent Sunil Kumar. With regard to the Claim Petition filed by Harpal Singh, the Claims Tribunal held that in the absence of any documentary evidence with respect to the deceased's income the compensation could be assessed only on the basis of minimum wages payable to an unskilled worker. The Claims Tribunal made an addition of 50% on account of inflation, deducted 50% towards personal and living expenses and applied the multiplier of 14 as per the age of the father of the deceased to compute the loss of dependency as Rs. 3,99,000/-. The Claims Tribunal awarded a sum of Rs. 5,000/- towards funeral charges and Rs. 10,000/- each towards loss to estate and loss of company.

7. Similarly, in reply to the Claim Petition preferred by Smt. Satto, the Claims Tribunal granted the compensation on the basis of minimum wages and after making an addition of non-pecuniary damages awarded an overall compensation of Rs. 2,24,500/-.

8. The Claims Tribunal held that the deceased were travelling as owner of the goods and thus, the Insurance Company was liable to pay the compensation. At the same time, relying on **National Insurance Company Limited v. Kusum Rai & Ors.** (2006) 4 SCC 250, the Claims Tribunal opined that since the driver was not competent to drive a transport/commercial vehicle, there was intentional and willful breach

of the terms and conditions of the policy and thus, while making the Insurance Company liable to pay the compensation initially also granted it recovery rights.

9. In the two Appeals filed by the Insurance Company (MAC APP.138/2011 and MAC APP.143/2011) the following contentions are raised by the Appellant Insurance Company:-

(i) Since the deceased were travelling as gratuitous passengers, the Insurance Company was not liable to pay the compensation even if it is assumed that the deceased were the owner /representative of the owner of the goods, they could travel only in the cabin beside the driver. Since the deceased were travelling on the top of the tempo, the Insurance Company is not liable to pay the compensation.

(ii) The Insurance Company successfully proved the breach of the terms and conditions of the policy as the owner willfully allowed its driver to drive the vehicle involved in the accident without holding a valid and effective driving licence to drive the same. Thus, the Insurance Company was not liable to pay the compensation.

(iii) In the absence of any evidence with regard to future prospects, no addition in the income of the deceased could have been made by the Claims Tribunal. In MAC APP.138/2011 it is also urged that the father of the deceased Naresh Kumar @ Setu was not dependent on the deceased and thus, there was no loss of dependency.

10. On the other hand, learned counsel for the Claimants urges that:-

(i) The Claims Tribunal rightly opined that the deceased were travelling as owner/representative of the owner of the goods.

(ii) The liability to pay the compensation to the third party is statutory. The Claims Tribunal, therefore, rightly made the Insurance Company liable to pay the compensation and granted it recovery rights.

(iii) The compensation awarded is inadequate and paltry.

11. I have heard Mr. K.L. Nandwani learned counsel for the Insurance Company and Mr. Navneet Goyal learned counsel for the Claimants.

12. I am expected to go only into the quantum of compensation and the liability of the Insurance Company as the finding on negligence is not challenged by the Appellant Insurance Company.

GRATUITOUS PASSENGER

13. In MAC APP. 30/2012 relating to the death of deceased Naresh Kumar @ Setu his father Harpal Singh filed his Affidavit Ex.PW-1/A and deposed that his son was travelling in the tempo in the capacity of owner of the goods. In cross-examination also Harpal Singh reiterated the stand and denied the suggestion that his son was not carrying his goods in the tempo or that he was travelling as a gratuitous passenger.

14. Similarly, Smt. Satto in her Affidavit Ex.PW-2/A testified that her son Naresh Kumar was travelling in the tempo as representative of the owner of the goods, as the goods were owned by one Shri Ajay Pal. In cross-examination Smt. Satto denied the suggestion that the deceased was travelling as a gratuitous passenger. PW-3 Ram Saran with regard to status of the persons travelling in the tempo deposed as under:-

> "On the night of 11/12.09.05, I myself along with one Naresh, Setu, Lokender and one Harpal were travelling in a tempo no.UP-12K-5797. We started our journey from village Harsoli, Muzaffarnagar, U.P. and we were proceeding towards Azadpur Mandi, Delhi. The driver of the said tempo was driving at a very fast speed rashly and negligently and without caring for the rules of traffic. We repeatedly asked the driver to drive at a moderate speed but he did not pay any heed and continue to drive recklessly. Myself, Naresh, Setu and Lokender were travelling in the cabin of the tempo and we were sitting beside the driver. We all were travelling in the tempo in the capacity of the owners of the Guava which was being carried/transported in the said tempo. We all were the owners of our respective goods....."

15. In cross-examination Ram Saran deposed that out of five persons, four persons were travelling in the driver's cabin while one was sitting on the rear portion of the tempo. He stated that he was carrying 17 cases of guava each weighing 18 kg. He denied the suggestion that he was not

carrying his goods in the said tempo or that he was a gratuitous passenger. No suggestion was given to this witness that deceased Naresh Kumar @ Setu and deceased Naresh Kumar son of Kashmira were not travelling as owner of the goods/representative of the owner of the goods in the tempo at the time of the accident.

16. PW-4 Lokender Kumar also supported PW-3's stand with regard to five persons travelling in the tempo as owner of the goods and that the two deceased amongst others were travelling in the cabin of the tempo along with the driver.

17. It is urged by the learned counsel for the Appellant Insurance Company that the testimony of PW-3 Ram Saran and PW-4 Lokender Kumar, who were eye witnesses to the accident and who were travelling in the tempo is contrary to what has been stated in the FIR with regard to the place where the two deceased were sitting in the tempo. Mr. K.L. Nandwani argues that as per the FIR lodged on the statement of Lokender Kumar (PW-4) the two deceased were sitting on the top of the vehicle after placing wooden fatta (plank). No suggestion was given to either PW-4 Lokender Kumar or to PW-3 Ram Saran that deceased Naresh Kumar @ Setu and Naresh Kumar son of Kashmira were travelling on the wooden plank fixed on the top of the tempo nor they were confronted with the FIR lodged with the police. In the circumstances, on the basis of the evidence adduced it has to be held that the two deceased persons along with PWs Ram Saran and Lokender Kumar were travelling inside the cabin of the tempo. A three Judge Bench decision of the Supreme Court in **New India Assurance Co. Ltd. v. Asha Rani,** (2003) 2 SCC 223 while overruling the judgment in **New India Assurance Co. Ltd. v. Satpal Singh,** (2000) 1 SCC 237 that the provisions of the Motor Vehicles Act prior to its amendment in 1994 included liability in respect of every person travelling in a goods vehicle ruled that after the amendment to Section 147 of the Motor Vehicles Act w.e.f. 1994 (by virtue of Section 6 of Act of 1994) it was compulsory for the insurer to insure the risk of the owner of the goods or his authorized representative being carried in a goods vehicle.

18. It is true that in the case of **National Insurance Co. Ltd. v. Cholleti Bharatamma,** (2008) 1 SCC 423, the Supreme Court held that the risk of the owner of the goods or his representative would be covered only if he travels in the cabin with the driver. I have already observed

above that there is ample evidence to show that the two deceased were travelling in the cabin along with the driver. A copy of the certificate of insurance as also a certificate Ex.RW-2/1 has been proved on record which shows the sitting capacity of the vehicle involved in the accident to be three, that is, 1+2. Thus, only two persons could have been carried in the vehicle as owner of the goods.

19. Admittedly, five Claim Petitions were preferred, that is, three for the injuries suffered by the persons travelling in the vehicle and two for the persons who died in the accident. Mr. Nandwani submits that the Insurance Company has not preferred any appeal in respect of the three injury cases as the amount of compensation awarded was very small.

20. In **National Insurance Co. Ltd. v. Anjana Shyam & Ors.,** (2007) 7 SCC 445 the Supreme Court laid down that where persons more than the carrying capacity of a vehicle are carried by the driver/owner of the vehicle, the liability of the Insurance Company will be limited to the number of passengers which the owner was authorized to carry. It was further held that in case of injury to persons more than the carrying capacity in a vehicle the Insurance Company will pay the highest compensation payable to the persons as per the carrying capacity which shall be pro rata distributed amongst all the claimants and rest of the compensation would be recoverable from the driver/owner of the vehicle. In the instant case, as stated earlier, the Insurance Company has preferred not to challenge the award of compensation in three injury cases. It is stated that the compensation awarded in those three cases was very small. Thus, in the absence of any Appeal, the Insurance Company cannot shy away from its liability to pay the compensation to the legal representatives of the two deceased as it is proved that the deceased Naresh Kumar @ Setu was travelling as owner of the goods whereas the deceased Naresh Kumar son of Kashmira was travelling as representative of the owner (Ajay Pal) of the goods.

BREACH OF THE TERMS OF THE POLICY

21. The Claims Tribunal on the issue of liability held that a notice under Order XII Rule 8 CPC was duly served upon the owner and driver of the offending vehicle to produce the original policy and driving licence, etc. which were not produced in the court by them. The copy of the insurance policy and the postal receipts were duly proved during inquiry before the Claims Tribunal. The Claims Tribunal further held that as per

the certificate Ex.R2W1/C issued by Transport Authority, Muzaffarnagar, the driver possessed a licence to drive only a Light Motor Vehicle (Non Transport) whereas he was found to be driving a goods vehicle which was a commercial vehicle. Thus, the Claims Tribunal opined that the Insurance Company successfully proved the breach of the terms and conditions of the policy, yet while granting recovery rights made it liable to pay the compensation.

22. The issue of satisfying the third party liability even in case of breach of the terms of insurance policy is settled by a three Judge Bench report in **Sohan Lal Passi v. P. Sesh Reddy,** (1996) 5 SCC 21. As per Section 149(2) of the Motor Vehicles Act (the Act), an insurer is entitled to defend the action on the grounds as mentioned under Section 149(2)(a)(i)(ii) of the Act. Thus, the onus is on the insurer to prove that there is breach of the condition of the policy. It is well settled that the breach must be conscious and willful. Even if a conscious breach on the part of the insured is established, still the insurer has a statutory liability to pay the compensation to the third party and will simply have the right to recover the same from the insured/tortfeasor either in the same proceedings or by independent proceedings as the case may be, as ordered by the Claims Tribunal or the Court. The question of statutory liability to pay the compensation was discussed in detail by a two Judge Bench of the Supreme Court in **Skandia Insurance Company Limited v. Kokilaben Chandravadan,** (1987) 2 SCC 654 where it was held that exclusion clause in the contract of Insurance must be read down being in conflict with the main statutory provision enacted for protection of victim of accidents. It was laid down that the victim would be entitled to recover the compensation from the insurer irrespective of the breach of the condition of policy. The three Judge Bench of the Supreme Court in Sohan Lal Passi analyzed the corresponding provisions under the Motor Vehicles Act, 1939 and the Motor Vehicles Act, 1988 and approved the decision in Skandia. In **New India Assurance Co., Shimla v. Kamla and Ors.,** (2001) 4 SCC 342, the Supreme Court referred to the decision of the two Judge Bench in Skandia, the three Judge Bench decision in Sohan Lal Passi and held that the insurer who has been made liable to pay the compensation to third parties on account of issuance of certificate of insurance, shall be entitled to recover the same if there was any breach of the policy condition on account of the vehicle being driven without a valid driving licence. The relevant portion of the report is

extracted hereunder:

"21. A reading of the proviso to sub-section (4) as well as the language employed in sub-section (5) would indicate that they are intended to safeguard the interest of an insurer who otherwise has no liability to pay any amount to the insured but for the provisions contained in Chapter XI of the Act. This means, the insurer has to pay to the third parties only on account of the fact that a policy of insurance has been issued in respect of the vehicle, but the insurer is entitled to recover any such sum from the insured if the insurer were not otherwise liable to pay such sum to the insured by virtue of the conditions of the contract of insurance indicated by the policy.

22. To repeat, the effect of the above provisions is this: when a valid insurance policy has been issued in respect of a vehicle as evidenced by a certificate of insurance the burden is on the insurer to pay to the third parties, whether or not there has been any breach or violation of the policy conditions. But the amount so paid by the insurer to third parties can be allowed to be recovered from the insured if as per the policy conditions the insurer had no liability to pay such sum to the insured.

23. It is advantageous to refer to a two-Judge Bench of this Court in **Skandia Insurance Company Limited v. Kokilaben Chandravadan,** (1987) 2 SCC 654. Though the said decision related to the corresponding provisions of the predecessor Act (Motor Vehicles Act, 1939) the observations made in the judgment are quite germane now as the corresponding provisions are materially the same as in the Act. Learned Judge pointed out that the insistence of the legislature that a motor vehicle can be used in a public place only if that vehicle is covered by a policy of insurance is not for the purpose of promoting the business of the insurance company but to protect the members of the community who become suffers on account of accidents arising from the use of motor vehicles. It is pointed out in the decision that such protection would have remained only a paper protection if the compensation awarded by the courts were not recoverable by the victims (or dependants of the victims) of the accident. This is the raison d'etre for the legislature making it prohibitory for

motor vehicles being used in public places without covering third-party risks by a policy of insurance.

24. The principle laid down in the said decision has been followed by a three-Judge Bench of this Court with approval in **Sohan Lal Passi v. P. Sesh Reddy,** (1996) 5 SCC 21.

25. The position can be summed up thus:

The insurer and the insured are bound by the conditions enumerated in the policy and the insurer is not liable to the insured if there is violation of any policy condition. But the insurer who is made statutorily liable to pay compensation to third parties on account of the certificate of insurance issued shall be entitled to recover from the insured the amount paid to the third parties, if there was any breach of policy conditions on account of the vehicle being driven without a valid driving licence....."

23. Again in **United India Insurance Company Ltd. v. Lehru & Ors.,** (2003) 3 SCC 338, in para 18 of the report the Supreme Court referred to the decision in Skandia, Sohan Lal Passi and Kamla and held that even where it is proved that there was a conscious or willful breach as provided under Section 149(2)(a) (ii) of the Motor Vehicle Act, the Insurance Company would still remain liable to the innocent third party but may recover the compensation paid from the insured. The relevant portion of the report is extracted hereunder:

"18. Now let us consider Section 149(2). Reliance has been placed on Section 149(2)(a)(ii). As seen, in order to avoid liability under this provision it must be shown that there is a "breach". As held in Skandia and Sohan Lal Passi cases the breach must be on the part of the insured. We are in full agreement with that. To hold otherwise would lead to absurd results. Just to take an example, suppose a vehicle is stolen. Whilst it is being driven by the thief there is an accident. The thief is caught and it is ascertained that he had no licence. Can the insurance company disown liability? The answer has to be an emphatic "No". To hold otherwise would be to negate the very purpose of compulsory insurance....."

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xxxx xxxx xxxx xxxx xxxx

20. .....If it ultimately turns out that the licence was fake, the insurance company would continue to remain liable unless they prove that the owner/insured was aware or had noticed that the licence was fake and still permitted that person to drive. More importantly, even in such a case the insurance company would remain liable to the innocent third party, but it may be able to recover from the insured. This is the law which has been laid down in Skandia, Sohan Lal Passi and Kamla cases. We are in full agreement with the views expressed therein and see no reason to take a different view."

24. The three Judge Bench of the Supreme Court in **National Insurance Company Limited v. Swaran Singh & Ors.,** (2004) 3 SCC 297 again emphasized that the liability of the insurer to satisfy the decree passed in favour of the third party was statutory. It approved the decision in Sohan Lal Passi, Kamla and Lehru. Paras 73 and 105 of the report are extracted hereunder:

"73. The liability of the insurer is a statutory one. The liability of the insurer to satisfy the decree passed in favour of a third party is also statutory.

xxxx xxxx xxxx xxxx xxxx

xxxx xxxx xxxx xxxx xxxx

105. Apart from the reasons stated hereinbefore, the doctrine of stare decisis persuades us not to deviate from the said principle."

25. This Court in MAC APP. No.329/2010 Oriental Insurance Company Limited v. Rakesh Kumar and Others and other Appeals decided by a common judgment dated 29.02.2012, noticed some divergence of opinion in **National Insurance Company Limited v. Kusum Rai & Ors.,** (2006) 4 SCC 250, **National Insurance Company Limited v. Vidhyadhar Mahariwala & Ors.,** (2008) 12 SCC 701; **Ishwar Chandra & Ors. v. The Oriental Insurance Company Limited & Ors.,** (2007) 10 SCC 650 and **Premkumari & Ors. v. Prahalad Dev & Ors.,** (2008) 3 SCC 193 and held that in view of the three Judge Bench decision in **Sohan Lal Passi** (supra) and Swaran Singh, the liability of the Insurance Company vis-a-vis the third party is statutory. If the Insurance Company

successfully proves the conscious breach of the terms of the policy, then it would be entitled to recovery rights against the owner or driver, as the case may be.

26. The driver and owner of the offending vehicle have not challenged the finding of the Claims Tribunal granting recovery rights.

27. In view of the above discussion, there is no manner of doubt that the liability of the Insurance Company to satisfy the award in the first instance is statutory; it is bound to satisfy the same and will be entitled to recover the amount of compensation paid from the driver and the owner Sunil Kumar and Mohd. Qayum (Respondents No.2 and 3 in MAC APPs.138/2011 and 143/2011) in execution of this very judgment without having recourse of independent civil proceedings.

AMOUNT OF COMPENSATION

MAC APP. 30/2012 & MAC APP.138/2011

28. The only challenge to the quantum of compensation laid by the appellant Insurance Company in MAC APP.138/2011 is that addition of 50% towards future prospects/inflation could not have been given by the Claims Tribunal. In support of the submission, reliance is placed on **Reshma Kumari & Ors. v. Madan Mohan & Anr.** 2013 (5) SCALE 160.

29. On the other hand, learned counsel for the claimant urges that Claimant's testimony as PW-1 that his deceased son Naresh Kumar @ Setu was earning Rs. 4500/- per month from his business as a fruit supplier was not challenged in cross-examination and thus the deceased Setu's income should have been taken as Rs.4500/- per month to compute the compensation. Learned counsel for the Claimant presses into service another three Judge Bench decision of the Supreme Court in **Rajesh & Ors. v. Rajbir Singh & Ors.** 2013 (6) SCALE 563 to submit that addition towards inflation was rightly made by the Claims Tribunal.

30. To determine the income of the deceased Naresh Kumar @ Setu it would be relevant to refer to the testimony of PW-1 Harpal Singh. He testified that his son was dealing in the supply of guava and was earning Rs. 4500/- per month. This part of PW-1's testimony was not challenged in cross-examination. It is not necessary that in every case there must be some documentary evidence to support the income of the

deceased. In every case the Court has to reach to the conclusion on the basis of preponderance of probabilities. Since PW-1's testimony with regard to deceased's income was not challenged and the income of Rs.4500/- was not unreasonable, the same ought to have been accepted by the Claims Tribunal.

31. In *Reshma Kumari,* the three Judge Bench was dealing with a reference made by a two Judge Bench (S.B. Sinha and Cyriac Joseph, J.J.). The two Hon'ble Judges wanted an authoritative pronouncement from a Larger Bench on the question of applicability of the multiplier and whether the inflation was built in the multiplier. The three Judge Bench approved the two Judge Bench decision of the Supreme Court in **Sarla Verma (Smt.) & Ors. v. Delhi Transport Corporation & Anr.,** (2009) 6 SCC 121 with regard to the selection of multiplier. It further laid down that addition towards future prospects to the extent of 50% of the actual salary shall be made towards future prospects when the deceased had a permanent job and was below 40 years and addition of 30% should be made if the age of the deceased was between 40-50 years. No addition towards future prospects shall be made where the deceased was self-employed or was getting a fixed salary without provision of annual increment.

32. Of course, three Judge Bench of the Supreme Court in its later judgment in Rajesh relying on **Santosh Devi v. National Insurance Company Ltd. & Ors.,** 2012 (6) SCC 421 observed that there would be addition of 30% and 50%, depending upon the age of the deceased, towards future prospects even in the case of self-employed persons. It may, however, be noted that in *Rajesh*, the three Judge Bench decision in Reshma Kumari was not brought to the notice of their Lordships.

33. In view of **Union of India & Ors. v. S.K. Kapoor** (2011) 4 SCC 589+ the three Judge Bench decision in Reshma Kumari shall be taken as binding precedent. Since the deceased was not in permanent or regular employment, he would not be entitled to any addition towards future prospects. The loss of dependency thus comes to Rs. 3,78,000/- (Rs. 4500/- x 1/2 x 12 x 14).

34. In *Rajesh* the three Judge Bench laid down that keeping in view the inflation, unless there is evidence to the contrary for higher expenses, a sum of Rs.25,000/- should be awarded towards funeral expenses.

Thus, the Claimant would be entitled to a sum of Rs.25,000/- towards funeral expenses. The compensation of Rs.10,000/- awarded towards loss of company and Rs. 5,000/- towards loss to estate was on the lower side; I would rather award a sum of Rs.25,000/- towards loss of love and affection and Rs.10,000/- towards loss to estate.

35. The overall compensation thus comes to Rs. 4,38,000/-. The compensation stands enhanced from Rs. 4,24,000/- to Rs. 4,38,000/-. The enhanced compensation of Rs. 14,000/- shall carry interest @ 7.5% per annum as awarded by the Claims Tribunal.

36. The compensation awarded by the Claims Tribunal shall be released in terms of the impugned judgment. The enhanced compensation will be released in favour of the Appellant Harpal Singh on deposit. 37. Both the appeals stands disposed of accordingly.

MAC APP. 744/2011 & MAC APP.143/2011

38. The only challenge laid by the Insurance Company is to the addition of 50% towards inflation/future prospects.

39. Admittedly, the deceased was having a temporary job and in view of the observations made earlier, the Claimant would not be entitled to any addition towards future prospects/inflation. The loss of dependency thus comes to Rs.1,32,972/- (3166/- x 1/2 x 12 x 7).

40. If a sum of Rs.25,000/- each towards funeral expenses and loss of love and affection and Rs.10,000/- towards loss to estate is added, the overall compensation comes to Rs.1,92,972/-. It may, however, may be noticed that this Court in catena of judgments including **National Insurance Company v. Farzana & Ors.,** 2009 ACJ 2763; **Satender Mahto & Ors. v. Mohd. Sahbir & Ors.,** Manu/DE/3608/2012 and **Pardeep Rai & Anr. v. Rajiv Kumar Saini & Anr.,** (MAC.APP.115/2011) decided on 18.11.2011, this Court has held that even in case of death of a minor school going child a total compensation of Rs. 3,75,000/- is to be awarded (Rs.2,25,000/- towards loss of dependency, Rs.75,000/- towards non-pecuniary damages and Rs. 75,000/- towards future prospects). The compensation in case of death of a young son of the claimant who is a widowed mother cannot be less than that of a school going child. Hence, the compensation stands increased from Rs.2,24,500/- to Rs.3,75,000/-.

41. Enhanced compensation of Rs.1,50,500/- shall carry interest @ 7.5% per annum as awarded by the Claims Tribunal. Claimant Satto was about 62 years at the time of accident which took place in the year 2005. Keeping in view the age of the Claimant, 50% of the enhanced compensation shall be held in Fixed Deposit for a period of one year; rest 50% to be released on deposit. The compensation awarded shall be released in terms of the orders passed by the Claims Tribunal, if not already released.

42. Both the appeals are disposed of in above terms.

43. The statutory deposit of Rs. 25,000/- shall be refunded to the Appellant Insurance Company in MAC APP.138/2011 and MAC APP.143/2011.

44. Pending Applications also stand disposed of.

ILR (2013) V DELHI 3677
CO. A. (SB)

AGYA HOLDINGS PVT. LTD. ....APPELLANT

VERSUS

JONES LANG LASALLE PROPERTY CONSULTANTS (INDIA) P. LTD. & ORS. ....RESPONDENTS

(R.V. EASWAR, J.)

CO. A. (SB) NO. : 19/2013 DATE OF DECISION: 09.09.2013

Companies Act, 1956—Sec. 10F—Valuer appointed by CLB—Appellant undertook to bear the entire fees of the valuer and paid part installment—Held, as a professional valuer, it was not the duty of the valuer to keep the appellant inform as how every input supplied by the appellant was considered and factored while arriving at the value of land—It would have

been unprofessional if the valuer were to do so—Merely because the appellant had agreed to bear the entire fees of the valuer, it gives no right to the appellant to demand that every step in the process of valuation of the land should be made known to it and it should be taken into confidence as to how the valuation is arrived at and what is the value determined. Also held Sec. 8(1) of the Arbitration & Conciliation Act, 1996 not attracted to the dispute between the appellant and the valuer and it was the appellant which approached CLB with application seeking refund of the first installment paid to the valuer and after having lost that application takes contradictory stand that CLB had no jurisdiction to pass the impugned order.

[Di Vi]

APPEARANCES:

FOR THE APPELLANTS : Mr. Anil Agarwal, Advocate.

FOR THE RESPONDENTS : Mr. Navin Kumar with Ms. Rupal Bhatia and Ms. Rashmeet Kaur, Advocates for R-1 Mr. .Abhishek Kumar, Advocate for R-2.

CASE REFERRED TO:

1. *Canara Bank* vs. *Nuclear Power Corporation of India* (1995) 84 Company Cases 70.

RESULT: Appeal Dismissed.

R.V. EASWAR, J.

1. This is an appeal filed under section 10F of the Companies Act, 1956 against the order passed by the Company Law Board on 14.3.2013 in CA No.260/2012 in Co.Pet.63(ND)/2008.

2. The appeal has been filed in the following circumstances. The appellant is a company incorporated under the Companies Act. It entered into a joint venture agreement on 28.10.2007 with another company by

name 'Boortmal N.V.', which is a company registered in Antwerp, Belgium for the purpose of setting up a malt manufacturing plant in India. In terms of the joint venture agreement another company by name of Agya Boortmalt Pvt. Ltd. (hereinafter referred to as "Indian company") was incorporated with registered office at Delhi. In this company the appellant as well as the Belgium company had equal shareholding. Pursuant to the setting up of this company, 18.6 acres of lands were acquired in Uttarakhand for putting up the plant, loans were obtained and other steps were taken to make the company functional. It is alleged that sometime in June/July, 2008, the Belgium company and its directors started acting against the interest of the Indian company incorporated in terms of the joint venture agreement leading to disputes between the appellant and the Belgium company. The appellant therefore filed CP 58(ND)/2008 before the Company Law Board on 19.9.2008 under sections 397 and 398 of the Companies Act, complaining against the acts of oppression by the Belgium company. In October, 2008, the Belgium company filed a company petition before the Company Law Board in CP 63(ND)/2008 against the appellant alleging oppression and mismanagement.

3. In the course of the arguments advanced on 31.8.2009 before the CLB during the hearing of the company petition filed by the Belgium company, there was an attempt at settling the issues and both parties agreed before the CLB that the price of the shares of the Indian company may be determined. The CLB accordingly passed an order on 10.9.2009 appointing M/s Ernst and Young for the purpose of determining the share price on the date of filing the company petition. Since the process of determining the fair price of the shares involved the process of valuing the land, the CLB on the same date appointed M/s Jones Lang Lasalle Property Consultants (India) Pvt. Ltd., the first respondent herein, for determining the value of the land as on January, 2008. The question of fees payable to M/s Jones Lang Lasalle Property Consultants (India) Pvt. Ltd. (hereinafter referred to as "JLL") was left to be negotiated between the parties. JLL quoted their professional fees for valuing the land at Rs.32 lakhs. The Belgium Company filed an application before the CLB stating that the fees payable to JLL were very high. In the course of the hearing of the application, the appellant herein, apparently in an attempt to cut short the litigation, agreed to bear the entire fees payable to JLL.

4. Thereupon a Consulting Services Agreement (CSA) was entered into between the appellant and the first respondent on 12.4.2010 at New Delhi. Amongst elaborate provisions made for the purpose of valuation of the land, the CSA also contained Clause 17 titled "dispute resolution",

which provided for arbitration in case of any dispute which may arise between the parties.

5. In terms of the CSA, the appellant paid a sum of Rs.17,64,800/- to JLL pursuant to the invoice raised by the latter on 27.4.2010. This consisted of 50% of the fees of Rs.32 lakhs negotiated, which amounted to Rs.16 lakhs and taxes such as service tax, educational cess etc. On 29.4.2010 JLL wrote a letter to the CLB seeking extension of time till 21.5.2010 for completing the assignment of valuation. According to the appellant, between April, 2010 and December, 2010 several e-mails were written by it to JLL requesting them to complete the work properly and also giving information which according to the appellant constituted relevant inputs for the purpose of the valuation.

6. Piqued by the absence of any response from JLL to the e-mails written by it giving what it claims to be relevant information for the purpose of the valuation, the appellant filed an application on 16.5.2012 before the CLB in CA 260/2012. In this application, the appellant stated that the valuers JLL acted in gross violation of the CSA, that the micro and macro research for transactions related to development around the subject land were not done, that under the CSA it was the duty of the appellant to supply relevant information which would constitute the basis of the valuation and that JLL had whimsically chosen not to take into consideration the inputs and details pertaining to the land furnished by the appellant. It was pointed out that the entire purpose of the valuation would stand defeated if the inputs supplied by the appellant were not taken into consideration. On this basis it was contended that JLL had completely failed to carry out its duties and obligations as per the orders passed by the CLB and within the time frame. The applicant accordingly prayed that the CLB may direct JLL to refund the amount of Rs. 16 lakhs paid by the appellant and appoint some other valuer to carry out the valuation of the land.

7. JLL filed a reply to the aforesaid application and stoutly denied the allegation made by the appellant in the application. It was first submitted that JLL was not a party to the litigation pending before the CLB in the company petition and that it was only appointed for a limited purpose to carry out the valuation of the land consisting of 18.6 acres in Kashipur, Dist. Udham Singh Nagar, Uttarakhand. Referring to the affidavit filed by the appellant in the application seeking reference of the dispute to arbitration in terms of clause 17 of the CSA, JLL contended that neither the contents of the valuation report nor the payment of provisional fee could be made the subject matter of arbitration within the scope of clause 17 of the

CSA. It was submitted that the applicant (appellant herein) was refusing to pay the balance of the fees and also asking for refund of the fees paid on the ground that JLL had submitted an inappropriate valuation report, which cannot be a subject matter of arbitration within the scope of clause 17 of the CSA. It was further pointed out that none of the conditions of section 8 of the Arbitration and Conciliation Act, 1996 was satisfied and it was not open to the applicant to present a plea under section 8 that the question of payment of fees should be referred to arbitration.

8. In the reply, JLL also pointed out that it had sent a letter dated 20.5.2010 to the Company Law Board stating that the report is ready for submission and soliciting formal instructions and the final payment prior to submitting the report, a copy of which was also marked to the counsel for the appellant. It was thus submitted by JLL that the delay in submitting the report, even though it was ready, to the CLB was only on account of the refusal of the applicant to pay the balance of fees. The e-mails written by the JLL to the counsel for the applicant were also referred to in the reply. On this basis, JLL prayed that the application be dismissed with exemplary costs and a direction be issued to the applicant to pay the balance professional fee of '16 lakhs together with interest at 12% per annum from the due date till the actual date of payment.

9. After hearing the rival submissions in CA 260/2012, the CLB passed the impugned order rejecting the application and directed the applicant (appellant herein) to deposit the remaining fee of '16 lakhs with the bench officer by a demand draft made out in the name of JLL on or before 21.3.2013, failing which the applicant shall render itself liable for payment of interest at 18% per annum from 13.7.2012 till payment and also for coercive action for recovery of the said amount under orders of the Board. Thus, the application filed by the appellant was dismissed.

10. The reasoning given by the CLB was that clause 17 of the CSA is not attracted since once the appellant agreed to the appointment of JLL and also agreed and undertook before the CLB to bear the fees payable for the work of valuation and also paid the first instalment, it was bound to pay the balance of the fee to JLL on submission of the valuation report as per orders of the CLB. Commenting on the conduct of the appellant (applicant before the CLB), the CLB observed that the application was nothing but a blatant abuse of the process of the Board.

11. It is the aforesaid order of the CLB that is challenged in appeal

before this Court.

12. After hearing the rival arguments, I am satisfied that there is absolutely no merit in the appeal. The appellant, as pointed by the CLB, had undertook and agreed before the CLB that it would bear the entire fees payable to JLL who were appointed by the CLB to carry out the work of valuation of the land. Accordingly, the first instalment of the fee of Rs. 16 lakhs together with service tax etc. was paid in April, 2010. Thereafter, it kept on communicating with JLL and giving information, which it claims to be relevant information, regarding the valuation of the land. It must be remembered that JLL is the appointee of CLB and is a professional valuer. It is not bound to respond or communicate with the appellant in respect of each and every information or input given by the latter, even though it may be relevant for the purpose of valuation of the land. As a professional valuer it was not the duty of JLL to keep the appellant informed as to how every input supplied by the latter was considered and factored while arriving at the value of the land. It would have been unprofessional if JLL were to do so. It went about the task in a professional manner and when it found necessary to seek an extension of time, it did so by writing to the CLB seeking extension of time for submission of the final report. Even on 20.5.2010 the appellant was intimated by JLL that the report was ready for submission and it was awaiting the payment of the balance of the fees. This was done by JLL by marking a copy of its letter dated 20.5.2010 addressed to the CLB to the counsel for the appellant. On 14.12.2010 JLL wrote an e-mail to the counsel for the appellant intimating that the report will be submitted directly to the CLB once the full payment of the fees was made. JLL also pointed out that since it was appointed by the CLB, the report would be sent directly to the CLB in confidence and therefore it will not be in a position to share any details pertaining to the report with the appellant prior to the submission of the same to the CLB. Despite being notified by JLL about the fact that the report was ready for submission and the appellant should therefore remit the balance of the fees agreed upon, the appellant went on making excuses and did not pay balance fees. Merely because the appellant had agreed to bear the entire fees payable to JLL, it gives no right to the appellant to demand that every step in the process of valuation of the land should be made known to it and it should be taken into confidence as to how the valuation is arrived at and what is the value determined. The conduct of the appellant in insisting of being made aware of the process of valuation at every stage leaves much to be desired. I agree with the sentiments expressed by the CLB, with

respect, regarding the conduct of the appellant in filing CA 260/2012.

13. The learned counsel for the appellant relied on section 8 of the Arbitration and Conciliation Act and submitted that the CLB ought to have referred the matter to arbitration instead of deciding the matter itself. Section 8(1) is as follows:

> **"8. Power to refer parties to arbitration where there is an arbitration agreement** - (1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration."

After the judgment of the Supreme Court in **Canara Bank Vs. Nuclear Power Corporation of India** (1995) 84 Company Cases 70, it cannot be disputed that the Company Law Board is a judicial authority. However, the other condition of the sub-section is that the action which was brought before the CLB should have been in a matter which is the subject of an arbitration agreement. This condition is not satisfied in the present case. The main company petition No.63(ND)/2013 was filed by the Belgium Company against the appellant herein, under sections 397 and 398 of the Companies Act alleging oppression and mismanagement. The appellant had also filed a petition under section 397 and 398 of the Companies Act in CP 58(ND)/2008 complaining against acts of oppression and mismanagement by the Belgium company. Thus there were cross-petitions before the CLB containing mutual allegations of oppression and mismanagement. It was in one of those petitions that the CLB, in an attempt to ascertain the fair price of the shares of the Indian company, appointed JLL as the valuer for valuing the land as part of the process of valuing the shares. Thus the matter which is the subject of an arbitration agreement between the appellant and JLL was not the action which was brought before the CLB. The order passed by the CLB on 10.9.2009 was an order seeking an expert opinion regarding the fair price of the shares of the Indian Company which was to be determined keeping in view of the possibility of resolving the disputes between the parties amicably. Therefore, section 8(1) of the Arbitration and Conciliation Act, 1996 is not attracted to the dispute between the appellant and JLL. Moreover, it is the appellant which approached the CLB with an application in CA 260/2012 seeking refund of the first instalment of the fee of '16 paid to JLL and also seeking directions from the CLB appointing another valuer, other than JLL. After approaching the CLB with the application and having lost it, it now contends that the CLB had no jurisdiction to pass the impugned

order. Its stand is contradictory.

14. It was further argued on behalf of the appellant that on 18.5.2912 the appellant had sent a communication to JLL requesting for appointment of an arbitrator and that this amounted to commencement of arbitral proceedings under section 21 of the Arbitration and Conciliation Act and therefore from this date the CLB lost jurisdiction to adjudicate upon the matter. I have already discussed how section 8(1) of the aforesaid Act is not attracted to the dispute between appellant and JLL. Therefore, the CLB was well within its jurisdiction to have decided CA 260/2012.

15. In the view I have taken, namely, that the provisions of section 8(1) of the Arbitration and Conciliation Act, 1996 are not attracted to the dispute between the appellant and JLL I do not think it necessary to consider the other subsidiary arguments advanced on behalf of both the sides.

16. In the result, the impugned order is confirmed and the appeal and all connected applications are dismissed with no order as to costs.

ILR (2013) V DELHI 3684
CO. A. (SB)

GURPARTAP SINGH & ANR. ....APPELLANTS

VERSUS

VISTA HOSPITALITY PVT. LTD. & ORS. ....RESPONDENTS

(R.V. EASWAR, J.)

CO. A. (SB) NO. : 22/2013 DATE OF DECISION: 09.09.2013
WITH CO. APPL. 833/2013

Companies Act, 1956—Question whether CPC applicable to proceedings before CLB—Held strict provisions of CPC, Indian Evidence Act etc. not applicable to proceedings before Tribunals to make the functioning of these specialised tribunals

effected—Enactment constituting the tribunals makes specific provisions as to the extent of the applicability of the provisions of CPC wherever required—The result is that except the provisions of the CPC made applicable, the other provisions are not applicable—Therefore, unless specifically conferred, CPC not applicable to CLB. Also held that the object and purpose of Sec. 397 & 398 of the Companies Act and the wide and unbridled powers given to the CLB U/s 402 of the Act, the CLB should be extremely reluctant to reject the petition in the threshold itself on highly technical grounds. Thus, the permission granted by the CLB earlier to withdraw the petition and file afresh petition on a fresh cause of action should not be viewed on the basis of strict parameters of Order 7 Rule 11 of the CPC. Also held there is no requirement that the petition against oppression and mismanagement should be filed only by minority or that it cannot be filed by majority members.

[Di Vi]

APPEARANCES:

FOR THE APPELLANTS : Mr. Virender Ganda, Senior Advocate with Mr. Rakesh Kumar and Mr. Aditya Nayyan, Advocates.

FOR THE RESPONDENTS : Mr. Ravi Gupta, Sr. Ashish Aggarwal and Mr. Varun Sharma, Advocates for R-2 to 5.

CASES REFERRED TO:

1. *K. Muthusamy and P. Durai* vs. *S. Balasubramanian and Ors.,* (2012) 106 CLA 120 (MAD.).
2. *Ultrafilter GMBH* vs. *Ultrafilter (India) P. Ltd. and Anr.,* (2012) 106 CLA 163 (KAR.).
3. *B. Subha Reddy* vs. *S.S. Organics Ltd.,* (2009) 151 Comp Cas 190 (AP).
4. *Union of India* vs. *Madras Bar Association,* (2010) 11 SCC 1.

5. *J.P. Srivastava & Sons (P) Ltd. and Ors.* vs. *Gwalior Sugar Co. Ltd. and Ors.,* (2005) 1 SCC 172.
6. *Jer Rutton Kavasmaneck and Ors.* vs. *Gharda Chemicals Ltd. and Ors.,* (2001) 106 Company Cases 25 (Bom.).
7. *Khimji M. Shah* vs. *Ratilal Damodardas Modi,* [1988] ML] 38 ; [1990] 67 Comp Cas 185 (Bom).
8. *Dr. V. Sebastian and Ors.* vs. *City Hospital P. Ltd. and Ors.,* (1985) 57 Company Cases 453.
9. *Drum-mond-Jackson* vs. *British Medical Association* [1970] 1 All ER 1094.
10. *Nagle* vs. *Feilden,* [1966] 1. All ER 689, 695.
11. *Ramashankar Prosad and Ors.* vs. *Sindri Iron Foundry (P) Ltd. and Ors.,* AIR 1966 Calcutta 512.
12. *Shanti Prasad Jain* vs. *Kalinga Tubes, AIR 1965 SC 1535.*
13. *S.P. Jain* vs. *Kalinga Tubes Ltd.* (1965) 2 SCR 720.

RESULT: Appeal Allowed.

R.V. EASWAR, J.

1. This is an appeal filed by one Shri Gurpartap Singh and Smt. Geeta Partap Singh under section 10F of the Companies Act, 1956 ('Act', for short) impugning the order passed by the Company Law Board in C.P. No.7(ND)/2013 and CA No.41/2013 on 13.03.2013.

2. It is necessary to give a brief background of the facts leading to the filing of the present appeal. The respondent-company, Vista Hospitality Private Ltd. was incorporated on 10.01.2003, with the appellants as the original promoters and directors. Pursuant to a joint venture agreement, hereinafter referred to as JVA, entered into between the appellants and the respondents herein on 21.12.2007 there was a restructuring of the shareholding as well as the board of directors under which the appellants, the Gurpartap group, came to hold 65% and the respondents, the Jhankar group, came to hold 35% of the shares in the company. The board of directors consisted of 5 directors nominated by the Gurpartap group and 3 directors nominated by the Jhankar group. Upto the year 2010, the affairs of the company were running smoothly. Sometime early in the year 2011, it appears that disputes over the functioning of the company and the conduct of its business arose between the two groups. There were allegations and rebuttals that the respondents

were trying to entice away the clientele of the company to their concern, Jhankar Banquets, which was operating opposite to the company and thereby causing loss. It was also alleged by Gurpartap group that the Jhankar group was acting to the detriment of the company's business.

3. In the above situation, the Gurpartap group, the appellants herein, filed a petition before the Company Law Board (CLB) in C.P. No. 101(ND)/ 2012 under sections 397-398 of the Act alleging oppression and mismanagement and sought reliefs by way of permanent injunction against the Jhankar group (i) from diverting the business of the company to their own business and (ii) from acting contrary to the understanding arrived at in the JVA and (iii) to pass orders directing the parties to make offers for buying out the other party's shares even before the expiry of the lock-in period of five years which was to expire on 20.12.2012 and (iv) to direct that respondent No.3 was not capable of being appointed a director of the company.

4. The aforesaid company petition was mentioned before the CLB on 30.08.2012, on which date it would appear that the respondents took the plea that the petition was not maintainable in view of the provision in the JVA for arbitration and wanted to move an appropriate application. The plea was allowed and on the next day, the respondents filed an application under section 8 of the Arbitration and Conciliation Act, 1996 which was numbered as C.A. No. 468/2012. The appellants filed their reply to the application. Some attempt at a settlement appears to have been made which did not fructify.

5. The application filed by the respondents in CA No.468/2012 was taken up for hearing by the CLB on 14.01.2013. What happened on that date as well as the next two dates was a matter of intense debate and considerable arguments were advanced on that point before me which I will refer to at the appropriate juncture. I will for the present only notice what was stated in the orders passed by the CLB on 14.01.2013 and 16.01.2013 and the letter dated 15.01.2013 written by the appellants to the CLB.

6. On 14.01.2013, the order passed by the CLB was this:

> "Arguments were part heard. To continue on 16.01.2013 at 10.30 am as item No.2.
>
> Sd/-
> (Justice D.R. Deshmukh)
> Chairman"

On 15.01.2013, a letter was written by the appellants (respondents before the CLB in the application) which is as below: -

> "To,
>
> The Bench Officer,
> Company Law Board,
> C.G.O. Complex, Paryavaran Bhawan
> New Delhi
>
> Reg.: Company Petition in the matter of "Shri Gurpartap Singh & Anr. Versus M/s. Vista Hospitality Private Limited & Ors." before the Hon'ble Company Law Board, Principal Bench, New Delhi Sir,
>
> This is with reference to the filing of the fresh Company Petition u/s 397-398 read with Section 402 of the Companies Act, 1956 in the above said matter, a copy of which is enclosed herewith.
>
> Kindly note that earlier Company Petition being C.P. No.101(ND) of 2012 was filed before the Ho'ble Bench u/s 397-398 read with Section 402 of the Companies Act, 1956. The last date of hearing in the said petition was 14.01.2013 and the next date of hearing in the matter is 16th January, 2012.
>
> The Petitioners would like to withdraw the said Company Petition i.e. 101 (ND) of 2012, which is pending before the Hon'ble Bench and coming up for hearing on 16th January, 2013 and would seek a liberty to file the fresh company petition before the Hon'ble Bench.
>
> The Petitioners would serve the present company petition along with its annexures on the Respondents on 16th January, 2013 i.e. the next date of hearing fixed in the said C.P. No.101(ND) of 2012 on which date the Petitioners are proposed to withdraw the said C.P. No.101(ND) of 2012 and will serve the company petition to the Respondents.
>
> Take notice that we have filed the accompanying Company Petition under Section 397, 398 read with Section 402 of the Companies Act, 1956 against the Respondents. The above said petition is likely to be listed on 17th day of January, 2013 at 2.30 P.M.

Please find attached herewith the copy of the Petition along with Annexures.

Thanking you

Yours faithfully
Sd/-
(Rakesh Kumar)
Advocate

CC to: 1. M/s. Jhankar Banquets Private Limited, G-87, Preet Vihar, Delhi – 110092

2. Shri Mahesh Kapoor, G-87, Preet Vihar, Delhi-110092

3. Smt. Usha Kapoor, G-87, Preet Vihar, Delhi-110092

4. Shri Balvinder Sachdeva, D-72, Lajpat Nagar, New Delhi-110024

(Counsel for the aforesaid Respondents will be duly served in the forthcoming hearing in C.P. No.101(ND) of 2013 on 16th January, 2013).

Encl.: Copy of Petition along with Annexures"

The petition filed on 15.01.2013 under cover of the above letter was numbered as CP No. 7(ND)/2013.

On 16.01.2013, the CLB passed the following order:

"Counsel for the Petitioner sought leave to withdraw the petition with liberty to file a fresh petition on a fresh cause of action. Prayer is not opposed. Leave granted. Petition is dismissed as withdrawn.

Sd/-
(Justice D.R. Deshmukh)
Chairman"

7. It would appear that after the above order was passed, the applicants before the CLB (Jhankar group) filed an application in CA No. 41/2013 for dismissal of the C.P. No. 7(ND)/2013. This application was a composite application for dismissal of the petition both under section 8 of the Arbitration and Conciliation Act, 1996 and under Order VII, Rule 11 of the Code of Civil Procedure (CPC) read with Regulation 44 of the CLB Regulations.

8. CP No. 24(ND)/2013 was thereafter filed by the Jhankar group

in February, 2013 under sections 397-398 of the Act alleging oppression and mis-management on the part of the Gurpartap Singh group, the appellants herein. That petition remains to be disposed of by the CLB as on date.

9. The CLB passed orders in C.P. No.7(ND)/2013 and CA No. 41/2013 on 13.03.2013. The following are its findings:

a) The petition filed earlier by the petitioner in CP No.101(ND)/2013 was withdrawn by the petitioner on 16.01.2013 with liberty to file a fresh petition on a "fresh cause of action". The petition filed thereafter in CP No. 7(ND)/2013 does not disclose any fresh cause of action, which it must, under Order VII, Rule 11 of the CPC.

b) The fresh petition does not disclose any fresh cause of action. The averments in paragraphs 6.1 to 6.50 and 6.55 to 6.64 are identical with the averments in the earlier petition which was withdrawn. In fact, the fresh petition was signed and filed on 15.01.2013, even before the withdrawal of the earlier petition on 16.01.2013.

c) The petitioners being in control and management of the company by virtue of their majority shareholding *"have failed to substantiate any oppressive act by the minority, i.e., the Respondents or to satisfy on the existence of a situation justifying winding up of R-1 company. Therefore on both counts the application under section 397, 398, 402 of the Companies Act must fail as held in* ***S.P. Jain v. Kalinga Tubes Ltd.*** *(1965) 2 SCR 720.*

d) It can be said "with absolute certainty that after the withdrawal of the earlier petition on 16.01.2013 no fresh cause of action has arisen in favour of the Petitioners to file a fresh petition u/s. 397,398 & 402 of the Companies Act 1956 against the Respondents".

In the aforesaid view of the matter, the CLB held that the CP No.7(ND)/2013 was liable to outright rejection for not having disclosed any fresh cause of action under Order VII, Rule 11 of the CPC. That part of the application filed by the Jhankar group which was based on Section 8 of the Arbitration and Conciliation Act was however rejected. The CA No.41/2013 filed by Jhankar group was thus partly allowed and the main company petition filed by Gurupartap Singh (appellants herein) was dismissed for non-disclosure of any fresh cause of action.

10. It is the aforesaid order of the CLB that is impugned in the present appeal.

11. Sections 397 and 398 of the Companies Act read with Section 402 of the said Act confer wide powers and ample jurisdiction upon the CLB to pass such orders and give such directions as it thinks fit to achieve the object. These powers are without any limitation or restriction and the only limitation on the exercise of such powers is that there should be a nexus between the order that may be passed by the CLB and the object sought to be achieved by these Sections. In order to reach the conclusion that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members, it is open to the CLB to hold a thorough inquiry into the allegations made in the petition. If the allegations are found correct, the CLB is empowered to make such order as it thinks fit, with a view to bringing to an end the matters complained of. In order that the CLB may make an order under Section 397, it must be satisfied firstly that the affairs of the company are being conducted in a manner oppressive to any member or members; secondly that the facts would justify the making of a winding-up order on the ground that it is just and equitable that the company be wound up and thirdly that a winding-up order would unfairly prejudice the applicant or applicants.

12. Considering the vast and unlimited powers exercisable by the Company Law Board with reference to the petitions filed under Sections 397 and 398 of the Act it would be first necessary to examine whether the petition can be disposed of on preliminary or technical grounds. In the present case there are two preliminary or technical grounds on which the company petition filed by the appellants herein before the CLB was dismissed. The first is that the petition was not maintainable since it was filed by the majority shareholders who held 65% of the total shareholding in the company. The argument on behalf of the appellants on this point was that so long as the requisite conditions of Section 399 are satisfied, the petition should be held maintainable even if it is filed by shareholders having a majority shareholding. Section 399 specifies the members of a company who shall have the right to apply under Section 397 or Section 398. Clause (a) of sub-section (1) of the Section provides that in the case of a company having a share capital not less than 100 members of the company or not less than 1/10th of the total number of its members whichever is less or any member or members holding not less than 1/10th of the issued share capital of the company may apply. The company involved in the present case being a company having a share capital, it

is open to any member or members holding at least 1/10th of the issued capital to approach the CLB under Section 397 or Section 398. This is the only condition which, according to the learned counsel for the appellants, needs to be satisfied and there is no requirement that a petition against oppression and mis-management should be filed only by minority.

13. The Calcutta High Court in **Ramashankar Prosad and Ors. Vs. Sindri Iron Foundry (P) Ltd. and Ors.,** AIR 1966 Calcutta 512 seems to have decided this issue for the first time in India. In that case the argument put forth was that the petition was not maintainable because it was filed by the majority. In support of the argument, reliance was placed on the judgment of the Supreme Court in **Shanti Prasad Jain vs. Kalinga Tubes,** AIR 1965 SC 1535. The Division Bench of the Calcutta High Court rejected this argument. Distinguishing the English Companies Act, under which only a minority can file a petition against oppression and mis-management by the majority, the Division Bench held that the English Act did not contain a section like Section 399 of the Indian Act which, according to the Calcutta High Court, was a code by itself as to the qualification necessary for filing an application under Sections 397 and 398. It appears to have also been argued before the Court that Section 399 only fixed the lower limit of the qualification of the shareholders and not the upper limit. This argument was also rejected by holding that if the Legislature had only fixed a lower limit, but no upper limit as to the qualification for relief and if the object of the section is to prevent a mischief and to remove oppression and mis-management of the companies, there was no reason why an upper limit should be implied so as to bring the section in line with the English section. According to the Court, the section was of a remedial nature and, therefore, the proper construction thereof should be to give the words used their widest amplitude. The Calcutta High Court also dealt with the argument based on the judgment of the Supreme Court in **Shanti Prasad Jain** (supra). The argument was rejected in the following words: -

> "61. No doubt in **Shanti Prosad Jain's** case, 1965 SCA 556: (AIR SC 1535) the Supreme Court referred extensively to the English decisions and observed more than once that it was the minority which had the right to complain of oppression by majority. But **Shanti Prosad Jain's** case 1956 SCA 556: (AIR 1965 SC 1535) was one of complaint by a minority and the court was not called upon to go into the question as to whether a majority which had been paralysed by the wrongful acts of a minority could seek the protection of the court under that section.

Indeed, speaking of Section 397 read with Section 399 the court observed "it gives a right to members of a company who comply with the conditions of Section 399 to apply to the court for relief under Section 402 of the Act or such other reliefs as may be suitable in the circumstances of the case if the affairs of a company are being conducted in a manner oppressive to any member or members including any one or more of those applying." This quotation goes to show that in the view of the Supreme Court a member or members applying under Section 397 had to qualify under Section 399."

14. The position was dealt with also by the Kerala High Court in **Dr. V. Sebastian and Ors. Vs. City Hospital P. Ltd. and Ors.,** (1985) 57 Company Cases 453 by a learned Single Judge (M.P. Menon, J.). The learned judge held as under: -

"It is true that ss. 397 and 398 are intended primarily to protect the minority interests. In ordinary cases, the majority will be able to protect itself by controlling the directors at general body meetings. But, where the majority is prevented from doing so, despite the clear indication in the articles that majority rule based on the right to demand poll should operate as a correcting influence, the majority becomes an artificial minority entitled to claim protection under ss. 397 and 398. When the directors with the majority backing, oppress the minority and misconduct the affairs of a company, occasion arises for interference by the courts. But, when the directors, with only minority support, seek to stifle the majority by taking advantage of some defect or error, I think such a situation can also be remedied in a like manner. The Calcutta High Court has held in **Sinduri Iron Foundry (P.) Ltd.,** In re [1964] 34 Comp Cas 510, that such a remedy is available to the majority when it is rendered ineffective by the wrongful acts of a minority. (The decision was confirmed in appeal – See Ramashankar Prosad v. Sindri Iron Foundry (P.) Ltd., AIR 1966 Cal 512)."

In **J.P. Srivastava & Sons (P) Ltd. and Ors. Vs. Gwalior Sugar Co. Ltd. and Ors.,** (2005) 1 SCC 172 the Supreme Court noted that any member/ members of a company may apply under Sections 397 and 398 of the Act to the CLB complaining of mis-management or oppression "provided such member or members have the requisite shareholding as prescribed under Section 399 to do so".

15. In the light of the above authorities it appears to me that the objection raised by the respondents both before the CLB as well as before me that the petition before the CLB was not maintainable because it was filed by the majority shareholders, cannot be upheld.

16. I will now proceed to consider the other preliminary ground on which the petition was held not maintainable by the CLB. Before I do so, it is necessary to bear in mind, having regard to the object and purpose of Sections 397 and 398 and the very wide and unbridled powers given to the CLB under Section 402, that the CLB should be extremely reluctant to reject the petition in the threshold itself on highly technical grounds. In **Jer Rutton Kavasmaneck and Ors. Vs. Gharda Chemicals Ltd. and Ors.,** (2001) 106 Company Cases 25 (Bom.), the learned Single Judge (S. S. Nijjar, J., as he then was) was confronted with a situation where, in an application under Section 397 and 398 of the Companies Act, counsel for the respondents had taken an objection that the company petition was not maintainable and should be dismissed under Order VII Rule 11 (a) of the Code of Civil Procedure, 1908 as disclosing no cause of action. It must also be noted that in the days before the establishment of the CLB, petitions complaining of oppression and mis-management were being filed before and dealt with by the High Courts. Under Rule 6 of the Companies (Court) Rules, 1959, the provisions of CPC, so far as they are applicable, applied to all proceedings under the Companies Act. Even so, the objection of the respondents in that case that the company petition should be dismissed in limine on the ground that it did not disclose any cause of action was rejected. The reasoning of the Bombay High Court runs thus: -

"I am of the considered opinion that the judgment in **Khimji M. Shah v. Ratilal Damodardas Modi,** [1988] ML] 38 ; [1990] 67 Comp Cas 185 (Bom) has correctly interpreted the law laid down by the Supreme Court. Even the Supreme Court in the case of **Kalhiga Tubes Ltd.** [1965] 35 Comp Cas 351; AIR 1965 SC 1535, has held that facts and events leading up to the filing of the petition are relevant. Keeping the aforesaid proposition of law in view, the court is now required to see as to whether sufficient facts have been pleaded to make out an arguable case of oppression as well as mismanagement. It is a settled proposition of law that whilst exercising powers under Order 7, rule 11, the courts act with utmost caution. Dismissal of a petition at the threshold leads to very serious consequences. The courts in India as well as in England have been very reluctant to reject the

plaint at the threshold. Order 7, rule 11(a) of the Code of Civil Procedure provides that the court may reject the plaint/petition if it discloses no cause of action. A similar provision occurring in Rules of the Supreme Court, Order 18, rule 19 in England was considered in the case of **Drum-mond-Jackson v. British Medical Association** [1970] 1 All ER 1094, wherein Lord Pearson observes as follows (page 1101):

> "Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases....."

Similar views expressed by other judges are also noticed in that judgment which are as follows:

"In **Nagle v. Feilden,** [1966] 1. All ER 689, 695, Danckwerts L.J. observes:

"The summary remedy which has ,,been applied to this action is one which is only to be applied in plain and obvious cases, when the action is one which cannot succeed or is in some way an abuse of the process of the court'."

Salmon L.J. at page 697 observes:

"It is well settled that 'a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable'."

Thus, the rule appears to be that the plaint can be rejected in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the court. The plaint should not be struck out unless the case is unarguable. In the same judgment, Sir Gordon Willmer observed as follows (page 1105):

"The question whether a point is plain and obvious does not depend on the length of time it takes to argue. Rather the question is whether, when the point has been argued, it has become plain and obvious that there can be but one result."

Thus, it becomes clear that the petition could be struck out only if the case put forward is unarguable."

Thereafter, at page 44 of the report the High Court observed as under:-

"At this stage the court is not required to decide the petition on the merits. The petition could be held to be demurrable only if the claim put forward cannot be established even if all the allegations made in the petition are accepted to be true. Such is not the position here. Very complicated questions of fact and law have been raised. It is only at the final hearing of the petition that the court would be able to decide the issues as to whether the dividend squeeze could amount to an oppression. The court would also have to decide as to whether or not transfer of shares made in contravention of the articles of association would amount to an act of oppression. The court would also have to decide as to whether or not the remuneration received by respondent No. 2 is an act of oppression. These are all matters which require detailed consideration and have to be decided on the merits at the final hearing of the petition."

17. It appears to me, on a careful reading of the judgment of the **Bombay High Court** (supra), that the CLB cannot dismiss a petition under Section 397/ 398 of the Act as not maintainable, unless the petition raises issues which are absolutely unarguable or frivolous or in a case where the petition does not disclose the satisfaction of the basic requirements of these sections. In this light, I proceed to examine the question whether the CLB was justified in rejecting the company petition on the ground that it did not disclose any fresh cause of action within the meaning of Order VII Rule 11 of the CPC. 18. Order VII Rule 11 of the CPC is in the following terms: -

> "R.11. Rejection of plaint. – The plaint shall be rejected in the following cases: -
>
> (a) Where it does not disclose a cause of action;
>
> (b) Where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
>
> (c) Where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
>
> (d) Where the suit appears from the statement in the plaint to be barred by any law:"

19. The first question for consideration now is whether the provisions of the CPC are applicable to proceedings before the CLB; and the further question to be considered is whether, if those provisions are applicable to the proceedings before the CLB, the CLB was right in dismissing the fresh petition filed on 15.01.2013 on the ground that it did not disclose a fresh cause of action.

20. I would for the moment assume that the provisions of the CPC are applicable to the proceedings before the CLB. Even so, I am unable to agree with the CLB that the fresh petition filed on 15.01.2013 did not disclose any fresh cause of action. It is necessary to bear in mind the sequence of the events leading to the filing of the fresh petition. In the first petition filed by the appellants herein in Company Petition No.101(ND)/2012, several allegations were made and several acts were brought to the notice of the CLB which according to the petitioners constituted oppression and mis-management on the part of the respondents. When the petition came up for hearing on 14.01.2013, arguments were heard in part and they were to continue on 16.01.2013. For the present I would proceed on the assumption that there was no suggestion from the CLB on that date that the petition may be withdrawn and a fresh petition may be filed. On 15.01.2013, the petitioner (Guru Partap Group) filed a fresh petition before the CLB under cover of a letter of even date. A perusal of the letter shows that it refers to the hearing which took place on 14.01.2013 and also to the fact that the next date of hearing was 16.01.2013. Thereafter, the petitioners state that they would like to withdraw Company Petition No.101(ND)/2012, which is to come up for hearing on 16.01.2013 and would seek liberty to file the fresh petition before the CLB. The copy of the petition along with the relevant annexures were annexed to the letter and filed before the CLB as per endorsement made thereon (Diary No.214/ 16.01.2013). On 16.01.2013 the CLB passed an order stating that the petitioner sought leave to withdraw Company Petition No.101(ND)/2012 with liberty to file a fresh petition on a fresh cause of action. Since the prayer was not opposed, leave was granted and the petition was dismissed as withdrawn. When the fresh petition which was numbered as Company Petition No.7(ND)/2013 was mentioned on 22.01.2013 and notice was issued, it was noticed by the CLB that Company Application No.41/2013 had been filed in the meantime by the respondent under Section 8 of the Arbitration and Conciliation Act, 1996 and also on the basis of Order VII, Rule 11 of the CPC. The petitioner was granted a week's time to file a reply in the aforesaid application. The matter was directed to be listed on 15.02.2013, on which date it was heard. The

application in Company Application No.41/2013 as also the fresh company petition in C.P. No.7(ND)/2013 were disposed of by order dated 13.03.2013.

21. It further needs to be noted that in the fresh petition filed on 15.01.2013, the petitioner added paragraphs 6.51 to 6.54 and in these paragraphs had drawn the attention of the CLB to the fact that the lock-in period of 5 years mentioned in the JVA for transfer of shares between the petitioners and the contesting respondents had already expired on 21.12.2012 and it was because of this that the earlier Company Petition No.101(ND)/2012 was withdrawn with liberty to file a fresh petition. The other contents of the fresh petition were mere repetition of the contents of the earlier petition. The argument on behalf of the appellants was that by withdrawing the earlier petition the petitioners did not admit that there was no cause of action and that having regard to the fact that the contents of the earlier petition were retained in the fresh petition, with the addition of the reference to the fact that the lock-in period had expired on 20.12.2012, the fresh petition was in substance and in effect a continuation of the earlier petition with an additional fact being brought to the notice of the CLB. The contention further is that the earlier cause of action was not abandoned by the petitioners. My attention was also drawn to the reply filed by the petitioners (appellants herein) to the application filed by the respondents under Order VII, Rule 11 before the CLB, particularly to the averment in paragraph 15 that the petitioner chose to file the fresh petition on a fresh cause of action, which did not mean that the cause of action which constituted the basis for filing the earlier petition had lapsed and that the fresh petition was *"carrying the said cause of action in addition to the subsequent cause of action arising in favour of the petitioners and against the respondents....."*. These arguments were countered on behalf of the respondent by submitting that there was no fresh cause of action which arose after the filing of the first petition on the basis of which the fresh petition filed on 15.01.2013 could be justified, that the relief sought by the petitioner in the fresh petition is identical to the relief sought in the earlier petition and that the withdrawal of the first petition by the petitioners gave a vested right to the respondent and that in these circumstances the CLB was justified in law in dismissing the fresh petition as not based on any fresh cause of action.

22. Having considered the rival submissions on this point, I am of the view that the contentions advanced on behalf of the appellant should prevail. I have already opined that the CLB should be reluctant to strike out any proceedings before it on technical grounds. This is particularly

so with reference to proceedings under Sections 397 and 398 of the Act alleging oppression and mis-management and seeking remedies. It should be the effort of the CLB to bring to an end all matters complained of and towards this end the CLB is empowered to make such order as it thinks fit. It is the interest of the company that is the paramount consideration under Section 397/ 398. Therefore, the permission granted by the CLB to the petitioners to withdraw the petition and file a fresh petition on a fresh cause of action should not be viewed on the basis of the parameters for a strict implementation of Order VII Rule 11 (a) of the CPC. It should be looked at more as a substantive compliance, particularly when the fresh petition did not abandon or omit the earlier cause of action but merely added one more cause of action namely the expiry of the lock-in period on 20.12.2012. Obviously it was during the pendency of the first petition that the lock-in period expired. The expiry of the lock-in period undoubtedly facilitated a possible arrangement under which the CLB could direct either party to acquire the shares of the other party. It was only with a view to bringing this to the notice of the CLB that the petitioners withdrew the earlier petition and filed a fresh petition. In substance and effect this was merely an amendment or an addition to the earlier petition and to the contents thereof. The expiry of the lock-in period could have even been brought to the notice of the CLB in the course of the oral submissions made before the CLB. The withdrawal of the first petition might even have been prompted by the discovery, in the course of the argument before the CLB on 14.01.2013, that the lock-in period had expired. In my view the CLB was not justified in preferring to adopt a very technical approach.

23. In any case as held by the Supreme Court in **Shanti Prosad Jain vs. Kalinga Tubes Ltd.** (supra) it is necessary for the petitioner who has filed a petition under Section 397 of the Act to show that the conduct complained of was oppressive and *"this requires that events have to be considered not in isolation but as part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members"*. This observation shows that the acts complained of as being oppressive have to be viewed in a wholesome manner and without dissecting them into separate, disjunctive or component parts of oppression. What is complained of is oppression and such oppression may be the result of several continuous acts, all of which constitute what the Supreme Court describes as a consecutive story. It is neither proper nor necessary to look at each act of oppression disjointedly. Viewed

from this angle also, there is no justification, in proceedings under Section 397 of the Act, to insist on a fresh petition being filed only on the basis of a fresh cause of action. I would even venture to say that in a petition under Section 397, there is no room for such theories as fresh cause of action. The observations of the Supreme Court cited above also add strength to my view, that what was brought to the notice of the CLB in the fresh petition was only one more development after the filing of the petition, which would be a relevant development, which the CLB ought to note while passing orders under Section 402 with a view to bringing to an end the matters complained of. On this basis I would further venture to think that the CLB was not also justified in insisting on a fresh petition being filed only on a fresh cause of action. The approach of the CLB, with respect, seems to me highly technical, an approach not called for and even indicted by the spirit of Sections 397 and 398.

24. The above discussion of mine is on the assumption that the provisions of the CPC are applicable to the proceedings before the CLB. In fairness to the arguments advanced before me, I must also deal with the question whether the provisions of the CPC are applicable to proceedings before the CLB. I may start with a very basic common sense approach prompted by the very rationale of constituting specialised tribunals to deal with issues arising out of special legislation. The Central Administrative Tribunal (CAT) deals with service matters relating to employees of the Central Government; the Income Tax Appellate Tribunal deals with issues arising out of assessments made under the Income Tax Act, 1961. Similarly, the CLB exclusively deals with issues arising out of the working of the Companies Act, 1956. All these Tribunals have been given power to regulate their own procedure. In exercise of such power, rules/ regulations have been framed by these Tribunals. It has been uniformally held that in order to make the functioning of these specialised Tribunals effective, the strict provisions of the CPC, Indian Evidence Act, 1872 etc. are not applicable to the proceedings before such Tribunals. It is quite normal to find in the enactment constituting these Tribunals a provision which makes only some of the provisions of the CPC applicable to proceedings before them. So far as the CLB is concerned, Section 10-E(4-C) provides as follows: -

> "(4-C) Every Bench referred to in sub-section (4-B) shall have powers which are vested in a Court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters namely:
>
> (a) discovery and inspection of documents or other material

objects producible as evidence;

(b) enforcing the attendance of witnesses and requiring the deposit of their expenses;

(c) compelling the production of documents or other material objects producible as evidence and impounding the same;

(d) examining witnesses on oath;

(e) granting adjournments;

(f) reception of evidence on affidavits."

25. The other sub-sections which are relevant are the following: -

"(4-D) Every Bench shall be deemed to be a Civil Court for the purpose of section 195 and [Chapter XXVI of the Code of Criminal Procedure, 1973] and every proceeding before the Bench shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code and for the purpose of section 196 of that Code.]

[(5) Without prejudice to the provisions of sub-sections (4C) and (4D), the Company Law Board shall in the exercise of its powers and the discharge of the functions under this Act, or any other law be guided by the principles of natural justice and shall act in its discretion.]

[(6) Subject to the foregoing provisions of this section, the Company Law Board shall have power to regulate its own procedure.]"

26. Pursuant to the power given under sub-section (6) of Section 10E the CLB has framed the Company Law Board Regulations, 1991 governing the proceedings before it. Similar provisions occur in the Income Tax Act, 1961 also. Section 255 read with Section 131 of the said Act, confers upon the Income Tax Appellate Tribunal the following powers which are vested in a Court under the CPC when trying a suit in respect of the following matters, namely (a) discovery and inspection, (b) enforcing the attendance of any person, including any officer of a banking company and examining him on oath, (c) compelling production of books of accounts and other documents and (d) issuing commissions. Section 255(6) further provides that the proceedings before the Tribunal shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 and for the purpose of Section 196 of the Indian Penal

Code, and further that the Tribunal shall be deemed to be a civil court for all the purposes of Section 195 and Chapter XXXV of the Code of Criminal Procedure. Sub-section (5) of Section 255 of the Income Tax Act, 1961 confers upon the Income Tax Appellate Tribunal the power to regulate its own procedure and the procedure of the Benches thereof in all matters arising out of the exercise of its powers or of the discharge of its functions, including the places at which the Benches shall hold their sittings. Pursuant to this power, the Income Tax Appellate Tribunal has framed the Income Tax Appellate Tribunal Rules, 1963 regulating its functioning.

27. Thus wherever the legislature so desired, specific provisions were enacted in the statutes creating the Tribunals as to the extent of the applicability of the provisions of the CPC in the functioning or the proceedings before such Tribunals. The result is that except the provisions of the CPC which have been so made applicable, the other provisions are not applicable. In **Union of India vs. Madras Bar Association,** (2010) 11 SCC 1, the Supreme Court has observed as under: -

"(iii) While courts are governed by detailed statutory procedural rules, in particular the Code of Civil Procedure and the Evidence Act, requiring an elaborate procedure in decision making, tribunals generally regulate their own procedure applying the provisions of the Code of Civil Procedure only where it is required, and without being restricted by the strict rules of the Evidence Act."

28. The aforesaid observations cover not only the CLB but also Tribunals in general.

29. The position, therefore, is that unless specifically conferred, the provisions of the CPC are not applicable to CLB. My attention was also drawn to the following judgments in which a similar proposition was accepted:-

(i) **B. Subha Reddy vs. S.S. Organics Ltd.,** (2009) 151 Comp Cas 190 (AP).

(ii) **K. Muthusamy and P. Durai vs. S. Balasubramanian and Ors.,** (2012) 106 CLA 120 (MAD.).

(iii) **Ultrafilter GMBH vs. Ultrafilter (India) P. Ltd. and Anr.,** (2012) 106 CLA 163 (KAR.).

30. It is, however, possible to postulate an argument that though the provisions of the CPC are not applicable to CLB, there is no prohibition in applying the principles evolved in the CPC. There can be no quarrel

with such an argument, subject to the caveat that the well recognised principles embedded in the elaborate provisions of the CPC can be invoked to the proceedings before the CLB with a view to suppressing the mischief and advancing the cause of justice. This seems to be the purpose of Regulation 44 of the CLB Regulations. Even if this argument is given effect to, I do not think that the CLB in the present case was justified in any manner in throwing out the fresh petition on the basis of the principle behind Order VII Rule 11(a). In addition to the reasons which I have earlier given, on the basis of the vast powers conferred upon the CLB in petitions complaining of oppression and mis-management and the expectation of the Companies Act that the disputes arising out of acts of oppression and mis-management should be effectively put an end to by the CLB, I would add that the principle embedded in Order VII Rule 11(a) ought not to have been invoked in the present case to defeat the right of the appellants to the remedy against acts of oppression and mis-management allegedly committed by the respondent, without even examining the petition on merits. As rightly contended on behalf of the appellants, section 397(2) requires the CLB to form an opinion, that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members. It is difficult to visualise the possibility of such an opinion being formed by the CLB without examining the acts of the oppression and mis-management complained of or without inquiring into the question whether there is substance in the complaint or not. The CLB not only has to form such an opinion but shall further pass such order as it thinks fit with a view to bringing to an end the matters complained of. It needs no emphasis that the interests of the company are paramount in moulding the relief and the remedy under Section 397 is an alternative to winding-up. A company is a corporate personality and is normally promoted to foster economic growth of the country. Its proper functioning is, therefore, essential for the economic strength of the country. The provisions of Section 397 and 398 are a step towards ensuring that companies formed for this purpose do not get derailed because of lack of probity or merely because of egoistic disputes between the men behind the company. Rejection of the petition filed under Section 397/ 398 of the Act on a technical or a preliminary ground leaves the disputes unsettled which goes against the mandate of the provision. The disputes are allowed to linger and that is not good for the company or the public interest. Having these factors in mind I am unable to uphold the dismissal of the fresh company petition filed by the appellants herein before the CLB on the basis of the principle embedded in Order VII, Rule 11(a) of the CPC,

even assuming that there is no bar on the principles embedded in the CPC being invoked to proceedings before the CLB.

31. There is one more reason for my view. Though the appellant's petition before the CLB was dismissed as not maintainable for not disclosing a fresh cause of action, the petition filed by the respondents before the CLB in C.P. No.24(ND)/2013, also under Sections 397 and 398 of the Act, complaining of acts of oppression and mis-management against the appellants, is still stated to be pending before the CLB pursuant to an order passed by the CLB on 19.02.2013. On this date the CLB passed an order for listing the petition filed by the respondents herein along with the fresh petition filed by the appellants before the CLB. However, the fresh petition filed by the appellants was dismissed, though the petition filed by the respondents was adjourned and is kept pending. When both the petitions were initially directed to be listed together for hearing it would have been just and equitable that the mutual allegations were examined and an opinion was formed as to whether the affairs of the company were being conducted in a manner prejudicial to public interest or oppressive to any member or members and it was eminently desirable that the CLB passed an order with a view to bringing to an end the matters complained of. Taking up both the petitions together for hearing would have given an opportunity to the CLB to see the points of view of both the sides in order to arrive at a just decision. This is one more reason which, in my view, ought to have prevailed upon the CLB and persuaded it not to throw out the fresh petition filed by the appellants herein on the basis of principle behind Order VII, Rule 11(a) of the CPC.

32. Regulation 44 of the CLB Regulations, 1991 reads as under: -

> "44. Saving of inherent power of the Bench – Nothing in these rules shall be deemed to limit or otherwise affect the inherent power of the Bench to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Bench."

33. The above rule shows that the inherent power of the Bench is preserved subject to the condition that such power shall be exercised only for the ends of justice or to prevent abuse of the process of the Bench. It is difficult to fathom how the filing of the fresh petition by the appellants herein was contrary to the ends of justice or can be said to result in the abuse of the process of the Bench. The CLB could have examined the merits of the fresh petition and taken a decision on the merits and could have also decided the petition filed by the respondents

at the same time. In other words both the petitions which are under Sections 397 and 398 of the Act could have been disposed of in a consolidated manner. The impugned order dated 13.03.2013 shows that the CLB was of the opinion that the petitioners could not satisfy that a situation existed which justify the winding-up of the company. The only reason for this conclusion given by the CLB in paragraph 3 of the impugned order is that the petitioners were in control of the management of the company to the exclusion of the respondent and being in majority have failed to substantiate any oppressive act by the minority. That the petitioners were the majority shareholders of the company was the only ground put against them on merits and it was presumed, without examining the various allegations made in the fresh petition, that a minority cannot act against the majority under any circumstances. There is no other reason given on the merits of the allegations and it appears to me that the CLB, with respect, expressed its opinion on merits without actually examining them. There is no reference to any of the allegations made in the fresh petition or to the contents of the elaborate pleadings in the petition. The order of the CLB which is impugned before this Court, therefore, does appear to me to be unsustainable, in so far as it purports to reject the petition also on merits.

34. It was argued on behalf of the appellants that it would be a contradiction to say, on the basis of Section 8 of the Arbitration and Conciliation Act, 1996 that in view of the specific clause in the JVA, the disputes between the parties should be referred to arbitration and also say, in the same breath, that there is no fresh cause of action. This contradictory stand, according to the learned counsel for the appellants, was taken by the learned counsel for the respondents which, according to him, cannot bear scrutiny. When the respondents filed Company Application No.41/2013 on the ground that in view of the arbitration clause, the CLB would have no jurisdiction to entertain the petition filed by the appellants herein and also in the same application took a ground that there was no fresh cause of action in filing the fresh petition, they were to some extent taking a contradictory stand. If there were disputes which needed to be referred to arbitration, for the very same reason, it can also be said that there was a continuing cause of action on the basis of which the fresh petition may be entertained. This position need not, however, be examined further because I have already taken the view that in the very nature of things, acts of oppression and mis-management are a continuous story and they cannot be dissected into separate causes of action. I have also expressed the view that by filing the fresh petition,

the petitioners (appellants herein) were merely bringing to the notice of the CLB another aspect of the JVA which may assist the CLB in dealing with the petition on merits. The CLB ought not to have disposed of the petition on merits, without actually examining the merits of the allegations made in the petition.

35. In the course of the arguments the learned counsel for the appellants took up the position, inter alia, that the earlier petition was withdrawn at the suggestion of the CLB, which was made after it was noticed that the lock-in period of 5 years had expired on 20.12.2012 and the petition having been withdrawn at the suggestion of the CLB, the CLB was not justified in refusing to entertain the fresh petition on the ground that it disclosed no fresh cause of action. This was strongly contested by the learned counsel for the respondents, the argument being that there was nothing in the orders passed by the CLB to suggest that the first petition was withdrawn at the behest of the CLB with liberty to file a fresh petition on a fresh cause of action and that the Judge's record is final and nothing can be permitted to be stated by the parties against the same. I do not consider it necessary to examine this aspect of the matter despite the elaborate arguments advanced by both the sides on this issue. I have preferred to rest my decision on the assumption that there was no such suggestion by the CLB and that in withdrawing the earlier petition and filing the fresh petition, the petitioners (appellants herein) were acting on their own.

36. For the above reasons I am of the view that the impugned order passed by the CLB on 13.03.2013 in Company Petition No.7(ND)/2013 and Company Application No.41/2013 should be set-aside. I hold accordingly and remand the matter to the CLB which will now deal with the petitions filed by the appellants herein under Section 397 and 398 and dispose them of on merits and in accordance with law. It is for the consideration of the CLB whether the cross-petition filed by the respondents herein (C.P. No.24(ND)/2013) before the CLB under the above sections should also be heard along with the petition filed by the appellants herein.

37. The appeal is allowed in the aforesaid terms, with no order as to costs. The Co. Appl. No.833/2013, consequently stands disposed of.