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Part-II (October, 2013)
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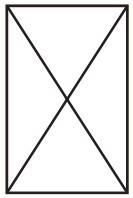

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# DELHI SERIES
# 2013

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

# VOLUME-5, PART-II

**(CONTAINS GENERAL INDEX)**



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**HIGH COURT OF DELHI: NEW DELHI**

No. 909/Comp./DHC
Dated 23/10/13

**NOTICE**

The e-filing of cases in the Company and Tax jurisdictions in the Delhi High Court will be inaugurated by the Hon'ble the Chief Justice of India at 5 pm on 25th October 2013. Thereafter in both jurisditions the e-filing of appeals, petitions, counter affidavits, rejoinder affidavits, applications and all documents will take place at the e-filing Cente, Room No. 4, Ground Floor, Lawyers' Chambers Block-I, Delhi High Court.

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(H.C. Suri)
Registrar (Compertization)

Endst No. 25151-59/Comp/DHC Dated: 23/10/13

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fatal to the admissibility or appreciation of evidence—Trial Court observed that the mere use of personal vehicles of the investing officers the investigation and evidence on record as suspicious—Hence the present leave to appeal petition. Held-PW-4 to PW-7 in their testimony have stated that being the official of Special Cell they are not required to enter their arrival and departure in the register—All police officials irrespective of their rank are bound to record their arrival at the time of joining their duties and departure at the time of leaving their office—Trial Court rightly held it is possible to manage the rojnamcha register—Material contradictions in the testimonies of police officials on the timing of preparation of the rukka and registration of FIR—Use of special vehicles PW-5 neither ascribed any special reason for using private vehicles nor was any log book maintained by him—Testimonies of the policed official witnesses are dissatisfactory with regard to this circumstance also—Master—Piece of currencies (Ex. P-3)—One side could have been used to print the FICN—Prosecution failed to show how the FICN were printed on both sides by the respondent no. 1- Tampering with the case property—Yellow coloured envelopes found missing—Possibility of tampering with the case property—No public witness was called—Taking the search of the house of respondent no.1—Section 100(4) of Cr.P.C casts a mandatory duty upon the investigators to call upon two or more independent and respectable inhabitants of the locality where the search is to be conducted—Wife of respondent 1 was present in the house at the time of search but no efforts were made to join her as recovery witness—No list of seized articles was delivered to respondent no.1 —Non—Joining of any independent witness at the time of raid—The Supreme Court in *Pradeep Narayan Madgaonkar v. State of Maharashtra*, observed "evidence of the officials (police) witnesses cannot be discarded merely on the ground that they belong to the force—But prudence dictates that their evidence needs to be subjected to strict scrutiny—Requires greater care to appreciate their testimony"—Leave is to be granted in exceptional cases where the judgment under appeal is found to be perverse.

*State* v. *Om Prakash & Ors.*..... *3959*



— Sec. 378 (1)—The deceased had died within seven years of marriage under unnatural circumstances—Post mortem report ExPW-1/A, mentioned the cause of death as asphyxia as a result of ligature pressure over neck produced by strangulation—Testimonies of PW-1 and PW-15 stated that the deceased was harassed by respondent no. Demand of car as dowry—The Trial Court observed material contradictions on the testimonies of the PW-1 and P-15 and secondly, testimony of PW-1 and his statement before Magistrate EX.PW-1A with respect to time of demand of car—The Court observed numerous flaws in the post mortem report ExPW-8/A upon cross—Examination of PW-8 and PW-9—Hence the present Appeal. Held—Proximity between the time of demand of dowry and the time of death of deceased-demand of dowry to be covered under Section 304—B of IPC has to made soon before death—No definite interpretation to phrase "soon before death"—The Supreme Court in *Satvir Singh v. State of Punjab* observed that the phrase "soon before her death" should have a perceptible nexus between her death and the dowry—Relate harassment or cruelty inflicted on her- the interval between the two events should not be wide—The deceased went back to her matrimonial house—Period of 11 month proceeding her death—No demand of dowry made by the respondent—No perceptible nexus exists between her death and dowry related demand—Further, crucial elements have not been examined and recorded in the post mortem report—does not inspire confidence—Appears to be a case of hanging—No evidence that any of the accused had abetted the suicide of the deceased—Prosecution has not been able to prove its case beyond reasonable doubt.

*State* v. *Paramjeet Singh & Ors.*..... *4014*

— Indian Penal Code, 1860—Sec. 302/34—Petition for leave to appeal field by State—Brother of the deceased, PW-5 and Laxman Tyagi PW-9, nephew of the deceased recovered the body of the deceased in a decomposed condition—During investigation, it was found the relations between the deceased and his wife and children were not good—Lived separately—Respondent no. 1 started visiting the deceased—Respondent

no.1 brought Chach (lassi) for deceased but he did not consume—PW-1 found the lassi to be bitter—PW-2 asked to give the lassi to him—Felt unconscious and was rushed to the doctor—The deceased told PW-1 that respondent no 1 mixed poison in his lassi—Respondent no. 1 had asked PW-10 to transfer share of plot of land in his name belonging to the deceased—Further, PW-10 stated that Respondent asked him about a poison that cause death—On the this information PW-31 issued notice to respondent under Section 160 of Cr.P.C—During interrogation respondent confessed his guilt and was arrested—In a disclosure statement, respondent no 1 named respondent no. 2 and stated that they thrown their clothes and gloves and knife—Recovery of both the shop was recovered form the pocket of pajama of respondent no. 1—Dagger type knife (weapon of offence) was also recovered at the instance of respondent no. 1—Charge sheet was prepared under Section 302/34 of IPC—The Trial Court observer that the Investigating Officer had not conducted proper investigation to find out whether the shop and plot of village were in the name of the deceased—The Trial Court, Form the depositions of PW-10, PW-9 and PW-5 observed that the deceased had no plot of land in the village at the time of incident—Hence, property as the motive of murder has been established—Prosecution has not attributed any motive on respondent no.2 except for the fact that he is a friend of respondent no. 1—The Trial Court disbelieved the prosecution case with respect to the incident of poisonous lassi—Depositing of PW-5, PW-8 and PW-9 indicate that they had no personal knowledge of the incident of poisonous lassi—Their testimony is hearsay and therefore inadmissible in evidence PW-21 and PW-2 turned hostile—Evidence of PW-31, PW- 30 and PW- 19 indicate that effort was made to call any public witness at the time of alleged recovery of blood stained clothes and knife—Rule of prudence and not mandatory—However, wherein recoveries effected form a public place—Serious effort to join an independent witness—Trial Court observed that there was serious inconsistencies in the testimonies of the police officials examined as recovery witness-Hence the present leave petition. Held—The learned Trial Court rightly disbelieved the recoveries effected upon the



disclosure statement of the respondents—Mere presence of blood on the recovered clothes and knife are not sufficient to prove that respondents committed the murder of the deceased—Leave to appeal is to be granted in exceptional cases where the Judgment under appeal is found to be perverse—Presumption of innocence of the accused—Trial Court's acquittal adds to the presumption of innocence.

*State* v. *Vikas @ Bhola & Anr.* ..... *4032*

**CONSTITUTION OF INDIA, 1950**—Article 226—Writ Petition—Article 14—Service Law—Central Industrial Security Force (CISF)—Promotion—Assured Career Progressive Scheme (ACP)—Promotion Cadre Course (PCC)-petitioner-constable-seeks restoration of the first financial upgradation as per ACP Scheme *w.e.f* 28.02.2004-12 years continuous service with CISF-became entitled for grant of second financial upgradation as per MACP Scheme *w.e.f* 28.02.2012-Petitioner was granted financial upgradation by the respondent *w.e.f* 17.02.2004 on completion of 12 years of service-ACP benefit cancelled on failure in the promotion Cadre Course (PCC)—Held *w.e.f* July, 2004—first chance-respondent proceeded to recover amount paid towards his financial upgradation from 28.02.2004—Petitioner's representation of no avail-respondent proceeded to re-grant the ACP upgradation to the petitioner vide order dtd. 23.02.2006—Denied the financial upgradation *w.e.f* 28.02.2004 to 20.01.2006—Contended-every employee is given three opportunities to complete the PCC-in case of inability of the employee to complete the course in the first attempt-the second and third opportunities available to him-respondent contended—Para 4 of the Circular dtd. 07.11.2003 to the effect that a conscious decision taken to effect recovery of pay and allowances pertaining to the period from the date of upgradation of scale under ACP scheme to the date of stoppage of such financial upgradation—Court observed-Para 4 of the Circular is to be read in the context of para 2 of the Circular which clearly recognizes that an employee would be entitled to financial upgradation from the date he becomes eligible for the same-recovery can only be made if the

respondents have given three chances for undergoing the PCC-the employee unable to do so-or-unsuccessful-the respondent not waited for the petitioner qualifying in PCC before proceedings with the recovery action—Held - petitioner entitled to the amount recovered from him-refunded to him-further held-petitioner entitled for second upgradation as per ACP scheme-Writ petition allowed.



— Article 226—Writ Petition—Service Law—Central Civil Service (Pension) Rules, 1972—Rule 48-A (F)-Notice of voluntary retirement-withdrawal- petitioner-an Assistant Engineer (E&M) with the Field Workshop of the General Reserve Engineer Force (GREE) of the Boarder Security Force (BSF) sent a letter dtd. 17.08.2010 to the Secretary of the Border Road Development Board (BRDB) seeking voluntary retirement from service *w.e.f.* 01.12.2010 (FN)—Ground—Domestic problem and ill health-three month notice of voluntary retirement commencing from 01.09.2010—Withdrew letter by a communication dtd. 23.11.2010—Withdrawal refused-resignation accepted by an order dtd. 15.11.2010—Petitioner aggrieved-preferred writ petition-contended-finding improvements in his family circumstances moved an application dtd. 23.11.20010 for withdrawal of his aforesaid application for voluntary under the provision of Rule 48-A of the CCS (Pension) Rules, 1972—Respondent contended-order dtd. 15.11.2010 served upon the petitioner vide a letter dtd. 20.11.2010 and filed a speed post receipt dtd. 23.11.2010—Further contended that the request for withdrawal of voluntary retirement application had been processed under Rule 48-A(4) of CCS (Pensions) Rules and petitioner's request rejected by the competent authority—Court observed—In the withdrawal application petitioner had stated that he came to know regarding departmental promotion committee was likely to be held shortly and decided to take advantage of the same—however did not suggest that domestic problem over or had recovered from his health—The ground on which VRS sought—Petitioner remained on leave throughout the notice on the ground of medical illness—Held—Ordinarily approval for



withdrawal should not be granted unless the officer concerned in the position to show material change in the circumstances in consideration of which the notice originally given—writ petition dismissed.



— Article 226—Writ Petition—Article 14—Service Law—Central Industrial Security Force (CISF)—Promotion—Assured Career Progression Scheme (ACP)—Promotion Cadre Course (PCC)—Petitioner constable seeks restoration of the first financial upgradation as per ACP Scheme *w.e.f.* 17.02.2004 when he completed 12 years of continuous service with CISF and become entitled for grant of second financial upgradation as per MACP Scheme *w.e.f.* 17.02.2012—The petitioner after completion of 12 years of service was offered an opportunity to undergo PCC in December 2006—Could not go to medical unfitness—Asked to the posting as per the advise of doctor in the training centre—Granted first promotional upgradation—Subsequently qualify the PCC—Result conveyed on 24.11.2008—Prior to the that on 30.07.2008 order issued ACP benefit granted cancelled due to his failure to complete PCC held in December, 2006—Respondent proceeded to recover the amount to paid for financial upgradation—However respondent proceeded to re-grant the ACP upgradation *w.e.f.* 12.02.2009—Denied the benefit of the financial upgradation *w.e.f.* 17.02.2004 to 11.02.2009—Petitioner Contended-completion of actual PCC would have no effect date of grant of financial benefit—In as much as—All employee undergo the PCC only after become eligible for grant of ACP—Further—Every employee given three opportunities to complete PCC—Inability to successfully complete the PCC in first or second attempt would render petitioner eligible for attempt—Therefore withdrawal and recovery of the benefit unjustified—Respondent contended—In terms of circular an employee deputed for PCC fails to clear the course or showed inability to go the course on one pretext or the other, the benefit of scheme already granted had to be stopped and recovery had to be made—Held—Every employee

Labour Court which held charge levelled against him was not fair and proper—Respondent preferred writ petition and order of Labour Court was quashed—Aggrieved appellant preferred appeal and urged, witness in inquiry proceedings must depose orally as to alleged misconduct and cannot rely on or adopt his earlier report—Thus, order of Inquiry Officer based upon such evidence of Traffic Inspector was not proper. Held:- Strict rules of the Evidence Act, and the standard of proof envisaged therein do not apply to departmental proceedings or domestic tribunal.

*Nepal Singh* v. *Delhi Transport Corporation* ..... *4007*

— Art. 226—Criminal Procedure Code, 1973—Section 482—Mandamus—Direction to Delhi Police to pass order u/s. 149 Cr.P.C to the Secretary, Aviation Employees Cooperative House Building Society—Restraining private caterers from creating any public nuisance—ADM(E) Delhi passed a conditional order u/s 133(1)(a) Cr.P.C followed by interim order retraining the society form locating/private caterers—A complaint u/s 473 Delhi Municipal Corporation Act—Revision petition—Interim order by learned Additional Sessions Judge restraining society form washing utensils in open area—Held—Powers under Article 226 and Section 482 to be exercised in exceptional cases and very sparingly—Alternative remedy available under various statutory provisions of law—No ground for exercising the extra ordinary jurisdiction of this court.

*Ankur Mutreja* v. *Delhi Police* ..... *4043*

— Article 226 and 227—Criminal Penal Code, 1860—Section 482—Inherent power of the High Court—Quashing of FIR—Section 498A/406/34 of IPC—Cruelty—Demand for dowry—Punishment for criminal breach of trust—Common Intention—Hence the present petition—Held, quashing of FIR can be done only if the allegation made in the complaint, even if taken at their face value, do not prima facie constitute any offence and the uncontroverted allegations made in the FIR or complaint do not disclose the commission of any offence—Complain constitute cognizable offence—Investigation is still at threshold—Disputed questions of fact are not to be



determined in the Writ Petition—No ground for quashing of FIR.

*Avneesh Gupta & Ors.* v. *State of NCT of Delhi & Ors.* ..... *4051*

**INCOME TAX ACT, 1961**—Sec. 226 (3)—Share purchase agreement dated 25.09.2005—The sellers and the purchaser and respondent no. 2 entered into an Escrow Agreement dated 27.09.2005—Assessing Officer issued a notice to respondent no 2 under Section 226(3)—Amount held—As an escrow agent-vide Escrow Agreement dated 27.09.2005—Notice was objected to respondent 2—Clarified that the respondent 2 was not holding any money on account of the assessee company—Assessing Officer sent another similar notice dated 15.02.2007—Respondent no. 2 bank also furnished an affidavit dated 07.12.2012 fixed deposit of 94,84,96,05.97/—Was held by respondent no. 2 in terms of the Escrow Agreement—Assessing Officer passed impugned order and sent a notice 04.02.2013—Calling upon respondent no. 2 to forthwith pay the amount held by respondent no. 2—Hence the present petition. Held—Section 226(3) of the Act confers upon an Assessing Officer a special jurisdiction to proceed directly against a person, other than an assessee, for recovery of income-tax demands due form the assessee—Proceedings is in the nature of garnishee proceedings—But section 226(3) must be confined to cases where third party admits to owing money or holding any money on account of the assessee—Shaw Wallace and Co. Ltd. v. Union of India (relied on)—Once the third Party noticee has disputed that he owes any money—The Assessing Officer have no jurisdiction to proceed further—Assessee company is not a party to the Share Purchase Agreement—Neither the Share Purchase Agreement nor the Escrow Agreement provides for any contingency—Funds held by the respondent no. 2 bank in escrow be paid either to the assessee company or to the Income—Tax Department—The conclusion of the Assessing Officer that the amount of money kept with respondent no. 2 in escrow is available to the assessee for meeting its income—Tax demand held erroneous—The decision of Assessing Officer set aside—Respondent no. 1 directed to forthwith refund the amount

recovered from respondent no. 2 bank pursuant to the notice.

*AAA Portfolios Pvt. Ltd. & Ors.* v. *The Deputy Commissioner of Income Tax & Ors.* ..... *3939*

— Section 148—The Petitioner is a company engaged in the manufacture and sale of optical and sale of optical and magnetic storage media projects—The petitioner for the relevant financial year for the Assessment year 2005-2006 had unit—Petitioner filed its return on 31.10.2005 declaring loss—The petitioner claimed deduction under Section 10B—The Assessing Officer (AO) issued various questionnaires dated 31.10.2007, 01.10.2008 and 14.11.2008—Sought explanation form the assessee qua the claim under Section 10A/10B—Claim of deduction of deferred revenue expenditure for technical know—How fee—The claim of the petitioner was accepted—No 27.05.2009, the AO rectified the Assessment order dated 31.12.2008 and reduced the claim of deduction under Section 10B—The Deputy Commissioner on 04.05.2011 issued notice to the petitioner under Section 148 for Re-assessing the income of the petitioner—Petitioner filed objections—Made full and true disclosure of material facts—Issue of notice under Section 148—Based on Change of opinion—No fresh information or tangible material came to the knowledge of the AO—The Deputy Commissioner disposed of the objections vide impugned order dated 01.02.2013—Hence the present petition. Held: Allowing deduction under Section 10B and subsequent rectification—The AO Formed definite opinion on the claim of benefit under Section 10B—Further there was disclosure of full and true material facts—Deferred revenue expenditure—Specific query was raised—Responded to by the petitioner—Response to the questionnaire—Establishes the AO formed an opinion on the claim of the petitioner—The reason recorded by the Deputy Commissioner —Do not suggest any fresh and tangible material—That income had escaped assessment—AO to indicate specifically—Material or relevant facts subsequently came to knowledge.

*Moser Baer India Ltd.* v. *Deputy Commissioner of Income-Tax and Anr.* ..... *4022*



**INDIAN PENAL CODE, 1860**—Section 302/34—Appellants convicted for the offence of murder on the basis of recovery of blood stained clothes and the weapon of offence and the refusal to participate in TIP proceedings—Conviction challenged on the ground that one of the alleged eye witnesses was on inimical terms with the appellants and not a man worthy of credence and the other eye witness did not identify the accused persons in Court and that the prosecution failed to prove the motive of robbery and the recovery of certain articles at the instance of the accused not proved to be connected with the crime. Held: The testimony of the solitary eye witness of the incident does not inspire confidence for he has materially improved his statement given u/s 161 Cr.PC and his entire conduct found to be quite unnatural and further that he falsely denied his relationship with the appellants and the factum of a property dispute with them. The defence witnesses on the other hand much more reliable and their evidence should not have been ignored by the Court. Further more it has not been established beyond doubt that motive to commit crime was robbery. Neither the charge sheet was submitted for offence of robbery nor any separate charge for robbery was framed by Ld. ASJ. Further belongings of the deceased found lying next to his body only. Recovery of certain currency from the house of one of the accused not proved to be that belonging to the deceased. Recovery of blood stained from the house of one of the accused not reliable to establish the guilt of the accused persons for neither the blood found on the clothes proved to be that of the deceased nor any independent witness joined during the said asserted recovery. In the absence of detection of blood on thee alleged weapon of offence, it cannot be stated that it was used in the crime, more so when it was never shown to the concerned doctor to seek his opinion whether the injury on the person of deceased could been inflicted by it. Recovery of a purse assertedly belonging to the deceased at the instance of one of the accused not sufficient to convict the accused persons but merely raises a grave suspicion. Refusal of the accused persons to join the TIP does not lead to an adverse inference against them for the accused were already known to the

asserted star eye witness. Prosecution cannot be said to have established its case beyond reasonable doubt and hence appellants entitled to benefit of doubt. Appeal allowed.

*Suresh @ Bona* v. *State* ..... *3882*

— Section 302/364A/365/201/34—Appellants convicted for having abducted the son of the complainant aged about 19 years, for making a ransom demand of Rs. 1 Lakh for his safe release and for committing his murder and causing disappearance of the evidence of the offence—Prosecution based its case on circumstantial evidence and the circumstances which accounted for the conviction of the appellants were namely that the deceased was last seen with them and it was in pursuance of their disclosures and pointing out that the body of the deceased was recovered from a premises taken on rent by the appellants. Recovery of the Titan watch of the deceased from one of the appellants and the recovery of the dummy notes from one of the accused in pursuance of the same having been handed over to him by the complainant also held to be incriminating facts against them—Conviction challenged inter alia on the grounds that recovery of incriminating articles not witnessed by any public independent witness and hence doubtful, the identity of the dead body not being established conclusively, the premises from where the body recovered could not have been pointed out jointly by both the appellants and that the prosecution also failed to prove that the said premises had been taken on rent by the appellants. Held: No trace of doubt that the deceased was last seen in the company of the appellants. The recovery of incriminating articles namely the dummy notes and the purse of the deceased, from the appellants also proved beyond reasonable doubt. Though due to the death of the complainant, he could not be examined but the recovery was witnesses by four police officials and no material on record to discredit their testimony. The testimony of police personnel have to be treated in the same manner as testimony of any other witnesses and there is no principal of law that without corroboration by independent witnesses their testimony cannot be relied upon. On perusal of evidence, there is no difficulty



in finding that the dead body that was recovered was that of the son of the complainant and that was sufficient proof of *corpus delecti*. Further the legal position on joint and simultaneous disclosures by more than one accused leading to discovery of new facts is that the same are per se admissible u/s 27 of the Evidence Act. The evidence on record amply proves that it was on the disclosure and the pointing out of both appellants that the bag containing the dead body of the deceased was detected from the floor of a gallery of a premises rented out by the appellants and the appellants have failed to offer any explanation as to how they came to know of such concealment. Testimony of the landlord of the premises sufficient to prove that the premises in question were rented out to the appellants only and the mere fact that there was no documentary evidence in the form of rent agreement or rent receipt not sufficient to draw a presumption that the premises was not let out to the appellants. All the circumstances proved on record cumulatively taken together lead to the irresistible conclusion that the appellants alone are the perpetrators of the crime. Also to be taken note of that the appellants did not give any explanation u/s 313 Cr. PC to the incriminating circumstances pointing to their guilt. Appeal stands dismissed.

*Ashok Vishwakarma @ Surji* v. *State* ..... *3906*

— Sec. 392, 411, 34—Arms Act—Sec. 27, 54 & 55—Prosecution case emanates from the fact that on 9th July, 2001 SI Prahlad Singh along with Constable Rajesh was on patrolling and surprise checking in the area. At about 8.40 pm when they were going to Kailashpuri via Gali No. 5, Main Sagarpur, they heard noise coming from the Gali. They saw two boys running and they tried to apprehend them but one of the boys managed to escape.—Meanwhile, Smt. Bhagwan Devi came and gave her statement, inter alia, to the effect that on that day at about 8:30 pm, she along with her grand-daughter aged about 1 1/2 years was coming from the shop of Dr. Mudgil. She was on foot and coming to her house. When she was in front of Kesho Ram Sweets in Gali No. 5, three boys aged about 20-22 years suddenly came from the

side of Gali No. 5, Main Sagarpur and one boy who was a little fat and was wearing a cap snatched her wearing chain weighing about 18-20 grams on which a thread of 'Babaji' had been tied. She fell down along with her grand-daughter who was in her arms and also received injuries on her right Hand and also on stomach—On hearing her noise, her son Ghanshyam and public persons started following those boys. One of the boys who had snatched the chain and was a little fat was apprehended at a distance of about 200 meters by the public and she identified that boy—Charge for offence under section 392 r/w Section 397 IPC was framed against both the accused to which they pleaded not guilty and claimed trial.—Vide impugned order dated 3rd March, 2004, the appellant was held guilty of offence under Section 392 IPC, however, co-accused Shamshe Alam was granted benefit of doubt and was acquitted of the charge levelled against him. Feeling aggrieved by this impugned order, the present appeal has been preferred by the appellant Ravinder Paswan—It was submitted by learned counsel for the appellant that there are contradictions in the statements of the witnesses as such no reliance can be placed on the same. None of the public witnesses have identified the appellant.—Moreover, as per prosecution version, besides the chain, a knife was also recovered from the possession of the appellant. However, the recovery of knife has not been believed by the learned Trial Court.—Testimony of PW1 and PW2 find corroboration from PW 3 Sunil Sharma, an independent witness who has also stated that the boy who was apprehended gave his name as 'Paswan' and he was fat and was wearing a cap. From his possession, chain and knife was recovered. Constable Rajesh (PW6) and SI Prahlad (PW7) have also deposed regarding apprehension of appellant at spot by the public and that he was beaten by the public and when running away, he was apprehended by them and on his search, chain Ex. P1 was recovered. The sequence of events leads to the only conclusion that it was the appellant Ravinder Paswan who had snatched the chain and when he was running away, he was chased by ghanshyam and was apprehended by him and then the public who gathered at the spot took charge of him and gave beatings to him. Police officials, while on patrolling, reached the spot



and apprehended him. Chain (Ex.P1) was recovered from his possession. Presence of the appellant at the spot stands further proved from the fact that since he was administered beatings by the public, vide application Ex. PW7/2, he was sent to DDU hospital were his MLC Ex. PW 5/A was prepared by Dr. D.S. Chauhan (PW5) and a perusal of the MLC goes to show that at the very initial juncture, the history of "being beaten by public" was given.—In Gurcharan vs. State of Punjab, AIR 1956 SC 460, where some accused persons were acquitted and some others were convicted, it was held as follows:- "9.....The highest that can be or has been said on behalf of the Appellants in this case is that two of the four accused have been acquitted, though the evidence against them, so far as the direct testimony went, was the same as against the Appellants also; but it does not follow as a necessary corollary that because the other two accused have been acquitted by the high Court the Appellants also must be similarly acquitted." In *Gangadhar Behera vs. State of Orrisa,* (2002) 8 SCC 381: 2003 SCC (Crl.) 32 reliance was placed on *Gurcharan Singh* (Supra) and it was Held:- "15....Merely because some of the accused persons have been acquitted though evidence against all of them, so far as direct testimony went was the same dose not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a court to differentiate the accused who had been acquitted from those who were convicted." This authority was cited with approval in *Prathap Vs. State of Kerala* (2010) 12 SCC 79 and *Surajit Sarkar Vs. State of West Bengal* (2013) 1 SCC (Cri) 877. It is being the legal position, the appellant cannot be absolved of his involvement in the commission of the crime merely because co-accused who was not identified by the witnesses nor any recovery was effected from him, acquitted. So far as the appellant is concerned, there is cogent and reliable evidence to connect him with the crime. As such the submission of learned counsel for the appellant deserves rejection. —There is no infirmity in the impugned order dated 3rd March, 2004 whereby the appellant was convicted of the offence under Section 392 IPC which warrants interference,—Dismissed.

*Ravinder Paswan* v. *State* ..... *3721*

— Sec. 420, 498A, 376—Complainant got married to appellant on 1st May, 1982. After her marriage, she got an appointment in Doordarshan and thereafter she went under training in Pune and thereafter she was transferred to Delhi. Her father was alleged to be the member of Parliament and was residing in Delhi, therefore, she also shifted Delhi. In 1993, the accused is alleged to have started harassing complainant by saying that he would divorce her. He also filed divorce petition against the complainant in Family Court at Bhuvneshwar of which she received a notice. However, due to intervention of parents of the complainant, the matter got compromised and thereafter they continued to live together.—Charges under Section 498A/ 420/376 IPC were framed against the accused to which he pleaded not guilty and claimed trial. In order to substantiate its case, prosecution, in all, examined four witnesses out of whom the material witness was the complainant herself—After hearing learned counsel for the parties, learned Trial Court came to the conclusion that neither any offence under Section 420 IPC or 498A IPC or 376 IPC was made out, however, it was observed that since the accused concealed the factum of obtaining ex parte decree of divorce and continued to co-habit with the complainant, offence under Section 493 IPC is made out—In nut shell, the facts which emerge from the evidence coming on record are that the complainant was the legally wedded wife of the appellant, however, a divorce petition was filed. Appellant assured the complainant to withdraw the divorce petition. Complainant remained under the belief that divorce petition must have been withdrawn by the appellant—The sole question for consideration is whether under these facts and circumstances, offence under Section 493 IPC is made out or not—The Section contains two ingredients: (i) Deceitfully causing a false belief in the existence of a lawful marriage and (ii) co-habitation or sexual intercourse with the person causing belief—The essence of an offence under Section 493 IPC is, therefore, practice of deception by a man on a woman as a consequence of which the woman is led to believe that she is lawfully married to him although she is not and then make her co-habit with him—If a woman is induced to change her status from that of an unmarried to



that of a married woman with all the duties and obligations pertaining to the changed relationship and that result is accomplished by deceti, such woman within the law can be said to have been deceived and the offence under Section 493 IPC is brought home. Inducement by a person deceitfully to a woman to change her status from unmarried woman to a lawfully married woman and on that inducement making her cohabit with him in the belief that she is lawfully married to him is what constitutes an offence under Section 493—A perusal of Section 415 IPC makes it clear that the word 'deception' is also found but the explanation appended to this Section makes it clear that a dishonest concealment of facts is also a deception within the meaning of this Section. However, such an explanation is missing under Section 493 of the Indian Penal Code—In Kaumuddin Sheikh vs. State (1997) ILR 2 CAL 365, facts were substantially the same. In that case, the husband gave irrevocable "Talak" and Continued to live as husband and wife. It was held that it was not the case of prosecution that even though a valid and effective 'Talak' was given to the complainant, the appellant caused her to believed that there was no such valid or effective 'Talak and thereby managed to co-habit or have sexual intercourse with her in the belief that she continues to be legally merried wife of the appellant. It was a case where the appellant is said to have sexual intercourse with the complainant by not mentioning or suppressing the "Talak"—Things are substantially the same in the instant case, inasmuch as, it stands proved that the filing of the divorce petition by the appellant was within the knowledge of the complainant inasmuch as she had also caused her appearance before Family Court at Cuttack on 1st October, 1993. The whole case of prosecution revolves around the fact that an assurance was given by the appellant that he would withdraw the divorce petition, despite that, he did not withdraw the same. Complainant remained under the impression that he must have withdrawn the petition and under that belief continued to co-habit with him—The allegations at the most are appellant continued to have sexual intercourse with complainant by non-

mentioning or suppressing the factum of divorce. From such non-mention or suppression of divorce, it cannot be said that the appellant by deceit caused complainant to believe that she was lawfully married to him and to co-habit or have sexual intercourse with him in that belief. It may be that the appellant suppressed the factum of obtaining divorce decree from the complainant, but he was not alleged to have made any representation to her as to cause her to believe that she continues to be his legally married wife and induced her to co-habit or have sexual intercourse with him in that belief. That being so, the case is not covered within the four corners of Section 493 IPC—There is another aspect of the matter. The complainant in her deposition, before the Court had categorically stated that she had settled her disputes with the appellant and she does not want to pursue her complaint and the consequent case. Under those circumstances, it was even otherwise futile to proceed further with the case—Allowed.

*Pradeepta Kumar Mohapatra* v. *State* ..... *3732*

— Sections 392, 397 and 34—During the course of investigation, the appellant was arrested by Special Staff (South District) and confessed his guilt. Pursuant to his disclosure statement, he recovered stolen goods i.e. mobile phone made Nokia-2310, two flower post and the knife used in the incident. The Investigating Officer recorded statements of the witnesses conversant with the facts. On completion of the investigation, a charge-sheet was submitted against the appellant and he was duly charged and brought to trial. The prosecution examined sixteen witnesses. In his 313 statement, the appellant pleaded false implication. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned Judgment, held the appellant perpetrator of the crime for the offences mentioned previously. Being aggrieved, he has preferred the appeal.—During the course of arguments, on instructions, appellant's counsel state at bar that the appellant has opted not to challenge conviction under Section 392 IPC. She argued that Section 397 IPC was not attracted as the prosecution could not establish beyond doubt that any 'deadly' weapon was used



by the appellant while committing robbery.—Since the appellant has not opted to challenge conviction under Section 392 IPC, findings of the Trial Court on conviction under Section 392 IPC are affirmed.—Under Section 397 IPC, it is to be proved that 'deadly' weapon was used at the time of committing robbery or dacoity or grievous hurt was caused to any person.—In the instant case, DD No. 48A (Ex.PW-14/A) was recorded on 07.11.2009 at 06.50 A.M. on getting information that there was 'theft' near House No 39, Rajpur Khurd, Susan John, the complainant in her statement (Ex.PW-2/A) disclosed that three or four boys entered into her room and they were armed with knives. One of them was having a 'desi katta' There is no mention that the knives and country-made pistol were used in committing robbery.—The record reveals that no inmate in the house was injured and taken to hospital for medical examination. There is no cogent evidence on record to establish that the appellant was armed with 'deadly' weapon and it was used by him while committing robbery. Section 397 fixed a minimum terms of imprisonment.—It is Imperative for the Trial Court to return specific findings that the 'assailant' was armed with a 'deadly' weapon and it was used by him before convicting him with the aid of Section 397. In the instant case, the evidence is lacking on this aspect and benefit of doubt is to be given to the appellant.—While upholding the conviction and sentence of the appellant under Section 392 IPC, his conviction and sentence under Section 397 is set aside.—The appeal is disposed of in the above terms.

*Mustaq* v. *The State (NCT of Delhi)* ..... *3743*

— Section 412—Allegations against the appellants are that they received or retained five washing machines make Videocon knowing or having reasons to believe that it was robbed property. The assailants were convicted under Section 392/394/34 IPC for robbing washing machines (Ex.P-1 to P-5) from Ram Shanker. After arrest, they were interrogated and their disclosure statements (Ex. PW-2A, 2/B and 2/C) were recorded. They led the police to shop No. 17, DDA Market, Turkman Gate recovered two washing machines which were

seized. It led to A-2's arrest vide seizure memo (Ex.PW-2/D). He was interrogated and his disclosure statement (Ex.PW-2/E) was recorded. He took the police to House No.A-1, DDA flats, turkman Gate and recovered three washing machines which were seizure memo (Ex.PW-2/F). The recoveries were effected by the Investigating Officer PW-11 Mahender Pal Singh on 17.09.2000 who identified A-2 to be the person found present at shop No. 17 DDA Market, Turkman Gate when the assailants recovered two washing machines bearing 49247 and 49249 make Videocon seized by seizure memo (Ex.PW2/D). A-2 also put his signatures on various memos prepared there. Pursuant to his disclosure statement (Ex.PW.2/E) three more washing machines make videocon No. 49229, 49257 and 49253 were recovered at his instance—PW-9 (Ram Shankar) had informed the police about the robbery of washing machines from his possession on 09.09.2000. Apparently, these washing machines did not belong to A-2. He did not explain as to how and under what circumstances, he got possession of these washing machines. He did not produce ay document to show that he was bona fide purchaser of these articles. The assailants who had sold the washing were not dealers/shop-keepers—The recovery of two washing machines from A-2's possession, at shop No. 17, DDA Market, Turkman gate and three washing at his instance from flat, Turkman Gate establishes beyond doubt that he received and retained the washing machines knowing or having reasons to believe that it was a stolen property. A-2 did not produce any evidence that reception of property were innocent. The circumstances in which A-2 received the property were such that any reasonable man must have felt convinced that the property with which he was dealing must be a stolen property—Since nothing incriminating i.e. Washing machine was recovered from A-1's possession or at his instance, it cannot be inferred with certainty that he received or retained any robbed/stolen article from the assailants. He deserves benefit of doubt—The prosecution could not establish beyond doubt that A-2 was aware or had reasons to believe that the articles were a robbed property at the time of its reception. IT did not surface in evidence that A-2 had



hatched conspiracy with the assailants to rob the complainant and to deliver the robbed articles to him—In the light of the above discussion, A-2 is guilty of committing offence under Section 411 IPC only. He has already spent two and a half months in custody and has suffered trial for about ten years. He is not a previous convict. Considering the mitigating circumstances, A-2's substantive sentence is modified and reduced to one year under Section 411 IPC. Other terms of sentence order are left undisturbed. A-1 is Given benefit of doubt and is acquitted—A-2 is directed to Surrender and serve the remainder of his sentence—Appeal stands disposed of.

*Ahmed Sayyad @ Nanhu @ Nanhe & Anr.* v.
*State* ..... *3749*

— Section 392, 397 and 34—On 8.10.1994, ASI Shiv Singh (PW7) along with Ct. Anand Kumar (PW3) and Ct. Brahm Singh reached Shyam Nagar at about 11.50 a.m where the complainant Ravinder Chetwani (PW1) met them and gave his statement, Ex.PW 1/A regarding commission of robbery of Rs. 1,50,000/- Endorsement Ex. PW7/A was made by ASI Shiv Singh and the same was sent through Ct. Anand Kumar to police station on the basis of which FIR Ex.PW 2/B was recorded by Ct. Itwari Singh (PW2)—It was submitted by learned counsel for the appellant that the complainant did not identify the appellant and in fact was categorical in stating that he was called in the police station on 04.02.1995 where he had identified only one accused and not the second accused. He specifically deposed that accused Jai Veer Singh was not the second accused who had put the country made pistol on his person. That being so, there was no occasion for his being convicted for offence u/S 392 IPC. As regards recovery of Rs 15000/-, it was submitted that recovery was alleged to have been effected in the presence of PW4 Ashok Rana. However this witness has categorically deposed that no recovery was effected in his presence. Although he admitted his signatures at recovery memo at Point A, however he clarified that his signatures were obtained on blank paper. Moreover, the learned Trial Court has convicted the appellant while raising presumption u/S 114(a) of the Evidence Act—

Learned Public Prosecutor, however, stressed upon refusal on the part of the appellant to join TIP proceedings. Although it is true that the appellant had refused to join TIP proceedings, as such an adverse inference can be drawn against him for his failure to join the proceedings but that, ipso facto, is not sufficient to arrive at the conclusion that he was the person who participated in the commission of crime because it is the statement made by the witness in Court which is of prime importance and, as seen above, the complainant has categorically deposed that the appellant was not the second accused who had put the pistol on his neck at the time of committing robbery, therefore, only on the basis of presumption it cannot be held that appellant was the second accused who had put pistol on the neck of the complainant to commiting robbery—In *Earabhadrappa v. State of Karnataka,* AIR 1983 SC 446, the Supreme Court held that the nature of presumption under Illustration (a) to Section 114, must depend upon the nature of the evidence adduced. No fixed time limit can be laid down to determine whether possession is recent or otherwise and each case must be judged on its own facts. The question as to what amounts to recent possession sufficient to justify the presumption of guilt varies according as the stolen article is or is not calculated to pass readily from hand to hand. If the stolen articles were such as were not likely to pass readily from hand to hand, the period of one year that elapsed cannot he said to be too long particularly when the Appellant had been absconding during that period—In *State of Rajasthan Vs. Talewar and Anr.,* AIR 2011 SC 2271, in pursuance to disclosure statement, cash, silver glass, scooter, key of the car were recovered from accused persons. Recovery was not in close proximity of the time from the date of incident. It was observed that recovery is either of cash, small things or vehicles which can be passed from one person to another without any difficulty. In such a situation, no presumption can be drawn against the accused under Section 114 illustration (a) of the Evidence Act. No adverse inference can be drawn on the basis of recoveries made on their disclosure statements to connect them with the commission of crime—In the instant case also, since recovery is only of cash, that too, after about



three months of the incident it is not safe to draw an inference that the appellant in possession of the stolen property had committed robbery. In that view of the matter, the conviction of the appellant for the charge of robbery u/s 392 IPC cannot be sustained and is accordingly set aside—However, since the recovery of stolen property was effected at the instance of accused which remains unexplained, as such he is convicted u/s 411 IPC. The incident took place in the year 1994. The appellant remained in custody for a period of 11 months. It was submitted that the appellant is now well settled in life and is now living in his village along with his family. Under the circumstances, the ends of justice will be met, if he is sentenced to the period already undergone. However, the fine of Rs.5000/- imposed upon him is enhanced to Rs.5,000/- — Disposed of.

*Jai Veer Singh* v. *State* ..... *3755*

— Section 376, 506—The prosecution examined ten witnesses in all to substantiate the charges. In his 313 Statement, the appellant pleaded false implication. He pleaded that 'X's father had taken Rs.10,000/- as loan from him and when he demanded back the loan, a quarrel took place and 'X's father falsely implicated him in the case. He examined one witness in defence. After marshalling the facts and through scrutiny of evidence and considering the rival contentions of the parties, the Trial Court, by the impugned judgment convicted the appellant for the offences mentioned previously and sentenced him accordingly. Being aggrieved, the appellant has preferred the appeal—Learned additional Public Prosecutor urged that there are no valid reasons to discard the cogent testimony of the child witness which requires no corroboration. The prosecutrix was exploited for sexual gratification by the appellant for the last one and a half year. The prosecutrix and her parents had no animosity to falsely implicate their neighbour with whom they had no prior enmity or ill-will—The material testimony to establish the guilt of the appellant is that of the prosecutrix 'X'. In her 164 Cr.P.C.(Ex.P. W-5/B) statement on 11.09.1998, she named the appellant for committing rape upon her. She gave detailed

account of the incident. She was examined as PW-4 before the Court. The learned Presiding Officer put number of preliminary questions to the child witness before recording her statement to ascertain if she was competent to make statement and was able to give rational answers. The Trial Court was satisfied that she was a competent witness and understood the questions and was able to give rational answers to it. Her statement was recorded without oath as she did not understand its sanctity. In her deposition, she stated that suresh committed rape upon her. She had bleeded from her vagina. She further disclosed that Suresh took out whitish material from his penis and applied it on her anus. When she cried, he said 'Very good'. On arrival of her mother suddenly, Suresh started putting 'on' his pant. When her mother inquired as to what had happened, she told that Suresh uncle was doing bad thing with her and threatened to kill if she told anything to her parents. The prosecutrix apparently proved the version narrated by her at the first instance to the police and the Metropolitan Magistrate with no major variations. She was cross-examined at length but no material discrepancies emerged to disbelieve her. No ulterior motive was assigned to the child witness to make a false statement. Nothing was on record to infer that 'statement' was tutored to her by her parents—First Information Report was lodged without delay. Lodging of prompt FIR lends full credence to the version of the child witness. In the FIR the appellant was specifically named as culprit—In the MLC (Ex.PW-3/A) PW-3 (Dr.Milo Tabin) noted one contused lacerated wound on the malar region of the accused. At the time of medical examination, smegma was found absent on the corona of the accused's penis. Absence of smegma on the corona of penis in rape cases would show that the rape was committed. It is best circumstantial evidence against the appellant—The Court find no good reasons to deviate from the said findings. In sexual offences against minors there is no valid or tangible reason as to why the parents will tender false evidence against the accused. In the instant case, for a paltry sum of Rs.10,000/-, prosecurtrix's parents are not expected to level serious allegations of rape with their minor daughter to put her honour



at stake—In O.M.Baby (Dead) by L.Rs. V. State of Kerala 2012 Cri.LJ 3794 the Supreme Court observed "In any event, absence of injuries or mark of violence on the person of the prosecutrix may not be decisive, particularly, in a situation where the victim did not offer any resistance on account of threat or fear meted out to her as in the present case. Such a view has already been expressed by this Court in Gurcharan Singh V. State of Haryana (1972) 2 SCC 749 and Devinder Singh Vs. State of H.P. (2003) 11 SCC 488". Prosecution's case from the inception is that 'X' was exploited for sexual intercourse for the last about one and a half year by the accused. Whenever he got an opportunity finding the child alone in the house, he used to indulge in sexual activity with her. MLC (Ex.PX) records that hymen was torn and had old tear. Merely because MLC (Ex.PX) does not record rape, the cogent and reliable testimony of the prosecutrix cannot be dis credited. The girl below 6 years of age was incapable to understand the consequences of the nefarious acts—As per the nominal roll dated 27.01.2004, he also earned remission for eight months and 16 days. His jail conduct was satisfactory. He is not a previous convict. He is not involved in any other criminal activity. His substantive sentence was suspended on 14.07.2004. There is no indication of his deviant behavior/ conduct during this period. The original Trial Court record is not traceable. Some documents and other materials were reconstructed. The appellant was aged about 20 years on the day of incident. Considering these facts and circumstances, the substantive sentence is reduced to Rigorous Imprisonment for eight years. Other terms and conditions of the sentence order are left undisturbed—The appeal and all pending applications stand disposed of.

*Suresh* v. *State of Delhi* ..... *3777*

— Sec. 392, 397, 34—Ashuddin and Sher Khan @ Shahid Ali Mulla @ Arif were sent for trial in case fir No. 64/2011 PS Mayur Vihar with allegations that on 02.03.2011 at about 06.45 P.M. at road near 25 Block, Trilok Puri, Bus Stand, they and their associates boarded a DTC bus bearing No. DL 1PB-3177 on route No. 360 and robbed bag containing tickets and cash

Rs.280/- from Nitu—Conductor in the bus at the point of knife. The assailants got down the bus to flee and were chased. Ashuddin was caught hold at some distance and the bag robbed was recovered from his possession.—Ashuddin was charged under Section 392/34 read with Section 397 IPC. The prosecution examined six witnesses. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment, held Ashuddin guilty of committing offence under Section 392 IPC. Sher Khan @ Shahid Ali Mulla @ Arif was acquitted of all the charges. It is significant to note that the State did not challenge the acquittal—The appellant's counsel urged that the pleasant's identity as assailant has not been established beyond reasonable doubt. PW-4 (Rajesh Kumar), driver could not recognise him in the Court. PW-1 (Nitu)'s identification is shaky. He is not sure if he was the person who snatched the bag from him. No independent public witnesses including passengers were associated at any stage of the investigation. The story projected by the State is highly improbable—The apprehension at the spot is dispute. He sustained injuries due to the beatings at the hands of public and was medically examined vide MLC (Ex.PW-6/B) at Lal Bahadur Shastri Hospital, Khichripur, Delhi at 11.55 P.M. that day. The alleged history records that he was 'assaulted and beaten by public' It confirms his presence at the spot. In his 313 statement he admitted his presence in the bus but stated that he had got down the bus and was apprehended while moving away—The findings on conviction under Section 392 IPC are based upon fair appreciation and evaluation of reliable reliable evidence and are affirmed—The appellant was sentenced to undergo RI for five years with fine Rs.1,000/-. Nominal roll dated 09.04.2013 reveals that he has already undergone two years, one month and ten days incarceration as on 13.04.2013. He also earned remissions for five months and twenty two days. He is not a previous convict and not involved in any other criminal case. His overall jail conduct is satisfactory. On the date of incident, he was a young boy of 21 years. He is the sole earning member of the family and is to look after his wife and son. Sher Khan has been acquitted for want of cogent evidence. The assailants who used 'deadly' weapons in



committing robbery are absconding and could not be arrested. Considering these mitigating circumstances, order on sentence is modified and the appellant is sentenced to undergo RI for three years with fine Rs. 1,000/- and failing to pay the fine to undergo SI for 15 days—The appeal is decided.

*Ashuddin* v. *State* ..... *3788*

— Sec. 304 Part-I—Allegations against the appellant-Shakuntala were that on the night intervening 25/26.09.2008 at about 01.30 A.M. she poured acid on her husband Rattan Lal at jhuggi No. A-408, behind ITI, K Block, Jahangir Puri Daily Diary (DD) No. 5B (Ex. PW-9/A) was recorded at PS jahangir Puri at 02.29 A.M. after getting information from Duty HC Umed Singh, Babu Jagjivan Ram Memorial Hospital (in short BJRM Hospital) that Rattan Lal's wife had poured acid on him and he was admitted at BJRM Hospital. ASI Vijender Singh lodged First Information Report for commission of offence under Section 326 IPC—On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment, held the appellant guilty under Section 304 Part-I IPC and sentenced her. Being aggrieved, she has preferred the appeal—It is not under challenge that Rattan Lal and Shakuntala lived together at jhuggi No. A-408, K Block, Jahangir Puri. It is also not in controversy that at the time of incident on the night intervening 25/26.09.2008 only the victim and Shakuntala were present inside the jhuggi. In her 313 statement, she admitted that on 25.09.2008 her husband Rattan Lal came at the jhuggi at night. She did not claim if anybody else was present that night inside the jhuggi. It is also not disputed that Rattan Lal Sustained burn injuries due to acid on his body. She however pleaded that on that night Rattan Lal came drunk at the jhuggi and sexual intercourse with her—The defence version inspires no confidence and deserves outright rejection. Had the victim sustained injuries due to fall of acid accidentally, natural conduct of the appellant would have been to raise alarm and to take him to the hospital at the earliest. She was not expected to close the door of the jhuggi and to run to the police station as alleged. This conduct is quite unreasonable and unjustified—

The police machinery came into motion when PW-12 (HC Umed Singh) informed on phone to the Duty Officer at PS Jahangir Puri that one Rattan Lal was admitted in the hospital and had complained that his 'wife' had poured 'tejab'' on him. DD No. 5B (Ex. Pw-9/A) records this fact. It corroborates the version given by PW-3 and PW-10.PW-16 (SI Vijender Singh) recorded victim's statement (Ex.PX). MLC (Ex. PW-14/A) reveals that at the time of admission the patient was conscious and oriented. It is not in dispute that after sustaining burn injuries, the victim had run towards BJRM Hospital and had got himself admitted. It is not the appellant's case that the victim was unconscious or was not fit to make statement. PW-16 (SI Vijender Singh) lodged First Information Report under Section 326 IPC. Since the injuries sustained by the appellant were not sufficient to cause death in the ordinary course of nature, it appears that PW-16 did not consider it fit to record his statement under Section 164 Cr.P.C. from SDM—Vide post-mortem report (Ex. PW-15/A) the cause of death was opined as shock due to burn injuries consequent to ante-mortem corrosive burns—In 'State of Karnatka vs. Shariff', (2003) 2 SCC 473, the Supreme court categorically held that there was no requirement of law that a dying declaration must necessarily be made before Magistrate. Hence, merely because the dying declaration was not recorded by the Magistrate in the instant case, that by itself cannot be a ground to reject the whole prosecution case. It is equally true that the statement of the injured, in the event of his death may also be treated as FIR dying declaration. The Court has to be on guard that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly it can base its conviction without any further corroboration. In this case, the deceased had no ulterior motive to falsely implicate his wife and to exonerate the real culprit. There is no inconsistency in the version narrated and deposed by PW-3, PW-10, 12 & PW-16 regarding the complicity of the accused in the incident. In 'Paras Yadav and ors. Vs. State of Bihar', (1999) 2 SCC 126, the Supreme Court held that lapse on the part of the



Investigation Officer in not bringing the Magistrate to record the statement of the deceased should not be taken in favour of the accused. The Supreme Court further held that a statement of the deceased recorded by a police officer in a routine manner as a complaint and not as a dying declaration can also be treated as dying declaration after the death of the injured and relied upon if the evidence of the prosecution witnesses clearly establishes that the deceased was conscious and was in a fit state of health to make the statement—Discrepancies/contradiction highlighted by appellant's counsel are not material to discard the prosecution case in its entirety. At the time of occurrence, only the appellant and the victim were together inside the jhuggi. It was imperative for the appellant to establish under Section 106 Evidence Act as to how and under what circumstances, the victim sustained burn injuries. The appellant's conduct is unreasonable. Instead of taking him to the hospital without delay to provide medical aid, she locked the door of the jhuggi from outside and allegedly went to the police station. The appellant's false implication at PW-1 (Naveen)'s instance as alleged is not believable. PW-1 (Naveen), victim's son from the previous marriage lived separate with his 'mausi' at Bhalaswa Dairy. He deposed that the appellant quarreled with his father on his providing money for their maintenance. PW-1 (Naveen) or his relative were not present at the spot and came to know about the incident only after the victim sustained injuries. There are no allegations that PW-1 (Naveen) instigated the victim to make statement (Ex.PX). The finding of the learned Trial Court whereby the appellant was convicted under Section 304 Part-I IPC are based upon sound reasoning and do not call for interference and are affirmed. The appellant was sentenced to undergo RI for seven years with fine Rs.5,000/-. She is to undergo SI for six months in default of payment of fine. It is informed that she has no issue and is in custody from the very beginning. Nominal roll dated 10th January, 2012 reveals that she has already undergone three years, three months and thirteen days incarceration as on 10th January, 2012. She also earned remissions for four months and five days. Her over all jail conduct is satisfactory. She is not a previous convict

and is not involved in any other criminal case. Considering the facts and circumstances of the case and the mitigating circumstances, in the interest of justice, the order on sentence is modified and the substantive sentence of the appellant is reduced to six years with fine Rs.2,000/- and failing to pay the undergo SI for one month. She will be entitled to benefit under Section 428 Cr.P.C.—Disposed of.

*Shakuntala* v. *State (G.N.C.T. of Delhi)* ..... *3792*

**INDUSTRIAL DISPUTES ACT, 1947**—Section 33 & 33A—Appellant preferred appeal to challenge order passed in writ petition dismissing award passed by Industrial Tribunal in his favour—According to appellant, he was protected workman, thus, respondent had to seek approval of Industrial Tribunal before taking action against him—Since respondent did not comply with provisions of Section 33 (3) of Act, thus, he could not be dismissed from service pursuant to disciplinary inquiry held against him. Held:— Once a complaint is made under Section 33A of the Act and it established that there has been a violation of Section 33(2) (b) of the Act then the Tribunal has merely to direct that employee be given an appropriate relief.

*I.S. Rana* v. *Centaur Hotel* ..... *3969*

**PREVENTION OF CORRUPTION ACT, 1988**—Section 7—Taking illegal gratification other than legal remuneration—Section 13(2)—Criminal misconduct—Section 20—Presumption—Indian Evidence Act, 1872—Section 27—recovery at pointing out—Admissibility—Complainant, a contractor for PWD—Awarded contract for Rs. 5 lacs approximately—Part payment made—final bill for Rs. 2.5 Lacs due and pending for 2½ months—Met appellant—Demanded Rs. 10,000/- for getting the bill passed—Asked to come at 7 PM—Lodged complaint with CBI—Per-trap formalities completed—Trap laid—Complainant visited the appellant—Appellant took currency notes from the complainant—Kept in the brief case—Thereafter passed the bills—Signal given to the raiding party—Appellant apprehended—Pointed out towards the brief cases where had kept the money—Money



recovered from the brief case—Hand washes taken—Charge sheeted—Appellant convicted of offences punishable under Sections 7, 13(2) r/w. 13(1)(d)—aggrieved appellant preferred appeal—Contended—The person in whose presence initial demand made neither cited not examined by prosecution—examined as defence witness—believed the version of complainant—Appellant had no motive to demand the bribe—Not examined the other officers of CBI and no explanation furnished for the same—PW6 neither witnessed the demand nor the recovery—The only witness to demand is PW7—Testimony of PW7 is wholly contradictory—No money recovered from the possession of the appellant—Money recovered from the unlocked briefcase not sufficient to hold guilty—Taking of hand wash not properly proved—CBI contended—Recovery and acceptance proved by PW7—briefcase from where currency notes seized recovered at the pointing out of appellant—Recovery of briefcase with money admissible u/s. 27 IEA—Appellant not furnished any explanation for possession of currency notes and simply denied the question put to him under section 313 Cr. P.C.—Presumption under section 20 PC Act—Held—Testimony of PW1 as regards sanction cogent—Sanction valid—PW6 did not enter the room of the appellant—Not a Witness either to demand or acceptance—Material contradiction in the testimony of the complainant, the only witness with regard to demand—Demand not proved—Currency notes kept in the briefcase were within the knowledge of the complainant—No discovery of fact pursuant to the disclosure—Section 27 cannot be invoked—Possibility of the dipping the fingers of the official holding the finger of the accused in the solution—Neither demand nor acceptance proved—Recovery memo not a substantive evidence—Recovery doubtful—Presumption proved u/s. 20 PC Act cannot be raised—Prosecution not able to prove beyond doubt the demand, acceptance and recovery—Appeal allowed—Conviction set aside—Appellant acquitted.

*Parmanand* v. *C.B.I.* ..... *3707*

— Section 7 and 13(2) r/w Section 13(1)(d)—Appellant was employed in Delhi Electricity Supply Undertaking (DESU) in

February, 1994 and new posted at DESU Office in Keshav Puram those days—The raiding team comprising of complainant, panch witness and some officials of Anti-Corruption Branch office headed by Inspector Ramesh Singh went to the office of the accused. Complainant and panch witness were asked to contact the accused for the transaction of banding over of bribe money to the accused by the complainant as per the plan. Thereafter, the complainant told the accused that he had brought the amount of Rs.300/- as demanded by him and then the accused told the complainant to given him the money.—They were informed by the complainant that accused had accepted the bribe money and was holding the same in his left hand fist—In order to substantiate its case, prosecution examined 14 witnesses. Statement of the accused was recorded under Section 313 Cr.P.C. wherein he denied the case of prosecution, claimed innocence and pleaded false implication in the case.—Since on the date of filing of the charge sheet and when cognizance of the offence was taken, the appellant was not a public servant, therefore, there was no need to obtain any sanction for his prosecution. The retirement was never challenged by the appellant at any point of time on the ground that due to his suspension on account of this criminal prosecution he continues to remain in service—It is undisputed case of the parties that the charge sheet was filed in the Court on 22nd January, 1999 while the date of superannuation of the appellant was 18th February, 1998, meaning thereby, on the date when the charge sheet was submitted in the Court, the appellant ceased to be a public servant and, therefore, in view of the settled principle enunciated in various authorities viz *Prakash Singh Badal and Anr. Vs. State of Punjab and Ors.* (2007) 1 SCC 1; *Abhay Singh Chautala Vs. CBI,* (2011) 7 SCC 141 and *R.S. Nayak Vs. A.R. Antulay* (1984) 2 SCC 183, no sanction was required—As regards the submission that the appellant was not dealing with the area of the premise s No. 4210, Hansapur Road, Trinagar where the complainant resided, same is without any substance, inasmuch as, PW-7 Sh. S.K. Saroha who was posted as Assistant financial Officer, Delhi Vidyut Board, Keshav Puram on 13th October, 1998 deposed



that appellant was functioning and employed as senior clerk in billing section during that period in the said office. He was doing the job of bills/ rectifying the mistakes in the electricity bills issued to the consumers—The statement recorder under Section 313 Cr.P.C. of the appellant goes to show that one is of denial simplicitor and even in this statement, no plea was taken by the appellant that the area of Trinagar was not within his jurisdiction and, therefore, he was not competent to deal with electricity bill in question. Under the circumstances, this plea taken by the appellant in the ground of appeal is not substantiated by the record—In fact as observed by the Supreme Court in *State of UP Vs. Dr. G.K. Ghosh,* AIR 1984 SC 1453: by and large a citizen is reluctant to complain the vigilance department and to have a trap arranged even if illegal gratification is demanded a government servant. It is only when a citizen feels oppressed by a feeling of being wronged and finds the situation to be beyond endurance that he adopts the course of approaching the vigilance department for laying a trap. His evidence cannot, therefore, be easily or lightly brushed aside—Moreover, evidence of complainant is full corroborated by the panch witness. Panch witness has also deposed that when the accused was apprehended and challenged by the raid officer he become perplexed and also tendered apology, which part of his testimony goes unchallenged as no cross-examination was effected on this point. This conduct of accused is also another incriminating piece of evidence against him— From the evidence of the complainant, panch witness and the raid officer prosecution was able to establish its case beyond any reasonable doubt and the appellant was rightly convicted by the learned Special Judge, Delhi and sentenced accordingly. Neither the order of conviction nor of sentence suffers from any infirmity which calls for interference—Dismissed.

**ILR (2013) V DELHI 3707**
**CRL. A.**

**PARMANAND ....APPELLANT**

**VERSUS**

**C.B.I. ....RESPONDENT**

**(MUKTA GUPTA, J.)**

**CRL. APPEAL NO. : 132/2004 DATE OF DECISION: 03.07.2013**

**Prevention of Corruption Act, 1988—Section 7—Taking illegal gratification other than legal remuneration—Section 13(2)—Criminal misconduct—Section 20—Presumption—Indian Evidence Act, 1872—Section 27—recovery at pointing out—Admissibility—Complainant, a contractor for PWD—Awarded contract for Rs. 5 lacs approximately—Part payment made—final bill for Rs. 2.5 Lacs due and pending for 2½ months—Met appellant—Demanded Rs. 10,000/- for getting the bill passed—Asked to come at 7 PM—Lodged complaint with CBI—Per-trap formalities completed—Trap laid—Complainant visited the appellant—Appellant took currency notes from the complainant—Kept in the brief case—Thereafter passed the bills—Signal given to the raiding party—Appellant apprehended—Pointed out towards the brief cases where had kept the money—Money recovered from the brief case—Hand washes taken—Charge sheeted—Appellant convicted of offences punishable under Sections 7, 13(2) r/w. 13(1)(d)—aggrieved appellant preferred appeal—Contended—The person in whose presence initial demand made neither cited not examined by prosecution—examined as defence witness—believed the version of complainant—Appellant had no motive to demand the bribe—Not examined the other officers of CBI and no explanation furnished for the same—**



**PW6 neither witnessed the demand nor the recovery—The only witness to demand is PW7—Testimony of PW7 is wholly contradictory—No money recovered from the possession of the appellant—Money recovered from the unlocked briefcase not sufficient to hold guilty—Taking of hand wash not properly proved—CBI contended—Recovery and acceptance proved by PW7—briefcase from where currency notes seized recovered at the pointing out of appellant—Recovery of briefcase with money admissible u/s. 27 IEA—Appellant not furnished any explanation for possession of currency notes and simply denied the question put to him under section 313 Cr. P.C.—Presumption under section 20 PC Act—Held—Testimony of PW1 as regards sanction cogent—Sanction valid—PW6 did not enter the room of the appellant—Not a Witness either to demand or acceptance—Material contradiction in the testimony of the complainant, the only witness with regard to demand—Demand not proved—Currency notes kept in the briefcase were within the knowledge of the complainant—No discovery of fact pursuant to the disclosure—Section 27 cannot be invoked—Possibility of the dipping the fingers of the official holding the finger of the accused in the solution—Neither demand nor acceptance proved—Recovery memo not a substantive evidence—Recovery doubtful—Presumption proved u/s. 20 PC Act cannot be raised—Prosecution not able to prove beyond doubt the demand, acceptance and recovery—Appeal allowed—Conviction set aside—Appellant acquitted.**

**Important Issue Involved:** Merely because a draft sanction order was received from CBI will not vitiate the otherwise valid sanction granted after due application of mind.

The recovery memo is not a substantive evidence.

A statement made by the police officer is not admissible in evidence except to the extent it leads to discovery of a new fact.

Where from the evidence on record, recovery of the bribe amount is proved beyond doubt, a presumption under section 20 PC Act can be drawn.

Once the story of demand of bribe and acceptance of money becomes acceptable not being demolished in cross-examination, the presumption under section 20 can be raised.

Where the demand and acceptance have not been proved beyond reasonable doubt, the factum of recovery cannot be the sole basis for the raising presumption under section 20 of the Act.

**[Vi Hu]**

**APPEARANCES:**

**FOR THE APPELLANT** : Mr. D.K. Singh and Mr. Divyang Thakur, Advocate.

**FOR THE RESPONDENT** : Mr. P.K. Sharma, Standing Counsel for the CBI with Mr. Anil Kumar Singh, Advocate.

**CASES REFERRED TO:**

1. *State* vs. *G. Premraj,* 2010 (1) SCC 398.
2. *Banarasi Dass* vs. *State of Haryana,* 2010 (4) SCC 450.
3. *Narayana* vs. *State of Karnataka,* 2010 (14) SCC 453.
4. *C.M. Girish Babu* vs. *CBI, Cochin, High Court of Kerala,* 2009 (3) SCC 779.
5. *State of Maharashtra* vs. *Dnyaneshwar Laxman Rao Wankhede,* 2009 (15) SCC 200.



6. *M. Narsinga Rao* vs. *State of A.P.* [(2001) 1 SCC 691 : 2001 SCC (Cri) 258].
7. *Madhukar Bhaskarrao Joshi* vs. *State of Maharashtra* (2000) 8 SCC 571 : 2001 SCC (Cri) 34.
8. *Meena (Smt) w/o Balwant Hemke* vs. *State of Maharashtra,* 2000 (5) SCC 21.
9. *M.K. Harshan* vs. *State of Kerala* [(1996) 11 SCC 720 : 1997 SCC (Cri) 283].
10. *G.V. Nanjundiah* vs. *State (Delhi Administration),* 1987 Supl. SCC 266.
11. *Surajmal* vs. *State (Delhi Administration)* 1979 (4) SCC 725.
12. *Sita Ram* vs. *State of Rajasthan* (1975) 2 SCC 227: 1975 SCC (Cri) 491.

**RESULT:** Appeal allowed.

**MUKTA GUPTA, J.**

**1.** The Appellant challenges the judgment dated 30th January, 2004 convicting him for offences punishable under Sections 7 and 13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act, 1988 (in short the 'PC Act') and the order on sentence dated 31st January, 2004 directing him to undergo Rigorous Imprisonment for a period of one year and to pay a fine of Rs. 10,000/- under Section 7 of the PC Act and Rigorous Imprisonment for a period of two years and to pay a fine of Rs. 20,000/- for offence under Section 13 (2) of the PC Act.

**2.** Learned counsel for the Appellant contends that as per the Complainant PW7 Mustafa the alleged initial demand took place in the presence of one Sriniwas Bhati on 21st September, 1998. However Sriniwas Bhati was neither cited as a witness nor examined. Thus the Appellant was constrained to cite him as a defence witness. Sriniwas Bhati DW1 belied the version of the Complainant which has not been considered by the learned Trial Court. It is the case of the prosecution that on 23rd September, 1998 at about 11.30 a.m. the bill was cleared with deduction of Rs. 50,000/- and was sent to the accountant Chaman Lal Gupta for preparation of the cheque. Chaman Lal Gupta was also neither cited as a witness nor examined by the prosecution. Instead one Shri Keshri

Singh, Assistant Engineer appeared as PW4. Even he stated that on 23rd September, 1998 the bill was cleared by the Appellant at 11.30 a.m. with deduction of Rs. 50,000/- and thus there was no motive of the Appellant demanding the bribe amount at 7.30 p.m. in the evening. The case of the Appellant is that this deduction of Rs. 50,000/- from the bill at 11.30 a.m. annoyed the Complainant PW7 thus he lodged the complaint at 3.30 p.m. and a raid was conducted at 7.30 p.m. on the same day. The trap team allegedly consisted of PW7 the Complainant, PW6 Ajay Kumar, shadow witness, PW2 Brij Mohan, the recovery witness and four officers of CBI. Out of the four officers of CBI only one, that is, PW10 Inspector Azad the trap laying officer was examined. Though the prosecution had valid reason for not examining Inspector Ved Prakash, as he passed away before he was examined in the Court, however there is no explanation whatsoever as to why Dy. S.P. Shri S.K. Sharma and Inspector P. Balachandran were not examined. PW6 Ajay Kumar was directed by the Investigating Officer to accompany the Complainant when the Complainant enters the room however, as per both PW6 and PW7 the Complainant, Ajay Kumar did not enter the room of the Appellant and thus he witnessed neither the demand nor the acceptance of money. Thus the only witness for demand of bribe was PW7 the Complainant whose testimony is wholly contradictory. In his examination-in-chief, PW7 the Complainant stated that when he entered the room of the Appellant at 7.30 p.m. on 23rd September, 1998 the Appellant stated "paise laye ho" however, in his cross-examination PW7/ Complainant stated that the Appellant demanded the money by gesticulation only. Further no money was recovered from the possession of the Appellant. The alleged recovery was made from the briefcase lying near the visitors, table which was not locked. Though the case of the prosecution is that the money was taken out from the briefcase by PW6 the shadow witness however, PW6 the shadow witness denies taking out the money from briefcase and stated that the CBI officer had taken out money. The learned Trial Court held the offence to be proved against the Appellant only on the basis that the Appellant has not given an explanation as to how money came into his possession. It is well settled that mere recovery of money is not sufficient to hold a person guilty for offence under Sections 7/13 (2) of the PC Act. Reliance is placed on **Surajmal vs. State (Delhi Administration)** 1979 (4) SCC 725; **C.M. Girish Babu vs. CBI, Cochin, High Court of Kerala,** 2009 (3) SCC 779; **Banarasi Dass vs. State of Haryana,** 2010 (4) SCC 450; **G.V. Nanjundiah vs. State (Delhi Administration),** 1987 Supl. SCC



266; **State of Maharashtra vs. Dnyaneshwar Laxman Rao Wankhede,** 2009 (15) SCC 200 and **Meena (Smt) w/o Balwant Hemke vs. State of Maharashtra,** 2000 (5) SCC 21. Further the alleged hand wash taken has also not been proved properly as PW2 the independent witness has stated that the official of the CBI held the hand of the Appellant from the fingers and dipped in the solution. Thus when fingers of the Appellant were caught and dipped then the fingers of the CBI officers were also dipped and admittedly the CBI officials had treated the GC notes with the chemical and the solution was bound to turn pink.

**3.** Per contra learned Standing Counsel for the CBI contends that PW7 the Complainant has proved beyond reasonable doubt the recovery and acceptance. On the Complainant giving the signal the trap team entered the room of the Appellant and apprehended him. The briefcase from where the currency notes were recovered was seized vide Ex.PW2/C on the pointing out of the Appellant. This recovery of the briefcase with the tainted currency notes is admissible under Section 27 of the Indian Evidence Act. Further the facts stated in recovery memo Ex. PW2/C are also relevant. The version of PW6 Ajay Kumar, the shadow witness was duly supported by the PW10 qua counting of the money. The number of currency notes recovered tallied with the number of currency notes mentioned in the handing over memo Ex. PW2/A. PW10 the trap laying officer fully supported the prosecution case and thus conviction can be based on the sole testimony of PW10. The Appellant simply denied the questions put to him under Section 313 Cr.P.C. and gave no explanation as to how he came into possession of the currency notes. Ex. PW5/A CFSL report proves that the hand wash solution turned pink thus corroborating the ocular version on record. PW1 the sanctioning authority has stated that she had gone through the documents of SP, CBI and the statement of the witnesses before granting sanction. Reliance is placed on **Narayana vs. State of Karnataka,** 2010 (14) SCC 453. It is thus contended that since the recovery is proved, in view of the presumption under Section 20 of PC Act the conviction can be safely based upon the said evidence.

**4.** I have heard learned counsel for the parties.

**5.** The brief exposition of facts as per the statement of PW7 the Complainant is that he was working as a contractor for P.W.D. and used to take the work of whitewashing the buildings maintained by P.W.D. for

the last ten to twelve years. He was awarded contract for whitewashing the staff quarters in Kalyanvaas for a sum of Rs. 5 lakhs approximately. Part payments had been received on completion of work and the final bill which amounted to Rs. 2.50 lakhs was due and pending with the P.W.D. for 2½ months. For this work, he met the Appellant who stated that since there was deviation in the work resulting in extension of work, the bill could not be passed. On 21st September, 1998 the Complainant PW7 met the Appellant who stated that he would take Rs. 10,000/- for getting the bill passed. In the cross-examination, the Complainant admitted that when he met the Appellant on 21st September, 1998 one Shri Bhati a contractor was also present and the alleged demand of Rs. 10,000/- was made by the Appellant. He was asked to come on 23rd September, 1998 at 7.00 p.m. Since he did not want to pay the amount he went to the office of CBI on 23rd September, 1998 and gave his complaint in writing Ex. PW7/A. The officer enquired from him about the complaint and called two persons who were N.D.M.C. employees. He admitted that he reached CBI office at about 2.00-2.30 p.m. and when the complainant was taken to another CBI officer he asked to bring bribe amount of Rs. 10,000/- so that the same can be treated. The Appellant brought money. The pre-trap formalities such as writing down the number of notes, and the treatment of the notes with the powder were completed. The GC notes were kept in the right pocket of the pant of the Complainant and one of the employees of NDMC was directed to accompany him as shadow witness however, the Complainant refused to take him along as he apprehended that on seeing the shadow witness the Appellant would not accept the money. A tape recorder was arranged with a blank cassette. The raiding party reached the office of the Appellant at about 7.00-7.15 p.m. and the Complainant went to the room of the Appellant. PW6 Ajay Kumar, who accompanied him stood outside the room along with the other members of the party who were at a distance. On entering the room of the Appellant, the Complainant wished him 'namaste' on which the Appellant asked whether he had brought the money "paise laye ho". The Complainant gave the Appellant Rs. 10,000/- and asked him to count. The Appellant took the GC notes from the Complainant and after looking at them, kept in the brief case lying on the side table. Thereafter the Appellant passed on the bill and the accompanying documents and two red MB books to the Complainant and told him to give the bill and the book to Chaman Lal. The Appellant came out of the room and handed over the books and bill to Om Prakash, peon standing outside the room



of the Appellant and requested him to give them to Chaman Lal who was the dealing clerk and simultaneously gave signal to the members of the raiding party. On this the members of the raiding party including PW6 Ajay Kumar and PW2 Brij Mohan entered the room. CBI officer introduced himself to the Appellant by giving his introduction and challenged the Appellant that he had accepted Rs. 10,000/- from him. The Appellant pointed towards the brief case where he had kept the currency notes. PW6 Ajay Kumar picked up the currency notes from the briefcase and the numbers on the notes were compared and the same tallied. The Complainant handed over the tape recorder to the CBI officer which was played wherein voices had been recorded. Thereafter the accused was asked to dip his left and right hands in the two solutions which turned pink. A paper was also recovered from the briefcase on which the currency notes had been placed and the same was also washed which also turned pink. He exhibited the MB books as Ex. PW3/A and PW3/B, filed relating to the bill Ex.PW3/C and three letters in the file.

**6.** At the outset since the tape recorder could not give any discernible voice during the trial, the evidence of the tape recorded version was rejected. The other evidence in the present case is the evidence of PW7 and the other members of the raiding party. As regards the demand of money on 23rd September, 1998 at the time of raid admittedly as per the Complainant and PW6 Ajay Kumar, Ajay Kumar did not go inside the room and the Complainant alone went. Thus PW6 is not the witness to either the demand or acceptance. The prosecution is, therefore, left only with the testimony of the Complainant regarding demand and acceptance. The Complainant in his examination-in-chief has stated that when he entered the room the Appellant was sitting alone and he wished him. Thereafter the Appellant asked him whether he had brought the money "pasie laye ho" on which he gave Rs. 10,000/- to the Appellant and told him to count. However, in his cross-examination the Complainant did not support this version and stated that the Appellant demanded the money by gesticulation and not by uttering words. This is a material contradiction in the testimony of the only witness with regard to demand. Hence the prosecution has not been able to prove the demand at the time of raid beyond reasonable doubt.

**7.** With regard to the acceptance, the Complainant has stated that the Appellant accepted Rs. 10,000/- and kept them in the briefcase which was lying on the side table. No evidence has been led by the prosecution

to prove that the briefcase from which the money was recovered belonged to the Appellant. The contention of learned counsel for the CBI that there was recovery of tainted G.C. notes from the briefcase at the pointing out of the Appellant, hence admissible in evidence under Section 27 Evidence Act, is misconceived. The fact that G.C. Notes were kept in the briefcase were in the knowledge of the complainant. Thus there is no discovery of fact not in the knowledge of the investigating agency pursuant to the disclosure of the accused. The only corroborative evidence to the version of the Complainant is the hand wash. In this regard PW2 Brij Mohan, the independent witness has stated that two CBI officials participated in the process of taking the respective hand washes and the paper wash. On both the occasions the hands of the Appellant were held from his fingers and then dipped in the sodium carbonate solution. Thus the hands of the Appellant were not held from the wrist but from the fingers and in case they were held from the fingers then the fingers of the official holding them were also liable to be dipped in the solution. It may be relevant that no other witness has spoken with regard to the manner in which the hands of the Appellant were caught and dipped in the solution.

**8.** Further the statement of PW7 the Complainant is also contrary to the extent that on the one hand he states that after he came out of the room and handed over the books and bills to Om Prakash, the peon standing outside the room, he requested him to give them to Chaman Lal who was the dealing clerk and gave signal to the members of the raiding party, however, PW8 Om Prakash has stated that after the Complainant gave him the documents including the measurement book and the bill, he took them to Chaman Lal Gupta in the Accounts Branch, and the Complainant followed him there. According to PW8, he and the Complainant were in the office of Chaman Lal Gupta for 15 minutes. Thus the presence of the Complainant after he gave the signal when recovery was made is thus doubtful. Further PW8 has not been cross-examined by the learned APP on this aspect. This is further evident from the cross-examination of the Complainant wherein he states that he does not remember about the various aspects of the proceeding after he gave signal as he did not know how was the hand of the Appellant caught, who caught hold of the hands, who made recovery from the briefcase etc.

**9.** I find no merit in the contention regarding non-application of



mind for grant of sanction. The testimony of PW1 is clear and cogent she had gone through the report of the SP, CBI, statement of witnesses as well, comments of the CPWD before granting sanction. Merely because a draft sanction order was received from the CBI will not vitiate the otherwise valid sanction granted after due application of mind.

**10.** In the present case the evidence on record neither proves demand and acceptance. Even the recovery has not been proved beyond reasonable doubt as the recovery is from an open briefcase which was lying on the side table. It has not been proved beyond reasonable doubt that the briefcase belongs to the Appellant. The contention of the learned counsel for the Respondent that since the briefcase was recovered at the pointing out of the Appellant the said recovery is admissible under Section 27 of the Evidence Act is also liable to be rejected. The fact that the money was lying in the briefcase was within the knowledge of the Complainant hence there is discovery of no new fact. The contention of the learned Standing Counsel for the CBI that the Appellant admitting the briefcase to be his as noted in the recovery memo Ex. PW2/C is contrary to law. The recovery memo is not a substantive evidence. A statement made by the accused to the police officer is not admissible in evidence except to the extent it leads to discovery of a new fact. Further in **Narayana** (supra) relied upon the learned Standing Counsel for the CBI the Hon'ble Supreme Court held that from the evidence on record in that case the recovery of the bribe amount was proved beyond reasonable doubt notwithstanding the fact that the Inspector had died and thus could not be examined as witness and thus a presumption under Section 20 of PC Act was required to be drawn. In **Banarasi Dass** (supra) the Hon'ble Supreme Court while dealing with the earlier judgments of the Hon'ble Supreme Court on this point held:

> "19. The above findings recorded by the High Court show that the Court relied upon the statements of PW 10 and PW 11. It is further noticed that recovery of currency notes, Exts. P-1 to P-4 from the shirt pocket of the accused, examined in light of Exts. PC and PD, there was sufficient evidence to record the finding of guilt against the accused. The Court remained uninfluenced by the fact that the shadow witness had turned hostile, as it was the opinion of the Court that recovery witnesses fully satisfied the requisite ingredients. We must notice that the

High Court has fallen in error insofar as it has drawn the inference of the demand and receipt of the illegal gratification from the fact that the money was recovered from the accused.

20. It is a settled canon of criminal jurisprudence that the conviction of an accused cannot be founded on the basis of inference. The offence should be proved against the accused beyond reasonable doubt either by direct evidence or even by circumstantial evidence if each link of the chain of events is established pointing towards the guilt of the accused. The prosecution has to lead cogent evidence in that regard so far as it satisfies the essentials of a complete chain duly supported by appropriate evidence. Applying these tests to the facts of the present case, PW 10 and PW 11 were neither the eyewitnesses to the demand nor to the acceptance of money by the accused from Smt Sat Pal Kaur (PW 2).

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23. To constitute an offence under Section 161 IPC it is necessary for the prosecution to prove that there was demand of money and the same was voluntarily accepted by the accused. Similarly, in terms of Section 5(1)(d) of the Act, the demand and acceptance of the money for doing a favour in discharge of his official duties is sine qua non to the conviction of the accused.

24. In **M.K. Harshan v. State of Kerala** [(1996) 11 SCC 720 : 1997 SCC (Cri) 283] this Court in somewhat similar circumstances, where the tainted money was kept in the drawer of the accused who denied the same and said that it was put in the drawer without his knowledge, held as under: (SCC pp. 723-24, para 8)

> "8. ... It is in this context the courts have cautioned that as a rule of prudence, some corroboration is necessary. In all such type of cases of bribery, two aspects are important. Firstly, there must be a demand and secondly, there must be acceptance in the sense that the accused has obtained the illegal gratification. Mere demand by itself is not sufficient to establish the offence. Therefore, the other aspect, namely, acceptance is very important and when the accused has come forward with a plea that the currency notes were put in the drawer without his knowledge, then there must be clinching evidence to show that it was with the tacit approval of the accused that the money had been put in the drawer as an illegal gratification. Unfortunately, on this aspect in the present case we have no other evidence except that of PW 1. Since PW 1's evidence suffers from infirmities, we sought to find some corroboration but in vain. There is no other witness or any other circumstance which supports the evidence of PW 1 that this tainted money as a bribe was put in the drawer, as directed by the accused. Unless we are satisfied on this aspect, it is difficult to hold that the accused tacitly accepted the illegal gratification or obtained the same within the meaning of Section 5(1)(d) of the Act, particularly when the version of the accused appears to be probable."



25. Reliance on behalf of the appellant was placed upon the judgment of this Court in **C.M. Girish Babu** [(2009) 3 SCC 779: (2009) 2 SCC (Cri) 1] where in the facts of the case the Court took the view that mere recovery of money from the accused by itself is not enough in absence of substantive evidence for demand and acceptance. The Court held that there was no voluntary acceptance of the money knowing it to be a bribe and giving advantage to the accused of the evidence on record, the Court in paras 18 and 20 of the judgment held as under: (SCC pp. 784 & 785-86)

> "18. In **Suraj Mal v. State (Delhi Admn.)** [(1979) 4 SCC 725 : 1980 SCC (Cri) 159] this Court took the view that (at SCC p. 727, para 2) mere recovery of tainted money divorced from the circumstances under which it is paid is not sufficient to convict the accused when the substantive evidence in the case is not reliable. The mere recovery by itself cannot prove the charge of the prosecution against the accused, in the absence of any

evidence to prove payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe.

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20. A three-Judge Bench in **M. Narsinga Rao v. State of A.P.** [(2001) 1 SCC 691 : 2001 SCC (Cri) 258] while dealing with the contention that it is not enough that some currency notes were handed over to the public servant to make it acceptance of gratification and prosecution has a further duty to prove that what was paid amounted to gratification, observed: (SCC p. 700, para 24)

'24. ... we think it is not necessary to deal with the matter in detail because in a recent decision rendered by us the said aspect has been dealt with at length. (Vide **Madhukar Bhaskarrao Joshi v. State of Maharashtra** [(2000) 8 SCC 571 : 2001 SCC (Cri) 34].) The following statement made by us in the said decision would be the answer to the aforesaid contention raised by the learned counsel: (**Madhukar** case [(2000) 8 SCC 571 : 2001 SCC (Cri) 34] , SCC p. 577, para 12)

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



In fact, the above principle is no way a derivative but is a reiteration of the principle enunciated by this Court in **Suraj Mal** case [(1979) 4 SCC 725: 1980 SCC (Cri) 159] where the Court had held that mere recovery by itself cannot prove the charge of prosecution against the accused in the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money. Reference can also be made to the judgment of this Court in **Sita Ram v. State of Rajasthan** [(1975) 2 SCC 227: 1975 SCC (Cri) 491] where similar view was taken.

26. **C.M. Girish Babu** case [(2009) 3 SCC 779 : (2009) 2 SCC (Cri) 1] was registered under the Prevention of Corruption Act, 1988, Section 7 of which is in pari materia with Section 5 of the Prevention of Corruption Act, 1947. Section 20 of the 1988 Act raises a rebuttable presumption where the public servant accepts gratification other than legal remuneration, which presumption is absent in the 1947 Act. Despite this, the Court followed the principle that mere recovery of tainted money divorced from the circumstances under which it is paid would not be sufficient to convict the accused despite presumption and, in fact, acquitted the accused in that case."

**11.** In **State vs. G. Premraj,** 2010 (1) SCC 398 it was held that once the story of demand of bribe and acceptance of money by Respondent near the scooter stand became acceptable not being demolished in cross-examination and the amount of being substantial the presumption under Section 20 PC Act was raised. In the present case as discussed above, the demand and acceptance have not been proved beyond reasonable doubt and thus the factum of recovery which is also doubtful cannot be the sole basis for raising presumption under Section 20 PC Act for convicting the Appellant. Since the prosecution has not been able to prove beyond reasonable doubt the demand, acceptance and recovery, the impugned judgment dated 30th January, 2004 and the order on sentence dated 31st January, 2004 are set aside. The Appellant is acquitted of the charges framed. Bail bond and surety bond are discharged.

**12.** Appeal is disposed of.

**ILR (2013) V DELHI 3721**
**CRL.**

**RAVINDER PASWAN ....APPELLANT**

**VERSUS**

**STATE ....RESPONDENT**

**(SUNITA GUPTA, J.)**

**CRL.A. NO. : 319/2004 DATE OF DECISION: 05.07.2013**

**Indian Penal Code, 1860—Sec. 392, 411, 34—Arms Act—Sec. 27, 54 & 55—Prosecution case emanates from the fact that on 9th July, 2001 SI Prahlad Singh along with Constable Rajesh was on patrolling and surprise checking in the area. At about 8.40 pm when they were going to Kailashpuri via Gali No. 5, Main Sagarpur, they heard noise coming from the Gali. They saw two boys running and they tried to apprehend them but one of the boys managed to escape.—Meanwhile, Smt. Bhagwan Devi came and gave her statement, inter alia, to the effect that on that day at about 8:30 pm, she along with her grand-daughter aged about 1 1/2 years was coming from the shop of Dr. Mudgil. She was on foot and coming to her house. When she was in front of Kesho Ram Sweets in Gali No. 5, three boys aged about 20-22 years suddenly came from the side of Gali No. 5, Main Sagarpur and one boy who was a little fat and was wearing a cap snatched her wearing chain weighing about 18-20 grams on which a thread of 'Babaji' had been tied. She fell down along with her grand-daughter who was in her arms and also received injuries on her right Hand and also on stomach—On hearing her noise, her son Ghanshyam and public persons started following those boys. One of the boys who had snatched the chain and was a little fat was**



**apprehended at a distance of about 200 meters by the public and she identified that boy—Charge for offence under section 392 r/w Section 397 IPC was framed against both the accused to which they pleaded not guilty and claimed trial.—Vide impugned order dated 3rd March, 2004, the appellant was held guilty of offence under Section 392 IPC, however, co-accused Shamshe Alam was granted benefit of doubt and was acquitted of the charge levelled against him. Feeling aggrieved by this impugned order, the present appeal has been preferred by the appellant Ravinder Paswan—It was submitted by learned counsel for the appellant that there are contradictions in the statements of the witnesses as such no reliance can be placed on the same. None of the public witnesses have identified the appellant.—Moreover, as per prosecution version, besides the chain, a knife was also recovered from the possession of the appellant. However, the recovery of knife has not been believed by the learned Trial Court.—Testimony of PW1 and PW2 find corroboration from PW 3 Sunil Sharma, an independent witness who has also stated that the boy who was apprehended gave his name as 'Paswan' and he was fat and was wearing a cap. From his possession, chain and knife was recovered. Constable Rajesh (PW6) and SI Prahlad (PW7) have also deposed regarding apprehension of appellant at spot by the public and that he was beaten by the public and when running away, he was apprehended by them and on his search, chain Ex. P1 was recovered. The sequence of events leads to the only conclusion that it was the appellant Ravinder Paswan who had snatched the chain and when he was running away, he was chased by ghanshyam and was apprehended by him and then the public who gathered at the spot took charge of him and gave beatings to him. Police officials, while on patrolling, reached the spot and apprehended him. Chain (Ex.P1) was recovered from his possession. Presence of the**

**appellant at the spot stands further proved from the fact that since he was administered beatings by the public, vide application Ex. PW7/2, he was sent to DDU hospital were his MLC Ex. PW 5/A was prepared by Dr. D.S. Chauhan (PW5) and a perusal of the MLC goes to show that at the very initial juncture, the history of "being beaten by public" was given.—In Gurcharan vs. State of Punjab, AIR 1956 SC 460, where some accused persons were acquitted and some others were convicted, it was held as follows:- "9.....The highest that can be or has been said on behalf of the Appellants in this case is that two of the four accused have been acquitted, though the evidence against them, so far as the direct testimony went, was the same as against the Appellants also; but it does not follow as a necessary corollary that because the other two accused have been acquitted by the high Court the Appellants also must be similarly acquitted." In *Gangadhar Behera vs. State of Orrisa,* (2002) 8 SCC 381: 2003 SCC (Crl.) 32 reliance was placed on *Gurcharan Singh* (Supra) and it was Held:- "15....Merely because some of the accused persons have been acquitted though evidence against all of them, so far as direct testimony went was the same dose not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a court to differentiate the accused who had been acquitted from those who were convicted." This authority was cited with approval in *Prathap Vs. State of Kerala* (2010) 12 SCC 79 and *Surajit Sarkar Vs. State of West Bengal* (2013) 1 SCC (Cri) 877. It is being the legal position, the appellant cannot be absolved of his involvement in the commission of the crime merely because co-accused who was not identified by the witnesses nor any recovery was effected from him, acquitted. So far as the appellant is concerned, there is cogent and reliable evidence to connect him with the crime. As such the submission of learned counsel**



**for the appellant deserves rejection. —There is no infirmity in the impugned order dated 3rd March, 2004 whereby the appellant was convicted of the offence under Section 392 IPC which warrants interference,— Dismissed.**

**Important Issue Involved:** The appellant cannot be absolved of his involvement in the commission of the crime merely because co-accused who was not identified by the witnesses nor any recovery was effected from him.

**[Ch Sh]**

**APPEARANCES:**

**FOR THE APPELLANT** : Mr. Ujas Kumar, Advocate along with the appellant (in custody).

**FOR THE RESPONDENT** : Ms. Fizani Hussain, APP SI Raghuvir, PS Dabri.

**CASES REFERRED TO:**

1. *Surajit Sarkar* vs. *State of West Bengal* (2013) 1 SCC (Cri) 877.
2. *Prathap* vs. *State of Kerala* (2010) 12 SCC 79.
3. *Gangadhar Behera* vs. *State of Orrisa,* (2002) 8 SCC 381:2003 SCC (Cri.) 32.
4. *Gurcharan* vs. *State of Punjab,* AIR 1956 SC 460.

**RESULT:** Dismissed.

**SUNITA GUPTA, J.**

**1.** Challenge in this appeal is to the impugned judgment dated 3rd March, 2004 and order on sentence dated 17th March, 2004, passed by learned Addl. Sessions Judge in Session Case No.07/2002 arising out of FIR No. 576/2001, Police Station Dabri, under Section 392/411/34 IPC and 27/54/59 Arms Act whereby the appellant was convicted for offence under Section 392 IPC and was sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.3,000/- in default of payment of fine to further undergo simple imprisonment for one year.

**2.** Prosecution case emanates from the fact that on 9th July, 2001 SI Prahlad Singh along with Constable Rajesh was on patrolling and surprise checking in the area. At about 8.40 pm when they were going to Kailashpuri via Gali No. 5, Main Sagarpur, they heard noise coming from the Gali. They saw two boys running and they tried to apprehend them but one of the boys managed to escape. They, however, managed to apprehend one of the boys, who, on inquiry gave his name as Shamshe Alam. Both of them along with Shamshe Alam reached near the crowd and found that the crowd had also apprehended another boy who was handed over to SI Prahlad Singh. Meanwhile, Smt. Bhagwan Devi came and gave her statement, inter alia, to the effect that on that day at about 8:30 pm, she along with her grand-daughter aged about 1½ years was coming from the shop of Dr. Mudgil. She was on foot and coming to her house. When she was in front of Kesho Ram Sweets in Gali No. 5, three boys aged about 20-22 years suddenly came from the side of Gali No. 5, Main Sagarpur and one boy who was a little fat and was wearing a cap snatched her wearing chain weighing about 18-20 grams on which a thread of 'Babaji' had been tied. As soon as she tried to catch hold of him and raised alarm, he whipped out a knife and his two other accomplices pushed her. She fell down along with her grand-daughter who was in her arms and also received injuries on her right hand and also on stomach. She raised alarm on which all the three boys ran towards Gali No. 5. On hearing her noise, her son Ghanshyam and public persons started following those boys. One of the boys who had snatched the chain and was a little fat was apprehended at a distance of about 200 meters by the public and she identified that boy. The boy was beaten by the public. His other accomplices were also apprehended and given beatings but two of them managed to escape. She identified both the boys Shamshe Alam and Ravinder Paswan and also stated that when Ravinder Paswan was searched, from his wearing black pant pocket, her chain which was broken was also recovered. The knife was also recovered from his pant. The statement Ex. PW1/1 of Smt. Bhagwan Devi became bed rock of investigation. After making endorsement Ex.PW7A, same was sent to police station for registration of the case on the basis of which FIR Ex.PW4/1 was recorded by Head Constable Om Prakash (PW4). Chain (Ex.P1) was taken into possession vide memo Ex.PW1/4. Sketch of the knife Ex.PW1/2 was prepared which was sealed in a pulanda and was taken into possession by memo Ex.PW1/3. From the possession of accused Shamse Alam, a knife was recovered for which separate proceedings



were initiated. Both the accused were arrested and their personal search was conducted vide memos Ex.PW-1/5 and Ex. PW1/6. The accused Ravinder Paswan was sent to DDU Hospital for his medical examination. His MLC Ex.PW5/1 was prepared by Dr. Devender Singh Chauhan (PW5). After completing investigation, charge sheet was submitted against both the accused.

**3.** Charge for offence under Section 392 r/w Section 397 IPC was framed against both the accused to which they pleaded not guilty and claimed trial.

**4.** Prosecution examined seven witnesses in order to substantiate its case. All the incriminating evidence was put to both the accused while recording their statements under Section 313 Cr. P.C., wherein they denied the case of prosecution. According to the appellant Ravinder Paswan, on 9th July, 2001, he was sitting in his dhaba along with his father when police officials came. He was taken forcibly to an unknown place and was given merciless beatings and his leg was broken. He was forced to sign on blank papers and then he was taken to DDU Hospital where he was shown to his in-laws. He further alleged his false implication in this case at the behest of his in-laws as he was in love with Jaimala to whom he married against the wishes of her parents. It had enraged her parents and they had taken away their daughter after getting him involved in this case. Although, he took an opportunity to produce defence evidence but no evidence was led but certified copies of certain documents were filed. Accused Shamshe Alam also pleaded his innocence and alleged that he was picked up from his shop and was falsely implicated in this case.

**5.** Vide impugned order dated 3rd March, 2004, the appellant was held guilty of offence under Section 392 IPC, however, co-accused Shamshe Alam was granted benefit of doubt and was acquitted of the charge levelled against him. Feeling aggrieved by this impugned order, the present appeal has been preferred by the appellant Ravinder Paswan.

**6.** It was submitted by learned counsel for the appellant that there are contradictions in the statements of the witnesses as such no reliance can be placed on the same. None of the public witnesses have identified the appellant. Moreover, as per prosecution version, besides the chain, a knife was also recovered from the possession of the appellant. However, the recovery of knife has not been believed by the learned Trial Court.

Furthermore, on the same set of facts, co-accused has been acquitted, therefore, the appellant could not have been convicted on the basis of same set of facts. As such it was submitted that prosecution has failed to bring home the guilt of appellant beyond shadow of doubt and the appellant is entitled to be acquitted.

**7.** Per contra, it was submitted by the learned Public Prosecutor for the State that the factum of snatching of chain of the complainant stands proved from her testimony. The same was recovered from the possession of the appellant which was duly identified by the complainant. The entire evidence has been considered by the learned Trial Court in correct perspective and no interference is called for. As such, the appeal is liable to be dismissed.

**8.** Record reveals that as regards the factum of incident of snatching of chain belonging to complainant Bhagwan Devi is concerned, the same stands proved from her testimony wherein she testified that in the month of July, 2001, she was going on foot with her grand-daughter aged about 1+ years, who was in her arms and when she was at the corner of gali No. 5, her chain was snatched from her neck, she was pushed and she fell down and sustained injuries. Her testimony in this regard goes un-rebutted and unchallenged inasmuch as even no suggestion was given to her that no such incident had taken place. Immediately after the incident, police officials Constable Rajesh (PW6) and SI Prahlad Singh (PW7) came to the spot. Accused were apprehended and thereafter the complainant made a statement (Ex.PW1/1) which became bed rock of investigation. The chain was also recovered which was duly identified by the complainant as belonging to her. Under the circumstances, incident of snatching of chain belonging to the complainant stands proved.

**9.** As regards, the complicity of the accused in the crime, it has come in the statement of PW-1 Smt. Bhagwan Devi that the boy who had snatched the chain was wearing the cap. She also admitted that her son Ghanshyam and public persons had chased the boys and apprehended the boy who had snatched the chain. She identified the chain (Ex. P1) which was snatched from her neck and it was recorded that hook of the chain was intact but it was broken. The witness expressed her inability to identify the accused which was quite obvious inasmuch as she was aged about 60 years and was examined after a lapse of about one year of the incident. Moreover, the occurrence had taken place in a fraction



of seconds, therefore, it was difficult for her to identify the boy but the sequence of events establishes that it was the appellant who had snatched the chain because on hearing the noise PW-2 Ghanshyam Singh, son of the complainant came out of his house and started running towards Gali No.5 from where the noise was coming. Other persons were also running. With the help of other persons, he caught hold of a boy, who was running, however, the custody of that boy was taken from him by the public persons who started giving him beatings. That boy, however, managed to escape from the clutches of public persons but the police officials apprehended the boy whose name came to be known as Ravinder Paswan and on his search, one knife and chain of his mother was recovered. He was categorical in deposing that the chain and knife was recovered from the possession of that particular boy who had been apprehended by him and had succeeded in escaping from the clutches of the public persons and who was then apprehended by the police. To the same effect is the testimony of PW-3 Sh. Sunil Kumar Sharma who also deposed that on 9th July, 2001 at about 8.30 pm, he was going towards Subzi Mandi from his house. When he was near a shop of Kesho Ram Sweets, he heard 'Halla Gulla' and someone from the public told that chain had been snatched and the boy was running. Public persons chased and apprehended that boy. Name of that boy was told as 'Paswan'. From the possession of that boy one knife was recovered. Chain had already been recovered from that boy by the public persons as well as the police officials.

**10.** It has further come in the testimony of the police officials that SI Prahlad Singh along with constable Rajesh was on patrolling duty in the area when they reached near Gali No. 5, main Sagarpur and were proceeding towards Kailashpuri Main Road, they found that there was a crowd in the Gali. They saw that two boys were running towards inside Gali No. 5. They tried to apprehend those boys. One of the boys was apprehended whose name was disclosed as Shamse Alam. Thereafter, they proceeded towards the crowd. One boy was apprehended by the public who was handed over to them. Name of that boy was disclosed as 'Ravinder Paswan'. On his search, from left side pocket of pant, a chain (broken piece) was recovered which was identified by the complainant and a knife was also recovered which was also seized. Name of the other boy who was apprehended was disclosed as Shamse Alam.

**11.** Testimony of PW1 and PW2 find corroboration from PW 3 Sunil Sharma, an independent witness who has also stated that the boy who was apprehended gave his name as 'Paswan' and he was fat and was wearing a cap. From his possession, chain and knife was recovered. Constable Rajesh (PW6) and SI Prahlad (PW7) have also deposed regarding apprehension of appellant at the spot by the public and that he was beaten by the public and when he was running away, he was apprehended by them and on his search, chain Ex. P1 was recovered. The sequence of events leads to the only conclusion that it was the appellant Ravinder Paswan who had snatched the chain and when he was running away, he was chased by Ghanshyam and was apprehended by him and then the public who gathered at the spot took charge of him and gave beatings to him. Police officials, while on patrolling, reached the spot and apprehended him. Chain (Ex.P1) was recovered from his possession. Presence of the appellant at the spot stands further proved from the fact that since he was administered beatings by the public, vide application Ex. PW7/2, he was sent to DDU hospital where his MLC Ex. PW 5/A was prepared by Dr. D.S. Chauhan (PW5) and a perusal of the MLC goes to show that at the very initial juncture, the history of "being beaten by public" was given. No suggestion was given to any of the public witnesses that the appellant was not given beatings by the public or that he was taken to police station where he was beaten by police.

**12.** The plea taken by the accused is that he was lifted from his Dhaba in the presence of his father and was thereafter falsely implicated in this case at the instance of his in-laws who were against his marriage with their daughter Jaimala. This plea does not appeal to reason inasmuch as no evidence has been produced by the appellant to prove that he was lifted from his Dhaba on that day, although it was alleged that at that time even his father was present. However, for reasons best known to him, he has not even examined his father in order to substantiate this plea. Moreover, he has been taking contradictory pleas, inasmuch as, it was suggested to PW7 in his cross-examination that he was picked up from his house and thereafter falsely implicated in this case. In order to prove that relations between him and his in-laws were not cordial, he had filed certified copies of a writ petition filed by his father-in-law before this Court and the orders passed on the writ petition but that does not help the appellant inasmuch as that at the most reflect that the relations between him and his in-laws may not be cordial but no presumption can



be drawn that due to that reason at the behest of his in-laws, police would falsely implicate him in this case. This is particularly so, when the appellant was apprehended at the spot immediately after the incident and the chain snatched by him was also recovered then and there.

**13.** As regards, the submission that recovery of knife from the possession of the appellant has not been believed by the learned Trial Court, same is devoid of substance, inasmuch as, no finding has been given by the learned Trial Court regarding recovery of knife from the possession of the appellant. The charge against the appellant was also under Section 397 IPC, however, since there was no evidence to prove that at the time of snatching the chain from Bhagwan Devi, the appellant had used the deadly weapon, therefore, use of deadly weapon at the time of committing robbery was not proved. That being so, he was convicted only for offence under Section 392 IPC.

**14.** As regards the submission that co-accused Shamshe Alam has been acquitted on the same set of facts and, therefore, the appellant could not have been convicted, the plea is devoid of merits inasmuch as there are catena of decisions to the effect that merely because other accused is acquitted, that is no ground for acquittal of the co-accused.

**15.** In **Gurcharan vs. State of Punjab,** AIR 1956 SC 460, where some accused persons were acquitted and some others were convicted, it was held as follows:-

> "9.....The highest that can be or has been said on behalf of the Appellants in this case is that two of the four accused have been acquitted, though the evidence against them, so far as the direct testimony went, was the same as against the Appellants also; but it does not follow as a necessary corollary that because the other two accused have been acquitted by the High Court the Appellants also must be similarly acquitted."

**16.** In **Gangadhar Behera vs. State of Orrisa,** (2002) 8 SCC 381:2003 SCC (Cri.) 32 reliance was placed on **Gurcharan Singh** (Supra) and it was held:-

> "15..... Merely because some of the accused persons have been acquitted though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be

acquitted. It is always open to a court to differentiate the accused who had been acquitted from those who were convicted. "

**17.** This authority was cited with approval in **Prathap Vs. State of Kerala** (2010) 12 SCC 79 and **Surajit Sarkar Vs. State of West Bengal** (2013) 1 SCC (Cri) 877. It is being the legal position, the appellant cannot be absolved of his involvement in the commission of the crime merely because co-accused who was not identified by the witnesses nor any recovery was effected from him, acquitted. So far as the appellant is concerned, there is cogent and reliable evidence to connect him with the crime. As such the submission of learned counsel for the appellant deserves rejection.

**18.** In view of the aforesaid discussion there is no infirmity in the impugned order dated 3rd March, 2004 whereby the appellant was convicted of the offence under Section 392 IPC which warrants interference.

**19.** Coming to the quantum of sentence, learned Public Prosecutor for the State submitted that the appellant does not deserve any leniency and she placed on record the involvement of the appellant in as many as 36 cases. As such, it was submitted that the appellant belongs to a criminal background and despite the fact that his sentence was suspended and he was released on bail again he indulged in criminal activities due to which again he has been lodged in jail. The submission has force. Keeping in view the antecedents of the appellant, the sentence imposed upon him cannot be said to be onerous which may call for interference. Under the circumstances, there is no merit in the appeal. The same is, accordingly, dismissed.

**20.** Trial Court record be sent back.

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**ILR (2013) V DELHI 3732**
**CRL. A.**

**PRADEEPTA KUMAR MOHAPATRA ....APPELLANT**

**VERSUS**

**STATE ....RESPONDENT**

**(SUNITA GUPTA, J.)**

**CRL. A. NO. : 233/2003 DATE OF DECISION: 09.07.2013**

**Indian Penal Code, 1860—Sec. 420, 498A, 376—Complainant got married to appellant on 1st May, 1982. After her marriage, she got an appointment in Doordarshan and thereafter she went under training in Pune and thereafter she was transferred to Delhi. Her father was alleged to be the member of Parliament and was residing in Delhi, therefore, she also shifted Delhi. In 1993, the accused is alleged to have started harassing complainant by saying that he would divorce her. He also filed divorce petition against the complainant in Family Court at Bhuvneshwar of which she received a notice. However, due to intervention of parents of the complainant, the matter got compromised and thereafter they continued to live together.—Charges under Section 498A/420/376 IPC were framed against the accused to which he pleaded not guilty and claimed trial. In order to substantiate its case, prosecution, in all, examined four witnesses out of whom the material witness was the complainant herself—After hearing learned counsel for the parties, learned Trial Court came to the conclusion that neither any offence under Section 420 IPC or 498A IPC or 376 IPC was made out, however, it was observed that since the accused concealed the factum of obtaining ex parte decree of divorce and continued to co-habit with the complainant, offence under Section 493 IPC is**

made out—In nut shell, the facts which emerge from the evidence coming on record are that the complainant was the legally wedded wife of the appellant, however, a divorce petition was filed. Appellant assured the complainant to withdraw the divorce petition. Complainant remained under the belief that divorce petition must have been withdrawn by the appellant—The sole question for consideration is whether under these facts and circumstances, offence under Section 493 IPC is made out or not—The Section contains two ingredients: (i) Deceitfully causing a false belief in the existence of a lawful marriage and (ii) co-habitation or sexual intercourse with the person causing belief—The essence of an offence under Section 493 IPC is, therefore, practice of deception by a man on a woman as a consequence of which the woman is led to believe that she is lawfully married to him although she is not and then make her co-habit with him—If a woman is induced to change her status from that of an unmarried to that of a married woman with all the duties and obligations pertaining to the changed relationship and that result is accomplished by deceti, such woman within the law can be said to have been deceived and the offence under Section 493 IPC is brought home. Inducement by a person deceitfully to a woman to change her status from unmarried woman to a lawfully married woman and on that inducement making her cohabit with him in the belief that she is lawfully married to him is what constitutes an offence under Section 493—A perusal of Section 415 IPC makes it clear that the word 'deception' is also found but the explanation appended to this Section makes it clear that a dishonest concealment of facts is also a deception within the meaning of this Section. However, such an explanation is missing under Section 493 of the Indian Penal Code—In Kaumuddin Sheikh vs. State (1997) ILR 2 CAL 365, facts were substantially the same. In that case,



the husband gave irrevocable "Talak" and Continued to live as husband and wife. It was held that it was not the case of prosecution that even though a valid and effective 'Talak' was given to the complainant, the appellant caused her to believed that there was no such valid or effective 'Talak and thereby managed to co-habit or have sexual intercourse with her in the belief that she continues to be legally merried wife of the appellant. It was a case where the appellant is said to have sexual intercourse with the complainant by not mentioning or suppressing the "Talak"—Things are substantially the same in the instant case, inasmuch as, it stands proved that the filing of the divorce petition by the appellant was within the knowledge of the complainant inasmuch as she had also caused her appearance before Family Court at Cuttack on 1st October, 1993. The whole case of prosecution revolves around the fact that an assurance was given by the appellant that he would withdraw the divorce petition, despite that, he did not withdraw the same. Complainant remained under the impression that he must have withdrawn the petition and under that belief continued to co-habit with him—The allegations at the most are appellant continued to have sexual intercourse with complainant by non-mentioning or suppressing the factum of divorce. From such non-mention or suppression of divorce, it cannot be said that the appellant by deceit caused complainant to believe that she was lawfully married to him and to co-habit or have sexual intercourse with him in that belief. It may be that the appellant suppressed the factum of obtaining divorce decree from the complainant, but he was not alleged to have made any representation to her as to cause her to believe that she continues to be his legally married wife and induced her to co-habit or have sexual intercourse with him in that belief. That being so, the case is not covered within the four corners of Section 493 IPC—There is another

**aspect of the matter. The complainant in her deposition, before the Court had categorically stated that she had settled her disputes with the appellant and she does not want to pursue her complaint and the consequent case. Under those circumstances, it was even otherwise futile to proceed further with the case—Allowed.**

**Important Issue Involved:** It cannot be said that the appellant by deceit caused complainant to believe that she was lawfully married to him and to cohabit or have sexual intercourse with him in that belief the case is not covered within the four corners of Section 493 IPC.

**[Ch Sh]**

**APPEARANCES:**

**FOR THE APPELLANTS** : Mr. S.S. Mishra, Advocate.

**FOR THE RESPONDENT** : Ms. Fizani Husain, APP.

**CASE REFERRED TO:**

1. *Kaumuddin Sheikh* vs. *State* (1997) ILR 2 CAL 365.

**RESULT:** Allowed.

**SUNITA GUPTA, J.**

**1.** Challenge in this appeal is to the conviction order dated 3rd April, 2003 and order on sentence dated 4th April, 2003 passed by the learned Additional Sessions Judge in Sessions Case No. 29/2002 arising out of FIR No. 398/1998 PS Tilak Nagar under Section 420/498A/376 IPC.

**2.** Factual matrix of the case is:

Complainant got married to appellant on 1st May, 1982. After her marriage, she got an appointment in Doordarshan and thereafter she went under training in Pune and thereafter she was transferred to Delhi. Her father was alleged to be the member of Parliament and was residing in Delhi, therefore, she also shifted to the residence of her father in Delhi. In 1993, the accused is alleged to have started harassing complainant by saying that he would divorce her. He also filed divorce petition against



the complainant in Family Court at Bhuvneshwar of which she received a notice. However, due to intervention of parents of the complainant, the matter got compromised and thereafter they continued to live together. It was alleged that the accused assured the complainant and her parents that he would withdraw the divorce petition and believing this version and further believing that he might have withdrawn the petition, she continued to live with him. The accused, however, obtained an ex parte decree of divorce against the complainant on 6th January, 1996 but this fact was concealed by him and he continued to have sexual intercourse with her till 1998. During this period, she allegedly conceived thrice but she was persuaded by the accused to go for abortion which she did. In the month of February, 1998, while going to her office by car, she was chased by some unknown hired person just to frighten and harass her. In the month of February, 1996, she got refund amount of Rs.1.75 lacs from DDA in her name. Her husband by making false representation forced her to open a joint account and another account with her son in Standard Chartered Bank, Parliament Street, New Delhi. In joint account with minor son, Rs.1 lac was deposited and in another joint account with her, Rs. 75,000/- were deposited. However, without giving any information, he withdrew Rs.25,000/- from the joint account. On 18th March, 1998, he quarrelled with her, assaulted her and abused her son in the room and bolted it from outside and went away from there. She informed her parents who got confirmation from the Family Court, Cuttack that accused got a decree of divorce. After 2nd April, 1998, her husband did not return back and started harassing her on telephone by using abusive and unparliamentary language. On the basis of this compliant, FIR under Sections 420/376/498A IPC was registered. After completing investigation, charge sheet was submitted against the accused.

**3.** Charges under Sections 498A/420/376 IPC were framed against the accused to which he pleaded not guilty and claimed trial.

**4.** In order to substantiate its case, prosecution, in all, examined four witnesses out of whom the material witness was the complainant herself.

**5.** All the incriminating evidence was put to the accused while recording his statement under Section 313 Cr. P.C. wherein he denied the case of prosecution. He denied that in the year of 1998, he co-habited with complainant concealing the fact of obtaining decree of divorce

against her. His case was that he was not staying with the complainant since 1990 and only used to go to her residence occasionally in day time to see his son. He examined himself in his defence as DW1 as well as DW2 Pradeep Kumar Puri.

**6.** After hearing learned counsel for the parties, learned Trial Court came to the conclusion that neither any offence under Section 420 IPC or 498A IPC or 376 IPC was made out, however, it was observed that since the accused concealed the factum of obtaining ex parte decree of divorce and continued to co-habit with the complainant, offence under Section 493 IPC is made out. Accordingly, vide order dated 3rd April, 2003 he was convicted of offence under Section 493 IPC and vide order dated 4th April, 2003, he was sentenced to undergo rigorous imprisonment for one year and was also directed to pay a sum of Rs.50,000/- as compensation to the complainant. Feeling aggrieved by this order, the present appeal has been preferred.

**7.** It was submitted by learned counsel for the appellant that the essential ingredients of Section 493 IPC are not fulfilled in the instant case inasmuch as it is the admitted case of the parties that the complainant was legally wedded wife of the appellant. There are no allegations that the appellant deceived the complainant into believing that they were lawfully married or under that deception, they cohabited together. Moreover, before the learned Trial Court itself, complainant had stated that she had compromised the matter with the accused and did not want to proceed further. That being so, the impugned order deserves to be set aside.

**8.** Per contra, it was submitted by the learned Public Prosecutor that for the misdeeds committed by the appellant, he is liable to compensate her and as such, the appellant should at least give compensation to the complainant.

**9.** Factual matrix of the case is not much in dispute, inasmuch as it is undisputed case of the parties that the complainant got married to appellant on 1st May, 1982. Out of the wedlock, one son was born. Things, however, did not go smoothly. As such, divorce petition was filed by the appellant at Bhuvneshwar. Although, initially the complainant had taken a plea that she was not aware about filing of the divorce petition, however, it was proved on record that she did received notice of the divorce petition and put her appearance before the Family Court at Cuttack on 1st October, 1993. With the intervention of parents of the



complainant, the matter was compromised and the appellant assured the complainant and her parents that he would withdraw the divorce petition. However, the petition was not withdrawn which remained pending from 1993 to 1996 and the decree of divorce was granted by the Family Court at Cuttack on 6th January, 1996. The appellant has taken a plea that he has been staying separately since 1987. He used to visit his wife's house sometimes to see his son but never stayed in her house nor cohabited with her. Complainant, in her cross-examination although admitted that her husband used to work in Bahadurgarh since 1991 and had been staying there but further stated that he used to visit her in Delhi regularly and used to stay with her on Saturday and Sunday. She denied the suggestion that he used to come to her place only to see her son in day time. In fact, the appellant himself put suggestion to the complainant that during the period of 1996 to 1998 he resided with her and had relationship as that of husband and wife. Thus, when such a suggestion was given by the accused himself, it was rightly observed by learned Trial Court that it was admission on his part that during 1996-1998 he resided with the complainant as her husband and cohabited with her. In nut shell, the facts which emerge from the evidence coming on record are that the complainant was the legally wedded wife of the appellant, however, a divorce petition was filed. Appellant assured the complainant to withdraw the divorce petition. Complainant remained under the belief that divorce petition must have been withdrawn by the appellant. However, it remained pending and the decree of divorce was granted only on 6th January, 1996. During the period from 1996-1998, they continued to live together and co-habited as husband and wife.

**10.** The sole question for consideration is whether under these facts and circumstances, offence under Section 493 IPC is made out or not.

**11.** Section 493 IPC reads as under:-

> "493. Cohabitation caused by a man deceitfully inducing a belief of lawful marriage.- Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

**12.** The Section contains two ingredients:

(i) Deceitfully causing a false belief in the existence of a lawful marriage and (ii) co-habitation or sexual intercourse with the person causing such belief.

**13.** The essence of an offence under Section 493 IPC is, therefore, practice of deception by a man on a woman as a consequence of which the woman is led to believe that she is lawfully married to him although she is not and then make her co-habit with him.

**14.** *Stroud's Judicial Dictionary (5th Edn.) explains "deceit"* as follows:

"Deceit.- ' "Deceit", deceptio, fraus, dolus, is a subtle, wily shift or device, having no other name; hereto may be drawn all manner of craft, subtilly, guile, fraud, wilinesse, slight, cunning, coven, collusion, practice, and offence used to deceive another man by any means, which hath none other proper or particular name but offence.."

Black's Law Dictionary (8th Edn.) explains "deceit" thus:

"Deceit, n. –(1) The act of intentionally giving a false impression <the juror's deceit led the lawyer to believe that she was not biased>. 2. A false statement of fact made by a person knowingly or recklessly (i.e., not caring whether it is true or false) with the intent that someone else will act upon it.

" In *The Law Lexicon* by P. Ramanatha Aiyar (2nd Edn., Reprint 2000),

"deceit" is described as follows: "Deceit.- Fraud; false representation made with intent to deceive; 'Deceit, "deception of fraud" is a subtle, wily shift or device, having no other name, In this may be included all manner of craft, subtlety, guile, fraud, wiliness, slight, cunning, coven, collusion, practice and offence used to deceive another may by any means, which hath none other proper or particular name but offence'."

**15.** "Deceit", in the law, has a broad significance. Any device or false representation by which one man misleads another to his injury and fraudulent misrepresentations by which one man deceives another to the



injury of the latter, are deceit. Deceit is a false statement of fact made by a person knowingly or recklessly with intent that it shall be acted upon by another who does act upon it and thereby suffers an injury. It is always a personal act and is intermediate when compared with fraud. Deceit is sort of a trick or contrivance to defraud another. It is an attempt to deceive and includes any declaration that misleads another or causes him to believe what is false.

**16.** If a woman is induced to change her status from that of an unmarried to that of a married woman with all the duties and obligations pertaining to the changed relationship and that result is accomplished by deceit, such woman within the law can be said to have been deceived and the offence under Section 493 IPC is brought home. Inducement by a person deceitfully to a woman to change her status from unmarried woman to a lawfully married woman and on that inducement making her cohabit with him in the belief that she is lawfully married to him is what constitutes an offence under Section 493. The victim woman has been induced to do that which, but for the false practice, she would not have done and has been led to change her social and domestic status. The ingredients of Section 493 can be said to be fully satisfied when it is proved - (a) deceit causing a false belief of existence of a lawful marriage and (b) cohabitation or sexual intercourse with the person causing such belief.

**17.** In order to commit deceitfully causing a false belief in the existence of a lawful marriage some misrepresentation by the offender is necessary. Mere omission to mention or even suppression of the fact of divorce does not bring one within the mischief of the first ingredient of Section 493 of the Indian Penal Code. That it is so, will be apparent if we refer to Section 415 Indian Penal Code, which defines 'cheating'. This Section reads as under:-

415. Cheating.- Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to" cheat".

Explanation.- A dishonest concealment of facts is a deception within the meaning of this section.

**18.** A perusal of Section 415 IPC makes it clear that the word 'deception' is also found but the explanation appended to this Section makes it clear that a **dishonest concealment of facts** is also a deception within the meaning of this Section. However, such an explanation is missing under Section 493 of the Indian Penal Code. Section 493, Indian Penal Code, contemplates of punishing a man either married or unmarried who induces a woman to think that she is his wife but in reality she is concubine. Such an offence can be committed by a person by inducing a woman to believe that she is lawfully married to him although in fact there is no legal or valid marriage between them in the eyes of law and thereby to co-habit or have sexual intercourse with him.

**19.** In **Kaumuddin Sheikh vs. State** (1997) ILR 2 CAL 365, facts were substantially the same. In that case, the husband gave irrevocable 'Talak' and continued to live as husband and wife. It was held that it was not the case of prosecution that even though a valid and effective 'Talak' was given to the complainant, the appellant caused her to believe that there was no such valid or effective 'Talak' and thereby managed to co-habit or have sexual intercourse with her in the belief that she continues to be legally married wife of the appellant. It was a case where the appellant is said to have sexual intercourse with the complainant by not mentioning or suppressing the 'Talak'. From such non-mention or suppression of the 'Talak', it cannot be said that the appellant by deceit caused complainant to believe that she was lawfully married to him and to co-habit or have sexual intercourse with him in that belief. It may be that the appellant suppressed the 'Talaknama' to complainant but he is not alleged to have made any misrepresentation to her as to cause her to believe that she continues to be his legally married wife and induced her to co-habit or have sexual intercourse with him in that belief. This being the position, it was held that the case does not fall within the four corners of Section 493 of the IPC and the conviction of the appellant was set aside.

**20.** Things are substantially the same in the instant case, inasmuch as, it stands proved that the filing of the divorce petition by the appellant was within the knowledge of the complainant inasmuch as she had also caused her appearance before Family Court at Cuttack on 1st October,



1993. The whole case of prosecution revolves around the fact that an assurance was given by the appellant that he would withdraw the divorce petition, despite that, he did not withdraw the same. Complainant remained under the impression that he must have withdrawn the petition and under that belief continued to co-habit with him. Complainant was an educated lady, therefore, she should have ensured that the divorce petition had been withdrawn by the appellant. However, she believed the assurance given by the appellant and then stayed with him. However, it is not the case of the prosecution that the appellant, at any point of time, caused the complainant to believe that the divorce petition had been withdrawn or under that belief the complainant continued to cohabit or have sexual intercourse with him in the belief that she continues to be the legally married wife of the appellant. The allegations at the most are that the appellant continued to have sexual intercourse with complainant by non-mentioning or suppressing the factum of divorce. From such non-mention or suppression of divorce, it cannot be said that the appellant by deceit caused complainant to believe that she was lawfully married to him and to co-habit or have sexual intercourse with him in that belief. It may be that the appellant suppressed the factum of obtaining divorce decree from the complainant, but he was not alleged to have made any representation to her as to cause her to believe that she continues to be his legally married wife and induced her to co-habit or have sexual intercourse with him in that belief. That being so, the case is not covered within the four corners of Section 493 IPC.

**21.** There is another aspect of the matter. The complainant in her deposition, before the Court had categorically stated that she had settled her disputes with the appellant and she does not want to pursue her complaint and the consequent case. Under those circumstances, it was even otherwise futile to proceed further with the case.

**22.** In the result, the appeal is allowed. The orders of conviction and sentence passed by learned Additional Sessions Judge against the appellant are set aside. He be discharged from his bail bonds.

**23.** Trial Court record be sent back.

**ILR (2013) V DELHI 3743**
**CRL.**

**MUSTAQ .....APPELLANT**

**VERSUS**

**THE STATE (NCT OF DELHI) .....RESPONDENT**

**(S.P. GARG, J.)**

**CRL.A. NO. : 1411/2011 & CRL.M.B. NO. : 1991/2011** **DATE OF DECISION: 11.07.2013**

**Indian Penal Code, 1860—Sections 392, 397 and 34—During the course of investigation, the appellant was arrested by Special Staff (South District) and confessed his guilt. Pursuant to his disclosure statement, he recovered stolen goods i.e. mobile phone made Nokia-2310, two flower post and the knife used in the incident. The Investigating Officer recorded statements of the witnesses conversant with the facts. On completion of the investigation, a charge-sheet was submitted against the appellant and he was duly charged and brought to trial. The prosecution examined sixteen witnesses. In his 313 statement, the appellant pleaded false implication. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned Judgment, held the appellant perpetrator of the crime for the offences mentioned previously. Being aggrieved, he has preferred the appeal.—During the course of arguments, on instructions, appellant's counsel state at bar that the appellant has opted not to challenge conviction under Section 392 IPC. She argued that Section 397 IPC was not attracted as the prosecution could not establish beyond doubt that any 'deadly' weapon was used by the appellant while committing robbery.—Since the appellant has not opted to challenge**



**conviction under Section 392 IPC, findings of the Trial Court on conviction under Section 392 IPC are affirmed.—Under Section 397 IPC, it is to be proved that 'deadly' weapon was used at the time of committing robbery or dacoity or grievous hurt was caused to any person.—In the instant case, DD No. 48A (Ex.PW-14/A) was recorded on 07.11.2009 at 06.50 A.M. on getting information that there was 'theft' near House No 39, Rajpur Khurd, Susan John, the complainant in her statement (Ex.PW-2/A) disclosed that three or four boys entered into her room and they were armed with knives. One of them was having a 'desi katta' There is no mention that the knives and country-made pistol were used in committing robbery.—The record reveals that no inmate in the house was injured and taken to hospital for medical examination. There is no cogent evidence on record to establish that the appellant was armed with 'deadly' weapon and it was used by him while committing robbery. Section 397 fixed a minimum terms of imprisonment.—It is Imperative for the Trial Court to return specific findings that the 'assailant' was armed with a 'deadly' weapon and it was used by him before convicting him with the aid of Section 397. In the instant case, the evidence is lacking on this aspect and benefit of doubt is to be given to the appellant.—While upholding the conviction and sentence of the appellant under Section 392 IPC, his conviction and sentence under Section 397 is set aside.—The appeal is disposed of in the above terms.**

**Important Issue Involved:** Section 397 of Indian Penal code do not create new substantive offence, it is merely complimentary of Section 392 and 393 of Indian Penal Code, it only merely compliment already prescribed.

That it is a burden upon the prosecution to prove that the knife used for the offence is deadly is nature and its design or the method of its use such is calculated to or is likely to produce death, then only a charge under Section 397 is made.

[Ch Sh]

**APPEARANCES:**

**FOR THE APPELLANTS** : Ms. Saahila Lamba, Advocate.

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

**CASES REFERRED TO:**

1. *Sunil @ Munna* vs. *The State (Govt. of NCT),* 2010 (1) JCC 388.
2. *Gulab @ Bablu* vs. *The State (NCT of Delhi),* Crl.A.515/2010.
3. *Samiuddin @ Chotu* vs. *State of NCT of Delhi.,*175 (2010) Delhi Law Times 27.
4. *Rakesh Kumar* vs. *The State of NCT of Delhi* 2005 (1) JCC 334.
5. *Charan Singh* vs. *The State.,* 1988 Crl.L.J. NOC 28 (Delhi).

**RESULT:** Disposed of.

**S.P. GARG, J.**

**1.** The appellant-Mustaq challenges judgment dated 16.07.2011 of learned Additional Sessions Judge in Sessions Case No. 27/2010 arising out of FIR No. 602/2009 PS Mehrauli by which he was held guilty for committing offences punishable under Sections 392/397/34 IPC. By an order dated 21.07.2011, he was sentenced to undergo RI for three years under Section 392/34 IPC and RI for seven years under Section 397 IPC with fine Rs. 2,000/-.

**2.** Allegations against the appellant were that on 07.11.2009 at about 03.00 A.M. at House No. 39, Rajpur Khurd Extension, he and his associates (not arrested) committed lurking house tress-pass and robbed CRL.A. inmates of the house of various articles including cash, mobile



and flower pots etc. They were armed with weapons and gave beatings to the inmates. ASI Girish Kumar lodged First Information Report. During the course of investigation, the appellant was arrested by Special Staff (South District) and confessed his guilt. Pursuant to his disclosure statement, he recovered stolen goods i.e. mobile phone made Nokia-2310, two flower pots and the knife used in the incident. The Investigating Officer recorded statements of the witnesses conversant with the facts. On completion of the investigation, a charge-sheet was submitted against the appellant and he was duly charged and brought to trial. The prosecution examined sixteen witnesses. In his 313 statement, the appellant pleaded false implication. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment, held the appellant perpetrator of the crime for the offences mentioned previously. Being aggrieved, he has preferred the appeal.

**3.** During the course of arguments, on instructions, appellant's counsel stated at bar that the appellant has opted not to challenge conviction under Section 392 IPC. She argued that Section 397 IPC was not attracted as the prosecution could not establish beyond doubt that any 'deadly' weapon was used by the appellant while committing robbery. Learned APP urged that the victims have categorically testified that the assailants were armed with guns, knife, iron rods and these were used for inflicting injuries to the inmates.

**4.** Since the appellant has not opted to challenge conviction under Section 392 IPC, findings of the Trial Court on conviction under Section 392 IPC are affirmed.

**5.** Under Section 397 IPC, it is to be proved that 'deadly' weapon was used at the time of committing robbery or dacoity or grievous hurt was caused to any person. The assailant who actually uses the 'deadly' weapon is liable for minimum punishment with the aid of Section 397. The provisions of Section 397 do not create new substantive offence but merely serve as complementary to Section 392 and 395 by regulating the punishment already prescribed. In the instant case, DD No. 48A (Ex.PW-14/A) was recorded on 07.11.2009 at 06.50 A.M. on getting information that there was 'theft' near House No. 39, Rajpur Khurd. Susan John, the complainant in her statement (Ex.PW-2/A) disclosed that three or four boys entered into her room and they were armed with knives. One of them was having a 'desi katta'. There is no mention that the knives and

country-made pistol were used in committing robbery. During investigation, the appellant was arrested on 22.11.2009 in FIR No. 30/2009 PS Fatehpur Beri under Section 25 Arms Act. It is relevant to note that he has been acquitted in the said case. Appellant's involvement surfaced pursuant to his disclosure statement in FIR No. 30/2009. PW-1 (Rashmi) in her court statement did not specifically depose that the appellant was armed with any specific weapon. She gave vague statement that 'every person' was armed with a knife, gun, saria and like weapons. There is no mention if any such weapon was used to give her beatings or cause injuries. She was not sure if the appellant was one of the assailants. PW-2 (Smt.Susan John) improved her version in court statement and stated that the number of assailants were 5-6. She was robbed of her ear tops, gold chain on the point of gun and knife and given beatings. She further deposed that the appellant was one of those robbers who used knife, gun and lathi. Again, she was not sure as to what weapon was used by the appellant. The knife recovered at the appellant's instance in FIR No. 30/2009 was not shown to both PW-1 & PW-2 to ascertain if it was the same knife which was used in the incident. The record reveals that no inmate in the house was injured and taken to hospital for medical examination. There is no cogent evidence on record to establish that the appellant was armed with 'deadly' weapon and it was used by him while committing robbery. Section 397 fixes a minimum terms of imprisonment. It is imperative for the Trial Court to return specific findings that the 'assailant' was armed with a 'deadly' weapon and it was used by him before convicting him with the aid of Section 397. In the instant case, the evidence is lacking on this aspect and benefit of doubt is to be given to the appellant.

**6.** In Crl.A.515/2010 **'Gulab @ Bablu vs. The State (NCT of Delhi)',** this court held:

> "8. A perusal of the aforesaid provision makes it clear that if an offender at the time of committing robbery or dacoity, uses any deadly weapon or causes grievous hurt or attempts to cause death or grievous hurt to any person the imprisonment with which such offender shall be punished shall not be less than seven years. This provision prescribes minimum sentence which shall be handed down to such an offender. In this case neither the victim has sustained grievous hurt nor there is an evidence that attempt was made to cause death or grievous hurt to the



> victim nor is there any evidence to show that the knife used at the time of committing robbery was a 'deadly weapon'. Simple injuries have been sustained by the victim on his thigh.

9. In **'Charan Singh vs. The State',** 1988 Crl.L.J. NOC 28 (Delhi), Single Judge has held as under:-

> "At the time of committing dacoity one of the offenders caused injury by knife on the hand of the victim but the said knife was not recovered. In order to bring home a charge under Section 397, the prosecution must produce convincing evidence that the knife used by the accused was a deadly weapon. What would make knife deadly is its design or the method of its use such as is calculated to or is likely to produce death. It is, therefore, a question of fact to be proved by the prosecution that the knife use by the accused was a deadly weapon. In the absence of such an evidence and particularly, the non-recovery of the weapon would certainly bring the case out of the ambit of Section 397. The accused could be convicted under Section 392."

10. In **'Samiuddin @ Chotu vs. State of NCT of Delhi',**175 (2010) Delhi Law Times 27, a Bench of co-ordinate jurisdiction has held that when a knife used in the commission of crime is not recovered the offence would not fall within the ambit of Section 397 IPC. In **'Rakesh Kumar vs. The State of NCT of Delhi** 2005 (1) JCC 334 and **Sunil @ Munna vs. The State (Govt. of NCT),** 2010 (1) JCC 388, it was observed that in the absence of recovery of the knife used by the appellant at the time of commission of robbery charge under Section 397 IPC cannot be established.

> 11. In the present case, indubitably the knife used for commission of crime was not recovered. Accordingly, in my view, appellant could not have been sentenced under Section 397 IPC and Trial Court has erred on this point."

**7.** For the foregoing reasons, while upholding the conviction and sentence of the appellant under Section 392 IPC, his conviction and sentence under Section 397 is set aside.

**8.** The appeal is disposed of in the above terms. Pending application also stands disposed of. Trial Court record be sent back forthwith.

**ILR (2013) V DELHI 3749**
**CRL.**

**AHMED SAYYAD @ NANHU @ NANHE & ANR.** **....APPELLANTS**

**VERSUS**

**STATE** **.....RESPONDENT**

**(S.P. GARG, J.)**

**CRL.A. NO. : 445/2004** **DATE OF DECISION: 12.07.2013**

**Indian Penal Code, 1860—Section 412—Allegations against the appellants are that they received or retained five washing machines make Videocon knowing or having reasons to believe that it was robbed property. The assailants were convicted under Section 392/394/34 IPC for robbing washing machines (Ex.P-1 to P-5) from Ram Shanker. After arrest, they were interrogated and their disclosure statements (Ex. PW-2A, 2/B and 2/C) were recorded. They led the police to shop No. 17, DDA Market, Turkman Gate recovered two washing machines which were seized. It led to A-2's arrest vide seizure memo (Ex.PW-2/D). He was interrogated and his disclosure statement (Ex.PW-2/E) was recorded. He took the police to House No.A-1, DDA flats, turkman Gate and recovered three washing machines which were seizure memo (Ex.PW-2/F). The recoveries were effected by the Investigating Officer PW-11 Mahender Pal Singh on 17.09.2000 who identified A-2 to be the person found present at shop No. 17 DDA Market, Turkman Gate when the assailants recovered two washing machines bearing 49247 and 49249 make Videocon seized by seizure memo (Ex.PW2/D). A-2 also put his signatures on various memos prepared there. Pursuant to his disclosure statement (Ex.PW.2/E) three more washing machines make**



**videocon No. 49229, 49257 and 49253 were recovered at his instance—PW-9 (Ram Shankar) had informed the police about the robbery of washing machines from his possession on 09.09.2000. Apparently, these washing machines did not belong to A-2. He did not explain as to how and under what circumstances, he got possession of these washing machines. He did not produce ay document to show that he was bona fide purchaser of these articles. The assailants who had sold the washing were not dealers/shop-keepers—The recovery of two washing machines from A-2's possession, at shop No. 17, DDA Market, Turkman gate and three washing at his instance from flat, Turkman Gate establishes beyond doubt that he received and retained the washing machines knowing or having reasons to believe that it was a stolen property. A-2 did not produce any evidence that reception of property were innocent. The circumstances in which A-2 received the property were such that any reasonable man must have felt convinced that the property with which he was dealing must be a stolen property—Since nothing incriminating i.e. Washing machine was recovered from A-1's possession or at his instance, it cannot be inferred with certainty that he received or retained any robbed/stolen article from the assailants. He deserves benefit of doubt—The prosecution could not establish beyond doubt that A-2 was aware or had reasons to believe that the articles were a robbed property at the time of its reception. IT did not surface in evidence that A-2 had hatched conspiracy with the assailants to rob the complainant and to deliver the robbed articles to him—In the light of the above discussion, A-2 is guilty of committing offence under Section 411 IPC only. He has already spent two and a half months in custody and has suffered trial for about ten years. He is not a previous convict. Considering the mitigating circumstances, A-2's substantive sentence is modified and reduced to one year under**

**Section 411 IPC. Other terms of sentence order are left undisturbed. A-1 is Given benefit of doubt and is acquitted—A-2 is directed to Surrender and serve the remainder of his sentence—Appeal stands disposed of.**

**Important Issue Involved:** When the assailants sold the articles as low as compared to their to their value/place inference can be drawn that accused was aware that the articles delivered to him were stolen property. He was real beneficiary on purchase at cheap rates.

**[Ch Sh]**

**APPEARANCES:**

**FOR THE APPELLANTS** : Mr. Sunil Tiwari, Advocate.

**FRO THE RESPONDENT** : Ms. Fizani Hussain, APP for the State.

**RESULT:** Disposed of.

**S.P. GARG, J.**

**1.** The appellants-Ahmed Sayyad @ Nanhu @ Nanhe (A-1) and Ameen Alou (A-2) challenge judgment dated 19.05.2004 of learned Additional Sessions Judge in Sessions Case No.50/2001 arising out of FIR No.366/2000 by which they were held guilty for committing offence punishable under Section 412 IPC. By an order on 20.05.2004, they were sentenced to undergo RI for three years with fine Rs. 1,000/-each.

**2.** On 09.09.2000 Rama Shanker working with Aggrelliolo & Co., 11-B, Netaji Subhash Marg, Darya Ganj, Delhi took five washing machines make Videocon on the cycle rickshaw of the company for Crl.A.No.445-2004 Page 1 of 8 delivery to Ladi Electronics, Dakshin Puri. When he reached behind Indira Gandhi Indoor Stadium, cycle-rickshaw punctured. Four boys in the age group of 25-30 years robbed washing machines and caused injuries to him. SI Mahender Pal Singh lodged First Information Report after recording Ram Shankar's statement (Ex.PW9/A). He was medically examined. During investigation, it revealed that Nuresh, Qutubddin, Zakir, Jamshed and Amrul were perpetrators of the crime.



On 17.09.2000, on receipt of secret information, Qutubddin, Jamshed and Zakir were arrested from the jhuggies in Moolchand Basti, Yamuna Pushta and identified by the complainant. Pursuant to disclosure statements, they led the police to shop No.17, DDA Market, Turkman Gate and recovered two washing machines bearing Nos.49247 and 49249 from A-2's possession. A-2 was arrested and interrogated. At his instance, the police recovered three more washing machines bearing Nos. 49229, 49257 and 49253 from A-1's flat No.A-1, DDA flats, Turkman Gate. On surrender in the court on 11.10.2000, A-1 after police remand was taken to Meerut for recovery of the documents but nothing could be recovered. Thereafter, A-1 allegedly recovered documents i.e. letter pad and visiting cards from underneath a pillow in his flat. The investigating officer recorded statements of the witnesses conversant with facts. The prosecution examined 13 witnesses. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment convicted Qutubddin @ Ganja, Mohd.Jamshed @ Jamil, Mohd.Zakir @ Rakesh Gupta, for committing offences punishable under Section 392/394/34 IPC. A-1 and A-2 were convicted under Section 412/34 IPC. Benefit of doubt was given to Abdul Rashid. It appears that the convicts who robbed Ram Shankar have not preferred appeals against their conviction.

**3.** Appellants' counsel urged that the prosecution could not establish recovery of washing machines beyond doubt from appellants' possession. The defence witnesses categorically elaborated that the premises from where recoveries were made did not belong to A-1 and A-2. Recovery of Videocon machines after one month of incident is doubtful. Nothing could be recovered pursuant to A-1's disclosure statement from Meerut. No independent public witnesses were associated during investigation. The investigation officer did not collect documentary evidence to show that the premises from where the recoveries were effected belonged to the appellants. Learned APP has urged that the judgment is based on fair appraisal of the evidence and no interference is called for.

**4.** I have considered the submissions of the parties and have examined the record. Allegations against the appellants are that they received or retained five washing machines make Videocon knowing or having reasons to believe that it was robbed property. The assailants were convicted under Sections 392/394/34 IPC for robbing washing machines (Ex.P-1 to P-5) from Ram Shanker. After arrest, they were interrogated and their disclosure statements (Ex.PW-2/A, 2/B and 2/C)

were recorded. They led the police to shop No.17, DDA Market, Turkman Gate and recovered two washing machines which were seized vide seizure memo (Ex.PW-2/D). It led to A-2's arrest. He was interrogated and his disclosure statement (Ex.PW-2/E) was recorded. He took the police to House No.A-1, DDA flats, Turkman Gate and recovered three washing machines which were seized vide seizure memo (Ex.PW2/ F). The recoveries were effected by the Investigating Officer PW-11 SI Mahender Pal Singh on 17.09.2000 who identified A-2 to be the person found present at shop No.17 DDA Market, Turkman Gate when the assailants recovered two washing machines bearing 49247 and 49249 make Videocon seized by seizure memo (Ex.PW2/D). A-2 also put his signatures on various memos prepared there. Pursuant to his disclosure statement (Ex.PW2/E) three more washing machines make Videocon No.49229, 49257 and 49253 were recovered at his instance. PW-2 (Constable Subhash), PW-4 (Head Constable Birpal Singh) and PW-7 (Constable Ghure Singh) were witnesses to the recovery. All these witnesses were cross-examined at length but no vital discrepancies emerged in their cross-examination to disbelieve recovery of the washing machines from A-2's possession. A-2 was not acquainted with the complainant or the prosecution witnesses to be falsely implicated. The police witnesses had no ulterior motive to plant five washing machines of substantial value in the year 2000 to rope in A-2. A-2's involvement surfaced only when the assailants/robbers disclosed the police that they had sold the robbed property to him. PW-1 (Rajeev Aggarwal), partner, M/s Aggrellios and Co. identified the washing machines (Ex.P-1 to P-5) handed over to PW-9 (Ram Shankar), rickshaw-puller, for supplying at Khanpur. PW-9 (Ram Shankar) had informed the police about the robbery of washing machines from his possession on 09.09.2000. Apparently, these washing machines did not belong to A-2. He did not explain as to how and under what circumstances, he got possession of these washing machines. He did not produce any document to show that he was bona fide purchaser of these articles. The assailants who had sold the washing machines were not dealers/shop-keepers. In the ordinarcourse of business, A-2 was not expected to obtain possession of the washing machines without any apparent reason from the strangers with whom he had no regular business/ dealings. A-2 himself had no such avocation. He also did not explain as to for what consideration washing machines were received. The recovery of two washing machines from A-2's possession, at shop No.17, DDA Market, Turkman Gate and three washing machines at his instance from



flat No. A-1, DDA flats, Turkman Gate establishes beyond doubt that he received and retained the washing machines knowing or having reasons to believe that it was a stolen property. A-2 did not produce any evidence that reception of property were innocent. The circumstances in which A-2 received the property were such that any reasonable man must have felt convinced that the property with which he was dealing must be a stolen property. The prosecution, has, however, failed to establish that A-1 was found in physical or constructive possession of the stolen articles any time. All the five washing machines were recovered on 17.09.2000. Three washing machines lying at flat No. A-1, DDA flats, Turkman Gate were recovered in pursuance of A-2's disclosure statement. A-1 was not present at either place at the time of recovery of the washing machines. He surrendered in the court on 11.10.2000 and his disclosure statement was recorded. He was taken to Meerut to recover the documents but no recovery could be effected at his instance. Subsequently, documents i.e. visiting card (Ex.P6) and letter pad of M/ s Aggrellios & Co. were recovered and seized vide seizure memo Ex.PW-4/A at his instance from his flat. It appears that the stolen articles had already been recovered before recording A-1's disclosure statement. No incriminating document was recovered from flat No. A-1, DDA flats, Turkman Gate at that time. There was no occasion for A-1 to retain these documents of insignificant value for such a long duration after A-2's arrest. Since nothing incriminating i.e. washing machine was recovered from A-1's possession or at his instance, it cannot be inferred with certainty that he received or retained any robbed/stolen article from the assailants. He deserves benefit of doubt.

**5.** The prosecution could not establish beyond doubt that A-2 was aware or had reasons to believe that the articles were a robbed property at the time of its reception. It did not surface in evidence that A2 had hatched conspiracy with the assailants to rob the complainant and to deliver the robbed articles to him. The assailants in their disclosure statements claimed to have got '15,000/-for sale of five washing machines which is highly low as compared to their value/price. Inference can be drawn that A-2 was aware that the articles delivered to him were 'stolen' property. He was real beneficiary on purchase at cheap rates.

**6.** In the light of the above discussion, A-2 is guilty of committing offence under Section 411 IPC only. He has already spent two and a half months in custody and has suffered trial for about ten years. He is not

a previous convict. Considering the mitigating circumstances, A-2's substantive sentence is modified and reduced to one year under Section 411 IPC. Other terms of sentence order are left undisturbed. A-1 is given benefit of doubt and is acquitted.

**7.** A-2 is directed to surrender and serve the remainder of his sentence. For this purpose, he shall appear before the Trial court on 19.07.2013, The Registry shall transmit the Trial Court records forthwith to ensure compliance with the judgment.

**8.** The appeal stands disposed of in the above terms.

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**ILR (2013) V DELHI 3755**
**CRL. A.**

**JAI VEER SINGH ....APPELLANT**

**VERSUS**

**STATE ....RESPONDENT**

**(SUNITA GUPTA, J.)**

**CRL.A. NO. : 249/2003 DATE OF DECISION: 15.07.2013**

**Indian Penal Code, 1860—Section 392, 397 and 34—On 8.10.1994, ASI Shiv Singh (PW7) along with Ct. Anand Kumar (PW3) and Ct. Brahm Singh reached Shyam Nagar at about 11.50 a.m where the complainant Ravinder Chetwani (PW1) met them and gave his statement, Ex.PW 1/A regarding commission of robbery of Rs. 1,50,000/- Endorsement Ex. PW7/A was made by ASI Shiv Singh and the same was sent through Ct. Anand Kumar to police station on the basis of which FIR Ex.PW 2/B was recorded by Ct. Itwari Singh (PW2)—It was submitted by learned counsel for the appellant**



**that the complainant did not identify the appellant and in fact was categorical in stating that he was called in the police station on 04.02.1995 where he had identified only one accused and not the second accused. He specifically deposed that accused Jai Veer Singh was not the second accused who had put the country made pistol on his person. That being so, there was no occasion for his being convicted for offence u/S 392 IPC. As regards recovery of Rs 15000/-, it was submitted that recovery was alleged to have been effected in the presence of PW4 Ashok Rana. However this witness has categorically deposed that no recovery was effected in his presence. Although he admitted his signatures at recovery memo at Point A, however he clarified that his signatures were obtained on blank paper. Moreover, the learned Trial Court has convicted the appellant while raising presumption u/S 114(a) of the Evidence Act—Learned Public Prosecutor, however, stressed upon refusal on the part of the appellant to join TIP proceedings. Although it is true that the appellant had refused to join TIP proceedings, as such an adverse inference can be drawn against him for his failure to join the proceedings but that, ipso facto, is not sufficient to arrive at the conclusion that he was the person who participated in the commission of crime because it is the statement made by the witness in Court which is of prime importance and, as seen above, the complainant has categorically deposed that the appellant was not the second accused who had put the pistol on his neck at the time of committing robbery, therefore, only on the basis of presumption it cannot be held that appellant was the second accused who had put pistol on the neck of the complainant to commiting robbery—In *Earabhadrappa v. State of Karnataka,* AIR 1983 SC 446, the Supreme Court held that the nature of presumption under Illustration (a) to Section 114, must depend upon the nature of the evidence adduced. No fixed**

**time limit can be laid down to determine whether possession is recent or otherwise and each case must be judged on its own facts. The question as to what amounts to recent possession sufficient to justify the presumption of guilt varies according as the stolen article is or is not calculated to pass readily from hand to hand. If the stolen articles were such as were not likely to pass readily from hand to hand, the period of one year that elapsed cannot he said to be too long particularly when the Appellant had been absconding during that period—In *State of Rajasthan Vs. Talewar and Anr.,* AIR 2011 SC 2271, in pursuance to disclosure statement, cash, silver glass, scooter, key of the car were recovered from accused persons. Recovery was not in close proximity of the time from the date of incident. It was observed that recovery is either of cash, small things or vehicles which can be passed from one person to another without any difficulty. In such a situation, no presumption can be drawn against the accused under Section 114 illustration (a) of the Evidence Act. No adverse inference can be drawn on the basis of recoveries made on their disclosure statements to connect them with the commission of crime—In the instant case also, since recovery is only of cash, that too, after about three months of the incident it is not safe to draw an inference that the appellant in possession of the stolen property had committed robbery. In that view of the matter, the conviction of the appellant for the charge of robbery u/s 392 IPC cannot be sustained and is accordingly set aside—However, since the recovery of stolen property was effected at the instance of accused which remains unexplained, as such he is convicted u/s 411 IPC. The incident took place in the year 1994. The appellant remained in custody for a period of 11 months. It was submitted that the appellant is now well settled in life and is now living in his village along with his family. Under the circumstances, the ends of justice will be met, if he is**



**sentenced to the period already undergone. However, the fine of Rs.5000/- imposed upon him is enhanced to Rs.5,000/- —Disposed of.**

**Important Issue Involved:** Not safe to draw an inference that the person in possession of the stolen property had committed robbery.

**[Ch Sh]**

**APPEARANCES:**

**FOR THE APPELLANTS** : Mr. Jitender Tyagi, Advocate.

**FOR THE RESPONDENT** : Ms. Fizani Husain, APP.

**CASES REFERRED TO:**

1. *C. Ronald & Anr.* vs. *Union Territory of Andaman & Nicobar Islands,* (2012) 1 SCC (Crl.) 596.
2. *Sunil Clifford Daniel* vs. *State of Punjab,* 2012 11 SCC 205.
3. *State of Rajasthan* vs. *Talewar and Anr.,* AIR 2011 SC 2271.
4. *Karamjit Singh* vs. *State (Delhi Admn.)* 2003 5 SCC 291.
5. *Sanjay* vs. *State,* AIR 2001 SC 979.
6. *State Govt. of NCT of Delhi* vs. *Sunil and Anr.,* (2001) 1 SCC 652.
7. *Gulab Chand* vs. *State of Madhya Pradesh,* (1995) 3 SCC 574.
8. *Earabhadrappa* vs. *State of Karnataka,* AIR 1983 SC 446.
9. *Tulsi Ram Kanu* vs. *State,* AIR 1954 SC 1.

**RESULT:** Disposed of.

**SUNITA GUPTA, J.**

**1.** Challenge in this appeal is to the judgment dated 26.03.2003 and the order on sentence dated 31.03.2003 arising out of Sessions Case

No.133/96 in case FIR 310/94 u/s 392/397/34 IPC, P.S. Okhla Industrial Area, vide which the appellant along with his co-accused was held guilty of offence u/s 392 read with Section 34 IPC and was sentenced to undergo 27 months rigorous imprisonment and to pay a fine of Rs.500/- each, in default of payment of fine to undergo simple imprisonment for 15 days.

**2.** Prosecution case emanates from the fact that on 8.10.1994, ASI Shiv Singh (PW7) along with Ct. Anand Kumar (PW3) and Ct. Brahm Singh reached Shyam Nagar at about 11.50 a.m where the complainant Ravinder Chetwani (PW1) met them and gave his statement, Ex.PW 1/A regarding commission of robbery of Rs.1,50,000/-. Endorsement Ex. PW 7/A was made by ASI Shiv Singh and the same was sent through Ct. Anand Kumar to police station on the basis of which FIR Ex.PW 2/B was recorded by Ct. Itwari Singh (PW2).

**3.** It is further the case of prosecution that on 03.02.1995, SI Vimal Kishore Tripathi (PW9) posted at Spl. Staff South District interrogated two accused Ramesh Kumar and Jai Veer Singh who were arrested in case FIR No. 220/94 u/s 457/380 IPC P.S. Mehrauli and recorded their disclosure statements. In pursuance thereof, accused Ramesh got recovered Rs.50,000/- along with gold ornaments whereas accused Jai Veer Singh got recovered Rs.15,000. Insp. Narender Singh (PW10), on receipt of investigation of this case, formally arrested the accused person. The accused refused to join test identification proceedings. After completing investigation, charge-sheet was submitted against them in the Court of learned Metropolitan Magistrate who committed the case to the Court of Sessions since offence u/s 397 IPC was triable by a Court of Sessions.

**4.** On commitment, charge u/s 392/397 IPC was framed against both the accused persons to which they pleaded not guilty and claimed trial. In order to substantiate its case, prosecution examined ten witnesses. All the incriminating evidence was put to accused persons while recording their statement u/s 313 Cr.P.C wherein they denied the case of prosecution, pleaded innocence and alleged false implication in this case. Vide impugned order referred above, both the accused were held guilty u/s 392 read with Section 34 IPC and were sentenced separately. Since the accused Ramesh had already undergone the sentence, as such he was not taken in custody whereas the present appellant Jai Veer Singh had undergone



only 11 months, therefore, in order to serve the remaining sentence, he was taken in custody. Feeling aggrieved by the order, appellant Jai Veer Singh has preferred the present appeal.

**5.** I have heard Mr. Jitender Tyagi, learned counsel for the appellant and Ms. Fizani Husain, learned Public Prosecutor for the State and have perused the Trial Court record.

**6.** It was submitted by learned counsel for the appellant that the complainant did not identify the appellant and in fact was categorical in stating that he was called in the police station on 04.02.1995 where he had identified only one accused and not the second accused. He specifically deposed that accused Jai Veer Singh was not the second accused who had put the country made pistol on his person. That being so, there was no occasion for his being convicted for offence u/s 392 IPC. As regards recovery of Rs 15000/-, it was submitted that recovery was alleged to have been effected in the presence of PW4 Ashok Rana. However this witness has categorically deposed that no recovery was effected in his presence. Although he admitted his signatures at recovery memo at Point A, however he clarified that his signatures were obtained on blank paper. Moreover, the learned Trial Court has convicted the appellant while raising presumption u/s 114(a) of the Evidence Act. However, in this case, that presumption is not available because the alleged recovery which, otherwise, is doubtful was effected after 3 months of the incident. Under the circumstances, it was submitted that no case u/s 392 IPC is made out. In case, it is held that the appellant was found in possession of the stolen money, then, at the most, he can be held guilty u/s 411 IPC. He has already remained in custody for a period of 11 months. The incident took place in the year 1994. The appellant is now well settled in life and has a family to support. As such he be sentenced to the period already undergone.

**7.** Per contra, it was submitted by learned Public Prosecutor for the State that the appellant refused to join TIP. Moreover, recovery of Rs.15,000/- was effected from him in the presence of an independent witness Ashok Rana. Although this witness has turned hostile but admitted his signatures on the recovery memo. Under the circumstances, it was submitted that there is no infirmity in the impugned order which calls for interference.

**8.** The most material witness is the complainant Ravinder Chetwani

who unfolded that on 08.10.1994, he was working with M/s Infocom Digital Systems Pvt. Ltd having its office at B-285, Okhla Industrial Area, Phase-I as an Accountant. On that day, at about 11.30 a.m, after withdrawing Rs.1,50,000/- from the account of the company held in SBI Okhla,Phase-III he kept the currency notes contained in a polythene bag in the dicky of his scooter bearing No.DDP 5339. When he reached near G.B. Pant Polytechnic, since the road was bad, he was driving his scooter at low speed. In the meanwhile, two boys riding a two wheeler scooter DL 3S 2208 came from behind and obstructed his way. The front wheel of that scooter touched his scooter and he was forced to stop his scooter since on the other side there was a nallah. Those two boys asked him to open the dicky and when he resisted, one of them who was sitting on the pillion seat of the scooter, put a country made pistol on his backside. The other boy, who was driving the scooter, opened the dicky with a fist blow. They then removed the polythene bag from the dicky of the scooter and fled away. He started his scooter and after covering some distance, he saw two police officials and gave his statement Ex. PW1/A which bears his signatures at Point A. He identified the accused Ramesh as the person who was driving the scooter and who had taken out the polythene bag containing currency notes from the dicky of his scooter. However, he could not identify the other person who was sitting on the pillion seat of the scooter and who had put country made pistol on his back. Currency notes were later on returned to him on Superdari. Since the witness did not support the case of prosecution regarding the present appellant, he was cross-examined by learned Public Prosecutor with the permission of the Court and in cross-examination, he admitted that in his complaint Ex.PW 1/A he had given the description of one accused and had given the age of the other accused. However, he went on stating that he had seen the accused who was driving the scooter and who had taken the currency notes from the dicky of the scooter clearly but he had not properly seen the pillion rider who had put the pistol on his back as he was on one side. He was shown the accused Jai Veer Singh and was asked whether he was the second person who was sitting on the pillion seat of the scooter and who had put the country made pistol on his neck and after looking at accused Jai Veer Singh, he categorically stated that he was not the second accused. He went on stating that accused Jai Veer Singh does not answer the description of second accused. He admitted that he was shown two persons at the police station on 04.02.1995 but he was able to identify



only one accused, whom he identified in the Court also. He had not identified the second accused. He was the solitary witness to the incident and was the best person to identify the accused but he completely exonerated him by deposing that he was not the second accused and in fact he had not even identified him in the police station on 04.02.1995.

**9.** Learned Public Prosecutor, however, stressed upon refusal on the part of the appellant to join TIP proceedings. Although it is true that the appellant had refused to join TIP proceedings, as such an adverse inference can be drawn against him for his failure to join the proceedings but that, *ipso facto,* is not sufficient to arrive at the conclusion that he was the person who participated in the commission of crime because it is the statement made by the witness in Court which is of prime importance and, as seen above, the complainant has categorically deposed that the appellant was not the second accused who had put the pistol on his neck at the time of committing robbery, therefore, only on the basis of presumption it cannot be held that appellant was the second accused who had put pistol on the neck of the complainant to commiting robbery.

**10.** It is the case of prosecution that the present appellant along with his co-accused was arrested in case FIR No.220/94 u/s 457/380 IPC P.S. Mehrauli by PW-9 SI Vimal Kishore Tripathi wherein they made disclosure statements. In pursuance thereof, while accused Ramesh got recovered Rs.50,000/- pertaining to this case along with some gold ornaments of some other case, the present appellant got recovered Rs.15,000/- pertaining to this case. The same were seized vide recovery memoes Ex.PW 6/C and PW 6/D respectively. The recovery was effected in the presence of H.C Tarachand PW6 and at the time of recovery, one independent witness Ashok Rana PW-4 was also joined. So far as, PW4 Ashok Rana is concerned, this witness has not supported the case of prosecution by deposing that no recovery was effected in his presence. He admitted his signatures at Point A on the recovery memo but went on stating that his signatures were obtained on blank paper. The reason for not supporting the case of prosecution by this witness is quite obvious as he was residing in the neighbourhood of the present accused. That being so, being neighbour of the accused, he might have chosen not to support the case of prosecution but then there is testimony of H.C Tarachand and SI Vimal Kishore Tripathi, both of whom have deposed about the recovery of Rs.15,000/- at the instance of this accused in pursuance to his disclosure statement. Despite cross-examination, nothing

could be elicited to discredit their testimony.

**11.** The testimony of police personnel have to 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. It depends upon the facts and circumstances of each case and no principle of general application can be laid down as held in **Karamjit Singh Vs. State (Delhi Admn.)** 2003 5 SCC 291, **C. Ronald & Anr. Vs. Union Territory of Andaman & Nicobar Islands,** (2012) 1 SCC (Crl.) 596. In **Sunil Clifford Daniel vs. State of Punjab,** 2012 11 SCC 205, Apex Court referred to **State Govt. of NCT of Delhi v. Sunil and Anr.,** (2001) 1 SCC 652, wherein Court held as under:-

> "20. ... But if no witness was present or if no person had agreed to affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so prepared by the police officer must be treated as tainted and the recovery evidence unreliable. The court has to consider the evidence of the investigating officer who deposed to the fact of recovery based on the statement elicited from the accused on its own worth.
>
> 21. We feel that it is an archaic notion that actions of the police officer should be approached with initial distrust.....At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other way round. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature. Hence when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the accused, through cross-examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact that no other independent person was present at the time of recovery. But it is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions."



Record reveals that no ill-will or animus has been alleged against any of the police officials for which reason they will falsely implicate the accused. Under the circumstance, recovery of Rs.15,000/- at the instance of this accused stands proved. Moreover the accused has not claimed this money in his statement recorded u/s 313 Cr.P.C nor any explanation has been afforded as to how he came in possession of so much currency notes. Under the circumstances it becomes clear that it was a stolen property.

**12.** Learned Trial Court has convicted the present appellant u/s 392 I.P.C along with the co-accused relying upon the presumption available u/s 114(a) of the Evidence Act on the ground that the appellant was found in possession of the stolen property. Reliance was placed on **Sanjay vs. State,** AIR 2001 SC 979 and **Gulab Chand vs. State of Madhya Pradesh,** (1995) 3 SCC 574.

**13.** Illustration (a) of Section 114 of the Indian Evidence Act, 1872 provides that the Court may presume *that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.*

**14.** The words "soon after" in this illustration are pertinent. In **Tulsi Ram Kanu vs. State,** AIR 1954 SC 1, it was observed:

> "The Supreme Court has indicated that the presumption permitted to be drawn under Section 114, Illustration (a) of the Evidence Act 1972 has to be drawn under the 'important time factor'. If the ornaments in possession of the deceased are found in possession of a person soon after the murder, a presumption of guilt may be permitted. But if a long period has expired in the interval, the presumption cannot be drawn having regard to the circumstances of the case."

**15.** In **Earabhadrappa v. State of Karnataka,** AIR 1983 SC 446, the Supreme Court held that the nature of presumption under Illustration (a) to Section 114, must depend upon the nature of the evidence adduced.

No fixed time limit can be laid down to determine whether possession is recent or otherwise and each case must be judged on its own facts. The question as to what amounts to recent possession sufficient to justify the presumption of guilt varies according as the stolen article is or is not calculated to pass readily from hand to hand. If the stolen articles were such as were not likely to pass readily from hand to hand, the period of one year that elapsed cannot he said to be too long particularly when the Appellant had been absconding during that period.

**16.** Following such a reasoning, in **Sanjay** (supra), Hon'ble Supreme Court upheld the conviction by the trial court since disclosure statements were made by the accused persons on the next day of the commission of the offence and the property of the deceased was recovered at their instance from the places where they had kept such properties, on the same day. The Court found that the trial court was justified in holding that the disclosure statements of the accused persons and huge recoveries from them at their instance by itself was a sufficient circumstance on the very next day of the incident which clearly went to show that the accused persons had joined hands to commit the offence of robbery. Therefore, recent and unexplained possession of stolen properties will be taken to be presumptive evidence of the charge of murder as well.

**17.** In **Gulab Chand** (supra) also, Hon'ble Supreme Court upheld the conviction for committing dacoity on the basis of recovery of ornaments of the deceased from the possession of the person accused of robbery and murder immediately after the occurrence.

**18.** In both the authorities, **Sanjay** (supra) and **Gulabchand** (supra), since recovery was effected immediately after the incident and the accused were unable to explain the possession of stolen properties, such a presumption u/s 114(a) of the Evidence Act was drawn. However, things are entirely different in the instant case, inasmuch as the incident had taken place on 08.10.1994 whereas the accused was arrested on 03.02.1995 i.e after almost three months of the incident and the recovery was of cash which can be passed from one person to another without any difficulty.

**19.** In **State of Rajasthan vs. Talewar and Anr.,** AIR 2011 SC 2271, in pursuance to disclosure statement, cash, silver glass, scooter, key of the car were recovered from accused persons. Recovery was not in close proximity of the time from the date of incident. It was observed



that recovery is either of cash, small things or vehicles which can be passed from one person to another without any difficulty. In such a situation, no presumption can be drawn against the accused under Section 114 illustration(a) of the Evidence Act. No adverse inference can be drawn on the basis of recoveries made on their disclosure statements to connect them with the commission of crime.

**20.** In the instant case also, since recovery is only of cash, that too, after about three months of the incident it is not safe to draw an inference that the appellant in possession of the stolen property had committed robbery. In that view of the matter, the conviction of the appellant for the charge of robbery u/s 392 IPC cannot be sustained and is accordingly set aside.

**21.** However, since the recovery of stolen property was effected at the instance of accused which remains unexplained, as such he is convicted u/s 411 IPC. The incident took place in the year 1994. The appellant remained in custody for a period of 11 months. It was submitted that the appellant is now well settled in life and is now living in his village along with his family. Under the circumstances, the ends of justice will be met, if he is sentenced to the period already undergone. However, the fine of Rs.500/- imposed upon him is enhanced to Rs.5,000/- which be deposited with the learned Trial Court within seven days, failing which he is to undergo S.I for a period of one month. Fine of Rs.500/-, if already deposited, be adjusted. With these observations the appeal stands disposed of.

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**ILR (2012) DELHI 3767**
**CRL.**

**KALYAN SINGH .....APPELLANT**

**VERSUS**

**STATE OF DELHI ....RESPONDENT**

**(SUNITA GUPTA, J.)**

**CRL.A. NO. : 268/2004 DATE OF DECISION: 15.07.2013**

**Prevention of Corruption Act, 1988—Section 7 and 13(2) r/w Section 13(1)(d)—Appellant was employed in Delhi Electricity Supply Undertaking (DESU) in February, 1994 and new posted at DESU Office in Keshav Puram those days—The raiding team comprising of complainant, panch witness and some officials of Anti-Corruption Branch office headed by Inspector Ramesh Singh went to the office of the accused. Complainant and panch witness were asked to contact the accused for the transaction of banding over of bribe money to the accused by the complainant as per the plan. Thereafter, the complainant told the accused that he had brought the amount of Rs.300/- as demanded by him and then the accused told the complainant to given him the money.—They were informed by the complainant that accused had accepted the bribe money and was holding the same in his left hand fist—In order to substantiate its case, prosecution examined 14 witnesses. Statement of the accused was recorded under Section 313 Cr.P.C. wherein he denied the case of prosecution, claimed innocence and pleaded false implication in the case.—Since on the date of filing of the charge sheet and when cognizance of the offence was taken, the appellant was not a public servant, therefore, there was no need to obtain any sanction**



**for his prosecution. The retirement was never challenged by the appellant at any point of time on the ground that due to his suspension on account of this criminal prosecution he continues to remain in service—It is undisputed case of the parties that the charge sheet was filed in the Court on 22nd January, 1999 while the date of superannuation of the appellant was 18th February, 1998, meaning thereby, on the date when the charge sheet was submitted in the Court, the appellant ceased to be a public servant and, therefore, in view of the settled principle enunciated in various authorities viz *Prakash Singh Badal and Anr. Vs. State of Punjab and Ors.* (2007) 1 SCC 1; *Abhay Singh Chautala Vs. CBI,* (2011) 7 SCC 141 and *R.S. Nayak Vs. A.R. Antulay* (1984) 2 SCC 183, no sanction was required—As regards the submission that the appellant was not dealing with the area of the premise s No. 4210, Hansapur Road, Trinagar where the complainant resided, same is without any substance, inasmuch as, PW-7 Sh. S.K. Saroha who was posted as Assistant financial Officer, Delhi Vidyut Board, Keshav Puram on 13th October, 1998 deposed that appellant was functioning and employed as senior clerk in billing section during that period in the said office. He was doing the job of bills/ rectifying the mistakes in the electricity bills issued to the consumers—The statement recorder under Section 313 Cr.P.C. of the appellant goes to show that one is of denial simplicitor and even in this statement, no plea was taken by the appellant that the area of Trinagar was not within his jurisdiction and, therefore, he was not competent to deal with electricity bill in question. Under the circumstances, this plea taken by the appellant in the ground of appeal is not substantiated by the record—In fact as observed by the Supreme Court in *State of UP Vs. Dr. G.K. Ghosh,* AIR 1984 SC 1453: by and large a citizen is reluctant to complain the vigilance department and to have a trap**

**arranged even if illegal gratification is demanded a government servant. It is only when a citizen feels oppressed by a feeling of being wronged and finds the situation to be beyond endurance that he adopts the course of approaching the vigilance department for laying a trap. His evidence cannot, therefore, be easily or lightly brushed aside—Moreover, evidence of complainant is full corroborated by the panch witness. Panch witness has also deposed that when the accused was apprehended and challenged by the raid officer he become perplexed and also tendered apology, which part of his testimony goes unchallenged as no cross-examination was effected on this point. This conduct of accused is also another incriminating piece of evidence against him—From the evidence of the complainant, panch witness and the raid officer prosecution was able to establish its case beyond any reasonable doubt and the appellant was rightly convicted by the learned Special Judge, Delhi and sentenced accordingly. Neither the order of conviction nor of sentence suffers from any infirmity which calls for interference—Dismissed.**

**Important Issue Involved:** No Sanction for the prosecution of the appellant was required to be obtained from any authority as the appellant was no longer a public servant when the charge sheet was submitted.

**[Ch Sh]**

**APPEARANCES:**

**FOR THE APPELLANT** : Mr. K.B. Andley, Sr. Advocate. With Mr. M. Shamikh, Advocate.

**FOR THE RESPONDENT** : Ms. Fizani Husain, APP.

**CASES REFERRED TO:**

1. *Prakash Singh Badal and Anr.* vs. *State of Punjab and Ors.* (2007) 1 SCC 1.



2. *T.S. Ramaswamy* vs. *State of Tamilnadu,* 1994 Cri.LJ 545.
3. *Abhay Singh Chautala* vs. *CBI,* (2011) 7 SCC 141.
4. *R.S. Nayak* vs. *A.R. Antulay* (1984) 2 SCC 183.

**RESULT:** Dismissed.

**SUNITA GUPTA, J.**

**1.** Challenge in this appeal is to the judgment dated 29th March, 2004 and order on sentence dated 2nd April, 2004 arising out of CC No. 13/1999 in case FIR 3/94 PS Anti-Corruption Branch whereby the appellant was convicted for offences punishable under Section 7 and 13(2) r/w Section 13(1) (d) of Prevention of Corruption Act, 1988 and sentenced to undergo rigorous imprisonment for a period of one year and also to pay fine of Rs.500/-, in default of payment to undergo further rigorous imprisonment for three months on each count for his convictions under Section 7 & 13 (1) (d) of Prevention of Corruption Act, 1998.

**2.** Prosecution case, in brief, is that the appellant was employed in Delhi Electricity Supply Undertaking (DESU) in February 1994 and was posted at DESU Office in Keshav Puram those days. On 3rd February, 1994, at about 10:00 a.m. one Hari Chand went to the Anti-Corruption Branch office and lodged a complaint against the accused, inter alia, alleging that on receipt of excess electricity bill in respect of his residential house in Hansapuri Road, Trinagar, Delhi, he had contacted the accused on 1st February, 1994. The accused had asked him to come on 2nd February, 1994 and on 2nd February, 1994, when he contacted the accused, he demanded Rs.300/- as bribe for rectifying his electricity bill and also told the complainant that in case he wanted to get his bill rectified, he will have to pay Rs.300/- otherwise he should deposit the bill amount which, as per the complainant, was Rs.791/-. At that time, the complainant expressed his readiness to give that much money to the accused. However, he was not willing to pay any bribe to the accused. As such, he requested for taking necessary action against the accused.

**3.** In view of the allegations of demand of bribe by a public servant made by the complainant in his aforesaid complaint, the officials of Anti-Corruption Branch decided to lay a trap for apprehending the accused red handed while accepting bribe. One government servant was associated for the trap to act as a panch witness. The complainant produced two

currency notes of Rs.100/-. It was explained to the complainant and the panch witness as to how the accused was going to be trapped. The currency notes produced by the complainant were treated with phenolphthalein powder and a solution of sodium carbonate was also prepared. It was explained to them that if anybody touches the phenolphthalein treated notes and then fingers of that person are dipped in colourless solution of sodium carbonate that solution would turn pink. Raid officer then gave practical demonstration also and thereafter that solution was thrown away and those notes were returned back to the complainant for being used as bribe money for the trap. Necessary instructions were imparted to the complainant and the panch witness for being followed by them during the trap. The complainant was told to keep the panch witness close to himself at the time of trap so that panch witness could hear his talks with the accused and also see the transaction of acceptance of bribe money by the accused and the panch witness was directed to give a signal to the raiding party by moving his hand over his head on being satisfied that the accused had accepted the money from the complainant as bribe.

**4.** Thereafter, the raiding team comprising of complainant, panch witness and some officials of Anti-Corruption Branch office headed by Inspector Ramesh Singh went to the office of accused. Complainant and panch witness were asked to contact the accused for the transaction of handing over of bribe money to the accused by the complainant as per the plan. The accused was found available in his office and he told the complainant that his bill had been rectified and then he took out the corrected bill from the drawer of his table. Thereafter the complainant told the accused that he had brought the amount of Rs.300/- as demanded by him and then the accused told the complainant to give him the money. The complainant took out the phenolphthalein treated notes and gave the same to the accused who accepted them with his left hand. The panch witness gave the pre-arranged signals to the members of the raiding party and then members of the raiding party rushed to the spot. They were informed by the complainant that accused had accepted the bribe money and was holding the same in his left hand fist. The raid officer disclosed his identity to the accused and informed him that he had accepted Rs.300/- as bribe from the complainant for correcting his electricity bill. The accused confessed his guilt and sought pardon. Thereafter, the raid officer recovered the bribe money from the left hand of the accused.



Numbers of those recovered notes tallied with the numbers earlier noted in the pre-raid proceedings. Then the solution of Sodium Carbonate was prepared at the spot in which wash of left hand of the accused was taken and that solution turned pink which confirmed that accused had accepted bribe money from the complainant. The solution was then transferred into two bottles which were sealed and labelled and seized vide memo Ex.PW-5/B. The tainted notes were also seized by the raid officer at the spot vide memo Ex.PW-5/A. Post raid report Ex.PW-6/A was also prepared at the spot by the raid officer. Raid officer then prepared a rukka Ex.PW-8/A and sent the same to Anti-Corruption branch through a constable for registration of an FIR under Section 7/13 of Prevention of Corruption Act, 1988 on the basis of which FIR Ex.PW-8/B was registered.

**5.** Further investigation was handed over to Inspector Sobhan Singh who prepared site plan Ex.PW-9/A of the place of acceptance of bribe by the accused. He also recovered the bill Ex.PW5/D of the complainant from the table drawer of the accused and seized it vide memo Ex.PW5/E. Inspector Sobhan Singh deposited the case property in the Malkhana. During the course of investigation, the same were sent to CFSL for chemical analysis and later on CFSL report Ex.PW4/A was obtained. As per the report, the contents of the bottle gave positive test for the presence of phenolphthalein and the sodium carbonate.

**6.** On completion of investigation, a charge sheet was submitted against the accused on 22nd January, 1999 under Section 7 and 13(1)(d) of Prevention of Corruption Act. Charges under the aforesaid Sections were framed against the accused to which he pleaded not guilty and claimed trial.

**7.** In order to substantiate its case, prosecution examined 14 witnesses. Statement of the accused was recorded under Section 313 Cr.P.C. wherein he denied the case of prosecution, claimed innocence and pleaded false implication in the case. He did not prefer to lead any defence evidence. After hearing learned counsels for the parties, impugned order was passed which is the subject matter of present appeal. The impugned judgment has been basically challenged by the learned counsel for the appellant on following counts:-

(i) No sanction was obtained prior to launching the prosecution against the appellant. It was submitted that the appellant

was suspended from government service after his apprehension in the present trap and he continued to remain under suspension till the age of his superannuation and his suspension was never revoked. That being so, he continued to be in service and could not have been retired. Under the circumstance, the Court could not have taken cognizance against him without there being a sanction for his prosecution from the competent authority as provided under Section 19(1) of the Act. Reliance was placed on a judgment of Madras High Court, **T.S. Ramaswamy Vs. State of Tamilnadu,** 1994 Cri.LJ 545.

(ii) The appellant was posted in Keshav Puram area. He was not dealing with the electricity bill matters of the area of Trinagar where the complainant resided. As such, he was not in a position to get the amount of bill in question corrected/rectified. It is the case of complainant himself that on receipt of excessive bill, he contacted AFO, who in turn referred him to the concerned officer. Since the appellant had no authority to rectify the bills pertaining to Trinagar area, therefore, there was no question of that concerned officer to refer the complainant to him or thereafter his demanding any bribe from the complainant. The complainant did not make any complaint to the department regarding demand of any bribe by the appellant. Merely because the bill was recovered from the drawer of the appellant does not mean that he was the concerned clerk for dealing with that bill. No evidence has been led by prosecution to prove that he was the dealing clerk and the burden to prove this fact was squarely upon the prosecution. Reference was also made to the personal search memo of the appellant to show that nothing incriminating was recovered from the same. As such, it was submitted that the impugned order deserves to be set aside.

**8.** Per contra, it was submitted by learned Public Prosecutor for the State that there was no need for obtaining sanction for prosecution of the appellant, inasmuch as, admittedly the appellant had retired on 28th February, 1991 and charge sheet was filed on 22nd January, 1999. Since



on the date of filing of the charge sheet and when cognizance of the offence was taken, the appellant was not a public servant, therefore, there was no need to obtain any sanction for his prosecution. The retirement was never challenged by the appellant at any point of time on the ground that due to his suspension on account of this criminal prosecution he continued to remain in service. The authority relied upon by the learned counsel for the appellant was sought to be distinguished by submitting that no such rules have been shown by the appellant unlike that case for substantiating his submission that unless the suspension order was revoked or modified, the appellant could not have been retired.

**9.** As regards the submission that the appellant was not the dealing clerk pertaining to the area of Trinagar, reference was made to the testimony of PW-7 and PW-12 who had deposed that the appellant was doing the job of rectifying the bills or rectifying the mistake in the electricity bills issued to the consumers and no suggestion was given to those witnesses that appellant was not competent to deal with the electricity bill in question. As such, it was submitted that this plea has no legs to stand.

**10.** It was further submitted that the incriminating articles were seized vide separate memo and the same was not required to be shown in the personal search of the appellant. All the prosecution witnesses proved the case of prosecution beyond reasonable doubt and therefore, the appellant was rightly convicted of the offence alleged against him. The impugned order does not suffer from any infirmity which calls for any interference. As such, the appeal is liable to be dismissed.

**11.** It is undisputed case of the parties that the charge sheet was filed in the Court on 22nd January, 1999 while the date of superannuation of the appellant was 18th February, 1998, meaning thereby, on the date when the charge sheet was submitted in the Court, the appellant ceased to be a public servant and, therefore, in view of the settled principle enunciated in various authorities viz **Prakash Singh Badal and Anr. Vs. State of Punjab and Ors.** (2007) 1 SCC 1; **Abhay Singh Chautala Vs. CBI,** (2011) 7 SCC 141 and **R.S. Nayak Vs. A.R. Antulay** (1984) 2 SCC 183, no sanction was required.

**12.** However, learned counsel for the appellant has tried to take a plea that since the appellant was suspended and on the date of his superannuation, the order of suspension was neither revoked or modified,

the appellant continued to be in service and, therefore, before launching prosecution against him, sanction was pre-requisite.

**13.** In the judgment cited by the learned counsel for the appellant, the concerned accused, who was a public servant was a railway employee. He was placed under suspension w.e.f. 8th December, 1984 on the basis of criminal offence alleged against him and charge sheet was filed in Court on 30.4.1985, without a sanction for his prosecution as required under Section 6 of the Prevention of Corruption Act, 1947. Railway Discipline Rules were referred to on behalf of the convict before the High Court wherein it was provided that a suspension order shall continue to remain in force until is modified or revoked by the competent authority. Since in that case it was found that the suspension of the convict/ appellant was never revoked, it was held that he continued to be in service even though he had reached the age of superannuation and, therefore, sanction was necessary. Things are entirely different in the instant case, inasmuch as, the appellant has neither taken a plea either during the cross-examination of PW-12 Sh. Ganpat Shakarwal, who deposed that the appellant had retired on 28th February, 1998 nor during his own statement under Section 313 Cr. P.C. that he had not retired because of the suspension order and that he continued to be in service. In fact, he has never challenged factum of his retirement in the absence of revocation of suspension order. He has not also filed any service rules applicable to him which may provide that an employee under suspension would not retire if his suspension is not revoked as was the rule in the case before Madras High Court. As such, this judgment does not help the appellant. Since the appellant was no longer a public servant when the charge sheet was submitted and cognizance was taken by the Court, as such, no sanction for his prosecution was required to be obtained from any authority.

**14.** As regards the submission that the appellant was not dealing with the electricity bill of the area of the premises No.4210, Hansapur Road, Trinagar where the complainant resided, same is without any substance, inasmuch as, PW-7 Sh. S.K. Saroha who was posted as Assistant Financial Officer, Delhi Vidyut Board, Keshav Puram on 13th October, 1998 deposed that appellant was functioning and employed as senior clerk in billing section during that period in the said office. He was doing the job of rectifying the bills/rectifying the mistakes in the electricity bills issued to the consumers. In the cross-examination, he deposed that



there were 7-8 bill clerks functioning in the office at Keshav Puram, DESU office during the year 1998. Complaint regarding rectification of mistake and defect in the bill was marked by AFO to his immediate junior. No suggestion was given to this witness that the appellant was not competent to rectify the bills or mistakes in the electricity bills pertaining to the area where complainant resided. PW-12 Sh. Ganpat Shakarwal was posted as APOB-IV at DVB, Keshav Puram in the year 1999 and has deposed that Kalyan Singh was working in AFO, Keshav Puram, DVB as Senior Clerk. To him also, no suggestion was given to the effect that the area allotted to the appellant was confined to Keshav Puram and he was not competent to deal with the bill in question. It was also not put to the complainant that at the time of trap, the appellant had not shown him the corrected bill Ex.PW-5/D as claimed by him. Investigating Officer has also deposed that he had seized this bill vide memo Ex. PW5/E which reflects that the corrected bill was recovered from the table drawer of the accused. Under the circumstances, it is proved that the appellant was the concerned clerk who was referred by AFO for correction in the bill otherwise the bill would not have been with him and so demand of bribe by him cannot be said to be improbable. The statement recorded under Section 313 Cr.P.C. of the appellant goes to show that one is of denial simplicitor and even in this statement, no plea was taken by the appellant that the area of Trinagar was not within his jurisdiction and, therefore, he was not competent to deal with electricity bill in question. Under the circumstances, this plea taken by the appellant in the grounds of appeal is not even substantiated by the record.

**15.** The complainant has substantiated his complaint with Anti-Corruption Branch, laying of trap and the subsequent recovery of bribe and the bill from the appellant. Despite cross-examination, his testimony could not be assailed. He has no axe to grind against the accused so as to falsely implicate him. His evidence is fully trustworthy, reliable and inspires full confidence. In fact as observed by the Supreme Court in State of UP Vs. Dr. G.K. Ghosh, AIR 1984 SC 1453: by and large a citizen is reluctant to complain the vigilance department and to have a trap arranged even if illegal gratification is demanded by a government servant. It is only when a citizen feels oppressed by a feeling of being wronged and finds the situation to be beyond endurance that he adopts the course of approaching the vigilance department for laying a trap. His evidence cannot, therefore, be easily or lightly brushed aside.

**16.** Moreover, evidence of complainant is fully corroborated by the panch witness. Panch witness has also deposed that when the accused was apprehended and challenged by the raid officer he became perplexed and also tendered apology, which part of his testimony goes unchallenged as no cross-examination was effected on this point. This conduct of accused is also another incriminating piece of evidence against him.

**17.** From the evidence of the complainant, panch witness and the raid officer, prosecution was able to establish its case beyond any reasonable doubt and the appellant was rightly convicted by the learned Special Judge, Delhi and sentenced accordingly. Neither the order of conviction nor of sentence suffers from any infirmity which calls for interference. As such there is no merit in the appeal. Same is accordingly dismissed.

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**ILR (2013) V DELHI 3777**
**CRL. A.**

**SURESH** **....APPELLANT**

**VERSUS**

**STATE OF DELHI** **....RESPONDENT**

**(S.P. GARG, J.)**

**CRL.A. NO. : 792/2001 & CRL. M.A. NO. : 1734/2002, 638/2003 AND 2825/2003** **DATE OF DECISION: 16.07.2013**

**Indian Penal Code, 1860—Section 376, 506—The prosecution examined ten witnesses in all to substantiate the charges. In his 313 Statement, the appellant pleaded false implication. He pleaded that 'X's father had taken Rs.10,000/- as loan from him and when he demanded back the loan, a quarrel took place and 'X's father falsely implicated him in the**



**case. He examined one witness in defence. After marshalling the facts and through scrutiny of evidence and considering the rival contentions of the parties, the Trial Court, by the impugned judgment convicted the appellant for the offences mentioned previously and sentenced him accordingly. Being aggrieved, the appellant has preferred the appeal—Learned additional Public Prosecutor urged that there are no valid reasons to discard the cogent testimony of the child witness which requires no corroboration. The prosecutrix was exploited for sexual gratification by the appellant for the last one and a half year. The prosecutrix and her parents had no animosity to falsely implicate their neighbour with whom they had no prior enmity or ill-will—The material testimony to establish the guilt of the appellant is that of the prosecutrix 'X'. In her 164 Cr.P.C.(Ex.P. W-5/B) statement on 11.09.1998, she named the appellant for committing rape upon her. She gave detailed account of the incident. She was examined as PW-4 before the Court. The learned Presiding Officer put number of preliminary questions to the child witness before recording her statement to ascertain if she was competent to make statement and was able to give rational answers. The Trial Court was satisfied that she was a competent witness and understood the questions and was able to give rational answers to it. Her statement was recorded without oath as she did not understand its sanctity. In her deposition, she stated that suresh committed rape upon her. She had bleeded from her vagina. She further disclosed that Suresh took out whitish material from his penis and applied it on her anus. When she cried, he said 'Very good'. On arrival of her mother suddenly, Suresh started putting 'on' his pant. When her mother inquired as to what had happened, she told that Suresh uncle was doing bad thing with her and threatened to kill if she told anything to her parents. The prosecutrix apparently proved the version narrated by her at the**

**first instance to the police and the Metropolitan Magistrate with no major variations. She was cross-examined at length but no material discrepancies emerged to disbelieve her. No ulterior motive was assigned to the child witness to make a false statement. Nothing was on record to infer that 'statement' was tutored to her by her parents—First Information Report was lodged without delay. Lodging of prompt FIR lends full credence to the version of the child witness. In the FIR the appellant was specifically named as culprit—In the MLC (Ex.PW-3/A) PW-3 (Dr.Milo Tabin) noted one contused lacerated wound on the malar region of the accused. At the time of medical examination, smegma was found absent on the corona of the accused's penis. Absence of smegma on the corona of penis in rape cases would show that the rape was committed. It is best circumstantial evidence against the appellant—The Court find no good reasons to deviate from the said findings. In sexual offences against minors there is no valid or tangible reason as to why the parents will tender false evidence against the accused. In the instant case, for a paltry sum of Rs.10,000/-, prosecurtrix's parents are not expected to level serious allegations of rape with their minor daughter to put her honour at stake—In O.M.Baby (Dead) by L.Rs. V. State of Kerala 2012 Cri.LJ 3794 the Supreme Court observed "In any event, absence of injuries or mark of violence on the person of the prosecutrix may not be decisive, particularly, in a situation where the victim did not offer any resistance on account of threat or fear meted out to her as in the present case. Such a view has already been expressed by this Court in Gurcharan Singh V. State of Haryana (1972) 2 SCC 749 and Devinder Singh Vs. State of H.P. (2003) 11 SCC 488". Prosecution's case from the inception is that 'X' was exploited for sexual intercourse for the last about one and a half year by the accused. Whenever he got an opportunity**



**finding the child alone in the house, he used to indulge in sexual activity with her. MLC (Ex.PX) records that hymen was torn and had old tear. Merely because MLC (Ex.PX) does not record rape, the cogent and reliable testimony of the prosecutrix cannot be dis credited. The girl below 6 years of age was incapable to understand the consequences of the nefarious acts—As per the nominal roll dated 27.01.2004, he also earned remission for eight months and 16 days. His jail conduct was satisfactory. He is not a previous convict. He is not involved in any other criminal activity. His substantive sentence was suspended on 14.07.2004. There is no indication of his deviant behavior/conduct during this period. The original Trial Court record is not traceable. Some documents and other materials were reconstructed. The appellant was aged about 20 years on the day of incident. Considering these facts and circumstances, the substantive sentence is reduced to Rigorous Imprisonment for eight years. Other terms and conditions of the sentence order are left undisturbed—The appeal and all pending applications stand disposed of.**

**Important Issue Involved:** If the statement of prosecutrix inspires confidence in the mind of the court there is no necessity of corroborating her evidence.

There are circumstances which have to be explained by the accused as it is within his special knowledge.

That the time of medical examination, smegma was found absent on the corona of the accused's penis. Absence of smegma on the corona of penis in rape case would show that the rape was committed. It is the best circumstantial evidence the accused.

In any event, absence of injuries or mark of violence on the person or the prosecutrix may not be decisive, particularly in a situation where victim did not offer any resistance on account of threat or fear meted out to her merely because MLC does not record rape the cogent reliable testimony of the prosecutrix cannot be discredited.

**[Ch Sh]**

**APPEARANCES:**

**FOR THE APPELLANT** : Mr. K.B. Andley, Sr. Advocate with Mr. M.L. Yadav, Advocate.

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

**CASES REFERRED TO:**

1. *Aslam* vs. *State of Uttar Pradesh* 2013 ALLMR (Cri) 1894 (Crl.A.No.2110/2008).
2. *O.M.Baby (Dead) by L.Rs.* vs. *State of Kerala* 2012 Cri.LJ 3794.
3. *Rajinder* vs. *State of Himachal Pradesh* : (2009) 16 SCC 69.
4. *Devinder Singh* vs. *State of H.P.* (2003) 11 SCC 488.
5. *State of Punjab* vs. *Gurmit Singh* : (1996) 2 SCC 384.
6. *Gurcharan Singh* vs. *State of Haryana* (1972) 2 SCC 749.

**RESULT:** Disposed of.

**S.P. GARG, J.**

**1.** The appellant-Suresh impugns a judgment dated 11.09.2001 in Sessions Case No.10/1999 arising out of FIR No.849/1998 under Sections 376 IPC registered at Police Station Sri Nivas Puri by which he was held guilty for committing offence under Section 376/506 IPC. By an order dated 14.09.2001, he was sentenced to undergo RI for ten years with fine Rs. 500/-.

**2.** Allegations against the appellant were that on 10.09.1998, he committed rape upon prosecutrix 'X' (assumed name) aged six years



inside her house. The appellant lived on the first floor of the premises in question. He had good terms with prosecutrix's family and was a frequent visitor to the house. On 10.09.1998 when Aklimo Nisa (PW-2) ,prosecutrix's mother, returned to home at about 12.30 P.M., she found that her two children were playing outside the house and the room was closed from inside. When she knocked at the door, the appellant opened it. She saw that appellant's pant and underwear were lowered down and he had put off 'chadhi' of her daughter 'X'. On seeing her, 'X' started crying and the appellant pulled up his pant. 'X' while pointing towards her private part, told her that Suresh uncle was doing 'batamizi' with her. Aklimo Nisa (PW-2) lodged First Information Report with the police. 'X' was medically examined. The appellant was arrested. The statements of the witnesses conversant with the facts were recorded. The exhibits were sent to Forensic Science Laboratory. After completion of investigation, a charge-sheet was submitted against the appellant for committing the aforesaid offence. The prosecution examined ten witnesses in all to substantiate the charges. In his 313 statement, the appellant pleaded false implication. He pleaded that 'X's father had taken '10,000/ -as loan from him and when he demanded back the loan, a quarrel took place and 'X's father falsely implicated him in the case. He examined one witness in defence. After marshalling the facts and through scrutiny of evidence and considering the rival contentions of the parties, the Trial Court, by the impugned judgment convicted the appellant for the offences mentioned previously and sentenced him accordingly. Being aggrieved, the appellant has preferred the appeal.

**3.** Learned Senior 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 and partisan witnesses. They gave inconsistent and contradictory version. No injury on the private parts of the prosecutrix was noticed. MLC (Ex.PX) did not observe any fresh injury and the hymen had old tear. It did not record in categorical terms that the prosecutrix was ravished or raped. It merely recorded an 'attempt to sexually assault' the prosecutrix. He further argued that the MLC (Ex.PW-3/A) was not proved following legal procedure and was exhibited without examining the doctor who prepared it. Learned Additional Public Prosecutor urged that there are no valid reasons to discard the cogent testimony of the child witness which requires no corroboration. The prosecutrix was exploited for sexual gratification by the appellant for

the last one and a half year. The prosecutrix and her parents had no animosity to falsely implicate their neighbour with whom they had no prior enmity or ill-will.

**4.** I have considered the submissions of the parties and have examined the record. The material testimony to establish the guilt of the appellant is that of the prosecutrix 'X'. In her 164 Cr.P.C.(Ex.PW-5/B) statement on 11.09.1998, she named the appellant for committing rape upon her. She gave detailed account of the incident. She was examined as PW-4 before the court. The learned Presiding Officer put number of preliminary questions to the child witness before recording her statement to ascertain if she was competent to make statement and was able to give rational answers. The Trial Court was satisfied that she was a competent witness and understood the questions and was able to give rational answers to it. Her statement was recorded without oath as she did not understand its sanctity. In her deposition, she stated that Suresh committed rape upon her. She had bleeded from her vagina. She further disclosed that Suresh took out whitish material from his penis and applied it on her anus. When she cried, he said 'very good'. On arrival of her mother suddenly, Suresh started putting 'on' his pant. When her mother inquired as to what had happened, she told that Suresh uncle was doing bad thing with her and threatened to kill if she told anything to her parents. The prosecutrix apparently proved the version narrated by her at the first instance to the police and the Metropolitan Magistrate with no major variations. She was cross-examined at length but no material discrepancies emerged to disbelieve her. No ulterior motive was assigned to the child witness to make a false statement. Nothing was on record to infer that the 'statement' was tutored to her by her parents. In **Aslam Vs.State of Uttar Pradesh** 2013 ALLMR (Cri) 1894 (Crl.A.No.2110/2008) decided on 13.02.2013 the Supreme Court held:

> "This Court has held that if, upon consideration of the prosecution case in its entirety, the testimony of the prosecutrix inspires confidence in the mind of the Court, the necessity of corroboration of her evidence may be excluded. This Court in **Rajinder v.State of Himachal Pradesh** : (2009) 16 SCC 69 has observed as under:
>
> This Court in **State of Punjab v. Gurmit Singh** : (1996) 2 SCC 384 made the following weighty observations in respect of



> evidence of a victim of sexual assault: (SCC pp.395-96, para 8)
>
> ....the courts must, while evaluating evidence remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault along to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relyig upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of a sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a

requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realist diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable."

**5.** PW-2 (Aklimo Nisa), 'X's mother, corroborated her on material facts and deposed that Suresh was acquainted with them being a tenant in the premises. Sometime prior to 10.09.1998 'X' complained of pain in her vagina but she did not give due attention. On the day of incident, at about 12.30 P.M., she returned to the house and knocked at the door. Suresh opened it. She saw that 'X's underwear had been removed and Suresh's pant and underwear were lowered down. 'X' started crying on seeing her. She pointed at her vagina and told that Suresh was doing 'batamizi' with her. She lodged FIR (Ex.PW-2/A) with the police. PW-1 (Mubarak Khan), 'X's father, deposed on similar lines.

**6.** From the testimonies of PWs-1, 2 and 4 it stands established that when PW-2 ('X's mother) returned, Suresh was present inside the bolted room with 'X'. He did not offer explanation for his presence in the prosecutrix's room without any sound reasons. He had no occasion to visit the prosecutrix, a child aged six years, when she was alone at her house. Again, he had no excuse to bolt the room from inside during daytime. These circumstances which have not been explained point an accusing finger at him. Under Section 106 Evidence Act, it was upon the accused to explain the facts which were within his special knowledge.

**7.** First Information Report was lodged without delay. Lodging of prompt FIR lends full credence to the version of the child witness. In the FIR the appellant was specifically named as culprit. Graphic account was narrated as to under what circumstances, he was found with the prosecutrix in the room. In the absence of prior animosity, 'X's parents



are not imagined to level false allegations of rape to bring their daughter 'X' in disrepute. The ocular testimony of PWs is in consonance with medical/forensic evidence. FSL report shows that underwear and vaginal slides were found to have semen and human spermatozoa. At the time of appellant's medical examination, his underwear was seized by PW-3 (Dr.Milo Tabin) and handed over to the police in a sealed condition. It falsifies the appellant's defence that underwear on which human spermatozoa was found was that of 'X's father.

**8.** In the MLC (Ex.PW-3/A) PW-3 (Dr.Milo Tabin) noted one contused lacerated wound on the malar region of the accused. At the time of medical examination, smegma was found absent on the corona of theaccused's penis. Absence of smegma on the corona of penis in rape cases would show that the rape was committed. It is the best circumstantial evidence against the appellant. Suggestion was put to the Investigating Officer (PW-10) that he had asked the accused to wash his penis which was denied. This plea does not appeal to mind.

**9.** The Trial Court has dealt with appellant's relevant contentions minutely in the impugned judgment with cogent reasons to discard them. The defence of false implication on non-payment of alleged loan of Rs. 10,000/-to 'X's father has been disbelieved on valid reasons. I find no good reasons to deviate from the said findings. In sexual offences against minors there is no valid or tangible reason as to why the parents will tender false evidence against the accused. In the instant case, for a paltry sum of Rs. 10,000/-, prosecurtrix's parents are not expected to level serious allegations of rape with their minor daughter to put her honour at stake. It is true that MLC (Ex.PX) was not exhibited by the doctor who examined the prosecutrix. It is significant to note that when MLC (Ex.PX) was exhibited, Suresh's counsel did not object to it and consented to dispense with the formal mode of proof. After conviction, the appellant cannot be permitted to change his version and doubt the correctness/genuineness of the contents recorded in the MLC. It is true that no fresh injury was found at the time of medical examination of the prosecutrix. The law is clear on this aspect. In **O.M.Baby (Dead) by L.Rs. V.State of Kerala** 2012 Cri.LJ 3794 the Supreme Court observed "In any event, absence of injuries or mark of violence on the person of the prosecutrix may not be decisive, particularly, in a situation where the victim did not offer any resistance on account of threat or fear meted out to her as in the present case. Such a view has already been expressed by this Court

in **Gurcharan Singh V.State of Haryana** (1972) 2 SCC 749 and **Devinder Singh Vs.State of H.P.** (2003) 11 SCC 488". Prosecution's case from the inception is that 'X' was exploited for sexual intercourse for the last about one and a half year by the accused. Whenever he got an opportunity finding the child alone in the house, he used to indulge in sexual activity with her. MLC (Ex.PX) records that hymen was torn and had old tear. Merely because MLC (Ex.PX) does not record rape, the cogent and reliable testimony of the prosecutrix cannot be discredited. The girl below 6 years of age was incapable to understand the consequences of the nefarious acts. There is overwhelming ocular and medical evidence to establish the guilt of the accused. I find no illegality or irregularity in the impugned judgment which is based on fair appraisal of the evidence. The conviction of the appellant under Section 376 IPC is confirmed.

**10.** The appellant has been sentenced to undergo Rigorous Imprisonment for ten year with fine of Rs. 500/-under Section 376 (2) (f) IPC which is a minimum sentence prescribed. However, there are mitigating circumstances to award sentence less than the prescribed one under Section 376 (2) (f) IPC. The incident is dated 10.09.1998. The appellant has already undergone five years, four months and sixteen days incarceration as on 27.10.2004. As per the nominal roll dated 27.01.2004, he also earned remission for eight months and 16 days. His jail conduct was satisfactory. He is not a previous convict. He is not involved in any other criminal activity. His substantive sentence was suspended on 14.07.2004. There is no indication of his deviant behavior/conduct during this period. The original Trial Court record is not traceable. Some documents and other materials were reconstructed. The appellant was aged about 20 years on the day of incident. Considering these facts and circumstances, the substantive sentence is reduced to Rigorous Imprisonment for eight years. Other terms and conditions of the sentence order are left undisturbed.

**11.** The appeal and all pending applications stand disposed of in the above terms. The appellant is directed to surrender and serve the remainder of his sentence. For this purpose, he shall appear before the Trial court 22nd July, 2013. The Registry shall transmit the re-constructed trial Court record forthwith along with a copy of this judgment to ensure compliance with the judgment.

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**ILR (2013) V DELHI 3788**

**CRL. A.**

**ASHUDDIN ....APPELLANT**

**VERSUS**

**STATE .....RESPONDENT**

**(S.P. GARG, J.)**

**CRL.A. NO. : 1581/2011 DATE OF DECISION: 16.07.2013**

**Indian Penal Code, 1860—Sec. 392, 397, 34—Ashuddin and Sher Khan @ Shahid Ali Mulla @ Arif were sent for trial in case fir No. 64/2011 PS Mayur Vihar with allegations that on 02.03.2011 at about 06.45 P.M. at road near 25 Block, Trilok Puri, Bus Stand, they and their associates boarded a DTC bus bearing No. DL 1PB-3177 on route No. 360 and robbed bag containing tickets and cash Rs.280/- from Nitu—Conductor in the bus at the point of knife. The assailants got down the bus to flee and were chased. Ashuddin was caught hold at some distance and the bag robbed was recovered from his possession.—Ashuddin was charged under Section 392/34 read with Section 397 IPC. The prosecution examined six witnesses. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment, held Ashuddin guilty of committing offence under Section 392 IPC. Sher Khan @ Shahid Ali Mulla @ Arif was acquitted of all the charges. It is significant to note that the State did not challenge the acquittal—The appellant's counsel urged that the pleasant's identity as assailant has not been established beyond reasonable doubt. PW-4 (Rajesh Kumar), driver could not recognise him in the Court. PW-1 (Nitu)'s identification is shaky. He is not sure if he was the person who snatched the bag from him. No**

**independent public witnesses including passengers were associated at any stage of the investigation. The story projected by the State is highly improbable—The apprehension at the spot is dispute. He sustained injuries due to the beatings at the hands of public and was medically examined vide MLC (Ex.PW-6/B) at Lal Bahadur Shastri Hospital, Khichripur, Delhi at 11.55 P.M. that day. The alleged history records that he was 'assaulted and beaten by public' It confirms his presence at the spot. In his 313 statement he admitted his presence in the bus but stated that he had got down the bus and was apprehended while moving away—The findings on conviction under Section 392 IPC are based upon fair appreciation and evaluation of reliable reliable evidence and are affirmed—The appellant was sentenced to undergo RI for five years with fine Rs.1,000/-. Nominal roll dated 09.04.2013 reveals that he has already undergone two years, one month and ten days incarceration as on 13.04.2013. He also earned remissions for five months and twenty two days. He is not a previous convict and not involved in any other criminal case. His overall jail conduct is satisfactory. On the date of incident, he was a young boy of 21 years. He is the sole earning member of the family and is to look after his wife and son. Sher Khan has been acquitted for want of cogent evidence. The assailants who used 'deadly' weapons in committing robbery are absconding and could not be arrested. Considering these mitigating circumstances, order on sentence is modified and the appellant is sentenced to undergo RI for three years with fine Rs. 1,000/- and failing to pay the fine to undergo SI for 15 days—The appeal is decided.**

**Important Issue Involved:** When the minor discrepancies and contradictions in the testimony of the witnesses if do not go to the root of the case it will not throw away the prosecution case entirely.



No adverse inference can be drawn for non-joining of independent public witness.

**[Ch Sh]**

**APPEARANCES:**

**FOR THE APPELLANT** : Ms. Jyoti Gupta, Advocate.

**FOR THE RESPONDENT** : Mr. M.N. Dudeja, APP SI Bhanu Kanwaria. PS Mayur Vihar.

**RESULTS:** Disposed of.

**S.P. GARG, J.**

**1.** Ashuddin and Sher Khan @ Shahid Ali Mulla @ Arif were sent for trial in case FIR No. 64/2011 PS Mayur Vihar with allegations that on 02.03.2011 at about 06.45 P.M. at road near 25 Block, Trilok Puri, Bus Stand, they and their associates boarded a DTC bus bearing No. DL 1PB-3177 on route No. 360 and robbed bag containing tickets and cash Rs. 280/-from Nitu-Conductor in the bus at the point of knife. The assailants got down the bus to flee and were chased. Ashuddin was caught hold at some distance and the bag robbed was recovered from his possession. The Investigating Officer lodged First Information Report after recording complainant's/Nitu's statement. During investigation, he recorded statements of the witnesses conversant with the facts. On completion of the investigation, a charge-sheet was submitted. Ashuddin was charged under Section 392/34 read with Section 397 IPC. The prosecution examined six witnesses. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment, held Ashuddin guilty of committing offence under Section 392 IPC. Sher Khan @ Shahid Ali Mulla @ Arif was acquitted of all the charges. It is significant to note that the State did not challenge the acquittal.

**2.** The appellant's counsel urged that the appellant's identity as assailant has not been established beyond reasonable doubt. PW-4 (Rajesh Kumar), driver could not recognise him in the Court. PW-1 (Nitu)'s identification is shaky. He is not sure if he was the person who snatched the bag from him. No independent public witnesses including passengers were associated at any stage of the investigation. The story projected by

the State is highly improbable. Learned APP urged that there are no reasons to discredit victim's deposition and that of PW-2 (Const.Mohd.Irfan), who apprehended the appellant after chase.

**3.** The appellant's apprehension at the spot is not in dispute. He sustained injuries due to the beatings at the hands of public and was medically examined vide MLC (Ex.PW-6/B) at Lal Bahadur Shastri Hospital, Khichripur, Delhi at 11.55 P.M. that day. The alleged history records that he was 'assaulted and beaten by public'. It confirms his presence at the spot. In his 313 statement he admitted his presence in the bus but stated that he had got down the bus and was apprehended while moving away. PW-1 (Nitu) in his statement (Ex.PW-1/A) given to the police at first instance narrated graphic account as to how bag containing tickets and cash was snatched by assailants who were four in number in the bus. He further disclosed that the assailants were chased and one of them i.e. Ashuddin was apprehended with the assistance of Const.Mohd.Irfan and the bag was recovered from his possession. In Court statement as PW-1, he proved the version given to the police without any variation. He identified Ashuddin who was apprehended at the spot after chase by him with the assistance of Const.Mohd.Irfan. Arrest memo (Ex.PW-1/B) and personal search memo (Ex.PW-1/C) bear his signatures. He was unable to identify Sher Khan. PW-1 (Nitu) further identified the robbed articles i.e. bag (Ex.P2), tickets (Ex.P3) and cash (Ex.P4). PW-2 (Const.Mohd.Irfan) corroborated PW-1's version and identified Ashuddin to be the assailant who was chased and apprehended at the spot. He further proved recovery of the tickets and bag from his possession. Both these witnesses were tested in cross-examination but no material discrepancies emerged to disbelieve them. PW-1 (Nitu) is not expected to fake the incident. The appellant was not acquainted with them to be falsely implicated in the case. He did not attribute any mala fide to discredit their version. Minor discrepancies and contradictions pointed out by the appellant's counsel in the testimony of the witnesses do not go to the root of the case to throw away the prosecution case in its entirety. Non identification by PW-4 (Rajesh Kumar) is not fatal. No adverse inference can be drawn for non-joining of independent public witnesses. PW-1 and PW-4 cannot be termed partisan witnesses. The public was not expected to beat an innocent. Medical evidence is in consonance with ocular version. The findings on conviction under Section 392 IPC are based upon fair appreciation and evaluation of reliable evidence



and are affirmed.

**4.** The appellant was sentenced to undergo RI for five years with fine Rs. 1,000/-. Nominal roll dated 09.04.2013 reveals that he has already undergone two years, one month and ten days incarceration as on 13.04.2013. He also earned remissions for five months and twenty twodays. He is not a previous convict and not involved in any other criminal case. His overall jail conduct is satisfactory. On the date of incident, he was a young boy of 21 years. He is the sole earning member of the family and is to look after his wife and son. Sher Khan has been acquitted for want of cogent evidence. The assailants who used 'deadly' weapons in committing robbery are absconding and could not be arrested. Considering these mitigating circumstances, order on sentence is modified and the appellant is sentenced to undergo RI for three years with fine Rs. 1,000/-and failing to pay the fine to undergo SI for 15 days.

**5.** The appeal is decided in the above terms.

**6.** Copy of the order be sent to the Jail Superintendent. Trial Court record be sent back forthwith.

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**ILR (20103) V DELHI 3792**
**CRL.**

**SHAKUNTALA .....APPELLANT**

**VERSUS**

**STATE (G.N.C.T. OF DELHI) ....RESPONDENT**

**(S.P. GARG, J.)**

**CRL.A. NO. : 1060/2011 DATE OF DECISION: 17.07.2013**

**Indian Penal Code, 1860—Sec. 304 Part-I—Allegations against the appellant-Shakuntala were that on the night intervening 25/26.09.2008 at about 01.30 A.M. she poured acid on her husband Rattan Lal at jhuggi**

No. A-408, behind ITI, K Block, Jahangir Puri Daily Diary (DD) No. 5B (Ex. PW-9/A) was recorded at PS jahangir Puri at 02.29 A.M. after getting information from Duty HC Umed Singh, Babu Jagjivan Ram Memorial Hospital (in short BJRM Hospital) that Rattan Lal's wife had poured acid on him and he was admitted at BJRM Hospital. ASI Vijender Singh lodged First Information Report for commission of offence under Section 326 IPC—On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment, held the appellant guilty under Section 304 Part-I IPC and sentenced her. Being aggrieved, she has preferred the appeal—It is not under challenge that Rattan Lal and Shakuntala lived together at jhuggi No. A-408, K Block, Jahangir Puri. It is also not in controversy that at the time of incident on the night intervening 25/26.09.2008 only the victim and Shakuntala were present inside the jhuggi. In her 313 statement, she admitted that on 25.09.2008 her husband Rattan Lal came at the jhuggi at night. She did not claim if anybody else was present that night inside the jhuggi. It is also not disputed that Rattan Lal Sustained burn injuries due to acid on his body. She however pleaded that on that night Rattan Lal came drunk at the jhuggi and sexual intercourse with her—The defence version inspires no confidence and deserves outright rejection. Had the victim sustained injuries due to fall of acid accidentally, natural conduct of the appellant would have been to raise alarm and to take him to the hospital at the earliest. She was not expected to close the door of the jhuggi and to run to the police station as alleged. This conduct is quite unreasonable and unjustified—The police machinery came into motion when PW-12 (HC Umed Singh) informed on phone to the Duty Officer at PS Jahangir Puri that one Rattan Lal was admitted in the hospital and had complained that his 'wife' had poured 'tejab'' on him. DD No. 5B (Ex.



Pw-9/A) records this fact. It corroborates the version given by PW-3 and PW-10.PW-16 (SI Vijender Singh) recorded victim's statement (Ex.PX). MLC (Ex. PW-14/A) reveals that at the time of admission the patient was conscious and oriented. It is not in dispute that after sustaining burn injuries, the victim had run towards BJRM Hospital and had got himself admitted. It is not the appellant's case that the victim was unconscious or was not fit to make statement. PW-16 (SI Vijender Singh) lodged First Information Report under Section 326 IPC. Since the injuries sustained by the appellant were not sufficient to cause death in the ordinary course of nature, it appears that PW-16 did not consider it fit to record his statement under Section 164 Cr.P.C. from SDM—Vide post-mortem report (Ex. PW-15/A) the cause of death was opined as shock due to burn injuries consequent to ante-mortem corrosive burns—In 'State of Karnatka vs. Shariff', (2003) 2 SCC 473, the Supreme court categorically held that there was no requirement of law that a dying declaration must necessarily be made before Magistrate. Hence, merely because the dying declaration was not recorded by the Magistrate in the instant case, that by itself cannot be a ground to reject the whole prosecution case. It is equally true that the statement of the injured, in the event of his death may also be treated as FIR dying declaration. The Court has to be on guard that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly it can base its conviction without any further corroboration. In this case, the deceased had no ulterior motive to falsely implicate his wife and to exonerate the real culprit. There is no inconsistency in the version narrated and deposed by PW-3, PW-10, 12 & PW-16 regarding the complicity of the accused in the incident. In 'Paras Yadav and ors. Vs. State of

**Bihar', (1999) 2 SCC 126, the Supreme Court held that lapse on the part of the Investigation Officer in not bringing the Magistrate to record the statement of the deceased should not be taken in favour of the accused. The Supreme Court further held that a statement of the deceased recorded by a police officer in a routine manner as a complaint and not as a dying declaration can also be treated as dying declaration after the death of the injured and relied upon if the evidence of the prosecution witnesses clearly establishes that the deceased was conscious and was in a fit state of health to make the statement—Discrepancies/ contradiction highlighted by appellant's counsel are not material to discard the prosecution case in its entirety. At the time of occurrence, only the appellant and the victim were together inside the jhuggi. It was imperative for the appellant to establish under Section 106 Evidence Act as to how and under what circumstances, the victim sustained burn injuries. The appellant's conduct is unreasonable. Instead of taking him to the hospital without delay to provide medical aid, she locked the door of the jhuggi from outside and allegedly went to the police station. The appellant's false implication at PW-1 (Naveen)'s instance as alleged is not believable. PW-1 (Naveen), victim's son from the previous marriage lived separate with his 'mausi' at Bhalaswa Dairy. He deposed that the appellant quarreled with his father on his providing money for their maintenance. PW-1 (Naveen) or his relative were not present at the spot and came to know about the incident only after the victim sustained injuries. There are no allegations that PW-1 (Naveen) instigated the victim to make statement (Ex.PX). The finding of the learned Trial Court whereby the appellant was convicted under Section 304 Part-I IPC are based upon sound reasoning and do not call for interference and are affirmed. The appellant was sentenced to undergo RI for seven years with fine Rs.5,000/-. She is**



**to undergo SI for six months in default of payment of fine. It is informed that she has no issue and is in custody from the very beginning. Nominal roll dated 10th January, 2012 reveals that she has already undergone three years, three months and thirteen days incarceration as on 10th January, 2012. She also earned remissions for four months and five days. Her over all jail conduct is satisfactory. She is not a previous convict and is not involved in any other criminal case. Considering the facts and circumstances of the case and the mitigating circumstances, in the interest of justice, the order on sentence is modified and the substantive sentence of the appellant is reduced to six years with fine Rs.2,000/- and failing to pay the undergo SI for one month. She will be entitled to benefit under Section 428 Cr.P.C.—Disposed of.**

**Important Issue Involved:** The court inferred that the statement of deceased recorded by police officer in a routine matter can be treated as dying declaration after the death of the injured, if it is established that the statement was not a result of either tutoring of prompting or a product of imagination. Once the court is satisfied that the declaration was true and voluntary, it can base its conviction without any further corroboration.

**APPEARANCES:**

**FOR THE APPELLANT** : Mr. R.K. Dikshit, Advocate & Ms. Nandita Rao, Advocate.

**FOR THE RESPONDENT** : MR. M.N. Dudeja, APP.

**CASES REFERRED TO:**

1. *State of Karnatka* vs. *Shariff,* (2003) 2 SCC 473.
2. *Paras Yadav and Ors.* vs. *State of Bihar,* (1999) 2 SCC 126.

**RESULT:** Disposed of.

**S.P. GARG, J.**

**1.** Shakuntala (the appellant) challenges correctness of a judgment dated 03.01.2011 of learned Additional Sessions Judge in Sessions Case No. 68/2009 arising out of FIR No. 480/2008 PS Jahangir Puri by which she was held guilty for committing offence punishable under Section 304 Part-I IPC. By an order dated 10.01.2011, she was sentenced to undergo RI for seven years with fine Rs. 5,000/-.

**2.** Allegations against the appellant-Shakuntala were that on the night intervening 25/26.09.2008 at about 01.30 A.M. she poured acid on her husband Rattan Lal at jhuggi No. A-408, behind ITI, K Block, Jahangir Puri. Daily Diary (DD) No.5B (Ex.PW-9/A) was recorded at PS Jahangir Puri at 02.29 A.M. after getting information from Duty HC Umed Singh, Babu Jagjivan Ram Memorial Hospital (in short BJRM Hospital) that Rattan Lal's wife had poured acid on him and he was admitted at BJRM Hospital. The investigation was assigned to ASI Vijender Singh who with Const. Devender went to the spot. He recorded Rattan Lal's statement in the hospital after declared fit to make statement. In his statement (Ex.PX), Rattal Lal disclosed to the Investigating Officer that at 01.30 A.M. his wife Shakuntala poured acid on him. He also attributed motive for causing burn injuries with acid by her. ASI Vijender Singh lodged First Information Report for commission of offence under Section 326 IPC. Rattan Lal succumbed to the injuries on 28.09.2008. Post-mortem examination was conducted on the body. During investigation, statements of the witnesses conversant with the facts were recorded. Shakuntala was arrested. The exhibits were sent to Forensic Science Laboratory and report was collected. After completion of investigation, a charge-sheet was submitted against the appellant-Shakuntala for committing the offence under Section 304 Part-I IPC. She was duly charged and brought to Trial. The prosecution examined sixteen witnesses to prove her guilt. In her 313 statement, she pleaded false implication. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment, held the appellant guilty under Section 304 Part-I IPC and sentenced her. Being aggrieved, she has preferred the appeal.

**3.** The 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 hearsay evidence. It ignored the vital



discrepancies and contradictions in the testimonies of the prosecution witnesses without valid reasons. In her 313 statement, the appellant specifically disclosed as to how and under what circumstances Rattan Lal sustained burn injuries in the bathroom. However, the defence version was not given any weightage. The Investigating Officer did not make sincere efforts to record victim's statement under Section 164 Cr.P.C. by SDM/ MM. He did not associate doctors or nurses on duty while recording the alleged dying declaration of the victim. It is unclear that the victim was in a fit state of mind to make statement (Ex.PX). The prosecution witnesses have given inconsistent version regarding lock put outside the jhuggi where the incident occurred. Dying declaration recorded by the Investigating Officer is not reliable and cannot be acted upon. The prosecution did not establish appellant's motive to pour acid upon her husband. Recovery of the articles is doubtful. The appellant did not flee the spot and was present in the hospital. The mattress was not found burnt. The source from where the acid was procured could not be established. Learned APP for the State urged that testimony of PW-1 (Naveen), PW-3 (Chandu) and PW-10 (Islam) coupled with dying declaration (Ex.PX) recorded by the Investigating Officer at the first instance are sufficient to establish the guilt of the accused.

**4.** I have carefully considered the submissions of the parties and have examined the relevant materials. It is not under challenge that Rattan Lal and Shakuntala lived together at jhuggi No. A-408, K Block, Jahangir Puri. It is also not in controversy that at the time of incident on the night intervening 25/26.09.2008 only the victim and Shakuntala were present inside the jhuggi. In her 313 statement, she admitted that on 25.09.2008 her husband Rattan Lal came at the jhuggi at night. She did not claim if anybody else was present that night inside the jhuggi. It is also not disputed that Rattan Lal sustained burn injuries due to acid on his body. She however pleaded that on that night Rattan Lal came drunk at the jhuggi and had sexual intercourse with her. After the sexual intercourse, she went inside the bathroom to pass urine. Rattan Lal who was naked and under the influence of liquor, came in the bathroom; tried to pull her and abused her. In the process, the plastic can lying on the shelf in the bathroom fell down and the acid fell on him. Rattan Lal kept abusing her and tried to throw the acid on her. Some acid fell on her clothes. With great difficulty, she managed to escape, came out of the jhuggi and went to the police station after locking the door of the jhuggi from outside. She

was falsely implicated thereafter by the police. The defence was taken for the first time by the appellant in her 313 statement only. No such question was put in the cross-examination of any prosecution witnesses examined before the Court. The appellant did not produce any witness from the neighbourhood in defence to substantiate her defence. She alleged that the appellant had come to the jhuggi that night after consuming liquor and was under its influence when he sustained burn injuries. MLC (Ex.PW14/ A) was made/ written when Rattan Lal went to BJRM Hospital on 26.09.2008 at 02.15 A.M. It (MLC) does not reveal if there was smell of alcohol or the victim was under the influence of alcohol. No such suggestion was put to PW-14 (Dr.Seema) in the cross-examination. PW15 (Dr.Amit Sharma) who conducted post-mortem examination on the body also did not find any alcohol. It falsifies the appellant's plea that the victim was under the influence of alcohol at the time of occurrence. When the victim had sexual intercourse with her (the appellant) with her consent as alleged, there was no occasion for the victim thereafter to follow her in the bathroom where she had gone to pass urine and to pick up quarrel with her without any apparent reason. She did not elaborate as to what had prompted the victim to quarrel with her in the bathroom. She was medically examined on 26.09.2008. MLC (on record) shows that no injuries due to acid were found on her body. The defence version inspires no confidence and deserves outright rejection. Had the victim sustained injuries due to fall of acid accidently, natural conduct of the appellant would have been to raise alarm and to take him to the hospital at the earliest. She was not expected to close the door of the jhuggi and to run to the police station as alleged. This conduct is quite unreasonable and unjustified.

**5.** PW-10 (Islam) lived in a jhuggi adjacent to the appellant's jhuggi and run a shop selling DVDs at C Block, Jahangir Puri. He deposed that on the night intervening 25/26.09.2008 at about 01.30 A.M. on hearing cries, he came out of the jhuggi and saw Rattan Lal coming out of his jhuggi. He was naked and was shouting that his wife Shakuntala had poured tejab on her. He then ran to BJRM Hospital. He was shouting that his wife had locked him after pouring acid on him. He further deposed that quarrels used to take place between the accused and her husband and she suspected him (Rattan Lal) of having illicit relation with other woman. In the cross-examination, he fairly admitted that acid was not poured in his presence. He himself did not open the door of the jhuggi.



He came to know from others that the accused used to suspect her husband having illicit relation with another woman. Over all testimony of this witness reveals that from the victim himself, he came to know that Shakuntala, his wife, had poured acid on him. Presence of the witness at the spot being neighbour is quite natural and probable. It was natural for him to come out of jhuggi after hearing the cries at odd hours. He saw Rattan Lal running naked towards BJRM Hospital. Material facts deposed by him remained unchallenged in the cross-examination. PW-3 (Chandu) in his testimony also spoke about his presence that time. MLC (Ex.PW14/ A) corroborates his version as Rattan Lal admitted himself in the hospital at 02.15 A.M. PW-3 (Chandu) another witness living in the neighbourhood also deposed on similar lines. He also stated that at about 01.30 -02.00 A.M. on the night intervening 25/26.09.2008, he came out of his jhuggi after hearing Rattan Lal's screams and saw that he (Rattan Lal) was running out of his jhuggi and was naked that time. He had burn injuries on abdomen due to acid and was shouting *'Shakuntala ne mere uper tejab dal diya'*. In the cross-examination, he admitted that the acid was not thrown upon the victim by the appellant in his presence. He elaborated that the police came at the spot at 03.00 A.M. and by the time the injured had already gone to the hospital. Rattan Lal himself ran to the hospital alone. He explained that he could not get any opportunity to help him as he went running. In the absence of any prior animosity, the credibility of this independent witness cannot be doubted. He had no ulterior motive to falsely implicate the accused who was living with her husband in his neighbourhood. His presence at the spot was not challenged in the cross-examination.

**6.** The police machinery came into motion when PW-12 (HC Umed Singh) informed on phone to the Duty Officer at PS Jahangir Puri that one Rattan Lal was admitted in the hospital and had complained that his 'wife' had poured 'tejab' on him. DD No. 5B (Ex.PW-9/A) records this fact. It corroborates the version given by PW-3 and PW-10. PW-16 (SI Vijender Singh) recorded victim's statement (Ex.PX). MLC (Ex.PW14/ A) reveals that at the time of admission the patient was conscious and oriented. It is not in dispute that after sustaining burn injuries, the victim had run towards BJRM Hospital and had got himself admitted. It is not the appellant's case that the victim was unconscious or was not fit to makestatement. PW-16 (SI Vijender Singh) lodged First Information Report under Section 326 IPC. Since the injuries sustained by the appellant

were not sufficient to cause death in the ordinary course of nature, it appears that PW-16 did not consider it fit to record his statement under Section 164 Cr.P.C. from SDM. He made endorsement (Ex.PW-16/A) and lodged First Information Report at 03.40 A.M. without inordinate delay. The version given by the victim in Ex.PX cannot be suspected. SI Vijender Singh had no ulterior motive to fabricate statement (Ex.PX). In Ex.PX, the victim categorically named his wife Shakuntala to have poured acid upon him as a result of which he sustained burn injuries on his body. He also attributed motive to her for pouring acid. Rattan Lal succumbed to the injuries and died on 28.09.2008. Post-mortem on the body was conducted by PW-15 (Dr.Amit Sharma). Vide post-mortem report (Ex.PW-15/A) the cause of death was opined as shock due to burn injuries consequent to ante-mortem corrosive burns.

**7.** In **'State of Karnatka vs. Shariff',** (2003) 2 SCC 473, the Supreme Court categorically held that there was no requirement of law that a dying declaration must necessarily be made before a Magistrate. Hence, merely because the dying declaration was not recorded by the Magistrate in the instant case, that by itself cannot be a ground to reject the whole prosecution case. It is equally true that the statement of the injured, in the event of his death may also be treated as FIR/ dying declaration. The Court has to be on guard that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly it can base its conviction without any further corroboration. In this case, the deceased had no ulterior motive to falsely implicate his wife and to exonerate the real culprit. There is no inconsistency in the version narrated and deposed by PW-3, PW-10, PW12 & PW-16 regarding the complicity of the accused in the incident.

**8.** In **'Paras Yadav and ors. Vs. State of Bihar',** (1999) 2 SCC 126, the Supreme Court held that lapse on the part of the Investigation Officer in not bringing the Magistrate to record the statement of the deceased should not be taken in favour of the accused. The Supreme Court further held that a statement of the deceased recorded by a police officer in a routine manner as a complaint and not as a dying declaration can also be treated as dying declaration after the death of the injured and relied upon if the evidence of the prosecution witnesses clearly establishes that the deceased was conscious and was in a fit state of health to make the statement.



**9.** Discrepancies/ contradictions highlighted by appellant's counsel are not material to discard the prosecution case in its entirety. At the time of occurrence, only the appellant and the victim were together inside the jhuggi. It was imperative for the appellant to establish under Section 106 Evidence Act as to how and under what circumstances, the victim sustained burn injuries. The appellant's conduct is unreasonable. Instead of taking him to the hospital without delay to provide medical aid, she locked the door of the jhuggi from outside and allegedly went to the police station. The appellant's false implication at PW-1 (Naveen)'s instance as alleged is not believable. PW-1 (Naveen), victim's son from the previous marriage lived separate with his 'mausi' at Bhalaswa Dairy. He deposed that the appellant quarreled with his father on his providing money for their maintenance. PW-1 (Naveen) or his relative were not present at the spot and had came to know about the incident only after the victim sustained injuries. There are no allegations that PW-1 (Naveen) instigated the victim to make statement (Ex.PX). The findings of the learned Trial Court whereby the appellant was convicted under Section 304 Part-I IPC are based upon sound reasoning and do not call for interference and are affirmed.

**10.** The appellant was sentenced to undergo RI for seven years with fine ' 5,000/-. She is to undergo SI for six months in default of payment of fine. It is informed that she has no issue and is in custody from the very beginning. Nominal roll dated 10th January, 2012 reveals that she has already undergone three years, three months and thirteen days incarceration as on 10th January, 2012. She also earned remissions for four months and five days. Her over all jail conduct is satisfactory. She is not a previous convict and is not involved in any other criminal case. Considering the facts and circumstances of the case and the mitigating circumstances, in the interest of justice, the order on sentence is modified and the substantive sentence of the appellant is reduced to six years with fine Rs. 2,000/-and failing to pay the fine to undergo SI for one month. She will be entitled to benefit under Section 428 Cr.P.C.

**11.** The appeal stands disposed of in the above terms. Trial Court record be sent back forthwith.

**ILR (2013) V DELHI 3803**
**W.P. (C)**

**BISHAN SINGH .....PETITIONER**

**VERSUS**

**UNION OF INDIA & ANR. .....RESPONDENTS**

**(GITA MITTAL & DEEPA SHARMA, JJ.)**

**W.P. (C) NO. : 4490/2013 DATE OF DECISION: 31.07.2013**

**Constitution of India, 1950—Article 226—Writ Petition—Article 14—Service Law—Central Industrial Security Force (CISF)—Promotion—Assured Career Progressive Scheme (ACP)—Promotion Cadre Course (PCC)-petitioner-constable-seeks restoration of the first financial upgradation as per ACP Scheme *w.e.f* 28.02.2004-12 years continuous service with CISF-became entitled for grant of second financial upgradation as per MACP Scheme *w.e.f* 28.02.2012-Petitioner was granted financial upgradation by the respondent *w.e.f* 17.02.2004 on completion of 12 years of service-ACP benefit cancelled on failure in the promotion Cadre Course (PCC)—Held *w.e.f* July, 2004—first chance-respondent proceeded to recover amount paid towards his financial upgradation from 28.02.2004—Petitioner's representation of no avail-respondent proceeded to re-grant the ACP upgradation to the petitioner vide order dtd. 23.02.2006—Denied the financial upgradation *w.e.f* 28.02.2004 to 20.01.2006—Contended-every employee is given three opportunities to complete the PCC-in case of inability of the employee to complete the course in the first attempt-the second and third opportunities available to him-respondent contended—Para 4 of the Circular dtd. 07.11.2003 to the effect that a conscious decision taken to effect recovery of pay and allowances**



**pertaining to the period from the date of upgradation of scale under ACP scheme to the date of stoppage of such financial upgradation—Court observed-Para 4 of the Circular is to be read in the context of para 2 of the Circular which clearly recognizes that an employee would be entitled to financial upgradation from the date he becomes eligible for the same-recovery can only be made if the respondents have given three chances for undergoing the PCC-the employee unable to do so-or-unsuccessful-the respondent not waited for the petitioner qualifying in PCC before proceedings with the recovery action—Held - petitioner entitled to the amount recovered from him-refunded to him-further held-petitioner entitled for second upgradation as per ACP scheme-Writ petition allowed.**

We may note that the respondents were conscious of the distinction between "stoppage" of the financial benefit and its "withdrawal" which is evident from bare reading of para 2 of the said circular. Para 2 of this circular clearly recognizes that a person would be entitled to financial upgradation from the date he becomes eligible to the same. The "stoppage" of the same is clearly noted to be with effect from the date of result of failure/ submission of medical unfitness certificate or expressing inability to undergo PCC on medical grounds. The recovery which is postulated has to be read in context of the clear stipulation as laid in para 2 and cannot be related to recovery of an amount beyond the period that is noted in para 2. In our view, the para 4 has to be operated in the context of what has been clearly stated in para 2 of the Circular dated 7th November, 2003. Furthermore recovery can only be if the respondents have given three chances for undergoing the PCC and the employee is unable to do so or is unsuccessful. Such reading and application of this Circular is in consonance with the above discussion. The respondents could not possibly seek recovery of the higher pay and allowances (advanced as benefits under the ACP Scheme) for the entire period from the date of upgradation

of the scale under the ACP Scheme to the date of stoppage of benefit in case a person fails to clear the PCC in all three chances. The view we have taken is clearly supported by the respondent's directive in the Circular dated 16th April, 2003 and 7th November, 2003 which has been placed before us. **(Para 19)**

**Important Issue Involved:** the completion of promotional cadre course is akin to completion of requisite training programme upon appointment/promotion and does not change the date of appointment.

**[Gu Si]**

**APPEARANCES:**

**FOR THE PETITIONER** : Mr. Subhasish Mohanty, Advocate.

**FOR THE RESPONDENTS** : Mr. Saqib, Advocate.

**CASES REFERRED TO:**

1. *Hargovind Singh* vs. *Central Industrial Security Force* W.P.(C)6937/2010.
2. *Bhagwan Singh* vs. *UOI & Ors.* W.P.(C) No.8631/2009.

**RESULT:** Writ Petition allowed.

**GITA MITTAL, J. (Oral)**

**1.** The petitioner seeks in this case restoration of the first financial upgradation as per the Assured Career Progression Scheme (herein after referred to as "ACP") w.e.f. 28th February 2004 when he completed 12 years of service with Central Industry Security Force (herein after referred as "CISF") and became entitled for grant of second financial upgradation as per MACP Scheme w.e.f. 28th February, 2012.

**2.** The undisputed facts in the instant case giving rise to the writ petition are enumerated that as per the ACP scheme other than completion of 12 years of continuous service in the post ofConstable, an employee of the CISF is required to have completed 12 years from the date of appointment to a post without any promotional financial benefit being made available to him and he should have also successfully undertaken



the Promotion Cadre Course (herein after referred to as "PCC").

**3.** The petitioner has stated that an employee is granted three chances for successful completion of promotional cadre course as per the applicable ACP Scheme which has been placed before us. This is uncontroverted.

**4.** Learned counsel for the petitioner submitted that the petitioner had completed 12 years of service on 28th February, 2004 and was offered an opportunity to undergo PCC pursuant to an offer made only in July, 2004. The petitioner unfortunately failed in the first attempt in the PCC, but qualified in the supplementary PCC vide Order no. RTC Barwaha S.O.No. Part-II No.120/ 2005 dated 20.07.2005 of the respondents.

**5.** It is also an admitted fact before us that the petitioner was granted financial upgradation by the respondents w.e.f. 17th February, 2004. The record placed before us shows that the petitioner successfully qualified the promotional cadre course and the result of the same was informed on 20th July 2005 by the respondent.

**6.** It appears that prior thereto the respondents have issued an order dated 14th November, 2004 whereby the ACP benefit granted to the petitioner w.e.f. 17th February 2004 was cancelled due to hisfailure in the promotion cadre course which was held w.e.f. July, 2004 which he has undertaken as his first chance. As a result, the respondents proceeded to recover the amount paid to the petitioner towards his financial upgradation from 28th February 2004. The petitioner's representations to respondents were of no avail. The respondent however, proceeded to re-grant the ACP upgradation to the petitioner by order passed vide order no. DIG HEC Ranchi S.O. No. 06/2006 dt. 23rd February 2006 which was made effective only from 30th January 2006. The petitioner was thus denied the benefit of the financial upgradation w.e.f. 28February, 2004 to 29January 2006, from which date he was granted the first financial upgradation.

**7.** Learned counsel for the petitioner has submitted that the respondents have done grave injustice to the petitioner inasmuch as the ACP upgradation could not have been withdrawn. It is further contended that a person becomes eligible for consideration for grant of the ACP upon completing the requisite number of years of service which the petitioner had already completed on 28th February, 2004. The manner in which the respondents worked the ACP Scheme is that the effective date

for consideration of the person for entitlement of the grant of financial upgradation is the date on which he acquires the requisite number of years of service in a post without any promotional opportunities being made available to him. It is urged that the completion of the actual PCC would have no effect on the effective date of grant of financial benefits inasmuch as all employees undergo the PCC only after having become eligible for grant of ACP Scheme. It is urged that the same is apparent from the fact that the respondents granted the ACP upgradation to the petitioner w.e.f. 17th February, 2004 when he completed 12 years of continuous service in the rank of Constable without any opportunity for promotion to the next post of Head Constable being made available to him till 17th February 2004. It is submitted that as per the Scheme of the respondents, every employee is given three opportunities to complete PCC. As such, the inability to successfully complete the PCC in the first or second attempt would render the petitioner eligible for a third opportunity.

**8.** So far as withdrawal of financial upgradation benefits, learned counsel for the respondents has placed reliance on para 4 of the Circular dated 7th November, 2003 which is to the effect that a considered decision was taken to effect the recovery of pay and allowances pertaining to the period from the date of upgradation of scale under ACP Scheme to the date of stoppage of such financial up-gradation. Learned counsel for the petitioner has also drawn our attention to the Circular dated 7th November, 2003 wherein, it is pointed out that the respondents have themselves drawn a distinction between "stoppage" of the financial upgradation and "withdrawal" of the amount given as the benefit thereunder.

**9.** In support of his contention, learned counsel for the petitioner has placed reliance on the pronouncement of this court dated 15th February, 2011 reported in W.P.(C)6937/2010 **Hargovind Singh v. Central Industrial Security Force**. In this case, the petitioner was seeking restoration of his second financial upgradation under the ACP Scheme with effect from 3rd November, 1999 and further grant of 3rd financial upgradation with effect from 1st September, 2008. It is note-worthy that the petitioner was granted the second upgradation under the ACP scheme on 3rd November, 1999 but the same was withdrawn without notice to the petitioner resulting in the claim in the writ petition. The stand of the respondents has been noted in para Nos 5 and 6 of the judgment which was to the following effect.



> "5. The undisputed position is that the petitioner was granted the benefit of the 2nd upgradation under the ACP Scheme with effect from 3.11.1999 but the same was withdrawn without notice to the petitioner; and thus the claim in the writ petition.
>
> 6. As per the counter affidavit filed, the 2nd ACP upgradation benefit was granted to the petitioner on 3.11.1999 in ignorance of the fact that the Mandatory Promotion Course was not successfully undertaken by the petitioner and when this was realized, petitioner was required to attend the Promotion Course commencing on 15.11.2009 for which he expressed his unwillingness to attend the course on 29.10.2004."

**10.** This very contention is urged before us. Just as the present case in hand, the petitioner Hargovind Singh also did not get the opportunity to undergo the PCC course on the date he became eligible for grant of further financial upgradation which waswithdrawn. On this aspect, in **Hargovind Singh's** case (supra) the court has ruled on the respondents. contention urged before us as well, commented on the responsibility of the department to detail the person for undertaking the promotional course. In this regard, observations made in para 8 to 14 of the judgment are being relied upon which reads thus :-

> "8. Learned counsel for the respondent would urge that the issue at hand is squarely covered against the petitioner as per the judgment and order dated 30.9.2010 disposing of W.P.(C) No.8631/2009 **Bhagwan Singh Vs. UOI & Ors.**
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> 9. A perusal of the decision in **Bhagwan Singh's** case (supra) would reveal that the petitioner therein was working as a Head Constable and was denied the second upgradation under the ACP Scheme on account of the fact he had consciously refused to undergo the mandatory promotional courses which would have made him eligible to be promoted as an Assistant Sub-Inspector and, in writing, had given that he foregoes the right to be promoted.
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> 10. The Division Bench noted paragraph 10 of the ACP Scheme which reads as under:-
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> "10. Grant of higher pay-scale under the ACP Scheme shall be conditional to the fact that an employee, while

accepting the said benefit, shall be deemed to have given his unqualified acceptance for regular promotion on occurrence of vacancy subsequently. IN regular promotion subsequently, he shall be subject to normal debarment for regular promotion as prescribed in the general instructions in this regard. However, as and when he accepts regular promotion thereafter, he shall become eligible for the second upgradation under the ACP Scheme only after he completes the required eligibility service/period under the ACP Scheme in that higher grade subject to the condition that the period for which he was debarred for regular promotion shall not count for the purpose. For example, if a person has got one financial upgradation after rendering 12 years of regular service and after 2 years therefrom if he refused regular promotion and is consequently debarred for one year and subsequently he is promoted to the higher grade on regular basis after completion of 15 years (12+12+1) of regular service, he shall be eligible for consideration for the second upgradation under the ACP Scheme only after rendering ten more years in addition to two years of service already rendered by him after the first financial upgradation (2+10) in that higher grade i.e. after 25 years (12+2+1+10) of regular service because the debarment period of one year cannot be taken into account towards the required 12 years of regular service in that higher grade.

11. In the instant case, facts noted hereinabove, would show that the respondents offered to detail the petitioner for the mandatory PCC course to be held with effect from 15.11.2004. We shall deal with the effect of the petitioner not joining the said course, but relevant would it be to note that the petitioner's entitlement to the ACP benefit accrued with effect from the month of November 1999 and it is not the case of the respondents that till they offered petitioner the chance to clear the PCC course commencing with effect from 15.11.2004, any earlier opportunity was granted to the petitioner to attend the course.

12. It is an admitted position that the department has to detail persons for undertaking the promotion cadre course and attending



said courses is not at the option of the officers concerned.

13. If that be so, the respondents cannot take advantage of not discharging their obligation which precedes the obligation of the incumbent to clear the promotion cadre course. The prior obligation of the department is to detail the person concerned to undertake the promotion cadre course.

14. As regards petitioner's unwillingness to undergo the promotion cadre course commencing from 15.11.2004, it may be noted that the use of the word 'unwilling' would be a misnomer. What has happened is that prior to the petitioner being intimated that he would be detailed to undertake the promotion cadre course commencing with effect from 15.11.2004, on account of the extreme ill medical condition of the wife of the petitioner he had sought for and was granted leave to proceed to his native village."

**11.** Before us, it is an admitted position that the petitioner became eligible for grant of financial upgradation on 17th February, 2004 which was actually granted to him. So far his being given an opportunity to undergo the PCC is concerned, he was detailed for the first time to undergo the course which commenced on July, 2004.

**12.** Undoubtedly for the reasons recorded in **Hargobind Singh's** case (supra), an employee cannot be deprived of the financial upgradation for the period for which an employee is unable and unwilling to undergo the PCC Course. It is apparent from the working of the ACP Scheme by the respondents that a person is entitled to the financial benefit on the date he completes the required twelve years of service without a promotional opportunity. The respondents have so worked the scheme in **Hargovind Singh's** case as well as the present case. The completion of the promotion cadre course is akin to completion of the requisite training upon appointment/promotion. It does not change the date of the appointment or the date of his promotion.

**13.** On this aspect, we may usefully extract the observations of the Division Bench judgment in **Hargovind Singh's** case (supra) which are in consonance with the facts of the present case.

**14.** So far as the failure of the petitioner to undertake the promotion cadre course for which he was detailed in July 2004 is concerned, in **Hargovind Singh's** case (supra), this court has deemed the same to be

"a technical default". On this aspect it was held as follows :

> "14 As regards petitioner's unwillingness to undergo the promotion cadre course commencing from 15.11.2004, it may be noted that the use of the word 'unwilling' would be a misnomer. What has happened is that prior to the petitioner being intimated that he would be detailed to undertake the promotion cadre course commencing with effect from 15.11.2004, on account of the extreme ill medical condition of the wife of the petitioner he had sought for and was granted leave to proceed to his native village.
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> 15. Suffice would it be to state that the position therefore would be that the respondent is in greater default by not detailing the petitioner to undertake the promotion cadre course till an offer to this effect was made somewhere a few days prior to 15.11.2004. Surely, petitioner cannot be denied his rights till said date.
>
> 16. As regards the technical default committed by the petitioner in not undertaking a promotion cadre course with effect from 15.1.2004, suffice would it be to state that he has a reason for so doing".

**15.** The court thus held that the respondents were in greater default for not having detailed the petitioner for the PCC till November, 2004. The petitioner completed twelve years of service on 17th Febraury, 2004 when he was granted the first financial upgradation. After Febraury, 2004, the present petitioner was detailed for undertaking PCC only in July, 2004. It is an admitted position that the petitioner accepted this offer but was unsuccessful. He was offered his second chance and has successfully undertaken the PCC vide Order No. RTC Barwaha S.O. Part-II No.120/2005 dated 20.07.2005 of the respondents. In this background, the petitioner cannot be denied of his rightful dues under the financial upgradation schemes.

**16.** We may also note that this aspect of the matter can be examined from yet another angle. As per the Scheme, every employee is entitled to three chances to complete the PCC. In case, the petitioner had undertaken the PCC course when he was first offered the same but had failed to clear the course, the respondents would not have then deprived him of the benefits of the financial upgradation but would have offered



him a second, and thereafter, even a third chance to successfully complete the same. This being the position, a person who failed in PCC at the first option cannot be deprived of the benefit of the financial upgradation in this matter. The petitioner has in fact cleared the PCC course at the second chance, when he underwent the same.

**17.** Looked at from any angle, the acts of the respondents in recovering the amount and denying the financial upgradation to the th thpetitioner from 17February 2004 till 29January 2006 cannot be justified on any ground at all. The view we have taken is supported by the judgment rendered in **Hargovind Singh's** case (supra).

**18.** Before we part with the case, it is necessary to deal with the submissions of the learned counsel for the respondents premised on the decision mentioned in the Circular dated 7th November, 2003. The relevant extracts of this Circular reads as follows :-

> "02. Instructions had been issued to the field formations that the personnel who have been granted ACPs benefits without qualifying PCC, but later on declared failed in PCC express their inability to undergo PCC on the pretext of one reason or other reason and submit medical unfitness certificate when detailed for PCC, the ACP benefits earlier granted to them may be stopped from the date of result of failure/submission of medical unfitness certificate or expressing their inability to undergo PCC on medical ground. 04 In view of the observations of Internal Audit party of MHA, the case has been examined and it has been decided that the recovery of pay and allowances pertaining to the period from the date of upgradation of scale under ACPs to the date of stoppage of such benefits may be made".

**19.** We may note that the respondents were conscious of the distinction between "stoppage" of the financial benefit and its "withdrawal" which is evident from bare reading of para 2 of the said circular. Para 2 of this circular clearly recognizes that a person would be entitled to financial upgradation from the date he becomes eligible to the same. The "stoppage" of the same is clearly noted to be with effect from the date of result of failure/ submission of medical unfitness certificate or expressing inability to undergo PCC on medical grounds. The recovery which is postulated has to be read in context of the clear stipulation as laid in para 2 and cannot be related to recovery of an amount beyond the period that

is noted in para 2. In our view, the para 4 has to be operated in the context of what has been clearly stated in para 2 of the Circular dated 7th November, 2003. Furthermore recovery can only be if the respondents have given three chances for undergoing the PCC and the employee is unable to do so or is unsuccessful. Such reading and application of this Circular is in consonance with the above discussion. The respondents could not possibly seek recovery of the higher pay and allowances (advanced as benefits under the ACP Scheme) for the entire period from the date of upgradation of the scale under the ACP Scheme to the date of stoppage of benefit in case a person fails to clear the PCC in all three chances. The view we have taken is clearly supported by the respondent's directive in the Circular dated 16th April, 2003 and 7th November, 2003 which has been placed before us.

**20.** The respondents hold a person entitled to the PCC for the several years when the employee is not offered an opportunity to undergo the PCC course after completion of the twelve years of service and even though he may be willing and able to do so. He is given the pay uprgadation for this period (between February 2004 and November 2004 in the case of the petitioner). This amount is then recovered as the employee was unsuccessful in the promotion cadre course in the first chance. The respondents have not waited for the petitioner to avail the three available chances for qualifying in PCC course before proceeding with their recovery action. The restoration has also been effected most arbitrarily.

**21.** For all the foregoing facts and reasons this writ petition has to be allowed. We hold that the petitioner would be entitled to grant of financial upgradation under the Assured Career Progression Scheme benefit with effect from 17th February 2004. The petitioner is entitled to the amounts recovered from him which shall be refunded to him within six weeks from today.

**22.** In case the petitioner is entitled to the benefit of the second upgradation as per ACP Scheme as well, the respondent shall consider the claim of the petitioner in accordance with the scheme in the light of the forgoing discussion and pass appropriate orders in regard thereto within a period of three months.

**23.** The order passed therein shall be conveyed to the petitioner.

**24.** The amounts falling due and payable in terms of the above shall



be released to the petitioner within a period of six weeks thereafter.

**25.** This writ petition is allowed in the above terms. Dasti to learned counsel for the parties.

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**ILR (2013) V DELHI 3814**
**W.P. (C)**

**MANVENDRA SINGH RAWAT .....PETITIONER**

**VERSUS**

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

**(GITA MITTAL & DEEPA SHARMA, JJ.)**

**W.P. (C) NO : 99/2012 DATE OF DECISION: 31.07.2013**

**Constitution of India, 1950—Article 226—Writ Petition—Service Law—Central Civil Service (Pension) Rules, 1972—Rule 48-A (F)-Notice of voluntary retirement-withdrawal- petitioner-an Assistant Engineer (E&M) with the Field Workshop of the General Reserve Engineer Force (GREE) of the Boarder Security Force (BSF) sent a letter dtd. 17.08.2010 to the Secretary of the Border Road Development Board (BRDB) seeking voluntary retirement from service *w.e.f.* 01.12.2010 (FN)—Ground—Domestic problem and ill health-three month notice of voluntary retirement commencing from 01.09.2010—Withdrew letter by a communication dtd. 23.11.2010—Withdrawal refused-resignation accepted by an order dtd. 15.11.2010—Petitioner aggrieved-preferred writ petition-contended-finding improvements in his family circumstances moved an application dtd. 23.11.20010 for withdrawal of his aforesaid application for voluntary under the provision of Rule 48-A of the CCS (Pension) Rules, 1972—**

**Respondent contended-order dtd. 15.11.2010 served upon the petitioner vide a letter dtd. 20.11.2010 and filed a speed post receipt dtd. 23.11.2010—Further contended that the request for withdrawal of voluntary retirement application had been processed under Rule 48-A(4) of CCS (Pensions) Rules and petitioner's request rejected by the competent authority—Court observed—In the withdrawal application petitioner had stated that he came to know regarding departmental promotion committee was likely to be held shortly and decided to take advantage of the same—however did not suggest that domestic problem over or had recovered from his health—The ground on which VRS sought—Petitioner remained on leave throughout the notice on the ground of medical illness—Held—Ordinarily approval for withdrawal should not be granted unless the officer concerned in the position to show material change in the circumstances in consideration of which the notice originally given—writ petition dismissed.**

The petitioner has sought to rely on **Balram Gupta** case (supra) in which the appellant had sought to challenge the validity of Rule 48-A (4). However, this issue was not examined by the court though the question as to the correctness of the exercise of power under Sub-Rule 4 of Rule 48-A was examined. The observations and findings of this court on this aspect deserve to be considered in extenso. The Supreme Court while referring to yet another prior judicial pronouncement reported at AIR 1981 SC 1829 **Air India etc. Etc. Vs. Nirgesh Meerza etc.** observed as follows:-

> 11. xxx As mentioned hereinbefore the main question was whether the Sub-rule (4) of Rule 48-A was valid and if so whether the power exercised under the Sub-rule (4) of Rule 48-A was proper. In the view we have taken it is not necessary, in our opinion, to decide whether Sub-rule (4) of Rule 48-A was valid or not. It



may be a salutary requirement that a Government servant cannot withdraw a letter of resignation or of voluntary retirement at his sweet will and put the Government into difficulties by writing letters of resignation or retirement and withdrawing the same immediately without rhyme or reasons. Therefore, for the purpose of appeal we do not propose to consider the question whether Sub-rule (4) of Rule 48-A of the Pension Rules is valid or not. If properly exercised the power of the government may be a salutary rule. Approval, however, is not ipse dixit of the approving authority. The approving authority who has the statutory authority must act reasonably and rationally. The only reason put forward here is that the appellant had not indicated his reasons for withdrawal. This, in our opinion, was sufficiently indicated that he was prevailed upon by his friends and the appellant had a second look at the matter. This is not an unreasonable reason. The guidelines indicated are as follows:

"(2) A question has been raised whether a Government servant who has given to the appropriate authority notice of retirement under the para 2(2) above has any right subsequently (but during the currency of the notice) to withdraw the same and return to duty. The question has been considered carefully and the conclusion reached is that the Government servant has no such right. There would, however, be no objection to permission being given to such a Government servant, on consideration of the circumstances of his case to withdraw the notice given by him, but ordinarily such permission should not be granted unless he is in a position to show that there has been a material change in the circumstances in consideration of which the notice was originally given.

Where the notice of retirement has been served by Government on the Government servant, it may be withdrawn if so desired for adequate reasons, provided

the Government servant concerned is agreeable."

12. In this case the guidelines are that ordinarily permission should not be granted unless the Officer concerned is in a position to show that there has been a material change in the circumstances in consideration of which the notice was originally given. In the facts of the instant case such indication has been given. The appellant has stated that on the persistent and personal requests of the staff members he had dropped the idea of seeking voluntary retirement. We do not see how this could not be a good and valid reason. It is true that he was resigning and in the notice for resignation he had not given any reason except to state that he sought voluntary retirement. We see nothing wrong in this. In the modern age we should not put embargo upon people's choice or freedom. If, however, the administration had made arrangements acting on his resignation or letter of retirement to make other employee available for his job, that would be another matter but the appellant's offer to retire and withdrawal of the same happened in so quick succession that it cannot be said that any administrative set up or arrangement was affected. The administration has now taken a long time by its own attitude to communicate the matter. For this purpose the respondent is to blame and not the appellant." **(Para 19)**

As noted above, the Supreme Court has clearly prescribed the guidelines and has clearly laid down in **Balram Gupta** case (Supra) that ordinarily, the permission should not be granted unless the officer is in a position to show that there has been a material change in the circumstances for which the notice of voluntary resignation was originally given. The petitioner has nowhere stated that his domestic problems were over or that he has recovered. On the contrary, the claim in the leave applications of the petitioner was that he was still not well and he purported to enclose medical



certificates in support thereof. **(Para 26)**

**Important Issue Involved:** (a) Under the pension rule ordinarily permission should not be granted for withdrawal of resignation or of voluntary retirement unless the officer is in a position to the material change in the circumstances in consideration of which the notice was originally given.

**[Gu Si]**

**APPEARANCES:**

**FOR THE PETITIONER** : Mr. Dheeraj Kumar Nayal, Advocate.

**FOR THE RESPONDENTS** : Mr. Prasouk Jain, Advocate.

**CASES REFERRED TO:**

1. *Shambhu Murari Sinha* vs. *Project & Development India Limited* (2002) 2 Supreme 391 : AIR 2002 SC 1341.
2. *Balram Gupta* vs. *Union of India* (1987) Suppl. 1 SCC 228.
3. *Air India etc. Etc.* vs. *Nirgesh Meerza etc.* AIR 1981 SC 1829.
4. *Union of India* vs. *Gopal Chander& Ors.,* 1978 (2) SCC 301.

**RESULT:** Writ Petition dismissed.

**GITA MITTAL, J. (ORAL)**

**1.** While serving as an Assistant Engineer (E & M) with the Field Workshop of the General Reserve Engineer Force (GREF) of the Border Security Force (BSF), the petitioner in the instant case sent a letter dated 17th August, 2010 to the Secretary of the Border Road Development Board (BRDB) submitting that he had decided to take voluntary retirement from service w.e.f. 1st December, 2010 (FN). The petitioner stated in this application that he was giving three months notice of voluntary retirement commencing from 1st September, 2010.

**2.** It is claimed that the petitioner withdrew this letter by a communication dated 23rd November, 2010. In the present writ petition,

he is aggrieved by the refusal of the respondents to permit the withdrawal and their decision to proceed in the matter having accepted the resignation by an order passed on 15th November, 2010.

**3.** We have heard learned counsel for the parties and have also perused the available records. Before us, the petitioner has filed a copy of a letter dated 10th August, 2010 which he claims to have addressed to the Secretary, BRDB informing him that he had rendered thirty years qualifying service with the department and had decided to take voluntary retirement from service w.e.f. 1st December, 2010 (FN) "at my own due to my domestic compulsions". The petitioner also sought relaxation of the requirement of three months notice and acceptance of the retirement forthwith due to ill health. The petitioner pressed that the notice may be accepted at the earliest and he may be allowed to proceed on voluntary retirement.

**4.** The petitioner claims that due to his domestic problems, he had proceeded on 26 days sanctioned leave w.e.f. 4th October, 2010. While he was on this leave, he had fallen ill due to his domestic problem and intimated to the respondents vide an application dated 29th October, 2010 seeking extension of leave on medical ground. As he could not recover from the illness again due to domestic problems, he intimated to the respondents vide an application dated 16th November, 2010 requesting for extension of leave on medical grounds. The petitioner claims that he continued to be sick due to domestic problem and again intimated to the respondents vide a communication dated 17th December, 2010 requesting for extension of leave on medical grounds.

**5.** In the writ petition, the petitioner has claimed that finding improvement in his family circumstances, he submitted an application dated 23rd November, 2010 for withdrawal of his aforesaid application for voluntary retirement. This application dated 23rd November, 2010 was submitted under the provisions of Rule 48-A of the Central Civil Service (Pension) Rules, 1972. The petitioner also sought further extension of leave vide his application dated 29th December, 2010 on medical grounds.

**6.** The grievance of the petitioner is that the respondents issued a memorandum dated 14th January, 2011 which was never served upon him. It is complained that the respondents thereafter passed an order dated 20th January, 2011 whereby he was discharged from service with



effect from the afore-noted date and intimated the petitioner, at his home address that he has been discharged. The petitioner submits that as he was on medical leave/extraordinary leave, he was unable to hand over the charge.

**7.** It is noteworthy that even in the writ petition, the petitioner claims to be seriously ill and needs treatment in the hospital and that he had intimated the respondents vide an application dated 24th January, 2011 requesting for extension of leave on medical grounds.

**8.** The petitioner has also complained that the respondents have passed the impugned order dated 1st February, 2011 whereby they have intimated him that his application for withdrawal of voluntary retirement had not been approved by the respondent no.1.

**9.** Though the above facts are not essential for adjudication of the present writ petition, however, we have noted the same inasmuch as they are indicative of the conduct of the petitioner and clearly manifest the lack of intention on his part to continue to serve the respondents.

**10.** So far as the case of the respondents is concerned, it is contended that the respondents accepted the petitioner's request for voluntary retirement from service vide an order passed on 15th November, 2010.

**11.** The respondents submit that the order dated 15th November, 2010 was served upon the petitioner vide a letter dated 20th November, 2010. To support their plea that the petitioner has been duly served with the order of acceptance of his request for VRS, Mr. Prasouk Jain, learned counsel for the respondents, has handed over a speed post receipt bearing no.RLA No.3703 dated 23rd November, 2010 whereby the letter was despatched to the petitioner.

**12.** It has further been contended by the respondents that the request for withdrawal of voluntary retirement application has been processed in accordance with Rule 48-A(4) of the CCS Pension Rules and that the petitioner's request was rejected by the competent authority by its order dated 14th January, 2011 (page 98).

**13.** The above narration of facts would show that so far as the voluntary retirement of the petitioner was concerned, as per his request, the same was to take effect w.e.f. 1st December, 2010 (F/N). The petitioner made an application for withdrawal of the VRS application vide

his letter dated 23rd November, 2010. The competent authority did not grant the prior permission for withdrawal of the VRS application. The petitioner has continued to be on leave throughout the entire period.

**14.** In support of the writ petition, learned counsel for the petitioner has placed reliance on the pronouncement reported at (2002) 2 Supreme 391 : AIR 2002 SC 1341 **Shambhu Murari Sinha Vs. Project & Development India Limited**. Perusal of this case would show that the Court has relied upon several binding judicial precedents wherein the Supreme Court has reiterated the well settled principle that an employee would be within his right to withdraw his option for voluntary retirement even after its acceptance but before the actual date of release from employment. The underlining principle is that the relationship of employer and employee would come to an end on the date the retirement would take effect. In this regard, in Shambhu Murari case, the Supreme Court placed reliance on the Constitutional Bench pronouncement of the Supreme Court reported at 1978 (2) SCC 301 **Union of India Vs. Gopal Chander& Ors.,** wherein the court held as follows:-

> "In our opinion, none of the aforesaid reasons given by the High Court for getting out of the ratio of **Jai Ram's** case AIR 1954 SC 584 is valid. Firstly, it was not a 'casual' enunciation. It was necessary to dispose of effectually and completely the second point that had been canvassed on behalf of Jai Ram. Moreover, the same principle was reiterated pointedly in 1968 in **Raj Kumar's** case, AIR 1969 SC 180. Secondly a proposal to retire from service/office and a tender to resign office from a future date, for the purpose of the point under discussion stand on the same footing. Thirdly, the distinction between a case where the resignation is required to be accepted and the one where no acceptance is required, makes no difference to the applicability of the rule in Jai Ram's case.

**15.** The court has, therefore, laid down the general principle that in the absence of a legal, contractual or constitutional bar, the prospective resignation can be withdrawn at any time before it becomes effective and it becomes effective when it opts to terminate the employment of the office tenure of the resignor.

**16.** In the present case, so far as the voluntary retirement from service is concerned, the petitioner had communicated an effective date



of voluntary resignation. However, so far as the withdrawal of the request is concerned, Rule 48-A (4) of the "Central Civil Service (Pension) Rules, 1972 would govern the consideration. There is, therefore, a guiding and binding legal prescription for consideration of a request for voluntary retirement from service. This rule bound the respondents while considering the petitioner's withdrawal application. It certainly binds our consideration.

**17.** In view of the present consideration, it will be useful to set out the Rule 48-A(4) of the CCS (Pension) Rules in extenso which reads as follows:-

> "48-A(4) A Government servant, who has elected to retire under this rule and has given the necessary notice to that effect to the Appointing Authority, shall be precluded from withdrawing his notice except with the specific approval of such authority:
>
> Provided that the request for withdrawal shall be made before the intended date of his retirement."

**18.** The only judicial pronouncement which has pointed out to us, which has construed Rule 48-A(4) is reported at (1987) Suppl. 1 SCC 228 **Balram Gupta Vs. Union of India**. In this case, the appellant offered to resign from service by the letter dated 24th December, 1980 w.e.f. 31st March, 1981 and according to the appellant, his resignation would have been effective if accepted only from 31st March, 1981. Before the resignation could have become effective, the appellant withdrew the same by a letter dated 31st January, 1981. In the meantime, however prior thereto, on 20th January, 1981, the respondents had accepted the resignation through effective from 31st March, 1981. The competent authority refused to grant approval to Balram Gupta's request for withdrawal of the resignation or retirement application even though the application for withdrawal had been made before the intended date of retirement. (para 8 of the judgment)

The Supreme Court has pointed out that the normal rule which prevails in cases that a person can withdraw his resignation before it is effective, would not apply in full force to a case of this nature because here the government servant cannot withdraw except with approval of such authority.

**19.** The petitioner has sought to rely on **Balram Gupta** case (supra) in which the appellant had sought to challenge the validity of Rule 48-

A (4). However, this issue was not examined by the court though the question as to the correctness of the exercise of power under Sub-Rule 4 of Rule 48-A was examined. The observations and findings of this court on this aspect deserve to be considered in extenso. The Supreme Court while referring to yet another prior judicial pronouncement reported at AIR 1981 SC 1829 **Air India etc. Etc. Vs. Nirgesh Meerza etc.** observed as follows:-

> 11. xxx As mentioned hereinbefore the main question was whether the Sub-rule (4) of Rule 48-A was valid and if so whether the power exercised under the Sub-rule (4) of Rule 48-A was proper. In the view we have taken it is not necessary, in our opinion, to decide whether Sub-rule (4) of Rule 48-A was valid or not. It may be a salutary requirement that a Government servant cannot withdraw a letter of resignation or of voluntary retirement at his sweet will and put the Government into difficulties by writing letters of resignation or retirement and withdrawing the same immediately without rhyme or reasons. Therefore, for the purpose of appeal we do not propose to consider the question whether Sub-rule (4) of Rule 48-A of the Pension Rules is valid or not. If properly exercised the power of the government may be a salutary rule. Approval, however, is not ipse dixit of the approving authority. The approving authority who has the statutory authority must act reasonably and rationally. The only reason put forward here is that the appellant had not indicated his reasons for withdrawal. This, in our opinion, was sufficiently indicated that he was prevailed upon by his friends and the appellant had a second look at the matter. This is not an unreasonable reason. The guidelines indicated are as follows:
>
> > "(2) A question has been raised whether a Government servant who has given to the appropriate authority notice of retirement under the para 2(2) above has any right subsequently (but during the currency of the notice) to withdraw the same and return to duty. The question has been considered carefully and the conclusion reached is that the Government servant has no such right. There would, however, be no objection to permission being given to such a Government servant, on consideration of the circumstances of his case to withdraw the notice given by him, but ordinarily such permission should not be granted unless he is in a position to show that there has been a material change in the circumstances in consideration of which the notice was originally given.
> >
> > Where the notice of retirement has been served by Government on the Government servant, it may be withdrawn if so desired for adequate reasons, provided the Government servant concerned is agreeable."
>
> 12. In this case the guidelines are that ordinarily permission should not be granted unless the Officer concerned is in a position to show that there has been a material change in the circumstances in consideration of which the notice was originally given. In the facts of the instant case such indication has been given. The appellant has stated that on the persistent and personal requests of the staff members he had dropped the idea of seeking voluntary retirement. We do not see how this could not be a good and valid reason. It is true that he was resigning and in the notice for resignation he had not given any reason except to state that he sought voluntary retirement. We see nothing wrong in this. In the modern age we should not put embargo upon people's choice or freedom. If, however, the administration had made arrangements acting on his resignation or letter of retirement to make other employee available for his job, that would be another matter but the appellant's offer to retire and withdrawal of the same happened in so quick succession that it cannot be said that any administrative set up or arrangement was affected. The administration has now taken a long time by its own attitude to communicate the matter. For this purpose the respondent is to blame and not the appellant."



**20.** It was on this background that the Supreme Court held that there was no valid reason for the competent authority withholding the permission by the respondent and the court further held that there had been compliance with the above guidelines because the appellant had indicated there was a change in the circumstances namely the persistent and personal request from the staff members and relations which had changed his attitude towards continuing in service and induced the appellant to withdraw the notice. The court also noticed the practical aspect of the

issue observing that it was difficult to arrange one's future with any amount of certainty, a certain amount of flexibility is required and that if such flexibility does not jeopardize the government or administration, the administration should be graceful enough to respond and acknowledge the flexibility of human mind and attitude and allow the appellant to withdraw his letter of retirement in the facts and circumstances of the case. Thus, it was the desire of the employee to continue to serve the organisation which had weighed with the court in holding that his application for withdrawal of the resignation was justified.

**21.** Certain essential facts in the present case which have been pointed out by learned counsel for the respondents, deserve to be noted. It is pointed out that the petitioner's application for withdrawal dated 23rd November, 2010 (sent barely six days before the resignation became effective) actually was not even sent in original with ink signatures. The petitioner had directly sent this by a FAX communication to the Secretary of the BRDB. This was certainly not a proper application in the file. Several notings in the original record have been pointed out. The petitioner had, thereafter, submitted an original ink signed application only on the 28th November, 2010, barely two days before his resignation took effect.

**22.** The petitioner being a Government employee, was well aware of the requirement of Rule 48-A of the CCS Pension Rules which mandated that he was required to obtain approval and he was precluded from withdrawing his notice except with the "specific approval of such authority". The clear rule prescription prohibited withdrawal of the application without material change in the circumstances.

**23.** Coming now to the reasons given by the petitioner in his withdrawal request dated 23rd November, 2010, the petitioner has stated that he had come to know from reliable sources that he was in the promotion zone and that a Departmental Promotion Committee was under consideration of the UPSC which may get through any time within a month or so. The petitioner stated that he had decided to take post advantage of this promotion for which he was eligible and entitled before going on voluntary retirement.

**24.** It is noteworthy that the petitioner did not make the remotest suggestion that his domestic problems were over or that he had recovered his health, the reason for which he had sought the voluntary retirement.



**25.** The communication dated 23rd November, 2010 was followed by a letter dated 17th February, 2011 sent by the petitioner. In the letter dated 17th February, 2011, the petitioner had again stated that he was still recovering from illness and likely to rejoin duties in the last week of the month. He submitted that considering his "long dedicated and tough service", he may be allowed to proceed on voluntary retirement w.e.f. 28th February, 2011 (AN). It is evident from the above that the petitioner had no intention of continuing service. This request was reiterated in the two legal notices dated 22nd February, 2011 (page 60) and 10th March, 2011 sent by the petitioner again requesting that he may be discharged w.e.f. 28th February, 2011 (AN).

**26.** As noted above, the Supreme Court has clearly prescribed the guidelines and has clearly laid down in **Balram Gupta** case (Supra) that ordinarily, the permission should not be granted unless the officer is in a position to show that there has been a material change in the circumstances for which the notice of voluntary resignation was originally given. The petitioner has nowhere stated that his domestic problems were over or that he has recovered. On the contrary, the claim in the leave applications of the petitioner was that he was still not well and he purported to enclose medical certificates in support thereof.

**27.** Further, the petitioner's leave record would show that he was not in good health when he submitted application dated 17th August, 2010. He was not in good health even on 23rd November, 2010 when he submitted the application for withdrawal of VRS. As such, there was nothing which would enable this court to come to the conclusion that there was any material change in the circumstances in consideration of which the notice was originally given.

**28.** Even if we hold that the petitioner's expectation that he would be favourably considered by the Departmental Promotion Committee (DPC) and would be entitled to promotion is a material consideration, the same also loses any significance inasmuch as the petitioner has not prayed that he may be continued in employment but merely pressed for his VRS to be postponed to a date thereafter. This reason which is the sole reason set out in the withdrawal letter dated 23rd November, 2011 is, therefore, of no relevance so far as the present consideration is concerned.

**29.** We are pained also to note that in the instant case, we are not satisfied about the bona fides of the petitioner. He opted to send a FAX

communication dated 23rd November, 2011, which was not a notice in the eyes of law. He opted to send an ink signed communication on the eve of his notified date of retirement i.e. 1st December, 2010. The petitioner consciously and deliberately attempted to deprive the respondents of reasonable time for a meaningful consideration of the matter in the spirit and context of the guidelines governing the working of Rule 48-A (4) of the CCS Pension Rules.

**30.** The petitioner in his letters does not say that he did not have domestic problem which he purports to say in the writ petition. It is dishonesty on the part of the petitioner that he did not join duties, falsely claimed that he did not receive the communications from the respondents and respondents were compelled to assume the deemed discharge on 20th January, 2010 in the circumstances noted above.

In this background, the petitioner is disentitled to any relief as prayed for.

This writ petition is dismissed.

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**ILR (2013) V DELHI 3827**
**W.P. (C)**

**KARAM SINGH ....PETITIONER**

**VERSUS**

**UNION OF INDIA & ANR. ....RESPONDENTS**

**(GITA MITTAL & DEEPA SHARMA, JJ.)**

**W.P. (C) NO. : 4507/2013 DATE OF DECISION: 31.07.2013**

**Constitution of India, 1950—Article 226—Writ Petition—Article 14—Service Law—Central Industrial Security Force (CISF)—Promotion—Assured Career Progression Scheme (ACP)—Promotion Cadre Course (PCC)—Petitioner constable seeks restoration of the first**



**financial upgradation as per ACP Scheme *w.e.f.* 17.02.2004 when he completed 12 years of continuous service with CISF and become entitled for grant of second financial upgradation as per MACP Scheme *w.e.f.* 17.02.2012—The petitioner after completion of 12 years of service was offered an opportunity to undergo PCC in December 2006—Could not go to medical unfitness—Asked to the posting as per the advise of doctor in the training centre—Granted first promotional upgradation—Subsequently qualify the PCC—Result conveyed on 24.11.2008—Prior to the that on 30.07.2008 order issued ACP benefit granted cancelled due to his failure to complete PCC held in December, 2006—Respondent proceeded to recover the amount to paid for financial upgradation—However respondent proceeded to re-grant the ACP upgradation *w.e.f.* 12.02.2009—Denied the benefit of the financial upgradation *w.e.f.* 17.02.2004 to 11.02.2009—Petitioner Contended-completion of actual PCC would have no effect date of grant of financial benefit—In as much as—All employee undergo the PCC only after become eligible for grant of ACP—Further—Every employee given three opportunities to complete PCC—Inability to successfully complete the PCC in first or second attempt would render petitioner eligible for attempt—Therefore withdrawal and recovery of the benefit unjustified—Respondent contended—In terms of circular an employee deputed for PCC fails to clear the course or showed inability to go the course on one pretext or the other, the benefit of scheme already granted had to be stopped and recovery had to be made—Held—Every employee is entitled to three chances to complete PCC—In case the petitioner had undertaken the PCC when he was first offered the same but he had failed to clear the same the—Respondent would not have then deprived the benefit of financial upgradation but would have offered him second and third chance to complete the same—The**

**petitioner in fact had cleared the PCC in second chance when he underwent—The petitioner entitled to amount recovered from him—Be considered for second upgradation—Writ petition allowed.**

Para 2 of this circular clearly recognizes that a person would be entitled to financial upgradation from the date he becomes eligible to the same. The "stoppage" of the same is clearly noted to be with effect from the date of result of failure/ submission of medical unfitness certificate or expressing inability to undergo PCC on medical grounds. The recovery which is postulated has to be read in context of the clear stipulation as laid in para 2 and cannot be related to recovery of an amount beyond the period that is noted in para 2. In our view, the para 4 has to be operated in the context of what has been clearly stated in para 2 of the Circular dated 7th November, 2003. Furthermore recovery can only be if the respondents have given three chances for undergoing the PCC and the employee is unable to do so or is unsuccessful. Such reading and application of this Circular is in consonance with the above discussion. The respondents could not possibly seek recovery of the higher pay and allowances (advanced as benefits under the ACP Scheme) for the entire period from the date of upgradation of the scale under the ACP Scheme to the date of stoppage of benefit in case a person fails to clear the PCC in all three chances. The view we have taken is clearly supported by the respondent's directive in the Circular dated 16th April, 2003 and 7th November, 2003 which has been placed before us. **(Para 20)**

The respondents hold a person entitled to the PCC for the several years when the employee is not offered an opportunity to undergo the PCC course after completion of the twelve years of service and even though he may be willing and able to do so. He is given the pay uprgadation for this period (between February 2004 and July 2008 in the case of the petitioner). This amount is then recovered as the



employee was unsuccessful in the promotion cadre course in the first chance. The respondents have not waited for the petitioner to avail the three available chances for qualifying in PCC course before proceeding with their recovery action. The restoration has also been effected most arbitrarily. **(Para 21)**

**Important Issue Involved:** (a) The completion ,of promotional cadre course is akin to completion of requisite training programme upon appointment/promotion and does not change the date of appointment. (b)

**[Gu Si]**

**APPEARANCES:**

**FOR THE PETITIONER** : Mr. Subhasish Mohanty, Advocate.

**FOR THE RESPONDENT** : Mr. Saqib, Advocate.

**CASES REFERRED TO:**

1. *Hargovind Singh* vs. *Central Industrial Security Force* W.P.(C) 6937/2010.
2. *Bhagwan Singh* vs. *UOI & Ors.* W.P.(C) No.8631/2009.

**RESULT:** Writ Petition allowed.

**GITA MITTAL, J. (Oral)**

**1.** The petitioner seeks in this case restoration of the first financial upgradation as per the Assured Career Progression Scheme (herein after referred to as "ACP") w.e.f. 17th February, 2004 when he completed 12 years of service with Central Industry Security Force (herein after referred as "CISF") and became entitled for grant of first financial upgradation in the grade of Head Constable under the ACP Scheme and grant of second financial upgradation as per MACP Scheme w.e.f 17th February, 2012.

**2.** The undisputed facts in the instant case necessary for adjudication of the writ petition are noticed hereafter. As per the ACP scheme, in order to be eligible the employee of the CISF is required to have completed 12 years from the date of appointment to a post without any promotional financial benefit being made available to him and he should have also

successfully undertaken the Promotion Cadre Course (herein after referred to as "PCC").

**3.** The petitioner has stated that an employee is granted three chances for successful completion of promotional cadre course as per the applicable ACP Scheme which has been placed before us. This is uncontroverted.

**4.** The learned counsel for the petitioner submitted that the petitioner completed 12 years of service on 17th February, 2004 and was offered an opportunity to undergo PCC pursuant to an offer made only in December 2006. The petitioner could not undergo the PCC in the said batch due to medical unfitness (fracture in right leg) and was asked to return to his unit of posting PCC as per advise by the Doctor in the Training Centre.

**5.** It is also an admitted fact before us that the petitioner was granted financial upgradation by the respondents w.e.f. 17th February, 2004. The record placed before us shows that the petitioner successfully qualified the promotional cadre course and the result of the same was informed on 24th November 2008 by the respondent.

**6.** It appears that prior thereto the respondents have issued an order dated 30th July 2008 whereby the ACP benefit granted to the petitioner w.e.f. 17th February 2004 was cancelled due to his failure in the promotion cadre course which was held w.e.f. December, 2006 which he has undertaken as his first chance. As a result, the respondents proceeded to recover the amount paid to the petitioner towards his financial upgradation from 17th February 2004. The petitioner's representations to respondents were of no avail. The respondent however, proceeded to re-grant the ACP upgradation to the petitioner vide order no. Comdt. NTPC Unchahar S.O. No. 176/2009 dt. 21st February 2009 which was made effective only from 12th February 2009. The petitioner was thus denied the benefit th thof the financial upgradation w.e.f. 17February, 2004 to 11February 2009, from which date he was granted the first financial upgradation.

**7.** Learned counsel for the petitioner has submitted that the respondents have done grave injustice to the petitioner inasmuch as the ACP upgradation could not have been withdrawn. It is further contended that a person becomes eligible for consideration for grant of the ACP upon completing the requisite number of years of service which the petitioner had already completed on 17th February 2004. The manner in



which the respondents worked the ACP Scheme is that the effective date for consideration of the person for entitlement of the grant of financial upgradation is the date on which he acquires the requisite number of years of service in a post without any promotional opportunities being made available to him. It is urged that the completion of the actual PCC would have no effect on the effective date of grant of financial benefits inasmuch as all employees undergo the PCC only after having become eligible for grant of ACP Scheme. It is urged that the same is apparent from the fact that the respondents granted the ACP upgradation to the petitioner w.e.f. 17th February, 2004 when he completed 12 years of continuous service in the rank of Constable without any opportunity for promotion to the next post of Head Constable being made available to him till 17th February 2004. It is submitted that as per the Scheme of the respondents, every employee is given three opportunities to complete PCC. As such, the inability to successfully complete the PCC in the first or second attempt would render the petitioner eligible for a third opportunity.

**8.** So far as withdrawal of financial upgradation benefits, learned counsel for the respondents has placed reliance on para 4 of the Circular dated 7th November, 2003 which is to the effect that a considered decision was taken to effect the recovery of pay and allowances pertaining to the period from the date of upgradation of scale under ACP Scheme to the date of stoppage of such financial up-gradation. Learned counsel for the petitioner has also drawn our attention to the Circular dated 7th November, 2003 wherein, it is printed out that the respondents have themselves drawn a distinction between "stoppage" of the financial upgradation and "withdrawal" of the amount given as the benefit thereunder.

**9.** In support of his contention, learned counsel for the petitioner has placed reliance on the pronouncement of this court dated 15th February, 2011 reported in W.P.(C)6937/2010 **Hargovind Singh v. Central Industrial Security Force**. In this case, the petitioner was seeking restoration of his second financial upgradation under the ACP Scheme with effect from 3rd November, 1999 and further grant of 3rd financial upgradation with effect from 1st September, 2008. It is note-worthy that the petitioner was granted the second upgradation under the ACP scheme on 3rd November, 1999 but the same was withdrawn without notice to the petitioner resulting in the claim in the writ petition. The stand of the respondents has been noted in para Nos 5 and 6 of the judgment which

was to the following effect.

> "5. The undisputed position is that the petitioner was granted the benefit of the 2nd upgradation under the ACP Scheme with effect from 3.11.1999 but the same was withdrawn without notice to the petitioner; and thus the claim in the writ petition.
>
> 6. As per the counter affidavit filed, the 2nd ACP upgradation benefit was granted to the petitioner on 3.11.1999 in ignorance of the fact that the Mandatory Promotion Course was not successfully undertaken by the petitioner and when this was realized, petitioner was required to attend the Promotion Course commencing on 15.11.2009 for which he expressed his unwillingness to attend the course on 29.10.2004."

**10.** This very contention is urged before us. Just as the present case in hand, the petitioner **Hargovind Singh** also did not get the opportunity to undergo the PCC course on the date he became eligible for grant of further financial upgradation which was withdrawn. On this aspect, in **Hargovind Singh's** case (supra) the court has ruled on the respondents contention urged before us as well, commented on the responsibility of the department to detail the person for undertaking the promotional course. In this regard, observations made in para 8 to 14 of the judgment are being relied upon which reads thus :

> "8. Learned counsel for the respondent would urge that the issue at hand is squarely covered against the petitioner as per the judgment and order dated 30.9.2010 disposing of W.P.(C) No.8631/2009 **Bhagwan Singh Vs. UOI & Ors.**
>
> 9. A perusal of the decision in **Bhagwan Singh's** case (supra) would reveal that the petitioner therein was working as a Head Constable and was denied the second upgradation under the ACP Scheme on account of the fact he had consciously refused to undergo the mandatory promotional courses which would have made him eligible to be promoted as an Assistant Sub-Inspector and, in writing, had given that he foregoes the right to be promoted.
>
> 10. The Division Bench noted paragraph 10 of the ACP Scheme which reads as under:-



> "10. Grant of higher pay-scale under the ACP Scheme shall be conditional to the fact that an employee, while accepting the said benefit, shall be deemed to have given his unqualified acceptance for regular promotion on occurrence of vacancy subsequently. IN regular promotion subsequently, he shall be subject to normal debarment for regular promotion as prescribed in the general instructions in this regard. However, as and when he accepts regular promotion thereafter, he shall become eligible for the second upgradation under the ACP Scheme only after he completes the required eligibility service/period under the ACP Scheme in that higher grade subject to the condition that the period for which he was debarred for regular promotion shall not count for the purpose. For example, if a person has got one financial upgradation after rendering 12 years of regular service and after 2 years therefrom if he refused regular promotion and is consequently debarred for one year and subsequently he is promoted to the higher grade on regular basis after completion of 15 years (12+12+1) of regular service, he shall be eligible for consideration for the second upgradation under the ACP Scheme only after rendering ten more years in addition to two years of service already rendered by him after the first financial upgradation (2+10) in that higher grade i.e. after 25 years (12+2+1+10) of regular service because the debarment period of one year cannot be taken into account towards the required 12 years of regular service in that higher grade.

11. In the instant case, facts noted hereinabove, would show that the respondents offered to detail the petitioner for the mandatory PCC course to be held with effect from 15.11.2004. We shall deal with the effect of the petitioner not joining the said course, but relevant would it be to note that the petitioner's entitlement to the ACP benefit accrued with effect from the month of November 1999 and it is not the case of the respondents that till they offered petitioner the chance to clear the PCC course commencing with effect from 15.11.2004, any earlier opportunity was granted to the petitioner to attend the course.

12. It is an admitted position that the department has to detail persons for undertaking the promotion cadre course and attending said courses is not at the option of the officers concerned.

13. If that be so, the respondents cannot take advantage of not discharging their obligation which precedes the obligation of the incumbent to clear the promotion cadre course. The prior obligation of the department is to detail the person concerned to undertake the promotion cadre course.

14. As regards petitioner's unwillingness to undergo the promotion cadre course commencing from 15.11.2004, it may be noted that the use of the word 'unwilling' would be a misnomer. What has happened is that prior to the petitioner being intimated that he would be detailed to undertake the promotion cadre course commencing with effect from 15.11.2004, on account of the extreme ill medical condition of the wife of the petitioner he had sought for and was granted leave to proceed to his native village."

**11.** Before us, it is an admitted position that the petitioner became eligible for grant of financial upgradation on 17th February, 2004 which was actually granted to him. So far his being given an opportunity to undergo the PCC is concerned, he was detailed for the first time to undergo the course which commenced on December, 2006.

**12.** Undoubtedly for the reasons recorded in **Hargobind Singh's** case (supra), an employee cannot be deprived of the financial upgradation for the period for which an employee is unable and unwilling to undergo the PCC Course. It is apparent from the working of the ACP Scheme by the respondents that a person is entitled to the financial benefit on the date he completes the required twelve years of service without a promotion opportunity. The respondents have so worked the scheme in Hargovind Singh's case as well as the present case. The completion of the promotion cadre course is akin to completion of the requisite training upon appointment/promotion. It does not change the date of the appointment or the date of his promotion.

**13.** On this aspect, we may usefully extract the observations of the Division Bench judgment in **Hargovind Singh's** case (supra) which are in consonance with the facts of the present case.



**14.** So far as the failure of the petitioner to undertake the promotion cadre course for which he was detailed in December 2006 is concerned, in **Hargovind Singh's** case (supra), this court has deemed the same to be "a technical default". On this aspect it was held as follows :-

"14 As regards petitioner's unwillingness to undergo the promotion cadre course commencing from 15.11.2004, it may be noted that the use of the word "unwilling" would be a misnomer. What has happened is that prior to the petitioner being intimated that he would be detailed to undertake the promotion cadre course commencing with effect from 15.11.2004, on account of the extreme ill medical condition of the wife of the petitioner he had sought for and was granted leave to proceed to his native village.

15. Suffice would it be to state that the position therefore would be that the respondent is in greater default by not detailing the petitioner to undertake the promotion cadre course till an offer to this effect was made somewhere a few days prior to 15.11.2004. Surely, petitioner cannot be denied his rights till said date.

16. As regards the technical default committed by the petitioner in not undertaking a promotion cadre course with effect from 15.1.2004, suffice would it be to state that he has a reason for so doing".

**15.** The court thus held that the respondents were in greater default for not having detailed the petitioner for the PCC till December 2006. The petitioner completed twelve years of service on 17th February, 2004 when he was granted the first financial upgradation. After February, 2004, the present petitioner was detailed for undertaking PCC only in December, 2006. It is an admitted position that the petitioner accepted this offer but was unsuccessful. He was offered his second chance and has successfully undertaken the PCC vide Order No. RTC Deoli-II S.O. No. 124/2008 dated 24.11.2008 of the respondents. In this background, the petitioner cannot be denied of his rightful dues under the financial upgradation schemes.

**16.** We may also note that this aspect of the matter can be examined from yet another angle. As per the Scheme, every employee is entitled

to three chances to complete the PCC. In case, the petitioner had undertaken the PCC course when he was first offered the same but had failed to clear the course, the respondents would not have then deprived him of the benefits of the financial upgradation but would have offered him a second, and thereafter, even a third chance to successfully complete the same. This being the position, a person who failed in PCC at the first option cannot be deprived of the benefit of the financial upgradation in this matter. The petitioner has in fact cleared the PCC course at the second chance, when he underwent the same.

**17.** Looked at from any angle, the acts of the respondents in recovering the amount and denying financial upgradation to the petitioner from 17th February 2004 till 11th February 2009 cannot be justified on any ground at all. The view we have taken is supported by the judgment rendered in **Hargovind Singh's** case (supra).

**18.** Before we part with the case, it is necessary to deal with the submissions of the learned counsel for the respondents premised on the decision mentioned in the Circular dated 7th November, 2003. The relevant extracts of this Circular reads as follows :

> "02 Instructions had been issued to the field formations that the personnel who have been granted ACPs benefits without qualifying PCC, but later on declared failed in PCC express their inability to undergo PCC on the pretext of one reason or other reason and submit medical unfitness certificate when detailed for PCC, the ACP benefits earlier granted to them may be stopped from the date of result of failure/submission of medical unfitness certificate or expressing their inability to undergo PCC on medical ground.
>
> 04. In view of the observations of Internal Audit party of MHA, the case has been examined and it has been decided that the recovery of pay and allowances pertaining to the period from the date of upgradation of scale under ACPs to the date of stoppage of such benefits may be made".

**19.** We may note that the respondents were conscious of the distinction between "stoppage" of the financial benefit and its "withdrawal" which is evident from bare reading of para 2 of the said circular.

**20.** Para 2 of this circular clearly recognizes that a person would



be entitled to financial upgradation from the date he becomes eligible to the same. The "stoppage" of the same is clearly noted to be with effect from the date of result of failure/ submission of medical unfitness certificate or expressing inability to undergo PCC on medical grounds. The recovery which is postulated has to be read in context of the clear stipulation as laid in para 2 and cannot be related to recovery of an amount beyond the period that is noted in para 2. In our view, the para 4 has to be operated in the context of what has been clearly stated in para 2 of the Circular dated 7th November, 2003. Furthermore recovery can only be if the respondents have given three chances for undergoing the PCC and the employee is unable to do so or is unsuccessful. Such reading and application of this Circular is in consonance with the above discussion. The respondents could not possibly seek recovery of the higher pay and allowances (advanced as benefits under the ACP Scheme) for the entire period from the date of upgradation of the scale under the ACP Scheme to the date of stoppage of benefit in case a person fails to clear the PCC in all three chances. The view we have taken is clearly supported by the respondent's directive in the Circular dated 16th April, 2003 and 7th November, 2003 which has been placed before us.

**21.** The respondents hold a person entitled to the PCC for the several years when the employee is not offered an opportunity to undergo the PCC course after completion of the twelve years of service and even though he may be willing and able to do so. He is given the pay uprgadation for this period (between February 2004 and July 2008 in the case of the petitioner). This amount is then recovered as the employee was unsuccessful in the promotion cadre course in the first chance. The respondents have not waited for the petitioner to avail the three available chances for qualifying in PCC course before proceeding with their recovery action. The restoration has also been effected most arbitrarily.

**22.** For all the foregoing facts and reasons this writ petition has to be allowed. We hold that the petitioner would be entitled to grant of financial upgradation under the Assured Career Progression Scheme benefit with effect from 17th February 2004. The petitioner is entitled to the amounts recovered from him which shall be refunded to him within six weeks from today.

**23.** In case the petitioner is entitled to the benefit of the second upgradation as per ACP Scheme as well, the respondent shall consider

the claim of the petitioner in accordance with the scheme in the light of the forgoing discussion and pass appropriate orders in regard thereto within a period of three months.

**24.** The order passed therein shall be conveyed to the petitioner.

**25.** The amounts falling due and payable in terms of the above shall be released to the petitioner within a period of six weeks thereafter.

**26.** This writ petition is allowed in the above terms.

Dasti to learned counsel for the parties.

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**ILR (2013) V DELHI 3839**
**W.P. (C)**

**KULDIP SINGH .....PETITIONER**

**VERSUS**

**UNION OF INDIA & ANR. ....RESPONDENTS**

**(GITA MITTAL & DEEPA SHARMA, JJ.)**

**W.P. (C) NO. : 4514/2013 DATE OF DECISION: 31.07.2013**

**Constitution of India, 1950—Article 226—Writ Petition—Article 14—Service Law—Central Industrial Security Force (CISF)—Promotion—Assured Career Progression Scheme (ACP)- Promotion Cadre Course (PCC)- Petitioner head constable seeks restoration of the first financial upgradation as per ACP Scheme *w.e.f.* 21.04.2004 when he completed 12 years of continuous service with CISF and became entitled for grant for second financial upgradation as per MACP Scheme *w.e.f.* 21.04.2012—Petitioner granted financial upgradation *w.e.f. 21.04.2004*—Undergone the course on 21.03.2005 to 07.05.2005—Successfully qualified PCC**



**and result conveyed 21.02.2006—Petitioner offered the opportunity to undergo PCC in June, 2004 for the first time—He expressed unwillingness on the ground of availing leave to proceed to his native place—Failed in the second chance—Qualified in the supplementary—The benefit cancelled due to submission of unwillingness to undergo PCC would have no effect on effective date of grant of financial benefit—In as much as—All employee undergo the PCC only after having become eligible for grant the ACP scheme—Further—Every employee given three opportunities to complete PCC—Inability to successfully complete the PCC in first or second attempt would render petitioner eligible for third attempt—Therefore withdrawal and recovery of the benefit unjustified—respondent contended—In terms of circular an employee deputed for PCC fail to clear the course or showed inability to go to the course on one pretext or the other, benefit of scheme already granted had to be stopped and recovery had to be made—Held—Every employee is entitled to three chances to complete PCC—In case the petitioner had undertaken the PCC when he was first offered the same but he had failed to clear the same the—respondent would not have then deprived the benefit of financial upgradation but would have offered him second and third chance to complete the same—The petitioner entitled to amount recovered from him—Writ petition allowed.**

So far as the unwillingness of the petitioner to undertake the promotion cadre course for which he was detailed in June, 2004 is concerned, in **Hargovind Singh's** case (supra), this court has deemed the same to be "a technical default". On this aspect it was held as follows:

> " 14. As regards petitioner's unwillingness to undergo the promotion cadre course commencing from 15.11.2004, it may be noted that the use of the word

'unwilling' would be a misnomer. What has happened is that prior to the petitioner being intimated that he would be detailed to undertake the promotion cadre course commencing with effect from 04.12.2006, on account of the extreme ill medical condition of the wife of the petitioner he had sought for and was granted leave to proceed to his native village.

15. Suffice would it be to state that the position therefore would be that the respondent is in greater default by not detailing the petitioner to undertake the promotion cadre course till an offer to this effect was made somewhere a few days prior to 15.11.2004. Surely, petitioner cannot be denied his rights till said date.

16. As regards the technical default committed by the petitioner in not undertaking a promotion cadre course with effect from 15.1.2004, suffice would it be to state that he has a reason for so doing". **(Para 17)**

Looked at from any angle, the acts of the respondents in depriving the petitioner from first financial upgradation from 2nd July, 2004 till 28th January 2006 cannot be justified on any ground at all. It is further urged that the petitioner is entitled to the second financial upgradation as per the modified MACP 2ndScheme w.e.f. July, 2012. The view we have taken is supported by the judgment rendered in **Hargovind Singh's** case (supra). Before we part with the case, it is necessary to deal with the submissions of the learned counsel for the respondents premised on the decision mentioned in the Circular dated 7th November, 2003. The relevant extracts of this Circular reads as follows :

"02. Instructions had been issued to the field formations that the personnel who have been granted ACPs benefits without qualifying PCC, but later on declared failed in PCC express their inability to undergo PCC on the pretext of one reason or other reason and



submit medical unfitness certificate when detailed for PCC, the ACP benefits earlier granted to them may be stopped from the date of result of failure/submission of medical unfitness certificate or expressing their inability to undergo PCC on medical ground.

04. In view of the observations of Internal Audit party of MHA, the case has been examined and it has been decided that the recovery of pay and allowances pertaining to the period from the date of upgradation of scale under ACPs to the date of stoppage of such benefits may be made". **(Para 20)**

We may note that the respondents were conscious of the distinction between "stoppage" of the financial benefit and its "withdrawal" which is evident from bare reading of para 2 of the said circular. Para 2 of this circular clearly recognizes that a person would be entitled to financial upgradation from the date he becomes eligible to the same. The "stoppage" of the same is clearly noted to be with effect from the date of result of failure/ submission of medical unfitness certificate or expressing inability to undergo PCC on medical grounds. The recovery which is postulated has to be read in context of the clear stipulation as laid in para 2 and cannot be related to recovery of an amount beyond the period that is noted in para 2. In our view, the para 4 has to be operated in the context of what has been clearly stated in para 2 of the Circular dated 7th February, 2003. Such reading and application of this Circular is in consonance with the above discussion. The respondents would not possibly seek recovery of the higher pay and allowances (advanced as benefits under the ACP Scheme) for the entire period from the date of upgradation of the scale under the ACP Scheme to the date of stoppage of benefit in case a person fails to clear the PCC in all three chances. The view we have taken is clearly supported by the respondent's directive in the Circular dated 16th April, 2003 and 7th November, 2003 which has been placed before us. **(Para 21)**

**Important Issue Involved:** (a) the completion of promotional cadre course is akin to completion of requisite trainings programme upon appointment/promotion and does not change the date of appointment.

**[Gu Si]**

**APPEARANCES:**

**FOR THE PETITIONER** : Mr. Subhasish Mohanty, Advocate.

**FOR THE RESPONDENTS** : Mr. Saqib, Advocate.

**CASES REFERRED TO:**

1. *Hargovind Singh* vs. *Central Industrial Security Force* W.P.(C)6937/2010.
2. *Bhagwan Singh* vs. *UOI & Ors.* W.P.(C) No.8631/2009.

**RESULT:** Writ Petition allowed.

**GITA MITTAL, J. (Oral)**

**1.** The petitioner seeks in this case restoration of the first financial upgradation as per the Assured Career Progression Scheme (herein after referred to as "ACP") w.e.f. 21st April, 2004 when he completed 12 years of service with Central Industry Security Force (herein after referred as "CISF") and became entitled for grant of first financial upgradation in the grade of Head Constable under the ACP Scheme and grant of second financial upgradation as per MACP Scheme w.e.f 21st April, 2012.

**2.** The undisputed facts in the instant case necessary for adjudication of the writ petition are noticed hereafter. As per the ACP scheme, in order to be eligible the employee of the CISF is required to have completed 12 years from the date of appointment to a post without any promotional financial benefit being made available to him and he should have also successfully undertaken the Promotion Cadre Course (herein after referred to as "PCC").

**3.** The petitioner has stated that an employee is granted three chances for successful completion of promotional cadre course as per the applicable ACP Scheme which has been placed before us. This is uncontroverted.

**4.** Learned counsel for the petitioner submitted that the petitioner



completed 12 years of service on 21st April, 2004 and was offered an opportunity to undergo PCC pursuant to an offer made only in June 2004. The petitioner was compelled to express his unwillingness to undergo this PCC on the ground of his availing leave to proceed to his native place. The petitioner was offered to undergo PCC commencing w.e.f. 16th August, 2004 to 2nd October, 2004 in the 2nd chance. The petitioner unfortunately failed in the 2nd chance in the PCC, but qualified in the supplementary PCC vide Order of the respondent No. RTC Deoli-II, S.O. No. 184/2005, dt. 19th August, 2005.

**5.** Learned counsel for the parties have placed reliance on the Model Unwillingness Certificate wherein it is stated as follows :

**" UNWILLINGNES CERTIFICATE**

I.....Rank.....Name.....o f CISF Unit .....is not willing to undergo promotion course of Const. to HC/GD commencing w.e.f. ..... at ..... as detailed vide CISF Unit ..... Further I have no objection if I, am superseded due to my unwillingness."

**6.** While learned counsel for the respondent would contend that the petitioner had unequivocally expressed his unwillingness to undertake the PCC and that he had also clearly given his no objection to his supersession for the ACP due to his unwillingness. Learned counsel for the petitioner has however urged at some length that the unwillingness was restricted and limited only to the specific offer. It is submitted that the petitioner has expressed his unwillingness only to undergo the PCC which commenced from June 2004 and had not repudiated any other offer made by the respondents.

**7.** It is also an admitted fact before us that the petitioner was 21st granted financial upgradation by the respondents w.e.f. April, 2004. The record placed before us shows that the petitioner successfully qualified the promotional cadre course and the result of the same was informed on 21st February, 2006 by the respondent. The petitioner had undergone the course between 21st March 2005 to 7th May 2005.

**8.** It appears that prior thereto the respondents have issued an order No. 174/2004 dated 29th June, 2004 whereby the ACP 21stbenefit granted to the petitioner w.e.f. April, 2004 was cancelled due to the submission of his unwillingness to undergo the promotion cadre course which was

held w.e.f. June 2004. As a result, the respondents proceeded to recover the amount paid to the petitioner towards his financial upgradation from 21st April, 2004. The respondent however, proceeded to re-grant the ACP upgradation to the petitioner effective from 29th January 2006.

**9.** Learned counsel for the petitioner has submitted that the respondents have done grave injustice to the petitioner inasmuch as the ACP upgradation could not have been withdrawn. It is further contended that a person becomes eligible for consideration for grant of the ACP upon completing the requisite number of years of service which the petitioner had already 21stcompleted on April, 2004. The manner in which the respondents worked the ACP Scheme is that the effective date for consideration of the person for entitlement of the grant of financial upgradation is the date on which he acquires the requisite number of years of service in a post without any promotional opportunities being made available to him. It is urged that the completion of the actual PCC would have no effect on the effective date of grant of financial benefits inasmuch as all employees undergo the PCC only after having become eligible for grant of ACP Scheme. It is urged that the same is apparent from the fact that the respondents granted the ACP upgradation to the petitioner w.e.f. 21st April, 2004 when he completed 12 years of continuous service in the rank of Constable without any opportunity for promotion to the next post of Head Constable being made available to him. It is contended that as per the Circular issued by the respondents every employee is given three opportunities to complete PCC.

**10.** Learned counsel for the petitioner has also drawn our attention to the Circular dated 7th November, 2003 wherein, it is pointed out that the respondents have themselves drawn a distinction between *"stoppage"* of the financial upgradation and *'withdrawal'* of the amount given as the benefit thereunder. As against withdrawal of financial upgradation benefits, learned counsel for the respondents has placed reliance on para 4 of the Circular dated 7th November, 2003 which is to the effect that a considered decision was taken to effect the recovery of pay and allowances pertaining to the period from the date of upgradation of scale under ACP Scheme to the date of stoppage of such financial up-gradation.

**11.** In support of his contention, learned counsel for the petitioner has placed reliance on the pronouncement of this court dated 15th February, 2011 reported in W.P.(C)6937/2010 **Hargovind Singh v. Central**



**Industrial Security Force**. In this case, the petitioner was seeking restoration of his second financial upgradation under the ACP Scheme with effect from 3rd November, 1999 and further grant of 3rd financial upgradation with effect from 1st September, 2008. It is noteworthy that the petitioner was granted the second upgradation under the ACP scheme on 3rd November, 1999 but the same was withdrawn without notice to the petitioner resulting in the claim in the writ petition. The stand of the respondents has been noted in para Nos 5 and 6 of the judgment which was to the following effect.

> "5. The undisputed position is that the petitioner was granted the benefit of the 2nd upgradation under the ACP Scheme with effect from 3.11.1999 but the same was withdrawn without notice to the petitioner; and thus the claim in the writ petition.
>
> 6. As per the counter affidavit filed, the 2nd ACP upgradation benefit was granted to the petitioner on 3.11.1999 in ignorance of the fact that the Mandatory Promotion Course was not successfully undertaken by the petitioner and when this was realized, petitioner was required to attend the Promotion Course commencing on 15.11.2004 for which he expressed his unwillingness to attend the course on 29.10.2004."

**12.** This very contention is urged before us. Just as the present case in hand, the petitioner Hargovind Singh also did not get the opportunity to undergo the PCC course on the date he became eligible for grant of further financial upgradation which was withdrawn. On this aspect, in **Hargovind Singh's** case (supra) the court has ruled on the respondents contention urged before us as well, commented on the responsibility of the department to detail the person for undertaking the promotional course. In this regard, observations made in para 8 to 14 of the judgment are being relied upon which reads thus :

> "8. Learned counsel for the respondent would urge that the issue at hand is squarely covered against the petitioner as per the judgment and order dated 30.9.2010 disposing of W.P.(C) No.8631/2009 **Bhagwan Singh Vs. UOI & Ors.**
>
> 9. A perusal of the decision in **Bhagwan Singh's** case (supra) would reveal that the petitioner therein was working as a Head Constable and was denied the second upgradation under the ACP

Scheme on account of the fact he had consciously refused to undergo the mandatory promotional courses which would have made him eligible to be promoted as an Assistant Sub-Inspector and, in writing, had given that he foregoes the right to be promoted.

10. The Division Bench noted paragraph 10 of the ACP Scheme which reads as under :-

> "10. Grant of higher pay-scale under the ACP Scheme shall be conditional to the fact that an employee, while accepting the said benefit, shall be deemed to have given his unqualified acceptance for regular promotion on occurrence of vacancy subsequently. In regular promotion subsequently, he shall be subject to normal debarment for regular promotion as prescribed in the general instructions in this regard. However, as and when he accepts regular promotion thereafter, he shall become eligible for the second upgradation under the ACP Scheme only after he completes the required eligibility service/period under the ACP Scheme in that higher grade subject to the condition that the period for which he was debarred for regular promotion shall not count for the purpose. For example, if a person has got one financial upgradation after rendering 12 years of regular service and after 2 years therefrom if he refused regular promotion and is consequently debarred for one year and subsequently he is promoted to the higher grade on regular basis after completion of 15 years (12+12+1) of regular service, he shall be eligible for consideration for the second upgradation under the ACP Scheme only after rendering ten more years in addition to two years of service already rendered by him after the first financial upgradation (2+10) in that higher grade i.e. after 25 years (12+2+1+10) of regular service because the debarment period of one year cannot be taken into account towards the required 12 years of regular service in that higher grade.

11. In the instant case, facts noted hereinabove, would show that the respondents offered to detail the petitioner for the



mandatory PCC course to be held with effect from 15.11.2004. We shall deal with the effect of the petitioner not joining the said course, but relevant would it be to note that the petitioner's entitlement to the ACP benefit accrued with effect from the month of November 1999 and it is not the case of the respondents that till they offered petitioner the chance to clear the PCC course commencing with effect from 15.11.2004, any earlier opportunity was granted to the petitioner to attend the course.

12. It is an admitted position that the department has to detail persons for undertaking the promotion cadre course and attending said courses is not at the option of the officers concerned.

13. If that be so, the respondents cannot take advantage of not discharging their obligation which precedes the obligation of the incumbent to clear the promotion cadre course. The prior obligation of the department is to detail the person concerned to undertake the promotion cadre course.

14. As regards petitioner's unwillingness to undergo the promotion cadre course commencing from 15.11.2004, it may be noted that the use of the word 'unwilling' would be a misnomer. What has happened is that prior to the petitioner being intimated that he would be detailed to undertake the promotion cadre course commencing with effect from 15.11.2004, on account of the extreme ill medical condition of the wife of the petitioner he had sought for and was granted leave to proceed to his native village."

**13.** Before us, it is an admitted position that the petitioner became eligible for grant of financial upgradation on 2nd July, 2004 which was actually granted to him. So far his being given an opportunity to undergo the PCC is concerned, he was detailed for the first time to undergo the course which commenced on June 2004.

**14.** Undoubtedly for the reasons recorded in **Hargobind Singh's** case (supra), the petitioner could not be deprived of the financial upgradation for this period. It is apparent from the working of the ACP Scheme by the respondents that a person is entitled to the financial benefit on the date he completes the required twelve years of service without a promotional opportunity. The respondents have so worked the scheme in Hargovind Singh's case as well as the present case. The

completion of the promotional cadre course is akin to completion of the requisite training upon appointment/promotion. It does not change the date of the appointment or the date of his promotion.

**15.** We may now come to the second aspect of the matter. The respondents have relied upon the Unwillingness Certificate submitted by the petitioner which is to urge that the petitioner had submitted his unwillingness to undergo the PCC and stated that he had no objection if he was superseded due to his unwillingness. We have reproduced hereinafter therefore the exact words of the unwillingness expressed by the petitioner. The unwillingness was restricted to petitioner's inability to 4th undergo the promotional course which commenced on December 2006 and non other. Obviously, the petitioner could not have made any legally tenable objection in case he was superseded because of such unwillingness. There is nothing before us to show that the petitioner was detailed to undergo any other PCC for which he had expressed his unwillingness.

**16.** On this aspect, we may usefully extract the observations of the Division Bench judgment in **Hargovind Singh's** case (supra) which are in consonance with the facts of the present case. After June, 2004, the present petitioner was detailed for undertaking PCC only in March, 2005. It is an admitted position that the petitioner accepted this offer and has successfully undertaken the PCC which was conducted between 21st March 2005 to 7th May, 2005. In this background, the petitioner cannot be denied of his rightful dues till date.

**17.** So far as the unwillingness of the petitioner to undertake the promotion cadre course for which he was detailed in June, 2004 is concerned, in **Hargovind Singh's** case (supra), this court has deemed the same to be "a technical default". On this aspect it was held as follows:

> " 14. As regards petitioner's unwillingness to undergo the promotion cadre course commencing from 15.11.2004, it may be noted that the use of the word 'unwilling' would be a misnomer. What has happened is that prior to the petitioner being intimated that he would be detailed to undertake the promotion cadre course commencing with effect from 04.12.2006, on account of the extreme ill medical condition of the wife of the petitioner he had sought for and was granted leave to proceed to his native village.



> 15. Suffice would it be to state that the position therefore would be that the respondent is in greater default by not detailing the petitioner to undertake the promotion cadre course till an offer to this effect was made somewhere a few days prior to 15.11.2004. Surely, petitioner cannot be denied his rights till said date.
>
> 16. As regards the technical default committed by the petitioner in not undertaking a promotion cadre course with effect from 15.1.2004, suffice would it be to state that he has a reason for so doing".

**18.** The court has thus held that the petitioner had a reason for so doing.

**19.** It cannot be denied that in the case in hand as well the petitioner has given a genuine and reasonable explanation for his inability to undergo the PCC course which has not been doubted by the respondents. We may also note that this aspect of the matter can be examined from yet another angle. As per the Scheme, every employee is entitled to three chances to complete the PCC. In case, the petitioner had undertaken the PCC course when he was first offered the same but had failed to clear the course, the respondents would not have then deprived him of the benefits of the financial upgradation but would have offered him a second; and thereafter, even a third chance to successfully complete the same. This being the position, a person who was prevented by just and sufficient cause from undertaking PCC at the first option cannot be deprived of the benefit of the financial upgradation in this matter. The petitioner has in fact cleared the PCC course at the first chance, when he underwent the same.

**20.** Looked at from any angle, the acts of the respondents in depriving the petitioner from first financial upgradation from 2nd July, 2004 till 28th January 2006 cannot be justified on any ground at all. It is further urged that the petitioner is entitled to the second financial upgradation as per the modified MACP 2ndScheme w.e.f. July, 2012. The view we have taken is supported by the judgment rendered in **Hargovind Singh's** case (supra). Before we part with the case, it is necessary to deal with the submissions of the learned counsel for the respondents premised on the decision mentioned in the Circular dated 7th November, 2003. The relevant extracts of this Circular reads as follows:

"02. Instructions had been issued to the field formations that the personnel who have been granted ACPs benefits without qualifying PCC, but later on declared failed in PCC express their inability to undergo PCC on the pretext of one reason or other reason and submit medical unfitness certificate when detailed for PCC, the ACP benefits earlier granted to them may be stopped from the date of result of failure/submission of medical unfitness certificate or expressing their inability to undergo PCC on medical ground.

04. In view of the observations of Internal Audit party of MHA, the case has been examined and it has been decided that the recovery of pay and allowances pertaining to the period from the date of upgradation of scale under ACPs to the date of stoppage of such benefits may be made".

**21.** We may note that the respondents were conscious of the distinction between "stoppage" of the financial benefit and its "withdrawal" which is evident from bare reading of para 2 of the said circular. Para 2 of this circular clearly recognizes that a person would be entitled to financial upgradation from the date he becomes eligible to the same. The "stoppage" of the same is clearly noted to be with effect from the date of result of failure/ submission of medical unfitness certificate or expressing inability to undergo PCC on medical grounds. The recovery which is postulated has to be read in context of the clear stipulation as laid in para 2 and cannot be related to recovery of an amount beyond the period that is noted in para 2. In our view, the para 4 has to be operated in the context of what has been clearly stated in para 2 of the Circular dated 7th February, 2003. Such reading and application of this Circular is in consonance with the above discussion. The respondents would not possibly seek recovery of the higher pay and allowances (advanced as benefits under the ACP Scheme) for the entire period from the date of upgradation of the scale under the ACP Scheme to the date of stoppage of benefit in case a person fails to clear the PCC in all three chances. The view we have taken is clearly supported by the respondent's directive in the Circular dated 16th April, 2003 and 7th November, 2003 which has been placed before us.

**22.** The respondents have not waited for any employee to take the three available chances for undergoing the PCC course before proceeding with their recovery action. The restoration has also been effected most



arbitrarily. The respondents hold a person entitled to the PCC for the several years when the employee is not offered an opportunity to undergo the PCC course even though he may be willing and able to do so. He is given the pay uprgadation for the period from and then the amount in respect of said benefit is recovered on the ground that the employee though desirous, but is not able (on account of some unavoidable circumstances) to go for the PCC.

**23.** For all the foregoing facts and reasons this writ petition has to be allowed. We accordingly hold that the petitioner would be entitled to grant of financial upgradation under the Assured Career Progression Scheme benefit with effect from 2nd July, 2004. The petitioner is as a result entitled to the amounts recovered from him which shall be refunded to him within six weeks from today.

**24.** In case the petitioner is entitled to the benefit of second financial upgradation as per the modified ACP Scheme as well, the respondent shall consider the claim of the petitioner in accordance with the scheme in the light of the forgoing discussion and pass appropriate orders in regard thereto within a period of three months. The order passed thereon shall be conveyed to the petitioner. The amounts falling due and payable in terms of the above shall be released to the petitioner within a period of six weeks thereafter.

**25.** This writ petition is allowed in the above terms.

*Dasti* to learned counsel for the parties.

**ILR (2013) V DELHI 3853**
**I.A.**

**ACE INNOVATORS PVT. LTD. ....PLAINTIFF**

**VERSUS**

**HEWLETT PACKARD INDIA SALES PVT. LTD. & ORS. ....DEFENDANTS**

**(MUKTA GUPTA, J.)**

**I.A. NO. : 15446/2013 IN CS (OS) NO. : 1712/2012 DATE OF DECISION: 04.10.2013**

**Code of Civil Procedure, 1908—Order 7 Rule 11 Order 1 Rule 10—Contract Act—1872—Section 230—Plaintiff filed suit claiming damages against defendants—Defendant no. 3 preferred application U/o 7 Rule 11 and Order 1 Rule 10 of Code contending it is neither necessary nor proper party to suit. Held:- In the absence of any contract to that effect an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by him.**

It is thus evident that in terms of Section 230 of the Contract Act, in the absence of any contract to that effect an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by him. Further there is no presumption to the contrary as the name of the principal is known to the Plaintiff. In the present case, the agent, that is Defendant No. 3 has not entered into the contract with the Plaintiff and thus cannot be sued for the damages for breach of contract by Defendant No. 1. In **Prem Nath Motors Limited** (supra) the Hon'ble Supreme Court held:

"7. Section 230 of the Contract Act categorically



makes it clear that an agent is not liable for the acts of a disclosed principal subject to a contract of the contrary. No such contract to the contrary has been pleaded. An identical issue was considered by this Court in the case of **Marine Contained Services South (P) Ltd. v. Go Go Garments,** where a similar order passed under the Consumer Protection Act was set aside by this Court. It was held that by virtue of Section 230 the agent could not be sued when the principal had been disclosed. A similar view has been expressed by a three judge Bench of this Court in Civil Appeal 6653/2005 arising out of S.L.P. (C) No. 19562/2004."

This court in **Tristar Consultants** (supra) held:

"26. A perusal of Section 230 of the Indian Contract Act 1872 shows that unless an agent personally binds himself, an agent is not personally liable for contracts entered into by him on behalf of his principal.

27. I may note an exception. The exception is that where an agent has contracted on behalf of a principal who is unnamed and undisclosed, on properly constituted pleadings and on so establishing, such an agent who acts on behalf of a undisclosed principal may be personally liable for a contract entered into by him.

28. To interpret the law as is sought to be projected by the petitioner would mean negation of the concept of a company being limited by its liability as per the memorandum and articles of association of the company. Other than where directors have made themselves personally liable i.e. by way of guarantee, indemnity etc. liabilities of directors of a company, under common law, are confined to cases of malfeasance and misfeasance i.e. where they have been guilty of tort towards those to whom they owe a

duty of care i.e. discharge fiduciary obligations. Additionally, qua third parties, where directors have committed tort. To the third party, they may be personally liable.

29. For example by making false representations about a company, a director induces a third party to advance a loan to the company. On proof of fraudulent misrepresentation, a director may be personally liable to the third party.

30. But this liability would not flow from a contract but would flow in an action at tort. The tort being of misrepresentation of inducement and causing injury to the third party having induced the third party to part with money." **(Para 6)**

**Important Issue Involved:** In the absence of any contract to that effect an agent cannot personally enforce contracts entered into by him on behalf on his principal, nor is he personally bound by him.

**[Sh Ka]**

**APPEARANCES:**

**FOR THE PLAINTIFF** : Ms. Swega Agarwal, Advocate.

**FOR THE DEFENDANTS** : Mr. P.V. Dinesh, Advocate for Defendant No. 1. Mr. Vikas Mehta, Mr. Rajat Sehgal and Ms. Vandana Anand, Advocate for Defendant No. 2. Mr. Anil Airi, Ms. Shreya Bhandari and Mr. Hemant Manjani, Advocate No. 3.

**CASES REFERRED TO:**

1. *Prem Nath Motors Limited* vs. *Anurag Mittal,* 2009 (16) SCC 274.
2. *Tristar Consultants* vs. *M/s. Customer Services India Pvt. Ltd. and Another,* AIR 2007 Delhi 157.



**RESULT:** Application disposed of.

**MUKTA GUPTA, J. (ORAL)**

**1.** Learned counsel for the Defendant No. 3/the applicant contends that the Defendant No. 3 is neither a necessary nor proper party to the present suit and thus be deleted from the array of parties. The contract was entered into between the Plaintiff and the Defendant No. 1/Defendant No. 2. The Defendant No. 3 is only an agent and when the principal is known no suit would be maintainable against the agent. Referring to Section 23 of the Indian Contract Act it is contended that the agent is not personally bound by the acts of the principal and no presumption arises against the agent. Reliance is placed on **Prem Nath Motors Limited vs. Anurag Mittal,** 2009 (16) SCC 274 and **Tristar Consultants vs. M/s Customer Services India Pvt. Ltd. and Another,** AIR 2007 Delhi 157.

**2.** Learned counsel for the Plaintiff on the other hand contends that the Defendant No. 3 is a necessary and proper party. Defendant No. 3 delivered the goods and the delivery was found to be short and thus the cause of action arises against the Defendant No. 3 and hence he cannot be deleted from the array of parties.

**3.** I have heard learned counsel for the parties.

**4.** The facts pleaded in the plaint are that the Plaintiff which is a private limited company incorporated under the Companies Act, 1956 undertook the project awarded to it by the Unique Identification Authority of India (UIDAI) for data capture of residents of Delhi and their enrollment process for facilitating the process of issuance of ADHAAR cards by Delhi Government. For the execution of the project the Plaintiff required computer equipments which would adhere to the requirements/guidelines as stipulated and provided by the UIDAI. One of the mandatory requirements in the check list was that the laptops used for the project should be '32 BIT operating system' and not '64 BIT operating system'. Thus the Plaintiff purchased various computer products/equipments/its peripherals etc. of Defendant Nos. 1 and 2 during the period June, 2011 to September, 2011. The Defendant Nos. 1 and 2 are sister concerns wherein the Defendant No. 1 is involved in selling various electronic/ computer products/peripherals relating to the information technology under

the mark of Hewlett Packard (HP) and Defendant No. 2, offers/gives finance/funding facility of payment of bills to its customers to facilitate the purchase of computer equipments/products. The Defendant No. 3 is one of the authorized distributor/supplier of the products of HP Company. In September/October, 2011 the Plaintiff approached the Defendant No. 2 for availing of Rs. 1,57,59,012.22 for finance/funding facility for purchase of computer equipments/products/peripherals required by the Plaintiff with specific condition on the Plaintiff by the Defendant No. 2 that it would be mandatory for the Plaintiff to purchase 50% products of Defendant No. 1. The Plaintiff placed orders for purchase of 215 laptops of brand HP to Defendant No. 1 on 3rd October, 2011 which was also financed/funded by the Defendant No. 2. The Plaintiff signed a master rental and finance agreement dated 19th October, 2011 with the Defendant No. 2 along with all other necessary documents annexed with the aforesaid agreement. As mandated by the Defendant No. 2 the Plaintiff also furnished the bank guarantee for a sum of Rs.44,62,125/- and issued 24 post dated cheques of Rs. 7,82,751/- each in favour of the Defendant No. 2. That out of the aforesaid 215 laptops only 127 HP laptops were delivered to the Plaintiff on 28th October, 2011 by the Defendant No. 3 and the remaining 88 laptops were not delivered at all to the Plaintiff. Further the aforesaid 127 HP laptops were neither in consonance with the specifications of the purchase orders and had 65 Bit operating system installed in them instead of 32 Bit operating system. The Plaintiff vide its email dated 29th October, 2011 apprised the facts to the representative of the Defendant No. 2 Mr. Rohit Kumar and requested him to change all the laptops. The emails were replied by Mr. Rohit Kumar Arora on 31st October, 2011 assuring to resolve the issue by reloading and installing 32 Bit operating system on the said 127 HP laptops. It is further contended that despite assurance the needful was not done and after lot of persuasion 127 laptops were finally picked up by the representative of the Defendant No. 3 on 23rd November, 2011 after an assurance of the representative of the Defendant No. 1 that they shall replace the 127 laptops immediately with new laptops in conformity with the purchase orders. It is contended that since out of 215 laptops only 127 laptops were supplied the Defendant No. 2 did not have the right to invoke the bank guarantee of Rs. 44.62.125/- and/or to encash the post dated cheques. Thus the Plaintiff by the present suit claims damages against the Defendants.

**5.** It is well settled that for deciding the application under Order VII



Rule 11 CPC r/w Order I Rule 10 CPC the averments made in the plaint have to be read by way of demurrer. The only averments in the entire plaint against the Defendant No. 3 is that the Defendant No. 3 is the authorized distributor and supplied the products of HP company, that the Defendant No. 3 delivered to the Plaintiff 127 HP laptops instead of 215 HP laptops, did not deliver the remaining 88 laptops and finally after great persuasion 127 HP laptops were picked up by the representative of the Defendant No. 3 on 23rd November, 2011. Admittedly there is no privity of contract between the Plaintiff and the Defendant No. 3. Further admittedly the Defendant No. 3 is an agent of Defendant no. 1 Company, its authorized distributor/supplier. It is in the light of these averments it is to be seen whether the Defendant No. 3 is a necessary party or not. Section 230 of the Indian Contract Act (in short 'Contract Act') provides as under:-

> **230. Agent cannot personally enforce, nor be bound by, contracts on behalf of principal.**- In the absence of any contract to that effect an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.
>
> **Presumption of contract to contrary.**- Such a contract shall be presumed to exist in the following cases: -
>
> (1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;
>
> (2) Where the agent does not disclose the name of his principal;
>
> (3) where the principal, though disclosed, cannot be sued."

**6.** It is thus evident that in terms of Section 230 of the Contract Act, in the absence of any contract to that effect an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by him. Further there is no presumption to the contrary as the name of the principal is known to the Plaintiff. In the present case, the agent, that is Defendant No. 3 has not entered into the contract with the Plaintiff and thus cannot be sued for the damages for breach of contract by Defendant No. 1. In **Prem Nath Motors Limited** (supra) the Hon'ble Supreme Court held:

> "7. Section 230 of the Contract Act categorically makes it clear that an agent is not liable for the acts of a disclosed principal

subject to a contract of the contrary. No such contract to the contrary has been pleaded. An identical issue was considered by this Court in the case of **Marine Contained Services South (P) Ltd. v. Go Go Garments,** where a similar order passed under the Consumer Protection Act was set aside by this Court. It was held that by virtue of Section 230 the agent could not be sued when the principal had been disclosed. A similar view has been expressed by a three judge Bench of this Court in Civil Appeal 6653/2005 arising out of S.L.P. (C) No. 19562/2004."

This court in **Tristar Consultants** (supra) held:

"26. A perusal of Section 230 of the Indian Contract Act 1872 shows that unless an agent personally binds himself, an agent is not personally liable for contracts entered into by him on behalf of his principal.

27. I may note an exception. The exception is that where an agent has contracted on behalf of a principal who is unnamed and undisclosed, on properly constituted pleadings and on so establishing, such an agent who acts on behalf of a undisclosed principal may be personally liable for a contract entered into by him.

28. To interpret the law as is sought to be projected by the petitioner would mean negation of the concept of a company being limited by its liability as per the memorandum and articles of association of the company. Other than where directors have made themselves personally liable i.e. by way of guarantee, indemnity etc. liabilities of directors of a company, under common law, are confined to cases of malfeasance and misfeasance i.e. where they have been guilty of tort towards those to whom they owe a duty of care i.e. discharge fiduciary obligations. Additionally, qua third parties, where directors have committed tort. To the third party, they may be personally liable.

29. For example by making false representations about a company, a director induces a third party to advance a loan to the company. On proof of fraudulent misrepresentation, a director may be personally liable to the third party.

30. But this liability would not flow from a contract but would



flow in an action at tort. The tort being of misrepresentation of inducement and causing injury to the third party having induced the third party to part with money."

**7.** In the facts of the case, though the plaint is not liable to be rejected for mis-joinder of Defendant No. 3 however, the Defendant No. 3 is liable to be deleted from the array of parties as he is neither a proper party nor a necessary party.

Application is disposed of deleting the Defendant No. 3 from the array of parties.

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**ILR (2013) V DELHI 3860**
**I.A.**

**MAHENDER KUMAR KHURANA .....PLAINTIFF**

**VERSUS**

**RAJINDER KUMAR KHURANA & ORS. .....DEFENDANT**

**(MUKTA GUPTA, J.)**

**I.A. NO. : 10889/2011 (O.VII R.11 CPC) IN CS(OS) NO. : 453/2011** **DATE OF DECISION: 11.10.2013**

**(A) Code of Civil Procedure, 1908—Order VII Rule 11 & Order II Rule 2—Plaintiff filed suit seeking partition of suit properties and consequential relief of possession of 1/6th share in suit properties and profits arising therefrom—Defendant no. 1 moved application seeking rejection of plaint on ground suit barred by limitation—As per defendants, plaintiff had earlier filed a suit seeking declaration of joint ownership with defendant no. 1 and permanent injunction—Suit was dismissed as not maintainable—Fresh suit filed by him was barred**

**by limitation as plaintiff had requisite knowledge about stands of defendants in earlier suit, so he cannot seek extension of time in earlier suit, so he cannot seek extension of time in present suit on ground that matter was being mediated. Held:- Once the period of limitation starts running, the same cannot be set at naught by settlement talks going on.**

The main crux of the argument of the learned counsel for the defendant No.1 is that the present suit is hopelessly barred by limitation as once the stand of the defendants was clear in the earlier suit, the plaintiff had requisite knowledge about the same and the plaintiff cannot seek extension of time in the garb that Shri Sudershan Kumar Khurana was mediating in the matter. It is further contended that once the period of limitation starts running, the same cannot be postponed for any oral settlement, as alleged in the present plaint. I find merit in the contention of the learned counsel for the defendant No.1/ applicant that since the plaintiff had already filed a suit and was well aware of all the facts he cannot seek extension of period of limitation on the ground that Shri Sudershan Kumar Khurana was mediating. Further by the earlier suit the plaintiff had accepted that the other branches of late Shri Isher Dass i.e. Shri Sudershan Kumar and Nand Kumar were enjoying their own properties and the plaintiff was a co-owner only in respect of the properties which fell to the share of Shri Shyam Sunder i.e. C-315 Mayapuri Industrial Area, Phase-II, New Delhi and Shop No. 2961 Bahadurgarh, Delhi whereas by the present suit, the plaintiff claims himself to be the co-owner and in joint possession of all the properties purchased by Shri Isher Dass Khurana and his sons claiming himself to be entitled to 1/6th share therefrom. **(Para 9)**

**(B) Code of Civil Procedure, 1908—Order VII Rule 11 & Order II Rule 2—Plaintiff filed suit seeking partition of suit properties and consequential relief of possession of 1/6th share in suit properties and profits arising therefrom—As per defendants, Plaintiff in earlier suit**



**prayed for declaration and injunction and did not seek relief of partition, so he cannot maintain present suit seeking relief of partition now. Held:- In an earlier suit for declaration and injunction relief for partition not sought, there is a bar U/o II Rule 2 Civil Procedure Code to maintain fresh suit seeking relief of partition in subsequent suit.**

It is thus evident that the plaintiff was required to file the present suit within three years when the cause of action accrued. The plaintiff in the earlier suit asserted his right as a co-owner with defendant No.1 and now as co-owner with all the defendants. The stand of the defendants is that the plaintiff was not the co-owner in the properties and had already taken his share in the form of Rs. 2 lakhs as he was settled in Canada and had no intention of coming to Delhi. Further the present suit is also barred under Order II Rule 2 CPC. The earlier suit for declaration and injunction filed by the plaintiff was dismissed as not maintainable, as no relief of partition was sought. The plaintiff cannot maintain the present suit seeking this relief. Further the plaintiff cannot also seek the extension of the period of limitation on the ground that Shri Sudershan Kumar Khurana was mediating. Once the period of limitation starts running, the same cannot be set at naught by settlement talks going on. In the present suit the only fresh fact pleaded is the receiving of a forged dissolution Deed dated 5th October, 1992. The plaintiff has not sought the declaration of the said dissolution Deed to be forged and fabricated in the present suit. Further the said dissolution Deed had no effect on the rights of the partners inasmuch as the partnership stood dissolved automatically on the death of one of the partners i.e. Smt. Satyawati Devi on 5th October, 1992 as per Section 42 of the Partnership Deed. **(Para 11)**

**Important Issue Involved:** (A) Once the period of limitation starts running, the same cannot be set at naught by settlement talks going on.

(B) In an earlier suit for declaration and injunction relief for partition not sought, there is a bar U/o II Rule 2 Civil Procedure Code to maintain fresh suit seeking relief of partition in subsequent suit.

**[Sh, Ka]**

**APPEARANCES:**

**FOR THE PLAINTIFF** : Pramod Kumar Sharma, Advocate.

**FOR THE DEFENDANTS** : Mr. Naresh Thanai, Advocate for D-1. Mr. Arjun Pant, Advocate. for DDA. MR. Ajay Laroia, Advocate. for D-3, Ms. Meenakshi Jain, Ms. Sandesh Jindal, Advocate D-4.

**CASES REFERRED TO:**

1. *Raj Ahuja* vs. *Major General Satish Mediratta and Anr.* CS(OS) No. (OS) 2822/2011.
2. *Nanak Chand and Ors.* vs. *Chander Kishore and Ors.* AIR 1982 Delhi 520.
3. *Neelavathi and Ors.* vs. *N. Natarajan and Ors.* (1980) 2 SCC 247.
4. *Mst. Rushmabai* vs. *Lala Laxminarayanan and Others,* : [1960]2SCR253.
5. *Raghunath Das* vs. *Gokal Chand and Another,* AIR 1958 Sc 829.
6. *Govindrao and Another* vs. *Raja Bai and Another* MANU/PR/0076/1930.
7. *Mst. Bolo* vs. *Mt. Koklen and Others,* MANU/PR/0054/1930.
8. *Kawal Narain* vs. *Budh Singh,* AIR 1917 P.C. 39.
9. *Mt. Girju Bai* vs. *Sada Dhundiraj and Others,* AIR 1916 P.C. 104 Sura.
10. *Narain* vs. *Ikbal Narain,* (1913) 40 I.A. 40.

**RESULT:** Suit rejected.



**MUKTA GUPTA, J.**

**1.** By this application the defendant No.1 seeks rejection of the plaint, inter alia, on the ground that the suit is barred by limitation and for insufficiency in filing Court fees.

**2.** Learned counsel for the applicant/ defendant No.1 contends that the present suit has been instituted by the plaintiff seeking partition of the suit properties and the consequential relief of possession in favour of the plaintiff of his 1/6th share in the suit properties and the profits arising therefrom. Admittedly, as per the documents filed by the plaintiff the plaintiff had filed an earlier suit against the defendants being CS(OS) No. 94/96 seeking a decree of declaration of joint ownership with defendant No.1, permanent injunction in favour of the plaintiff being the legal heirs of late Shri Shyam Sunder and against the defendant No.1, his representatives etc. from selling, alienating, transferring property No. C-315 Rewari Line Industrial Area (also known as Mayapuri Industrial Area) Phase-II, New Delhi and shop/ property No. 2961 Bahadur garh Road, Sadar Bazar or parting with the possession and also restraining the defendant No.1 from raising any construction or addition therein. The suit was based on an alleged family arrangement dated 23rd March, 1982 between the families of the sons of late Lala Isher Dass. In the said suit, written statement was filed by the defendant No.1 who is also the defendant No.1 herein stating that there was no family settlement dated 23rd March, 1982 as alleged. It was further mentioned that Shri Shyam Sunder the father of plaintiff and defendant No.1 was owner of 50% share in M/s Shyam Sunder Nand Kumar and after his death his said half share devolved on the plaintiff, defendant No.1 and his wife Smt. Satyawati in equal shares. Smt. Satyawati continued in business. As the plaintiff was well settled in Canada and there was no likelihood of his coming back, the properties were partitioned and the plaintiff took his share in the form of cash to the extent of Rs. 2 lakhs from defendant No.1 in presence of defendants No.2&3. Further the property No. 2916 Sadar Bazar was only a rented property possession of which was handed over to the landlord in the year 1985 and property No. C-315 New Mayapuri Industrial Area, Phase-II is owned by defendant No.1 along with his sons as owner and plaintiff has no entitlement to the same. Admittedly, the said suit of the plaintiff was dismissed as not maintainable. Thus, the factum of the plaintiff not being entitled to any share in the suit property as alleged was known to the plaintiff admittedly by way of

written statement of the defendant No.1 which was filed prior to April, 1997. The present suit having been instituted in January, 2011 is clearly barred by limitation. Once the limitation starts running, the plaintiff cannot seek extension of period on the pretext that some mediation was going on and he was assured that he would get his due share. Further mediation between the parties is no acknowledgment of the liability. It is further stated that the plaintiff is admittedly not in actual possession of the property, thus the Court fees paid is deficient and the suit is liable to be rejected on this count as well. The contention of the plaintiff that the dissolution of the partnership vide dissolution deed dated 5th October, 1992 is a fabricated document is wholly incorrect as under Section 42 of the Partnership Act on death of a partner, the partnership stands dissolved. Thus, the present suit be rejected.

**3.** Learned counsel for the plaintiff/ non-applicant on the other hand contends that by way of the present suit the plaintiff has sought partition of his 1/6th share in all the suit properties as mentioned in Para 38 and is not confined to the reliefs as mentioned in the earlier suit. The cause of action is based on the fact that the plaintiff was assured of the mediation by Shri Sudershan Kumar Khurana, however when Shri Sudershan Kumar Khurana handed over a dissolution deed allegedly signed and executed by the plaintiff on 5th October, 1992 and the partnership deed dated 1st July, 1980 on 22nd February, 2007 the plaintiff was shocked to see the forged and fabricated dissolution deed dated 5th October, 1992 and thus filed criminal complaint before the SHO PS Paschim Vihar. Shri Sudershan Khurana also died on 19th February, 2009 and since the defendants were bent upon usurping the share of the plaintiff, the plaintiff sent legal notices dated 2nd March, 2010 and filed the present suit in January, 2011. The prayers in the present suit are different from the ones in the earlier suit. The nature of the suit being different is thus not barred under Order 2 Rule 2 CPC as held by this Court in **Nanak Chand and Ors. Vs. Chander Kishore and Ors.** AIR 1982 Delhi 520. There is no dispute that a suit for physical partition is governed by Article 113 of the Limitation Act, however the same has to be brought within three years from the time when the right to sue accrues. At this stage the averments in the plaint have to be read as demurer and in view of an independent cause of action, the present suit is not barred by limitation. Referring to **Raj Ahuja Vs. Major General Satish Mediratta and Anr.** CS(OS) No. (OS) 2822/2011 decided by



this Court on 17th September, 2011, MANU/DE/4621/2012 it is contended that the co-owner is in constructive possession of the suit of the joint properties and the suit cannot be thus barred by limitation. Relying upon **Neelavathi and Ors. Vs. N. Natarajan and Ors.** (1980) 2 SCC 247 it is contended that co-owners are in joint possession unless there is a clear ouster and thus no separate Court fees is required to be paid for the relief of possession.

**4.** Heard learned counsel for the parties and perused the record. The plaintiff who is the brother of defendant No.1, has filed the present suit seeking a decree of partition in respect of his 1/6th share in the suit properties with consequential relief of possession and profits out of the suit properties. It is stated in the plaint that Shri Isher Dass Khurana and his three sons Shyam Sunder Khurana, Sudershan Kumar Khurana and Shri Nand Kumar Khurana had been carrying on their joint business under partnership firms in the name and style of M/s Isher Dass Sudershan Kumar from Shop No. 2960, Bahadurgarh Road, Delhi-110006 and M/s Shyam Sunder Nand Kumar from Shop No. 2961, Bahadurgarh Road, Delhi 110006. That out of the earnings from the joint business which they had been carrying on in the name and style of the abovementioned partnership firms, three immovable properties were acquired i.e. (a) an industrial plot measuring 421.30 square yards bearing No. C-2/9, Mayapuri Industrial Area, Phase-II, Mayapuri, New Delhi acquired in the name of M/s. Shyam Sunder Nand Kumar; (b) an industrial plot measuring 421.30 square yards bearing No. C-315 Mayapuri Industrial Area, Phase-II, Mayapuri, New Delhi acquired in the name of M/s Isher Dass Sudershan Kumar and (c) an industrial plot measuring 440 square yards approximately bearing No. A-101/9, Wazirpur Industrial Area, Wazirpur, New Delhi acquired in the name of M/s Isher Dass Sudershan Kumar. Construction on the aforesaid industrial plots was raised by Shri Isher Dass and his three sons out of the earnings from the joint business and thus all the aforesaid immovable properties are as such their joint properties. In addition to the three industrial plots, Shri Isher Dass and his sons had also acquired rights of tenancy on pugree basis in shop No. 2960, Bahadurgarh Road, Delhi, in the name of M/s Isher Dass Sudershan Kumar and Shop No. 2961, Bahadurgarh Road, Delhi in the name of M/s Shyam Sunder Nand Kumar. The tenancy rights were also joint as they were carrying on their joint business from the aforesaid two shops and industrial properties. The pedigree of Shri Shyam Sunder Khurana is as under:

Isher Dass (deceased)

| | | |
|---|---|---|
| Shyam Sunder (Deceased son) | Sudershan Kumar (Deceased son) | Nand Kumar |
| Satyawati (deceased wife) | Nirmal Khurana (wife) | |
| Mahender (son) | Sadhna Vinayak (married daughter) | |
| Rajinder (son) | Archana Pabbi (married daughter) | |

**5.** Shri Shyam Sunder Khurana son of Shri Isher Dass died intestate on 24th October, 1976 leaving behind his wife and two sons i.e. Smt. Satyawati (wife), Shri Mahender Khurana (plaintiff) and Shri Rajinder Khurana (defendant No.1) herein. The plaintiff is settled in Canada and in 1980 when he came to India, a deed of partnership was executed of M/s Shyam Sunder Nand Kumar, 2961, Bahadurgarh Road, Delhi 110006 whereby Mr. Anil Kumar, son of defendant No.5 Shri Nand Kumar had retired with effect from 31st March, 1980 and Shri Sudershan Kumar Khurana was taken as working partner in the said firm. As per the partnership deed, the profit and loss sharing ratio of the partners of the firm was in the following proportion:

i) Shri Nand Kumar (Defendant No.5) 45%

ii) Shri Rajender Kumar (Defendant No.1) 20%

iii) Smt. Satyawati (since Deceased) 10%

iv) Shri Mahender Kumar (Plaintiff) 10%

v) Shri Sudershan Kumar (since Deceased) 15%

**6.** Thereafter the plaintiff neither signed any Deed of partnership nor any Deed of dissolution of the said partnership and as such continued to remain the partner in the said firm till today. In the year 1981 or 1982, Shri Isher Dass also died and after his death, a family agreement was executed between two sons of Shri Isher Dass, i.e., Shri Sudershan Kumar Khurana and Shri Nand Kumar and also the legal heirs of late Shri



Shyam Sunder Khurana, i.e. the plaintiff and defendant No.1. The contents of the said family arrangement which was not got registered are as under:

"FAMILY AGREEMENT BETWEEN THE FAMILIES OF SONS OF LATE L. ISHER DASS S/O LATE LALA BANSI LAL.

1) The sons of late L. Isher Dass and their respective families have agreed to divide the total assets and their interests in business e.g. M/s Isher Dass Sudershan Kumar, 2960, Bahadurgarh Road, Delhi-110006 and M/s Shyam Sunder Nand Kumar, 2961, Bahadurgarh Road, Delhi-110006 on March 23, 1982.

2) M/s Shyam Sunder Nand Kumar own that property situated at C-2/9, Mayapuri Industrial Area, Phase-II and is in possession of the shop situated at 2961, Bahadurgarh Road.

3) M/s Isher Dass Sudershan Kumar own the properties situated at C-315, Mayapuri Industrial Area Phase III and A-101/9, Wazirpur Industrial Area and are in possession of the shop situated at 2960, Bahadurgarh Road, Delhi.

4) That FAMILIES HAVE AGREED TO DISTRIBUTE THE ABOVE MENTIONED ASSETS IN THE FOLLOWING MANNER:

A. Mr. Sudershan Kumar will get the property located at C-2/9, Mayapuri Industrial Area, Phase-II and will withdraw all his interest in all other properties and shops.

B. Mr. Nand Kumar and his family including Mr. Nalin Kumar will get property located at A-101/9, Wazirpur Industrial Area and the shop located at 2960, Bahadurgarh Road, and they will withdraw all their interests in other properties and shops.

C. The legal heirs of late Shri Shyam Sunder will equally share the property located at C-315, Mayapuri and the shop situated at 2961, Bahadurgarh Road and will withdraw all their interest in all other properties and shops.

5) The properties situated at C-2/9, Mayapuri Industrial Area and C-315, Mayapuri Industrial Area are to be interchanged between M/s Isher Das Sudershan Kumar and M/s Shyam Sunder Nand

Kumar in DDA. All expenses of interchange are to be shared equally by all families. Any other DDA related expenses will be shared equally as well unless somebody sells his property before the DDA transaction is completed.

6) Mr. Sudershan Kumar and Mr. Nand Kumar and their families will operate business under the name of M/s Isher Dass Sudershan Kumar without any link with each other's business. The heirs of late Shri Shyam Sunder will operate as Shyam Sunder Nand Kumar, if they wish. 7) The total working capital, assets and liabilities of both firms E.G. M/s Isher Dass and Sudershan Kumar and M/s Shyam Sunder Nand Kumar will be equally divided between the families of sons of late Lala Isher Dass.

8) Mr. Sudershan Kumar has agreed to pay Mr. Nand Kumar and family Rs. 20,000/- as compensation within a year after separation.

9) All the liabilities of M/s Shyam Sunder Nand Kumar towards Bank, Creditors, Loanees have to be cleared satisfactorily before separation.

10) Till such time that it is possible to divide the assets and interests between the three families in the above manner the business will continue to operate as at present as mutually agreed to by the three families.

Sd/- (Nand Kumar)
Sd/-(Nalin Kumar)
Sd/-(Sudershan Kuamr)
Sd/-(Mahender Kumar)
Sd/-(Rajinder Kumar)
Sd/-(Smt. Satyawati)"

**7.** The Plaintiff had executed a General Power of Attorney on 15th July, 1983 in favour of Shri Ramesh Kumar Manchanda known to the plaintiff and defendant No.1 in good faith and trust as the mother of the plaintiff was also alive at that time and there was no reason to disbelieve the defendant No.1 or the uncles. Though the plaintiff was settled in Canada, however he had been coming frequently to India and was also contributing to the family in all responsibilities. The mother of the plaintiff and defendant No.1, Smt. Satyawati died intestate on 5th October, 1992



and the plaintiff was informed of the death after one week by his uncle Shri Sudershan Kumar Khurana and by that time the cremations and other ceremonies had already taken place. Thus, after the death of the plaintiff's mother, the plaintiff and defendant No.1 became the equal co-owners of the movable and immovable properties which belonged to late father Shri Shyam Sunder and late mother Smt. Satyawati. Though the defendant No.1 agreed to pay and deposit the share of plaintiff, however he did not do so despite promises. In June 1993 when the plaintiff was in India, the defendant No.1 purchased some stamp papers and got some documents prepared upon the same regarding settlement, however since no settlement was finally arrived, the documents were not signed by the plaintiff or the other parties. In 1996, the plaintiff came to India and filed a suit for declaration and permanent injunction against the defendants No.1 and 5, Shri Sudershan Kumar and Shri Nalin Kumar (son of defendant No.5) relying upon the family arrangement. The aforesaid suit being suit No. 94/96 was however dismissed as not maintainable and the plaintiff could not amend the said suit as well for partition because Shri Sudershan Kumar had mediated. Shri Sudershan Kumar assured that the plaintiff would get his due share in all properties and that the plaintiff should not insist for partition because the same would adversely affect the business of the family and assured that the plaintiff's assets were appreciating. In the interest of the family, the plaintiff did not pursue the partition at that time. The properties continued to be held jointly, in joint ownership and possession by plaintiff, defendant No.1, Shri Sudershan Kumar Khurana and defendant No.5, the plaintiff being in constructive possession thereof. However, Shri Sudershan Kumar did nothing and was trying to create documents so as to divest the plaintiff of his share in the aforesaid properties and usurp the same. On 22nd February, 2007 the plaintiff approached his uncle Shri Sudershan Kumar Khurana and requested him to get plaintiff's share in the ancestral properties, when Shri Sudershan Kumar Khurana handed over a dissolution deed alleged to have been signed and executed by the plaintiff on 5th October, 1992 and also the partnership deed dated 1st July, 1980. The plaintiff found that the dissolution deed dated 5th October, 1982 was forged and fabricated by the defendant No.1 in collusion with his uncle on a stamp paper bearing date of purchase as 6th October, 1992 whereas on the said date the plaintiff was not in India and the plaintiff's mother had expired which fact was informed to the plaintiff after about a week. The plaintiff lodged a complaint in this regard to the SHO, PS Paschim Vihar, DCP Crime

Branch and the Commissioner of Police, Delhi on 8th February, 2008. Shri Sudershan Khurana also passed away on 19th February, 2009 and thereafter all the defendants are trying to usurp the share of the plaintiff. Thus the plaintiff has filed the present suit.

**8.** In the plaint it is admitted by the plaintiff that before filing the present suit the plaintiff had filed a suit in 1996 being suit No. 94/96 titled as **"Mahender Kumar Khurana Vs. Rajinder Kumar Khurana and Ors."** which was dismissed as not maintainable and the plaintiff could not amend the suit as well for partition. The plaintiff has placed on record the plaint filed by the plaintiff and the written statement filed by the defendant No.1 in suit No. 94/96. The averments in suit No. 94/96 filed before the Senior Civil Judge, Delhi which are relevant for the decision of the present application are that in the said suit the plaintiff had relied upon the family agreement between the parties arrived at after the death of Shri Isher Dass which is also mentioned in Para 11 of the present plaint. The plaintiff also stated that under the said agreement the parties started separate business in the property as agreed/ settled under the said agreement and as Smt. Satyawati the mother of the plaintiff and defendant No.1 had passed away in 1992, the plaintiff and defendant No.1 being her legal heirs and legal heirs of late Shri Shyam Sunder became the owners of properties C-315, Mayapuri Phase-II, New Delhi and shop No. 2961, Bahadurgarh Road as co-owners in joint possession. It is alleged that the defendant No.1 despite agreement did not pay to the plaintiff his share. To complete the formalities, the plaintiff executed a General Power of Attorney in favour of Shri Ramesh Kumar Manchanda, however the parties did not move the DDA for inter-se change and other formalities. It is also stated that in June 1993 when plaintiff came to India, defendant No.1 purchased the stamp paper and agreed to settle the matter, however nothing came out of the settlement as the intention of defendant No.1 was malafide and thus the deeds were not signed. Defendant No.1 did not render true accounts/ income to the plaintiff. When the plaintiff was in India in 1993, the defendant No.1 got executed some documents for settlement from the plaintiff, however the defendant No.1 did not honour the settlement and thus the bank account opened by the wife of the plaintiff was closed in 1995. It is alleged that the plaintiff repeatedly visited India in 1983, 1986, 1989, 1993 and again in June 1993 and finally on 10th February, 1996 giving cause of action to the plaintiff herein to file the said suit. In the said suit the prayer of the plaintiff was



for a decree of declaration in favour of the plaintiff and against defendant No.1 declaring the plaintiff as joint owner of equal share in property No. C-315, Rewari Line, Industrial Area (also known as Mayapuri Industrial Area, Phase-II) with defendant No.1 and in property No. 2961 Bahadurgarh, Sadar Bazar as per family agreement. A decree of permanent injunction was also sought and no decree was sought against defendant No.2 to 4 therein i.e. the uncles. In the said suit the written statement filed by defendant No.1 stated that the suit of the plaintiff was based on non-existing documents. The alleged family settlement on the basis of which plaintiff had filed the suit was inadmissible document and did not exist, as such could not create any right in favour of the plaintiff in the properties. It was also stated that the plaintiff was not entitled to any relief in respect of suit property No. 2961 Bahadurgarh Road, Sadar Bazar, Delhi as the same was only rented property, possession of which has been handed over to the landlord in the year 1985 in accordance with the oral settlement and as far as property No. C-315, Rewari Line Industrial Area, Phase-II, New Delhi was concerned, the plaintiff did not have any right title or interest therein as the defendant No.1 was holding the said property as owner along with his sons. It was also stated that the Plaintiff had relinquished his rights in respect of the properties left behind by Shri Shyam Sunder and 14 years had elapsed after the alleged oral settlement and the suit was filed highly belatedly and not within the period of limitation. It was further explained in the written statement filed by the defendant No.1 that by virtue of the agreement dated 23rd March, 1982 the plaintiff intended to defer the partition of the property by the terms and conditions mentioned therein which were not in accordance with law and were not acceptable, thus the same was cancelled and destroyed. It was further stated that it seems that the plaintiff had secretly kept a photocopy of the same on the basis of which the plaintiff had been claiming ownership of half the share in the property. It was clearly stated that Shri Shyam Sunder was the owner of 50% share in the firm M/s Shyam Sunder Nand Kumar and after his death half share devolved upon the plaintiff, defendant No.1 as well as Smt. Satyawati in equal shares. Smt. Satyawati continued with the business and as far as the plaintiff is concerned he was settled in Canada and there was no likelihood of his coming back. Therefore it was agreed that the properties be partitioned and as far as the share of the plaintiff in the immovable properties is concerned he expressed his intention that the same should be given in cash. Smt. Satyawati never intended to give her share to the plaintiff as

he was well settled in Canada and she was being looked after and maintained by defendant No.1 and his wife and had love and affection of her grandsons i.e. the sons of defendant No.1. It was also noted that the plaintiff who was residing in Canada did not even turn up at the demise of his father or the mother. The plaintiff visited India in 1982 when partition of the properties was effected and the plaintiff received his share in the form of cash to the extent of Rs. 2 lakhs from the defendant No.1 in presence of defendant No.2 & 3 therein and others and thus the defendant No.1 and his sons are the absolute owners of the property. The property No. 2961 Bahadurgarh Road, Delhi was a tenanted property and its possession was taken over by the landlord in 1985 which fact was within the knowledge of the plaintiff. It may be noted that defendant No. 2 to 4 who are the uncles and son of defendant No.3 in the earlier suit also filed their written statement. They have also stated that the defendant No.1 is the owner of C-315 Rewari Line Industrial Area, Phase-II in accordance with the oral settlement arrived at in the year 1985. They have also stated that in fact a settlement was arrived at in between the parties and then plaintiff received his share and thereafter he has permanently settled in Canada for the last 30 years. Since he was settled in Canada he himself suggested to take cash only in lieu of his share.

**9.** The main crux of the argument of the learned counsel for the defendant No.1 is that the present suit is hopelessly barred by limitation as once the stand of the defendants was clear in the earlier suit, the plaintiff had requisite knowledge about the same and the plaintiff cannot seek extension of time in the garb that Shri Sudershan Kumar Khurana was mediating in the matter. It is further contended that once the period of limitation starts running, the same cannot be postponed for any oral settlement, as alleged in the present plaint. I find merit in the contention of the learned counsel for the defendant No.1/ applicant that since the plaintiff had already filed a suit and was well aware of all the facts he cannot seek extension of period of limitation on the ground that Shri Sudershan Kumar Khurana was mediating. Further by the earlier suit the plaintiff had accepted that the other branches of late Shri Isher Dass i.e. Shri Sudershan Kumar and Nand Kumar were enjoying their own properties and the plaintiff was a co-owner only in respect of the properties which fell to the share of Shri Shyam Sunder i.e. C-315 Mayapuri Industrial Area, Phase-II, New Delhi and Shop No. 2961 Bahadurgarh, Delhi whereas



by the present suit, the plaintiff claims himself to be the co-owner and in joint possession of all the properties purchased by Shri Isher Dass Khurana and his sons claiming himself to be entitled to 1/6th share therefrom.

**10.** In none of the decisions relied upon by the plaintiff there was an earlier suit filed by the plaintiff therein making admission of certain facts which are now sought to be denied and a claim based thereon. In **Nanak Chand and Ors.** (supra) relied upon by learned counsel for the plaintiff it was held:

> "(8) After consideration, we agree that the contentions of the plaintiffs ought to prevail on all the points but we wish to say something regarding the article of limitation applicable to the case.
>
> (9) Separation from the joint family involving severance in status with all its legal consequences is quite distinct from the de facto division into specific shares of the joint property. One is a matter of individual decision, the desire to cover himself and enjoy his hitherto undefined and unspecified share separately from the others; whilst the other a natural resultant from his decision is the division and separation of his share which may be arrived at either by private agreement or by arbitration appointed by the parties or in the last resort by the court. One should not confuse the severance of status, with the allotment of shares. Therefore, a division in status takes place when a member expresses his intention to become separate unequivocally and unambiguously ,and makes it known to other members of the family from whom he seeks to separate. The process of communication may vary in the circumstances of each particular case. The filing of a suit for partition is clear expression of such an intention. A decree may be necessary for working out the results of severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate whether he obtains a consequential judgment or not: see **Mt. Girju Bai v. Sada Dhundiraj and Others,** Air 1916 P.C. 104 Sura) **Narain v. Ikbal Narain,** (1913) 40 I.A. 40, and **Kawal Narain v. Budh Singh,** AIR 1917 P.C. 39 partition in its larger sense, no doubt, therefore, consists in a division by which

the share of each co-parcener with respect to all or any of the joint property is. fixed, and once the shares are defined, the partition in the sense of severance of disruption of the family is complete, but after 'the shares are so ascertained', the parties might elect either to have a partition of their shares by metes and bounds' or continue to live together and 'enjoy their property in common as before.' Whether they did one or the other would affect the mode of enjoyment, but not the tenure of the property or their interest in it. The joint ownership turns into possession and enjoyment in common until the physical partition takes place according to the shares standing at the date of severance of status. It is no more in doubt that a suit for such physical partition is governed by Article 120(113 new) as was held in **Raghunath Das v. Gokal Chand and Another,** AIR 1958 Sc 829, and **Mst. Rushmabai v. Lala Laxminarayanan and Others,** : [1960]2SCR253. Such a suit under Article 113 is to be brought within three years from the time when the right to sue accrues. If the date of service of notice is the date from which the limitation is to start, then in virtue of section 30 of the Act, the suit should have been brought latest by 17-5-1969 but it was filed on 23-7-1969. It appears thus ex facie barred by time but ex facto it is not so. The crucial question in such cases is when a right to sue accrues, there can be no right to sue until there is an accrual of the right asserted in the suit and its infringement or, at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted : **Mst. Bolo v. Mt. Koklen and Others,** MANU/PR/0054/1930. Where there are successive invasions or denials of a right, the right to sue under Article 120 (Article 113) accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such right, however, ineffective or innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether the threat effectively invades or jeopardizes the said right: Mst Rukna Bai v. La!a Laxminarayan, : [1960]2SCR253 . The right to partition sprang into existence in this case when the notice of severance and demand for partition was served, but



right to sue did not accrue until the defendant infringed or threatened to infringe that right. The plaintiffs had averred that it was in 1968 and afterwards that the defendant began to infringe the tenancy-in-common and deny their right to share. Such a pleas could be defeated by a specific denial and by proof that the right had been lost on account of ouster and exclusion that is adverse possession for more than the statutory period that is for not less than 12 years, vide **Govindrao and Another v. Raja Bai and Another** MANU/PR/0076/1930. That is the effect of Article 65 and section 27 of the Limitation Act. We are, therefore, of the view that the suit is not barred under Article 113. Consequently, we reject the argument so assiduously and ably built by Mr. Malhotra in this regard.

(10) Mr. Malhotra also tried to urge that the suit was barred by Order 2 Rule 2 Civil Procedure Code , but we do think that the nature of the earlier suit and the present suit being different, there can be no question of such a bar and reject this submission.

**11.** It is thus evident that the plaintiff was required to file the present suit within three years when the cause of action accrued. The plaintiff in the earlier suit asserted his right as a co-owner with defendant No.1 and now as co-owner with all the defendants. The stand of the defendants is that the plaintiff was not the co-owner in the properties and had already taken his share in the form of Rs. 2 lakhs as he was settled in Canada and had no intention of coming to Delhi. Further the present suit is also barred under Order II Rule 2 CPC. The earlier suit for declaration and injunction filed by the plaintiff was dismissed as not maintainable, as no relief of partition was sought. The plaintiff cannot maintain the present suit seeking this relief. Further the plaintiff cannot also seek the extension of the period of limitation on the ground that Shri Sudershan Kumar Khurana was mediating. Once the period of limitation starts running, the same cannot be set at naught by settlement talks going on. In the present suit the only fresh fact pleaded is the receiving of a forged dissolution Deed dated 5th October, 1992. The plaintiff has not sought the declaration of the said dissolution Deed to be forged and fabricated in the present suit. Further the said dissolution Deed had no effect on the rights of the partners inasmuch as the partnership stood dissolved automatically on the death of one of the partners i.e. Smt. Satyawati Devi on 5th October, 1992 as per Section 42 of the Partnership

Deed.

**12.** In view of the aforesaid discussion, the suit is liable to be rejected. Consequently, the application is disposed off rejecting the suit.

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**ILR (2013) V DELHI 3877**
**I.A.**

**DAISY K MEHTA ....PLAINTIFF**

**VERSUS**

**KAPIL KUMAR ....DEFENDANT**

**(MUKTA GUPTA, J.)**

**I.A. NO. : 6975/2012 IN CS(OS) 126/2011** **DATE OF DECISION: 11.10.2013**

**Code of Civil Procedure, 1908—Order XXXVII—Plaintiff preferred suit for recovery U/o XXXVII of Code—Defendant sought for leave to defend and alleged plaintiff failed to show concluded legally enforceable contract with regard to sale and purchase of convertible warrants was entered into between them—Also, on that account defendant was indebted to pay to plaintiff amount mentioned in cheque, plaintiff cannot be granted permission to seek judgment against defendant by way of summary procedure. Held:- Mere issuance of cheque in the absence of documents to show a contract was concluded between the parties. It it cannot be presumed there was a liability to pay debt and cheque was issued in discharge of the liability to enforce the suit U/o XXXVII of Civil Procedure Code.**

The case of the defendant is that in the entire suit it is



nowhere pleaded that 2,50,000 Convertible Warrants were handed over to the defendant along with a duly executed transfer deed by the plaintiff making the defendant a bona fide holder of the warrants and in the absence thereof there was no concluded contract between the parties. Hence the defendant incurred no liability for payment of the dishonoured cheques and thus the same cannot be enforced by a suit under Order XXXVII CPC. Both the learned counsel for the defendant and the plaintiff seek to draw inferences in their favour from the e-mails with regard to possession of Convertible Warrants, however the documents of none of the parties clearly admit/ deny that the Convertible Warrants have been transferred to the defendant. There is no specific averment in the entire plaint that 2,50,000 Convertible Warrants have been handed over to the defendant. Further as noted above, since there is no clear evidence on record placed by the plaintiff to prove that the Convertible Warrants were transferred to the defendant, it cannot be presumed that the defendant incurred a liability and thus the cheque which got dishonoured was issued in discharge of the liability. The affidavit of the plaintiff is silent on this aspect. **(Para 5)**

**Important Issue Involved:** Mere issuance of cheque in the absence of documents to show a contract was concluded between the parties. It it cannot be presumed there was a liability to pay debt and cheque was issued in discharge of the liability to enforce the suit U/o XXXVII of Civil Procedure Code.

**[Sh, Ka]**

**APPEARANCES:**

**FOR THE PLAINTIFF** : Mr. Subhash C. Vashishth, Advocate.

**FOR THE DEFENDANT** : Mr. R, Ramachandra, Mr. Sujeet Kumar Mishra, Advocate.

**RESULT:** Application disposed of.

**MUKTA GUPTA, J.**

**1.** By this application the defendant seeks leave to defend the suit filed by the plaintiff under Order XXXVII CPC.

**2.** Learned counsel for the defendant/ applicant states that by mere issuance of a cheque it cannot be presumed that the defendant was liable to pay a debt and the cheque was issued in discharge of the liability. Since the plaintiff in the entire plaint has not shown that a concluded contract which was legally enforceable, with regard to sale and purchase of Convertible Warrants was entered between the parties and the defendant on that account was indebted to pay to the plaintiff the amount mentioned in the cheque, the plaintiff cannot be granted the permission to seek a judgment against the defendant by way of summary procedure. In the entire plaint or the documents enclosed it is nowhere stated that the possession of the 2,50,000 Convertible Warrants was handed over to the defendant. The cheque that was dishonoured was thus issued in discharge of the liability. From a perusal of the e-mails between the parties a clear inference can be drawn that the possession of the Convertible Warrants was never handed over, and thus Order XXXVII CPC has no application to the facts of the present case. Thus, leave to defend be granted to the defendant.

**3.** Learned counsel for the plaintiff on the other hand contends that from the perusal of the documents it is clear that the defendant was handed-over the Convertible Warrants and the cheque was issued in lieu of the said liability. Thus, no leave to defend be granted.

**4.** Heard learned counsel for the parties. The facts pleaded in the plaint are that the defendant is a promoter/ managing director of M/s. Brushman (India) Limited a company registered under the Companies Act. Brushman (India) Limited issued 36,50,000 Convertible Warrants of Rs. 10/- each at a premium of Rs. 115/- to its promoters and others on preferential basis. As per the terms of issue of Convertible Warrants a sum of Rs. 12.50 per Convertible Warrant was to be paid at the time of making the application. The plaintiff applied for 2,50,000 Warrants and forwarded a cheque along with the application. The plaintiff was finally allotted 2,50,000 Convertible Warrants on 22nd June, 2007 amounting to Rs. 31,25,000/- By his letter dated 27th October, 2007 the defendant approached the plaintiff for purchase of the Convertible Warrants of



Brushman (India) Limited which were allotted to the plaintiff. The plaintiff by her letter dated 14th November, 2007 consented to sell the same to the defendant at Rs. 12.50 per Convertible Warrant. The defendant by his letter dated 2nd January, 2008 forwarded to the plaintiff two cheques dated 3rd January, 2008 and 25th January, 2008 bearing numbers 179067 and 179068 amounting to Rs. 7,81,000/- and Rs. 23,43,750/- respectively. Though the first cheque of the defendant for Rs.7,81,250/- got cleared and the plaintiff received the payment of the same, however the defendant by his e-mail dated 22nd January, 2008 stated, inter alia, that he could get the balance amount proceeds funded only after producing the proof that 25% of the payment of the Warrants has been made by him. He needed three clear weeks from the date of payment of 25%. The defendant kept on postponing the payment, when finally the plaintiff deposited the defendant's second cheque being cheque no. 179068 for Rs. 23,43,750/- which was dishonoured due to "insufficient funds". The defendant gave another cheque to the plaintiff's representative being cheque No. 225309 dated 22nd July, 2008 amounting to Rs.23,43,750/- for payment of the balance amount of 2,50,000 Convertible Warrants of Brushman (India) Limited, agreed to be purchased by the defendant from the plaintiff. The defendant again requested not to deposit the cheque and when finally the plaintiff deposited the aforesaid cheque on 3rd December, 2008 the same was returned dishonoured with the remarks "funds insufficient". The plaintiff filed a criminal complaint under Section 138 of the Negotiable Instruments Act and the present suit under Order XXXVII CPC.

**5.** The case of the defendant is that in the entire suit it is nowhere pleaded that 2,50,000 Convertible Warrants were handed over to the defendant along with a duly executed transfer deed by the plaintiff making the defendant a bona fide holder of the warrants and in the absence thereof there was no concluded contract between the parties. Hence the defendant incurred no liability for payment of the dishonoured cheques and thus the same cannot be enforced by a suit under Order XXXVII CPC. Both the learned counsel for the defendant and the plaintiff seek to draw inferences in their favour from the e-mails with regard to possession of Convertible Warrants, however the documents of none of the parties clearly admit/ deny that the Convertible Warrants have been transferred to the defendant. There is no specific averment in the entire plaint that 2,50,000 Convertible Warrants have been handed over to the defendant.

Further as noted above, since there is no clear evidence on record placed by the plaintiff to prove that the Convertible Warrants were transferred to the defendant, it cannot be presumed that the defendant incurred a liability and thus the cheque which got dishonoured was issued in discharge of the liability. The affidavit of the plaintiff is silent on this aspect.

**6.** On the facts of the case the defendant has made out a triable issue and thus the leave to defend is required to be granted to the defendant. Consequently, the leave to defend is granted.

**7.** Application is disposed of.

**CS(OS) 126/2011**

Written statement be filed within four weeks. Replication in four weeks thereafter.

List before the learned Joint Registrar for completion of pleadings and admission/ denial of documents on 13th January, 2014.

The matter be placed before this Court on 14th April, 2014 for framing of issues.

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**ILR (2013) V DELHI 3882**
**CRL. A.**

**SURESH @ BONA ....APPELLANT**

**VERSUS**

**STATE ....RESPONDENT**

**(REVA KHETRAPAL & SUNITA GUPTA, JJ.)**

**CRL. A. NO. : 941/2010 & 1211/2010** **DATE OF DECISION: 02.07.2013**

**Indian Penal Code, 1860—Section 302/34—Appellants convicted for the offence of murder on the basis of recovery of blood stained clothes and the weapon of offence and the refusal to participate in TIP proceedings—Conviction challenged on the ground that one of the alleged eye witnesses was on inimical terms with the appellants and not a man worthy of credence and the other eye witness did not identify the accused persons in Court and that the prosecution failed to prove the motive of robbery and the recovery of certain articles at the instance of the accused not proved to be connected with the crime. Held: The testimony of the solitary eye witness of the incident does not inspire confidence for he has materially improved his statement given u/s 161 Cr.PC and his entire conduct found to be quite unnatural and further that he falsely denied his relationship with the appellants and the factum of a property dispute with them. The defence witnesses on the other hand much more reliable and their evidence should not have been ignored by the Court. Further more it has not been established beyond doubt that motive to commit crime was robbery. Neither the charge sheet was submitted for offence of robbery nor any separate charge for robbery was framed by Ld. ASJ. Further**

**belongings of the deceased found lying next to his body only. Recovery of certain currency from the house of one of the accused not proved to be that belonging to the deceased. Recovery of blood stained from the house of one of the accused not reliable to establish the guilt of the accused persons for neither the blood found on the clothes proved to be that of the deceased nor any independent witness joined during the said asserted recovery. In the absence of detection of blood on thee alleged weapon of offence, it cannot be stated that it was used in the crime, more so when it was never shown to the concerned doctor to seek his opinion whether the injury on the person of deceased could been inflicted by it. Recovery of a purse assertedly belonging to the deceased at the instance of one of the accused not sufficient to convict the accused persons but merely raises a grave suspicion. Refusal of the accused persons to join the TIP does not lead to an adverse inference against them for the accused were already known to the asserted star eye witness. Prosecution cannot be said to have established its case beyond reasonable doubt and hence appellants entitled to benefit of doubt. Appeal allowed.**

Under the circumstances, in our opinion, keeping in view the fact that the entire conduct of the witness having witnessed the incident is quite improbable and unnatural, and despite the fact that he was related to the accused persons and relations were strained, not only he tried to suppress the relationship, he also denied having any relationship with them or any strained relations with them and furthermore, material improvements were made in his deposition affecting core issues, it will be highly unsafe to convict the accused on the solitary testimony of this witness. It has been held time and again by the Hon'ble Supreme Court and this Court that when the sentence is quite onerous, the burden also becomes heavy on the prosecution to prove its case beyond any shadow of doubt. **(Para 20)**



It is the submission of learned Public Prosecutor for the State that besides the oral testimony of Laxman Indoria, even the circumstantial evidence proves the complicity of the accused in the crime. It was submitted that the motive for committing the murder was robbery. At the outset, it may be mentioned that neither the charge sheet was submitted for offence of robbery nor any separate charge for robbery was framed by learned Additional Sessions Judge. Furthermore, it is not established beyond doubt that motive to commit crime was robbery only because on personal search of deceased, from his baniyan, Rs. 4,000/- in denomination of 1,000/- each along with his passport, visa, electronic tickets from Delhi to Abu Dhabi, from his shirt Rs. 156/- in currency and coins from the right pocket of his pant, a NOKIA 1600 mobile phone were recovered. Near the dead body, two bags containing clothes and daily use articles and four photographs were recovered. If the intention of the accused was really to rob the deceased, it is not understandable as to why they left behind two bags which were found lying near the dead body and why the articles and mobile phone recovered from the personal search of the deceased were not taken by the accused. As such, a doubt is raised regarding the intention of the accused to rob the deceased. **(Para 21)**

It is further the case of prosecution that after the arrest, the accused persons were interrogated. Accused Vikas @ Sunil made a disclosure statement Ex. PW-13/B. In pursuance to the disclosure statement, he led the police officials to his house No. 6461/1, Gali Hanuman Mandir, Nabi Karim from where he got recovered one half pant/knicker which was stained with blood and one Iraqi Dinar of the value of Rs. 25,000/- lying underneath a newspaper from his almirah, which were separately seized. Admittedly, there is no independent witness to the recovery of both these items despite the fact that recovery is alleged to have been effected from the house of accused and it has been admitted by both the police officials, i.e., ASI Ashwini and Inspector

Joginder Singh that family members of the accused were present in the house at that time. No explanation is forthcoming as to why they were not asked to join the recovery proceedings. Even assuming for the sake of arguments that such recovery was effected, the question is whether the same implicates the accused or not, inasmuch as, half pant was sent to FSL. As per the report although blood was detected on the same, which was of human origin but blood group could not be opined. Thus, it cannot be said with certainty that the blood, which was found on the half pant of the accused, was that of the deceased. Similar view was taken in **Sattatiya vs. State of Maharashtra and Ors.,** (2008) 3 SCC 2010; **State vs. Shahid Mian,** 2010 (166) DLT 350 Moreover, there was no occasion for the accused to retain blood stained half pant at his house after the commission of offence. As such, this circumstance is not reliable to establish the guilt of accused. **(Para 23)**

The other incriminating piece of evidence alleged against the accused persons is their refusal to join Test Identification Proceedings conducted by learned Metropolitan Magistrate. As per record, on 20.09.2007, an application Ex.PW11/A for conducting Test Identification Parade of both the accused was moved by Inspector Joginder Singh before learned Metropolitan Magistrate. On 27.09.2007, Shri Jagdish Kumar, M.M. (PW11) went to Tihar Jail, where both the accused refused to join TIP proceedings as per TIP proceedings, Ex.PW11/2 and PW11/3. In normal course, refusal to join Test Identification Proceedings in the absence of satisfactory explanation, raises an adverse inference against the accused that in case they had joined the proceedings they would have been identified by the witnesses. However, things are somewhat different in the instant case because the accused were to be identified by Laxman Indoria who was previously known to the accused persons being their relative. That being so, no purpose would have been served even if the accused had joined the proceedings. In fact, according to Laxman Indoria, even when the accused were produced in



muffled face before the Court of Sh. Alok Aggarwal, learned MM he could identify them from their walk/gait. That being so in the peculiar circumstances of the present case, refusal to join Test Identification Proceedings by the accused does not lead to any adverse inference against them.**(Para 27)**

**Important Issue Involved:** (A) Omissions which amount to contradiction in material particulars i.e. go to the root of the case/materially affect the trial or core of the.

(B) Defence witnesses are entitled to equal treatment and to same weight as that of the prosecution witnesses.

(C) If two views are possible on the evidence adduced in a case of cirumstantial evidence, one pointing to the guilt of the accused and the other to his innocence, the Court should adopt the latter view favourable to the accused.

**[An Gr]**

**APPEARANCES:**

**FOR THE APPELLANT** : Bhupesh Narula, Advocate along with the appellant (in judicial custody).

**FOR THE RESPONDENT** : Ms. Ritu Gauba, APP.

**CASES REFERRED TO:**

1. *State* vs. *Shahid Mian,* 2010 (166) DLT 350.
2. *Sunil W. Sambhudayal Gupta* vs. *State* (2010), 13 SCC 657.
3. *Sattatiya* vs. *State of Maharashtra and Ors.,* (2008) 3 SCC 2010.
4. *Banti @ Guddu* vs. *State of M.P.,* 2004 SCC (Cri) 294.
5. *Munshi Prasad and Ors* vs. *State of Bihar,* AIR 2001 SC 3031.

6. *Harendera Narain Singh* vs. *State of Bihar,* AIR 1991 S.C. 1842.

7. *Dudh Nath Pandey* vs. *State of U.P.,* 1981 Cri LJ 618.

8. *Kali Ram* vs. *State of Himachal Pradesh,* AIR 1973 SC 2773.

9. *Data Xiva Naique Desai and Another* vs. *The State,* AIR 1967 Goa, Daman and Diu 4.

10. *Swarn Singh Ratan Singh* vs. *State of Punjab,* AIR 1957 SC 637.

**RESULT:** Appeal Allowed.

**SUNITA GUPTA, J.**

**1.** Suresh @ Bona & Vikas @ Sunil seek to challenge the impugned order dated 30th January, 2010 and 6th February, 2010 whereby both the appellants were convicted for offence under Section 302/34 IPC and sentenced to undergo imprisonment for life and a fine of Rs.15,000/- each, in default of payment of fine to undergo rigorous imprisonment for six months each.

**2.** The factual matrix of the case is:-

**3.** On 17th September, 2007 on receipt of a telephone call from an unknown person at 10:25 pm regarding one person lying unconscious in front of shop No. 5632, Qutub Road near Hanuman Mandir and bleeding, DD No. 26A Ex. PW 2/A was recorded. The DD was handed over by Duty Officer to Constable Amit (PW-19) who handed over the same to ASI Ashwini Kumar (PW-13). ASI Ashwini Kumar along with Constable Amit Kumar reached the spot where Inspector Joginder Singh (PW-20) also reached, where they met one Chowkidar Veer Bahadur (PW-7) who informed them that one person was lying unconscious at Qutab Road and blood was oozing from his body. On reaching the spot, they found that one person aged about 27-28 years was found lying in front of Shop No. 5632 wearing white shirt with baniyan and white pant and blood was oozing from his nose and mouth. There was injury on his stomach at left side which seemed to be inflicted by some sharp weapon. The clothes were blood stained and the blood was also lying near the dead body on the ground. One TATA 407 No. DL 1 LB 1925 was also stationed near that person. Two bags of black and red colour were also lying near the



dead body. No eye witness was available at the spot. As such, ASI Ashwini Kumar prepared Rukka (Ex. PW-13/A) and handed over the same to Constable Amit Kumar for registration of the case. FIR (Ex.PW3/A) was recorded by HC Mehar Singh. After registration of the case, further investigation was handed over to Inspector Joginder Singh.

**4.** During the course of investigation, Inspector Joginder Singh called the crime team who inspected the scene of crime, took photographs and gave a report Ex. PW-8/A. Site Plan Ex. PW-20/A was prepared. Blood oozing from the wounds of the deceased, blood lying near the dead body, earth control, blood stained earth were seized vide seizure memos Ex.PW-4/G to Ex.PW-4/J. On search of the dead body and from the pocket of the baniyan, one passport, visa, one electronic ticket from Delhi to Abu Dhabi in the name of Richpal and cash of Rs.4000/- in the denomination of Rs.1000/- each, all bloodstained were recovered. From the pocket of shirt Rs.156/- in denomination of one currency note of Rs.100/-, Rs.50/-, one coin of Rs.5/- and one coin of Rupee 1/- were recovered. From the wearing pant one Nokia 1600 mobile phone was recovered. On checking the bags lying near the dead body, wearing clothes, daily use articles and four photographs were recovered. All the articles were seized vide separate Seizure Memos. Laxman Indoria, eye witness came at the spot. His statement was recorded. The dead body was sent to Mortuary of Maulana Azad Medical College through ASI Ashwini and Constable Amit. Inquest proceedings under Section 174 Cr.P.C. were conducted. After identification of the dead body and post-mortem, same was handed over to the relatives of the deceased.

**5.** It is further the case of prosecution that on 19th September, 2007, Inspector Joginder Singh received a secret information that the accused wanted in this case are present at the back side of MCD store near Railway line. On the pointing out of secret informer both the accused were apprehended, interrogated and arrested vide arrest memos Ex. PW-13/C and Ex.PW-13/D. They made disclosure statements Ex.PW-13/A and Ex.PW-13/B. They were taken to nearby police booth at Qutab Road near Hanuman Mandir Gali. After leaving accused Suresh @ Bona in the custody of HC Sadhu Ram, Inspector Joginder Singh along with ASI Ashwini Kumar took Vikas at his residence, i.e., 6461/1, Gali Hanuman Mandir. He got recovered one blood stained half pant/knicker from iron shelf of his first floor room and he also got recovered one foreign

currency note, i.e., dinar of Rs.25,000/- from almirah underneath the newspaper. Same were seized vide seizure memos Ex. PW-13/I and PW 13/J. Thereafter, accused Vikas was brought back at the police booth near Qutub Road and after handing him over to HC Sadhu Ram, accused Suresh @ Bona took them to Hanuman Mandir Gali near a khokha where some bricks were lying and he got recovered one chura lying there which was blood stained. After preparing the sketch of chura Ex. PW13/K, it was sealed in a pullanda and was seized vide seizure memo Ex. PW-13/L. Thereafter, accused Suresh took them to Banke Birla Masjid where one Wasim met them at the gate of Masjid. At the instance of accused Suresh @ Bona, a brown colour purse was got recovered from inside the wall of Masjid, which on checking was found to contain photographs of the deceased and some torn papers. The same were seized vide seizure memo Ex. PW9/A. An application for conducting Test Identification Parade of both the accused persons was moved vide Ex. PW20/A. On 27th September, 2007, both the accused persons refused to participate in TIP proceedings. An application Ex. PW20/B was moved for conducting Test Identification Parade of the recovered purse which was conducted by Metropolitan Magistrate. Exhibits were sent to FSL. After completion of investigation, charge sheet was submitted in the court.

**6.** Charge for offence under Section 302/34 IPC was framed against both the accused to which they pleaded not guilty and claimed trial. Prosecution examined 20 witnesses in support of its case. All the incriminating evidence was put to both the accused, while recording their statements under Section 313 Cr.P.C. Both of them denied the case of prosecution. According to accused Vikas, he was falsely implicated in this case at the instance of Laxman Kumar Indoria who is his step-brother and is residing in front of his house. He is a habitual complainant and is a police informer. He is desirous to grab his property. He had come to police station on the morning of the next day of the incident with some press reporters and asked him to give a share in the property to him or threatened him to implicate falsely in this case. According to him, he was lifted on the intervening night of 17-18th September, 2007 from his house at about 02.00 a.m. by Constable Arvind. Substantially similar plea was taken by accused Suresh. According to him, the case was registered at the instance of Laxman Indoria who is residing in front of his house and is informer of the police. According to him, he was lifted on 18th September, 2007 from his house at about 11/11.30 pm by



Constable Arvind and then implicated in this case.

**7.** The accused examined two witnesses in support of their defence DWI Smt. Sunita and DW2 Arti. DW1, Smt. Sunita is the cousin of Laxman Indoria and accused Vikas @ Sunil. She testified that Smt. Hardai, grand-mother of Laxman Indoria and Vikas @ Sunil is one and the same. From the first marriage of Smt. Hardai there were two children, namely, Babu Lal who is father of Vikas @ Sunil and other is Jugal Kishore. After the death of her husband Smt. Hardai entered into second marriage with Nathu Ram and from the said marriage four children were born, namely, Ram Narain, Bhagwan Dass, Madan Lal and Radhey Shyam. Ram Narain is the father of Laxman Indoria. Relations between family members of accused and Laxman were not cordial because Laxman is an informer of the police and extorts money by blackmailing the persons. He resides opposite the house of accused Vikas @ Sunil. The ground portion of the house of accused Vikas @ Sunil has already been grabbed from his father by elder brother of Laxman Indoria namely Raj Kumar Indoria. Laxman Indoria was also demanding Rs. 5 Lacs from father of accused Vikas who expired in November, 2009. Laxman threatened father of accused Vikas that in case the demand is not fulfilled he will implicate his children in false case. DW2, Aarti has deposed on the same lines as DW1, Smt. Sunita that Laxman Indoria is her 'jeth' and he is step brother of her husband Vikas @ Sunil. Smt. Hardai is grandmother of Laxman Indoria and her husband Vikas @ Sunil, first marriage was with Chaman Lal and two children namely Babu Lal and Jugal Kishore were born. Babu Lal is her father-in-law. After the death of Chaman Lal, Smt. Hardai entered into a second marriage with Nathu Ram. Four children were born out of the wedlock. One of them was Sh. Ram Narain who is the father of Laxman Indoria. She further deposed that her father-in-law Babu Lal expired on 8th October, 2009 and on his cremation, Laxman Indoria, his elder brother Raj Kumar Indoria and their real uncle Madan Lal were also present and they had spent money on the expenses for his cremation.

**8.** After hearing the parties and perusing the record, learned Additional Sessions Judge vide impugned order held both the appellants guilty of offence under Section 302/34 IPC and convicted them separately. Feeling aggrieved by the said order, the present appeal has been preferred.

**9.** We have heard Sh. Siddharth Aggarwal and Mr. Bhupesh Narula,

Advocate, for both the appellants and Ms. Ritu Gauba, learned public prosecutor for State. It was submitted by learned counsel for the appellant that it was a blind murder, however, prosecution has based its case on the testimony of Laxman Indoria, and recovery of certain articles at the instance of accused persons. Testimony of Laxman Indoria has been severely attacked on the ground that he proclaims himself to be an eye witness of the incident and wants the court to believe that he had witnessed the entire incident. However, his conduct was referred for submitting that in fact, he is not a witness to the incident but is a witness of convenience for the prosecution who claims to know the accused persons for last 20-25 years but denies any relationship with them. However, the defence witnesses have amply proved that he is related to the accused persons and was on inimical terms with them. He is an interested witness. Although it was fairly conceded that there is no rule of law that testimony of an interested witness cannot be relied upon, but it was submitted that the same should inspire confidence and the entire demeanour of the witness makes it clear that he is not a man worthy of credence. Veer Bahadur, PW-7 also claims to be an eye witness but he is hostile regarding identity of the accused persons. He neither helps prosecution nor the defence, inasmuch as, he deposed that he could not see the accused persons. faces and saw their back only. Moreover, prosecution has tried to give a colour of robbery to be the motive for commission of crime but neither any charge of robbery was framed nor the same stands proved, inasmuch as, the belongings of the deceased were found lying at the spot. If the accused really intended to rob the deceased, they would not have left the bags which were found lying near him and the various articles recovered from the person of the deceased. Even regarding arrest of the accused, it was submitted that police officials have tried to give a colour as if the accused persons were arrested in pursuance to a secret information. However, there was no need of such secret information as it has come on record that Laxman Indoria was known to the accused persons from before and they were living in front of his house. That being so, where was the difficulty for the police officials to nab them from their house instead of waiting for some secret information to come and then to arrest them. The recovery alleged to have been effected at the instance of accused persons has also been challenged on the ground that from accused Vikas, recovery of Iraqi Dinar of Rs.25,000/- was alleged to have been effected. However, recovery simplicitor of any foreign currency is no offence unless it is proved that it belonged to the



deceased. No evidence has come on record to show that the same belonged to the deceased. Moreover, different versions are forthcoming as to whether, it was Iraqi Dinar or dollar, which was recovered at the instance of accused. As regards, recovery of knife at the instance of accused Suresh, it was submitted that such knives are easily available in the market. Moreover, no blood was detected on the same. Further, the opinion of the concerned doctor was not sought as to whether it was the weapon of offence with which crime was committed. Moreover, there is no independent witness to the recovery. As such the recovery of knife at the instance of the accused is doubtful. As regards recovery of purse, it was submitted that the same is alleged to have been recovered from an open space, which was not in exclusive possession of either of the accused. As such same does not connect them with the crime. As regards refusal on the part of the accused persons to join test identification proceedings, it was submitted that the same is inconsequential, inasmuch as, Laxman Indoria already knew the accused persons from before. Therefore, no purpose would have been served even if the accused would have joined the proceedings. As such, it was submitted that prosecution has miserably failed to prove its case beyond reasonable doubt and both the accused are entitled to acquittal.

**10.** Per contra, it was submitted by learned public prosecutor for the State that robbery was the motive for murder. The incident was witnessed by Laxman Indoria and he has given a true and vivid picture of the entire incident. There is no reason to disbelieve his testimony. Moreover, subsequent to the arrest of the accused persons, recovery was also effected at their instance viz. currency note of 25,000 dinar, purse, blood stained half pant and knife. All these recoveries connect the accused with crime. Moreover, injuries on the person of injured find corroboration from the medical evidence. The impugned order does not suffer from any infirmity which calls for interference. As such the appeals are liable to be dismissed.

**11.** We have given our thoughtful consideration to the respective submissions of learned counsel for the parties and have perused the record.

**12.** It has come on record through the testimony of PW-10 Sh. Pritam Singh that on 16th September, 2007 his son Richpal had come to Delhi by bus for going to Abu Dhabi. After arriving at Delhi, Richpal

made a telephone call to him that he had reached Delhi and again a call was made that his flight was cancelled and he would go to Abu Dhabi on 18th September, 2007 and would stay in Gurdwara in the night. At about 12:30 a.m., he received a telephone call from the police that some accident had taken place. He informed his relatives who were residing in Delhi to enquire about the same from Police Station Nabi Karim. Thereafter, he came to Delhi and came to know that Richpal had been murdered by stabbing. When Richpal left the village for Delhi, he was having Rs. 7000/- cash, two bags, some eatables, dollars to the tune of Rs. 25,000/- and a mobile.

**13.** It has come in the statement of Vir Bahadur (PW-7) that on 17th September, 2007, he was doing the duty of Chowkidar at Qutab Road. At about 9:30 pm, he was going from Hanuman Mandir to Birla Mandir side. After 3-4 minutes when he was coming back towards the said Mandir, he saw a person lying unconscious in front of shop No. 5635. Blood was oozing out from the injury as if somebody had stabbed him. Two bags were lying near the said person. He saw two persons running on the road. Since there was no street light, he could not see the faces of those persons, but could see them only from their back. He went to Police Chowki, Nabi Karim to inform the police. When he came back, it was revealed that the person had died.

**14.** On receipt of telephone call regarding one person lying unconscious ahead of Hanuman Mandir who was bleeding, DD No. 26A (Ex. PW2/A) was recorded and was sent by HC Layakram (PW2) to ASI Ashwini Kumar (PW13) through Constable Amit (PW19), who went to the spot along with constable Amit. Later on Inspector Joginder Singh also joined them. The dead body was sent to MAMC Mortuary. Post-mortem on the body of Richpal Singh was conducted by Dr. Bheem Singh (PW-5), who gave his report Ex.PW5/A. On examination, he found external injury No. 1, incised stab wound 5.5 cm x 2cm x cavity deep present over the left side of trunk in the anterior axillary lying at the level of 8th rib, horizontally placed, inner angle was obtuse, outer angle acute, situated 17 cm below the left nipple and 13 cm above and outer to the umbilicus. On internal examination in the neck region, there was presence of clotted and fluid blood in the trachea. He opined that death was due to haemorrhagic shock consequent upon visceral injuries due to stab wound via injury No.1. Injury No. 1 was ante mortem, fresh in duration and could be caused by single edged sharp weapon. Injury No. 1 was



sufficient to cause death in ordinary course of nature. Thus the fact that Richpal met homicidal death is not in dispute.

**15.** The crucial question for consideration is who was responsible for causing this homicidal death.

**16.** Prosecution has primarily relied upon the testimony of PW4 Laxman Kumar Indoria and PW7 Veer Bahadur.

**17.** So far as Veer Bahadur is concerned, testimony of this witness is confined to the fact that he saw a person lying in front of shop no.5632 in unconscious condition and blood was oozing out from his injuries. Although, he also saw two persons running on the road, however, he could not see them as street light was not on. This witness was cross examined by ld. Public Prosecutor and in cross examination he denied having stated to the police that he saw accused persons running towards Hanuman Mandir at about 10.15 P.M. and that he was not intentionally identifying them.

**18.** The star witness of prosecution is PW4 Laxman Indoria who has deposed that on 17th September, 2007 at about 8 P.M. he had gone to Chowk Singhara in his Santro car to meet his sister. On receipt of a telephone call from his house at about 10.00 p.m. that some guests have come to his house, he was returning from Chowk Singhara in his Santro Car. At about 10.15 p.m. he reached near Qutub Road, M.C.D. Store, Nabi Karim and saw both the accused across the road near Transport Office/Shop no. 5632. They had caught hold of one person and were scuffling with him and trying to snatch something. Resistance was being offered by that person. There was a blue coloured Tata 407, a cycle rickshaw parked there. Street light was falling on the said person and the vehicles. The person whom the accused persons had caught hold of and were robbing was a passenger on the said cycle rickshaw. The rickshaw puller put down the two bags of the passenger and ran away. While sitting in the car he asked the accused persons not to trouble that man. However he did not come out of the car as there was heavy traffic jam on that road at that time and it was not possible to stop and park his car. On hearing this, Suresh @ Bona took out a knife and stabbed that person while accused Vikas @ Sunil caught hold of that person from the back. Thereafter both the accused ran away towards gali Hanuman Mandir with the knife. He went to his home. He looked after the guests and took dinner with them. Thereafter he went to Railway Station to see them off

as they wanted to go to Jaipur. He got very late at the railway station. From there he returned over there and found many police officers present at the spot and a dead body was lying there. He disclosed the entire incident to the police who recorded his statement. Police seized two bags of that person from the spot which contained daily wearing apparel, other articles and the passport of the deceased. On search of the dead body, a ticket from Delhi to Abu Dhabi and Rs.156 in cash were found. There were four currency notes in the denomination of Rs. 1000/- each in the purse. Four photographs were recovered from the bag of the deceased. One mobile phone was also recovered from the search of the dead body. All these articles were seized vide separate seizure memos. He further deposed that on 15th November 2007 he came to the court of Sh. Alok Aggarwal,M.M. where he identified the accused persons to be the same accused who stabbed Richpal Singh. He further deposed that both the accused are very well known to him for the last 20-25 years. They are of criminal background. He went on deposing that since the date he appeared as a witness, there is threat to his life.

**19.** As claimed by prosecution he is the solitary eyewitness of the incident. Although, there is no rule of law that a conviction cannot be based on the solitary testimony of a witness, but it should be of such a nature that Court can place implicit reliance on the same. A close scrutiny of his deposition reveals that it does not inspire confidence due to following:-

(i) The witness has made material improvements in his deposition inasmuch as, he was confronted with various portions of his statement recorded under Section 161 Cr.PC where various facts viz., when he reached the spot the accused persons were scuffling with the deceased and there was "Hathapai and Cheena Jhapati", there was TATA 407 and cycle rickshaw parked there; accused were present across the road near the transport office outside the shop; the person whom the accused were robbing was the passenger of cycle rickshaw, were not recorded. These facts pertain to the basic substratum of the case. Omission to mention these facts in his statement recorded under Section 161 Cr.P.C. casts a serious doubt about his witnessing the incident. In **Sunil W. Sambhudayal Gupta Vs. State** (2010), 13 SCC 657 it has been laid down that



the omissions which amount to contradiction in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution case, render the testimony of the witness liable to be discredited.

(ii) The entire conduct of the witness is quite unnatural. According to him when he was going to his house via Qutub Road, MCD Store, Nabi Karim, he saw the accused persons across the road outside Shop No.5632, catching hold of one person, scuffling with him and trying to snatch from him. He called out at the accused persons by sitting in the car not to trouble that person. According to him, accused Suresh took out a knife and stabbed that person while accused Vikas caught hold of that person. Thereafter they ran away from the spot. However, he did not come out of the car as there was heavy traffic jam on the road and it was not possible to stop the car. Assuming this to be correct, the least which he could have done was to inform the police or PCR about the incident and admittedly this was not done. Things did not end here. He went to his house, had dinner with the guests, went to see them off to railway station and it was only at 1:30 a.m. when he was returning from the railway station by the same route, then, he saw many police officers present at the spot and a dead body lying there, then he went to the spot and gave statement to the police. This entire conduct of the witness is very unnatural.

(iii) It was admitted by the witness that when accused were produced in the Court of Sh. Alok Aggarwal, Metropolitan Magistrate, they were in muffled face and he identified them. In pursuance to a question put to the witness as to how he recognised them, he replied that he recognised them from their "walk/gait". He however denied the suggestion that any of the accused are related to him. He also denied that accused Vikas is son of his real elder uncle or that accused Suresh @ Bona is his brother-in-law. He, however, admitted that accused persons are living in the same street in front of his house. He denied the suggestion that cross case bearing FIR No. 378/07 under

Section 341/321 IPC dated 04.11.2007 between him and Madan Mati was going on and he appeared as witness. He also denied the suggestion that he alongwith Constable Arvind had gone to the house of the accused and asked them to dispose of their house and give their share to him. However, it has come in the statement of DW-1 Smt. Sunita and DW-2 Arti that this witness is closely related to both the accused as Smt. Hardai, grandmother of Laxman Indoria and accused Vikas was one. Vikas is the son of Babulal who was born out of the wedlock of Smt. Hardai with Chaman Lal, whereas Laxman Indoria is the son of Ram Narayan, who was born out of her second marriage with Nathu Ram. As such, this witness and accused Vikas are step brothers. It has further come in their testimony that while ground floor portion of the house of accused Vikas was already grabbed by elder brother of Laxman Indoria, Laxman Indoria also demanded Rs.5 lakhs from the father of accused Vikas and threatened to implicate his children in false case, in case the demand is not made. DW2 Aarti has also deposed that on 17th September, 2009 at about 02:00 a.m, Constable Arvind came to her house and enquired about her husband and took him. House of Laxman Indoria is opposite her house and he was witnessing the entire thing. On the next morning at about 6:00/7:00 a.m. Laxman Indoria came to police station with 2-3 press reporters and in her presence demanded Rs.5 lacs or share in the property from her husband and father-in-law Sh. Babu Lal, otherwise threatened to implicate her husband in this case.

There are a catena of decisions to the effect that defence witnesses are entitled to same weight as that of prosecution witnesses. In **Banti @ Guddu vs. State of M.P.,** 2004 SCC (Cri) 294, it was held that evidence of defence witness is not to be ignored by courts. Like any other witness, his evidence has to be tested on the touch stone of reliability, credibility and trustworthiness. Similar view was taken in **Dudh Nath Pandey vs. State of U.P.,** 1981 Cri LJ 618, where it was held that the defence witnesses are entitled



to equal treatment with those of the prosecution. Courts ought to overcome their traditional instinctive disbelief in defence witnesses. Relying upon this authority in **Munshi Prasad and Ors vs. State of Bihar,** AIR 2001 SC 3031, it was held that defence witnesses are not to be treated differently from prosecution witnesses. The evidence tendered by the defence witnesses cannot always be termed to be tainted only by reason of the factum of the witnesses being examined by the defence. The defence witnesses are entitled to equal respect and treatment as those of the prosecution. The issue of credibility and trustworthiness ought also to be attributed to the defence witnesses at par with those of the prosecution. That being so, there is no reason to disbelieve the testimony of DW-1 Smt. Sunita and DW-2 Arti, that witness Laxman Indoria and accused are related to each other and their relations are strained. In fact, the same has also not been challenged by learned public prosecutor, as even no suggestion to the contrary was given to the witness. This material fact has not only been suppressed by the witness, but in fact he even denied the suggestion to this effect given by the defence counsel In this scenario, the testimony of Laxman Indoria is required to be scrutinised with great care and circumspection.

(iv) The examination-in-chief of this witness was partly recorded on 02.06.2008, it was deferred and at that time he had deposed that a purse was also recovered from the search of deceased. However, when he appeared on the next date of hearing i.e. 24.07.2008 the witness suo-moto clarified that there was no purse on the deceased. This fact assumes significance, inasmuch as, it is the case of prosecution that when the accused Suresh was apprehended, in pursuance of his disclosure statement, he got recovered one purse belonging to the deceased.

**20.** Under the circumstances, in our opinion, keeping in view the fact that the entire conduct of the witness having witnessed the incident is quite improbable and unnatural, and despite the fact that he was related to the accused persons and relations were strained, not only he tried to

suppress the relationship, he also denied having any relationship with them or any strained relations with them and furthermore, material improvements were made in his deposition affecting core issues, it will be highly unsafe to convict the accused on the solitary testimony of this witness. It has been held time and again by the Hon'ble Supreme Court and this Court that when the sentence is quite onerous, the burden also becomes heavy on the prosecution to prove its case beyond any shadow of doubt.

**21.** It is the submission of learned Public Prosecutor for the State that besides the oral testimony of Laxman Indoria, even the circumstantial evidence proves the complicity of the accused in the crime. It was submitted that the motive for committing the murder was robbery. At the outset, it may be mentioned that neither the charge sheet was submitted for offence of robbery nor any separate charge for robbery was framed by learned Additional Sessions Judge. Furthermore, it is not established beyond doubt that motive to commit crime was robbery only because on personal search of deceased, from his baniyan, Rs. 4,000/- in denomination of 1,000/- each along with his passport, visa, electronic tickets from Delhi to Abu Dhabi, from his shirt Rs. 156/- in currency and coins from the right pocket of his pant, a NOKIA 1600 mobile phone were recovered. Near the dead body, two bags containing clothes and daily use articles and four photographs were recovered. If the intention of the accused was really to rob the deceased, it is not understandable as to why they left behind two bags which were found lying near the dead body and why the articles and mobile phone recovered from the personal search of the deceased were not taken by the accused. As such, a doubt is raised regarding the intention of the accused to rob the deceased.

**22.** It is further the case of prosecution that on 19th September, 2007, on the basis of secret information, both the accused were apprehended at about 7:00 pm at Qutub Road near police picket, Hanuman Mandir, Qutub Road behind MCD store. It does not appeal to reason as to where was the occasion for the police officials to wait for the secret information, inasmuch as, the accused were well known to Laxman Indoria and they were living in front of his house. That being so, for the purpose of apprehension of accused, police officials could have straight away gone to the house of the accused and nabbed them. But instead of doing so, as per prosecution version, on the basis of secret information, they were arrested on 19th September, 2007. It is the plea of accused



Suresh that he was lifted on 18th September, 2007 from his house at about 11/11:30 pm by Constable Arvind whereas according to Vikas, he was lifted from his house on the intervening night of 17/18th September, 2007 at about 2:00 am by Constable Arvind. Keeping in view this plea of the accused, which has been substantiated by DW2 Aarti that, on 17.09.2007, in late night, at about 2 a.m., Constable Arvind came to her house and took her husband coupled with the fact that the circumstances of the case makes it clear that there was no need for the police officials to wait for any secret information but the accused could have been apprehended from their house and there is no independent witness to the arrest, arrest of the accused as projected by the prosecution becomes doubtful.

**23.** It is further the case of prosecution that after the arrest, the accused persons were interrogated. Accused Vikas @ Sunil made a disclosure statement Ex. PW-13/B. In pursuance to the disclosure statement, he led the police officials to his house No. 6461/1, Gali Hanuman Mandir, Nabi Karim from where he got recovered one half pant/knicker which was stained with blood and one Iraqi Dinar of the value of Rs. 25,000/- lying underneath a newspaper from his almirah, which were separately seized. Admittedly, there is no independent witness to the recovery of both these items despite the fact that recovery is alleged to have been effected from the house of accused and it has been admitted by both the police officials, i.e., ASI Ashwini and Inspector Joginder Singh that family members of the accused were present in the house at that time. No explanation is forthcoming as to why they were not asked to join the recovery proceedings. Even assuming for the sake of arguments that such recovery was effected, the question is whether the same implicates the accused or not, inasmuch as, half pant was sent to FSL. As per the report although blood was detected on the same, which was of human origin but blood group could not be opined. Thus, it cannot be said with certainty that the blood, which was found on the half pant of the accused, was that of the deceased. Similar view was taken in **Sattatiya vs. State of Maharashtra and Ors.,** (2008) 3 SCC 2010; **State vs. Shahid Mian,** 2010 (166) DLT 350 Moreover, there was no occasion for the accused to retain blood stained half pant at his house after the commission of offence. As such, this circumstance is not reliable to establish the guilt of accused.

**24.** As regards recovery of Iraqi Dinar of the denomination of

Rs.25,000/- a discrepancy was pointed out by learned counsel for the appellant that the father of the deceased has deposed that when his son left he was having Rs.25,000/- dollars and even learned public prosecutor gave a suggestion to this effect. That being so, the currency which is alleged to have been recovered from the house of accused Vikas was of Iraqi Dinar, therefore, it does not connect him with the crime. Although, this discrepancy is very minor in as much as being rustic villager, witness may not be able to differentiate between the foreign currency by terming it as dollar instead of Iraqi dinar but the fact remains that even if a foreign currency is recovered from the house of the accused that, ipso facto, is not an offence unless it is proved that it belonged to the deceased. No evidence has been led by the prosecution to prove that this Iraqi Dinar belonged to deceased.

**25.** As far as accused Suresh is concerned, it is the case of prosecution that in pursuance to the disclosure statement, Ex.PW13/A, he led the police party to a wooden khoka near Hanuman Mandir, Nabi Karim and got recovered one 'chura' lying beneath the bricks. Here again, there is no independent witness to the recovery. Moreover, the 'chura' was sent to FSL and as per the report of FSL, blood could not be detected on the same. In the absence of detection of blood on the 'chura', it cannot be said that it was the weapon of offence, which was used in the crime. Moreover, the weapon of offence was never shown to the concerned doctor who conducted the post-mortem of the deceased to seek his opinion whether the injury on the person of deceased could have been inflicted by this weapon of offence. Under the circumstances, even this chura does not connect the accused with crime.

**26.** The other incriminating piece of evidence alleged against this accused is recovery of 'purse' at his instance from inside wall of Bankey Birla Maszid. Recovery was alleged to have been effected in the presence of PW-9 Wasim Raja, who deposed that one person namely Suresh was in custody of police official and he got recovered one purse, however, this witness does not say that accused who was present in the court was the same who got the purse recovered and in cross-examination, he clarified that he had not seen the face of the accused accompanying the police. Under the circumstances, although according to this witness one Suresh got recovered one purse, however, from his deposition it is not established that it was the same Suresh who got the purse recovered who was wanted in this case. After recovery of purse on 23.10.2007,



an application Ex.PW12/A was moved by Inspector Joginder Singh for conducting Test Identification Parade of the case property. On 29.10.2007, proceedings were conducted by Shri Vidiya Prakash (PW12), Metropolitan Magistrate. As per proceedings Ex.PW10/A duly proved by learned Metropolitan Magistrate, purse was correctly identified by complainant as belonging to his son, however, recovery of this purse simplicitor will not be sufficient to connect the accused with the crime. Although, it raises a pointing finger towards the accused but suspicion howsoever grave, is not sufficient to convict the accused. The presumption of innocence always tilts in favour of the accused and the burden of proof is heavy upon the prosecution to establish its case beyond reasonable doubt.

**27.** The other incriminating piece of evidence alleged against the accused persons is their refusal to join Test Identification Proceedings conducted by learned Metropolitan Magistrate. As per record, on 20.09.2007, an application Ex.PW11/A for conducting Test Identification Parade of both the accused was moved by Inspector Joginder Singh before learned Metropolitan Magistrate. On 27.09.2007, Shri Jagdish Kumar, M.M. (PW11) went to Tihar Jail, where both the accused refused to join TIP proceedings as per TIP proceedings, Ex.PW11/2 and PW11/3. In normal course, refusal to join Test Identification Proceedings in the absence of satisfactory explanation, raises an adverse inference against the accused that in case they had joined the proceedings they would have been identified by the witnesses. However, things are somewhat different in the instant case because the accused were to be identified by Laxman Indoria who was previously known to the accused persons being their relative. That being so, no purpose would have been served even if the accused had joined the proceedings. In fact, according to Laxman Indoria, even when the accused were produced in muffled face before the Court of Sh. Alok Aggarwal, learned MM he could identify them from their walk/gait. That being so in the peculiar circumstances of the present case, refusal to join Test Identification Proceedings by the accused does not lead to any adverse inference against them.

**28.** In **Harendera Narain Singh vs. State of Bihar,** AIR 1991 S.C. 1842, their Lordships of the Supreme Court had reiterated the well known principle of the criminal jurisprudence law that:

> "..... The basic rule of criminal jurisprudence is that if two views are possible on the evidence adduced in a case of

circumstantial evidence, one pointing to the guilt of the accused and the other to his innocence, the Court should adopt the latter view favourable to the accused....."

**29.** In **Data Xiva Naique Desai and Another vs. The State,** AIR 1967 Goa, Daman and Diu 4, Hon'ble Court reiterated the well known principles of the criminal jurisprudence which are reproduced as under:

"The learned Judge would be advised to observe the following general rules when he is dealing with the serious question of the guilt or innocence of persons charged with crime: (i) The onus of proving everything essential to the establishment of the charge against the accused lies on the prosecution; (ii) The evidence must be such as to exclude to a moral certainty every reasonable doubt of the guilt of the accused; (iii) In matter of doubt it is safer to acquit than to condemn; for it is between several guilty persons should escape than that one innocent person suffer; and (iv) the hypothesis of delinquency should be consistent with all the facts proved."

**30.** In **Swarn Singh Ratan Singh vs. State of Punjab,** AIR 1957 SC 637, it was held by the Apex Court that in criminal cases mere suspicion, however, strong, cannot take the place of proof. The Court must also take into consideration that an accused is presumed to be innocent till charges against him are proved beyond reasonable doubt. Mere suspicion, however, strong it may be, cannot take the place of legal proof.

**31.** Moreover, in **Kali Ram vs. State of Himachal Pradesh,** AIR 1973 SC 2773, the Apex Court had observed as follows:-

"Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced in the case is consistent only with the hypothesis of the guilt of the accused and is inconsistent with that of his innocence,



the court should refrain from recording a finding of guilt of the accused. It is also an accepted rule that in case the court entertains reasonable doubt regarding the guilt of the accused, the accused must have the benefit of that doubt. Of course, the doubt regarding the guilt of the accused should be reasonable : it is not the doubt of a mind which is either so vacillating that it is incapable of reaching a firm conclusion or so timid that it is hesitant and afraid to take things to their natural consequences. The rule regarding the benefit of doubt also does not warrant acquittal of the accused by resort to surmises, conjectures or fanciful considerations.

Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex-facie trustworthy on grounds which are fanciful or in the nature of conjectures. The guilt of the accused has to be adjudged not by the fact that a vast number of people believe him to be guilty but whether his guilt has been established by the evidence brought on record. Indeed, the courts have hardly any other yardstick or material to adjudge the guilt of the person arraigned as accused. Reference is sometimes made to the clash of public interest and that of the individual accused. The conflict in this respect, in our opinion, is more apparent than real.

It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilized society. All this highlights the importance of ensuring as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice. Such a risk can be minimised but not ruled out altogether."

**32.** Keeping these broad principles in mind, prosecution cannot be said to have established its case beyond reasonable doubt. That being so, both the appellants are entitled to benefit of doubt. Accordingly, the

appeals are allowed. Both the appellants are acquitted of the offence alleged against them. They be released forthwith, if not wanted in any other case.

**33.** Trial Court Record be sent back.

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**ILR (2013) V DELHI 3905**
**CRL. A.**

**ASHOK VISHWAKARMA @ SURJI ....APPELLANT**

**VERSUS**

**STATE ....RESPONDENT**

**(REVA KHETRAPAL & SUNITA GUPTA, JJ.)**

**CRL. A. NO. : 1052/2010 DATE OF DECISION: 09.07.2013**
**CRL. A. NO. : 845/2010**

**Indian Penal Code, 1860—Section 302/364A/365/201/34—Appellants convicted for having abducted the son of the complainant aged about 19 years, for making a ransom demand of Rs. 1 Lakh for his safe release and for committing his murder and causing disappearance of the evidence of the offence—Prosecution based its case on circumstantial evidence and the circumstances which accounted for the conviction of the appellants were namely that the deceased was last seen with them and it was in pursuance of their disclosures and pointing out that the body of the deceased was recovered from a premises taken on rent by the appellants. Recovery of the Titan watch of the deceased from one of the appellants and the recovery of the dummy notes from one of the accused in pursuance of the same having been handed over to him by the complainant also held to be incriminating**



**facts against them—Conviction challenged inter alia on the grounds that recovery of incriminating articles not witnessed by any public independent witness and hence doubtful, the identity of the dead body not being established conclusively, the premises from where the body recovered could not have been pointed out jointly by both the appellants and that the prosecution also failed to prove that the said premises had been taken on rent by the appellants. Held: No trace of doubt that the deceased was last seen in the company of the appellants. The recovery of incriminating articles namely the dummy notes and the purse of the deceased, from the appellants also proved beyond reasonable doubt. Though due to the death of the complainant, he could not be examined but the recovery was witnesses by four police officials and no material on record to discredit their testimony. The testimony of police personnel have to be treated in the same manner as testimony of any other witnesses and there is no principal of law that without corroboration by independent witnesses their testimony cannot be relied upon. On perusal of evidence, there is no difficulty in finding that the dead body that was recovered was that of the son of the complainant and that was sufficient proof of *corpus delecti*. Further the legal position on joint and simultaneous disclosures by more than one accused leading to discovery of new facts is that the same are per se admissible u/s 27 of the Evidence Act. The evidence on record amply proves that it was on the disclosure and the pointing out of both appellants that the bag containing the dead body of the deceased was detected from the floor of a gallery of a premises rented out by the appellants and the appellants have failed to offer any explanation as to how they came to know of such concealment. Testimony of the landlord of the premises sufficient to prove that the premises in question were rented out to the appellants only and the mere fact**

**that there was no documentary evidence in the form of rent agreement or rent receipt not sufficient to draw a presumption that the premises was not let out to the appellants. All the circumstances proved on record cumulatively taken together lead to the irresistible conclusion that the appellants alone are the perpetrators of the crime. Also to be taken note of that the appellants did not give any explanation u/s 313 Cr. PC to the incriminating circumstances pointing to their guilt. Appeal stands dismissed.**

It has come on record that both the accused were well known to the complainant. Ashok was residing as a tenant in their house for last about seven years. He was also running the school started by the husband of the complainant and also used to give tuitions. Keeping in view the fact that accused Ashok had taken Pawan with him for the purpose of getting some documents, pertaining to the school, signed/ attested and thereafter, Pawan was lastly seen in the company of accused Ashok and Angad on the roof of the school and thereafter, his whereabouts were not known, the onus shifted upon the accused persons to explain as to where Pawan had gone after he was seen in their company. However, no explanation is coming forth on the part of any of the accused. Therefore, there can be no trace of doubt that the deceased was last seen in the company of accused persons. **(Para 13)**

This submission has no substance, in as much as, recovery was effected in the presence of complainant Jaglal, however, due to non availability of Jaglal as he has since expired, he could not be examined but the fact remains that the recovery was witnessed by ASI V.P. Singh, HC Mahavir Singh, HC Ishwar Singh and SI Amar Pal Singh. All these witnesses have been cross-examined at length by learned defence counsel. However, nothing material could be elicited to discredit their testimony. The testimony of police personnel have to 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. It will all depend upon the facts and circumstances of each case and no principle of general application can be laid down as held in **Karanjit Singh Vs. State (Delhi Admn.)** 2003 5 SCC 291, **C. Ronald & Anr. Vs. Union Territory of Andaman & Nicobar Islands,** (2001) 1 SCC (Crl.) 596. In **Sunil Clifford Daniel vs. State of Punjab,** 2012 11 SCC 205, Apex Court referred to **State Govt. of NCT of Delhi v. Sunil and Anr.,** (2001) 1 SCC 652, wherein Court held as under:-

> "20. ... But if no witness was present or if no person had agreed to affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so prepared by the police officer must be treated as tainted and the recovery evidence unreliable. The court has to consider the evidence of the investigating officer who deposed to the fact of recovery based on the statement elicited from the accused on its own worth.
>
> 21. We feel that it is an archaic notion that actions of the police officer should be approached with initial distrust.....At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other way round. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature. Hence when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the

accused, through cross-examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact that no other independent person was present at the time of recovery. But it is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions."

Record reveals that no ill-will or animus has been alleged against any of the police officials for which reason they will falsely implicate the accused. Under the circumstances, receipt of ransom call by Shri Jaglal from accused Ashok and thereafter recovery of dummy bundle of notes from the possession of accused stands established. **(Para 16)**

It is the submission of learned counsel for the appellant Ashok that identity of the dead body as that of Pawan is not established since as per the post mortem report Ex. PW16/A, dead body was in highly decomposed condition and recovery was effected after a lapse of about one month and seven days, as such it was not identifiable. This submission is devoid of merit. Smt. Durgawati Devi, mother of the deceased has deposed that she as well as her husband Jaglal identified the dead body to be of their son Pawan. Beside her, Yogesh Dua and Ramesh Chand Ojha had also identified the dead body vide identification statements Ex. PW1/A and Ex. PW2/A respectively. It was suggested to PW2 Ramesh Chand Ojha that since the dead body was disintegrated, it was not in identifiable condition, however, he denied the suggestion. No such suggestion was given to PW1 Yogesh Dua. Moreover, the best person to depose



about this fact was Dr. L.K. Barua. Although there is a mention in the post mortem report that the body was in high state of decomposition, however, it was not taken from him that the decomposition was such as to render the identification difficult or impossible. As stated above, the entire proceedings were conducted in the presence of various police officials, ADM, Doctor and all these witnesses have deposed that the dead body was identified by Jaglal, Yogesh Dua, Ramesh Chand Ojha to be that of Pawan. On perusal of evidence, there is no difficulty in finding that the dead body that was recovered was of Pawan and that was sufficient proof of corpus delecti. Kaju and Anr. Etc. Vs. State, 1985 Crl. LJ, 367 relied upon by learned APP for the State was also a case where it was held that in criminal prosecution one of the essential factors to be proved to a moral certainty is the *corpus delecti*. In that case, photographs of the dead body were not taken in order to get him identified in court. It was held that despite the fact that the dead body was in a high state of decomposition there was nothing to show that the decomposition rendered identification difficult or impossible. Son and son-in-law of the deceased had identified the dead body, therefore, it was held that there was sufficient proof of corpus delecti. In such a case, it was not necessary for the prosecution to have taken photographs of the dead body and then get them identified in the court. The present case stands on much better footing in as much as, as many as 23 photographs Ex. PX24 to PX46 were taken by HC Ajeet Singh and the entire proceeding was also videographed. The cassette Ex. PX was even displayed before learned Addl. Sessions Judge when the evidence was being recorded before him. Under the circumstances, the identification of the dead body is proved by clinching evidence. **(Para 23)**

The legal position on joint disclosures as it emerges is that the same *per se* are admissible under Section 27 of the Evidence Act. The plea against inadmissibility of disclosure statements Ex.PW21/E and Ex.PW21/F made by the

appellants Ashok Viswakarama and Angad Singh respectively must therefore get answered in the negative. We have very carefully gone through the voluminous evidence led by prosecution in this regard and find no material to disbelieve the version given by them that the place was shown by both the accused and that when the place was dug up, a plastic bag containing dead body of Pawan was recovered. This evidence conclusively shows that accused Ashok and Angad had buried the said plastic bag containing the dead body of Pawan and that it was detected in furtherance of the voluntary information furnished by them. **(Para 33)**

Another aspect is to be taken note of. All the incriminating circumstances which point to the guilt of the accused persons have been put to them, yet they could not give any explanation under Section 313 of the Cr.P.C. except chosing the mode of denial. In **State of Maharashtra Vs. Suresh** (2001) SCC 471 reiterated in **Jagroop Singh Vs. State of Punjab,** (2013) 1 SCC (Crl.) 1136, it has been held that when the attention of the accused is drawn to such circumstances that inculpate him in the crime and he fails to offer appropriate explanation or gives a false answer, the same can be counted as providing a missing link for completing the chain of circumstances. We may hasten to add that we have referred to the aforesaid decisions only to highlight that the accused have not given any explanation whatsoever as regards the circumstances put to them under Section 313 Cr.P.C. **(Para 43)**

From the aforesaid analysis, we are of the considered opinion that all the circumstances which have been established by the prosecution complete the chain. There can be no trace of doubt that all the circumstances consistent with the guilt of the accused have been proved beyond reasonable doubt. It is worthwhile to remember that in **Sucha Singh Vs. State of Punjab,** (2003) 7 SCC 643, it has been stated that : (SCC State 653 Para 20):

> "20...The prosecution is not required to meet any and every hypothesis put forward by the accused.... A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some inevitable flaws because human beings are prone to err, it is argued that it is too imperfect." **(Para 44)**



**Important Issue Involved:** (A) 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.

(B) If the prosecution is able to establish its case beyond reasonable doubt against an accused, despite some lapses on the part of the investigating officer, the accused cannot be acquitted on account of such lapses.

(C) Joint and simultaneous disclosures by more than one accused leading to discovery of new facts are per se admissible u/s 27 of the Evidence Act.

**[An Gr]**

**APPEARANCES:**

**FOR THE APPELLANTS** : Mr. Shri L.S. Saini, Advocate.

**FOR THE RESPONDENT** : Ms. Ritu Gauba, APP.

**CASES REFERRED TO:**

1. *Sunil Clifford Daniel* vs. *State of Punjab,* 2012 11 SCC 205.
2. *C. Munniappan and Others* vs. *State of Tamilnadu,* 2010 IX AD (SC) 317.
3. *Ningappa Yallappa Hosamani & Ors.* vs. *State of Karnataka & Ors.,* (2010) 1 SCC (Cri) 1460.

4. *State* vs. *Kiran,* 2010 (117) DRJ 647.
5. *Raj Kumar* vs. *State* in Crl.A.56/2009.
6. *Vijay Kumar* vs. *State (GNCT) of Delhi,* 2008 (101) DRJ 725.
7. *State (N.C.T. of Delhi)* vs. *Navjot Sandhu,* 2005 Crl. LJ 3950.
8. *Karanjit Singh* vs. *State (Delhi Admn.)* 2003 5 SCC 291.
9. *C. Ronald & Anr.* vs. *Union Territory of Andaman & Nicobar Islands,* (2001) 1 SCC (Crl.) 596.
10. *State Govt. of NCT of Delhi* vs. *Sunil and Anr.,* (2001) 1 SCC 652.
11. *State of Maharashtra* vs. *Suresh* (2000) 1 SCC 471.
12. *State* vs. *Damodar* 2000 Cri LJ 175.
13. *Ram Behari Yadav* vs. *State of Bihar,* AIR 1998 SC 1850.
14. *State of Andhra Pradesh* vs. *Gangula Satya Murthy,* 1997 Crl.J 774.
15. *Gyano @ Gyanwati* vs. *State of U.P,* 1995 Cri LJ 1016.
16. *Mohd. Abdul Hafeez* vs. *State of Andhra Pradesh,* AIR 1983 SC 367.
17. *State Government, M.P.* vs. *Chhotelal Mohanlal,* AIR 1955 Nagpur 71.
18. *Motilal* vs. *State,* AIR 1959 Patna 54.
19. *Nathu* vs. *State,* AIR 1958 All. 467.
20. *Putta* vs. *Emperor,* AIR (32) 1945 Oudh 235.
21. *Adam Khan* vs. *Emperor,* 1927 Cri LJ 456.
22. *Ram Singh* vs. *Emperor,* 1916 Cri LJ 273.

**RESULT:** Appeal Dismissed.

**SUNITA GUPTA, J.**

**1.** Tried on charges under Sections 302, 364-A, 365, 201 IPC read with Section 34 IPC in Sessions Case No.64/08 arising out of FIR



No.594/04 under Section 365 IPC, PS Najafgarh, the appellants stand convicted by a judgment dated 28.07.2009 of Additional Sessions Judge, Delhi and sentenced on 31.07.2009 to:-

(i) Imprisonment for life and fine of Rs.15,000/- each in default of payment of fine, one year rigorous imprisonment under Sections 302/34 IPC, fine if realised, be given to the mother of the deceased.

(ii) Sentenced for life and fine of Rs.15,000/- each, in default of payment of fine one year imprisonment, fine if realised, be given to sister of the deceased under Section 364-A IPC.

(iii) Seven years rigorous imprisonment and fine of Rs.5,000/- each, in default of payment of fine, six months rigorous imprisonment under Sections 201/34 IPC, fine if realised, be given to the mother of the deceased.

**2.** All the sentences of imprisonment are to run concurrently.

**3.** The appellants are in appeal against the aforesaid judgment of conviction and order of sentence passed by learned Additional Sessions Judge, Delhi.

**4.** The appellants faced trial on the allegation that they abducted Pawan Kumar aged about 19 years and tried to extort Rs.1 lakh from his father by making a phone call for his safe release and committed his murder. Facts of the case reveal that on 13.10.2004, Pawan went along with accused Ashok at about 10.30 a.m. for going to the office of BDO, however, he did not return. His parents made an unsuccessful search for him. On 14.10.2004, Shri Jaglal Prashad, father of the deceased, made a call regarding missing of his son, which was received by Constable Ram Swroop (PW17) at about 13:43 p.m. He entered the message in the PCR form Ex.PW17/A and sent the same to South-West District Control Room. On receipt of message, ASI Rani Devi (PW13) recorded DD No.21, Ex.PW13/A and sent to ASI Vijay Pal. ASI Vijay Pal Singh (PW28) sent wireless message on receipt of this DD No.21, Ex.PW13/A. On 15.10.2004, Anu Kumari (PW3), sister of the deceased received a telephone call from an unknown person that Pawan Kumar is with them and this information should not be leaked to anyone and that the caller will make call again. Anu Kumari informed her father Jaglal Prasad

about the telephone call. Thereupon, Jaglal Prasad went to Police Station Najafgarh. ASI Vijay Pal Singh (PW28) recorded his statement Ex.PW28/A and made his endorsement Ex.PW28/B, prepared rukka and handed over to duty officer for registration of FIR. Head Constable Munni (PW10) recorded FIR Ex.PW10/A and handed over copy of the same and original rukka to ASI Vijay Pal Singh for further investigation. On 07.11.2004, the investigation of this case was assigned to SI Amar Pal Singh (PW25).

**5.** On 20.11.2004, Jaglal Prasad, father of the deceased, received a telephone call from accused Ashok demanding a sum of Rs.1 lac for release of his son Pawan. Thereupon Jaglal Prasad went to Police Station Najafgarh and informed SI Amar Pal Singh regarding receipt of telephone call from accused Ashok on his phone No.25323586 stating that his son has been abducted by him and his associate. He was directed by Ashok to reach at PCO booth near Sai Baba Mandir between 12:00 noon to 1:00 p.m. and that in case he informs the police they would kill his son. Complainant was produced before Inspector H.S.Meena, who directed SI Amar Pal Singh to organise a raiding party and to prepare dummy bundles of currency notes. SI Amar Pal Singh prepared 10 wads of papers and wrapped the same in a newspaper. The same were put in a bag of Maroon colour and handed over to the complainant directing him to reach at the given spot. Raiding party comprising of SI Amar Pal Singh, ASI Vijay Pal Singh, ASI Chandu Lal, SI S.S.Yadav, Head Constable Iswar Singh, Constable Mahabir Singh and other staff was organised. They all reached near Sai Baba Mandir. At about 12.10 p.m., both the accused came at the PCO booth. Accused Ashok had conversation with complainant Jaglal Prasad and took the bag from him and then handed over the same to co-accused Angad. On getting signal from complainant, police officials apprehended both the accused and took the bag from them. On search of accused Ashok, one slip bearing telephone No.25323586 was recovered. Both the accused were interrogated, arrested and their personal search was taken in which besides other things, one key each was also recovered. They made disclosure statements and led the police party to AB -38, Nangli Vihar, Najafgarh, Near Annu Public School and pointed out the place where they committed murder of deceased. Accused Ashok also got recovered one Titan watch belonging to Pawan which was identified by his father, Shri Jaglal. Thereafter, they led the police team to Ranaji Enclave, house of Tara Chand by stating that they had buried the deceased after committing his murder over there.



Dead body was recovered from the house of Tara Chand at Ranaji Enclave. One iron chain, one white sheet and pair of chappal were found inside the bag. The accused also got recovered one kudal from the front room and iron tawa from the rear room. Photographs were taken by Head Constable Ajeet Singh (PW6), whereas videography was done by Constable Bhom Pal (PW12). Post mortem on the dead body was conducted by Dr. L.N.Barua (PW16), who gave his report Ex.PW16/A. After post mortem, dead body was handed over to complainant. Subsequent opinion regarding iron chain was obtained from Dr. L.K.Barua. After completing investigation, charge-sheet was submitted.

**6.** In order to substantiate its case, prosecution examined 28 witnesses, however, record reveals that Constable Bhom Pal was examined as PW12 and again as PW27. Similarly, Head Constable Ishwar Singh was examined as PW22 and again as PW24. All the incriminating evidence was put to both the accused by recording their statements under Section 313 Cr.P.C., wherein they denied the case of prosecution. They did not prefer to lead any evidence.

**7.** In the absence of direct evidence for commission of offence, the prosecution based its case on circumstantial evidence. The circumstances that were held by the learned trial court as firmly established, find mention in the impugned judgment. On examining the evidence on record, the learned trial court found that the circumstances taken together formed a chain so complete that there was no escape from the conclusion within all human probability that crime was committed by the appellants and none else. It found that the circumstances proved were incapable of explanation on any reasonable hypothesis save that of the guilt against the appellants.

**8.** Impugned judgment was challenged by filing the present appeal.

**9.** We have heard Shri L.S.Saini, learned counsel for Appellant Ashok, Shri Vivek Sood, learned counsel for appellant Angad and Ms. Ritu Gauba, learned Additional Public Prosecutor for the State and have perused the record.

**10.** Conviction of the appellants rests on circumstantial evidence. The circumstances which accounted for their conviction may be broadly categorised as under:-

(i) The deceased being last seen with the appellants.

(ii) Recovery of bag containing dummy notes from the possession of accused in pursuance of the ransom call made by them to complainant Jaglal Prasad.

(iii) Recovery of slip from Ashok bearing telephone number of complainant.

(iv) Recovery of Titan watch at the instance of accused Ashok belonging to the deceased.

(v) Recovery of dead body of Pawan Kumar in a plastic bag from their residential room.

**11.** Each of the circumstance, in seriatum, will be taken by us.

**Last seen evidence:-**

**12.** Durga Wati Devi (PW5) is the mother of the deceased and she has testified that on 13th October, 2004, her son Pawan Kumar aged about 19 years got ready at about 8:00 am. Her husband enquired from him as to where he was going in such early hours of morning on which he informed him that Sirji, i.e., Ashok Kumar had asked him to go to BDO Office, Najafgarh in order to get some papers, pertaining to school, signed/attested. Thereafter, her husband, left for duty. At about 10:00 am., accused Ashok Vishwakrma came and enquired from Pawan as to whether he is going to BDO Office or not, on which Pawan replied in affirmative. Ashok left the house and he was followed by Pawan. She also came out of the house. Her husband had started a school, namely, Anu Public School in the name of her daughter. On the roof of the school, accused Ashok and Angad were standing. Her son also went over there. Thereafter, she came inside her house and started working. At about 2:00 pm, accused Ashok came to her house. She enquired about Pawan from him, then Ashok told him as to why she was getting worried, he may be roaming with his friends and will come soon. Angad and Ashok used to reside in the school premises itself where he used to take tuitions. At about 4:00 pm, she saw accused Ashok taking a gunny bag in a rickshaw. She enquired from him as to what he was taking in the gunny bag. Then Ashok informed him that Angad had taken a room on rent in Ranaji Enclave, Najafgarh. He was taking some utensils and rice in the katta. At that time also, she enquired from him about Pawan, thereupon Ashok told her that after leaving Angad, he would search



Pawan. At about 7:45 pm, she informed her husband on telephone that Pawan has not returned back. Her husband came at about 8:00 pm and then search was made for Pawan in relatives and friends. At that time, accused Ashok and Angad also came and Ashok told her that he was also searching for Pawan. On 14th October, 2004, Ashok advised her husband that missing report be lodged regarding Pawan. Thereupon, her husband lodged missing report by making a telephone call from the house itself. Thereafter, on 15th October, 2004 at about 10:00 am, a telephone call came which was heard by her daughter. The caller informed her daughter that Pawan is with them and this fact should not be revealed to anyone and they will call after two days. Police was intimated. Thereafter, on 20th November, 2004 at about 9:00 am, Ashok made a call to her husband demanding a sum of Rs.1 lac for release of Pawan. The witness was extensively cross-examined, however, nothing material could be elicited to discredit her testimony.

**13.** It has come on record that both the accused were well known to the complainant. Ashok was residing as a tenant in their house for last about seven years. He was also running the school started by the husband of the complainant and also used to give tuitions. Keeping in view the fact that accused Ashok had taken Pawan with him for the purpose of getting some documents, pertaining to the school, signed/attested and thereafter, Pawan was lastly seen in the company of accused Ashok and Angad on the roof of the school and thereafter, his whereabouts were not known, the onus shifted upon the accused persons to explain as to where Pawan had gone after he was seen in their company. However, no explanation is coming forth on the part of any of the accused. Therefore, there can be no trace of doubt that the deceased was last seen in the company of accused persons.

**Recovery of Bag containing dummy notes**

**14.** Durgawati, mother of the deceased has deposed that on 20th November, 2004 at about 9:00 am, a telephone call was received by her husband. She enquired from her husband as to who had made the call. Thereupon, her husband informed her that Ashok had made the call and demanded a sum of Rs.1 lac for release of Pawan. Thereupon, her husband went to Police Station and met HC Asmita (PW14) who was working as duty officer on that day and told her regarding the receipt of ransom call from Ashok Vishvakarma @ Sirji. She recorded his statement

vide D.D.No.10A Ex.PW14/A and produced complainant Jaglal before SI Amarpal Singh. Jaglal reiterated before SI Amarpal that he had received a telephone call from accused Ashok on his phone No.25323586 that he and his associate has abducted his son and he asked him to reach at PCO Booth near Sai Baba Mandir between 12:00 noon to 1:00 pm. A sum of Rs.1 lac was demanded for release of his son and he was further directed not to inform the police failing which his son will be killed. SI Amarpal Singh produced Jaglal before Additional SHO H.S. Meena and informed him about the facts disclosed to him by the complainant. Additional SHO made enquiries from the complainant and directed SI Amarpal Singh to organize a raiding party and to prepare dummy bundles of currency notes. He prepared ten wads of papers and wrapped the same in newspaper. The wads were put in bag of Maroon colour and handed over to complainant vide memo Ex. PW19/A. He was directed to reach at given spot. Raiding party comprising of SI Amarpal Singh, ASI V.P. Singh, H.C. Ishwar Singh, SI S.S. Yadav and other staff reached near Sai Baba Mandir at about 12:10 pm. Both the accused came at PCO Booth. Accused Ashok talked to the complainant and took over the bag which was in his possession. Then he handed over the said bag to his associate Angad. On getting signal from complainant, SI Amarpal Singh with the help of Head Constable Mahavir over powered Angad while ASI V.P. Singh and Head Constable Ishwar Singh over powered accused Ashok. They were brought at the PCO Booth. On checking the bag fake wads were recovered. The same were seized vide seizure memo Ex.PW21/A.

**15.** This recovery has been challenged on the ground that there is no independent witness of recovery despite the fact that Sai Baba Mandir is a crowded place. Moreover, according to prosecution version, this recovery was effected during noon time but PW 1 and PW2 have deposed that news had spread in the locality in the morning itself regarding apprehension of accused. If that is so, the apprehension of accused and recovery of bag containing dummy bundles of notes is doubtful.

**16.** This submission has no substance, in as much as, recovery was effected in the presence of complainant Jaglal, however, due to non availability of Jaglal as he has since expired, he could not be examined but the fact remains that the recovery was witnessed by ASI V.P. Singh, HC Mahavir Singh, HC Ishwar Singh and SI Amar Pal Singh. All these witnesses have been cross-examined at length by learned defence counsel.



However, nothing material could be elicited to discredit their testimony. The testimony of police personnel have to 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. It will all depend upon the facts and circumstances of each case and no principle of general application can be laid down as held in **Karanjit Singh Vs. State (Delhi Admn.)** 2003 5 SCC 291, **C. Ronald & Anr. Vs. Union Territory of Andaman & Nicobar Islands,** (2001) 1 SCC (Crl.) 596. In **Sunil Clifford Daniel vs. State of Punjab,** 2012 11 SCC 205, Apex Court referred to **State Govt. of NCT of Delhi v. Sunil and Anr.,** (2001) 1 SCC 652, wherein Court held as under:-

> "20. ... But if no witness was present or if no person had agreed to affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so prepared by the police officer must be treated as tainted and the recovery evidence unreliable. The court has to consider the evidence of the investigating officer who deposed to the fact of recovery based on the statement elicited from the accused on its own worth.
>
> 21. We feel that it is an archaic notion that actions of the police officer should be approached with initial distrust.....At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other way round. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature. Hence when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the accused, through cross-examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact that no other independent person was present at the time

of recovery. But it is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions."

Record reveals that no ill-will or animus has been alleged against any of the police officials for which reason they will falsely implicate the accused. Under the circumstances, receipt of ransom call by Shri Jaglal from accused Ashok and thereafter recovery of dummy bundle of notes from the possession of accused stands established.

**Recovery of Slip**

**17.** It has come in the testimony of the police officials that after the accused were apprehended, on search of accused Ashok one PCO slip bearing telephone no. 25323586 Ex. PW 21/P1 was recovered from his pocket which was pasted on white paper and seized vide memo Ex. PW21/B. Recovery of this slip has been challenged by learned counsel for the accused on the ground that it is highly improbable that accused will keep on carrying such a slip for such a long time. Moreover, if he was tenant of the complainant then he must be remembering the telephone number and there was no need to note the telephone number on a slip. It was also submitted that as per personal search memo of accused Ashok there are 4 witnesses besides the Investigating Officer. However, the slip bears the signatures of only the complainant and the Investigating Officer. This submission is devoid of merit inasmuch as record reveals that after the recovery of the slip it was seized vide seizure memo Ex. PW21/B. The witnesses to this seizure memo are the same who are witnesses to the personal search memo of the accused. The recovery was effected at the same time and on the same day i.e. 20.11.2004. Under the circumstances the mere fact that the slip bears only the signatures of complainant Jaglal Prasad and the Investigating Officer and no other witnesses does not cast any doubt regarding the recovery of slip from the possession of accused Ashok.

**18.** The submission of defence counsel regarding possibility of non-retention of slip for such a long time or recollecting the number being a tenant are based on conjectures. On the other hand, there is no reason to disbelieve the testimony of the police officials regarding recovery of slip from the person of accused.



**19.** The fact that a telephone call was received by the complainant on this telephone number on 20.11.2004 stands proved from Durgawati Devi who has deposed that Ashok made ransom call on this telephone number which was heard by her husband, Shri Jaglal and it was only thereafter that whole police machinery was set in motion. Krishan Lal (PW-9), owner of STD booth at RZ-109, Ranaji Enclave, Najafgarh, Delhi, although has deposed that on 20.11.2004, some person had come to make telephone call at his STD booth, however, could not identify the person who made the call, rightly so, as number of persons come at STD booths to make calls and it is difficult to identify the callers. In fact, the Investigating Officer should have collected the call details in order to ascertain that call was made from the STD booth of Kishan Lal which was not done but that, at best, is a lapse on the part of the Investigating Officer, which, however, does not cast any dent on prosecution version. In **Ram Behari Yadav Vs. State of Bihar,** AIR 1998 SC 1850, it was held by Supreme Court that if primacy is given to the omissions or lapses by perfunctory investigation by the investigating agency, the faith and confidence of people would be shaken, not only in law enforcing agency, but also in the administration of justice. It is true, if on account of any lapse, doubts are created in prosecution case, the accused would be entitled to the benefit of that doubt. But, if the prosecution is able to establish its case beyond reasonable doubt against the accused, in spite of lapses, the accused cannot be acquitted because of the lapse on the part of the IO. Substantially, similar view was taken in **C. Munniappan and Others Vs. State of Tamilnadu,** 2010 IX AD (SC) 317 where it was held that where there has been negligence on the part of Investigating Agency or omissions etc which resulted in defective investigation, there is a legal obligation on the part of the Court to examine the prosecution evidence, de hors such lapses carefully to find out whether said evidence is reliable or not or to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation.

**Recovery of Watch**

**20.** After the arrest of accused, they were interrogated and they made disclosure statements, Ex. PW21/E and Ex. PW21/F. Both of them led the police party to house No. AB-38, Nangli Vihar, Najafgarh and at

their instance pointing out memo Ex. PW21/C was prepared. Thereafter accused Ashok opened the room with the key which was recovered from his personal search and got recovered one Titan Watch Ex. PW 21/P2 which was identified by complainant Jaglal to be belonging to his son Pawan. The watch was seized after sealing in a pullanda vide memo Ex. PW21/H. Here again, it may be mentioned that all the police officials have corroborated each other regarding recovery of watch at the instance of accused Ashok and there is no reason to disbelieve their testimony.

**Recovery of Dead body**

**21.** Both the accused, namely Ashok and Angad were arrested from Sai Baba Mandir and their personal search was conducted vide memos Ex. PW-21/C and PW-21/D. From their personal search, one key each besides other articles were recovered. Both the accused were interrogated. They made disclosure statements Ex.PW21/E and Ex.PW 21/F stating therein that they had abducted Pawan Kumar with a view to extort money from his father and thereafter, committed his murder and buried the dead body inside the earth after digging floor of the gallery and cemented the same in Ranaji Enclave in the house of Tara Chand, which was taken on rent by Angad and that they can get the dead body recovered.

**22.** Both the accused took the police team to M.S. Block, Ranaji Enclave at the house of Tara Chand and pointed out vide memos Ex. PW21/K and Ex. PW21/L. Thereupon, Inspr. H.S. Meena moved an application Ex. PW7/A before Shri S.S. Kanawat, Addl. District Magistrate (South-West) District, Kapashera on the same day who referred him to seek opinion from the Surgeon. Insp. H.S. Meena contacted Dr. L.K. Barua who opined to dig out the dead body to ascertain the cause of death of deceased. Crime team and videographer were summoned to the spot. Thereafter, written orders were taken from ADM who also reached the spot. In the presence of ADM Shri S.S. Kanawat, Dr. L.K. Barua, father of the deceased late Sh. Jaglal, two public witnesses, PW1 Yogesh Dua and PW2 Ramesh Chand Ojha and other members of the raiding team, the lock of the room was opened with key recovered from the personal search of accused Angad. Both the accused led the police party inside the room where they pointed out the place where they had buried the dead body of the deceased in front of room in the gallery. Thereafter, after breaking open the floor and digging the earth upto ¾ ft., one yellow plastic katta was taken out. One dead body was recovered lying wrapped



in sheet inside the plastic katta. One iron chain and one sandal like chappal pair was found in the katta. On opening the sheet, dead body was taken out which was identified by father of the deceased Jaglal, Yogesh Dua and Ramesh Chand Ojha vide Identification Memos Ex. PW1/A and Ex. PW2/A. Dead body was wearing blue colour jeans-pant and T-shirt. Inquest proceedings were conducted by Inspr. H.S. Meena. He lifted sample earth, soil on the katta, soil inside the katta, broken pieces of floor, earth control, etc. from the spot and seized vide Memo Ex. PW22/A. Thereafter, at the instance of accused Angad, one kudal and one tawa used for digging the floor and carrying the soil were recovered from the room which were seized vide Memo Ex. PW22/B. Dead body was sent through Ct. Umed Singh for post mortem. Iron chain, sheet and chappal were also sent. Lock was seized vide memo Ex. PW26/B. Photographs were taken by HC Ajit Singh (PW6). SI Rajender Singh (PW8), In-Charge Crime Team gave his report Ex. PW8/A. Ct. Bhom Pal (PW12 and again examined as PW27) videographed the entire proceedings. Thus, recovery of dead body at the instance of both the accused persons stands proved not only from the testimony of police officials- Ct. Umed Singh, HC Mahavir , HC Ishwar Singh, SI Amar Pal Singh, Insp. H.S. Meena, ASI Vijay Pal, but also from totally independent witnesses, namely Shri S.S. Kanawat, ADM, Dr. L.K. Barua, Yogesh Dua and Ramesh Chand Ojha. Besides them, parents of the deceased were also present at the spot. Complainant Jaglal, father of the deceased could not be examined as it has come in the statement of Smt. Durgawati Devi, mother of the deceased that due to shock of the murder of Pawan her husband has since expired. Death certificate was also filed. Smt. Durgawati Devi was also present at the time of disinterment proceedings, however, on seeing the dead body of her son, she became unconscious. Son of her brother-in-law took her to her house. As such mere fact that the proceedings do not bear her signatures, does not cast any doubt regarding her presence at the time of proceedings. Even otherwise, clinching evidence has come on record to prove the recovery of dead body at the instance of accused persons.

**23.** It is the submission of learned counsel for the appellant Ashok that identity of the dead body as that of Pawan is not established since as per the post mortem report Ex. PW16/A, dead body was in highly decomposed condition and recovery was effected after a lapse of about one month and seven days, as such it was not identifiable. This submission

is devoid of merit. Smt. Durgawati Devi, mother of the deceased has deposed that she as well as her husband Jaglal identified the dead body to be of their son Pawan. Beside her, Yogesh Dua and Ramesh Chand Ojha had also identified the dead body vide identification statements Ex. PW1/A and Ex. PW2/A respectively. It was suggested to PW2 Ramesh Chand Ojha that since the dead body was disintegrated, it was not in identifiable condition, however, he denied the suggestion. No such suggestion was given to PW1 Yogesh Dua. Moreover, the best person to depose about this fact was Dr. L.K. Barua. Although there is a mention in the post mortem report that the body was in high state of decomposition, however, it was not taken from him that the decomposition was such as to render the identification difficult or impossible. As stated above, the entire proceedings were conducted in the presence of various police officials, ADM, Doctor and all these witnesses have deposed that the dead body was identified by Jaglal, Yogesh Dua, Ramesh Chand Ojha to be that of Pawan. On perusal of evidence, there is no difficulty in finding that the dead body that was recovered was of Pawan and that was sufficient proof of corpus delecti. Kaju and Anr. Etc. Vs. State, 1985 Crl. LJ, 367 relied upon by learned APP for the State was also a case where it was held that in criminal prosecution one of the essential factors to be proved to a moral certainty is the *corpus delecti*. In that case, photographs of the dead body were not taken in order to get him identified in court. It was held that despite the fact that the dead body was in a high state of decomposition there was nothing to show that the decomposition rendered identification difficult or impossible. Son and son-in-law of the deceased had identified the dead body, therefore, it was held that there was sufficient proof of corpus delecti. In such a case, it was not necessary for the prosecution to have taken photographs of the dead body and then get them identified in the court. The present case stands on much better footing in as much as, as many as 23 photographs Ex. PX24 to PX46 were taken by HC Ajeet Singh and the entire proceeding was also videographed. The cassette Ex. PX was even displayed before learned Addl. Sessions Judge when the evidence was being recorded before him. Under the circumstances, the identification of the dead body is proved by clinching evidence.

**24.** It was not disputed by learned counsel for appellants that the statement of accused that they had buried the dead body in Ranaji Enclave, which they can get recovered was admissible under Section 27 of the



Evidence Act, but what has been strenuously contended before us is that the prosecution evidence that both the accused Ashok and Angad stated that they had buried the dead body in Ranaji Enclave after committing murder and they can get the same recovered should be rejected as being vague and indefinite, it being not clear as to on whose statement, whether of Ashok or of Angad, the discovery was made. The evidence, therefore, ought to have been rejected against both. Reliance was placed on **Mohd. Abdul Hafeez v. State of Andhra Pradesh,** AIR 1983 SC 367; **Ram Singh vs. Emperor,** 1916 Cri LJ 273; **Adam Khan vs. Emperor,** 1927 Cri LJ 456; **Putta Vs. Emperor,** AIR (32) 1945 Oudh 235; **State (N.C.T. of Delhi) vs. Navjot Sandhu,** 2005 Crl. LJ 3950.

**25.** In **Mohd. Abdul Hafeez** (supra), it was held that if evidence otherwise confessional in character is admissible under Section 27 of the Indian Evidence Act, it is obligatory upon the Investigating Officer to state and record who gave the information; what words were used by him so that recovery pursuant to the information received may be connected to the person giving the information so as to provide incriminating evidence against that person. In that case, three of the accused gave information to the IO that the ring was sold to the jeweller, pursuant thereof, they took the police party to the shop of jeweller and got recovered the ring. It was observed that it is impossible to believe that all spoke simultaneously. This way of recording evidence is most unsatisfactory and such mode of recording evidence was deprecated. In **Ram Singh** (supra) also, it was held that where two persons are alleged to have given certain information to the police which led to the arrest of another accused, it is only the information given first which can be admitted under Section 27 of the Evidence Act. It is also necessary that the information given by each should be precisely and separately stated. Similar view was taken in **Adam Khan** (supra). In **Puttu** (supra), it was observed that Section 27 of Evidence Act has to be construed strictly. The use of word "a person" in singular in Section 27, is somewhat significant. The word was used in singular designedly because the joint statement of a number of persons cannot be said to be an information received from any particular one of them. When a fact is discovered in consequence of information received from one of several persons charged with an offence, and when others give like information, it is impossible to treat the discovery as having been made from the information received from each one of them. Where all the accused persons jointly pointed out

the place where the dead body of the deceased was discovered buried and jointly pointed out other places from where articles belonging to the deceased were recovered, the facts discovered on such information cannot be used as evidence against any of the accused persons. Relying on these authorities, it was submitted that both the accused jointly pointed out the place where the dead body of deceased was discovered buried, the facts discovered on such information cannot be used as evidence against any of the accused persons.

**26.** Repelling the submission of learned counsels for the appellant, it was urged by learned APP for the State that the disclosure statements made by the accused are not joint statements but are distinct and separate. Even if, pointing out memo is one since recovery has been effected in pursuance thereof, it is admissible in evidence. Reliance was placed on **Motilal Vs. State,** AIR 1959 Patna 54, **State Government, M.P. Vs. Chhotelal Mohanlal,** AIR 1955 Nagpur 71, **Nathu Vs. State,** AIR 1958 All. 467.

**27.** In **Moti Lal** (supra), it was held:

> "It is well established now that provisions of Section 27 of the Evidence Act are by way of exceptions to the rule of inadmissibility of confessional statements of an accused in custody of a police officer as provided in Sections 25 and 26 of the Act. It is also well established that section should be strictly construed and the prosecution is to bring the statements of the accused leading to the discovery strictly within the four corners of the section. Further, only so much of the evidence of the accused is admissible as leads to the discovery and not the past account or the past history.
>
> xx xx xx xx xx xx xx xx xx
>
> Where a relevant fact is discovered in consequence of statements made by one or more accused in custody, so much of those statements as relates distinctly to the discovery of that fact is admissible under S. 27. Information received from more than one person accused of an offence, whether it amounts to a confession or not, may relate distinctly to the fact thereby discovered and may be proved under S. 27 of the Act. What is not desirable to admit is a vague and indefinite statement like



> saying 'two or more persons said this and said that'. What should be insisted upon by the Courts is that the statements should be recorded as precisely as possible attributing the respective words to each accused, whether they made the statements simultaneously or immediately one after the other before the discovery of the fact was made. As a rule of prudence, vagueness in such statements of information leading to the discovery of a fact should be avoided.
>
> There is no sufficient reason to hold that a fact cannot be said to be discovered in consequence of the information of more than one person accused of any offence. The information may be by one or by several persons but, if the information precedes the fact of discovery, the discovery must be attributed to the joint and several information by all and so much of the information as leads distinctly to the fact thereby discovered must be admitted in evidence under S. 27 against all such persons who gave that information.
>
> No principle in support can be found for the view, that the statements of two or more accused leading to the discovery of a relevant fact will be admissible only if they are simultaneously made. The statement nevertheless remains the statement of two or more persons, whether made simultaneously or one after the other, and, if it is admissible against all those who made the statement, if made simultaneously, it is equally admissible if made one after the other, provided always that the statements made by those accused which are to be admitted relate distinctly to the discovery and not rediscovery of the relevant fact. "

**28.** It was further held that in view of Section 13 of the General Clauses Act, the words 'a person' used in Section 27 of the Evidence Act in singular number must be held to include the plural.

**29.** In **Nathu** (supra) it was held:-

> "There is nothing in section 27 to show, beyond what the words "a person" may themselves mean, that the Legislature intended to depart from the general rule laid down in section 13 of the General Clauses Act. The presence of the words "a person" in singular therefore cannot mean that the information should be by

a single individual only.

Thus S.27 on its plain language does not exclude the interpretation as to plurality of information received from persons accused of any offence. Being an exception to the general rule contained in the preceding section, it nevertheless insists that only such information shall be admitted as relates distinctly to the facts thereby discovered. The information should directly and distinctly relate to the facts discovered. Where, therefore a fact has already been discovered, any information given in that behalf afterwards cannot be said to lead to the discovery of the fact. There cannot be a rediscovery. It is easily conceivable that two or more persons simultaneously or jointly furnish an information and as a result of that information a common discovery is made; such a case will, if other conditions are satisfied, be covered by the section. Each case will, however, have to be judged on its own facts but the underlying principle seems to be that the information is such information as cannot be said to be already in the possession of the police and that the discovery is made in consequence of that information and further that the discovery is made in consequence of that information and further that the discovery is not rediscovery of something already discovered."

Similarly, in **Chhote Lal Mohan Lal** (supra), it was held that under Section 27 Evidence Act, simultaneous statements made by accused persons are not per se inadmissible in evidence and are liable to be considered if the discovery made in consequence thereof affords a guarantee about the truth of the statements.

The word 'a person' in Section 27, Evidence Act, do not in any way exclude admission of information from more than one person simultaneously received provided it fulfils the requirements of Section 27. Section 13(2), General Clauses Act, provides that words in the singular shall include the plural and 'vice versa' provided there is nothing repugnant in the subject or context. There is nothing repugnant in the provisions of Section 27 for acceptance of statements jointly made by more than one person provided that facts discovered in consequence thereof afford some guarantee about truthfulness of their statements."

**30.** It was further submitted that recovery in pursuance to disclosure



statement is also relevant under Section 8 of the Evidence Act. Reliance was placed on **A.N. Venkatesh & Another Vs. State of Karnataka,** 2005 SCC (Cri) 1938 which was also a case pertaining to kidnapping and murder for ransom. Accused pointed out to police the place where the dead body was buried and on that basis the body exhumed from that place. It was held that:-

> "By virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simplicitor, that the accused pointed out to the police officer, the place where the dead body of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 or not as held by this Court in **Prakash Chand v. State (Delhi Administration)**. Even if we hold that the disclosure statement made by the accused appellants (Ex. P14 and P15) is not admissible under Section 27 of the Evidence Act, still it is relevant under Section 8. The evidence of the investigating officer and PWs 1, 2, 7 and PW4 the spot mahazar witness that the accused had taken them to the spot and pointed out the place where the dead body was buried, is an admissible piece of evidence under Section 8 as the conduct of the accused. Presence of A-1 and A-2 at a place where ransom demand was to be fulfilled and their action of fleeing on spotting the police party is a relevant circumstance and are admissible under Section 8 of the Evidence Act."

**31.** In view of these authoritative pronouncements, there is no legal bar to the admissibility of two simultaneous disclosure statements made by accused persons which leads to discovery of certain facts. In fact, learned counsel for the appellant himself relied upon **Navjot Sandhu** (supra), more popularly known as "Parliament attack case", where dwelling on Section 27 of the Evidence Act with particular reference to joint disclosures, it was held as under:-

> "Joint disclosures- to be more accurate, simultaneous disclosures, per se, are not inadmissible under Section 27 of the Evidence

Act, 1872. A person accused need not necessarily be a single person, but it could be plurality of accused. It seems that the real reason for not acting upon the joint disclosures by taking resort to Section 27 is the inherent difficulty in placing reliance on such information supposed to have emerged from the mouths of two or more accused at a time. In fact, joint or simultaneous disclosure is a myth, because two or more accused persons would not have uttered informatory words in a chorus. At best, one person would have made the statement orally and the other person would have given unequivocal nod to what has been said by the first person. Or, two persons is custody may be interrogated separately and simultaneously and both of them may furnish similar information leading to the discovery of fact. Or, in rare cases, both the accused may reduce the information into writing and hand over the written notes to the police officer at the same time. But such disclosures by two or more persons in police custody do not go out of the purview of Section 27 altogether. If information is given one after the other without any break almost simultaneously, and if such information is followed up by pointing out the material thing by both of them, we find no good reason to eschew such evidence from the regime of Section 27. However, there may be practical difficulties in placing reliance on such evidence. It may be difficult for the witness (generally the police officer), to depose which accused spoke what words and what sequence. In other words, the deposition in regard to the information given by the two accused may be exposed to criticism from the standpoint of credibility and its nexus with discovery. Admissibility and credibility are two distinct aspects, whether and to what extent such a simultaneous disclosure could be relied upon by the Court is really a matter of evaluation of evidence."

**32.** This very authority was relied upon by this Court in **Vijay Kumar Vs. State (GNCT) of Delhi,** 2008 (101) DRJ 725; **State Vs. Kiran,** 2010 (117) DRJ 647; **Raj Kumar Vs. State** in Crl.A.56/2009. In this very authority, **Mohd. Abdul Hafeez** (supra) was referred to and it was observed that there is nothing in this judgment which suggests that simultaneous disclosures by more than one accused do not at all enter into the arena of Section 27, as a proposition of law.



**33.** The legal position on joint disclosures as it emerges is that the same *per se* are admissible under Section 27 of the Evidence Act. The plea against inadmissibility of disclosure statements Ex.PW21/E and Ex.PW21/F made by the appellants Ashok Viswakarama and Angad Singh respectively must therefore get answered in the negative. We have very carefully gone through the voluminous evidence led by prosecution in this regard and find no material to disbelieve the version given by them that the place was shown by both the accused and that when the place was dug up, a plastic bag containing dead body of Pawan was recovered. This evidence conclusively shows that accused Ashok and Angad had buried the said plastic bag containing the dead body of Pawan and that it was detected in furtherance of the voluntary information furnished by them.

**34.** Facts were substantially similar in **Ningappa Yallappa Hosamani & Ors. Vs. State of Karnataka & Ors.,** (2010) 1 SCC (Cri) 1460 relied upon by learned APP for the State where it was held that where on the basis of statement made under Section 27 of the Evidence Act, dead body of deceased was recovered in furtherance of voluntary information furnished by two accused, the natural presumption in absence of explanation was that it was these two accused persons who had murdered the deceased and buried his body. Reliance was placed on **State of Maharashtra vs. Suresh** (2000) 1 SCC 471, where it was observed as follows:-

"Three possibilities may be countenanced when an accused points out the place where a dead body or an incriminating material was concealed without stating that it was concealed by himself. One is that he himself would have concealed it. Second is that he would have seen somebody else concealing it. And the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities, the criminal court can presume that it was concealed by the accused himself. This is because accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the Court as to how else he came to know of it, the presumption is a well justified course to be adopted by the criminal court that the concealment was made by

himself. Such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act."

**35.** Relying upon this authority, it was held in the case of **Ningappa** (supra) that the evidence conclusively proved that the accused had buried the gunny bag containing the dead body of deceased and it was detected in furtherance of voluntary information furnished by them.

**36.** In **State vs. Damodar** 2000 Cri LJ 175, it was observed by Supreme Court that;-

"Where in a charge of kidnapping, murder and then concealing the body of the victim, the prosecution evidence was that the deceased was seen in the company of the accused on the fateful day, the accused took the investigating team to his house and dug out portion of the room from where the body of the deceased was exhumed and the failure of the accused to give explanation as to how the body came to be exhumed in his house, the chain of the circumstances was complete to uphold the accused guilty under Section 300, 364 and 201 IPC. "

**37.** In **State of Andhra Pradesh vs. Gangula Satya Murthy,** 1997 Crl.J 774, the Apex Court observed that:-

"Where the fact that the dead body was found on the cot inside the house of the accused, it was held to be a telling circumstance against him. It was further held that the accused owed a duty to explain as to how a dead body, which was resultant of a homicide, happened to be in his house. In the absence of any such explanation from him, the implication of the said circumstances is definitely adverse to the accused."

**38.** In. **Gyano @ Gyanwati Vs. State of U.P,** 1995 Cri LJ 1016, it was held:-

"Where the accused killed the deceased and concealed the dead body inside the house in a room where nobody had access except the accused persons, the conviction was held proper."

**39.** In the present case also the accused persons have failed to offer any explanation as to how they came to know of such concealment. The evidence on record amply proves that the accused persons had



buried the plastic bag containing the dead body of deceased and it was detected in furtherance of information furnished by them.

**40.** It was urged that no cogent evidence has come on record to prove that premises at Ranaji Enclave belongs to PW4 Tara Chand or that it was taken on rent by the accused persons as there is no documentary evidence in this regard nor the person who introduced the accused to Tara Chand nor any neighbour has been examined. The submission is devoid of merit in as much as it stands proved from the photocopy of the document produced by Tara Chand, which was seized vide memo Ex.PW4/A that he is the owner of Plot No.1A out of Khasra No.33/24/2 situated in the area of village Nangli Sakurbasti Colony known as MS Block, Ranaji Enclave Road, Najafgarh, New Delhi. It has come in his deposition that on 05.10.2004, both the accused came to him for taking on rent the premises in Ranaji Enclave and he let out the same to them at the rate of Rs.1500/- per month. One month advance was paid by accused persons and they took the key of the room. The mere fact that there is no documentary evidence in the form of rent agreement or rent receipt, no presumption can be drawn that the premises was not let out by him to the accused persons in as much as there is no statutory requirement for executing the documents before letting out the premises. Moreover, there is no reason as to why the witness would falsely depose in regard to letting out the premises to the accused persons with whom no animosity is alleged or proved. Moreover, in his statement recorded under Section 313 Cr.P.C., accused Angad has not even denied the factum of taking the premises belonging to Tara Chand on rent, he merely replied 'don't know'. This is only an evasive answer. Under the circumstances, it stands proved that the premises at Ranaji Enclave was taken on rent by the accused persons belonging to Tara Chand. Moreover, the key of the room was recovered in the personal search of accused Angad and it was with this key that the house at Ranaji Enclave was opened from where a plastic katta was recovered containing the dead body of deceased Pawan. Durga Devi identified the katta to be the same which accused was carrying in the rickshaw on 13.10.2004. One iron chain was also found near the dead body. Dr. L.N.Barua who conducted the post mortem on the dead body of the deceased, had opined in his post mortem report Ex. PW16/A that the cause of death was 'strangulation'. According to him, time since death was approximately one and a half month, which co-relates to the period since when Pawan

went missing. In pursuance to the subsequent opinion sought by the Investigating Officer, Dr.L.N.Barua gave his opinion Ex.PW16/B that the iron chain which was recovered at the instance of the accused persons along with the body of the deceased could have been used for causing injury and strangulation.

**41.** The aforesaid evidence led by prosecution establishes the following facts: -

- Complainant Jaglal opened a school in the name of his daughter "Annu Public School".
- The school was being run by accused Ashok where he also used to give tuition.
- Accused Ashok had taken two rooms on rent in the school premises where he was residing.
- On 05.10.2004, both the accused had taken a room on rent in Ranaji Enclave belonging to Tara Chand and the room was in their exclusive possession.
- On 13.10.2004 accused Ashok took deceased Pawan at about 10.30 AM for getting some papers pertaining to school signed/attested.
- Smt. Durgawati Devi, mother of deceased saw Pawan in the company of both the accused on the terrace of the school.
- Pawan did not return back. On repeated inquiries by Smt. Durgawati, accused persons kept on assuring her that he will return back.
- On the suggestion of accused Ashok, Jaglal lodged a missing report on 14.10.2004.
- On 15.01.2004 at 10.00 AM one telephone call came at the house of Jaglal which was heard by his daughter Annu informing that Pawan is with them. Nobody should be informed and that they will again make a call after two days.
- On the same day, Jaglal informed the police and FIR was registered.



- On 20.11.2004 accused Ashok made a call to Jaglal demanding a sum of Rs. One lac for release of Pawan.
- A raiding party was organized. Jaglal was sent with 10 bundles of dummy papers Ex. P 19/P2, wrapped in newspaper Ex. P 19/P12 in a bag Ex. P19/P1 near Sai Baba Mandir, PCO Booth, Najafgarh, New Delhi.
- Both the accused came, talked to Jaglal and took bag from him.
- On receiving signal from complainant, police team apprehended both the accused alongwith bag containing dummy papers.
- On search of accused Ashok, one slip Ex.PW 21/P1 bearing telephone number of complainant was recovered
- Accused pointed out House No. AB-38, Najafgarh where they committed murder of deceased Pawan.
- The room was opened with key recovered from shirt of accused Ashok.
- Accused Ashok got recovered one Titan Watch Ex. P21/P2 belonging to Pawan from underneath the mattress inside the room.
- Accused led the police team to Ranaji Enclave and the room was opened with the key recovered from pocket of accused Angad.
- On the pointing out of both the accused, floor in the gallery was dug out and a plastic bag containing dead body was recovered.
- Dead body was identified by Jaglal, Yogesh Dua and Ramesh Chand Ojha to be of Pawan.
- One plastic chain and other articles were recovered in the plastic bag in which the dead body was recovered.
- Doctor opined that the cause of death was strangulation and that the iron chain which was recovered at the instance of accused person along with body of the deceased, could have been used for causing injury and strangulation to the deceased.

- One Tawa Ex.PW 22/P3 and Kudal Ex. PW 22/P2 were also recovered at the instance of accused Angad which were used by them to dig the floor before concealing the body.

**42.** Above circumstances cumulatively taken together lead to the irresistible conclusion that the accused-appellants alone are the perpetrators of the crime. Each and every incriminating circumstance has been established by reliable and clinching evidence. The circumstances in the chain of events established rule out the reasonable likelihood of innocence of the accused. The overwhelming evidence led by prosecution on record is inconsistent with the plea of innocence of accused persons. No other hypothesis can be developed in the wake of such strong circumstances appearing against the accused persons.

**43.** Another aspect is to be taken note of. All the incriminating circumstances which point to the guilt of the accused persons have been put to them, yet they could not give any explanation under Section 313 of the Cr.P.C. except chosing the mode of denial. In **State of Maharashtra Vs. Suresh** (2001) SCC 471 reiterated in **Jagroop Singh Vs. State of Punjab,** (2013) 1 SCC (Crl.) 1136, it has been held that when the attention of the accused is drawn to such circumstances that inculpate him in the crime and he fails to offer appropriate explanation or gives a false answer, the same can be counted as providing a missing link for completing the chain of circumstances. We may hasten to add that we have referred to the aforesaid decisions only to highlight that the accused have not given any explanation whatsoever as regards the circumstances put to them under Section 313 Cr.P.C.

**44.** From the aforesaid analysis, we are of the considered opinion that all the circumstances which have been established by the prosecution complete the chain. There can be no trace of doubt that all the circumstances consistent with the guilt of the accused have been proved beyond reasonable doubt. It is worthwhile to remember that in **Sucha Singh Vs. State of Punjab,** (2003) 7 SCC 643, it has been stated that : (SCC State 653 Para 20):

> "20...The prosecution is not required to meet any and every hypothesis put forward by the accused.... A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some inevitable flaws because human beings are prone to err, it is argued that it is too imperfect."



**45.** The present case is one where there is no trace of doubt that all circumstances complete the chain and singularly lead to the guilt of the accused persons.

**46.** In view of the aforesaid reasons, we do not find any infirmity in the judgment of conviction and order on sentence recorded by learned Addl. Sessions Judge and accordingly, the appeal, being devoid of any substance, stands dismissed. Trial Court record be returned forthwith.

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**ILR (2013) V DELHI 3938**
**W.P. (C)**

**AAA PORTFOLIOS PVT. LTD. & ORS. ....PETITIONERS**

**VERSUS**

**THE DEPUTY COMMISSIONER OF INCOME TAX & ORS. ....RESPONDENTS**

**(BADAR DURREZ AHMED, ACJ. & VIBHU BAKHRU, J.)**

**W.P. (C) NO. : 1272/2013 DATE OF DECISION: 24.07.2013**

**Income Tax Act, 1961—Sec. 226 (3)—Share purchase agreement dated 25.09.2005—The sellers and the purchaser and respondent no. 2 entered into an Escrow Agreement dated 27.09.2005—Assessing Officer issued a notice to respondent no 2 under Section 226(3)—Amount held—As an escrow agent-vide Escrow Agreement dated 27.09.2005—Notice was objected to respondent 2—Clarified that the respondent 2 was not holding any money on account of the assessee**

**company—Assessing Officer sent another similar notice dated 15.02.2007—Respondent no. 2 bank also furnished an affidavit dated 07.12.2012 fixed deposit of 94,84,96,05.97/—Was held by respondent no. 2 in terms of the Escrow Agreement—Assessing Officer passed impugned order and sent a notice 04.02.2013—Calling upon respondent no. 2 to forthwith pay the amount held by respondent no. 2—Hence the present petition. Held—Section 226(3) of the Act confers upon an Assessing Officer a special jurisdiction to proceed directly against a person, other than an assessee, for recovery of income-tax demands due form the assessee—Proceedings is in the nature of garnishee proceedings—But section 226(3) must be confined to cases where third party admits to owing money or holding any money on account of the assessee—Shaw Wallace and Co. Ltd. v. Union of India (relied on)—Once the third Party noticee has disputed that he owes any money—The Assessing Officer have no jurisdiction to proceed further—Assessee company is not a party to the Share Purchase Agreement—Neither the Share Purchase Agreement nor the Escrow Agreement provides for any contingency—Funds held by the respondent no. 2 bank in escrow be paid either to the assessee company or to the Income—Tax Department—The conclusion of the Assessing Officer that the amount of money kept with respondent no. 2 in escrow is available to the assessee for meeting its income—Tax demand held erroneous—The decision of Assessing Officer set aside—Respondent no. 1 directed to forthwith refund the amount recovered from respondent no. 2 bank pursuant to the notice.**

**Important Issues Involved:** (A) Section 226(3) of the Act confers upon an Assessing officer a special jurisdiction to proceed directly against a person, other than an assessee, for recovery of income—Tax but the provision must be confined to cases of the assessee.



(B) Since no money is due to the assessee company or is held on behalf of the assessee company, recovery of Income-Tax demands due for assessee company is erroneous.

**[Sa Gh]**

**APPEARANCES:**

**FOR THE PETITIONERS** : Mr. Parag P. Tripathi, Sr. Adv with Mr. Simran Mehta, Mr. R.M. Mehta, Ms. Yogita Sunaria & Ms. Mahima Gupta.

**FOR THE RESPONDENT** : Mr. Sanjeev Sabharwal & Mr. Punnet Gupta For R-1 Mr. Sumit Bansal & Mr. Ateev Mathur for R-2. Mr.Y.K. Kapur for R-3.

**CASES RERFERRED TO:**

1. *Shaw Wallace and Co. Ltd.* vs. *Union of India:* (2003) 262 ITR 528 (Cal.
2. *Surinder Nath Kapoor* vs. *Union of India:* AIR 1988 SC 1777.
3. *Beharilal Ramcharan* vs. *ITO* [1981] 131 ITR 129, 137-38.%
4. *P. K. Trading Co.* vs. *ITO* [1970] 78 ITR 427, 433 (Cal).
5. *Mohamedaly Sarafaly and Co.* vs. *ITO* [1968] 68 ITR 128, 131 (Mad).

**RESULT:** Petition disposed of.

**VIBHU BAKHRU, J.**

**1.** This is a writ petition filed by the petitioners challenging the order dated 01.02.2013 passed by Respondent no.1 (hereinafter referred to as the "Assessing Officer") and the consequential notice dated 04.02.2013 issued under Section 226(3) of the Income Tax Act, 1961 (hereinafter referred to as the "Act"). The petitioners are aggrieved on account of the action of the Assessing Officer in appropriating a sum of Rs. 95,85,30,934/-which was lying in escrow with respondent No.2

bank.

**2.** The petitioners held shares in respondent No.3 company, namely, Escorts Heart Institute & Research Centre Ltd. (hereinafter referred to as the "assessee company"). Petitioner Nos.1 & 2 held 1,00,000 shares each of the assessee company and the petitioner No.3 held 16,00,000 shares of the assessee company. The petitioners along with three other entities, namely Charak Ayurvedic Institute, Escorts Employees Welfare Trust and Diamond Leasing and Finance Limited who held 100 shares of the assessee company each entered into a share purchase agreement dated 25.9.2005 for sale of their shares in the assessee company to M/s Fortis Health Care Ltd. (hereinafter referred to as the "purchaser"). In all 18,00,300 shares of the assessee company which aggregated 90.01% of the issued and paid up share capital of the assessee company were agreed to be sold by the petitioners and three other entities (hereinafter collectively referred to as the "sellers"). The consideration for the sale of 18,00,300 shares of the assessee company was agreed at Rs.585,00,97,485/-@ Rs.3249.51 per share. As agreed under the share purchase agreement, the purchaser was required to deposit the entire consideration with the escrow agent and the sellers agreed to deposit certain documents including share transfer deeds and instructions with the escrow agents in order to consummate the transaction for sale and purchase of an aggregate of 18,00,300 equity shares of the assessee company. The shares held by petitioner No.3 were pledged with certain lenders and the escrow agent was required to release part of the consideration to the lenders in order that the petitioner No.3 could redeem the pledge and transfer unencumbered shares to the purchaser.

**3.** It was agreed between the sellers and the purchaser that the escrow agent would release Rs.3,24,951/-each to Charak Ayurvedic Institute, Escorts Employees Welfare Trust and Diamond Leasing and Finance Limited as consideration for the sale of the 100 shares each held by them in the assessee company and out of the balance consideration deposited by the purchaser an aggregate sum of Rs.149,99,02,514/- would be withheld with the escrow agent and the remaining balance amount would be released to the petitioner No.3. The amount to be withheld by the escrow agent included a sum of Rs.64,99,02,514/-which was the entire consideration payable to petitioner Nos.1 and 2 for sale of their shares in the assessee company to the purchaser.



**4.** The purpose for withholding the sum of '64,99,02,514/-from the sale consideration payable by the purchaser was on account of the income tax liability of the assessee company that was being contested. It is relevant to state that M/s Escorts Heart Institute and Research Centre, which was a charitable society was merged with another society and subsequently, the same was converted into a company incorporated under the Companies Act, namely, the assessee company. The Assessing Officer denied the exemption to the assessee company under Section 35(1)(ii) of the Act and passed an assessment order for the assessment year 2001-2002 raising a demand of '124.36 crores. The said demand is disputed by the assesssee company. As there were disputes pending with the Income Tax Department regarding the tax liability of the assessee company, it was agreed between the purchaser and the petitioners that a certain sum would be held back from the sale consideration by the escrow agent and would not be released to the petitioners until the income tax liability of the assessee company was finally adjudicated. In the event that the income tax liability of the assessee company exceeded the amount withheld by the escrow agent from the sale consideration, the same would not be released to the petitioners but would be returned to the purchaser. However, in the event, the tax liability of the assessee company was less than the amount withheld by the escrow agent then the amount equal to the income tax liability of the assessee company would be refunded to the purchaser and the balance would be released to the petitioners.

**5.** Pursuant to the share purchase agreement dated 25.09.2005, the sellers and the purchaser and respondent no. 2 entered into an Escrow Agreement dated 27.09.2005 which, inter alia, recorded the obligations of respondent no.2 as the escrow agent.

**6.** The Assessing Officer issued a notice under Section 226(3) of the Act to respondent no. 2 bank in respect to the amount held by respondent no. 2 as an escrow agent in terms of the Escrow Agreement dated 27.09.2005. The said notice was objected to and it was clarified by respondent no. 2 that it was not holding any money on account of the assessee company. The Assessing Officer sent another similar notice dated 15.02.2007 without considering the objections of the respondent no. 2 bank.

**7.** The Assessing Officer sent a notice dated 16.07.2008 directing the respondent no. 2/bank to remit a sum of ' 64,99,02,514/-which was

lying in fixed deposits to the Assessing Officer by 17.07.2008.

**8.** The notice dated 16.07.2008 was challenged by petitioner no. 1 and 2 by filing a writ petition, being writ petition no. 5080/2008 in this Court. This Court passed an interim order dated 17.07.2008 staying the operation of the notice dated 16.07.2008 and after hearing parties, remanded the matter to the Assistant Commissioner of Income-tax to decide whether the petitioner had a locus standi in the matter and to pass a reasoned order after considering the submissions of the petitioners. 9. It was contended before the Assessing Officer on behalf of the petitioners that the action under Section 226(3) of the Act was in the nature of garnishee proceedings where the revenue steps into the shoes of the assessee and recovers money directly from a third party who owes money to the assessee. It was further contended that respondent no. 2 does not either hold any money on account of the assessee company or owe any money to the assessee company and therefore, the sums held by the respondent no. 2 in escrow pursuant to the Escrow Agreement dated 27.09.2005 cannot be demanded by the revenue.

**10.** The respondent no. 2 bank also furnished an affidavit dated 07.12.2012 unequivocally affirming that the fixed deposit of Rs. 94,84,96,05.97/-was held by respondent no.2 in terms of the Escrow Agreement and that no part of the same was owed to or held on account of the assessee company. The relevant extract from the affidavit dated 07.12.2012 furnished by respondent no. 2 to the Assessing Officer is quoted below:

> "4. That the Bank is holding Fixed Deposit of Rs 94,84,96,005.97 (Rupees Ninety four crores eighty four lakhs ninety six thousand five and paise ninety seven only) as 'Escrow Agent' in terms of Escrow Agreement dated 27.09.2005 executed by and between Escorts Limited, AAA Portfolio Pvt. Ltd., Big Apple Clothing Pvt. Ltd., Charak Ayurvedic Institute. Escorts Employees Welfare Trust, Diamond Leasing & Finance Ltd., Fortis Healthcare Ltd. and HDFC Bank Limited.
>
> 5. That no part of the amount lying in the 'Escrow Account' is owed to or belongs to or held by the Bank or may be subsequently held by the Bank on account of M/s Escorts Heart Institute & Research Centre, Delhi".



**11.** The Assessing Officer after considering the submission of the petitioners passed the impugned order dated 01.02.2013. After quoting the relevant clauses from the Escrow Agreement the Assessing Officer held as under:

> "From the above quoted excerpts of the Escrow agreement, it is amply clear that any Income Tax Demand arising on account of merger of Escort Heart Institute and Research Center Delhi with EHIRCL, Chandigarh and/or the conversation of the merged entity into a Part IX company under the Companies Act, 1956 has to be paid by the ESCROW Account. The said demand has been raised due to the withdrawal of exemption of the Escort Heart Institute and Research Center, Delhi as it got merged with the Chandigarh Society which was a non-charitable society. Therefore, it can be concluded without doubt that the said amount of money has been kept in the ESCROW Account for meeting Income Tax demands only. So the notice u/s 226(3) sent by the ACIT dated 10.10.2006 is very much in accordance with ESCROW Agreement and Income Tax Act."

**12.** Pursuant to the impugned order, the Assessing Officer sent a notice dated 04.02.2013 under Section 226(3) of the Act calling upon respondent no. 2 to forthwith pay the amount held by respondent no.2 by way of fixed deposits pursuant to the Escrow Agreement. Thereafter, respondent no. 2 paid a sum of Rs.95,85,30,934/-to the Assessing Officer in compliance of the notice dated 04.02.2013.

**13**. The controversy in the present writ petition essentially revolves around the question whether respondent no. 2 held any money on account of the assessee company pursuant to the Escrow Agreement. While it is contended on behalf of the petitioners that the amount kept in escrow with the respondent bank belongs to petitioner no. 1 & 2 being the sale consideration receivable by them for sale of their shares to the purchaser, the impugned order holds to the contrary.

**14.** The other aspect that is required to be considered is whether respondent no.2 could be compelled to makeover the funds held in escrow despite an affidavit being furnished on behalf of respondent no.2 that it did not hold any sum on account of the assessee company.

**15.** Before proceeding further it would be relevant to examine the

provisions of Section 226 of the Act. Section 226 falls within chapter XVII of the Act, which contains the machinery provisions for collection and recovery of income tax. Section 226 of the Act provides for other modes of recovery of tax due from an assessee. Section 226(3) of the Act is relevant for considering the controversy in the present matter and the relevant clauses of Section 226 of the Act are quoted below:

**"226. -Other modes of recovery.**

xxxx xxxx xxxx xxxx xxxx

(3) (i) The Assessing Officer or Tax Recovery Officer may, at any time or from time to time, by notice in writing require any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee to pay to the Assessing Officer or Tax Recovery Officer either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount due by the assessee in respect of arrears or the whole of the money when it is equal to or less than that amount.

(ii) A notice under this sub-section may be issued to any person who holds or may subsequently hold any money for or on account of the assessee jointly with any other person and for the purposes of this sub-section, the shares of the joint holders in such account shall be presumed, until the contrary is proved, to be equal.

(iii) A copy of the notice shall be forwarded to the assessee at his last address known to the Assessing Officer or Tax Recovery Officer, and in the case of a joint account to all the joint holders at their last addresses known to the Assessing Officer or Tax Recovery Officer.

(iv) Save as otherwise provided in this sub-section, every person to whom a notice is issued under this sub-section shall be bound to comply with such notice, and, in particular, where any such notice is issued to a post office, banking company or an insurer, it shall not be necessary for any pass book, deposit receipt, policy or any other document to be produced for the purpose of any entry, endorsement or the like being made before payment



is made, notwithstanding any rule, practice or requirement to the contrary.

(v) xxxx xxxx xxxx xxxx xxxx

(vi) Where a person to whom a notice under this sub-section is sent objects to it by a statement on oath that the sum demanded or any part thereof is not due to the assessee or that he does not hold any money for or on account of the assessee, then nothing contained in this sub-section shall be deemed to require such person to pay any such sum or part thereof, as the case may be, but if it is discovered that such statement was false in any material particular, such person shall be personally liable to the Assessing Officer or Tax Recovery Officer to the extent of his own liability to the assessee on the date of the notice, or to the extent of the assessee's liability for any sum due under this Act, whichever is less."

**16.** The provisions of Section 226(3) of the Act provide the machinery for enabling an Assessing Officer to recover the amount of income tax due from an assessee by recovering sums from any person who owes any money to the assessee or holds any money on his account. Section 226(3) of the Act confers upon an Assessing Officer a special jurisdiction to proceed directly against a person, other than an assessee, for recovery of income-tax demands due from the assessee. The power conferred under Section 226(3) of the Act is a special power that enables the Assessing Officer to reach beyond the assessee in order to appropriate amounts due to or held by third parties on account of the assessee. The proceedings under Section 226(3) of the Act are in the nature of garnishee proceedings whereby a garnishee is called upon to directly pay a debt to the creditor of a person to whom the garnishee is indebted. The Assessing Officer is similarly situated as a garnisher and is in a position to initiate action under Section 226(3) of the Act to reach out to the property of the assessee which is held by a third party or to any sum which is owed by a third party to the assessee. The Assessing Officer steps into the shoes of an assessee with respect to recovering sums owed to or held by the garnishee on account of the assessee. An Assessing Officer is not conferred with any additional rights in respect of any amount due from the garnishee other than that which are available to the assessee.

**17.** Section 226(3) of the Act neither confers jurisdiction nor provides a machinery for an Assessing Officer to adjudicate the indebtedness of a third party to the assessee and the provisions of section 226(3) must be confined to those cases where a third party admits to owing money or holding any money on account of the assessee or in cases where it is indisputable that the third party owes money to or holds money on account of the assessee. However, in cases where there are contentious issues raised by a third party who disputes his liability to pay any money to the assessee there is no mechanism provided or jurisdiction conferred upon the Assessing Officer to proceed further in the matter and take upon himself the mantle of adjudicating the said disputes.

**18.** A Division Bench of the Calcatta High Court in the case of **Shaw Wallace and Co. Ltd. v. Union of India:** (2003) 262 ITR 528 (Cal.) also expressed a similar view and held as under:

> "In the facts and circumstances of the case whether the decree had been put to execution by VCVL or not is immaterial. If the decree is offered, the Tax Recovery Officer is free to proceed upon it under section 226(3) of the Act. But by reason of clause (vi) thereof the judgment debtor/garnishee has a right to object. As soon as objected, to the Tax Recovery Officer cannot proceed to recover until discovery of falsity of the objection. If the executability of the decree is challenged, the Tax Recovery Officer cannot assume jurisdiction to decide a dispute between the garnishee and the assessee. He cannot usurp the jurisdiction of the executing court. The jurisdiction of the Tax Recovery Officer is confined within the dispute between the assessee and the income tax authority. He cannot assume jurisdiction in respect of any dispute between the assessee and the garnishee nor can he embark upon an exercise to determine any such dispute unless it appears to be false on the face of it. As soon there appears to be a dispute prima facie, the objection cannot be presumed to be false. The proceedings under section 226(3) of the Act would then be subject to the determination by the appropriate forum. Until determination, the Tax Recovery Officer has no scope of discovering the falsity of the objection. When the garnishee does not admit or denies that he owes the debt to the assessee, the Tax Recovery Officer cannot sit in judgment over the denial and come to his own conclusion. It was so held in **Mohamedaly**



> **Sarafaly and Co. v. ITO** [1968] 68 ITR 128, 131 (Mad) and **P. K. Trading Co. v. ITO** [1970] 78 ITR 427, 433 (Cal). Once on oath the garnishee denies the liability towards the assessee, the burden of showing the statement on oath is false in any material particular would be upon the Revenue. The Revenue has to disclose material particulars that led it to a definite conclusion. Then only the payment can be imposed on the garnishee under section 226(3)(vi) of the Act. The apex court had taken such a view in **Beharilal Ramcharan v. ITO** [1981] 131 ITR 129, 137-38. It is only when the objection is altogether false and it is so apparent and is so discovered that the Tax Recovery Officer can proceed against the garnishee under section 226(3) of the Act. It is only the part, which cannot be objected to would come within its purview."

**19.** It is well settled that even in cases of garnishee proceeding under Order 21 Rule 46 of the Code of Civil Procedure (hereinafter referred to as the "CPC"), the Court may pass a garnishee order enabling a judgment creditor to obtain satisfaction of his claim only in those cases which are similar in scope as to judgments on admission under Order 12 Rule 6 of the CPC. A Court cannot issue garnishee order under Order 21 Rule 46 of the CPC against a debtor of the judgment debtor who disputes his indebtedness unless an issue in this regard is struck and tried as provided under Order 21 Rule 46C of the CPC. Unlike the CPC, Section 226(3) of the Act does not have any provision similar to Order 21 Rule 46C of the CPC which confers jurisdiction on the Assessing Officer to adjudicate the question regarding indebtedness of a third party to an assessee who disputes the same. Once the third party noticee has disputed that he owes any money or holds any money on account of the assessee, the Assessing Officer would not have any jurisdiction to proceed further against the third party. This is also abundantly clear from the language of clause (vi) of Section 226(3) of the Act.

**20.** The Supreme Court has in the case of **Surinder Nath Kapoor v. Union of India:** AIR 1988 SC 1777, observed as under:

> "15. The object of serving a notice under clause (3)(vi) of section 226 is to give the garnishee an opportunity to admit or deny his liability for the amount mentioned in the notice. Under clause (i) of section 226(3), if the garnishee objects to the notice by a

statement on oath that the sum demanded or any part thereof is not due to the assessee, then the garnishee will not be required to pay any such sum or part thereof, as the case may be."

**21.** In the present case, respondent no. 2 bank has furnished an affidavit unequivocally affirming that no part of the amount held by respondent no. 2 in escrow is owed to or belongs to or is held by respondent no. 2 on account of the assessee company. In view of the affidavit dated 07.12.2012 furnished by the respondent no. 2 bank, the Assessing Officer had no jurisdiction to proceed further and call upon the respondent no. 2 bank to makeover the funds held by respondent no. 2 as an escrow agent pursuant to the Escrow Agreement dated 27.09.2005, to the Assessing Officer. In this view, the impugned order dated 01.02.2013 and impugned notice dated 04.02.2013 are wholly without jurisdiction and are thus liable to be set aside.

**22.** In view of our finding that the decision of the Assessing Officer to proceed further despite the affidavit dated 07.12.2012 furnished by respondent no. 2 bank is without jurisdiction, it is not necessary to examine the question whether the amount held by respondent no. 2 bank pursuant to the Escrow Agreement could be stated to be any money which is due or may become due to the assessee company or which is held for and on account of the assessee company. However, we have heard counsel for the parties in this regard and deem it appropriate to examine the same.

**23.** Indisputably the monies held by respondent no. 2 bank are a part of the consideration which has been deposited by the purchaser for purchase of the shares of the assessee company from the sellers in terms of the Share Purchase Agreement dated 25.09.2005 entered into between the sellers and the purchaser. The assessee company is not a party to the said agreement. The Share Purchase Agreement dated 25.09.2005 contains the agreed covenants with regard to the escrow arrangement as agreed between the petitioners and the purchaser. Clause 2.9 of the Share Purchase Agreement is relevant and is quoted below:-

"2.9 The Escrow Agent, shall deal with the Heldback Amount No.2 as under:

AAA and Apple agree that the amount of their respective share of the Sale Consideration being Rs. 32,49,51,257



(Rupees Thirty Two Crores Forty Nine Lakhs Fifty One Thousand Two Hundred Fifty Seven Only) each aggregating to Rs,64,99,02,514 (Rupees Sixty Four Crores Ninety Nine Lakhs Two Thousand Five Hundred Fourteen Only) to which they are entitled under this Agreement, shall be retained by the Escrow Agent and shall be invested by the Escrow Agent in capital gains tax saving bonds in the names of AAA and Apple in equal proportions (the "Securities"). The Securities shall be kept in the custody of the Escrow Agent and shall be retained as security towards settlement of the Income Tax claim/demand of the Company subject to such Income Tax claim/demand having been finally adjudicated in law or finally settled, as the case may be. EL and the Purchaser hereby agree that the Income Tax claim/demand shall be defended by EL at its own cost in mutual consultation with the Purchaser and the Company. In the event EL is desirous of settling the Income Tax claim/demand it shall do so only with the prior written consent of the Purchaser and the Company, which consent shall not be unreasonably withheld.

For the purposes of this Article 2.9, Income Tax claim/demand shall mean any Income Tax and/or Capital Gain Tax claim/demand including interest and penalty thereon, if any, made on the Company on account of or in connection with the merger of Escorts Heart Institute and Research Centre Delhi with Escorts Heart Institute and Research Centre, Chandigarh and/or the conversion of the merged entity into a Part IX Company under the Companies Act, 1956, including all legal expenses incurred by EL for defending the Income Tax claim/demand.

Provided that EL shall have right to substitute the Securities with cash or such other securities as may be acceptable to the Purchaser by depositing an amount with the Escrow Agent, equivalent to the value of total Securities including interest accrued thereon up to the date of such substitution by EL. In the event EL substitutes the Securities with either cash or such other securities, the Securities in the names of AAA and Apple shall be released by the Escrow

Agent to AAA and Apple along with interest accrued thereon.

The Parties hereby agree and undertake that the Heldback Amount No.2 shall be utilized in the manner provided below:

(a) In the event the Income Tax claim/demand is equal to Rs.64,99,02,514 (Rupees Sixty Four Crores Ninety Nine Lakhs Two Thousand Five Hundred Fourteen Only) together with all interest accrued thereon, the entire amount of Rs.64,99,02,514 (Rupees Sixty Four Crores Ninety Nine Lakhs Two Thousand Five Hundred Fourteen Only) together with all interest accrued thereon shall be paid to the Purchaser in the first instance by EL under intimation to the Escrow Agent by EL, within two Business Days of the Company notifying EL, the Purchaser and the Escrow Agent, failing which by the Escrow Agent in favour of the Purchaser from the amount invested in securities or held in cash by the Escrow Agent as the case may be, together with all interest accrued thereon. In the event the said amount is paid directly by EL to the Purchaser the Escrow Agent, under instructions of EL, shall release to EL and/or AAA and/or Apple as the case may be, the amount (if in cash) or securities, as the case may be together with all interest accrued thereon held by the Escrow Agent.

(b) In the event the Income Tax claim/demand exceeds Rs.64,99,02,514 (Rupees Sixty Four Crores Ninety Nine Lakhs Two Thousand Five Hundred Fourteen Only), together with all interest accrued thereon, an amount of Rs.64,99,02,514 (Rupees Sixty Four Crores Ninety Nine Lakhs Two Thousand Five Hundred Fourteen Only) together with all interest accrued thereon shall be paid to the Purchaser in the first instance by EL under intimation to the Escrow Agent by EL, within two Business Days of the Company notifying EL, the Purchaser and the Escrow Agent, failing which by the Escrow Agent in favour of the Purchaser from the amount invested in securities or held in cash by the Escrow Agent as the case may be,



together with all interest accrued thereon. The balance amount being difference between aforesaid Rs.64,99,02,514 (Rupees Sixty Four Crores Ninety Nine Lakhs Two Thousand Five Hundred Fourteen Only) together with all interest accrued thereon and the Income Tax claim/demand shall be borne by EL and the Purchaser in the ratio of 1/3 and 2/3 respectively.

EL hereby undertakes to pay its 1/3 share to the Purchaser within two Business Days of the Company notifying EL, the Purchaser and the Escrow Agent. In the event there is a delay in payment to Purchaser by EL of its aforesaid 1/3 share, interest @ 15% per annum on the aforesaid 1/3 share or part thereof which shall remain payable by EL to the Purchaser shall commence with effect from the expiry of two Business Days until payment to the Purchaser. In the event the said amount is paid directly by EL to the Purchaser, the Escrow Agent under instructions of EL, shall release to EL and/or AAA and/or Apple as the case may be, the amount (if in cash) or securities as the case may be together with all interest accrued thereon held by the Escrow Agent.

(c) In the event the Income Tax claim/demand is less than Rs.64,99,02,514 (Rupees Sixty Four Crores Ninety Nine Lakhs Two Thousand Five Hundred Fourteen Only) together with all interest accrued thereon, the Income Tax claim/demand shall be paid to the Purchaser by EL in the first instance under intimation to the Escrow Agent by EL, within two Business Days of the Company notifying EL, the Purchaser and the Escrow Agent, failing which by the Escrow Agent in favour of the Purchaser from the amount invested in securities or held in cash by the Escrow Agent as the case may be, together with all interest accrued thereon. The Escrow Agent shall pay to EL the balance amount along with interest accrued thereon available with the Escrow Agent after payment of the Income Tax claim/demand. In the event the said amount is paid directly by EL to the Purchaser the Escrow Agent, under instructions of EL, shall release to EL and/or AAA and/or Apple as the

case may be, the amount (if in cash) or securities as the case may be together with all interest accrued thereon held by the Escrow Agent.

The Escrow Agent is hereby authorised jointly and/or severally by AAA, Apple and EL to deal with cash or the securities being Heldback Amount No.2, to give effect to the provisions of this Article 2.9.

On the Income Tax claim/demand being paid to the Purchaser in a manner as contemplated under this Article 2.9 (a), (b) and (c), EL and/or AAA and/or Apple shall stand discharged all of its obligations."

**24.** Pursuant to the Share Purchase Agreement dated 25.09.2005 the sellers, the purchaser and respondent no. 2 entered into an Escrow Agreement dated 27.09.2005 which, inter alia, recorded the obligations of respondent no.2 as the escrow agent. Clause 4.4 & clause 4.5 of the Escrow Agreement are relevant as the same relate to the sums agreed to be placed with the escrow agent with respect to the income tax liability of the assessee company. Clause 4.4 and 4.5 the Escrow Agreement are quoted below:

"4.4 The Escrow Agent, shall deal with the Heldback Amount No.2 as under:

(a) Parties agree that the amount under Heldback Amount No.2 comprise of respective shares of AAA and Apple in the Sale Consideration being Rs.32,49,51,257 (Rupees Thirty Two Crores Forty Nine Lakhs Fifty One Thousand Two Hundred Fifty Seven Only) each aggregating to Rs.64,99,02,514 (Rupees Sixty Four Crores Ninety Nine Lakhs Two Thousand Five Hundred Fourteen Only).

(b) Parties further agree that Heldback Amount No.2 shall be retained and invested on behalf of AAA and Apple by the Escrow Agent in two separate fixed deposits (the "Fixed Deposits") of Rs.32,49,51,257 (Rupees Thirty Two Crores Forty Nine Lakhs Fifty One Thousand Two Hundred Fifty Seven Only) each maintained with the Escrow Agent in the name of the Escrow Account. The Fixed Deposits shall be of a tenor of five years and one day each and would be encashable/renewable from time to time by



Escrow Agent without any further approval, consent or notice from AAA, Apple, EL and/or Purchaser, as the case may be, unless Escrow Agent is in receipt of any joint instructions to the contrary from EL and Purchaser.

(c) Parties further agree that Heldback Amount No.2 in the form of Fixed Deposits shall be retained by the Escrow Agent as custodian towards settlement of the Income Tax claim/demand of the Company.

Provided that EL shall have right to substitute the Fixed Deposits with cash or such other securities (Fixed Deposits along with cash and such other substituted securities shall hereinafter be referred to as the "Securities") as may be acceptable to the Purchaser and the Escrow Agent, by depositing such Securities with the Escrow Agent, equivalent to the value of total Fixed Deposits/substituted Securities including interest accrued thereon up to the date of such substitution by EL. In the event EL substitutes the Fixed Deposits with cash or other securities, the Fixed Deposits or any balance held in respect of Heldback Amount No.2 shall be released by the Escrow Agent to AAA and Apple in the proportion of their respective shares in the Sale Consideration along with interest accrued thereon.

For the purposes of this Clause 4.4, Income Tax claim/demand shall mean any Income Tax and/or Capital Gain Tax claim/demand including interest and penalty thereon, if any, made on the Company on account of or in connection with the merger of Escorts Heart Institute and Research Centre Delhi with Escorts Heart Institute and Research Centre, Chandigarh and/or the conversion of the merged entity into a Part IX Company under the Companies Act, 1956, including all legal expenses incurred by EL for defending the Income Tax claim/demand.

4.5 The Parties hereby agree and undertake that the Heldback Amount No.2 or any balance in respect thereof shall be disbursed either to the Sellers or the Purchaser in accordance with the manner specified below:

(a) In the event the Income Tax claim/demand is equal to

Rs.64,99,02,514 (Rupees Sixty Four Crores Ninety Nine Lakhs Two Thousand Five Hundred Fourteen Only) together with all interest accrued thereon, the entire amount of the Securities or any balance in respect thereof shall be paid to the Purchaser upon receipt of a opinion in writing by the Escrow Agent from the Purchaser obtained by the Purchaser from one amongst the following accounting firms, namely Price Waterhouse, Ernst & Young, Delloitte, Touche & Tohmatsu and KPMG certifying/stating that the demand pertains to Income Tax claim/demand.

(b) In the event the Income Tax claim/demand exceeds Rs.64,99,02,514 (Rupees Sixty Four Crores Ninety Nine Lakhs Two Thousand Five Hundred Fourteen Only), together with all interest accrued thereon, the entire amount of the Securities or any balance in respect thereof shall be paid to the Purchaser upon receipt of a opinion in writing by the Escrow Agent from the Purchaser, obtained by the Purchaser from one amongst the following accounting firms, namely Price Waterhouse, Ernst & Young, Delloitte, Touche & Tohmatsu and KPMG certifying/stating that the demand pertains to Income Tax claim/demand. The balance amount after payment of the Income Tax demand/ claim as aforesaid shall be borne and paid by the Seller and the Purchaser in terms of the SPA.

(c) In the event the Income Tax claim/demand is crystallised in part or is less than Rs.64,99,02,514 (Rupees Sixty Four Crores Ninety Nine Lakhs Two Thousand Five Hundred Fourteen Only) together with all interest accrued thereon, the Income Tax claim/demand crystallised in part shall be paid to the Purchaser upon receipt of a opinion in writing by the Escrow Agent from the Purchaser, obtained by the Purchaser from one amongst the following accounting firms, namely Price Waterhouse, Ernst & Young, Delloitte, Touche & Tohmatsu and KPMG certifying/stating that the demand pertains to Income Tax claim/demand. The balance amount after disbursement of the Income Tax claim/demand to the Purchaser as specified in this paragraph shall be released by the Escrow Agent



to EL and/or AAA and/or Apple as the case may be only upon receipt of joint instructions from EL and the Purchaser that there is no other Income Tax claim/demand pending and/or to be discharged."

**25.** A plain reading of the Share Purchase Agreement dated 25.09.2005 and the Escrow Agreement dated 27.09.2005 would indicate that the conclusion drawn by the Assessing Officer that respondent no. 2 held any money on a ccount of the assessee company is patently erroneous. Neither the Share Purchase Agreement nor the Escrow Agreement provides for any contingency which would enable the assessee company or any other party to insist that the funds held by the respondent no. 2 bank in escrow be paid either to the assessee company or to the Income-tax Department on account of the assessee company.

**26.** The reason why the purchaser and the sellers agreed to keep part of the sale consideration paid by the purchaser in escrow with respondent no. 2 bank is apparent from the terms of the Share Purchase Agreement and the Escrow Agreement. The assessee company whose shares were being transacted had been converted from a society with whom a charitable society had been merged. As per the Revenue these transactions had resulted in an income-tax liability upon the assessee company which was disputed by the assessee company. In the event, the income-tax as demanded was finally adjudicated to be payable, it would have an adverse effect on the value of the shares of the assessee company which were subject matter of the transaction. Thus, in order to indemnify the purchaser against such adverse effect in the value of the shares of the assessee company being acquired by the purchaser, an amount of Rs.64,99,02,514/( referred to as "Heldback Amount no.2" in the Share Purchase Agreement and the Escrow Agreement) was agreed to be withheld and kept in escrow with respondent no. 2 bank, from the consideration payable for purchase of the shares of the assessee company. In the event the liability of the assessee company on account of or in connection with the merger of Escorts Heart Institute and Research Centre Delhi with Escorts Heart Institute and Research Centre, Chandigarh and/or the conversion of the merged entity into a company under the Companies Act, 1956, including all legal expenses incurred by petitioner no. 3 for defending the Income Tax claim/demand, (defined as income tax claim/ demand for the purposes of the Share Purchase Agreement and the Escrow Agreement) as finally adjudicated was less than the amount

available with the respondent no. 2 bank, an amount equal to the income-tax liability would be paid to the purchaser and the balance would be released to the petitioners. In the event the income-tax claim/demand as finally adjudicated was greater than the amount available in escrow with the respondent no. 2 bank, the entire amount would be paid to the purchaser. The Share Purchase Agreement further recorded that in addition, petitioner no. 3 would pay 1/3rd of the deficient amount to the purchaser. It is clear from the language of the Share Purchase Agreement that under no circumstances would the money held in escrow be released either to the assessee company or to the Income-tax Department. This clearly indicates that no amount was held by respondent no. 2 on account of the assessee company.

**27.** There is also no reason why either the purchaser of shares of a company or the selling shareholders have any occasion to pay any part of the consideration for sale and purchase of shares of a company to the company. A company is an independent entity completely distinct from its shareholders. A transaction relating to sale and purchase of shares is a transaction inter-se the selling shareholders and purchasers and a company cannot stake claim to any part of the consideration as shares of a company are not the assets of the company but those of its shareholders. The assessee company is neither a party to the Share Purchase Agreement or the Escrow Agreement nor can claim any sum from the parties to the Escrow Agreement. No money is due to the assessee company by respondent no.2 or is held by or may subsequently be held by Respondent no. 2 on account of the assessee company. The conclusion of the Assessing Officer that the amount of money kept with respondent no. 2 in escrow is available to the assessee for meeting its income-tax demand is thus erroneous.

**28.** For the reasons as stated above, we set aside the decision of Assessing Officer dated 01.02.2013 and the notice dated 04.02.2013. Consequently, the respondent no. 1 is directed to forthwith refund the amount recovered from respondent no.2 bank pursuant to the notice dated 04.02.2013.

**29.** Parties are left to bear their own costs.

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**ILR (2013) V DELHI 3958**
**CRL. L.P.**

**STATE ....PETITIONER**

**VERSUS**

**OM PRAKASH & ORS. ....RESPONDENTS**

**(G.S. SISTANI & G.P. MITTAL, JJ.)**

**CRL.L.P. NO. : 74/2013 DATE OF DECISION: 05.08.2013**

**Code of Criminal Procedure, 1973—Sec. 378 (1)—Secret information received against respondent no. 1, involved in printing of fake Indian currency notes (FICN) in the denomination of '100/- and '50—Respondent was to supply FICN to respondent no. 2 and respondent no. 2 and respondent no.3—Direction to conduct the raid immediately—Raiding party left the special cell in private cars—Efforts made to persuade public persons to join the raiding party but none agreed—Respondent no.1 took out yellow coloured envelopes—Handed over to respondent no. 2 and respondent no. 3 respectively—The police apprehended them-35 FICN in the denomination of '50 recovered form respondent no. 2—Further, 35 FICN in the denomination of '100 and '34 FICN in the denomination of '50 recovered from respondent no. 3—Moreover, 76 FICN in the denomination of '100 and 54 FICN in the denomination of '50 recovered form respondent no.1—Trial Court has observed that absence of a public witness is fatal to the admissibility or appreciation of evidence—Trial Court observed that the mere use of personal vehicles of the investing officers the investigation and evidence on record as suspicious—Hence the present leave to appeal petition. Held-PW-4 to PW-7 in their testimony have**

**stated that being the official of Special Cell they are not required to enter their arrival and departure in the register—All police officials irrespective of their rank are bound to record their arrival at the time of joining their duties and departure at the time of leaving their office—Trial Court rightly held it is possible to manage the rojnamcha register—Material contradictions in the testimonies of police officials on the timing of preparation of the rukka and registration of FIR—Use of special vehicles PW-5 neither ascribed any special reason for using private vehicles nor was any log book maintained by him—Testimonies of the policed official witnesses are dissatisfactory with regard to this circumstance also—Master—Piece of currencies (Ex. P-3)—One side could have been used to print the FICN—Prosecution failed to show how the FICN were printed on both sides by the respondent no. 1- Tampering with the case property—Yellow coloured envelopes found missing—Possibility of tampering with the case property—No public witness was called—Taking the search of the house of respondent no.1—Section 100(4) of Cr.P.C casts a mandatory duty upon the investigators to call upon two or more independent and respectable inhabitants of the locality where the search is to be conducted—Wife of respondent 1 was present in the house at the time of search but no efforts were made to join her as recovery witness—No list of seized articles was delivered to respondent no.1 —Non—Joining of any independent witness at the time of raid—The Supreme Court in *Pradeep Narayan Madgaonkar v. State of Maharashtra*, observed "evidence of the officials (police) witnesses cannot be discarded merely on the ground that they belong to the force—But prudence dictates that their evidence needs to be subjected to strict scrutiny—Requires greater care to appreciate their testimony"—Leave is to be granted in exceptional cases where the judgment under appeal is found to**



**be perverse.**

**Important Issue Involved:** Evidence of the officials (police) witnesses cannot be discarded merely on the ground that they belong to the police force and are, either interested in the investigating or the prosecution agency but prudence dictates that their evidence needs to be subjected to strict scrutiny and as far as possible corroboration of their evidence in material particulars should be sought. Their desire to see the success of the case based on their investigation requires grated care to appreciate their testimony.

**[Sa Gh]**

**APPEARANCES:**

**FOR THE PETITIONERS** : Mr. Dayan Krishnan, Advocate.

**FOR THE RESPONDENT** : None

**CASE REFERRED TO:**

1. *Pradeep Narayan Madgaonkar* vs. *State of Maharasthra* reported at (1995) 4SCC 255.

**RESULT:** Petition for leave to appeal dismissed.

**G.S. SISTANI, J. (ORAL)**

**CRL.M.A. 2097/2013**

**1.** This is an application filed by the petitioner seeking condonation of 173 days. delay in filing the present petition for leave to appeal.

**2.** Heard. For the reasons stated in the application, the same is allowed. Delay in filing the present leave to appeal is condoned.

**3.** Application stands disposed of.

**CRL.L.P. 74/2013**

**4.** The present leave to appeal has been filed by the State under Section 378(1) of the Code of Criminal Procedure against the acquittal of the respondents of all charges under Sections 489A/489B/489C/489D/34 IPC, vide judgment dated 18.8.2012 passed by the learned trial court

in S.C.No.12/2011.

**5.** The brief facts, as noticed by the trial court, are that as per the prosecution on 8.1.2011 at about 2.15 p.m., a secret information was received by SI Satish Rana that one person, namely, Om Prakash, (respondent no.1 herein) is involved in the printing of fake Indian currency notes (FICN in short) in the denominations of Rs. 100/- and Rs. 50/- from his house. SI Satish Rana further learnt that Om Prakash used to supply the said FICN to meet his daily expenses. As per the information of SI Satish Rana, Om Prakash was to come near a Power House before Khajuri Red light at Pushta Road, Delhi, between 4.00 p.m. and 4.30 p.m. to supply FICN to two persons, namely, Sanni (respondent no.2) and Rohit (respondent no.3). SI Satish Rana produced the secret informer before Inspr. Subhash Vats, who, upon satisfying himself, conveyed the secret information by phone to his senior officer, who directed him to conduct the raid immediately. As directed by Inspr. Subhash Vats, SI Satish Rana constituted a raiding party comprising of ten police officials under the supervision of Inspr. Subhash Vats, he briefed the secret information to the members of the raiding party. The raiding party left the office of the Special Cell at about 2.40 p.m. in private cars. On the way efforts were also made to persuade public persons to join the raiding party but none agreed.

**6.** At about 4.05 p.m. two persons came from Khajuri Red Light side. One person, who was wearing a green linedar (lining) shirt and blue jeans was identified by the secret informer as Rohit and the another person, who was wearing a black coloured jersey and blue jeans, was identified as Sanni. After about 5 minutes, another person, who was wearing grey coloured jacket, reached there. He was identified as Om Prakash. Thereafter Om Prakash spoke to the said persons and took out two yellow coloured envelopes from two different pockets of his jacket and handed over one envelope to Rohit and the other envelope to Sanni. Both, Rohit and Sanni obtained the envelopes, looked inside the envelope and thereafter kept the same in the right pocket of their pants. As soon as all the three persons started moving towards their direction, the police party apprehended them. SI Satish Rana caught hold of Om Prakash, HC Ashok caught hold of Sanni and HC Ram Gopal caught hold of Rohit. Thereafter SI Satish Rana disclosed his identity and offered the search of members of raiding party, but the respondents refused to take the search. Requests to join the investigation were also made to 8-10 persons



but none came forward. Thereafter investigating officer took a search of Sanni whereupon one yellow coloured envelope was recovered from the right side pocket of his pants, which contained 35 FICN in the denomination of Rs. 50/- bearing serial number OND 177233. All the recovered currency notes were kept in the same envelope and sealed in a cloth parcel with the seal of SR and the parcel was given serial No.S. Form FSL was also filled up and the seal was handed over to HC Ram Gopal. Thereafter SI Satish Rana took the search of respondent Rohit, and recovered one yellow coloured envelope containing 35 FICN in the denomination of '100/- each, bearing serial number 7LH-031937 and 34 FICN of Rs. 50/- each, bearing serial No.OND 177233 from the right pocket of his pant. All the recovered currency notes were kept in the same envelope and sealed in a cloth parcel with the seal of SR and the parcel was given serial No.R. Form FSL was also filled and the seal was handed over to HC Ram Gopal. Thereafter search of the respondent Om Prakash, was also taken and one yellow coloured envelope was recovered from the right side pocket of his pants which was found containing 76 FICN in the denomination of Rs. 100/-, each, having serial number 7LH-031937 and 54 FICN of Rs.50/-, each, having serial No.OND 177233. All the recovered currency notes were kept in the same envelope and sealed in a cloth parcel with the seal of SR after taking it from HC Ram Gopal the parcel was given serial No.O. Form FSL was also filled and thereafter the seal was handed over to HC Ram Gopal. All the recovered currency notes were fake and counterfeit as the security thread was quite dull. Thereafter SI Satish Rana prepared a rukka and sent HC Ram Gopal to the Police Station of Special Cell to lodge an FIR for the offence punishable under Sections 489A/489C/34 IPC. After the investigation was complete challan was filed. Charge was framed vide order dated 24.5.2011.

**7.** The prosecution examined eight witnesses. The respondents were also examined under Section 313 of the Code of Criminal Procedure. No evidence was led by the defence. As per the respondents, the appellant had picked them up from their respective houses and falsely implicated them in this case.

**8.** Learned counsel for the State submits that the learned trial court has erred in not noticing that it is a settled law that independent witnesses are not required to be associated in searches consequent to disclosure

under Section 27 of the Indian Evidence Act. Counsel further submits that the trial court has further erred in not noticing the settled position of law that absence of a public witness is not fatal to the admissibility or appreciation of evidence. Counsel also submits that the trial court has laid great emphasis to minor discrepancies between witnesses without taking into account that there is clear and cogent corroboration by the witnesses as well as the evidence on record.

**9.** It is contended by counsel for the petitioner that the trial court has given undue weightage and has erred in coming to the conclusion that the mere use of personal vehicles of the investigating officers renders the investigation and evidence on record as suspicious. It is further contended that the trial court has also erred in coming to the conclusion that the mere fact that the light pole was not mentioned in the site plan renders the site plan itself suspicious.

**10.** We have heard learned counsel for the State and also examined the judgment and the evidence placed on record. It may be noticed that to bring home the guilt of the accused persons the prosecution examined eight witnesses and the entire case of the prosecution is based on the deposition of Police official witnesses. The prosecution has failed to involve any independent witness or any respectable persons of the locality to join the proceedings.

**11.** The first issue that needs to be dealt is whether the officials of Special Cell are under an obligation to maintain a register where they are required to enter their arrival and departure. In their testimonies, PW-4 to PW-7 have stated that being the officials of Special Cell they are not required to enter their arrival and departure in the register. The trial court has observed, after perusing the relevant rules under Punjab Police Rules, 1934, that all police officials irrespective of their rank are bound to record their arrival at the time of joining their duties and departure at the time of leaving their office. However, in the instant case, the members of raiding party did not make any entry of their arrival or departure in the register. In light of this fact, we are of the view that the trial court has rightly held that it is possible to manage the rojnamcha register.

**12.** Further, as per the prosecution case, the rukka was prepared and sent to the police station at about 8:15 pm and FIR was registered at 9:00 pm. There are material contradictions in the testimonies of police officials on this aspect. According to PW-5 SI Satish Rana he had sent



the rukka to police station at 8:15 pm through PW-4 HC Ram Gopal. But PW-4 deposed that he left from the spot to lodge the FIR at about 7:45 pm. As per the prosecution, PW-4 stayed at the police station after lodging the FIR whereas as per PW-6 HC Ashok Kumar, PW-4 had returned to the spot along with the FIR. PW-3 ASI Ramesh Chand has given a totally different version. He deposed that he had received the rukka from PW-4 at about 4:15 pm and thereafter he had registered the FIR. PW-3 further admitted in his cross-examination that there is overwriting in the FIR at daily diary number. After considering this issue, we are of the view that the above mentioned discrepancies are inconsistent to the case of prosecution and, therefore, cannot be relied upon.

**13.** The next circumstance which is to be considered is the use of private vehicles in conducting the raid. PW-5 SI Satish Rana deposed that he had used two private cars and one gypsy in the raid. He further deposed that Special Cell had 10-12 different types of vehicles along with the drivers and log books were also being maintained in the said vehicles. Similarly PW-4, PW-6 and PW-7 also deposed that numerous official vehicles were available in the Special Cell along with the drivers. It is not clear as to why PW-5 preferred to use personal vehicles in the alleged raid. The trial court observed that in some special circumstances, investigating agency is compelled to use private vehicles in order to conceal their identity from the culprits but once they used private vehicles in the raid, it is the paramount duty of the investigator to maintain the log book of the said vehicle. In the instant case, PW-5 neither ascribed any special reason for using private vehicles nor was any log book maintained by him. Therefore, in our view, the testimonies of the police official witnesses are dissatisfactory with regard to this circumstance also.

**14.** Further the case of the prosecution is that two master-pieces of currencies of ‘50/- and ‘100/- each were recovered from the house of respondent Om Prakash. The said master-piece currency notes were found pasted on a white paper sheet and the serial number on these master-piece currency notes was found similar to when compared with the recovered FICN. PW-5 SI Satish Rana admitted in his cross-examination that the master-piece Ex.P-3 was pasted on a white sheet, thus, only one side of the master-piece could have been used to print the FICN. In this regard, the prosecution failed to show how the FICN were printed on both sides by the respondent Om Prakash. On the contrary,

PW-6 HC Ashok Kumar deposed that the dye of both sides of FICN was recovered from the house of respondent Om Prakash. However, the prosecution did not produce the other side of the master-piece before the trial court. In our opinion, this further weakens the case of the prosecution as rightly considered by the trial court.

**15.** The next issue pertains to the allegation of tampering with the case property. As per the prosecution case, when FICN were recovered from the respondents, they were in yellow coloured envelopes and the investigation officer had sealed the recovered FICN after keeping them in the respective envelopes. However, when the case property was opened for the first time before the trial court the said yellow coloured envelopes were found missing. PW-8 Vijender Singh, Senior Scientific Officer has nowhere deposed that when the sealed parcels reached FSL, they were in the sealed yellow coloured envelopes. In light of these facts, we are of the view that the trial court has rightly held that there is a possibility of tampering with the case property in the instant case.

**16.** It is also the case of the prosecution that the writing work was done either below the light of an electricity pole or after sitting in the car. PW-5 SI Satish Rana, who prepared the site plan Ex.PW5/C, did not denote the point where the said electricity pole was located. This fact creates another suspicion in the prosecution case. Further as per the prosecution case raiding party was constituted by PW-5 SI Satish Rana under the supervision of Inspector Subhash Vats and the raid was conducted by PW-5. However, PW-6 deposed that Inspector Subhash Vats was the leader of raiding party. According to PW-6, raid was conducted by Inspector Subhash Vats and not by PW-5. The prosecution has failed to explain the reason for not citing Inspector Subhash Vats as a witness. In our view, this is a material discrepancy which casts a serious doubt on the case of prosecution.

**17.** Further, as per the prosecution case, no public witness was called for at the time of taking the search of the house of respondent Om Prakash. Section 100 sub-section 4 of the Code of Criminal Procedure casts a mandatory duty upon the investigators to call upon two or more independent and respectable inhabitants of the locality where the search is to be conducted. The object of this provision is to ensure that searches are conducted fairly and squarely and that there is no "planting" of articles by the police.



**18.** In the instant case, wife of respondent Om Prakash was present in the house at the time of search but no efforts were made to join her. PW-5 SI Satish Rana deposed that he cannot tell the reason why investigating officer ASI Amrik Singh (PW-7) had not called her at the time of alleged recovery. PW-7 also could not explain why the wife of respondent Om Prakash was not joined as a recovery witness. Moreover, no list of seized articles was delivered to the wife of respondent Om Prakash.

**19.** Regarding non-joining of any independent witness at the time of raid, PW-5 SI Satish Rana in his cross- examination had categorically admitted that he had not called any respectable person from the nearby locality either at the time of raid or investigation. In the case of **Pradeep Narayan Madgaonkar v. State of Maharasthra** reported at (1995) 4SCC 255 it has been held by the Apex Court:

> "11. ... Indeed, the evidence of the officials (police) witnesses cannot be discarded merely on the ground that they belong to the police force and are, either interested in the investigating or the prosecuting agency but prudence dictates that their evidence needs to be subjected to strict scrutiny and as far as possible corroboration of their evidence in material particulars should be sought. Their desire to see the success of the case based on their investigation, requires greater care to appreciate their testimony. We cannot lose sight of the fact that these police officials did not join any *independent* witnesses of the *locality* and made an attempt to create an impression on the courts that both PW 2 and PW 5 were *witnesses of locality and were independent,* knowing fully well that PW 2 was a witness who was under their influence and 'available' to them, as he had been joining the raids earlier also and PW 5 was a close associate of PW 2, their friendship having developed during the days of gambling when admittedly the police never conducted any raid at their gambling den.
>
> 12. The very fact that the police officers joined PW 2 and PW 5 in the raid creates a doubt about the fairness of the investigation. Coupled with this is the manner in which the confessional statement of A-1 and A-2 was recorded by Hemant Karkare PW 3, which has been rightly discarded by the Designated Court

itself. Even if we were to ignore the tell-tale discrepancy in the number of the room i.e. 3323 or 3334, from where the appellants were arrested, accepting the explanation of the prosecution that it was as a result of typographical error, it looks to us rather strange that the discrepancy should have come to the notice of the investigating officer only when he filed his affidavit in the Supreme Court in the special leave petition filed by the absconding accused, yet in the totality of the circumstances of the case and after a careful analysis of the evidence on the record we find it rather unsafe to rely upon PW 1, PW 4 and PW 6 only without there being any independent corroboration of their testimony, to uphold the conviction and sentence of the appellants. We cannot lose sight of the fact that since the mere possession of an arm, as specified in the schedule, without a licence, in a notified area, attracts the provisions of Section 5 of TADA with stringent punishment, the quality of evidence on which the conviction can be based has to be of a much higher order than the one we find available in the present case. Our independent appraisal of the evidence on the record has created an impression on our minds that the prosecution has failed to bring home the charge to the appellants beyond a reasonable doubt."

**20.** The learned trial court has noticed that PW-5 had merely asked some passsers by to join the investigation who were not even ready to disclose their names and addresses to him. In this regard, we agree with the view taken by the trial court that such efforts cannot be termed as 'genuine and sincere efforts'.

**21.** It is well settled that leave to appeal is to be granted in exceptional cases where the judgment under appeal is found to be perverse. The court must take into account the presumption of innocence of the accused and the acquittal by trial court adds to the presumption of his innocence.

**22.** We do not find any reasons for interference in the present case. Accordingly, no grounds are made out and the petition for leave to appeal stands dismissed.

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**ILR (2013) V DELHI 3968**
**LPA**

**I.S. RANA ....APPELLANT**

**VERSUS**

**CENTAUR HOTEL .....RESPONDENT**

**(BADAR DURREZ AHMED, ACJ. & VIBHU BAKHRU, J.)**

**LPA NO. : 164/2013 DATE OF DECISION: 08.08.2013**

**Industrial Disputes Act, 1947—Section 33 & 33A—Appellant preferred appeal to challenge order passed in writ petition dismissing award passed by Industrial Tribunal in his favour—According to appellant, he was protected workman, thus, respondent had to seek approval of Industrial Tribunal before taking action against him—Since respondent did not comply with provisions of Section 33 (3) of Act, thus, he could not be dismissed from service pursuant to disciplinary inquiry held against him. Held:— Once a complaint is made under Section 33A of the Act and it established that there has been a violation of Section 33(2) (b) of the Act then the Tribunal has merely to direct that employee be given an appropriate relief.**

The Supreme Court held that failure to make an application under Section 33(2)(b) of the Act would amount to non-compliance with the mandatory provisions of the Act and this would render the order of punishment inoperative. The contention that the order of punishment would not become void or inoperative till the same was set aside under Section 33A was not accepted by the Court. The relevant extract from the said decision of the Supreme Court is held as under:-

"14. Where an application is made under Section

33(2)(b), proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examinewhether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with ornot, etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if orderof discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of employer and employee from the date of his dismissal or discharge but that order remains incomplete andremains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comesto an end de jure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in serviceentitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement. But on the other hand, if approval is given by theauthority and if the employee is aggrieved by such an approval, he is entitled to make a complaint under Section 33A challenging the order granting approval on any of the grounds available to him. Section 33A is available only to an employeeand is intended to save his time and trouble inasmuch as he can straightaway make a complaint before the very authority where the industrial dispute is already pending between theparties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of



discharge or dismissal is inoperative for contravention of the mandatory conditions contained in the proviso or where the approval is refused, a workman should still make a complaint under Section 33A andthat the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33A and that tillsuch time he should suffer misery of unemployment in spite of statutory protection given to him by the proviso to Section 33(2)(b). It is not correct to say that where the order of discharge or dismissal becomes inoperative because of contravention of proviso to Section 33(2)(b), Section 33A would be meaningless and futile. The said Section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of theapproval granted.

15. The view that when no application is made or the onemade is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal ordischarge does not become void or inoperative unless such an order is set aside under Section 33A, cannot be accepted. In our view, not making an application under Section 33(2)(b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to Section 33(2)(b). An employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving himof the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority inthe matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an

application after dismissing ordischarging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under Section33A notwithstanding the contravention of Section 33(2)(b) proviso, driving the employee to have recourse to one or moreproceedings by making a complaint under Section 33A or to raise another industrial dispute or to make a complaint under Section 31(1). Such an approach destroys the protectionspecifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practiceor harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment."

16. Section 31 speaks of penalty in respect of the offences stated therein. This provision is not intended to give any remedy to an aggrieved employee. It is only to punish theoffender. The argument that Section 31 provides a remedy to an employee for contravention of Section 33 is unacceptable. Merely because penal provision is available or a workman has a further remedy under Section 33A to challenge the approval granted, it cannot be said that the order of discharge or dismissal not become inoperative or invalid unless set aside under Section 33A. There is nothing in Sections 31, 33 and33A to suggest otherwise even reading them together in the context. These sections are intended to serve different purposes."

**(Para 14)**

**Important Issue Involved:** Once a complaint is made under Section 33A of the Act and it established that there has been a violation of Section 33(2) (b) of the Act then the Tribunal has merely to direct that employee be given an appropriate relief.



**[Sh Ka]**

**APPEARANCES:**

**FOR THE APPELLANT** : Mr. J.S. Bhasin with Ms. Rashmi Priya.

**FOR THE RESPONDENT** : Ms. Tanu Priya Gupta.

**CASES REFERRED TO:**

1. *Tops Security Ltd.* vs. *Subhash Chander Jha:* 191 (2012) DLT 361.
2. *Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd.* vs. *Ram Gopal Sharma and Others:* (2002) 2 SCC 244.

**RESULT:** Appeal Disposed of.

**VIBHU BAKHRU, J.**

**1.** This appeal challenges the order dated 07.02.2013 passed by a learned Single Judge of this Court in the writ petition being W.P.(C) 2934/1997. The appellant was an employee of the respondent and was dismissed from service pursuant to a disciplinary inquiry held against him. The appellant/employee raised a dispute before the Industrial Tribunal which culminated in an award in his favour. The learned Single Judge has set aside the award passed by the Industrial Tribunal. The appellant being aggrieved by the same has preferred the present appeal.

**2.** The dispute in the present appeal revolves around the question whether the learned Single Judge was correct in setting aside the award when admittedly the appellant was a protected workman and respondent had failed and neglected to obtain the approval as required under Section 33(2)(b)/33(3) of the Industrial Dispute Act, 1947 (hereinafter referred to as the "Act"). The brief facts relevant to consider the controversy in the present appeal are as under.

**3.** The appellant was an employee of Hotel Corporation of India and was employed at Centaur Hotel, New Delhi (the respondent herein). The appellant joined the respondent as a House Keeping Attendant and was employed in this capacity from 16.08.1985 till his dismissal from service on 16.02.1988. It is alleged that on 17.06.1987, the appellant was to report for his duties at 09:30 am but he was late and reported at 10:27

am. He also failed to punch his attendance card at the end of his shift. It is further alleged that on the night of 17.06.1987 at about 11:00 pm the appellant unauthorisedly entered the lobby of the hotel in a drunken state and is stated to have physically assaulted another employee and caused "breach of peace" and "nuisance" in the hotel premises. It is alleged that the conduct of the appellant terrorized the guests and also caused loss of reputation and business to the hotel. The appellant was issued a chargesheet in respect of his aforementioned conduct on 22.07.1987 which constituted grave misconduct under Regulation 73(i), 73(xi) & 73(xviii) of the Hotel Corporation of India Employees Service Regulations. The relevant extract of the said Regulations are as under:-

**"REGULATION NO.73(i)**

".....Commission of any act subversive of discipline and of good behaviors"

**REGULATION NO.73(xi)**

"Breach of any law, rules, regulations or order applicable to the establishment".

**REGULATION NO.73(xviii)**

"Drunkenness, riotous, indecent behavior ..... committing nuisance on the premises of the establishment.....".

**4.** The appellant denied the allegation made in the chargesheet dated 22.07.1987, however, his explanation was not found to be satisfactory and the respondent constituted an inquiry to be conducted by the Personnel Manager of Centaur Hotel, Mumbai. The Inquiry Officer submitted his finding on 01.02.1988, wherein he concluded that the appellant was guilty of the charges leveled against him. The said inquiry report was accepted by the respondent who dismissed the appellant from service on 16.02.1988.

**5.** It is relevant to state that admittedly at the material time an industrial dispute was pending between the respondent and its workmen with regard to the system of service charges and bonus payable to the employees. It is also not disputed that the appellant was a protected workman within the meaning of the explanation to Section 33(3) of the Act, being an office bearer of a trade union connected with the respondent.



**6.** The appellant filed a complaint under Section 33A of the Act, before the Industrial Tribunal against the order of his dismissal, *inter alia,* challenging the inquiry proceeding held by the respondent as also the conclusion reached by the Inquiry Officer. After completion of the pleadings, the Tribunal framed the following issues:-

"1. Is this complaint maintainable in view of the preliminary objection filed in the reply? (OPC)

2. Did the respondent commit contravention of the provision of Section 33 of the Industrial Disputes Act? (OPC)

3. What relief, if any, is the Complainant entitled to? (OPC)"

**7.** The complaint filed by the appellant was found to be maintainable. It was admitted by the respondent before the Tribunal that an industrial dispute between the workman and the management of the respondent was pending with regard to the system of levy of service charge on guests which had been set in place instead of the system of collecting "tips". It was also not disputed that the appellant was a protected workman. Indisputably, the management of the respondent had to comply with Section 33 of the Act which the respondent had failed to do. Although, the Tribunal held that there was violation of Section 33 of the Act inasmuch as the respondent had not sought the approval under Section 33(2)(b) or Section 33(3) of the Act, the Tribunal held that the same was not sufficient for the appellant to get any relief and that the respondent was entitled to justify its action of dismissing the appellant from its employment. The Tribunal then proceeded to examine the evidence led before the Inquiry Officer and concluded that the findings of the Inquiry Officer holding the appellant guilty of the charges was not sustainable. Based on this conclusion, the Tribunal made an award dated 09.05.1997 reinstating the appellant in service with full back wages.

**8.** The award passed by the Tribunal was challenged by way of a writ petition by the respondent, which was allowed. The learned Single Judge examined the allegations made against the appellant as well as the evidence placed before the Inquiry Officer and concluded that there was sufficient evidence before the Inquiry Officer to come to the conclusion that the appellant was guilty of the charges framed in the chargesheet issued to him and that the Tribunal had erred in interfering with the disciplinary proceedings initiated by the respondent.

**9.** The appellant has contended before us that once the Tribunal had found that the respondent had not complied with provisions of Section 33(2)(b)/ 33(3) of the Act, the same would render the order dismissing him from service inoperative and consequently, he was liable to be reinstated. It is contended that the learned Single Judge erred in not considering that having once found that the provisions of Section 33(2)(b)/ 33(3) of the Act were violated, no further inquiry was necessary. The appellant relied on the decision of a constitution bench of the Supreme Court in the case of **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and Others:** (2002) 2 SCC 244 and the decision of this court in the case of **Tops Security Ltd. v. Subhash Chander Jha:** 191 (2012) DLT 361 in support of his contention that in view of the admitted position that the respondent had not complied with the mandatory provisions of section 33 of the Act, the order dismissing the appellant from service was liable to be declared as inoperative and the appellant was liable to be reinstated with back wages.

**10.** We have heard the learned counsel for the parties.

**11.** The relevant provisions of Section 33 & 33A of the Act are set out hereunder:

> "33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings:
>
> (1) xxxx xxxx xxxx xxxx xxxx
>
> (2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance withstanding orders applicable to a workman concerned in such dispute or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman-
>
> a) alter, in regard to any matter not connected with thedispute, the conditions of service applicable to that workman immediately before the commencementof such proceeding; or
>
> b) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman:



> Provided that no such workman shall be discharged of dismissed, unless he has been paid wages for one month and anapplication has been made by the employer to the authoritybefore which the proceeding is pending for approval of theaction taken by the employer.
>
> (3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute-
>
> a) by altering, to the prejudice of such protectedworkman, the conditions of service applicable to him immediately before the commencement of suchproceedings; or
>
> b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save withthe express permission in writing of the authority before which the proceeding is pending.
>
> Explanation.-For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being a member of the executive or other office bearer ofa registered trade union connected with the establishment, isrecognised as such in accordance with rules made in this behalf.
>
> (4) xxxx xxxx xxxx xxxx
>
> (5) xxxx xxxx xxxx xxxx"

**12.** The principal question raised before us is whether the Tribunal was required to go into the merits of the substantive dispute regarding dismissal of the appellant from services including the conduct of inquiry by the Inquiry Officer in view of the fact that contravention of the provision of Section 33(2)(b)/33(3) of the Act was established. The Tribunal held that the employer would have the right to justify the action against a workman even though it was established that Section 33 of the Act had been violated. The learned Single Judge did not examine this issue but only considered the question whether the evidence collected by the Inquiry Officer was sufficient to arrive at finding that the appellant was guilty of charges framed against the appellant.

**13.** In our view, the controversy urged before us is squarely covered

by the decision of a Constitution Bench of the Supreme Court in the case of **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd.** (supra). In that case, the Supreme Court had, inter-alia, framed the following question for consideration:-

> "If the approval is not granted under Section 33(2)(b) of the Industrial Disputes Act, 1947 whether the order of dismissalbecomes ineffective from the date it was passed or from thedate of non-approval of the order of dismissal and whether failure to make application under Section 33(2)(b) would notrender the order of dismissal inoperative?"

**14.** The Supreme Court held that failure to make an application under Section 33(2)(b) of the Act would amount to non-compliance with the mandatory provisions of the Act and this would render the order of punishment inoperative. The contention that the order of punishment would not become void or inoperative till the same was set aside under Section 33A was not accepted by the Court. The relevant extract from the said decision of the Supreme Court is held as under:-

> "14. Where an application is made under Section 33(2)(b), proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examinewhether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with ornot, etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if orderof discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of employer and employee from the date of his dismissal or discharge but that order remains incomplete andremains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comesto an end de jure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in serviceentitling him to all the benefits available.



This being the position there is no need of a separate or specific order for his reinstatement. But on the other hand, if approval is given by theauthority and if the employee is aggrieved by such an approval, he is entitled to make a complaint under Section 33A challenging the order granting approval on any of the grounds available to him. Section 33A is available only to an employeeand is intended to save his time and trouble inasmuch as he can straightaway make a complaint before the very authority where the industrial dispute is already pending between theparties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of discharge or dismissal is inoperative for contravention of the mandatory conditions contained in the proviso or where the approval is refused, a workman should still make a complaint under Section 33A andthat the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33A and that tillsuch time he should suffer misery of unemployment in spite of statutory protection given to him by the proviso to Section 33(2)(b). It is not correct to say that where the order of discharge or dismissal becomes inoperative because of contravention of proviso to Section 33(2)(b), Section 33A would be meaningless and futile. The said Section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of theapproval granted.

15. The view that when no application is made or the onemade is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal ordischarge does not become void or inoperative unless such an order is set aside under Section 33A, cannot be accepted. In our view, not making an application under Section 33(2)(b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to Section 33(2)(b). An employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving himof the statutory obligation created on him to make such an application. If it is so done, he will be happier or

more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority inthe matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an application after dismissing ordischarging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under Section33A notwithstanding the contravention of Section 33(2)(b) proviso, driving the employee to have recourse to one or moreproceedings by making a complaint under Section 33A or to raise another industrial dispute or to make a complaint under Section 31(1). Such an approach destroys the protectionspecifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practiceor harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment."

16. Section 31 speaks of penalty in respect of the offences stated therein. This provision is not intended to give any remedy to an aggrieved employee. It is only to punish theoffender. The argument that Section 31 provides a remedy to an employee for contravention of Section 33 is unacceptable. Merely because penal provision is available or a workman has a further remedy under Section 33A to challenge the approval granted, it cannot be said that the order of discharge or dismissal not become inoperative or invalid unless set aside under Section 33A. There is nothing in Sections 31, 33 and33A to suggest otherwise even reading them together in the context. These sections are intended to serve different purposes."

**15.** Following the decision of the Supreme Court in the case of **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd.** (supra), this Court has further clarified, in the case of **Tops Security Ltd.** (supra), that once a complaint is made under Section 33A of the Act and it established that there has been a violation of Section 33(2)(b) of the Act then the Tribunal has merely to direct that employee be given an appropriate relief. The relevant extract from the said decision is reproduced hereunder:-



"It is, therefore, abundantly clear that the employee may file a complaint with regard to the relief that is required to be given to the employee in respect of the contravention of the provisionsof Section 33. In other words, where no application seeking an approval under Section 33(2)(b) of the said Act is made by theemployer, the employee may yet make a complaint under Section 33A seeking relief of reinstatement and payment of back wages. It is that dispute which will be taken up by theIndustrial Tribunal which will obviously go into the question as to whether there has been or there has not been compliance withthe mandatory provisions of Section 33(2)(b) of the said Act. Once the Tribunal comes to the conclusion that the mandatoryprovisions have been contravened, the only thing that needs to be done by the Tribunal is to direct that the employee be given an appropriate relief by way of reinstatement and by making anorder with regard to back wages. The Tribunal is not required to go into the question of as to whether the dismissal was good orbad, on merits."

**16.** In the present case, admittedly there has been a violation of Section 33 of the Act inasmuch as the respondent has not sought the approval of the Industrial Tribunal under Section 33(2)(b) of the Act. The Tribunal has also held that the appellant is a protected workman and as such the provisions of Section 33(3) of the Act are also attracted and no action against the appellant could be taken without the express written permission, of the Tribunal before which the industrial dispute was pending.

**17.** In view of the above discussions, it is not necessary to examine whether the evidence collected and available with the Inquiry Officer was sufficient to hold the appellant guilty of the charges leveled against him.

**18.** We, accordingly, set aside the impugned judgment dated 07.02.2013 passed by the learned Single Judge. We further hold that the order of dismissal dated 16.02.1988 would be inoperative till the permission of the Tribunal is obtained by the respondent. It is clarified that we have not expressed any opinion with regard to the question whether the disciplinary inquiry held by the respondent and the finding returned by the Inquiry Officer were valid or not.

**19.** Having held that once violation of Section 33 of the Act has been established, there was no requirement for the Tribunal to examine

the merits of the dispute, we also set aside the findings in respect of the inquiry proceedings and the substantive merits of the dispute returned by the Tribunal while considering the issue of relief (issue no. 3, framed by the Tribunal). However, we uphold the operative decision of the Tribunal in reinstating the appellant in service with back wages.

**20.** The present appeal is disposed of, in the above terms. The parties are left to bear their own costs.

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**ILR (2013) V DELHI 3981**
**LPA**

**AJAY KUMAR ....APPELLANT**

**VERSUS**

**GAS AUTHORITY OF INDIA LTD. & ANR. ....RESPONDENTS**

**(BADAR DURREZ AHMED, ACJ. & VIBHU BAKHRU, J.)**

**LPA NO. : 521/2013 DATE OF DECISION: 08.08.2013**

**Constitution of India, 1950—Aggrieved appellant challenged judgment of order passed by Disciplinary Authority was dismissed—Appellant urged dismissal of his service by respondent no. 1 in pursuance of Disciplinary proceeding and upheld by Appellant Authority was bad it was based on mere suspicion—Whereas on basis of same evidence he was discharged by the Court of Chief Metropolitan Magistrate, Delhi in criminal case initiated by CBI against him. Held:—Proceedings in criminal case and departmental proceedings operate in different fields. The standards of proof and evidence required in two proceedings are also different.**

It is settled law that proceedings in a criminal case and



departmental proceedings operate in different fields. The disciplinary proceedings are concerned with ensuring that the employees conform to the rules of conduct which are prescribed by the employer and maintain discipline in relation to their employment. The disciplinary proceedings are to weed out persons who are considered unworthy of being a part of the employer organization. The criminal proceedings are with an object to punish the offender. The standards of proof and evidence required in the two proceedings are also different. The Supreme Court in the case of **Ajit Kumar Nag v. General Manager (P.J.), Indian Oil Corporation Ltd. Haldia & Ors.,** (2005) 7 SCC 764, held as under:-

> "11. As far as acquittal of the appellant by a criminal court is concerned, in our opinion, the said order does not preclude the Corporation from taking an action if it is otherwise permissible. In our judgment, the law is fairly well settled. Acquittal by a criminal court would not debar an employer from exercising power in accordance with Rules and Regulations in force. The two proceedings -criminal and departmental -are entirely different. They operate in different fields and have different objectives. Whereas the object of criminal trial is to inflict appropriate punishment on the offender, the purpose of enquiry proceedings is to deal with the delinquent departmentally and to impose penalty in accordance with service rules. In a criminal trial, incriminating statement made by the accused in certain circumstances or before certain officers is totally inadmissible in evidence. Such strict rules of evidence and procedure would not apply to departmental proceedings. The degree of proof which is necessary to order a conviction is different from the degree of proof necessary to record the commission of delinquency. The rule relating to appreciation of evidence in the two proceedings is also not similar. In criminal law, burden of proof is on the prosecution and unless the prosecution is able to prove the guilt

of the accused "beyond reasonable doubt", he cannot be convicted by a court of law. In departmental enquiry, on the other hand, penalty can be imposed on the delinquent officer on a finding recorded on the basis of ''preponderance of probability''. Acquittal of the appellant by a Judicial Magistrate, therefore, does not *ipso facto* absolve him from the liability under the disciplinary jurisdiction of the Corporation. We are, therefore, unable to uphold the contention of the appellant that since he was acquitted by a criminal court, the impugned order dismissing him from service deserves to be quashed and set aside." **(Para 13)**

In the case of **HPCL v. Sarvesh Berry:** (2005) 10 SCC 471, the Supreme Court while drawing a distinction between a departmental inquiry in a criminal case held as under:-

"8. The purposes of departmental enquiry and of prosecution are two different and distinct aspects. Criminal prosecution is launched for an offence for violation of a duty the offender owes to the society, or for breach of which law has provided that the offender shall make satisfaction to the public. So, crime is an act of commission in violation of law or of omission of public duty. The departmental enquiry is to maintain discipline in the service and efficiency of public service. ...." **(Para 14)**

**Important Issue Involved:** Proceedings in criminal case and departmental proceedings operate in different fields. The standards of proof and evidence required in two proceedings are also different.

**[Sh Ka]**

**APPEARANCES:**

**FOR THE APPELLANT** : Mr. D.K. Aggarwal, Sr. Advocate with Mr. Pramod Kumar.



**FOR THE RESPONDENT** : Mr. Sandeep Prabhakar & Mr. Vikas Mehta for R-1.

**CASES REFERRED TO:**

1. *Ajit Kumar Nag* vs. *General Manager (P.J.), Indian Oil Corporation Ltd. Haldia & Ors.,* (2005) 7 SCC 764.
2. *HPCL* vs. *Sarvesh Berry:* (2005) 10 SCC 471.
3. *Capt. M Paul Anthony* vs. *Bharat Gold Mines Ltd. and Anr.:* (1999) 3 SCC 679.
4. *Nelson Motis* vs. *Union of India and Anr:* (1992) 4 SCC 711.

**RESULT:** Appeal dismissed.

**VIBHU BAKHRU, J.**

**1.** The present appeal impugns the judgment dated 15.03.2013 passed by a learned Single Judge of this Court in W.P.(C) No.1163/2012. The appellant had filed the writ petition, inter alia, seeking quashing of the order dated 24.09.2011 passed by the Disciplinary Authority whereby the petitioner had been dismissed from the services of the respondent no. 1 company.

**2.** The appellant joined the services of respondent No.1 company as an Executive Trainee w.e.f. 27.09.2007. The appellant was selected as Executive Trainee on the basis of a written examination that was conducted by respondent no.1 company on 03.09.2006. The appellant was declared as qualified in the written examination and was called for a personal interview. The appellant took up his employment with respondent no.1 company after qualifying in the personal interview.

**3.** A complaint was received by the respondent no.1 company by an email allegedly sent by one Umesh Kumar (who admittedly could not be traced). It was alleged, in the complaint, that the appellant had not sat for his written examination but another person had impersonated the appellant and had taken the written exam as the appellant. Based on the aforesaid complaint, respondent No.1 company sent certain documents including the answer sheets of the appellant to the Government Examiner of questioned documents (GEQD). As per the opinion of the GEQD, the hand writing and the signatures on the answer sheets and other documents

pertaining to the written examination did not match with the handwriting of the appellant. Based on this information, respondent no.1 initiated disciplinary proceedings against the appellant and framed following charges against the appellant:-

> "Shri Ajay Kumar took the employment in GAIL as Executive Trainee w.e.f. 27.09.2007 fraudulently by not writing the written examination himself at Kolkata Centre at Tirthapati Institution, 142/1, Rash Behari Avenue, Kolkata held on 03.09.2006 which was mandatory, but by another person impersonating Shri Ajay Kumar who had written the examination, thereby Shri Ajay Kumar got himself short listed for interview in the selection of Executive Trainee".
>
> By his above act, Shri Ajay Kumar violated Rule 4 (1) (i) & (iii) read with Rule 5 (iii), (xvii), (xxx) and (xxxvi) of GAIL Employees' (Conduct, Discipline & Appeal) Rules, 1986;"

**4.** The appellant was also suspended from service on 16.05.2009. Information regarding the incident was also forwarded to Central Bureau of Investigation. The appellant was arrested by CBI on 03.08.2009 and remained in custody till 18.08.2009 when he was granted bail. The CBI filed a chargesheet against the appellant in the criminal court on 16.04.2010.

**5.** In the meantime, the inquiry against the appellant proceeded and was concluded. The Inquiry Officer submitted the Inquiry Report dated 22.11.2010 wherein the appellant was found guilty of the charges framed against him. The Disciplinary Authority forwarded the Inquiry Report to the appellant and it is not disputed that the appellant was afforded adequate opportunity for being heard.

**6.** The appellant was discharged in the criminal case by the Chief Metropolitan Magistrate, Delhi who found that there was insufficient evidence to proceed against the appellant in the criminal case filed by the CBI. The order discharging the appellant in the criminal case was forwarded by the appellant to the Disciplinary Authority.

**7.** The Disciplinary Authority considered the material placed before him including the Inquiry Report and the discharge order passed by the Chief Metropolitan Magistrate and passed an order dated 24.09.2011 imposing the penalty of dismissal from service on the appellant.



**8.** The appellant preferred an appeal before the Appellate Authority against his dismissal from service, which was also rejected by an order dated 13.01.2012. Aggrieved by the action of the Disciplinary Authority as well as the Appellate Authority, the appellant filed the writ petition impugning the orders dated 24.09.2011 and 13.01.2012 passed by the Disciplinary Authority and the Appellate Authority respectively. The learned Single Judge, vide an order dated 15.03.2013, dismissed the writ petition filed by the appellant. Aggrieved by the same, the Appellant has preferred the present appeal.

**9.** The learned counsel for the appellant has strongly contended before us that the appellant has been dismissed from service on mere suspicion without there being any evidence on the basis of which the appellant could have been held guilty of the charge leveled against him. The learned counsel has also placed strong reliance on the order of the Chief Metropolitan Magistrate, Delhi discharging the appellant from the criminal case filed against him by the CBI. It is contended that once the criminal court has found that the evidence of GEQD was not sufficient/admissible against the appellant and has discharged him from the criminal case, the appellant could not be held guilty in the disciplinary proceedings, whose finding, it is contended, is solely on the basis of the opinion of the GEQD. It was pointed out that apart from the evidence of GEQD there was no other evidence available with the Disciplinary Authority on the basis of which the appellant could have been held guilty in the departmental inquiry.

**10.** The Learned counsel for the appellant has placed reliance on the decision of **Capt. M Paul Anthony v. Bharat Gold Mines Ltd. and Anr.:** (1999) 3 SCC 679 in support of his contention that the appellant ought to be reinstated as the charge in the criminal case and the disciplinary proceedings were based on the same allegation and on the same evidence which had been found to be insufficient/inadmissible by the Chief Metropolitan Magistrate, Delhi.

**11.** We have heard the learned counsel for the parties at length.

**12.** The core of the controversy raised before us is whether the appellant could be held guilty of the charge of misconduct on the basis of the same set of facts and evidence on which the criminal court had declined to frame any charge. It is further necessary to consider whether there was sufficient evidence collected by or available with the Inquiry

Officer to arrive at the finding that the appellant was guilty of the charges leveled against him.

**13.** It is settled law that proceedings in a criminal case and departmental proceedings operate in different fields. The disciplinary proceedings are concerned with ensuring that the employees conform to the rules of conduct which are prescribed by the employer and maintain discipline in relation to their employment. The disciplinary proceedings are to weed out persons who are considered unworthy of being a part of the employer organization. The criminal proceedings are with an object to punish the offender. The standards of proof and evidence required in the two proceedings are also different. The Supreme Court in the case of **Ajit Kumar Nag v. General Manager (P.J.), Indian Oil Corporation Ltd. Haldia & Ors.,** (2005) 7 SCC 764, held as under:-

> "11. As far as acquittal of the appellant by a criminal court is concerned, in our opinion, the said order does not preclude the Corporation from taking an action if it is otherwise permissible. In our judgment, the law is fairly well settled. Acquittal by a criminal court would not debar an employer from exercising power in accordance with Rules and Regulations in force. The two proceedings -criminal and departmental -are entirely different. They operate in different fields and have different objectives. Whereas the object of criminal trial is to inflict appropriate punishment on the offender, the purpose of enquiry proceedings is to deal with the delinquent departmentally and to impose penalty in accordance with service rules. In a criminal trial, incriminating statement made by the accused in certain circumstances or before certain officers is totally inadmissible in evidence. Such strict rules of evidence and procedure would not apply to departmental proceedings. The degree of proof which is necessary to order a conviction is different from the degree of proof necessary to record the commission of delinquency. The rule relating to appreciation of evidence in the two proceedings is also not similar. In criminal law, burden of proof is on the prosecution and unless the prosecution is able to prove the guilt of the accused "beyond reasonable doubt", he cannot be convicted by a court of law. In departmental enquiry, on the other hand, penalty can be imposed on the delinquent officer on a finding recorded on the basis of ''preponderance of probability''. Acquittal of the appellant by a Judicial Magistrate, therefore, does not *ipso facto* absolve him from the liability under the disciplinary jurisdiction of the Corporation. We are, therefore, unable to uphold the contention of the appellant that since he was acquitted by a criminal court, the impugned order dismissing him from service deserves to be quashed and set aside."



**14.** In the case of **HPCL v. Sarvesh Berry:** (2005) 10 SCC 471, the Supreme Court while drawing a distinction between a departmental inquiry in a criminal case held as under:-

> "8. The purposes of departmental enquiry and of prosecution are two different and distinct aspects. Criminal prosecution is launched for an offence for violation of a duty the offender owes to the society, or for breach of which law has provided that the offender shall make satisfaction to the public. So, crime is an act of commission in violation of law or of omission of public duty. The departmental enquiry is to maintain discipline in the service and efficiency of public service. ...."

**15.** It would also be relevant to refer to the decision of the Supreme Court in the case of **Nelson Motis v. Union of India and Anr:** (1992) 4 SCC 711, wherein the Supreme Court held as under:-

> "5. So far the first point is concerned, namely whether the disciplinary proceedings could have been continued in the face of the acquittal of the appellant in the criminal case, the plea has no substance whatsoever and does not merit a detailed consideration. The nature and scope of a criminal case are very different from those of a departmental disciplinary proceeding and an order of acquittal, therefore, cannot conclude the departmental proceeding. ...."

Although in that case, it was also observed that the acts which lead to disciplinary proceedings were not exactly the same as the subject matter of the criminal case.

**16.** In view of the settled law as indicated above, the fact that the appellant was discharged by the Chief Metropolitan Magistrate, Delhi from the criminal case filed against him by the CBI would not in any manner set up a fetter against the respondent no.1 company in taking

disciplinary action against the appellant. The disciplinary proceedings initiated by the respondent no.1 company were completely independent of the criminal case filed by the CBI against the appellant. In view of the same, we are unable to accept the contention that the disciplinary proceedings were liable to be quashed on account of the appellant being discharged in the criminal case.

**17.** The reliance placed by learned counsel for the appellant on the decision of the Supreme Court in the case of **Capt. M Paul Anthony** (supra) is also misconceived. In the said case, the criminal case as well as the departmental proceedings were based on a police raid carried out at the residence of the appellant therein. The appellant was discharged in the criminal case as it was found that the raid and recovery alleged to have taken place at the residence of the appellant were not proved. In the meantime, the departmental proceedings had continued in absence of the participation of the appellant and were premised on the factum of the recovery of a gold ball and gold bearing sand alleged to have been recovered in the alleged police raid. It is in these circumstances that the Supreme Court held as under.

> "34. ....The whole case of the prosecution was thrown out and the appellant was acquitted. In this situation, therefore, where the appellant is acquitted by a judicial pronouncement with the finding that the "raid and recovery" at the residence of the appellant were not proved, it would be unjust, unfair and rather oppressive to allow the findings recorded at the ex parte departmental proceedings to stand."

**18.** In the present case, the departmental proceedings are not premised on any criminal case. The Chief Metropolitan Magistrate, Delhi found that the evidence of the GEQD was not sufficient/admissible for convicting the appellant and thus, declined to frame the charges. Consequently, no trial was undertaken. However, the departmental proceedings were indisputably conducted in accordance with the principles of natural justice. The appellant participated in the departmental proceedings and also cross examined the handwriting expert, on whose evidence the appellant has been found guilty of the charges framed. It is also relevant to point out that the Supreme Court in the case of **Capt. M Paul Anthony** (supra) reiterated the settled position that the departmental proceedings were different from a criminal case and that the standards of proof were also



different. The relevant extract from the said decision is quoted below-

> "13. ....As we understand, the basis for this proposition is that proceedings in a criminal case and the departmental proceedings operate in distinct and different jurisdictional areas. Whereas in the departmental proceedings, where a charge relating to misconduct is being investigated, the factors operating in the mind of the disciplinary authority may be many such as enforcement of discipline or to investigate the level of integrity of the delinquent or the other staff, the standard of proof required in those proceedings is also different than that required in a criminal case. While in the departmental proceedings the standard of proof is one of preponderance of the probabilities, in a criminal case, the charge has to be proved by the prosecution beyond reasonable doubts. ...."

In our view, the facts of the present case are materially different from the facts in the case of **M. Paul Anthony** (supra).

**19.** The next question that is required to be considered is whether there was sufficient evidence and material available with the Inquiry Officer to conclude that the appellant was guilty of the charge leveled against him.

**20.** A perusal of the report submitted by GEQD indicates that the questioned writing marked as Q-1 to Q-12 which were the writings on the question booklet No.111718, OMR Sheet, attendance sheet etc. submitted at the time of the written examination were opined not to match with the admitted writings and specimen writings of the appellant. The handwriting expert (Deputy Government Examiner) was produced as a witness on behalf of the management before the Inquiry Officer and was also cross-examined. During the examination, he gave clear evidence that the person who had written specimen writings/signatures referred as S-1 to S-13 and admitted writings/signatures A-1 to A-3, A-6 to A-24, A-27 to A-49 and A51 to A-77 had not written/signed the questioned documents marked as question Q-1 to Q-12.

**21.** In our view, the evidence of the handwriting expert was sufficient for the Inquiry Officer to return his finding that the appellant was guilty of the charges. We are not called upon to examine or re-appreciate the evidence placed before the Inquiry Officer. The only limited reason for

us to refer to the evidence of the handwriting expert was to examine whether there was any evidence available with the Inquiry Officer to proceed and arrive at a conclusion. In this regard, indisputably, the answer sheets, question paper, attendance sheet and other documents submitted at the time of the written examination were available with the Inquiry Officer alongwith the evidence of the handwriting expert and, thus, the contention that there was no evidence before the Inquiry Officer to find the appellant guilty is clearly erroneous.

**22.** We are also unable to accept the contention of the learned counsel for the appellant that the report of the handwriting expert could not be relied upon by respondent No.1 in as much as the same had been found to be insufficient/inadmissible by the Chief Metropolitan Magistrate, Delhi.

**23.** In the case of **HPCL v. Sarvesh Berry** (supra), the Supreme Court has also noted the distinction between the standards of proof and evidence in the two proceedings are different and has held as under:-

> "8. ....When trial for criminal offence is conducted it should be in accordance with proof of the offence as per the evidence defined under the provisions of the Indian Evidence Act, 1872 (in short the "Evidence Act"). Converse is the case of departmental enquiry. The enquiry in departmental proceedings relates to conduct or breach of duty of the delinquent officer to punish him for his misconduct defined under the relevant statutory rules or law. That the strict standard of proof or applicability of the Evidence Act stands excluded is a settled legal position. ...."

**24.** It is, thus, settled law that the standard of proof required in a criminal trial is different from the standard of proof that is required in departmental proceedings. While, the evidence of a handwriting expert may not be sufficient to proceed against an accused in a criminal trial, nonetheless, the same may constitute sufficient material for finding the accused guilty in a departmental proceeding.

**25.** We may further add that, in the present case, the departmental proceedings were completely independent of the criminal case filed against the appellant and respondent No.1 company as was not fettered in any manner in conducting disciplinary proceedings against the appellant. The charge leveled against the appellant was not based on the criminal case



filed against the appellant and thus could be inquired into independently in the disciplinary proceedings conducted under the rules of service applicable to the employees of respondent No.1.

**26.** The learned Single Judge has also come to the conclusion, and in our view rightly so, that an acquittal by a criminal court would not automatically result in the appellant having a right to be reinstated into service and there is no reason which would warrant interference in the decision of the Disciplinary Authority or the Appellate Authority of respondent No.1. We find no reason to differ from the decision of the learned Single Judge. The present appeal is, therefore, dismissed with no order as to costs.

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**ILR (2013) V DELHI 3992**
**LPA.**

**BRIDGE AND ROOF COMPANY INDIA LTD. EXECUTIVES' ASSOCIATION** **....APPELLANT**

**VERSUS**

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

**(BADAR DURREZ AHMED, ACJ. & VIBHU BAKHRU, J.)**

**LPA. NO. : 510/2013 & 511/2013 DATE OF DECISION: 08.08.2013**

**Constitution of India, 1950—Article 14—Sick Industrial Companies (Special Provision) Act, 1985—Section 3—Appellants preferred writ petition seeking direction to respondents to comply with office memorandum date 24.07.07 and 17.12.08 read with office memorandum dated 07.08.12 pertaining to appointment of Chief Executives and Functional Directors in sick/loss making Central Public Sector Enterprises—Writ petition dismissed—Aggrieved appellants preferred appeals urging violation of principles of natural justice and**

**decision of respondents not to extend tenure of appellants violative of Article 14. Held:—The elaborate principles of natural justice need not be observed while taking any administrative actions and the administrative authority has only to act fairly.**

A distinction must be drawn between a judicial, quasi-judicial and an administrative action which adversely affect the legal rights of a person and a purely administrative decision which is taken in the normal course of functioning of a Government company. Whereas, it may be necessary to adhere to the rules of natural justice by a decision maker where the nature of function itself necessitates that the decision maker acts judicially, no such requirement exists in cases where the decision is purely administrative. The decision, whether to grant extension of tenure or not is a purely administrative decision. **(Para 29)**

**Important Issue Involved:** The elaborate principles of natural justice need not be observed while taking any administrative actions and the administrative authority has only to act fairly.

**[Sh Ka]**

**APPEARANCES:**

**FOR THE APPELLANTS** : Mr. Kirti Uppal, Sr. Advocate with Mr. Deepak Bhattacharya and Mr. Sujeet Kumar Mishra in LPA No. 510/2013. Mr. A.K. Panda, Sr. Advocate with Ms. Harman Guliani and Mr. Sanjeev Jha in LPa No. 511/2013.

**FOR THE RESPONDENT** : Mr. Rajeev Mehra, ASG with Mr. Jatan Singh, Mr. Kartikey Mahajan, Mr. Soayib Qureshi and Ms. Shruti Aggarwal for UOI. Mr. Ashish Wad and Ms. Kavita Bhutani for R-4.



**CASES REFERRED TO:**

1. *State of Punjab* vs. *Salil Sabhlok and Ors.:* (2013) 5 SCC 1.
2. *Ravi Yashwant Bhoir* vs. *District Collector, Raigad & Ors.:* (2012) 4 SCC 407.
3. *Centre for PIL & Anr.* vs. *Union of India & Anr.:* (2011) 4 SCC 1.
4. *State of U.P. and Anr.* vs. *Girish Behari and Ors.:* (1997) 4 SCC 362.

**RESULT:** Appeals dismissed.

**VIBHU BAKHRU, J.**

**1.** These two appeals are directed against the order dated 11.07.2013 passed by a learned Single Judge in the writ petition being W.P.(C) No. 1722/2013. The appellant in LPA 510/2013 is an association of the executives of respondent no. 4 company and the second petitioner in the aforementioned writ petition. The appellant in LPA 511/2013 was the first petitioner in the above referred writ petition. The appellants in the present appeals are hereinafter collectively referred to as the 'appellants' and the appellant in appeal no. 511/2013 is referred to as the 'appellant'. Respondent no. 4 is a subsidiary of Bharat Yantra Nigam limited, a company held by the Government of India. As such respondent no. 4 is a Central Public Sector Enterprise (CPSE) and is hereinafter referred to as the respondent company.

**2.** The appellants had filed the writ petition, inter alia, seeking a direction to the respondents to comply with the Office Memorandum dated 24.07.2007 and dated 17.12.2008 read with Office Memorandum dated 07.08.2012 pertaining to the appointment of Chief Executives and functional Directors in sick/loss making Central Public Sector Enterprises (CPSE). Essentially, the appellants are seeking an extension of the tenure of the appellant as the Chairman-cum-Managing Director of the respondent company till he attains the age of 65 years. The appellants contend that the appellant is entitled to the extension of his service tenure beyond the age of superannuation on the basis of the policy of the Government to grant extension of tenure to members of the Board of Directors of sick Central Public Sector Enterprises who have contributed to the turnaround

of the sick CPSE.

**3.** The learned single judge held that the appellant had no right to extension of his tenure as sought by the appellants and dismissed the writ petition by an order dated 11.07.2013 which is impugned in the present appeals. As both the appeals are directed against the same order and raise a common issue, they have been taken up together.

**4.** The facts relevant to consider the controversy in the present appeals are as under:

**5.** The appellant joined the respondent company on 20.12.1977 on probation as a grade III employee. The appellant was successively promoted over the years and was functioning as a Chief General Manager (Finance & Accounts) of respondent company from 01.01.2004 to 31.03.2005. He was appointed as Director (Finance) of respondent no. 4 company by an order dated 01.04.2005 for a period of 5 years from the date of assumption of charge or till his superannuation. He continued to function as a Director (Finance) till 30.04.2007. The appellant was appointed as the Managing Director of the respondent company by an order dated 01.02.2007 issued by the Government of India. The said order is quoted below:-

**"O R D E R**

In exercise of the powers conferred on him under Article 10 of the Articles of Association of M/s Bridge & Roof Company (India) Limited (B&R), Kolkata, the President is pleased to appoint Shri Mukesh Jha, Director (Finance), B&R as Managing Director, M/s Bridge & Roof Company (India) Limited (B&R), in Schedule 'B' scale of pay of Rs.25750-65030950/-, for a period of five years from the date of taking charge of the post, on or after 01.05.2007 or till the date of his superannuation or until further orders, whichever is the earliest.

2. The appointment can be terminated by either side by giving three months notice or pay in lieu thereof without assigning any reason. The President, however, reserves the right not to accept Shri Mukesh Jha's resignation if a vigilance case is pending or contemplated against him.

3. The detailed terms and conditions of his appointment will be



issued separately in due course."

**6.** The post of the Managing Director was re-designated as Chairmancum-Managing Director on 18.07.2007. It is relevant to note that the age of superannuation for Board Members of the respondent company is 60 years. The appellant was born on 09.10.1952 and thus would superannuate on 31.10.2012 (i.e. the last day of the calendar month during which he turned 60). The five year term of the appellant on the post of the Chairman Cum Managing Director expired on 30.04.2012 i.e. prior to the appellant attaining the age of superannuation. The Appointments Committee of Cabinet (ACC) did not approve any further extension of services of the appellant beyond 30.04.2012 as at the material time, there were two vigilance cases pending and an inquiry with respect to the same was being conducted. The vigilance inquiry continued from 01.05.2012 to 19.09.2012 (for a period of 8 months and 14 days). It is for the reason of the pendency of the inquiry that the appellant was not granted extension of his term beyond 30.04.2012 till his superannuation. Since, the name of the appellant was cleared in September 2012, the appellant was allowed to rejoin services of the respondent company on 19.09.2012 till the date of his superannuation.

**7.** The services of the appellant were further extended for a period of 4 months and 18 days beyond 31.10.2012 (the date of superannuation) by an order dated 01.11.2012. While, it is contended on behalf of the appellants that this extension was pursuant to the policy of the Government to extend the tenure of employees who had contributed to the turnaround of a sick CPSE, the same is disputed by the respondents. It is asserted by the respondents that the extension of the service of the appellant for the period of 4 months and 18 days beyond 31.10.2012 was solely on account to compensate the appellant for break in service from 01.05.2012 to 19.09.2012, prior to his date of superannuation.

**8.** It is not disputed that the Public Sector Enterprises Selection Board recommended that the tenure of the appellant be extended beyond 31.10.2012 for a further period of 3 years till 31.10.2015. However, the said proposal was rejected by the Appointments Committee of the Cabinet on 19.02.2013. This proposal was again placed before the competent authority and was rejected in view of the earlier rejection.

**9.** The appellant has contended that as per the Office Memorandum dated 24.07.2007 issued by respondent no. 1, the appellant is entitled for

an extension of tenure beyond the age of superannuation till he attains the age of 65 years. The relevant extract of the said Office Memorandum on the basis of which the appellant is claiming such entitlement to extension of his tenure is quoted below:

> "2. The Government has considered this matter and the Competent Authority has decided that in the case of sick/loss making CPSEs for which revival plan has been approved by the Government, the following relaxation would be provided:
>
> (i) In case, any Board level incumbent of such CPSE has contributed exceedingly well in the turn around of that sick CPSE, his tenure may be extended till he attains the age of 65 years. Since, the selection process to a board level post is being initiated by Public Enterprises Selection Board (PESB) one year prior to the due date of superannuation of the incumbent, the proposal for extension of tenure beyond the age of superannuation will have to be initiated at least one year prior to the date of superannuation of the incumbent. In case, the balance period of tenure of incumbent is less than one year at the time of approval of revival package by the Government, such proposal for extension of tenure may be initiated immediately after approval of revival package by the Government. The decision on the extension of tenure beyond the normal retirement age will be taken as per the extant procedure for extension of tenure of Board level executives, i.e. joint appraisal by PESB followed by the approval of the competent authority. Further, such extension would be subject to annual review or the performance of the incumbent to be conducted by Secretary of the concerned administrative Ministry."

**10.** The appellant has also relied upon the Office Memorandum dated 07.08.2012 and the same is quoted as under:-

> "No 18(11)/2005 OM
>
> Government of India
> Ministry of Heavy Industries & Public Enterprises
> Department of Public Enterprises
>
> Public Enterprises Bhawan,
> Block No.14, CGO Complex,



> Lodi Road, New Delhi-110003
>
> Dated the 7thAugust, 2012
>
> **OFFICE MEMORANDUM**
>
> Sub: Incentive scheme for chief Executives and Functional Director in sick/loss making Central Public Sector Enterprises (CPSEs) under revival package approved by the Government.
>
> The undersigned is directed to refer to this Department's OM of even number dated 24thJuly, 2007 and 17th December, 2008 (copies enclosed) on the subject mentioned above.
>
> 2. The government had issued the above office orders in order to attract Board level executives capable of turning around sick CPSE's by providing for extension of tenure beyond the age of superannuation till 65 years and a lampsum incentive upto maximum of Rs.10 lakhs per annum to such board level incumbent of CPSE's including CMD who have contributed to the turnaround of the concerned sick CPSE.
>
> 3. It has been brought to the notice of this Department that is many cases the board level incumbents including CMD, who have played an effective role in turning around the sick CPSE have not been given the benefits of the above schemes. Such a position defeats the basic objective behind the introduction of the above schemes and also adversely ....the achievement of turnaround .... included in the revival package of the concerned CPSE's.
>
> 4. It has, therefore, been decided to impress upon the concerned administrative Ministries/Department to implement the benefits of achievers' as envisaged vide above referred DPE OM dated 24th July, 2007 and 17th December, 2008 in turnaround CPSEs to letter and spirit which would be consistent with the Government policy for strengthening and revival of sick CPSE's.
>
> 5. All administrative Ministries/Department are required to take necessary action, as applicable, in terms of provisions contained in above referred DPE OM dated 24th July, 2007 and 17th

December, 2008." Encl:-As above

Sd/-
(Arun Kumar Sinha)
Joint Secretary to the Government of India
Tel: 24360204"

**11.** The appellants have drawn our attention to various documents on record which indicates that the respondent company has been considered as a CPSE whose performance has been turned around. The appellants have also brought to our notice that respondent company was adjudged as the "best turnaround Central Public Sector Enterprises in India for the year 2011" by respondent no. 1 and the Indian Chamber of Commerce.

**12.** Mr Rajeev Mehra, learned ASG appearing on behalf of the respondents has disputed the claim of the appellants that respondent company was a sick company during the tenure of service of the appellant as the Managing Director or as Director (Finance) of the respondent company. It is, thus, contended that the Office Memorandum dated 24.07.2007 would not be applicable to the appellant or any other board member of the respondent company.

**13.** Mr Rajeev Mehra, learned ASG has also drawn our attention to the resolution dated 06.12.2004 which records the decision of the Government to establish a Board for Reconstruction of Public Sector Enterprises for the purposes of making recommendations with regard to revival of Sick Public Sector Enterprises. Paragraph 4(a) of the said Resolution dated 06.12.2004 provides for the criteria under which a Public Sector Undertaking could be considered as being 'sick'. The relevant extract of the Resolution is quoted below:-

"" 4. Operational Modalities

In the context of the Board's functioning and in making recommendations on revival matters, the Board and the Ministries concerned shall observe the following modalities:-

(a) All sick CPSEs will be referred to the Board for revival/ restructuring. For the purposes of the Board's consideration, company will be considered 'sick' if it has accumulated losses in any financial year equal to 50% or



more of its average net worth during four years immediately preceding such financial year and/or a company which is a sick company within the meaning of Sick Industrial Companies (Special Provisions) Act, 1985 (SICA).

(b) Other loss making CPSEs may be considered by the Board either *suo moto* or upon reference by the administrative Ministry, if it is of the opinion that the revival/restructuring is necessary for checking the incipient sickness (incurring loss for two consecutive years) and making the CPSE, profitable, keeping the industry specific business environment in view."

**14.** It is admitted by the parties that the question whether the respondent company was sick has to be determined on the touchstone of the definition of a sick CPSE as contained in the resolution dated 6.12.2004.

**15.** The learned ASG has handed over a printed copy of the Annual Report of the respondent company for the year 2011-12. The penultimate page of the said report gives the highlights of the financial performance of the respondent company for a period of 10 years commencing from the year 2002-03 to 2011-12. The data provided in the Annual Report indicates that respondent company has declared a profit before tax in each of the 10 years commencing 2002-03 to 2011-12. In response to the same, the appellants have contended that the respondent company had made a profit in all the years commencing 2002-03 except in the financial year 2004-05 during which the respondent company had suffered an operating loss. Whilst, the final accounts of the respondent company disclose a profit before tax of Rs. 148.62 lakhs for that year, it is contended that the profit has arisen only on account of waiver of interest of Rs. 31.31 crores by the Government. It is further asserted that the Government had waived the interest due from the respondent company as a part of a revival package to improve the performance of the respondent company. It is contended that in the event such interest had not been waived, respondent company would have declared a loss of over Rs. 30 crores.

**16.** It is further contended by the appellants that the respondent

company showed remarkable improvement in its performance in the year 2005-06 and declared a profit before tax of Rs. 310.80lakhs. The appellant had been appointed as Director (Finance) with effect from 01.04.2005 and it is contended that since this was a Board level appointment, the appellant would be entitled to the benefit of the Office Memorandum dated 24.07.2007.

**17.** The contention that the respondent company had made a loss in the financial year ended 31.3.2005 has been contested by the respondents and it has been pointed out that the profit and loss account of the respondent company does not disclose a loss. Without prejudice to the contention that the respondent company did not make a loss in the year 2004-05, it is submitted on behalf of the respondents that the appellant was appointed to the post of the Managing Director (subsequently re-designated as Chairman cum Managing Director) on 1.5.2007 and as the appellant is seeking extension of his tenure on this post, the benefit of any turnaround in the performance of the respondent company during the period prior to the appointment of the appellant as a managing director would not entitle the appellant to claim benefit of the OM dated 24.07.2007.

**18.** The counsel for the appellants has argued that the decision of the respondents in not granting extension of tenure to the appellant is arbitrary and violates Article 14 of the Constitution of India. It is submitted that even though Public Sector Enterprises Selection Board recommended the case of the appellant for grant of extension of his tenure, the same has been rejected without communicating any reasons and without following principles of natural justice. It is, thus, contended that the decision making process is flawed. In support of this contention the counsel for the respondents has placed reliance on the decisions of the Supreme Court in the cases of **Ravi Yashwant Bhoir v District Collector, Raigad & Ors.:** (2012) 4 SCC 407, **Centre for PIL & Anr.v Union of India & Anr.:** (2011) 4 SCC 1 and **State of Punjab v Salil Sabhlok and Ors.:** (2013) 5 SCC 1.

**19.** We have heard the learned counsel for the parties.

**20.** The principal question for consideration is whether the Office Memorandum dated 24.07.2007 confers a right on the appellant for extension of his tenure till the age of 65 years. It is also necessary to consider whether principles of natural justice have been violated and



whether the decision of the respondent not to extend the tenure of the appellant violates Article 14 of the Constitution of India.

**21.** Admittedly, a CPSE would be considered as a sick CPSE only if it fell within the ambit of the resolution dated 06.12.2004 i.e. the accumulated losses of the CPSE in any financial year were 50% or more of the average net worth during the preceding four years or the CPSE is a sick company under Sick Industrial Companies (Special Provisions) Act, 1985. As per Section 3(1)(o) of the Sick Industrial Companies (Special Provisions) Act, 1985, a company would be considered a sick company if its accumulated losses exceed the net worth of the company. In the present case, the respondent company has been a profit making company since past several years. The final accounts of the respondent company disclose that the respondent company has declared a profit in each year atleast since 199495. The net worth of the company has also been positive in all of the preceding 16 years. Under the circumstances, the respondent company could not be considered as a sick CPSE and thus, the benefit of the Office Memorandum dated 24.07.2007 would not be available to the appellant.

**22.** It is also important to note that a turnaround or revival of a sick CPSE does not by itself vest with the members of its Board of Directors, a right for extension in their tenure of service. The second criteria that must be satisfied in order to avail the benefit of the Office Memorandum dated 24.07.2007 is that the incumbent should have "contributed exceedingly well in the turnaround of that sick CPSE". It is clear from the language of the Office Memorandum dated 24.07.2007 that the object of the policy is to provide incentive to the employees, in the top management of the company, to contribute to the turnaround of the sick CPSE. The contribution of the employee in aiding the turnaround of the sick CPSE would have to be evaluated.

**23.** In the present case, even if it is assumed that the respondent company made an operating loss in the year 2004-05, it is apparent that the said loss was made up by the Government by waiving Rs. 31.91 crores of interest due from the respondent company. The respondent company has otherwise, admittedly been a profit making company in the years prior to year 2004-05 as well as thereafter. In the given circumstance, we are unable to accept that the respondent company was a sick company as per resolution dated 06.12.2004 and consequently, the benefit of the

O.M. dated 24.07.2007 would not be available to the appellant.

**24.** Another aspect which is relevant is that the appellant was not a member of the Board during the year 2004-05. He was appointed as a Managing Director of respondent company on 01.05.2007. Admittedly, the respondent company has not been a sick company during the tenure of the appellant as its managing director. Even if we accept the contention that the benefit of the Office Memorandum dated 24.07.2007 is liable to be extended to an employee from the date he joins the Board of a company, the appellant cannot claim any benefit since he was appointed as the Director (Finance) on 01.04.2005 after the close of the financial year 200405, the Annual report of which indicates that the respondent company had made a profit after accounting for the waiver of interest of Rs. 31.91 crores.

**25.** The learned Single Judge has also observed the fact that the Office Memorandum dated 24.07.2007 uses the word 'may' and not 'shall' and thus, confers discretion on the respondents whether to extend the tenure of service of an employee or not.

**26.** The learned Single Judge also came to the conclusion that there is no factual basis to indicate that respondent company was a sick company and has held as under:

> "However, when one goes through the averments made in the writ petition, one does not find any factual basis whatsoever laid out as to how this para 4(a) with its sub parts are complied with for the respondent No. 4-company to become a sick company in terms of this para 4(a) and how accordingly petitioner No. 1 can take benefit. In any case, I have already referred to the fact that the circular dated 24.7.2007 only requires the appointment as a discretionary measure because the word used is "may" and not "shall". There is therefore no legal or contractual right for the petitioner No.1 for being continued as CMD for 65 years.
>
> 8. In view of the aforesaid discussion, I am of the opinion that petitioner No.1 has no legal entitlement to continue as a CMD of the respondent No.4-company upto the age of 65 years. Accordingly, I do not find any merit in the writ petition which is accordingly dismissed, leaving the parties to bear their own costs....."



**27.** We do not find any error in the order passed by the learned Single Judge. The respondent company cannot be considered sick under paragraph 4 of the Resolution dated 6.12.2004. The contention that the respondent company had incurred operating losses in the financial year 2004-2005 also does not assist the appellant in claiming extension of his term as a Chairman-Cum Managing Director of the respondent company for the following reasons:

(a) Incurring an operating loss during the financial year ended 31.3.2005 does not result in the respondent company being considered as a sick CPSE for the said year as the final accounts of the respondent company as on 31.3.2005 disclose that the respondent company made a profit during the said year; and

(b) The appellant was not holding this post at the material time. The appellant cannot seek an extension on the post of Chairman-Cum-Managing Director on the basis of his tenure as Director (Finance). Moreover, the appellant was appointed as the Director (Finance) of the respondent company on 1.4.2005 and, admittedly, the respondent company has not made any loss in that year (i.e. 2005-06).

**28.** The learned ASG has produced the relevant file for our perusal. The case of the appellant for extension of tenure was duly considered and as it was found that the respondent company was not a loss making company and the tenure of the appellant could not be extended.

**29.** The contention that the decision of the respondent is vitiated for non observance of the principles of natural justice and it was necessary for the respondent to communicate the reasons for non-extension of his tenure to the appellant or to grant him a hearing is, in our view, erroneous. A distinction must be drawn between a judicial, quasi-judicial and an administrative action which adversely affect the legal rights of a person and a purely administrative decision which is taken in the normal course of functioning of a Government company. Whereas, it may be necessary to adhere to the rules of natural justice by a decision maker where the nature of function itself necessitates that the decision maker acts judicially, no such requirement exists in cases where the decision is purely administrative. The decision, whether to grant extension of tenure or not

is a purely administrative decision.

**30.** In the case of **State of U.P. and Anr. V. Girish Behari and Ors.:** (1997) 4 SCC 362, the respondent was member of Indian Police Service and was to superannuate on 31.03.1996. In that case, Governor of Uttar Pradesh passed an order on 20.03.1996 for extension of service of the respondent for a period of six months from the date of his retirement. The said order granting extension was cancelled by another order passed by the Governor on 23.03.1996 without affording any opportunity to the respondent for being heard. The Supreme Court while considering the challenge to the order dated 23.03.1996 held as under:

> "....Till the order came into force, as correctly observed by the Tribunal, no vested right could have arisen. If the order of extension did not create any right, the cancellation order could not have withdrawn any such right. Hence the question of right to hearing did not arise and we seen no violation of the rules of natural justice."

**31.** The decision not to extend the term of the appellant cannot be stated to be in derogation of any vested rights of the appellant. The nature of this decision is purely administrative which does not affect any rights of the appellant and thus, does not warrant that a hearing be granted or principles of natural justice be observed. It is settled law that the elaborate principles of natural justice need not be observed while taking any administrative actions and the administrative authority has only to act fairly. We do not find the decision of the respondents to be unfair in any manner.

**32.** The reliance placed by the appellants on the decisions of the Supreme Court in the cases of **Ravi Yashwant Bhoir** (supra), **Centre for PIL** (supra) and **Salil Sabhlok** (supra) are also misplaced. In the case of **Ravi Yashwant Bhoir** (supra), the Supreme Court was considering a case where the Chief Minister of Maharashtra had disqualified the President of a Municipal Council under the Maharashtra Municipal Council, Nagar Panchayats and Industrial Townships Act, 1965. There were several charges leveled against the appellant therein and a chargesheet was served on the appellant. The appellant submitted his explanation and a notice of hearing was issued to him. The appellant was held guilty of charges and was removed from his post. The appellant challenged his removal by way of a writ petition on, inter alia+ the ground that the order of dismissal



violated the principles of natural justice. The writ petition was dismissed and the appellant carried the matter to the Supreme Court. It is, in this context that the Supreme Court held that a speaking order, to dispose of the contentions of the appellant, was required to be passed. The case before the Supreme Court was of a punitive action being taken against a person under a statute. The decision was clearly a quasi-judicial and the nature of proceedings required that principles of natural justice be observed. This decision has no application to the facts of the present case where no punitive measures are being contemplated against an employee. In the present case, there is no vested right of the appellant which is affected as his term of employment has come to an end by efflux of time. The competent authority has to only consider whether the term of the appellant should be extended beyond the date of superannuation or not as per its policy. The decisions in the cases of **Centre for PIL** (supra) and **Sahil Sabhlok** (supra) relate to the factors that are relevant for consideration before recommending and appointing functionaries on certain posts and are equally inapplicable to the facts of the present case.

**33.** We, accordingly, dismiss the present appeals. The parties are left to bear their own costs.

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**ILR (2013) V DELHI 4006**
**LPA**

**NEPAL SINGH ....APPELLANT**

**VERSUS**

**DELHI TRANSPORT CORPORATION ....RESPONDENT**

**(BADAR DURREZ AHMED ACJ, & VIBHU BAKHRU, J.)**

**LPA NO. : 178/2013 DATE OF DECISION: 14.08.2013**

**Constitution of India, 1950—Appellant had challenged findings of Inquiry Officer before Labour Court which held charge levelled against him was not fair and**

**proper—Respondent preferred writ petition and order of Labour Court was quashed—Aggrieved appellant preferred appeal and urged, witness in inquiry proceedings must depose orally as to alleged misconduct and cannot rely on or adopt his earlier report—Thus, order of Inquiry Officer based upon such evidence of Traffic Inspector was not proper. Held:- Strict rules of the Evidence Act, and the standard of proof envisaged therein do not apply to departmental proceedings or domestic tribunal.**

The learned counsel for the appellant has been unable to justify the reasoning of the Labour Court that a witness in an inquiry proceeding must depose orally as to the alleged misconduct and cannot rely on or adopt his earlier report. There is no basis in law for this proposition. Besides, it is well settled that the Evidence Act, 1872 and the rules of evidence are not strictly applicable in the departmental proceedings. In the case of **Maharashtra State Board of Secondary and Higher Secondary Education v. K.S. Gandhi and Ors.:** (1991) 2 SCC 716, the Supreme Court has held as under:-

> "37. It is thus well settled law that strict rules of the Evidence Act, and the standard of proof envisaged therein do not apply to departmental proceedings or domestic tribunal. It is open to the authorities to receive and place on record all the necessary, relevant, cogent and acceptable material facts though not proved strictly in conformity with the Evidence Act. The material must be germane and relevant to the facts in issue....."

Further, in the case of **HPCL v. Sarvesh Berry:** (2005) 10 SCC 471, the Supreme Court has also held that:-

> "8. ....The enquiry in departmental proceedings relates to conduct or breach of duty of the delinquent officer to punish him for his misconduct defined under the relevant statutory rules or law. That the strict standard of proof or applicability of the Evidence Act stands excluded is a settled legal position. ...." **(Para 15)**



**Important Issue Involved:** Strict rules of the Evidence Act, and the standard of proof envisaged therein do not apply to departmental proceedings or domestic tribunal.

**[Sh Ka]**

**APPEARANCES:**

**FOR THE APPELLANT** : Mr. Atul T.N.

**FOR THE RESPONDENT** : Mr. Manish Garg.

**CASES REFERRED TO:**

1. *HPCL* vs. *Sarvesh Berry:* (2005) 10 SCC 471.
2. *Maharashtra State Board of Secondary and Higher Secondary Education* vs. *K.S. Gandhi and Ors.:* (1991) 2 SCC 716.

**RESULT:** Appeal dismissed.

**VIBHU BAKHRU, J.**

**1.** The present appeal impugns the order dated 21.01.2013 passed by a Single Judge in W.P.(C) 8046/2010. The learned Single Judge has allowed the writ petition filed by the respondent herein and has quashed the order dated 05.10.2009 passed by the Labour Court holding that the inquiry conducted by the respondent in respect of the charge levelled against the appellant was not fair and proper.

**2.** The Labour Court had come to the conclusion that the findings urged by the Inquiry Officer were not based on "acceptable evidence". This conclusion was arrived at by the Labour Court on the premise that the witness deposing before the Inquiry Officer was required to make an oral statement with regard to the facts constituting the alleged misconduct and it was not sufficient for the witness to rely on and adopt his report/ statement made earlier. The learned Single Judge has held that the Labour Court has misdirected itself in law in coming to this conclusion.

**3.** The controversy in the present appeal is limited to the question whether the Inquiry Officer could rely on the evidence of the Traffic Inspector who had adopted his earlier report and had not given a fresh oral testimony as to the facts alleged in the report or the incident to which the report related.

**4.** The appellant was employed as a Conductor with the respondent corporation and was on duty on 16.03.1994 when the bus on which he was performing his duty was intercepted and a check was conducted. It is alleged that certain passengers were found with tickets, the value of which was less than the fare due and paid by them to the appellant. Accordingly, a challan was issued to the appellant. Subsequently, a chargesheet was issued to the appellant on 31.03.1994 which reads as under:-

> "That on 16.3.94, while you were on duty with Bus No.9885 of route Sohna/K. Bagh, your bus was intercepted by the checking staff at G.G. by Pass and found that 5 passengers were traveling in the bus who were in possession of less denomination tickets while you had collected full due fare from them.
>
> Your above act tantamount to misconduct within the meaning of para 19(b)(f)&(m) of the Standing Orders governing the conduct of DTC employees."

**5.** The respondent filed his reply dated 18.04.1994 to the chargesheet issued to him which was not found satisfactory and an Inquiry Officer was appointed to conduct an inquiry into the charge leveled against the appellant. During the course of the proceedings, the traffic inspector who was involved in the surprise check conducted on 16.03.1994 deposed and adopted his report dated 16.03.1994 which indicated that passengers were found in possession of tickets of denominations which were less than the fare due or collected from them. This witness was cross-examined by the appellant.

**6.** On the basis of the evidence and the material available, the Inquiry Officer found that the appellant was guilty of the charge framed against him and submitted the inquiry report dated 29.11.1994. A copy of this report was also provided to the appellant.



**7.** A show cause notice dated 06.01.1995 was issued to the appellant calling upon him to show cause why the punishment of removal from service not be imposed upon him. The appellant was given yet another show cause notice to the same effect on 11.03.1996 and, thereafter, the Disciplinary Authority passed an order dated 26.09.1996 dismissing the appellant from the services of the respondent corporation. The appellant preferred an appeal against the order of dismissal from service before the Competent Authority which was also rejected by an order dated 04.12.1996.

**8.** The appellant raised an industrial dispute and the following reference was made to the Labour Court:" Whether the removal of Shri Nepal Singh, from service is illegal and/or unjustified, and if so, to what relief is he entitled and what directions are necessary in this respect?"

**9.** The pleadings were completed and the Labour Court framed the following issues:-

> "1. Whether the management has not conducted a fair and proper enquiry in accordance with the principles of natural justice?
>
> 2. As per terms of reference?"

**10.** The Labour Court passed an order dated 05.10.2009 deciding the first issue in favour of the appellant. The Labour Court noted that the management of the respondent had examined one Ram Kanwar, Traffic Inspector who had made a report on 16.03.1994 and had adopted the same in his examination-in-chief. The Labour Court thereafter held as under:-

> "It is not in the principles of natural justice to allow the management witness to rely on earlier statement or report. The witness has to speak the misconduct in the enquiry orally supported by the documents. The witness had not stated anything on the misconduct. Though this witness was cross-examined by the workman, it cannot said that the misconduct is proved by a one line statement of the witness who adopted the earlier report dated 16.03.1994."

**11.** The Tribunal further held that though the procedure adopted in the inquiry were not in conflict with the principles of natural justice, the findings of the Inquiry Officer was not based on acceptable evidence. On the basis of this reasoning, the Labour Court concluded that the management had not conducted a fair and proper inquiry. Thereafter, the Labour Court proceeded to examine the question whether the removal of the appellant from service was illegal or unjustified. The respondent produced the Disciplinary Authority as its witness who produced the documents relating to the inquiry including the reports of the checking staff. This evidence too was rejected by the Labour Court on the ground that the Disciplinary Authority was not one of the members of the checking staff and, therefore, had no personal knowledge of the incidence of 16.03.1994. The Labour Court thereafter directed the respondent to reinstate the appellant with continuity of service and other benefits and further directed that a sum of Rs.25,000/-be paid to the appellant.

**12.** Aggrieved by the order dated 05.10.2009 and the award dated 01.07.2010 passed by the Labour Court, the respondent preferred a writ petition which was allowed by the impugned order.

**13.** The learned Single Judge held that the Labour Court had misdirected itself in law in concluding that the finding of the Inquiry Officer was not based on acceptable evidence. The relevant extract from the decision of the learned Single Judge is as under:

> "14. While examining the issue whether the domestic enquiry conducted by the petitioner was legal, and whether the findings returned in the said enquiry were founded upon acceptable evidence, the Labour Court made the above quoted observation. However, there is no basis for observing that the witness has to speak the misconduct in the enquiry orally, supported by document, and that he cannot rely upon the earlier report prepared by him at the site when the misconduct was found, of which he is the author. The said report was a part of the enquiry proceedings, and the delinquent respondent was aware of the contents of the same. In fact, it is this report, which was prepared at the site at the time of the raid, which formed the very basis of the charge sheet. There was no need for the author to repeat what was stated therein. Once he appeared in the domestic enquiry



> proceedings and owned up the report prepared by him, the preparation of the said report stood proved.
>
> 15. Pertinently, the respondent had even examined the management's witness in the enquiry proceedings. There is no finding that on the basis of the evidence led in the enquiry proceedings, under no circumstances, the finding of guilt could be returned against the respondent/delinquent. It may be too broad a proposition to state that in no case the Labour Court will go into the aspect of sufficiency of evidence. The Labour Court would not only examine the validity of the departmental enquiry proceedings from the standpoint of procedural compliance, but also examine whether the charge is at all made out, or not. 16. Since the aforesaid misdirection in law is the only reason why the domestic enquiry has been brushed aside by the Labour Court, the finding of the Labour Court that the enquiry was not based on acceptable evidence cannot be sustained and is set aside.
>
> xxxx xxxx xxxx xxxx
>
> 18. In the facts of the present case, it cannot be said that the domestic enquiry conduct by the petitioner was based on no evidence, or that the management had not led the evidence broadly in compliance of the broad principles enshrined in the Evidence Act. The author of the report had himself appeared as a witness in the domestic enquiry to support the said report. He was not only the author of the report, but an eye-witness to the entire raid. The respondent had also availed of the opportunity to cross examine him and after considering the entire evidence the enquiry report had been prepared. Pertinently, the Labour Court does not discuss the evidence led by the parties to come to the conclusion that, under no circumstances, the finding of guilt could have been returned in this case."

**14.** We have heard the learned counsel for the parties.

**15.** The learned counsel for the appellant has been unable to justify the reasoning of the Labour Court that a witness in an inquiry proceeding must depose orally as to the alleged misconduct and cannot rely on or

adopt his earlier report. There is no basis in law for this proposition. Besides, it is well settled that the Evidence Act, 1872 and the rules of evidence are not strictly applicable in the departmental proceedings. In the case of **Maharashtra State Board of Secondary and Higher Secondary Education v. K.S. Gandhi and Ors.:** (1991) 2 SCC 716, the Supreme Court has held as under:-

> "37. It is thus well settled law that strict rules of the Evidence Act, and the standard of proof envisaged therein do not apply to departmental proceedings or domestic tribunal. It is open to the authorities to receive and place on record all the necessary, relevant, cogent and acceptable material facts though not proved strictly in conformity with the Evidence Act. The material must be germane and relevant to the facts in issue....."

Further, in the case of **HPCL v. Sarvesh Berry:** (2005) 10 SCC 471, the Supreme Court has also held that:-

> "8. ....The enquiry in departmental proceedings relates to conduct or breach of duty of the delinquent officer to punish him for his misconduct defined under the relevant statutory rules or law. That the strict standard of proof or applicability of the Evidence Act stands excluded is a settled legal position. ...."

**16.** We are in agreement with the decision of the learned Single Judge that the order dated 05.10.2009 passed by the Labour Court holding that the departmental inquiry against the appellant was not proper is erroneous and misdirected in law. We find no reason to interfere with the order passed by the learned Single Judge and accordingly dismiss the present appeal with no order as to costs.

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**ILR (2013) V DELHI 4014**
**CRL. L.P.**

**STATE** **.....PETITIONER**

**VERSUS**

**PARAMJEET SINGH & ORS.** **....RESPONDENTS**

**(G.S. SISTANI & G.P. MITTAL, JJ.)**

**CRL. L.P. NO. : 38/2012** **DATE OF DECISION: 21.08.2013**

**Code of Criminal Procedure, 1973—Sec. 378 (1)—The deceased had died within seven years of marriage under unnatural circumstances—Post mortem report ExPW-1/A, mentioned the cause of death as asphyxia as a result of ligature pressure over neck produced by strangulation—Testimonies of PW-1 and PW-15 stated that the deceased was harassed by respondent no. Demand of car as dowry—The Trial Court observed material contradictions on the testimonies of the PW-1 and P-15 and secondly, testimony of PW-1 and his statement before Magistrate EX.PW-1A with respect to time of demand of car—The Court observed numerous flaws in the post mortem report ExPW-8/A upon cross—Examination of PW-8 and PW-9—Hence the present Appeal. Held—Proximity between the time of demand of dowry and the time of death of deceased-demand of dowry to be covered under Section 304—B of IPC has to made soon before death—No definite interpretation to phrase "soon before death"—The Supreme Court in *Satvir Singh v. State of Punjab* observed that the phrase "soon before her death" should have a perceptible nexus between her death and the dowry—Relate harassment or cruelty inflicted on her- the interval between the two events should not be wide—The deceased went back to her matrimonial house—Period of 11 month proceeding**

**her death—No demand of dowry made by the respondent—No perceptible nexus exists between her death and dowry related demand—Further, crucial elements have not been examined and recorded in the post mortem report—does not inspire confidence—Appears to be a case of hanging—No evidence that any of the accused had abetted the suicide of the deceased—Prosecution has not been able to prove its case beyond reasonable doubt.**

**Important Issue Involved:** Demand of dowry to covered under Section 304-B of IPC has to be made soon before death. The phrase "soon before her death" should have a perceptible between her death and the dowry—Related harassment or cruelty inflicted on her.

**[Sa Gh]**

**APPEARANCES:**

**FOR THE PETITIONERS** : Mr. Rajdipa Behura, App for the State.

**FOR THE RESPONDENT** : Mr. Suman Kapoor, Adv. with Mr. Tarun Sharma, Advocate.

**CASES REFERRED TO:**

1. *Satvir Singh* vs. *State of Punjab,* (2001) 8 SCC 633.

**RESULT:** Petition for leave to appeal dismissed.

**G.S. SISTANI, J. (ORAL)**

**1.** State has filed the present leave to appeal under Section 378(1) of the Code of Criminal Procedure against the judgment dated 07.06.2011 passed by Additional Sessions Judge, arising out of an FIR lodged u/s 498A/304B/34 IPC (Subsequently charge u/s 302 IPC was added). The acquittal of the husband, mother-in-law and sister-in-law of the deceased by the learned trial court has led to the filing of the present leave to appeal.

**2.** The case of the prosecution, as noticed by the trial court, is that



a call was received at Police Station, Rohini on 18.03.2008 at 8:06 pm stating *"meri ladki ko sasural walon ne maar diya hai"* which was reduced into writing vide DD no.42A. Thereafter, DD no. 42A was handed over to SI Krishan Kant who along with Ct. Narender Kumar went to the place of incident i.e. F-25/144, Sector-3, Rohini. Navpreet Kaur (deceased) was declared brought dead in Baba Saheb Ambedkar Hospital. SI Krishan Kant informed Sukhbir Singh, Executive Magistrate as the deceased had died within seven years of marriage under unnatural circumstances. Statement of the father of the deceased (PW-1) was recorded on the basis of which an FIR bearing no. 160/08 u/s 498A/304B/34 IPC was registered. Subsequently, based on the post mortem report ExPW-1/A, that mentioned the cause of death as asphyxia as a result of ligature pressure over neck produced by strangulation, an alternate charge u/s 302/34 IPC was framed against the Respondents.

**3.** In order to bring home the guilt of the Respondents, the prosecution has examined 17 witnesses.

**4.** Learned counsel for State, Ms. Rajdipa Behura submits that the trial court has erred in ignoring the vital pieces of evidence that have emerged during the course of trial. Counsel further submits that the order of acquittal passed by the learned trial court is not sustainable in the eyes of law as it is based on presumptions, conjectures and surmises.

**5.** The star witnesses on whose testimonies the prosecution has sought to place reliance in order to prove charges u/s 498A/304B/34 IPC are PW-1, father of the deceased and PW-15, mother of the deceased. Learned counsel for the state submits that both these witnesses support the case of prosecution as both of them have stated in their testimonies that the deceased was harassed after her marriage with respondent no.1 and demand of Honda City car was made from her by the respondents. Learned counsel for the respondents, on the other hand, submits that there are material contradictions in the testimonies of PWs with respect to the dowry demand. Counsel for the respondents further submits that no allegation with respect to any other specific dowry demand emerges from the testimonies of PWs so as to attract Sections 498-A/304-B IPC and that the overall allegations made by prosecution are vague and hazy.

**6.** We have heard the counsel for the parties and perused through the evidence on record. Careful examination of the statement made by PW-1 before the Executive Magistrate i.e. Ex.PW-1/A, as well as

testimonies of PW-1 and PW-15 reveal that there are material contradictions between all three of them, with respect to the time of demand of Honda City Car. As per the statement made by PW-1 in his cross examination, his elder son- in- law had bought the Honda City car in the year 2005 and ever since then Respondents started demanding the same from him, whereas, in his statement before the Executive Magistrate he stated that within a few days of marriage of the deceased with Respondent no. 1 (which was performed on 07.09.2003), the Respondents started harassing her and demanded the Honda City car. As per the testimony of PW-15, mother of the deceased, the deceased had communicated the demand of Honda City car made by the respondents to her, on deceased's second visit to her parental home, which was sometime in 2003.

**7.** Therefore, we agree with the observation made by the trial court that the presence of material discrepancies, firstly, in the testimonies of PW-1 and PW-15 and secondly, between the testimony of PW-1 and his statement made before the Magistrate EX.PW-1/A, with respect to the demand of the Honda City car, do not inspire confidence.

**8.** Another factor that needs to be examined by us while dealing with the charge of dowry death is the proximity between the time of demand of dowry and the time of death of the deceased. It is a settled principle of law that the demand of dowry to be covered under Section 304-B of IPC, has to be made soon before death. It has been held that no definite interpretation can be given to the phrase "soon before death". It would be appropriate to reproduce the observations made by the Apex Court in the case of **Satvir Singh v. State of Punjab,** (2001) 8 SCC 633, with respect to the phrase "soon before":-

> "21. Thus, there are three occasions related to dowry. One is before the marriage, second is at the time of marriage and the third is "at any time" after the marriage. The third occasion may appear to be an unending period. But the crucial words are "in connection with the marriage of the said parties". This means that giving or agreeing to give any property or valuable security on any of the above three stages should have been in connection with the marriage of the parties. There can be many other instances for payment of money or giving property as between the spouses. For example, some customary payments in connection with birth of a child or other ceremonies are prevalent



> in different societies. Such payments are not enveloped within the ambit of "dowry". Hence the dowry mentioned in Section 304-B should be any property or valuable security given or agreed to be given in connection with the marriage.
>
> 22. It is not enough that harassment or cruelty was caused to the woman with a demand for dowry at some time, if Section 304-B is to be invoked. But it should have happened "soon before her death". The said phrase, no doubt, is an elastic expression and can refer to a period either immediately before her death or within a few days or even a few weeks before it. But the proximity to her death is the pivot indicated by that expression. The legislative object in providing such a radius of time by employing the words "soon before her death" is to emphasise the idea that her death should, in all probabilities, have been the aftermath of such cruelty or harassment. In other words, there should be a perceptible nexus between her death and the dowry-related harassment or cruelty inflicted on her. If the interval elapsed between the infliction of such harassment or cruelty and her death is wide the court would be in a position to gauge that in all probabilities the harassment or cruelty would not have been the immediate cause of her death. It is hence for the court to decide, on the facts and circumstances of each case, whether the said interval in that particular case was sufficient to snuff its cord from the concept "soon before her death".

**9.** It is clear from the testimonies of PW-1 and PW-15 that the respondents continued to make the demand for Honda City car only till April 2007 i.e. till deceased came to her parental home for a period of six months due to her differences with respondent no. 1, Paramjeet Singh. In October 2007, the deceased went back to her matrimonial house where she continued to stay till her death in March 2008. Applying the law laid down above to the facts of the present case at hand, since during the said period of 11 months preceeding her death, no demand for Honda City car was made by the respondents, there does not seem to exist any perceptible nexus between the dowry related harassment and her death. Therefore it has been correctly observed by the learned trial court that during the period w.e.f April 2007 till her death in March 2008 no dowry demand has been made by the respondents and hence, the ingredient of "soon before" has not been satisfied. Furthermore,

photographs have been submitted on record by the Respondents (DX-81 to 86 and DX-87 to 89) that have been taken on the occasions of second birthday of the daughter of respondent no.1 and deceased i.e. on 20.10.2007 and on the occasion of deceased's birthday celebrations on 07.12.2007 respectively. Deceased Navpreet appears to be happy in these photographs which have been taken as recently as three to six months before her death which further weakens the argument of harassment and dowry demand during the time period immediately preceding the death of the deceased.

**10.** Careful examination of all the above mentioned evidence would show that the prosecution has failed to prove that the cruelty meted out to deceased with respect to demand of Honda City car was the direct and proximate cause of the death of the deceased. Therefore, the prosecution has failed to prove its case beyond reasonable doubt for offences u/s 498A/304-B IPC.

**11.** Coming to the alternate charge u/s 302 IPC, the prosecution has sought to place reliance on the post mortem report ExPW8/A prepared by PW-8, Dr. Manoj Dhingra and PW-9, Dr. V.K. Jha to drive home the factum of death of deceased by way of strangulation. Relevant portion of the same has been reproduced below:

> "The cause of death is asphyxia as a result of ligature pressure over neck structures produced by strangulation. Injury no. 2 is sufficient to cause death in ordinary course of nature. All injuries are ante mortem in nature."

**12.** On the contrary, learned counsel for the respondent submits that there are various factors that put a question mark on the reliability of the post mortem report as many significant elements that the post mortem report ought to have recorded so as to arrive at the conclusion of death by strangulation, are missing.

**13.** We find no reason to disagree with the observation made by the learned trial court that the cross examination of these witnesses i.e. PW-8 and PW-9 confirms the presence of numerous flaws in the post mortem report ExPW-8/A. The relevant portion of the learned trial court's judgment is read as under:-

> ".....there was no sub conjuctival hemorrhage on the dead body and no discolouration of lips or finger nails was found. In the post mortem report Ex PW 8/A, the margin of ligature marks are not mentioned. The ligature mark was found 5 cm below the chin which is unusual in the case of strangulation. No bleeding from mouth, ear or nose was reported. The distance of ligature mark from supra sternal notch was not taken. The distance of ligature mark from mastoid process was not taken. The condition of trachea is not mentioned in post mortem report Ex PW-8/A as the fracture of the larynx and tracheal rings are common in strangulation. No damage was found to the skin underneath the ligature. The ligature material was not examined to find minute fibres from the ligature or suspicious substances. However as per the post mortem report ExPW-8/A, multiple scratch abrasions have been found on the right side of the neck during post mortem. It may indicate scuffle of the deceased with someone before the death but it does not necessarily mean that death was caused by strangulation by using chunni Ex.P-1 and Ex.P-2. There was no sign of considerable violence which is common in strangulation."



**14.** To substantiate these lacunae in the post mortem report and medical opinion of PW-8 and PW-9, further reliance has been placed by the counsel for the respondents on the statement of DW-1, Dr. Chandrakant who has a vast experience in the field of forensic science and has conducted over 14,000 post mortem examinations in the course of his medical career. DW-1 deposed that the ligature mark injury in case of the deceased has not been properly described and no measurement has been taken from the different points necessary to determine the ligature mark injury as oblique or horizontal. The neck was also not opened to examine the neck structures to differentiate between hanging and strangulation.

**15.** In our opinion, from the testimonies of PW-8 and PW-9 as well as the opinion of DW-1, it is clear that various crucial elements have not been examined and recorded in the post mortem report prepared by PW-8 and PW-9 and hence the opinion regarding the cause of death as asphyxia by strangulation as given in the post mortem report does not inspire any confidence. It appears to be the case of hanging and there is no evidence that any of the accused had abetted the suicide of the deceased. The prosecution has, thus, failed to prove that the cause of death was strangulation as opined in Ex. PW 8/A. Therefore, no case has been made out against the respondents u/s 302 IPC.

**16.** We are satisfied that the prosecution has not been able to prove its case beyond reasonable doubt, there is no perversity in the appreciation of evidence. There exist no compelling and substantial reasons for interference in the judgment of the trial court. Accordingly, the leave to appeal is dismissed.

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**ILR (2013) V DELHI 4021**
**W.P. (C)**

**MOSER BAER INDIA LTD. ....PETITIONER**

**VERSUS**

**DEPUTY COMMISSIONER OF INCOME-TAX AND ANR. ....RESPONDENTS**

**(SANJIV KHANNA & SANJEEV SACHDEVA, JJ.)**

**W.P. (C) NO. : 1004/2013 DATE OF DECISION: 22.08.2013**

**The Income Tax Act, 1961—Section 148—The Petitioner is a company engaged in the manufacture and sale of optical and sale of optical and magnetic storage media projects—The petitioner for the relevant financial year for the Assessment year 2005-2006 had unit—Petitioner filed its return on 31.10.2005 declaring loss—The petitioner claimed deduction under Section 10B—The Assessing Officer (AO) issued various questionnaires dated 31.10.2007, 01.10.2008 and 14.11.2008—Sought explanation form the assessee qua the claim under Section 10A/10B—Claim of deduction of deferred revenue expenditure for technical know—How fee—The claim of the petitioner was accepted—No 27.05.2009, the AO rectified the Assessment order dated 31.12.2008 and reduced the claim of deduction under Section 10B—The Deputy Commissioner on**



**04.05.2011 issued notice to the petitioner under Section 148 for Re-assessing the income of the petitioner—Petitioner filed objections—Made full and true disclosure of material facts—Issue of notice under Section 148—Based on Change of opinion—No fresh information or tangible material came to the knowledge of the AO—The Deputy Commissioner disposed of the objections vide impugned order dated 01.02.2013—Hence the present petition. Held: Allowing deduction under Section 10B and subsequent rectification—The AO Formed definite opinion on the claim of benefit under Section 10B—Further there was disclosure of full and true material facts—Deferred revenue expenditure—Specific query was raised—Responded to by the petitioner—Response to the questionnaire—Establishes the AO formed an opinion on the claim of the petitioner—The reason recorded by the Deputy Commissioner —Do not suggest any fresh and tangible material—That income had escaped assessment—AO to indicate specifically—Material or relevant facts subsequently came to knowledge.**

**Important Issue Involved:** Re-Assessment is permissible in terms of provision 147 after the lapse of period of four years the relevant assessment year only if fresh and further tangible material had come to the knowledge of the Assessing Officer where a bonafide belief formed that income had escaped had escaped assessment.

**[Sa Gh]**

**APPEARANCES:**

**FOR THE PETITIONERS** : Mr. Ajay Vohra, Ms. Kavita Jha & Mr. Vaibhav Kulkarni, Advocates.

**FOR THE RESPONDENT** : Mr. Kamal Sawhney, Advocates.

**CASE REFERRED TO:**

1. *Madras Industrial Investment Corporation Ltd.* vs. *CIT* (225 ITR 802).

**RESULT:** Writ petition is accordingly allowed with costs.

**SANJEEV SACHDEVA, J.**

**1.** The petitioner by way of the present petition has challenged the order dated 01.02.2013, passed by the Deputy Commissioner of Income Tax and the issuance of notice dated 04.05.2011 under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") and the proceedings initiated pursuant thereto.

**2.** Assessment year in issue is 2005-06.

**3.** The petitioner is a company engaged in the business of manufacture and sale of optical and magnetic storage media projects i.e. CD-Rom, Floppy Disks, etc. The petitioner during the relevant financial year pertaining to the Assessment Year 2005-06 had two units one at A164, Sector-80, Noida and the other at 66, Udyog Vihar, Greater Noida. Both the units were eligible for deduction under Section 10B of the Act.

**4.** On 31.10.2005, the petitioner filed its return of income for the Assessment Year 2005-06 declaring a loss of Rs.1,65,43,08,282/-under the normal provisions of the Act and book profit under Section 115JB of the Act at a loss of Rs.40,97,92,770/-. The petitioner claimed deduction under Section 10B of Rs.29,08,16,451 in respect of the profit derived from the unit at A-164, Sector 80, Noida. No such deduction was claimed in respect of the unit at 66, Udyog Vihar, Greater Noida.

**5.** Pursuant to the filing of the return, the Assessing Officer issued various questionnaires on 31.10.2007, 01.10.2008 and 14.11.2008 seeking details/ explanations from the assessee. The questionnaires among other details sought explanation from the assessee qua the claim under Section 10A/10B of the Act as well as claim of deduction of deferred revenue expenditure for technical know-how fee. The petitioner/assessee responded to the questionnaires and submitted the requisite information/explanation.

**6.** The assessment of the petitioner was completed under Section 143(3) of the Act and the claim of the petitioner under Section 10B and deduction of deferred revenue expenditure for technical know-how fee



were accepted. The Assessing Officer completed the assessment at an income of Rs.95,47,60,410/-under the normal provisions making following additions and disallowances:-

a. Addition of Rs.239,28,55,948 on account of adjustment in the arm's length price of the international transaction entered into by the Petitioner in the relevant financial year.

b. Restricting the claim of deduction under section 10B of the Act at Rs.25,42,43,918 as against Rs.29,08,16,451 claimed by the Petitioner.

c. Disallowing royalty of Rs.11,50,83,837 being 25% of Rs.46,03,35,350 as against actual expenditure on royalty of Rs.37,73,17,928 claimed by the Petitioner in the P&L account.

d. Disallowing expenses of Rs.9,33,27,335 alleging the same to be incurred for earning exempt dividend income invoking provisions of section 14A read with Rule 8D of the Income-tax Rules, 1962.

**7.** On 27.05.2009, the Assessing Officer passed an order under Section 154 of the Act rectifying the Assessment Order dated 31.12.2008 and reduced the claim of deduction under Section 10B of the Act to Rs.25,24,21,751/-as against deduction of Rs.25,42,43,918/-allowed in the earlier assessment order.

**8.** On 04.05.2011, the Deputy Commissioner of Income Tax issued a notice to the petitioner under Section 148 proposing to re-assess the income of the petitioner. The reasons to believe recorded for the said notice are as under:-

> "Return of income was filed on 30.10.2005 declaring loss of Rs.1,65,43,08,282/-. Assessment under Section 143(3) was completed on 31.12.2008 at Rs.95,47,60,410/subsequently, rectified under Section 154 on 27.05.2009 at an income of Rs.87,31,23,193/.
>
> Perusal of assessment record revealed that the assessee claimed from its total income the loss/depreciation of Rs.1,44,81,23,306/ -pertaining to Greater Noida unit (100% E.O.U.) which was eligible for deduction under Section 10B. As the deduction under

Section 10B do not form part of total income, the loss (being negative deduction) should also have been excluded from the total income. The mistake resulted in underassessment of income of Rs.144,81,23,306/-involving tax effect of Rs.76,83,61,555/-. Further, the assessee was allowed, in computation of income, a deduction of Rs.1,36,90,221 on account of deferred revenue expenditure as one-sixth of Rs.8,21,41,326/-(sum of Rs.1,80,05,185/-& Rs.6,41,36,441/-, being expenditure on technical knowhow pertaining to financial years 200102 and 2002-03. Out of the above, Rs.19,29,127/-& Rs.25,72,170/-were debited to P&L a/c in F.Y. 2001-02 and 2002-03 itself as Miscellaneous Expenditure written off. Out of the remaining Misc. expenditure of Rs.7,76,40,029/-, Rs.5,20,83,202/-was capitalized and Rs.2,55,56,827/-was written off during financial year 2003-04. Hence, no balance remained out of the above expenditure to be written off. Thus, the deduction of Rs.1,36,90,211/was inadmissible and should have been disallowed. This mistake resulted in underassessment of income of Rs.1,36,90,221/-involving tax effect of Rs.72,63,911. The failure on the part of the assessee to disclose true and correct particulars of its income.

Thus, I have reason to believe that income of assessee to the extent of Rs.1,46,18,527/-has escaped assessment by way of not declaring true and correct income. Thus, there is failure on the part of the assessee to fully and truly disclose true particulars of its income and the same is required to be reassessed and taxed which requires reopening of assessment by initiation of proceedings under Section 147 by issue of notice under Section 148. Therefore, notice under Section 148 is hereby issued. The notice is issued after obtaining approval from CIT-II, New Delhi, vide her letter NO. F.No. CIT-IIDelhi/ Notice u/s 148/2011-12/ 292 dated 29.04.2011."

**9.** The petitioner filed objections to the issuance of the said notice, inter-alia, on the grounds that the issuance of notice was barred under proviso to Section 147 as the petitioner had made full and true disclosure of material facts. Notice under Section 148 seeking to reopen the assessment was based on change of opinion as no fresh information or tangible material had come to the knowledge of the Assessing Officer.



**10.** By the impugned order dated 01.02.2013, the Deputy Commissioner of Income Tax disposed of the objections raised by the petitioner by rejecting on the grounds raised by the petitioner. Aggrieved by the disposal of the objections vide order dated 01.02.2013 and the issuance of notice under Section 148 proposing to reopen the assessment, the petitioner has filed the present petition.

**11.** In terms of the proviso to Section 147, any reassessment sought to be initiated after the lapse of a period of four years from the end of the relevant assessment year already subject matter of an order under section 143(3) of the Act, is permissible only if:-

> "..... any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under Section 139..... or to disclose fully and truly all material facts necessary for his assessment, for that assessment year."

**12.** The relevant assessment year in the present case is 2005-06 and in terms of proviso to Section 147, the reassessment notice issued after the expiry of four years from the end of the assessment year has to satisfy the requirements of the said proviso i.e. the assessee has failed to disclose fully and truly all material facts necessary for his assessment for that year. In the present case, the notice seeking to reopen the assessment has been issued on 04.05.2011, which is clearly beyond the stipulated period of four years.

**13.** The contention of the petitioner is that there is full and true disclosure of all material facts and as such, the notice seeking to reopen the assessment was barred and invalid and that the reassessment proceedings were merely initiated for the purpose of reappraising the material on record and to change the opinion formed earlier.

**14.** The original assessment order passed by the Assessing Officer was under Section 143(3) of the Act. The reasons to believe recorded prior to the issuance of notice dated 04.05.2011, pertain to the following:-

(i) Deduction under Section 10B of the Act;

(ii) Deduction on account of deferred revenue expenditure being expenditure on technical know-how.

**15.** With respect to the deductions under Section 10B, the record

reveals that the petitioner alongwith the return of income had enclosed the profit and loss account of both the units as well as the computation of deduction under Section 10B in respect of both the units. In the notes filed to the computation of income, the petitioner had specifically disclosed that no deduction was being claimed in respect of the unit at Greater Noida on account of loss in the said unit and had stated as under:-

> "1. Claim of benefit u/s 10B of the Income-tax Act, 1961 ('the Act')
>
> The assessee company is engaged in the business of manufacturing of compact disks, magnetic disks and other optical storage media devices, and is eligible to claim deduction u/s 10B of the Act. Accordingly, the assessee has claimed benefit u/s 10B of the Act in respect of the following units:
>
> (a) A-164, Sector – 80, Noida – Phase II – The said unit is registered as a 100% Export Oriented Unit (on May 19, 1998) and is accordingly eligible for claiming tax-holiday benefits u/s 10B of the Act. The said unit had commenced commercial production w.e.f March 1, 2000. The required Report in Form 56G in respect of the said benefit claimed u/s 10B of the Act is enclosed.
>
> (b) 66, Udyog Vihar, Greater Nodia – The said unit is registered as a 100% Export Oriented Unit (on November 28, 2001) and is accordingly eligible for claiming tax-holiday benefits u/s 10B of the Act. No deduction u/s 10B of the Act has been claimed in view of a loss situation. The required Report in Form 56G in respect of the said unit is enclosed. For computing the profits of the above undertaking, certain expenses/income debited/credited in the head office have been allocated to such units in the ratio of turnover."

**16.** By letters dated 31.10.2007, 01.10.2008 and 14.11.2008, specific queries were raised by the Assessing Officer with regard to the units eligible for deduction under Section 10B, which queries were replied to and detailed explanations rendered. After appreciating the response of the petitioner on the said issue of deductions under Section 10B of the Act, in respect of the respective units, the Assessing Officer allowed the deduction at Rs.25,42,43,918/-as against the deduction claimed of



Rs.29,08,16,451/-. It is pertinent to note that even the allowed deduction of Rs.25,42,43,918 was subsequently rectified under Section 154 of the Act to Rs.25,24,21,751/-. The original assessment allowing the deduction claimed by the petitioner under Section 10B and the subsequent rectification on the same by the Assessing Officer clearly establishes that the Assessing Officer had formed a definite opinion on the claim of benefit under Section 10B as a deduction and also the fact that the unit at Greater Noida of the petitioner was eligible for such deduction. It further establishes that having formed an opinion, the Assessing Officer now seeks to change the opinion and has thus sought to reopen the assessment. Further there was disclosure of full and true material factson the manner and mode of deduction u/s 10B and deduction was being claimed only for one unit.

**17.** With regard to the reasons to believe recorded in respect of the deferred revenue expenditure, it is pertinent to note that the petitioner in Note No.2 attached with the return of income explained as under:-

> "3. Deferred Revenue Expenditure Written Off
>
> The balance in Miscellaneous expenditure written off as per annual accounts of March 31, 20013 was Rs.77,640,029 (sum of Rs.16,076,058 and Rs.61,563,971, being expenditure incurred on technical know-how i.e. Rs.18,005,185 and Rs.64,136,141 less Rs.1,929,127 and Rs.2,572,170 debited in profit and loss account in FY 2001-02 and FY 2002-03 respectively). Out of the above, Rs.52,083,202, being technical know-how has been capitalized in the books of account by adjusting the opening balance and remaining Rs.25,556,827 has been written off during the FY 2003-04.
>
> However, as the Company would deserve the benefit from technical knowhow for years to come, by relying on the Supreme Court judgment rendered in **Madras Industrial Investment Corporation Ltd. Vs. CIT** (225 ITR 802), the Company has deferred the cost of acquisition of technical know-how for a period of six years while computing taxable income. Accordingly, a deduction amounting Rs.13,690,221 (sum of Rs.1/6th of Rs.18,005,185 and Rs.64,136,141) has been claimed in the previous year relevant to the assessment year 2007-08."

**18.** During the original assessment proceedings under Section 143(3) of the Act, the Assessing Officer had specifically in the questionnaire dated 31.10.2007 raised the query regarding deduction of Rs.1,36,90,221/-being 1/6th share of the payment of technical know-how fee aggregating to Rs.8,21,326 pertaining to the previous years 2001-02 and 2002-03. Vide letter dated 21.11.2008, the petitioner had submitted details/explanation and also submitted worksheets for arriving at the said deduction and treatment of the deferred revenue expenditure relating to the technical know-how fee.

**19.** The fact that the petitioner disclosed the deduction of deferred revenue expenditure on account of payment of technical know-how fee in the notes appended to the return of income and that a specific query was raised and responded to by the petitioner demonstrates that the petitioner has made true and full disclosure of all material facts. The original assessment framed after receiving the response to the questionnaire specifically dealing with the said issue further establishes that the Assessing Officer had formed an opinion on the said claim of the petitioner.

**20.** The reasons to believe recorded by the Deputy Collector, Commissioner of Income Tax do not suggest that any fresh or further tangible material had come to the knowledge of the Assessing Officer whereby a reasonable bonafide belief could or was formed that income had escaped assessment on account of failure of the assessee to disclose truly and fully the material facts.

**21.** There appears to be an intensive examination in the first instance in respect of the said issues which are now sought to be made the basis for reopening of the assessment. It was necessary for the Assessing Officer to indicate specifically as to what other material or relevant facts subsequently came to the knowledge of the Assessing Officer whereby a subjective opinion could be prima facie formed that the assessee had failed to disclose truly and fully the material facts. There has to be a tangible material existing on record for the reasons to believe which should have a direct nexus to the formation of such belief.

**22.** In the case of the petitioner, with respect to the Assessment Year 2004-05, a similar issue with regard to the claim of deduction under Section 10B was raised by issuance of a notice under Section 148 by the Deputy Commissioner of Income Tax. The petitioner had filed a writ petition – W.P.(C) 7677/2011, which was allowed vide judgment dated



06.12.2012 and the notice and the proceedings consequent thereto were quashed. The Court while allowing the petition held as under:-

> "17. In the present case, the original return of the assessee was subjected to scrutiny assessment, under Section 143 (3). The assessee was apparently closely questioned on various aspects, including its claim for treatment of the three units, under Sections 10-A/10B of the Act. In response to a query raised by Respondent No.1, the Petitioner by letter dated 21.02.2005 furnished information regarding the units eligible for deduction u/s 10A/10B. In the reply the Petitioner listed all three units as units eligible for claiming deduction. The issue of deduction under Sections 10A/10B was specifically examined by the Assessing Officer during the original assessment. Furthermore, Form 56F/56G was also submitted along-with the return of income. In the forms the Petitioner had specifically claimed deduction u/s 10A/10B in respect of profits of two units whereas NIL deduction for the third unit. Furthermore, in a Note (dated 12.01.2005), appended to the return of income, the writ petitioner specifically disclosed at Point 1(c) that, the claim for benefit under Sections 10A/10B of the Act, in respect of 66, Udyog Vihar, Greater Noida-was eligible for claiming tax-holiday benefits under Section 10B of the Act. No deduction under Section 10B of the Act was claimed in view of a loss situation. The Report in Form 56G for the said unit to was enclosed. On 27.12.2006 the Petitioner filed an approval letter from the competent authority regarding eligibility of the units for deduction u/s 10A/10B; approval letters regarding all three units were submitted.
>
> 18. In the above background of facts, when there was intensive examination in the first instance in respect of the issue, which was the basis for re-opening of assessment, it was necessary for the AO to indicate, what other material, or objective facts, constituted reasons to believe that the assessee had failed to disclose a material fact, necessitating reassessment proceedings. That is precisely the "tangible material" which have to exist on the record for the "reasons" (to believe" bearing a "live link with the formation of the belief" as spelt out in Kelvinator. When the assessment is completed, as in the present instance, under Section

143 (3), after the AO goes through all the necessary steps of inquiring into the same issue, the reasons for concluding that reassessment is necessary, have to be strong, compelling, and in all cases objective tangible material. This court discerns no such tangible materials which have a live link that can validate a legitimate formation of opinion, in this case. It is not enough that the AO in the previous instance followed a view which no longer finds favour, or if the latter view is suitable to the revenue; those would squarely be change in opinion. Perhaps, in given fact situations, they can be legitimate grounds for revising an order of assessment under Section 263; but not for re-opening it, under proviso to Section 147.

19. As a result of the above discussion, it is held that the impugned notice, under proviso to Section 147, and consequent reassessment proceedings, are beyond jurisdiction. They are unsustainable, and are hereby quashed. The writ petition is allowed in these terms, without any order as to costs."

**23.** We were informed that the respondent/revenue had assailed the said judgment by filing a Petition for Special Leave to appeal to the Supreme Court and the said Special Leave Petition bearing SLP (Civil) CC No.11048/2013 has been dismissed vide order dated 05.07.2013.

**24.** In view of the above, we are of the considered opinion that the assessee cannot be held to have failed to disclose truly and fully all the material facts. It is also not a case where fresh tangible material has come to the knowledge of the Assessing Officer. The Assessing Officer, at the time of original assessment, clearly formed an opinion on both the issues and a notice under Section 148 seeking to reopen the assessment is clearly an instance of change of opinion, which is impressible in law.

**25.** In view of the above, the impugned order dated 1.02.2013 is set aside and the notice dated 04.05.2011 and the proceedings initiated consequent thereto are hereby quashed.

**26.** The writ petition is accordingly allowed with costs of Rs. 10,000/-.



**ILR (2013) V DELHI 4032**
**CRL. L.P.**

**STATE ....PETITIONER**

**VERSUS**

**VIKAS @ BHOLA & ANR. ....RESPONDENTS**

**(G.S. SISTANI & G.P. MITTAL, JJ.)**

**CRL.L.P. NO. : 282/2012 DATE OF DECISION: 29.08.2013**

**Code of Criminal Procedure, 1973—Indian Penal Code, 1860—Sec. 302/34—Petition for leave to appeal field by State—Brother of the deceased, PW-5 and Laxman Tyagi PW-9, nephew of the deceased recovered the body of the deceased in a decomposed condition—During investigation, it was found the relations between the deceased and his wife and children were not good—Lived separately—Respondent no. 1 started visiting the deceased—Respondent no.1 brought Chach (lassi) for deceased but he did not consume—PW-1 found the lassi to be bitter—PW-2 asked to give the lassi to him—Felt unconscious and was rushed to the doctor—The deceased told PW-1 that respondent no 1 mixed poison in his lassi—Respondent no. 1 had asked PW-10 to transfer share of plot of land in his name belonging to the deceased—Further, PW-10 stated that Respondent asked him about a poison that cause death—On the this information PW-31 issued notice to respondent under Section 160 of Cr.P.C—During interrogation respondent confessed his guilt and was arrested—In a disclosure statement, respondent no 1 named respondent no. 2 and stated that they thrown their clothes and gloves and knife—Recovery of both the shop was recovered form the pocket of pajama of respondent no. 1—Dagger type**

**knife (weapon of offence) was also recovered at the instance of respondent no. 1—Charge sheet was prepared under Section 302/34 of IPC—The Trial Court observer that the Investigating Officer had not conducted proper investigation to find out whether the shop and plot of village were in the name of the deceased—The Trial Court, Form the depositions of PW-10, PW-9 and PW-5 observed that the deceased had no plot of land in the village at the time of incident—Hence, property as the motive of murder has been established—Prosecution has not attributed any motive on respondent no.2 except for the fact that he is a friend of respondent no. 1—The Trial Court disbelieved the prosecution case with respect to the incident of poisonous lassi—Depositing of PW-5, PW-8 and PW-9 indicate that they had no personal knowledge of the incident of poisonous lassi—Their testimony is hearsay and therefore inadmissible in evidence PW-21 and PW-2 turned hostile—Evidence of PW-31, PW- 30 and PW- 19 indicate that effort was made to call any public witness at the time of alleged recovery of blood stained clothes and knife—Rule of prudence and not mandatory—However, wherein recoveries effected form a public place—Serious effort to join an independent witness—Trial Court observed that there was serious inconsistencies in the testimonies of the police officials examined as recovery witness-Hence the present leave petition. Held—The learned Trial Court rightly disbelieved the recoveries effected upon the disclosure statement of the respondents—Mere presence of blood on the recovered clothes and knife are not sufficient to prove that respondents committed the murder of the deceased—Leave to appeal is to be granted in exceptional cases where the Judgment under appeal is found to be perverse—Presumption of innocence of the accused—Trial Court's acquittal adds to the presumption of innocence.**



**Important Issues Involved:** (A) When recoveries are made form public place officials should make serious effort to join an independent witness.

(B) Leave to appeal is to be granted in exceptional cases where the judgment under appeal is found to be perverse.

**[Sa Gh]**

**APPEARANCES:**

**FOR THE PETITIONERS** : Mr. Saleem Ahmed, ASC for the State.

**FOR THE RESPONDENT** : Mr. Mohd. Nasir & Mr. Mohd. Saleem Tabrej, Advocates.

**CASES REFERRED TO:**

1. *Harishchandra Ladaku Thange* vs. *State of Maharashtra* reported at AIR 2007 SC 2957.
2. *Mohan Singh* vs. *State of Haryana* (1995) 3 SCC 192.

**RESULT:** Petition for leave to appeal stands dismissed.

**G.S. SISTANI, J. (ORAL)**

**1.** Present petition for leave to appeal has been filed by the State under Section 378 (1) of the Code of Criminal Procedure, 1973 against the judgment passed by the learned Additional Sessions Judge on 22.12.2011 in case FIR No. 458/04, under Section 302/34 of the Indian Penal Code (IPC), whereby the respondents have been acquitted of the charge.

**2.** The relevant facts, as noticed by the trial court are that the deceased (Hari Prakash Tyagi) was running a shop by the name of Tyagi Spare Parts at WZ-154, Ground Floor, Main Najafgarh Road, Uttam Nagar. He was last seen at the shop on 04.06.2004 at 3.00 pm by complainant Harkesh Sharma PW-3, who was running his shop on the first floor above the shop of the deceased. On 07.06.2004, the complainant PW-3 felt a stink was coming from the shop of Hari Prakash Tyagi. He got suspicious and informed the brother of the deceased. At about 8.00

pm, brothers of the deceased, Nirajan Tyagi PW-5 and Laxman Tyagi PW-9 came at the shop along with Jai Kumar (nephew of deceased) and the lock of the shop was got broken. Upon checking, the body of the deceased was found from the box of Diwan lying in the shop. The body was in a decomposed condition and there were sharp injury marks on his stomach and neck. Blood was flowing on the floor. Thereafter, police was informed and on the basis of statement given by the complainant (Ex Pw-3/A), FIR was recorded under Section 302 IPC. During investigation, it was found that the relations between the deceased and his wife and children were not good and the deceased was residing in his shop while his wife and children were residing separately at Village Narsingh Pura. Since last about 1+- 2 years, respondent no. 1 Vikas (son of the deceased) started visiting the deceased Hari Prakash and used to take money from him for his expenses. A quarrel had also taken place between the deceased and his son Vikas, on the question of money but later on he sought an apology from the deceased. On 22.05.2004, respondent no. 1 brought Chach (lassi) in a bottle for Hari Prakash but he did not consume the same as he had already taken food. One Mahesh Sharma PW-21, who was sitting with the deceased, found the lassi to be bitter and at the asking of Hari Prakash when he went to throw the lassi, a footpath tea vendor, Sher Singh PW-2 asked him to give chhach to him. On taking the chhach, Sher Singh became unconscious and was rushed to a doctor who administered him glucose and gave him an injection. The deceased told Mahesh Sharma that his son Vikas had mixed poison in the chhach with a view to kill him. Nilesh Kumar (PW-10), nephew of deceased, stated that about two months ago respondent no. 1 had asked him to get the share of Hari Prakash in the plot at Village Jhatikra transferred in his name. When Nilesh (PW-10) asked about this to his father, he refused. Nilesh further stated that respondent no. 1 Vikas had asked him about a medicine which could cause death. On the basis of this information, the I.O., Inspector R. Chandran PW-31, issued notice to respondent no. 1 Vikas under section 160 Cr.P.C. During interrogation, Vikas confessed his guilt and was arrested. Subsequently, his disclosure statement was recorded wherein he named respondent no. 2 Anil Kumar and stated that they had thrown their clothes and gloves in a polythene bag near Neha Toka Factory at G.T. Road, Sonepat from the puliya and had thrown the knife in the bushes at a little distance away from the said place. Thereafter, respondent no. 2 Anil Kumar was arrested and both the respondents got recovered their clothes soaked with blood. From the pocket of pajama



of respondent no. 1 Vikas, a key of the lock of shop was recovered. A dagger type knife (weapon of offence) was also recovered at the instance of respondent no. 1. Exhibits were sent to FSL. On completion of investigation, charge sheet was prepared under Section 302/34 IPC.

**3.** The respondents pleaded not guilty to the charge, upon which the prosecution examined 34 witnesses to bring home the guilt of the respondents. The prosecution has relied on four circumstances, which the trial court has recorded in Para 5 of the judgment which reads as under:-

> " i) Motive – there were strained relations between the deceased and his wife and children due to which, the wife and children of the deceased were residing at the house of parents of the wife of deceased at Harsingh Pura and accused Vikas, who is the son of the deceased, was demanding Rs. 10,000/ from his father for maintenance and wanted to grab the property of his father.
>
> ii) Previous attempt by accused Vikas to kill his father by giving him lassi mixed with poison.
>
> iii) Recovery of blood stained clothes and the weapon of offence (dagger) having human blood at the instance of both the accused.
>
> iv) Recovery of key of the lock of shutter of the shop of deceased Hari Prakash from the clothes of accused Vikas."

**4.** Mr. Saleem Ahmed, learned counsel for the State, submits that the learned trial court has passed the impugned judgment on hypothecial presumptions, conjectures and surmises and the order is perverse and lacks legality. Counsel further submits that the Ld. Trial Court failed to appreciate the evidence led by the prosecution witnesses and wrongly applied the law on wrong assumptions.

**5.** Regarding motive, learned counsel for the State submits that the brothers of the deceased Niranjan Tyagi PW-4, Laxman Tyagi PW-9 and Suraj Bhan PW-8 and nephew of the deceased Nilesh PW-10 have consistently attributed the motive onto the respondent no. 1 to kill his deceased father. The Counsel further submits that respondent no. 1 Vikas wanted a share in the property situated at Village Jatikra for which he pressurised the deceased to force the grandfather for such share and as his demand was not met by the grandfather, he was unhappy with the

deceased and took revenge by murdering him which was the perfect motive to commit the crime.

**6.** With regard to the allegation of previous attempt by respondent no. 1 to kill the deceased, learned counsel for the State submits that on an earlier occasion also Vikas had tried to commit mischief with the deceased by bringing poisonous chhach (lassi) which incidentally was not consumed by the deceased as he was already through with his food for that day but it was consumed by a tea vendor Sher Singh (PW-2). Learned counsel further submits that although Shera @ Sher Singh who consumed the poisonous lassi turned hostile yet the doctor who attended him, Dr. Rakesh Sharma (PW-6) stood his ground.

**7.** Regarding the third circumstance, the learned counsel for the State submits that the recovery of blood stained clothes and weapon of offence were recovered only at the instance of the respondents but the trial court did not believe the recovery and passed the impugned judgment.

**8.** The learned counsel for the petitioner submits that the learned trial court failed to appreciate the evidence of Banwari Lal, PW-18, who is the owner of the vehicle (Tata Sumo) wherein he did not deny the suggestion that on 04.06.2004 his driver Praveen Kumar PW-4 took some passengers to Uttam Nagar in the night and came about 4am in the morning of 05/06/2004. Counsel further submits that the Ld. Trial Court failed to appreciate that FSL made all efforts to identify the blood group on the clothes and weapon of offence and ignored the finding of the FSL that the clothes and weapon of offence were stained with human blood.

**9.** We have heard the counsel for the petitioner and perused the impugned judgment dated 22.12.2011. The case is based on circumstantial evidence and there is no eye witness to the incident. The law with regard to conviction on the basis of circumstantial evidence has been discussed in detail by the Supreme Court of India in the case of **Harishchandra Ladaku Thange v. State of Maharashtra** reported at AIR 2007 SC 2957.

**10.** Considering property to be the motive, the trial court has observed that the Investigating Officer has not conducted proper investigation to find out whether the shop and plot of village Jhatikra were in the name of the deceased. As per the deposition of Nilesh Tyagi PW-10, the deceased was not having any plot in his name in the village and all the



property was in the name of his father and there had been no partition of the property. Similarly PW-9 Laxman Tyagi also stated in his cross examination that the deceased was not having any ancestoral or self acquired property at his native village at the time of the incident. PW-5 Niranjan Tyagi also deposed that there was no property in the name or in the possession of Hari Prakash in the village and no property was given during the lifetime of Hari Prakash by his father. Therefore, the trial court rightly observed that since the properties were not in the name of the deceased, respondent no. 1 Vikas could not have have gained anything by committing the murder of Hari Prakash Tyagi.

**11.** Nilesh PW-10 further deposed that respondent no. 1 Vikas had asked him about some poison which can cause the death of a person. Suraj Bhan PW-8 also deposed that his son Nilesh told him 2-3 days prior to the incident that respondent no. 1 Vikas had asked him if there was any such poison. However, neither of them informed the police about the alleged evil intention of respondent no. 1 when their statements were recorded on 08.06.2004. It was on 09.06.2004 when they first put nail of suspicion on respondent no. 1 Vikas. Their conduct in remaining silent for two days is not natural. The possibility of these witnesses trying to frame respondent no. 1 in order to grab the property themselves cannot be ruled out. As far as respondent no. 2 Anil is concerned, the prosecution has not attributed any motive to him except for the fact that he is a friend of respondent no. 1 Vikas. Hence, in our opinion, the trial court has rightly rejected the case of prosecution on the point of motive.

**12.** In our view, the trial court has given detailed reasons for disbelieving the prosecution case with respect to the incident of poisonous lassi and we are not inclined to take a different view. PW-5, PW-8 and PW-9 deposed that this incident was informed to them by the deceased and they have no personal knowledge of the fact. Their testimony is hearsay and therefore inadmissible in evidence. Even PW-21 Mahesh Chand, who was an eye witness to the alleged incident and in whose presence respondent no. 1 Vikas brought lassi for the deceased which the tea vendor Sher Singh had consumed, turned hostile. He denied that deceased told him that his son had brought chhach mixed with poison to kill him. It is pertinent to mention that PW-2 Sher Singh, victim of the poisonous lassi, also turned hostile. He denied the fact that PW-21 or the deceased gave him anything for eating. PW-6 Dr Rakesh Sharma, who had examined Sher Singh, deposed that he was told by Sher Singh that

he had started vomiting after eating something during the morning hours. In the light of the fact that none of the material prosecution witnesses have supported the case of the prosecution on this aspect nor the doctor has testified that he was told by Sher Singh that he consumed lassi, we believe that the trial court has rightly adjudicated that the second circumstance also stands disproved.

**13.** In the present case, as per the prosecution, the respondents got their blood stained clothes recovered from a polythene bag lying under the puliya near Neha Toka Private Limited Factory at G.T. Road, Rai, Sonepat. A blood stained knife was also recovered from bushes near Dev Rishi Vidya Niketan, G.T. Road. The trial court has observed that no attempt was made by the police to join any independent person at the time of recovery or even at the time of recording their disclosure statements. The investigating officer PW-31 has stated that no public person was called from the factory and none of the vehicles which were passing from the road were stopped to join in the investigation. SI Khemender Pal PW-30 and SI Neeraj Kumar PW-19 have also deposed on similar lines. They stated in their cross examination that although traffic was passing from the road but no one was stopped to join the investigation. From the evidence of PW-31, PW-30 & PW-19, it does not appear that they made any effort whatsoever to call any public witness at the time of alleged recovery. It is not mandatory but only a rule of prudence that a public witness should be associated at the time of recovery. However, in the facts and circumstances of this case wherein the recoveries are effected from a public place, we find that the police officials should have made serious efforts to join an independent witness. In the case of **Mohan Singh v. State of Haryana** (1995) 3 SCC 192 it was observed by the Apex Court that:

> "From the evidence of PW 6 and PW 7 it does not appear that they made any effort whatsoever to call any public witness or railway officials working in the booking office while taking the search of the appellant and recovery of pistol in that process. No explanation is forthcoming for not joining any independent witness. Baljit Singh, PW 7, however, preferred to pick up Hira Lal, PW 5 who is nobody but a mobile sweet vendor. According to the prosecution Hira Lal happened to be there when the appellant was apprehended at that particular time when search of his person was made and the country-made pistol is said to have



> been recovered. In these facts and circumstances when the police officials deliberately avoided to join any public witness or railway officials though available at the time when the appellant was apprehended the evidence of Hira Lal who is nobody but a chance witness and the evidence of police officials PW 6 and PW 7 has to be closely scrutinised with certain amount of care and caution."

**14.** In addition to that, the trial court has observed that there are serious inconsistencies in the testimonies of police officials who have been examined by the prosecution as recovery witnesses. The trial court has recorded this finding in Para 23 of the judgment which reads as under:

> "23. The first contradiction in the testimonies of the police witnesses is with regard to the distance at which the vehicle was stopped from the place of recovery. PW-19 stated that the vehicle was stopped 100 meters away from the place of recovery, PW-30 stated that the vehicle was stopped at a distance of 100 feet while PW-31 deposed that the vehicle was stopped 50 yards away from the factory. With regard to the depth of the Nala from where the recovery was affected, PW-26 stated that the depth of the Nala was 1.5 feet to 2 feet but PW-30 stated that the depth was 5 to 6 feet from the main road. PW-19 stated that the writing work was done at the place of the recovery while sitting in Tata 407, PW-26 stated that the writing work was done while sitting on the pulia, PW30 deposed that writing work was done while sitting on the road while PW-31 stated that writing work was done with the support of the vehicle as there was no place for writing at the place of recovery of weapon. PW-30 deposed that the place of recovery of weapon was 3 to 4 kilometers towards Sonepat from the place of recovery of polythene but PW-31 stated that after the recovery of the clothes, he along with his team and accused went in search of the weapon of offence and that the weapon of offence was traced out after 100-150 yards. PW-19 stated that polythene was not visible from the main road but PW-26 stated that the polythene which contained cloth was visible from the pulia. PW-30 stated that the knife was not visible from the main road but according to PW-26, knife was visible from a distance of 23 feet from the road. PW-30 stated that the bushes from where the knife was recovered

was 15-20 feet from Metallic Road but PW-31 stated that the weapon of offence was recovered within the limit of 50 yards from Metallic Road. PW-26 stated that he does not remember whether the seizure memos bear his signatures. He stated that the seizure memos were in the handwriting of IO Sukhwinder Pal. Prosecution has not cited any witness by the name Sukhwinder Pal. Thus, it is apparent that the testimonies of recovery witnesses are full of inconsistencies and contradictions and therefore they do not inspire confidence and hence it shall be unsafe to rely on their testimonies without corroboration from independent public witnesses. The recovery at the instance of accused appears to be doubtful."

**15.** After careful examination of the contradictions in the testimonies of recovery witnesses and the fact that no efforts were made by the police officials to join any independent witness, we are of the opinion that the learned trial court has rightly disbelieved the recoveries effected upon the disclosure statement of the respondents.

**16.** As per the testimony of PW-18 Banwari Lal, owner of Tata Sumo, his driver Praveen Kumar PW-4 took the vehicle on 04.06.2004 at 8:30am but did not bring the same in the night. He admitted that PW-4 told him that he had taken a passenger to Uttam Nagar in the night and came back at 04:00am in the morning. However, PW-4 turned hostile before the trial court. He did not identify the recovered clothes of the respondents. As per the FSL report, human blood was found on the clothes and knife but the report has not conclusively proved the blood group on the articles. Therefore, the trial court, in our opinion, has rightly observed that the mere presence of blood on the recovered clothes and knife are not sufficient to prove that respondents committed the murder of deceased.

**17.** The next circumstance on which the prosecution has relied is the recovery of key to the lock of shutter of the shop of deceased from the pocket of respondent no. 1 Vikas. The trial court has observed that the lock was broken in the presence of Niranjan Tyagi PW-5 and Laxman Tyagi PW-9. The broken lock was seized by the I.O. Inspector R. Chandran PW-31. As per the seizure memo Ex PW-19/K, the lock was not sealed. However, in the FSL report it has been stated that the lock was in a sealed pullanda bearing the seal of AKS. Moreover, FSL report



does not observe whether the lock was received in broken condition. There is nothing on record to show that the lock was subsequently sealed by the I.O. The lock was not shown to the brothers of the deceased for identification purposes. Thus, in our opinion, the trial court has rightly observed that there appears to be serious possibility that some other lock was sent to FSL in a sealed condition.

**18.** It is well settled that leave to appeal is to be granted in exceptional cases where the judgment under appeal is found to be perverse. The Court must take into account the presumption of innocence of the accused and the trial court's acquittal adds to the presumption of his innocence. We have no reason to disagree from the view taken by the trial court. There is no perversity in the appreciation of evidence.

**19.** Accordingly, no grounds are made out and the petition for leave to appeal stands dismissed.

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**ILR (2013) V DELHI 4042**
**W.P. (C)**

**ANKUR MUTREJA ....PETITIONER**

**VERSUS**

**DELHI POLICE ....RESPONDENT**

**(SUNITA GUPTA, J.)**

**W.P. (CRL.) NO. : 1037/2012 & CRL.M.A. NO. : 13021/2012** **DATE OF DECISION: 30.08.2013**

**Constitution of India, 1950—Art. 226—Criminal Procedure Code, 1973—Section 482—Mandamus—Direction to Delhi Police to pass order u/s. 149 Cr.P.C to the Secretary, Aviation Employees Cooperative House Building Society—Restraining private caterers from creating any public nuisance—ADM(E) Delhi passed a conditional order u/s 133(1)(a) Cr.P.C followed**

**by interim order retraining the society form locating/ private caterers—A complaint u/s 473 Delhi Municipal Corporation Act—Revision petition—Interim order by learned Additional Sessions Judge restraining society form washing utensils in open area—Held—Powers under Article 226 and Section 482 to be exercised in exceptional cases and very sparingly—Alternative remedy available under various statutory provisions of law—No ground for exercising the extra ordinary jurisdiction of this court.**

**Important Issue Involved:** It is observed in a plethora decisions that powers under Article 226 and Section 482 to be exercised in exceptional cases and very sparingly. When an alternative and equally efficacious remedy is available to litigant, he should be required to exhaust that remedy and not to invoke the special jurisdiction to issue prerogative writs.

**[Sa Gh]**

**APPEARANCES:**

**FOR THE PETITIONERS** : Petitioner in person.

**FOR THE RESPONDENTS** : Mr. Saleem Ahmed, ASC for the State with Ms. Charu Dalal, Adv. SI R.K. Jha, P.S. Jagatpuri Mr. K.K. Malhotra, Advocate. For R-2.

**CASES REFERRED TO:**

1. *Girraj* vs. *State N.C.T of Delhi & Ors.* in W.P(Crl.) 733/ 2009.
2. *Sakiri Vasu* vs. *State of U.P & Ors.,* AIR 2008 SC 907.
3. *Dhanabhai* vs. *State,* CR RA/691/2007.
4. *Peico Electronics* vs. *Deputy Commissioner,* (2005) 199 CTR 407.
5. *V.M.Singh* vs. *State* dated 01.10.1997.



6. *Rajender Kumar Sharma & Anr* vs. *Registrar Co-operative Societies & Ors.,* 65(1997) DLT 324.
7. *Bhajan Kaur* vs. *Delhi Administration,* 3 (1996) CLT 337.
8. *Nagpur Cable Operations* vs. *Commissioner of Police,* AIR 1996 Bom 180.
9. *NHRC* vs. *State of AP,* 1996 AIR 1234.
10. *Subhash Kumar* vs. *State of Bihar,* 1991 AIR 420.
11. *Assistant Collector, Central Excise, Chandan Nagar, West Bengal* vs. *Dunlop India Ltd. & Ors.,* AIR 1985 SCC 330.
12. *Himmatlal Mehta* vs. *State of MP,* 1954 AIR 403.

**RESULT:** Petition Dismissed

**SUNITA GUPTA, J.**

**1.** Present writ petition has been filed under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure for issuance of a writ of mandamus seeking a direction to Delhi Police to pass orders u/s 149 Cr.P.C addressed to the Secretary, Aviation Employees Co-operative House Building Society (hereinafter referred to as the 'Society') restraining them from locating halwais/ private caterers in any open area in and around Gagan Vihar Community Hall, whether within or outside the premises of the Gagan Vihar Community Hall or from creating any other public nuisance in whatever manner and to take immediate steps on failure of the society to obey the orders passed by Delhi Police.

**2.** The background facts are that the petitioner is resident of Unit I, Ground Floor, 156, Gagan Vihar Extension, Delhi which is located next to the Master Plan Road over disused canal. There is a community hall commonly known as Gagan Vihar Community Hall which is managed by the Society and is also located next to the Master Plan Road over disused canal. There are open areas on the rear southern side and western side of Gagan Vihar Community Hall Building. The open area on the rear side forms part of the Community Hall premises and on the western side is an internal road of Gagan Vihar Extension Colony whose status is under dispute in the Court of ADM(E) Delhi in a complaint filed by the

petitioner u/s 133 Cr.P.C. The said open area is often used by various people who organize functions in the community hall. The open areas are used for locating halwais/private caterers either by the society or the organizers themselves. The halwais/private caterers carry out various cooking and ancillary activities including washing of utensils in the open area. The location of halwais/private caterers in the open area is a public nuisance and cognizable offence under various sections of Chapter XIV IPC. Several complaints were filed with the SHO of local police station, ACP, DCP, Addl. CP, Joint CP and CP of Delhi from the year 2008 to 2012 complaining about nuisance but no action has been taken by Delhi Police till date. However, ADM(E) Delhi has passed a conditional order u/s 133(1)(a) Cr.P.C followed by an interim order restraining the society from locating halwais/private caterers in the western side open area and the location of halwais/private caterers stopped on the western open area thereafter, but it continued in the said rear open area which falls within the community hall premises itself. A complaint u/s 473 DMC Act was also filed which was transferred to the learned Municipal Magistrate, Karkardooma Courts, Delhi for removal of nuisance from the community hall premises. In a revision petition, an interim order was passed by learned Additional Sessions Judge restraining the society from washing utensils in the open area outside, which order was not obeyed by the Society, as such contempt petition was filed. A complaint was also filed before the ACP Preet Vihar but no action was taken. A criminal complaint u/s 200 Cr.P.C read with Section 156(3) Cr.P.C was filed before the learned ACMM(E) Delhi which was transferred to Sh. A.K.Aggarwal, learned M.M. Karkardooma Courts, Delhi and the Court has taken cognizance of the criminal complaint filed before it. The disobedience and public nuisance continued, hence this petition.

**3.** Respondent no.1, Delhi Police filed the status report submitting therein that during the course of inquiry, on the complaints filed by the petitioner, it was revealed that the society has managed the community hall, commonly known as Gagan Vihar Community Hall. There is open area on the rear southern and western side of the community hall building and forms part of the community hall premises. Enquiry was made from Sh. S.N.Singhal, Secretary of the society who stated that he is looking after the work of the community hall and functions and marriages take place in the community hall, when halwais sit in the area belonging to the community hall only and they clean up the place completely after cooking



etc and the halwais do not create or leave dirty water and garbage in the adjacent foot path. The various written complaints, e-mails and PCR calls made by the petitioner do not reveal any cognizable offence, as such, same were filed. However the petitioner has approached the various authorities/ADM/learned M.M. The petitioner is in the habit of making such types of complaints.

**4.** Respondent no.2 society, in reply has taken preliminary objection, inter alia on the ground that petitioner has absolutely no locus standi to file and institute the petition. He is neither the owner nor the lawful occupant of the property bearing No.156, Gagan Vihar Extension, Delhi. The petitioner and his parents, namely Sh. B.P.Mutreja and Smt. Pushpa Mutreja are unauthorized occupants of the property and have encroached upon a portion of 40 sq.yds of the property belonging to DDA/PWD/ Government of India which has been meant for foot-path. After encroaching upon a portion of about 40 sq.yds of government land, the petitioner has raised unauthorized construction, by raising the room. After grabbing land belonging to the Government of India and to protect his illegal and unauthorised construction over the said portion, he has affixed his board on the outer wall and is filing and has filed one after the other petition. Sh.B.P.Mutreja and Smt. Pushpa Mutreja were earlier litigating with the respondent and they gave an undertaking before the Court of Ms. Kamini Lau, Civil judge, Delhi that they will close the doors and windows towards the side of community hall but till date they have failed to close the same. Since they have given a solemn undertaking before the competent court of law, now they have put forward their son to litigate with the respondent. Earlier the parents of the petitioner were claiming themselves to be the owners of the property, now the petitioner is claiming his ownership. However he has nowhere disclosed the measurement of the plot which allegedly he has purchased. Petitioner himself is a wrong doer and has not come to the Court with clean hands. He is an unauthorised occupant and is not entitled to any relief. Moreover, petitioner is claiming similar type of reliefs in other litigations also, details of which are given in the reply.

**5.** It was further alleged that respondent is a co-operative housing building society and the plot in dispute has been allotted to the respondent by DDA for community purpose and vide the sanction plan, a community hall has been constructed over there which is being used by the members of the society as well as other neighbouring localities and is being given

to the public at nominal rate for conducting the marriages, kriya, religious functions etc. The same is not a commercial activity in any manner and the respondent is serving the public at large. The petitioner, who himself is a wrong doer, has intentions that the community hall may be closed for one reason or the other. The writ petition is not maintainable and there is absolutely no special reason for exercising the writ jurisdiction by this Court.

**6.** On merits it was submitted that there is absolutely no property as Unit No.1, ground floor, 156 Gagan Vihar Extension, Delhi. The Master Plan Road over disused canal is the back side of the property and the front side of the property is from Main Gagan Vihar Extension, Delhi. The petitioner in order to open the property from disused canal has alleged the same and created a new number of the property on his own. In fact the PWD wanted to raise a wall over the disused canal starting from Karkari Mor red light to SDM office, East Delhi but the petitioner has encroached upon a portion of about 40 sq.yds of government land that opens door towards disused canal road and got an injunction against the PWD from raising the wall by filing a suit in the Civil Court. It was further alleged that the halwais are not washing utensils in the open area. The open area is part and parcel of the community hall and meant for the purposes of the community and can be allowed to be used by the caterers/halwais or for any other activity. There is no public nuisance. Even otherwise, the petitioner has filed number of litigations seeking same relief, as such the petition is liable to be dismissed with cost.

**7.** I have heard the petitioner in person, Mr. Saleem Ahmed, learned Additional Standing Counsel for the State and Sh. K.K.Malhotra, Advocate for respondent no.2 and have perused the record.

**8.** The petitioner has relied upon **Bhajan Kaur v. Delhi Administration,** 3(1996) CLT 337; **NHRC v. State of AP,** 1996 AIR 1234; **Subhash Kumar v. State of Bihar,** 1991 AIR 420; **Himmatlal Mehta v. State of MP,** 1954 AIR 403; **Peico Electronics v. Deputy Commissioner,** (2005) 199 CTR 407; **Nagpur Cable Operations v. Commissioner of Police,** AIR 1996 Bom 180 and **Dhanabhai v. State,** CR RA/691/2007.

**9.** On the other hand, learned counsel for the respondent has relied upon **V.M.Singh v. State** dated 01.10.1997; **Rajender Kumar Sharma**



**& Anr v. Registrar Co-operative Societies & Ors.,** 65(1997) DLT 324 and **Girraj v. State N.C.T of Delhi & Ors.** in W.P(Crl.) 733/2009.

**10.** At the outset, it may be mentioned that powers under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure is to be exercised in exceptional cases and very sparingly. Furthermore, if alternative remedy is available to the petitioner, then the Court will not allow the said party to approach this Court in writ jurisdiction.

**11.** In **Rajender Kumar Sharma** (supra), it was held that where statutory remedy is available to a party, the Court would not allow the said party to approach this Court under Article 226 of the Constitution of India. The relevant observations are reproduced as under:-

> "19. It is a well recognised principle which has ripened now almost into a rule of law that where a statutory remedy is available to a particular party the Court would not allow the said party to approach this Court under Art. 226 of the Constitution of India. The underlying idea of the said principle is that where there is alternative remedy available to a party the said party must first exhaust that remedy before approaching this Court. Had this not been so every body would like to approach this Court under Art. 226 simply because the alternative remedy, according to him, is more arduous and strenuous with the result that the statutory provisions under an Act would become almost meaningless and non-existent. This Court is fortified in the above view by the observations of the Hon'ble Supreme Court as reported in : AIR (37) 1950 SCC 163, **Rashid Ahmad v. The Municipal Board, Kairana,**.... "There can be no question that the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs, but the powers given to this Court under Art. 32 are much wide and are not confined to issuing prerogative writs only."
>
> 20. To the same effect are again the observations of their Lordships of the Supreme Court as reported in AIR 1957 SCC 882, **Union of India v. T. R. Varma,** "It is well settled that when an alternative and an equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke the special jurisdiction of the High Court to issue a

prerogative writ. It is true that the existence of another remedy does not affect the jurisdiction of the Court to issue a writ, but, the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs. . . . And where such remedy exists, it will be a sound exercise of discretion to refuse to interfere in a petition under Art. 226, unless there are good grounds therefore."

21. It was then observed by the Hon'ble Supreme Court in AIR 1985 SCC 330, **Assistant Collector, Central Excise, Chandan Nagar, West Bengal v. Dunlop India Ltd. & Ors,**..." Article226 is not meant to short circuit or circumvent statutory proceedings. It is only where statutory remedies are entirely ill- suited to meet the demands of extraordinary situations, as for instance where the very virus of the statute is in question or where private or public wrongs are so inexplicably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to bypass the alternative remedy provided by the statute."

**12.** A perusal of the petition itself reflects that the petitioner is availing the various statutory remedies available to him under law. He approached ADM(E) and on 01.12.2009, a conditional order u/s 133(1)(a) Cr.P.C was passed directing the society to remove the public nuisance within 10 days. Thereafter a civil suit was also filed by the petitioner. The matter was taken to the Session Court by filing criminal revision No.85/2010. On 23.12.2010, Ms. Savita Rao, learned Additional Sessions Judge directed the respondent society to ensure that if the utensils are washed in the open area of community hall premises, the said activity shall not cause any nuisance as well as collection of garbage and dirty water on the adjacent footpath and if the petitioner cannot ensure such ramification then they shall get the utensils washed inside the building of the community hall. It was alleged that the directions are not being complied with, as such contempt petition is pending.

**13.** The petitioner also filed a complaint u/s 156(3) Cr.P.C in the Court of Sh. A.K.Aggarwal, M.M vide complaint case No.396/2011 and 402/2011. After calling for the status report, the learned M.M has directed the complainant to produce witnesses. All these goes to show that the



petitioner has an alternative efficacious remedy available to him and in fact he is resorting to the same by filing civil or criminal cases. Under the circumstances, there is no ground to exercise the extra-ordinary jurisdiction of the Court by issuing writ as prayed for.

**14.** None of the authorities relied upon by the petitioner helps him. **Bhajan Kaur** (supra) was a case where a riot victim sought enhancement of amount of compensation awarded to her on account of death of her husband. **National Human Rights Commission** (supra) was a public interest litigation filed by NHRC to enforce its rights under Article 21 of the Constitution of about 65,000 Chakma/Hajong tribals. **Subhash Kumar** (supra) was again a public interest litigation which was filed on the allegations that West Bokaro and Tata Iron and Steel Company are polluting the river Bokaro by discharging slurry from their washeries into the river and in fact this petition was dismissed by observing that personal interest cannot be enforced in the garb of public interest litigation and entertainment of petitions satisfying personal grudge is abuse of process of Court. In **Himmatlal Harilal Mehta** (supra), vires of Explanation II to s.2(g) of the Central Provinces and Berar Sales Tax Act, 1947 as further amended by Act XVI of 1949 itself was challenged which could not have been done by resorting to either civil or criminal remedy. In **Peico Electronics** (supra), an order passed by the Deputy Commissioner of Income Tax was challenged. Similarly in **Dhanabhai** (supra), the order passed by JMFC dismissing the complaint by the Magistrate was challenged. As such, none of the authorities relied upon by the petitioner has any application to the facts of the case in hand.

**15.** Moreover Hon'ble Supreme Court in **Sakiri Vasu v. State of U.P & Ors.,** AIR 2008 SC 907 also held that the writ petition should not be entertained when the petitioner has an alternative remedy available under the Code of Criminal Procedure to get an FIR registered. Since the petitioner has the alternative remedies available to him under various statutory provisions of law and in fact he is availing the same, as such there is no ground for exercising the extra-ordinary jurisdiction of this Court.

The petition is accordingly dismissed.

**ILR (2013) V DELHI 4051**
**W.P. (CRL.)**

**AVNEESH GUPTA & ORS. ....PETITIONERS**

**VERSUS**

**STATE OF NCT OF DELHI & ORS. ....RESPONDENTS**

**(SUNITA GUPTA, J.)**

**W.P.(CRL.) NO. : 588/2011 DATE OF DECISION: 04.09.2013**

**Constitution of India, 1950—Article 226 and 227—Criminal Penal Code, 1860—Section 482—Inherent power of the High Court—Quashing of FIR—Section 498A/406/34 of IPC—Cruelty—Demand for dowry—Punishment for criminal breach of trust—Common Intention—Hence the present petition—Held, quashing of FIR can be done only if the allegation made in the complaint, even if taken at their face value, do not prima facie constitute any offence and the uncontroverted allegations made in the FIR or complaint do not disclose the commission of any offence—Complain constitute cognizable offence—Investigation is still at threshold—Disputed questions of fact are not to be determined in the Writ Petition—No ground for quashing of FIR.**

**[Sa Gh]**

**APPEARANCES:**

**FOR THE PETITIONERS** : Ms. Rebbeca John, Sr. Advocate with Mr. V.K. Singh and Ms. Preeti Singh, Advocates.

**FOR THE RESPONDENT** : Mr. Hemant Kumar, Adv. For Mr. Saleem Ahmed, ASC for the State with IO/SI Vipin Kumar. Mr. Vikas Arora and Mr. Dhiraj Manchanda, Advocates for R-2.



**CASES REFERRED TO:**

1. *Rajiv Thapar & Ors* vs. *Madan Lal Kapoor,* 2013(1) Crimes 169 (SC).
2. *Prashant Bharti* vs. *State of NCT of Delhi,* 2013(1) Crimes 195(SC).
3. *Mukesh Kumar Aggarwal* vs. *State of Uttar Pradesh & Ors.,* (2009) 13 SCC 693.
4. *Priya Vrat Singh & Ors.* vs. *Shyam ji Sahai,* 2008(3) JCC 2069.
5. *Kanchan Gulati & Anr.* vs. *The State & Ors.,* 2007 IX AD (Delhi) 237.
6. *Smt. Neera Singh* vs. *The State,* 138(2007) DLT 152.
7. *Himmat Singh* vs. *State of Haryana & Ors.,* (2006) 9 SCC 256.
8. *Minu Kumari* vs. *State of Bihar* (2006 (4) SCC 359).
9. *MCD* vs. *State of Delhi and Another,* 2005 SCC (Cri) 1322.
10. *Y. Narasimha Rao and Others* vs. *Y.Venkata Lakshmi and Another,* (1991) 3 SCC 451.
11. *Satvinder Kaur* vs. *State (Govt. of NCT of Delhi) & Another,* AIR 1999 SC 3596.
12. *Bhagavat Singh and etc.* vs. *State of Tamil Nadu and Ors.,* 1998 Cr.LJ 3513.
13. *Jagdish Thakkar* vs. *State of Delhi,* 1993 JCC 117.
14. *Janata Dal* vs. *H.S. Chowdhary* (1992 (4) SCC 305).
15. *State of Haryana* vs. *Choudhary Bhajan Lal & Ors.* reported in JT 1990(4) SC 650.
16. *Raghubir Saran (Dr.)* vs. *State of Bihar* (AIR 1964 SC 1).

**RESULT:** Petition Dismissed.

**SUNITA GUPTA, J.**

**1.** This is a writ petition under Article 226 and 227 of the Constitution of India read with Section 482 of the Code of Criminal Procedure for quashing FIR bearing No.29/2011 dated 05.02.2011 u/s 498A/406/34 IPC, P.S. Farsh Bazar, East Delhi.

**2.** Before coming to the grounds set up in the petition for quashing of FIR, it will be in the fitness of things to have a glance at the FIR registered at the instance of respondent no.2, Smt. Sashi Kanta.

**3.** An application was submitted by Smt. Sashi Kanta, to Incharge, Police Station Farsh Bazar, Delhi regarding torture and humiliation to her daughter and her family alleging inter alia that the marriage of her daughter, Dr. Samita Gupta with Dr. Avneesh Gupta was solemnised on 01.02.2000 with great pomp and show. After a few days of marriage, parents of her son-in-law told them that they were expecting more dowry and at every occasion or the other, the mother-in-law of her daughter insulted them before everyone saying that they got very little amount from the Minister i.e father of Samita Gupta. However she and her husband never took it seriously and thought that everything would settle down.

**4.** In March, 2001, Dr. Kusum Gupta and Dr. M.G. Gupta came to her house and demanded Rs. 10 lakhs and a Honda City Car. For the sake of future of her daughter, she gave Rs.5,30,000/- after borrowing from her relatives and mortgaging her jewellery. Thereafter her son-in-law disclosed his wish for further studies in America and for that he had taken money from them several times. His visa was twice rejected by American embassy. Her husband made lot of efforts to get him visa only for the happiness of his daughter. After reaching there, her son-in-law started demanding money for his daily expenses and also forced her daughter to leave her government job and called her over there. In 2004 Avneesh Gupta demanded and asked Samita Gupta to bring $ 12,000. After the marriage, the parents-in-law and the husband of her daughter took all her jewellery in their possession which was kept in a locker somewhere in Delhi or the same has been sold as they did not give any right of operation of locker to her daughter. At the time of going to America, only a small portion of jewellery was given to Samita and remaining jewellery was in the custody of her in-laws. In December, 2005 and April, 2007 when her daughter came to Delhi she informed that she wanted to continue her further studies in America but Avneesh is not allowing her and in fact he had kept her there as a maid to fulfil his needs. When they told Avneesh and his parents, they replied that education of Avneesh is more important and only thereafter they will think about Samita. She came to know from Samita that when parents of Avneeesh visited America, they were finding ways and means of fighting with Samita and while returning, they also told her that she will get the punishment very soon.



**5.** After December, 2007, financial condition of her family was not good. On 11.09.2008, Avneesh sent Samita from America to Delhi and asked her to bring $ 15000 otherwise she need not come back to America. Same thing was repeated by the parents-in-law to her after she came back to Delhi. Her mother gave $ 10000 along with arrival departure tickets to Samita. However her son-in-law continued to torture her daughter physically and mentally in spite of receiving money. She and her family were fulfilling all the illegal demands of her son-in-law and her parents-in-law only for the happiness of her daughter as she was their only child. Dr. Kusum Gupta cursed her daughter for not giving them any child. They called her sterile and due to that her daughter got mentally depressed.

**6.** In January, 2010, Dr. Kusum Gupta and Dr. M.G. Gupta again asked for Rs. 3 lakhs which was handed over to them by her nephew Manish Gupta in cash. On 11.03.2010, at around 09.15 p.m, her son-in-law called up her husband and demanded Rs. 3 crores otherwise he will give divorce to her daughter. He also told them to inform them within a short span of time otherwise he will start divorce proceedings against her. This huge amount was beyond their imagination. So, on 11.03.2010, her husband went to meet Dr. Kusum Gupta and Dr. M.G. Gupta but they told him to do as Avneesh was saying. They came to know that Avneesh is working with a pathology laboratory in America and he wanted to purchase that and also to convert the same in his own name. Avneesh told her that he is completely settled in America so he does not need Samita any more. He also told her that he cancelled her visa and returned her back to Delhi and he will be free by getting divorce from her as her signatures has been taken on many blank papers.

**7.** On 21.03.2010 Kusum Gupta and M.G. Gupta asked them to sell the property in which they were residing for Rs. 3 crores and give the money to Avneesh so that he can purchase the pathology laboratory and then he will not divorce her daughter. On 28.03.2010 she along with her husband and relatives visited their house and requested to save the life of both the children and also to make Dr. Avneesh understand but they replied that they can do whatever they want to do. She suspected that they can do any mis-happening to her daughter, as such she prayed for strict action against them. This complaint culminated into registration of FIR against the petitioners.

**8.** The quashing of the FIR was sought on the ground that the marriage took place on 01.02.2000. Within 9 months i.e. on 15.09.2000, Dr. Samita Gupta took back all her jewellery and gifts received at the

time of her marriage and this receiving was reduced into writing. On 31.01.2001, petitioner no.1 along with Dr. Samita Gupta shifted to Vaishali, Ghaziabad. On 20.08.2001, petitioners 2 and 3 disowned the petitioner no.1 as well as Dr. Samita and a written contract was duly signed and acknowledged by all of them. On 13.03.2001 Samita visited the house of petitioner nos. 2 and 3 with the intention to kill them but on not finding them, she destroyed everything over there. Local police registered a complaint vide D.D. No.13A dated 13.03.2001 and also recorded the statement of two independent witnesses but no action was taken against Samita due to influence of her father Dr. Narender Nath. On 06.06.2004, petitioner no.1 left India for further studies and after 1-1/2 months approximately Samita Gupta also left India on the spouse visa provided by petitioner no.1 and since then both are residing at USA. Later on, Samita was diagnosed with Schizophrenia by the Doctor at U.S.A. On 11.03.2010, petitioner no.1 filed a petition for protection at U.S.A due to threats by Dr. Narender Nath. He also made a complaint to the Commissioner of Police at Delhi, Lokayukt in respect of continuous threat calls from father of Samita Gupta via e-mail. On 27.07.2010 a decree of divorce was granted by the Court at Arizona, U.S.A in favour of petitioner no.1 due to rude and cruel behaviour of Samita. Dr. Samita accepted the decree published by U.S.A Court and then started taking the maintenance amount at the rate of $ 2000 per month. Respondent no.2 filed a complaint before the Crime Against Women Cell, Krishna Nagar, Shahdara, Delhi on the same day. A notice was duly served upon petitioner nos. 2 and 3 on the same day and later on the complaint was converted into FIR, as such the petition was filed for quashing of FIR.

**9.** In the status report filed by respondent no.1, it was submitted that in the complaint itself there are specific allegations against Dr. Kusum Gupta and Dr. M.G.Gupta, parents of Avneesh regarding demand of Rs.10 lakhs and a Honda City car. There are specific allegations against Avneesh regarding demand of $ 15,000 in the year 2008 and Rs. 3 crores in the year 2010 for the purpose of Pathology Laboratory in U.S.A. During the course of investigation, parents of Avneesh submitted the documents pertaining to divorce granted by Arizona State, which reveals that divorce has been granted on the ground that marriage has broken irretrievably but as per the Hindu Marriage Act, irretrievable break down of marriage is not a ground for divorce in India. Notice u/s 41A Cr.P.C was served upon Dr. Avneesh Gupta via e-mail but despite that he has not joined investigation. Investigation is still in progress.



**10.** I have heard Ms. Rebecca John, Senior Advocate for the petitioner, Mr. Saleem Ahmed, Additional Standing Counsel for respondent no.1 and Mr. Vikas Arora, counsel for respondent no.2 at great length and have perused the record.

**11.** Learned senior counsel for the petitioner submitted that registration of FIR is an abuse of process of Court. Within 9 months of the marriage, Dr. Samita Gupta received back the gold, jewellery, sarees and other gift items from petitioner nos. 2 and 3 vide a writing dated 15.09.2000. All the grounds set up in the petition were sought to be substantiated on the basis of documents placed on record viz. receipt of jewellery, sarees and other gift items vide writing dated 15.09.2000, writing dated 20.08.2001, vide which petitioner nos. 2 and 3 disowned petitioner no.1 and Dr. Samita Gupta. Reference was made to D.D. No.13A dated 13.03.2001 when Samita visited the house of petitioner nos.2 and 3 and created a scene which was witnessed by two independent witnesses whose statements were recorded by the police. Thereafter petitioner no.1 left India for further studies. Dr. Samita also went to U.S.A. Divorce petition was filed which was duly contested by Dr. Samita and she accepted the decree of divorce and started taking maintenance. It was submitted that not only she accepted the decree but also kept on moving application for modification of the maintenance order. During this entire period, no complaint was made by Dr. Samita at any point of time. Although allegations are made in the FIR that on the demand of petitioners, money used to be given, however, nothing has been brought on record to show as to what was the source of income and how such payment was made. The decree of divorce granted by the foreign Court is binding since it was fully contested by Dr. Samita Gupta. Now after a lapse of 1-1/2 years, she has challenged the divorce decree. However, no stay has been granted. During the course of anticipatory bail application moved by petitioner nos. 2 and 3, offer was given to open the locker and to make inventory of the articles. Same was opened but nothing was found. Dr. Samita is guilty of suppressing material facts inasmuch as she did not disclose to the police regarding grant of decree of divorce of Arizona Court, as such due to suppression of material fact, the complaint is liable to be thrown at the threshold. The complaint has not been made by Dr. Samita Gupta but by her mother and the averments are merely hearsay. In the face of unimpeachable documents filed by the petitioners, no useful purpose will be served by keeping the complaint alive and as such the FIR deserves to be quashed.

**12.** Reliance was placed on **Priya Vrat Singh & Ors v. Shyam ji Sahai,** 2008(3) JCC 2069; **Rajiv Thapar & Ors vs. Madan Lal Kapoor,** 2013(1) Crimes 169 (SC); **Kanchan Gulati & Anr. vs. The State & Ors,** 2007 IX AD (Delhi) 237; **Prashant Bharti vs. State of NCT of Delhi,** 2013(1) Crimes 195(SC); **Smt. Neera Singh v. The State,** 138(2007) DLT 152; **MCD vs. State of Delhi and Another,** 2005 SCC (Cri) 1322.

**13.** Refuting the submissions of learned counsel for the petitioner, it was submitted by learned Additional Standing Counsel that the investigation is still in progress. Petitioner no.1 has not joined investigation despite the fact that notice for appearance has duly been served upon him via e-mail. Anticipatory bail was granted to petitioner no.2 and the application for cancellation of anticipatory bail filed by the State is still pending. It was further submitted that there are disputed questions of fact which cannot be decided in the writ petition and that being so, the writ petition is not maintainable and is liable to be dismissed.

**14.** It was submitted by learned counsel for respondent no.2 that there is no question of suppression of facts inasmuch as the complaint was made in the year 2010 whereas the divorce was granted in the year 2013. Therefore, this factum could not have been disclosed in the complaint which was made as far back as in the year 2010. As regards the decree of divorce, it was submitted that the same has been challenged by Dr. Samita Gupta in this Court which is pending adjudication. She in fact, did not contest the divorce petition on merits and she had raised objection regarding the jurisdiction inasmuch as the divorce petition was filed on the ground of irretrievable break down of marriage which is not a ground under Hindu Marriage Act. That being so, the divorce decree is not binding. As regards maintenance, it was the right of Dr. Samita Gupta to receive maintenance and, therefore, she got maintenance. Furthermore, it was submitted that although petitioners are relying upon a writing dated 20.08.2001 whereby petitioner nos. 2 and 3 disowned petitioner no.1 as well as Dr. Samita, however, this document was not even acted upon by the petitioners inasmuch as, as per the declaration given by them, they have visited petitioner no.1 at U.S.A thrice. If they had nothing to do with petitioner no.1, why did they go to U.S.A thrice. Moreover although this writing is dated 20.08.2001, however the joint locker was opened in the year 2004. The jewellery is still lying with the petitioners which has not been returned. Furthermore, there is no allegation that the averments made in the FIR does not make out any case or that the allegations are



insufficient to make out a case. By filing this petition, petitioners want a pre-trial and pre-judging the case which is impermissible under law. Petitioner no.1 although has joined petitioner nos. 2 and 3 in filing this petition but he himself has not joined investigation and a look out notice has been issued against him, as such it was submitted that the petition is liable to be dismissed.

**15.** I have given my considerable thoughts to the respective submissions of learned counsel for the parties and have perused the record. 16. Section 482 of the Code of Criminal Procedure is extracted as under:-

> "482. Saving of inherent powers of High Court. Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

17. In **Priya Vrat Singh** (supra) it was observed by Hon'ble Supreme Court as under:-

> "5. The parameters for exercise of power under Section 482 have been laid down by this Court in several cases.
>
> 6. The Section does not confer any new power on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognizes and preserves inherent powers of the High Courts. All courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle "quando lex

aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest" (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the section, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/ continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice.

7. As noted above, the powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court being the highest court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard-and-fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage. (See: **Janata Dal v. H.S. Chowdhary** (1992 (4) SCC 305), **Raghubir Saran (Dr.) v. State of Bihar** (AIR 1964 SC 1) and **Minu Kumari v. State of Bihar** (2006 (4) SCC 359)."

**18.** The proposition of law, pertaining to quashing of criminal proceedings, initiated against an accused by a High Court u/s 482 of



Cr.P.C has been dealt with in Rajiv Thapar(supra) where it was held as under:-

21. The High Court, in exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure, must make a just and rightful choice. This is not a stage of evaluating the truthfulness or otherwise of allegations levelled by the prosecution/complainant against the accused. Likewise, it is not a stage for determining how weighty the defences raised on behalf of the accused is. Even if the accused is successful in showing some suspicion or doubt, in the allegations levelled by the prosecution/complainant, it would be impermissible to discharge the accused before trial. This is so, because it would result in giving finality to the accusations levelled by the prosecution/complainant, without allowing the prosecution or the complainant to adduce evidence to substantiate the same. The converse is, however, not true, because even if trial is proceeded with, the accused is not subjected to any irreparable consequences. The accused would still be in a position to succeed, by establishing his defences by producing evidence in accordance with law. There is an endless list of judgments rendered by this Court declaring the legal position, that in a case where the prosecution/complainant has levelled allegations bringing out all ingredients of the charge(s) levelled, and have placed material before the Court, prima facie evidencing the truthfulness of the allegations levelled, trial must be held.

22. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 of the Code of Criminal Procedure, if it chooses to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 of the Code of Criminal Procedure, at the stages referred to hereinabove, would have far reaching consequences, inasmuch as, it would negate the prosecution's/complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section 482 of the Code of Criminal Procedure the High Court has to be

fully satisfied, that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such, as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such, as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 of the Code of Criminal Procedure to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.

23. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashing, raised by an accused by invoking the power vested in the High Court under Section 482 of the Code of Criminal Procedure:

(i) Step one, whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?

(ii) Step two, whether the material relied upon by the accused, would rule out the assertions contained in the charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false.

(iii) Step three, whether the material relied upon by the accused, has not been refuted by the prosecution/complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/complainant?



(iv) Step four, whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal proceedings, in exercise of power vested in it under Section 482 of the Code of Criminal Procedure. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as, proceedings arising therefrom) specially when, it is clear that the same would not conclude in the conviction of the accused.

**19.** This proposition of law was reiterated in **Prashant Bharti** (supra). In **Kanchan Gulati** (supra) also it was observed that quashing of FIR in exercise of writ jurisdiction is a discretion of the Court. Court should exercise discretion in rarest of rare case, where the circumstances and the facts reveal that, even if all the allegations made in the FIR are considered as true, no offence is made out.

**20.** In this case (i.e. **Kanchan Gulati's** case), the complainant had all along lived in U.S.A and left India immediately after marriage. There were no allegations of cruelty or breach of trust during this period. The allegations were that her father spent money in marriage beyond his capacity. It was observed that this does not amount to a dowry demand. If her jewellery or other articles were left behind in India with her mother-in-law or brother-in-law, the Court of competent jurisdiction had passed order in respect of these dowry articles and directed the parties for exchange of those articles. Decree of divorce passed by Court of U.S.A was not challenged by the complainant. Under those circumstances, the FIR was quashed.

**21.** Similarly in **Rajiv Thapar** (supra), complainant initially alleged death of her daughter by poison and later added strangulation as cause of death and also alleged strained relations and harassment. No allegations were substantiated. On the other hand, the material relied upon by the appellant was not rebutted by the complainant. The post-mortem report also supported the appellant's case. Under those circumstances, it was observed that the High Court should have exercised its power u/s 482 Cr.P.C and while allowing the appeal, proceedings were quashed. Similarly in **Prashant Bharti** (supra), FIR was registered u/s 376 IPC. The allegations of the prosecutrix were found to be false. She did not refute

any material relied upon by the appellant. In fact, she herself prayed for quashing of the FIR lodged by her. Under those circumstances, Hon'ble Supreme Court quashed the proceedings. **Neera Singh**(supra) was a petition u/s 482 Cr.P.C for setting aside the order passed by learned Additional Sessions Judge. FIR u/s 498A IPC was registered. The learned Magistrate discharged all the other family members except the husband. The revision was dismissed and the order was upheld by learned Additional Sessions Judge, Delhi. Keeping in view the facts and circumstances of the case, it was observed that the petition is devoid of merit and was dismissed. **Jagdish Thakkar vs. State of Delhi,** 1993 JCC 117 was relied upon for submitting that even if the FIR is registered u/s 406 IPC, as observed in that case, the proceedings u/s 406 and 498A are not meant for recovery of jewellery and dowry articles. Wife of the petitioner can move the civil court for recovery of the articles. **MCD**(supra) was relied upon for submitting that respondent is guilty of suppressing material facts of divorce decree and, therefore, the petition is liable to be thrown at the threshold. **Y. Narasimha Rao and Others v. Y.Venkata Lakshmi and Another,** (1991) 3 SCC 451 was relied upon for showing that the decree of divorce passed by Arizona Court is binding upon Dr. Samita Gupta.

**22.** At the outset, it may be mentioned that in view of the legal proposition enunciated in **Priya Vrat** (supra), **Prashant** (supra) and **Rajiv Thapar** (supra), the prayer for quashing can be entertained only if the material relied upon by the petitioner would rule out the assertion contained in the complaint. The various averments made in the complaint have not been refuted or challenged by the petitioner. At this stage, the truthfulness or otherwise of allegations levelled by the complainant against the accused require to be evaluated. Similarly it is not a stage for determining the defence raised by the petitioners.

**23.** As observed by Hon'ble Supreme Court in **Rajiv Thapar** (supra) and reiterated in **Prashant Bharti** (supra), even if the accused is successful in showing some suspicion or doubt in the allegations levelled by the complainant, it would be impermissible to discharge them before trial because that would result in giving finality to the accusations levelled by the prosecution/complainant without allowing them to adduce evidence to substantiate the same. On the other hand, if the trial is proceeded with, the petitioner would still be in a position to establish their defence by producing evidence in accordance with law. The quashing could have been done if the allegations levelled in the complaint, even if taken on its face value, does not disclose commission of any offence which is not



the case in the instant case. There are serious allegations of demands raised by the petitioners from time to time causing harassment to Dr. Samita Gupta and her parents. Under the circumstances, since disputed questions of facts are involved, there is no ground for quashing of FIR.

**24.** In **Satvinder Kaur v. State (Govt. of NCT of Delhi) & Another,** AIR 1999 SC 3596 it was held:

> "It is a well settled that if an offence is disclosed the Court will not normally interfere with an investigation into the case and will permit investigation into the offence alleged to be completed. If the FIR prima facie, discloses the commission of an offence, the court normally does not stop the investigation, for to do so would be to trench upon the lawful power of the police to investigate into cognizable offences. It is also settled by a long course of decision of this Court that for the purpose of exercising its powers under Sec. 482, Cr.P.C to quash an FIR or a complaint, the High Court will have to proceed entirely on the basis of allegations made in a complaint or the documents accompanying the same per se; it has no jurisdiction to examine the correctness or otherwise of the allegations."

**25.** As per the report, the complaint is still being investigated by the concerned authorities and while exercising its power u/s 482 Cr.P.C, this Court will have to proceed entirely on the basis of allegations made in the complaint and cannot examine the correctness or otherwise of the allegations.

**26.** In **State of Haryana vs. Choudhary Bhajan Lal & Ors.** reported in JT 1990(4) SC 650, following guidelines were given:-

1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima-facie constitute any offence or make out a case against the accused.
2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.
3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the

same do not disclose the commission of any offence and make out a case against the accused.

4. Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

6. Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

7. Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

**27.** A bare perusal of these guidelines goes to show that quashing of FIR can be done only if the allegations made in the complaint, even if taken at their face value, do not prima facie constitute any offence and the uncontroverted allegations made in the FIR or complaint do not disclose the commission of any offence. As narrated above, the allegations made in the complaint are still at the stage of investigation and it cannot be said that the uncontroverted allegations made in the FIR or complaint do not disclose the commission of any offence against the petitioners. In fact the averments made in the petition are required to be adjudicated upon at the stage of trial. It is settled law that disputed questions of fact cannot be adjudicated while exercising writ jurisdiction.

**28.** Adverting to the case in hand, the petitioner has raised pure question of facts for determination in the writ proceeding. It is well known that in a writ petition, ordinarily such disputed question of facts



is not to be entertained. The moment there is a debatable area in the case, it is not amenable to the writ jurisdiction of the High Court under Article 226 of the Constitution. This Court in exercise of jurisdiction under Article 226 of the Constitution cannot adjudicate the matter where the foundational facts are disputed. Rival contentions of the parties cannot be decided in a writ proceeding as held in **Himmat Singh Vs. State of Haryana & Ors.,** (2006) 9 SCC 256; **Mukesh Kumar Aggarwal Vs. State of Uttar Pradesh & Ors.,** (2009) 13 SCC 693; **Bhagavat Singh and etc. Vs. State of Tamil Nadu and Ors.,** 1998 Cr.LJ 3513. This Court is not required to embark upon an enquiry whether the allegations in the petition which are controverted by the respondents are correct or not. It cannot be said that the allegations made in the complaint which culminated in registration of FIR, even if taken at their face value and accepted in their entirety, do not prima facie set out any offence or make out a case against the accused. The investigation is still at threshold and petitioner no.1 has not even joined the investigation. Under the circumstances, it is not a case where the Court should exercise its discretion by quashing the FIR.

**29.** As regards grant of decree of divorce granted by Arizona Court, and that the foreign judgment is binding and reliance was placed on **Narsimha Rao** (supra), it is suffice to say that Dr. Samita Gupta has filed a petition for declaring the decree as null and void which is pending adjudication in this Court. Whether the decree is binding or not is not required to be adjudicated upon in this petition and in fact no observation is warranted, lest it may affect the merits of that case.

**30.** Suffice it to say, since the allegations made in the complaint constitutes cognizable offence and FIR has been registered which is required to be investigated, that being so, at this juncture there is no ground to quash the FIR. A perusal of the FIR prima facie reveals allegations of demand and continuous harassment. The FIR, on the face of it discloses the commission of cognizable offences. The matter is still pending investigation and it is for the investigating agency to investigate the matter and find out the role of each accused before final charge sheet is filed. In case the allegations are not made out against any of the petitioners, no charge sheet qua the said petitioner would be filed. However, at this stage, there is no ground to quash the FIR.

The petition, being devoid of merit, is dismissed.

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8. Hon'ble Mr. Justice P.K. Bhasin
9. Hon'ble Mr. Justice Kailash Gambhir
10. Hon'ble Mr. Justice G.S. Sistani
11. Hon'ble Dr. Justice S. Muralidhar
12. Hon'ble Ms. Justice Hima Kohli
13. Hon'ble Mr. Justice Vipin Sanghi
14. Hon'ble Mr. Justice Sudershan Kumar Misra
15. Hon'ble Ms. Justice Veena Birbal
16. Hon'ble Mr. Justice Siddharth Mridul
17. Hon'ble Mr. Justice Manmohan
18. Hon'ble Mr. Justice V.K. Shali
19. Hon'ble Mr. Justice Manmohan Singh
20. Hon'ble Mr. Justice Rajiv Sahai Endlaw
21. Hon'ble Mr. Justice J.R. Midha
22. Hon'ble Mr. Justice Rajiv Shakdher
23. Hon'ble Mr. Justice Sunil Gaur
24. Hon'ble Mr. Justice Suresh Kait
25. Hon'ble Mr. Justice Valmiki J. Mehta
26. Hon'ble Mr. Justice V.K. Jain
27. Hon'ble Ms. Justice Indermeet Kaur
28. Hon'ble Mr. Justice A.K. Pathak
29. Hon'ble Ms. Justice Mukta Gupta
30. Hon'ble Mr. Justice G.P. Mittal
31. Hon'ble Mr. Justice M.L. Mehta
32. Hon'ble Mr. Justice R.V. Easwar
33. Hon'ble Ms. Justice Pratibha Rani
34. Hon'ble Ms. Justice S.P. Garg
35. Hon'ble Mr. Justice Jayant Nath
36. Hon'ble Mr. Justice Najmi Waziri
37. Hon'ble Mr. Justice Sanjeev Sachdeva
38. Hon'ble Mr. Justice Vibhu Bakhru
39. Hon'ble Mr. Justice V.K. Rao
40. Hon'ble Ms. Justice Sunita Gupta
41. Hon'ble Ms. Justice Deepa Sharma
42. Hon'ble Mr. Justice V.P. Vaish

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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*

— Order 7 Rule 11 Order 1 Rule 10—Contract Act—1872—Section 230—Plaintiff filed suit claiming damages against defendants—Defendant no. 3 preferred application U/o 7 Rule 11 and Order 1 Rule 10 of Code contending it is neither necessary nor proper party to suit. Held:- In the absence of any contract to that effect an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by him.

*ACE Innovators Pvt. Ltd.* v. *Hewlett Packard India Sales Pvt. Ltd. & Ors.* ..... *3853*

— Order VII Rule 11 & Order II Rule 2—Plaintiff filed suit seeking partition of suit properties and consequential relief of possession of 1/6th share in suit properties and profits arising therefrom—Defendant no. 1 moved application seeking rejection of plaint on ground suit barred by limitation—As per defendants, plaintiff had earlier filed a suit seeking declaration of joint ownership with defendant no. 1 and permanent injunction—Suit was dismissed as not maintainable—Fresh suit filed by him was barred by limitation as plaintiff had requisite knowledge about stands of defendants in earlier suit, so he cannot seek extension of time in earlier suit, so he cannot seek extension of time in present suit on ground that matter was being mediated. Held:- Once the period of limitation

starts running, the same cannot be set at naught by settlement talks going on.

*Mahender Kumar Khurana* v. *Rajinder Kumar Khurana & Ors.* ..... *3860*

— Order VII Rule 11 & Order II Rule 2—Plaintiff filed suit seeking partition of suit properties and consequential relief of possession of 1/6th share in suit properties and profits arising therefrom—As per defendants, Plaintiff in earlier suit prayed for declaration and injunction and did not seek relief of partition, so he cannot maintain present suit seeking relief of partition now. Held:- In an earlier suit for declaration and injunction relief for partition not sought, there is a bar U/o II Rule 2 Civil Procedure Code to maintain fresh suit seeking relief of partition in subsequent suit.

*Mahender Kumar Khurana* v. *Rajinder Kumar Khurana & Ors.* ..... *3860*

— Order XXXVII—Plaintiff preferred suit for recovery U/o XXXVII of Code—Defendant sought for leave to defend and alleged plaintiff failed to show concluded legally enforceable contract with regard to sale and purchase of convertible warrants was entered into between them—Also, on that account defendant was indebted to pay to plaintiff amount mentioned in cheque, plaintiff cannot be granted permission to seek judgment against defendant by way of summary procedure. Held:- Mere issuance of cheque in the absence of documents to show a contract was concluded between the parties. It it cannot be presumed there was a liability to pay debt and cheque was issued in discharge of the liability to enforce the suit U/o XXXVII of Civil Procedure Code.

*Daisy K Mehta* v. *Kapil Kumar* ..... *3877*

**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/-.

*Jagmohini* v. *State (GNCT of Delhi) & Ors.* ..... *3433*

— Sec. 378 (1)—Secret information received against respondent no. 1, involved in printing of fake Indian currency notes (FICN) in the denomination of ‘100/- and ‘50—Respondent was to supply FICN to respondent no. 2 and respondent no.

2 and respondent no.3—Direction to conduct the raid immediately—Raiding party left the special cell in private cars—Efforts made to persuade public persons to join the raiding party but none agreed—Respondent no.1 took out yellow coloured envelopes—Handed over to respondent no. 2 and respondent no. 3 respectively—The police apprehended them-35 FICN in the denomination of '50 recovered form respondent no. 2—Further, 35 FICN in the denomination of '100 and '34 FICN in the denomination of '50 recovered from respondent no. 3—Moreover, 76 FICN in the denomination of '100 and 54 FICN in the denomination of '50 recovered form respondent no.1—Trial Court has observed that absence of a public witness is fatal to the admissibility or appreciation of evidence—Trial Court observed that the mere use of personal vehicles of the investing officers the investigation and evidence on record as suspicious—Hence the present leave to appeal petition. Held-PW-4 to PW-7 in their testimony have stated that being the official of Special Cell they are not required to enter their arrival and departure in the register—All police officials irrespective of their rank are bound to record their arrival at the time of joining their duties and departure at the time of leaving their office—Trial Court rightly held it is possible to manage the rojnamcha register—Material contradictions in the testimonies of police officials on the timing of preparation of the rukka and registration of FIR—Use of special vehicles PW-5 neither ascribed any special reason for using private vehicles nor was any log book maintained by him—Testimonies of the policed official witnesses are dissatisfactory with regard to this circumstance also—Master—Piece of currencies (Ex. P-3)—One side could have been used to print the FICN—Prosecution failed to show how the FICN were printed on both sides by the respondent no. 1- Tampering with the case property—Yellow coloured envelopes found missing—Possibility of tampering with the case property—No public witness was called—Taking the search of the house of respondent no.1—Section 100(4) of Cr.P.C casts a mandatory duty upon the investigators to call upon two or more independent and respectable inhabitants of the locality where the search is to be conducted—Wife of



respondent 1 was present in the house at the time of search but no efforts were made to join her as recovery witness—No list of seized articles was delivered to respondent no.1 —Non—Joining of any independent witness at the time of raid—The Supreme Court in *Pradeep Narayan Madgaonkar v. State of Maharashtra*, observed "evidence of the officials (police) witnesses cannot be discarded merely on the ground that they belong to the force—But prudence dictates that their evidence needs to be subjected to strict scrutiny—Requires greater care to appreciate their testimony"—Leave is to be granted in exceptional cases where the judgment under appeal is found to be perverse.

*State* v. *Om Prakash & Ors.*..... *3959*

— Sec. 378 (1)—The deceased had died within seven years of marriage under unnatural circumstances—Post mortem report ExPW-1/A, mentioned the cause of death as asphyxia as a result of ligature pressure over neck produced by strangulation—Testimonies of PW-1 and PW-15 stated that the deceased was harassed by respondent no. Demand of car as dowry—The Trial Court observed material contradictions on the testimonies of the PW-1 and P-15 and secondly, testimony of PW-1 and his statement before Magistrate EX.PW-1A with respect to time of demand of car—The Court observed numerous flaws in the post mortem report ExPW-8/A upon cross—Examination of PW-8 and PW-9—Hence the present Appeal. Held—Proximity between the time of demand of dowry and the time of death of deceased-demand of dowry to be covered under Section 304—B of IPC has to made soon before death—No definite interpretation to phrase "soon before death"—The Supreme Court in *Satvir Singh v. State of Punjab* observed that the phrase "soon before her death" should have a perceptible nexus between her death and the dowry—Relate harassment or cruelty inflicted on her- the interval between the two events should not be wide—The deceased went back to her matrimonial house—Period of 11 month proceeding her death—No demand of dowry made by the respondent—No perceptible nexus exists between her death and dowry related demand—Further, crucial elements have not been examined

and recorded in the post mortem report—does not inspire confidence—Appears to be a case of hanging—No evidence that any of the accused had abetted the suicide of the deceased—Prosecution has not been able to prove its case beyond reasonable doubt.

*State* v. *Paramjeet Singh & Ors.* ..... *4014*

— Indian Penal Code, 1860—Sec. 302/34—Petition for leave to appeal field by State—Brother of the deceased, PW-5 and Laxman Tyagi PW-9, nephew of the deceased recovered the body of the deceased in a decomposed condition—During investigation, it was found the relations between the deceased and his wife and children were not good—Lived separately—Respondent no. 1 started visiting the deceased—Respondent no.1 brought Chach (lassi) for deceased but he did not consume—PW-1 found the lassi to be bitter—PW-2 asked to give the lassi to him—Felt unconscious and was rushed to the doctor—The deceased told PW-1 that respondent no 1 mixed poison in his lassi—Respondent no. 1 had asked PW-10 to transfer share of plot of land in his name belonging to the deceased—Further, PW-10 stated that Respondent asked him about a poison that cause death—On the this information PW-31 issued notice to respondent under Section 160 of Cr.P.C—During interrogation respondent confessed his guilt and was arrested—In a disclosure statement, respondent no 1 named respondent no. 2 and stated that they thrown their clothes and gloves and knife—Recovery of both the shop was recovered form the pocket of pajama of respondent no. 1—Dagger type knife (weapon of offence) was also recovered at the instance of respondent no. 1—Charge sheet was prepared under Section 302/34 of IPC—The Trial Court observer that the Investigating Officer had not conducted proper investigation to find out whether the shop and plot of village were in the name of the deceased—The Trial Court, Form the depositions of PW-10, PW-9 and PW-5 observed that the deceased had no plot of land in the village at the time of incident—Hence, property as the motive of murder has been established—Prosecution has not attributed any motive on respondent no.2 except for the fact that he is a friend of



respondent no. 1—The Trial Court disbelieved the prosecution case with respect to the incident of poisonous lassi—Depositing of PW-5, PW-8 and PW-9 indicate that they had no personal knowledge of the incident of poisonous lassi—Their testimony is hearsay and therefore inadmissible in evidence PW-21 and PW-2 turned hostile—Evidence of PW-31, PW- 30 and PW- 19 indicate that effort was made to call any public witness at the time of alleged recovery of blood stained clothes and knife—Rule of prudence and not mandatory—However, wherein recoveries effected form a public place—Serious effort to join an independent witness—Trial Court observed that there was serious inconsistencies in the testimonies of the police officials examined as recovery witness-Hence the present leave petition. Held—The learned Trial Court rightly disbelieved the recoveries effected upon the disclosure statement of the respondents—Mere presence of blood on the recovered clothes and knife are not sufficient to prove that respondents committed the murder of the deceased—Leave to appeal is to be granted in exceptional cases where the Judgment under appeal is found to be perverse—Presumption of innocence of the accused—Trial Court's acquittal adds to the presumption of innocence.

*State* v. *Vikas @ Bhola & Anr.* ..... *4032*

**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.

*Saroj Devi* v. *Union of India & Anr.*..... *3259*

— 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.

*GP. Capt. Joe Emmauel Stephen* v. *Commandant (Personal) Directorate General of BSF and Ors.* .... *3300*

— 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.

*Binod Singh And Ors.* v. *Union of India and Ors.* ..... *3311*

— 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.

*DK Singh* v. *UOI & Ors.* ..... *3322*

— Article 226—Writ Petition—Article 14—Service Law—Central Industrial Security Force (CISF)—Promotion—Assured Career Progressive Scheme (ACP)—Promotion Cadre Course (PCC)-petitioner-constable-seeks restoration of the first financial upgradation as per ACP Scheme *w.e.f* 28.02.2004-12 years continuous service with CISF-became entitled for grant of second financial upgradation as per MACP Scheme *w.e.f* 28.02.2012-Petitioner was granted financial upgradation by the respondent *w.e.f* 17.02.2004 on completion of 12 years of service-ACP benefit cancelled on failure in the promotion Cadre Course (PCC)—Held *w.e.f* July, 2004—first chance-respondent proceeded to recover amount paid towards his financial upgradation from 28.02.2004—Petitioner's representation of no avail-respondent proceeded to re-grant the ACP upgradation to the petitioner vide order dtd. 23.02.2006—Denied the financial upgradation *w.e.f*



28.02.2004 to 20.01.2006—Contended-every employee is given three opportunities to complete the PCC-in case of inability of the employee to complete the course in the first attempt-the second and third opportunities available to him-respondent contended—Para 4 of the Circular dtd. 07.11.2003 to the effect that a conscious decision taken to effect recovery of pay and allowances pertaining to the period from the date of upgradation of scale under ACP scheme to the date of stoppage of such financial upgradation—Court observed-Para 4 of the Circular is to be read in the context of para 2 of the Circular which clearly recognizes that an employee would be entitled to financial upgradation from the date he becomes eligible for the same-recovery can only be made if the respondents have given three chances for undergoing the PCC-the employee unable to do so-or-unsuccessful-the respondent not waited for the petitioner qualifying in PCC before proceedings with the recovery action—Held - petitioner entitled to the amount recovered from him-refunded to him-further held-petitioner entitled for second upgradation as per ACP scheme-Writ petition allowed.

*Bishan Singh* v. *Union of India & Anr.* ..... *3803*

— Article 226—Writ Petition—Service Law—Central Civil Service (Pension) Rules, 1972—Rule 48-A (F)-Notice of voluntary retirement-withdrawal- petitioner-an Assistant Engineer (E&M) with the Field Workshop of the General Reserve Engineer Force (GREE) of the Boarder Security Force (BSF) sent a letter dtd. 17.08.2010 to the Secretary of the Border Road Development Board (BRDB) seeking voluntary retirement from service *w.e.f.* 01.12.2010 (FN)—Ground—Domestic problem and ill health-three month notice of voluntary retirement commencing from 01.09.2010—Withdrew letter by a communication dtd. 23.11.2010—Withdrawal refused-resignation accepted by an order dtd. 15.11.2010—Petitioner aggrieved-preferred writ petition-contended-finding improvements in his family circumstances moved an application dtd. 23.11.20010 for withdrawal of his aforesaid application for voluntary under the provision of Rule 48-A of the CCS (Pension) Rules, 1972—Respondent

contended-order dtd. 15.11.2010 served upon the petitioner vide a letter dtd. 20.11.2010 and filed a speed post receipt dtd. 23.11.2010—Further contended that the request for withdrawal of voluntary retirement application had been processed under Rule 48-A(4) of CCS (Pensions) Rules and petitioner's request rejected by the competent authority—Court observed—In the withdrawal application petitioner had stated that he came to know regarding departmental promotion committee was likely to be held shortly and decided to take advantage of the same—however did not suggest that domestic problem over or had recovered from his health—The ground on which VRS sought—Petitioner remained on leave throughout the notice on the ground of medical illness—Held—Ordinarily approval for withdrawal should not be granted unless the officer concerned in the position to show material change in the circumstances in consideration of which the notice originally given—writ petition dismissed.

*Manvendra Singh Rawat* v. *Union of India & Ors.* ..... *3814*

— Article 226—Writ Petition—Article 14—Service Law—Central Industrial Security Force (CISF)—Promotion—Assured Career Progression Scheme (ACP)—Promotion Cadre Course (PCC)—Petitioner constable seeks restoration of the first financial upgradation as per ACP Scheme *w.e.f.* 17.02.2004 when he completed 12 years of continuous service with CISF and become entitled for grant of second financial upgradation as per MACP Scheme *w.e.f.* 17.02.2012—The petitioner after completion of 12 years of service was offered an opportunity to undergo PCC in December 2006—Could not go to medical unfitness—Asked to the posting as per the advise of doctor in the training centre—Granted first promotional upgradation—Subsequently qualify the PCC—Result conveyed on 24.11.2008—Prior to the that on 30.07.2008 order issued ACP benefit granted cancelled due to his failure to complete PCC held in December, 2006—Respondent proceeded to recover the amount to paid for financial upgradation—However respondent proceeded to re-grant the ACP upgradation *w.e.f.* 12.02.2009—Denied the benefit of the



financial upgradation *w.e.f.* 17.02.2004 to 11.02.2009—Petitioner Contended-completion of actual PCC would have no effect date of grant of financial benefit—In as much as—All employee undergo the PCC only after become eligible for grant of ACP—Further—Every employee given three opportunities to complete PCC—Inability to successfully complete the PCC in first or second attempt would render petitioner eligible for attempt—Therefore withdrawal and recovery of the benefit unjustified—Respondent contended—In terms of circular an employee deputed for PCC fails to clear the course or showed inability to go the course on one pretext or the other, the benefit of scheme already granted had to be stopped and recovery had to be made—Held—Every employee is entitled to three chances to complete PCC—In case the petitioner had undertaken the PCC when he was first offered the same but he had failed to clear the same the—Respondent would not have then deprived the benefit of financial upgradation but would have offered him second and third chance to complete the same—The petitioner in fact had cleared the PCC in second chance when he underwent—The petitioner entitled to amount recovered from him—Be considered for second upgradation—Writ petition allowed.

*Karam Singh* v. *Union of India & Anr.* ..... *3827*

— Article 226—Writ Petition—Article 14—Service Law—Central Industrial Security Force (CISF)—Promotion—Assured Career Progression Scheme (ACP)- Promotion Cadre Course (PCC)-Petitioner head constable seeks restoration of the first financial upgradation as per ACP Scheme *w.e.f.* 21.04.2004 when he completed 12 years of continuous service with CISF and became entitled for grant for second financial upgradation as per MACP Scheme *w.e.f.* 21.04.2012—Petitioner granted financial upgradation *w.e.f. 21.04.2004*—Undergone the course on 21.03.2005 to 07.05.2005—Successfully qualified PCC and result conveyed 21.02.2006—Petitioner offered the opportunity to undergo PCC in June, 2004 for the first time—He expressed unwillingness on the ground of availing leave to proceed to his native place—Failed in the second chance—Qualified in the supplementary—The benefit cancelled due to

submission of unwillingness to undergo PCC would have no effect on effective date of grant of financial benefit—In as much as—All employee undergo the PCC only after having become eligible for grant the ACP scheme—Further—Every employee given three opportunities to complete PCC—Inability to successfully complete the PCC in first or second attempt would render petitioner eligible for third attempt—Therefore withdrawal and recovery of the benefit unjustified—respondent contended—In terms of circular an employee deputed for PCC fail to clear the course or showed inability to go to the course on one pretext or the other, benefit of scheme already granted had to be stopped and recovery had to be made—Held—Every employee is entitled to three chances to complete PCC—In case the petitioner had undertaken the PCC when he was first offered the same but he had failed to clear the same the—respondent would not have then deprived the benefit of financial upgradation but would have offered him second and third chance to complete the same—The petitioner entitled to amount recovered from him—Writ petition allowed.

*Kuldip Singh* v. *Union of India & Anr.* ..... *3839*

— Aggrieved appellant challenged judgment of order passed by Disciplinary Authority was dismissed—Appellant urged dismissal of his service by respondent no. 1 in pursuance of Disciplinary proceeding and upheld by Appellant Authority was bad it was based on mere suspicion—Whereas on basis of same evidence he was discharged by the Court of Chief Metropolitan Magistrate, Delhi in criminal case initiated by CBI against him. Held:—Proceedings in criminal case and departmental proceedings operate in different fields. The standards of proof and evidence required in two proceedings are also different.

*Ajay Kumar* v. *Gas Authority of India Ltd. & Anr.* ..... *3982*

— Article 14—Sick Industrial Companies (Special Provision) Act, 1985—Section 3—Appellants preferred writ petition seeking direction to respondents to comply with office memorandum date 24.07.07 and 17.12.08 read with office memorandum



dated 07.08.12 pertaining to appointment of Chief Executives and Functional Directors in sick/loss making Central Public Sector Enterprises—Writ petition dismissed—Aggrieved appellants preferred appeals urging violation of principles of natural justice and decision of respondents not to extend tenure of appellants violative of Article 14. Held:—The elaborate principles of natural justice need not be observed while taking any administrative actions and the administrative authority has only to act fairly.

*Bridge and Roof Company India Ltd. Executives' Association* v. *Union of India and Ors.* ..... *3993*

— Appellant had challenged findings of Inquiry Officer before Labour Court which held charge levelled against him was not fair and proper—Respondent preferred writ petition and order of Labour Court was quashed—Aggrieved appellant preferred appeal and urged, witness in inquiry proceedings must depose orally as to alleged misconduct and cannot rely on or adopt his earlier report—Thus, order of Inquiry Officer based upon such evidence of Traffic Inspector was not proper. Held:-Strict rules of the Evidence Act, and the standard of proof envisaged therein do not apply to departmental proceedings or domestic tribunal.

*Nepal Singh* v. *Delhi Transport Corporation* ..... *4006*

— Art. 226—Criminal Procedure Code, 1973—Section 482—Mandamus—Direction to Delhi Police to pass order u/s. 149 Cr.P.C to the Secretary, Aviation Employees Cooperative House Building Society—Restraining private caterers from creating any public nuisance—ADM(E) Delhi passed a conditional order u/s 133(1)(a) Cr.P.C followed by interim order retraining the society form locating/private caterers—A complaint u/s 473 Delhi Municipal Corporation Act—Revision petition—Interim order by learned Additional Sessions Judge restraining society form washing utensils in open area—Held—Powers under Article 226 and Section 482 to be exercised in exceptional cases and very sparingly—Alternative remedy available under various statutory provisions of law—No ground

for exercising the extra ordinary jurisdiction of this court.

*Ankur Mutreja* v. *Delhi Police* ..... *4043*

— Article 226 and 227—Criminal Penal Code, 1860—Section 482—Inherent power of the High Court—Quashing of FIR—Section 498A/406/34 of IPC—Cruelty—Demand for dowry—Punishment for criminal breach of trust—Common Intention—Hence the present petition—Held, quashing of FIR can be done only if the allegation made in the complaint, even if taken at their face value, do not prima facie constitute any offence and the uncontroverted allegations made in the FIR or complaint do not disclose the commission of any offence—Complain constitute cognizable offence—Investigation is still at threshold—Disputed questions of fact are not to be determined in the Writ Petition—No ground for quashing of FIR.

*Avneesh Gupta & Ors.* v. *State of NCT of Delhi & Ors.*..... *4051*

**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.

*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*

**INCOME TAX ACT, 1961**—Sec. 226 (3)—Share purchase agreement dated 25.09.2005—The sellers and the purchaser and respondent no. 2 entered into an Escrow Agreement dated 27.09.2005—Assessing Officer issued a notice to respondent no 2 under Section 226(3)—Amount held—As an escrow agent-vide Escrow Agreement dated 27.09.2005—Notice was objected to respondent 2—Clarified that the respondent 2 was not holding any money on account of the assessee company—Assessing Officer sent another similar notice dated 15.02.2007—Respondent no. 2 bank also furnished an affidavit dated 07.12.2012 fixed deposit of 94,84,96,05.97/—Was held by respondent no. 2 in terms of the Escrow Agreement—Assessing Officer passed impugned order and sent a notice 04.02.2013—Calling upon respondent no. 2 to forthwith pay the amount held by respondent no. 2—Hence the present petition. Held—Section 226(3) of the Act confers upon an Assessing Officer a special jurisdiction to proceed directly against a person, other than an assessee, for recovery of income-tax demands due form the assessee—Proceedings is in the nature of garnishee proceedings—But section 226(3) must be confined to cases where third party admits to owing money or holding any money on account of the assessee—Shaw Wallace and Co. Ltd. v. Union of India (relied on)—Once the third Party noticee has disputed that he owes any money—The Assessing Officer have no jurisdiction to proceed further—Assessee company is not a party to the Share Purchase Agreement—Neither the Share Purchase Agreement nor the Escrow Agreement provides for any contingency—Funds held by the respondent no. 2 bank in escrow be paid either to the assessee company or to the Income—Tax Department—The conclusion of the Assessing Officer that the amount of money kept with respondent no. 2 in escrow is



available to the assessee for meeting its income—Tax demand held erroneous—The decision of Assessing Officer set aside—Respondent no. 1 directed to forthwith refund the amount recovered from respondent no. 2 bank pursuant to the notice.

*AAA Portfolios Pvt. Ltd. & Ors.* v. *The Deputy Commissioner of Income Tax & Ors.* ..... *3939*

— Section 148—The Petitioner is a company engaged in the manufacture and sale of optical and sale of optical and magnetic storage media projects—The petitioner for the relevant financial year for the Assessment year 2005-2006 had unit—Petitioner filed its return on 31.10.2005 declaring loss—The petitioner claimed deduction under Section 10B—The Assessing Officer (AO) issued various questionnaires dated 31.10.2007, 01.10.2008 and 14.11.2008—Sought explanation form the assessee qua the claim under Section 10A/10B—Claim of deduction of deferred revenue expenditure for technical know—How fee—The claim of the petitioner was accepted—No 27.05.2009, the AO rectified the Assessment order dated 31.12.2008 and reduced the claim of deduction under Section 10B—The Deputy Commissioner on 04.05.2011 issued notice to the petitioner under Section 148 for Re-assessing the income of the petitioner—Petitioner filed objections—Made full and true disclosure of material facts—Issue of notice under Section 148—Based on Change of opinion—No fresh information or tangible material came to the knowledge of the AO—The Deputy Commissioner disposed of the objections vide impugned order dated 01.02.2013—Hence the present petition. Held: Allowing deduction under Section 10B and subsequent rectification—The AO Formed definite opinion on the claim of benefit under Section 10B—Further there was disclosure of full and true material facts—Deferred revenue expenditure—Specific query was raised—Responded to by the petitioner—Response to the questionnaire—Establishes the AO formed an opinion on the claim of the petitioner—The reason recorded by the Deputy Commissioner —Do not suggest any fresh and tangible material—That income had escaped assessment—AO to

indicate specifically—Material or relevant facts subsequently came to knowledge.

*Moser Baer India Ltd.* v. *Deputy Commissioner of Income-Tax and Anr.* ..... *4022*

**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.

*Dharmendra* v. *State* ..... *3332*

— 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.

*Manpreet Singh @ Bobby* v. *Jitender Singh @ Sonu & Ors.* ..... *3337*

— 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.

*Ranjana* v. *State* ..... *3394*

— 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.

*Virender @ Pappu Etc.* v. *State* ..... *3406*

— 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*

— Section 302/34—Appellants convicted for the offence of murder on the basis of recovery of blood stained clothes and the weapon of offence and the refusal to participate in TIP proceedings—Conviction challenged on the ground that one of the alleged eye witnesses was on inimical terms with the appellants and not a man worthy of credence and the other eye witness did not identify the accused persons in Court and that the prosecution failed to prove the motive of robbery and the recovery of certain articles at the instance of the accused not proved to be connected with the crime. Held: The testimony of the solitary eye witness of the incident does not inspire confidence for he has materially improved his statement given u/s 161 Cr.PC and his entire conduct found to be quite



unnatural and further that he falsely denied his relationship with the appellants and the factum of a property dispute with them. The defence witnesses on the other hand much more reliable and their evidence should not have been ignored by the Court. Further more it has not been established beyond doubt that motive to commit crime was robbery. Neither the charge sheet was submitted for offence of robbery nor any separate charge for robbery was framed by Ld. ASJ. Further belongings of the deceased found lying next to his body only. Recovery of certain currency from the house of one of the accused not proved to be that belonging to the deceased. Recovery of blood stained from the house of one of the accused not reliable to establish the guilt of the accused persons for neither the blood found on the clothes proved to be that of the deceased nor any independent witness joined during the said asserted recovery. In the absence of detection of blood on thee alleged weapon of offence, it cannot be stated that it was used in the crime, more so when it was never shown to the concerned doctor to seek his opinion whether the injury on the person of deceased could been inflicted by it. Recovery of a purse assertedly belonging to the deceased at the instance of one of the accused not sufficient to convict the accused persons but merely raises a grave suspicion. Refusal of the accused persons to join the TIP does not lead to an adverse inference against them for the accused were already known to the asserted star eye witness. Prosecution cannot be said to have established its case beyond reasonable doubt and hence appellants entitled to benefit of doubt. Appeal allowed.

*Suresh @ Bona* v. *State* ..... *3882*

— Section 302/364A/365/201/34—Appellants convicted for having abducted the son of the complainant aged about 19 years, for making a ransom demand of Rs. 1 Lakh for his safe release and for committing his murder and causing disappearance of the evidence of the offence—Prosecution based its case on circumstantial evidence and the circumstances which accounted for the conviction of the appellants were namely that the deceased was last seen with them and it was in pursuance of their disclosures and pointing

out that the body of the deceased was recovered from a premises taken on rent by the appellants. Recovery of the Titan watch of the deceased from one of the appellants and the recovery of the dummy notes from one of the accused in pursuance of the same having been handed over to him by the complainant also held to be incriminating facts against them—Conviction challenged inter alia on the grounds that recovery of incriminating articles not witnessed by any public independent witness and hence doubtful, the identity of the dead body not being established conclusively, the premises from where the body recovered could not have been pointed out jointly by both the appellants and that the prosecution also failed to prove that the said premises had been taken on rent by the appellants. Held: No trace of doubt that the deceased was last seen in the company of the appellants. The recovery of incriminating articles namely the dummy notes and the purse of the deceased, from the appellants also proved beyond reasonable doubt. Though due to the death of the complainant, he could not be examined but the recovery was witnesses by four police officials and no material on record to discredit their testimony. The testimony of police personnel have to be treated in the same manner as testimony of any other witnesses and there is no principal of law that without corroboration by independent witnesses their testimony cannot be relied upon. On perusal of evidence, there is no difficulty in finding that the dead body that was recovered was that of the son of the complainant and that was sufficient proof of *corpus delecti*. Further the legal position on joint and simultaneous disclosures by more than one accused leading to discovery of new facts is that the same are per se admissible u/s 27 of the Evidence Act. The evidence on record amply proves that it was on the disclosure and the pointing out of both appellants that the bag containing the dead body of the deceased was detected from the floor of a gallery of a premises rented out by the appellants and the appellants have failed to offer any explanation as to how they came to know of such concealment. Testimony of the landlord of the premises sufficient to prove that the premises in question were rented out to the appellants only and the mere fact that there



was no documentary evidence in the form of rent agreement or rent receipt not sufficient to draw a presumption that the premises was not let out to the appellants. All the circumstances proved on record cumulatively taken together lead to the irresistible conclusion that the appellants alone are the perpetrators of the crime. Also to be taken note of that the appellants did not give any explanation u/s 313 Cr. PC to the incriminating circumstances pointing to their guilt. Appeal stands dismissed.

*Ashok Vishwakarma @ Surji* v. *State* ..... *3906*

— Sec. 392, 411, 34—Arms Act—Sec. 27, 54 & 55—Prosecution case emanates from the fact that on 9th July, 2001 SI Prahlad Singh along with Constable Rajesh was on patrolling and surprise checking in the area. At about 8.40 pm when they were going to Kailashpuri via Gali No. 5, Main Sagarpur, they heard noise coming from the Gali. They saw two boys running and they tried to apprehend them but one of the boys managed to escape.—Meanwhile, Smt. Bhagwan Devi came and gave her statement, inter alia, to the effect that on that day at about 8:30 pm, she along with her grand-daughter aged about 1 1/2 years was coming from the shop of Dr. Mudgil. She was on foot and coming to her house. When she was in front of Kesho Ram Sweets in Gali No. 5, three boys aged about 20-22 years suddenly came from the side of Gali No. 5, Main Sagarpur and one boy who was a little fat and was wearing a cap snatched her wearing chain weighing about 18-20 grams on which a thread of 'Babaji' had been tied. She fell down along with her grand-daughter who was in her arms and also received injuries on her right Hand and also on stomach—On hearing her noise, her son Ghanshyam and public persons started following those boys. One of the boys who had snatched the chain and was a little fat was apprehended at a distance of about 200 meters by the public and she identified that boy—Charge for offence under section 392 r/w Section 397 IPC was framed against both the accused to which they pleaded not guilty and claimed trial.—Vide impugned order dated 3rd March, 2004, the appellant was held guilty of offence under Section 392 IPC,

however, co-accused Shamshe Alam was granted benefit of doubt and was acquitted of the charge levelled against him. Feeling aggrieved by this impugned order, the present appeal has been preferred by the appellant Ravinder Paswan—It was submitted by learned counsel for the appellant that there are contradictions in the statements of the witnesses as such no reliance can be placed on the same. None of the public witnesses have identified the appellant.—Moreover, as per prosecution version, besides the chain, a knife was also recovered from the possession of the appellant. However, the recovery of knife has not been believed by the learned Trial Court.—Testimony of PW1 and PW2 find corroboration from PW 3 Sunil Sharma, an independent witness who has also stated that the boy who was apprehended gave his name as 'Paswan' and he was fat and was wearing a cap. From his possession, chain and knife was recovered. Constable Rajesh (PW6) and SI Prahlad (PW7) have also deposed regarding apprehension of appellant at spot by the public and that he was beaten by the public and when running away, he was apprehended by them and on his search, chain Ex. P1 was recovered. The sequence of events leads to the only conclusion that it was the appellant Ravinder Paswan who had snatched the chain and when he was running away, he was chased by ghanshyam and was apprehended by him and then the public who gathered at the spot took charge of him and gave beatings to him. Police officials, while on patrolling, reached the spot and apprehended him. Chain (Ex.P1) was recovered from his possession. Presence of the appellant at the spot stands further proved from the fact that since he was administered beatings by the public, vide application Ex. PW7/2, he was sent to DDU hospital were his MLC Ex. PW 5/A was prepared by Dr. D.S. Chauhan (PW5) and a perusal of the MLC goes to show that at the very initial juncture, the history of "being beaten by public" was given.—In Gurcharan vs. State of Punjab, AIR 1956 SC 460, where some accused persons were acquitted and some others were convicted, it was held as follows:- "9.....The highest that can be or has been said on behalf of the Appellants in this case is that two of the four accused have been acquitted, though the evidence against



them, so far as the direct testimony went, was the same as against the Appellants also; but it does not follow as a necessary corollary that because the other two accused have been acquitted by the high Court the Appellants also must be similarly acquitted." In *Gangadhar Behera vs. State of Orrisa,* (2002) 8 SCC 381: 2003 SCC (Crl.) 32 reliance was placed on *Gurcharan Singh* (Supra) and it was Held:- "15....Merely because some of the accused persons have been acquitted though evidence against all of them, so far as direct testimony went was the same dose not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a court to differentiate the accused who had been acquitted from those who were convicted." This authority was cited with approval in *Prathap Vs. State of Kerala* (2010) 12 SCC 79 and *Surajit Sarkar Vs. State of West Bengal* (2013) 1 SCC (Cri) 877. It is being the legal position, the appellant cannot be absolved of his involvement in the commission of the crime merely because co-accused who was not identified by the witnesses nor any recovery was effected from him, acquitted. So far as the appellant is concerned, there is cogent and reliable evidence to connect him with the crime. As such the submission of learned counsel for the appellant deserves rejection. —There is no infirmity in the impugned order dated 3rd March, 2004 whereby the appellant was convicted of the offence under Section 392 IPC which warrants interference,—Dismissed.

*Ravinder Paswan* v. *State* ..... *3721*

— Sec. 420, 498A, 376—Complainant got married to appellant on 1st May, 1982. After her marriage, she got an appointment in Doordarshan and thereafter she went under training in Pune and thereafter she was transferred to Delhi. Her father was alleged to be the member of Parliament and was residing in Delhi, therefore, she also shifted Delhi. In 1993, the accused is alleged to have started harassing complainant by saying that he would divorce her. He also filed divorce petition against the complainant in Family Court at Bhuvneshwar of which she received a notice. However, due to intervention of parents of the complainant, the matter got compromised and thereafter

they continued to live together.—Charges under Section 498A/ 420/376 IPC were framed against the accused to which he pleaded not guilty and claimed trial. In order to substantiate its case, prosecution, in all, examined four witnesses out of whom the material witness was the complainant herself—After hearing learned counsel for the parties, learned Trial Court came to the conclusion that neither any offence under Section 420 IPC or 498A IPC or 376 IPC was made out, however, it was observed that since the accused concealed the factum of obtaining ex parte decree of divorce and continued to co-habit with the complainant, offence under Section 493 IPC is made out—In nut shell, the facts which emerge from the evidence coming on record are that the complainant was the legally wedded wife of the appellant, however, a divorce petition was filed. Appellant assured the complainant to withdraw the divorce petition. Complainant remained under the belief that divorce petition must have been withdrawn by the appellant—The sole question for consideration is whether under these facts and circumstances, offence under Section 493 IPC is made out or not—The Section contains two ingredients: (i) Deceitfully causing a false belief in the existence of a lawful marriage and (ii) co-habitation or sexual intercourse with the person causing belief—The essence of an offence under Section 493 IPC is, therefore, practice of deception by a man on a woman as a consequence of which the woman is led to believe that she is lawfully married to him although she is not and then make her co-habit with him—If a woman is induced to change her status from that of an unmarried to that of a married woman with all the duties and obligations pertaining to the changed relationship and that result is accomplished by deceti, such woman within the law can be said to have been deceived and the offence under Section 493 IPC is brought home. Inducement by a person deceitfully to a woman to change her status from unmarried woman to a lawfully married woman and on that inducement making her cohabit with him in the belief that she is lawfully married to him is what constitutes an offence under Section 493—A perusal of Section 415 IPC makes it clear that the word ‘deception’ is also found but the explanation appended to this



Section makes it clear that a dishonest concealment of facts is also a deception within the meaning of this Section. However, such an explanation is missing under Section 493 of the Indian Penal Code—In Kaumuddin Sheikh vs. State (1997) ILR 2 CAL 365, facts were substantially the same. In that case, the husband gave irrevocable “Talak” and Continued to live as husband and wife. It was held that it was not the case of prosecution that even though a valid and effective 'Talak' was given to the complainant, the appellant caused her to believed that there was no such valid or effective 'Talak and thereby managed to co-habit or have sexual intercourse with her in the belief that she continues to be legally merried wife of the appellant. It was a case where the appellant is said to have sexual intercourse with the complainant by not mentioning or suppressing the “Talak”—Things are substantially the same in the instant case, inasmuch as, it stands proved that the filing of the divorce petition by the appellant was within the knowledge of the complainant inasmuch as she had also caused her appearance before Family Court at Cuttack on 1st October, 1993. The whole case of prosecution revolves around the fact that an assurance was given by the appellant that he would withdraw the divorce petition, despite that, he did not withdraw the same. Complainant remained under the impression that he must have withdrawn the petition and under that belief continued to co-habit with him—The allegations at the most are appellant continued to have sexual intercourse with complainant by non-mentioning or suppressing the factum of divorce. From such non-mention or suppression of divorce, it cannot be said that the appellant by deceit caused complainant to believe that she was lawfully married to him and to co-habit or have sexual intercourse with him in that belief. It may be that the appellant suppressed the factum of obtaining divorce decree from the complainant, but he was not alleged to have made any representation to her as to cause her to believe that she continues to be his legally married wife and induced her to co-habit or have sexual intercourse with him in that belief. That being so, the case is not covered within the four corners of Section 493 IPC—There is another aspect of the matter.

The complainant in her deposition, before the Court had categorically stated that she had settled her disputes with the appellant and she does not want to pursue her complaint and the consequent case. Under those circumstances, it was even otherwise futile to proceed further with the case—Allowed.

*Pradeepta Kumar Mohapatra* v. *State* ..... *3732*

— Sections 392, 397 and 34—During the course of investigation, the appellant was arrested by Special Staff (South District) and confessed his guilt. Pursuant to his disclosure statement, he recovered stolen goods i.e. mobile phone made Nokia-2310, two flower post and the knife used in the incident. The Investigating Officer recorded statements of the witnesses conversant with the facts. On completion of the investigation, a charge-sheet was submitted against the appellant and he was duly charged and brought to trial. The prosecution examined sixteen witnesses. In his 313 statement, the appellant pleaded false implication. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned Judgment, held the appellant perpetrator of the crime for the offences mentioned previously. Being aggrieved, he has preferred the appeal.—During the course of arguments, on instructions, appellant's counsel state at bar that the appellant has opted not to challenge conviction under Section 392 IPC. She argued that Section 397 IPC was not attracted as the prosecution could not establish beyond doubt that any 'deadly' weapon was used by the appellant while committing robbery.—Since the appellant has not opted to challenge conviction under Section 392 IPC, findings of the Trial Court on conviction under Section 392 IPC are affirmed.—Under Section 397 IPC, it is to be proved that 'deadly' weapon was used at the time of committing robbery or dacoity or grievous hurt was caused to any person.—In the instant case, DD No. 48A (Ex.PW-14/A) was recorded on 07.11.2009 at 06.50 A.M. on getting information that there was 'theft' near House No 39, Rajpur Khurd, Susan John, the complainant in her statement (Ex.PW-2/A) disclosed that three or four boys entered into her room and they were armed with knives. One of them was having a 'desi katta' There is



no mention that the knives and country-made pistol were used in committing robbery.—The record reveals that no inmate in the house was injured and taken to hospital for medical examination. There is no cogent evidence on record to establish that the appellant was armed with 'deadly' weapon and it was used by him while committing robbery. Section 397 fixed a minimum terms of imprisonment.—It is Imperative for the Trial Court to return specific findings that the 'assailant' was armed with a 'deadly' weapon and it was used by him before convicting him with the aid of Section 397. In the instant case, the evidence is lacking on this aspect and benefit of doubt is to be given to the appellant.—While upholding the conviction and sentence of the appellant under Section 392 IPC, his conviction and sentence under Section 397 is set aside.—The appeal is disposed of in the above terms.

*Mustaq* v. *The State (NCT of Delhi)* ..... *3743*

— Section 412—Allegations against the appellants are that they received or retained five washing machines make Videocon knowing or having reasons to believe that it was robbed property. The assailants were convicted under Section 392/394/34 IPC for robbing washing machines (Ex.P-1 to P-5) from Ram Shanker. After arrest, they were interrogated and their disclosure statements (Ex. PW-2A, 2/B and 2/C) were recorded. They led the police to shop No. 17, DDA Market, Turkman Gate recovered two washing machines which were seized. It led to A-2's arrest vide seizure memo (Ex.PW-2/D). He was interrogated and his disclosure statement (Ex.PW-2/E) was recorded. He took the police to House No.A-1, DDA flats, turkman Gate and recovered three washing machines which were seizure memo (Ex.PW-2/F). The recoveries were effected by the Investigating Officer PW-11 Mahender Pal Singh on 17.09.2000 who identified A-2 to be the person found present at shop No. 17 DDA Market, Turkman Gate when the assailants recovered two washing machines bearing 49247 and 49249 make Videocon seized by seizure memo (Ex.PW2/D). A-2 also put his signatures on various memos prepared there. Pursuant to his disclosure statement (Ex.PW.2/E) three more washing machines make videocon No. 49229, 49257

and 49253 were recovered at his instance—PW-9 (Ram Shankar) had informed the police about the robbery of washing machines from his possession on 09.09.2000. Apparently, these washing machines did not belong to A-2. He did not explain as to how and under what circumstances, he got possession of these washing machines. He did not produce ay document to show that he was bona fide purchaser of these articles. The assailants who had sold the washing were not dealers/shop-keepers—The recovery of two washing machines from A-2's possession, at shop No. 17, DDA Market, Turkman gate and three washing at his instance from flat, Turkman Gate establishes beyond doubt that he received and retained the washing machines knowing or having reasons to believe that it was a stolen property. A-2 did not produce any evidence that reception of property were innocent. The circumstances in which A-2 received the property were such that any reasonable man must have felt convinced that the property with which he was dealing must be a stolen property—Since nothing incriminating i.e. Washing machine was recovered from A-1's possession or at his instance, it cannot be inferred with certainty that he received or retained any robbed/stolen article from the assailants. He deserves benefit of doubt—The prosecution could not establish beyond doubt that A-2 was aware or had reasons to believe that the articles were a robbed property at the time of its reception. IT did not surface in evidence that A-2 had hatched conspiracy with the assailants to rob the complainant and to deliver the robbed articles to him—In the light of the above discussion, A-2 is guilty of committing offence under Section 411 IPC only. He has already spent two and a half months in custody and has suffered trial for about ten years. He is not a previous convict. Considering the mitigating circumstances, A-2's substantive sentence is modified and reduced to one year under Section 411 IPC. Other terms of sentence order are left undisturbed. A-1 is Given benefit of doubt and is acquitted—A-2 is directed to Surrender and serve the remainder of his sentence—Appeal stands disposed of.

*Ahmed Sayyad @ Nanhu @ Nanhe & Anr.* v.
*State* ..... *3749*



— Section 392, 397 and 34—On 8.10.1994, ASI Shiv Singh (PW7) along with Ct. Anand Kumar (PW3) and Ct. Brahm Singh reached Shyam Nagar at about 11.50 a.m where the complainant Ravinder Chetwani (PW1) met them and gave his statement, Ex.PW 1/A regarding commission of robbery of Rs. 1,50,000/- Endorsement Ex. PW7/A was made by ASI Shiv Singh and the same was sent through Ct. Anand Kumar to police station on the basis of which FIR Ex.PW 2/B was recorded by Ct. Itwari Singh (PW2)—It was submitted by learned counsel for the appellant that the complainant did not identify the appellant and in fact was categorical in stating that he was called in the police station on 04.02.1995 where he had identified only one accused and not the second accused. He specifically deposed that accused Jai Veer Singh was not the second accused who had put the country made pistol on his person. That being so, there was no occasion for his being convicted for offence u/S 392 IPC. As regards recovery of Rs 15000/-, it was submitted that recovery was alleged to have been effected in the presence of PW4 Ashok Rana. However this witness has categorically deposed that no recovery was effected in his presence. Although he admitted his signatures at recovery memo at Point A, however he clarified that his signatures were obtained on blank paper. Moreover, the learned Trial Court has convicted the appellant while raising presumption u/S 114(a) of the Evidence Act—Learned Public Prosecutor, however, stressed upon refusal on the part of the appellant to join TIP proceedings. Although it is true that the appellant had refused to join TIP proceedings, as such an adverse inference can be drawn against him for his failure to join the proceedings but that, ipso facto, is not sufficient to arrive at the conclusion that he was the person who participated in the commission of crime because it is the statement made by the witness in Court which is of prime importance and, as seen above, the complainant has categorically deposed that the appellant was not the second accused who had put the pistol on his neck at the time of committing robbery, therefore, only on the basis of presumption it cannot be held that appellant was the second accused who had put pistol on the neck of the complainant

to commiting robbery—In *Earabhadrappa v. State of Karnataka,* AIR 1983 SC 446, the Supreme Court held that the nature of presumption under Illustration (a) to Section 114, must depend upon the nature of the evidence adduced. No fixed time limit can be laid down to determine whether possession is recent or otherwise and each case must be judged on its own facts. The question as to what amounts to recent possession sufficient to justify the presumption of guilt varies according as the stolen article is or is not calculated to pass readily from hand to hand. If the stolen articles were such as were not likely to pass readily from hand to hand, the period of one year that elapsed cannot he said to be too long particularly when the Appellant had been absconding during that period—In *State of Rajasthan Vs. Talewar and Anr.,* AIR 2011 SC 2271, in pursuance to disclosure statement, cash, silver glass, scooter, key of the car were recovered from accused persons. Recovery was not in close proximity of the time from the date of incident. It was observed that recovery is either of cash, small things or vehicles which can be passed from one person to another without any difficulty. In such a situation, no presumption can be drawn against the accused under Section 114 illustration (a) of the Evidence Act. No adverse inference can be drawn on the basis of recoveries made on their disclosure statements to connect them with the commission of crime—In the instant case also, since recovery is only of cash, that too, after about three months of the incident it is not safe to draw an inference that the appellant in possession of the stolen property had committed robbery. In that view of the matter, the conviction of the appellant for the charge of robbery u/s 392 IPC cannot be sustained and is accordingly set aside—However, since the recovery of stolen property was effected at the instance of accused which remains unexplained, as such he is convicted u/s 411 IPC. The incident took place in the year 1994. The appellant remained in custody for a period of 11 months. It was submitted that the appellant is now well settled in life and is now living in his village along with his family. Under the circumstances, the ends of justice will be met, if he is sentenced to the period already undergone. However, the fine



of Rs.5000/- imposed upon him is enhanced to Rs.5,000/- — Disposed of.

*Jai Veer Singh* v. *State* ..... *3755*

— Section 376, 506—The prosecution examined ten witnesses in all to substantiate the charges. In his 313 Statement, the appellant pleaded false implication. He pleaded that 'X's father had taken Rs.10,000/- as loan from him and when he demanded back the loan, a quarrel took place and 'X's father falsely implicated him in the case. He examined one witness in defence. After marshalling the facts and through scrutiny of evidence and considering the rival contentions of the parties, the Trial Court, by the impugned judgment convicted the appellant for the offences mentioned previously and sentenced him accordingly. Being aggrieved, the appellant has preferred the appeal—Learned additional Public Prosecutor urged that there are no valid reasons to discard the cogent testimony of the child witness which requires no corroboration. The prosecutrix was exploited for sexual gratification by the appellant for the last one and a half year. The prosecutrix and her parents had no animosity to falsely implicate their neighbour with whom they had no prior enmity or ill-will—The material testimony to establish the guilt of the appellant is that of the prosecutrix 'X'. In her 164 Cr.P.C.(Ex.P. W-5/B) statement on 11.09.1998, she named the appellant for committing rape upon her. She gave detailed account of the incident. She was examined as PW-4 before the Court. The learned Presiding Officer put number of preliminary questions to the child witness before recording her statement to ascertain if she was competent to make statement and was able to give rational answers. The Trial Court was satisfied that she was a competent witness and understood the questions and was able to give rational answers to it. Her statement was recorded without oath as she did not understand its sanctity. In her deposition, she stated that suresh committed rape upon her. She had bleeded from her vagina. She further disclosed that Suresh took out whitish material from his penis and applied it on her anus. When she cried, he said 'Very good'. On arrival of her mother suddenly, Suresh started

putting 'on' his pant. When her mother inquired as to what had happened, she told that Suresh uncle was doing bad thing with her and threatened to kill if she told anything to her parents. The prosecutrix apparently proved the version narrated by her at the first instance to the police and the Metropolitan Magistrate with no major variations. She was cross-examined at length but no material discrepancies emerged to disbelieve her. No ulterior motive was assigned to the child witness to make a false statement. Nothing was on record to infer that 'statement' was tutored to her by her parents—First Information Report was lodged without delay. Lodging of prompt FIR lends full credence to the version of the child witness. In the FIR the appellant was specifically named as culprit—In the MLC (Ex.PW-3/A) PW-3 (Dr.Milo Tabin) noted one contused lacerated wound on the malar region of the accused. At the time of medical examination, smegma was found absent on the corona of the accused's penis. Absence of smegma on the corona of penis in rape cases would show that the rape was committed. It is best circumstantial evidence against the appellant—The Court find no good reasons to deviate from the said findings. In sexual offences against minors there is no valid or tangible reason as to why the parents will tender false evidence against the accused. In the instant case, for a paltry sum of Rs.10,000/-, prosecurtrix's parents are not expected to level serious allegations of rape with their minor daughter to put her honour at stake—In O.M.Baby (Dead) by L.Rs. V. State of Kerala 2012 Cri.LJ 3794 the Supreme Court observed "In any event, absence of injuries or mark of violence on the person of the prosecutrix may not be decisive, particularly, in a situation where the victim did not offer any resistance on account of threat or fear meted out to her as in the present case. Such a view has already been expressed by this Court in Gurcharan Singh V. State of Haryana (1972) 2 SCC 749 and Devinder Singh Vs. State of H.P. (2003) 11 SCC 488". Prosecution's case from the inception is that 'X' was exploited for sexual intercourse for the last about one and a half year by the accused. Whenever he got an opportunity finding the child alone in the house, he used to indulge in sexual activity with



her. MLC (Ex.PX) records that hymen was torn and had old tear. Merely because MLC (Ex.PX) does not record rape, the cogent and reliable testimony of the prosecutrix cannot be dis credited. The girl below 6 years of age was incapable to understand the consequences of the nefarious acts—As per the nominal roll dated 27.01.2004, he also earned remission for eight months and 16 days. His jail conduct was satisfactory. He is not a previous convict. He is not involved in any other criminal activity. His substantive sentence was suspended on 14.07.2004. There is no indication of his deviant behavior/ conduct during this period. The original Trial Court record is not traceable. Some documents and other materials were reconstructed. The appellant was aged about 20 years on the day of incident. Considering these facts and circumstances, the substantive sentence is reduced to Rigorous Imprisonment for eight years. Other terms and conditions of the sentence order are left undisturbed—The appeal and all pending applications stand disposed of.

*Suresh* v. *State of Delhi* ..... *3777*

— Sec. 392, 397, 34—Ashuddin and Sher Khan @ Shahid Ali Mulla @ Arif were sent for trial in case fir No. 64/2011 PS Mayur Vihar with allegations that on 02.03.2011 at about 06.45 P.M. at road near 25 Block, Trilok Puri, Bus Stand, they and their associates boarded a DTC bus bearing No. DL 1PB-3177 on route No. 360 and robbed bag containing tickets and cash Rs.280/- from Nitu—Conductor in the bus at the point of knife. The assailants got down the bus to flee and were chased. Ashuddin was caught hold at some distance and the bag robbed was recovered from his possession.—Ashuddin was charged under Section 392/34 read with Section 397 IPC. The prosecution examined six witnesses. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment, held Ashuddin guilty of committing offence under Section 392 IPC. Sher Khan @ Shahid Ali Mulla @ Arif was acquitted of all the charges. It is significant to note that the State did not challenge the acquittal—The appellant's counsel urged that the pleasant's identity as assailant has not been established beyond

reasonable doubt. PW-4 (Rajesh Kumar), driver could not recognise him in the Court. PW-1 (Nitu)'s identification is shaky. He is not sure if he was the person who snatched the bag from him. No independent public witnesses including passengers were associated at any stage of the investigation. The story projected by the State is highly improbable—The apprehension at the spot is dispute. He sustained injuries due to the beatings at the hands of public and was medically examined vide MLC (Ex.PW-6/B) at Lal Bahadur Shastri Hospital, Khichripur, Delhi at 11.55 P.M. that day. The alleged history records that he was 'assaulted and beaten by public' It confirms his presence at the spot. In his 313 statement he admitted his presence in the bus but stated that he had got down the bus and was apprehended while moving away—The findings on conviction under Section 392 IPC are based upon fair appreciation and evaluation of reliable reliable evidence and are affirmed—The appellant was sentenced to undergo RI for five years with fine Rs.1,000/-. Nominal roll dated 09.04.2013 reveals that he has already undergone two years, one month and ten days incarceration as on 13.04.2013. He also earned remissions for five months and twenty two days. He is not a previous convict and not involved in any other criminal case. His overall jail conduct is satisfactory. On the date of incident, he was a young boy of 21 years. He is the sole earning member of the family and is to look after his wife and son. Sher Khan has been acquitted for want of cogent evidence. The assailants who used 'deadly' weapons in committing robbery are absconding and could not be arrested. Considering these mitigating circumstances, order on sentence is modified and the appellant is sentenced to undergo RI for three years with fine Rs. 1,000/- and failing to pay the fine to undergo SI for 15 days—The appeal is decided.

*Ashuddin* v. *State* ..... *3788*

— Sec. 304 Part-I—Allegations against the appellant-Shakuntala were that on the night intervening 25/26.09.2008 at about 01.30 A.M. she poured acid on her husband Rattan Lal at jhuggi No. A-408, behind ITI, K Block, Jahangir Puri Daily Diary (DD) No. 5B (Ex. PW-9/A) was recorded at PS jahangir



Puri at 02.29 A.M. after getting information from Duty HC Umed Singh, Babu Jagjivan Ram Memorial Hospital (in short BJRM Hospital) that Rattan Lal's wife had poured acid on him and he was admitted at BJRM Hospital. ASI Vijender Singh lodged First Information Report for commission of offence under Section 326 IPC—On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment, held the appellant guilty under Section 304 Part-I IPC and sentenced her. Being aggrieved, she has preferred the appeal—It is not under challenge that Rattan Lal and Shakuntala lived together at jhuggi No. A-408, K Block, Jahangir Puri. It is also not in controversy that at the time of incident on the night intervening 25/26.09.2008 only the victim and Shakuntala were present inside the jhuggi. In her 313 statement, she admitted that on 25.09.2008 her husband Rattan Lal came at the jhuggi at night. She did not claim if anybody else was present that night inside the jhuggi. It is also not disputed that Rattan Lal Sustained burn injuries due to acid on his body. She however pleaded that on that night Rattan Lal came drunk at the jhuggi and sexual intercourse with her—The defence version inspires no confidence and deserves outright rejection. Had the victim sustained injuries due to fall of acid accidentally, natural conduct of the appellant would have been to raise alarm and to take him to the hospital at the earliest. She was not expected to close the door of the jhuggi and to run to the police station as alleged. This conduct is quite unreasonable and unjustified—The police machinery came into motion when PW-12 (HC Umed Singh) informed on phone to the Duty Officer at PS Jahangir Puri that one Rattan Lal was admitted in the hospital and had complained that his 'wife' had poured 'tejab'' on him. DD No. 5B (Ex. Pw-9/A) records this fact. It corroborates the version given by PW-3 and PW-10.PW-16 (SI Vijender Singh) recorded victim's statement (Ex.PX). MLC (Ex. PW-14/A) reveals that at the time of admission the patient was conscious and oriented. It is not in dispute that after sustaining burn injuries, the victim had run towards BJRM Hospital and had got himself admitted. It is not the appellant's case that the victim was unconscious or was not fit to make statement.

PW-16 (SI Vijender Singh) lodged First Information Report under Section 326 IPC. Since the injuries sustained by the appellant were not sufficient to cause death in the ordinary course of nature, it appears that PW-16 did not consider it fit to record his statement under Section 164 Cr.P.C. from SDM—Vide post-mortem report (Ex. PW-15/A) the cause of death was opined as shock due to burn injuries consequent to ante-mortem corrosive burns—In 'State of Karnatka vs. Shariff', (2003) 2 SCC 473, the Supreme court categorically held that there was no requirement of law that a dying declaration must necessarily be made before Magistrate. Hence, merely because the dying declaration was not recorded by the Magistrate in the instant case, that by itself cannot be a ground to reject the whole prosecution case. It is equally true that the statement of the injured, in the event of his death may also be treated as FIR dying declaration. The Court has to be on guard that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly it can base its conviction without any further corroboration. In this case, the deceased had no ulterior motive to falsely implicate his wife and to exonerate the real culprit. There is no inconsistency in the version narrated and deposed by PW-3, PW-10, 12 & PW-16 regarding the complicity of the accused in the incident. In 'Paras Yadav and ors. Vs. State of Bihar', (1999) 2 SCC 126, the Supreme Court held that lapse on the part of the Investigation Officer in not bringing the Magistrate to record the statement of the deceased should not be taken in favour of the accused. The Supreme Court further held that a statement of the deceased recorded by a police officer in a routine manner as a complaint and not as a dying declaration can also be treated as dying declaration after the death of the injured and relied upon if the evidence of the prosecution witnesses clearly establishes that the deceased was conscious and was in a fit state of health to make the statement—Discrepancies/contradiction highlighted by appellant's counsel are not material to discard the prosecution case in its entirety. At the time of occurrence, only the appellant and the victim were together inside the jhuggi. It was imperative for the



appellant to establish under Section 106 Evidence Act as to how and under what circumstances, the victim sustained burn injuries. The appellant's conduct is unreasonable. Instead of taking him to the hospital without delay to provide medical aid, she locked the door of the jhuggi from outside and allegedly went to the police station. The appellant's false implication at PW-1 (Naveen)'s instance as alleged is not believable. PW-1 (Naveen), victim's son from the previous marriage lived separate with his 'mausi' at Bhalaswa Dairy. He deposed that the appellant quarreled with his father on his providing money for their maintenance. PW-1 (Naveen) or his relative were not present at the spot and came to know about the incident only after the victim sustained injuries. There are no allegations that PW-1 (Naveen) instigated the victim to make statement (Ex.PX). The finding of the learned Trial Court whereby the appellant was convicted under Section 304 Part-I IPC are based upon sound reasoning and do not call for interference and are affirmed. The appellant was sentenced to undergo RI for seven years with fine Rs.5,000/-. She is to undergo SI for six months in default of payment of fine. It is informed that she has no issue and is in custody from the very beginning. Nominal roll dated 10th January, 2012 reveals that she has already undergone three years, three months and thirteen days incarceration as on 10th January, 2012. She also earned remissions for four months and five days. Her over all jail conduct is satisfactory. She is not a previous convict and is not involved in any other criminal case. Considering the facts and circumstances of the case and the mitigating circumstances, in the interest of justice, the order on sentence is modified and the substantive sentence of the appellant is reduced to six years with fine Rs.2,000/- and failing to pay the undergo SI for one month. She will be entitled to benefit under Section 428 Cr.P.C.—Disposed of.

*Shakuntala* v. *State (G.N.C.T. of Delhi)* ..... *3792*

**INDUSTRIAL DISPUTES ACT, 1947**—Section 33 & 33A—Appellant preferred appeal to challenge order passed in writ petition dismissing award passed by Industrial Tribunal in his favour—According to appellant, he was protected workman,

thus, respondent had to seek approval of Industrial Tribunal before taking action against him—Since respondent did not comply with provisions of Section 33 (3) of Act, thus, he could not be dismissed from service pursuant to disciplinary inquiry held against him. Held:— Once a complaint is made under Section 33A of the Act and it established that there has been a violation of Section 33(2) (b) of the Act then the Tribunal has merely to direct that employee be given an appropriate relief.

*I.S. Rana* v. *Centaur Hotel* ..... *3969*

**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.

*New India Assurance Co. Ltd.* v. *Harpal Singh & Ors.* ..... *3654*

**PREVENTION OF CORRUPTION ACT, 1988**—Section 7—Taking illegal gratification other than legal remuneration—Section 13(2)—Criminal misconduct—Section 20—Presumption—Indian Evidence Act, 1872—Section 27—recovery at pointing out—Admissibility—Complainant, a contractor for PWD—Awarded contract for Rs. 5 lacs approximately—Part payment made—final bill for Rs. 2.5 Lacs due and pending for 2½ months—Met appellant—Demanded Rs. 10,000/- for getting the bill passed—Asked to come at 7 PM—Lodged complaint with CBI—Per-trap formalities completed—Trap laid—Complainant visited the appellant—Appellant took currency notes from the complainant—Kept in the brief case—Thereafter passed the bills—Signal given to the raiding party—Appellant apprehended—Pointed out towards the brief cases where had kept the money—Money

recovered from the brief case—Hand washes taken—Charge sheeted—Appellant convicted of offences punishable under Sections 7, 13(2) r/w. 13(1)(d)—aggrieved appellant preferred appeal—Contended—The person in whose presence initial demand made neither cited not examined by prosecution—examined as defence witness—believed the version of complainant—Appellant had no motive to demand the bribe—Not examined the other officers of CBI and no explanation furnished for the same—PW6 neither witnessed the demand nor the recovery—The only witness to demand is PW7—Testimony of PW7 is wholly contradictory—No money recovered from the possession of the appellant—Money recovered from the unlocked briefcase not sufficient to hold guilty—Taking of hand wash not properly proved—CBI contended—Recovery and acceptance proved by PW7—briefcase from where currency notes seized recovered at the pointing out of appellant—Recovery of briefcase with money admissible u/s. 27 IEA—Appellant not furnished any explanation for possession of currency notes and simply denied the question put to him under section 313 Cr. P.C.—Presumption under section 20 PC Act—Held—Testimony of PW1 as regards sanction cogent—Sanction valid—PW6 did not enter the room of the appellant—Not a Witness either to demand or acceptance—Material contradiction in the testimony of the complainant, the only witness with regard to demand—Demand not proved—Currency notes kept in the briefcase were within the knowledge of the complainant—No discovery of fact pursuant to the disclosure—Section 27 cannot be invoked—Possibility of the dipping the fingers of the official holding the finger of the accused in the solution—Neither demand nor acceptance proved—Recovery memo not a substantive evidence—Recovery doubtful—Presumption proved u/s. 20 PC Act cannot be raised—Prosecution not able to prove beyond doubt the demand, acceptance and recovery—Appeal allowed—Conviction set aside—Appellant acquitted.

*Parmanand* v. *C.B.I.* ..... *3707*

— Section 7 and 13(2) r/w Section 13(1)(d)—Appellant was employed in Delhi Electricity Supply Undertaking (DESU) in February, 1994 and new posted at DESU Office in Keshav



Puram those days—The raiding team comprising of complainant, panch witness and some officials of Anti-Corruption Branch office headed by Inspector Ramesh Singh went to the office of the accused. Complainant and panch witness were asked to contact the accused for the transaction of banding over of bribe money to the accused by the complainant as per the plan. Thereafter, the complainant told the accused that he had brought the amount of Rs.300/- as demanded by him and then the accused told the complainant to given him the money.—They were informed by the complainant that accused had accepted the bribe money and was holding the same in his left hand fist—In order to substantiate its case, prosecution examined 14 witnesses. Statement of the accused was recorded under Section 313 Cr.P.C. wherein he denied the case of prosecution, claimed innocence and pleaded false implication in the case.—Since on the date of filing of the charge sheet and when cognizance of the offence was taken, the appellant was not a public servant, therefore, there was no need to obtain any sanction for his prosecution. The retirement was never challenged by the appellant at any point of time on the ground that due to his suspension on account of this criminal prosecution he continues to remain in service—It is undisputed case of the parties that the charge sheet was filed in the Court on 22nd January, 1999 while the date of superannuation of the appellant was 18th February, 1998, meaning thereby, on the date when the charge sheet was submitted in the Court, the appellant ceased to be a public servant and, therefore, in view of the settled principle enunciated in various authorities viz *Prakash Singh Badal and Anr. Vs. State of Punjab and Ors.* (2007) 1 SCC 1; *Abhay Singh Chautala Vs. CBI,* (2011) 7 SCC 141 and *R.S. Nayak Vs. A.R. Antulay* (1984) 2 SCC 183, no sanction was required—As regards the submission that the appellant was not dealing with the area of the premise s No. 4210, Hansapur Road, Trinagar where the complainant resided, same is without any substance, inasmuch as, PW-7 Sh. S.K. Saroha who was posted as Assistant financial Officer, Delhi Vidyut Board, Keshav Puram on 13th October, 1998 deposed that appellant was functioning and employed as senior clerk in billing section during that period in the said office. He was

doing the job of bills/ rectifying the mistakes in the electricity bills issued to the consumers—The statement recorder under Section 313 Cr.P.C. of the appellant goes to show that one is of denial simplicitor and even in this statement, no plea was taken by the appellant that the area of Trinagar was not within his jurisdiction and, therefore, he was not competent to deal with electricity bill in question. Under the circumstances, this plea taken by the appellant in the ground of appeal is not substantiated by the record—In fact as observed by the Supreme Court in *State of UP Vs. Dr. G.K. Ghosh,* AIR 1984 SC 1453: by and large a citizen is reluctant to complain the vigilance department and to have a trap arranged even if illegal gratification is demanded a government servant. It is only when a citizen feels oppressed by a feeling of being wronged and finds the situation to be beyond endurance that he adopts the course of approaching the vigilance department for laying a trap. His evidence cannot, therefore, be easily or lightly brushed aside—Moreover, evidence of complainant is full corroborated by the panch witness. Panch witness has also deposed that when the accused was apprehended and challenged by the raid officer he become perplexed and also tendered apology, which part of his testimony goes unchallenged as no cross-examination was effected on this point. This conduct of accused is also another incriminating piece of evidence against him— From the evidence of the complainant, panch witness and the raid officer prosecution was able to establish its case beyond any reasonable doubt and the appellant was rightly convicted by the learned Special Judge, Delhi and sentenced accordingly. Neither the order of conviction nor of sentence suffers from any infirmity which calls for interference—Dismissed.

*Kalyan Singh* v. *State of Delhi*..... *3767*

**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.

*Saroj Devi* v. *Union of India & Anr.*..... *3259*

— 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.

*GP. Capt. Joe Emmauel Stephen* v. *Commandant (Personal) Directorate General of BSF and Ors.* .... *3300*

— 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.

*Binod Singh and Ors.* v. *Union of India and Ors.* ..... *3311*

— 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.

*DK Singh* v. *UOI & Ors.* ..... *3322*

— 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 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.

*Surender Pal Singh* v. *Union of India & Anr.* ..... *3414*

— 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.

*Tulsi Ram Arya* v. *The Chairman Delhi Transco Limited & Ors.* ..... *3552*

— 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.

*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.



**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."

*Lord Chloro Alkalies Ltd.* v. *Director General of Income Tax (Admn) and Anr.* ..... *3355*

— 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.

*Lord Chloro Alkalies Ltd.* v. *Director General of Income Tax (Admn) and Anr.* ..... *3355*

**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*